Transparent triage policies during the COVID-19 pandemic: a critical part of medico-legal risk management for clinicians

A lack of clear protocols elevates risks for clinicians for the consequences of decisions that they have a professional duty to make in the interests of their community

Eliana Close[1]
Lindy Willmott[1]
Tina Cockburn[1]
Simon Young[2,3]
Will Cairns[4,5]
Ben P White[1]

1 Australian Centre for Health Law Research, Queensland University of Technology, Brisbane, QLD.
2 Centre for Heritage and Culture, University of Southern Queensland, Toowoomba, QLD.
3 University of Western Australia, Perth, WA.
4 Townsville University Hospital, Townsville, QLD.
5 James Cook University, Townsville, QLD.

eliana.close@qut.edu.au

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Clinicians, ethicists and lawyers have long debated the parameters of triage in response to the inevitable disasters that sporadically overwhelm the health care system. Almost universally, they have advocated for open, transparent and consultative triage protocols, guidelines and legislation to combat biases and to support clinicians making unavoidable decisions in the interests of the community as a whole.

The coronavirus disease 2019 (COVID-19) pandemic has highlighted the importance of transparent triage. While there is considerable debate about ethical aspects of triage protocols, including concerns that the traditional focus on utilitarianism is discriminatory, largely missing from this discussion in Australia is that triage protocols are also important from a legal perspective — as a mechanism to promote lawful decision-making processes and as a justification or defence to support clinicians' decisions if a matter is litigated.

The purpose of this article is twofold. First, after providing an overview of current COVID-19 triage policies in Australia, we assess their legal status. Second, we argue that beyond ethics, transparent policies are needed so their compliance with law can be tested, and to enable practitioners to better understand their obligations before making sometimes "impossible" decisions.

Australian COVID-19 triage policies

Australian clinicians have seen numerous ethical and professional guidance documents addressing COVID-19 triage.[1-3] These documents anticipate that if Australia's health care system is overwhelmed as in other countries, clinicians will need guidelines to allocate limited resources, including ventilators, beds and highly trained personnel.

The umbrella term "triage policy" denotes: (i) broad ethical or operational guidelines with suggested decision-making principles;[1-3] and (ii) more specific triage protocols,[4] with set inclusion and exclusion criteria, and a process to prioritise individual patients when the system is overwhelmed. Many Australian COVID-19 triage policies are ethical guidelines, but some Australian hospitals have also developed triage protocols.[5] Internationally, the availability and content of such protocols varies widely. In a study from the United States, over half of responding institutions lacked a COVID-19 triage protocol.[6] In 2020, Mitchell and colleagues exposed insufficient transparency and significant variation in Victorian protocols.[5]

In Australia, primary responsibility for the administration of hospital services lies with the states, which have the power to promote a statewide approach to triage. Although every Australian state and territory has disaster management plans,[7] publicly available COVID-19 triage protocols are lacking. From March 2020 to 27 November 2020, the lead author (EC) regularly searched health department websites for COVID-19 triage policies, examining both the websites' content dedicated to COVID-19 and searching keywords alone and in various combinations (COVID; intensive care; critical care; ICU; triage; framework; guidelines; policy; ethical). These searches revealed few relevant documents (Box 1). New South Wales is the only state to mention a triage guideline, but its COVID-19 framework does not link to it.[8] Queensland Health released an extensive ethical framework for COVID-19 in April 2020,[5] which has since been removed.[9] Western Australia has a four-page ethical framework but no publicly accessible protocol.[10]

The Commonwealth Government's COVID-19 strategy indicates the Commonwealth will work with state and territory governments to "agree on novel coronavirus triage criteria (if required)",[11] but there are no such criteria to date. Given constitutional arrangements, there is no expectation that the Commonwealth Government would provide these. The National Health and Medical Research Council has conducted consultation on an ethics framework for pandemics, but this is limited to ethical guidance.

Legal status of COVID-19 triage policies

The prospect of deciding between patients who would benefit from life-sustaining treatment is distressing. Compounding this is the potential for legal liability. Many of the legal issues that arise in pandemic triage are untested, and various areas of law may be engaged and applied in complex, fact-specific ways. As other work has detailed, health authorities have wide discretion in making resource allocation decisions, which are generally respected by the courts.[12,13] However, in some circumstances, clinicians (and institutions) may be found liable, and decisions may also be challenged on public law grounds (Box 2).[13,14,15] These concerns are not merely academic; after Hurricane Katrina one doctor faced possible murder charges and civil lawsuits after several patients died during a hospital evacuation.[16]

Overseas, some governments have enacted immunity or indemnity laws to protect clinicians

1 Australian triage protocols and ethical guidelines for resource allocation during the coronavirus disease 2019 (COVID-19) pandemic

Jurisdiction	COVID-19 triage protocol or ethical guidelines	Type of guidance	Publicly available
Commonwealth	Australian Health Ethics Committee of the National Health and Medical Research Council: An ethics framework for pandemics (in development).	Ethical guidelines	Anticipated
Australian Capital Territory	None located on ACT Health website (https://health.act.gov.au).		
New South Wales	NSW Health provides a COVID-19 framework entitled "NSW adult intensive care services pandemic response planning".[8] The framework indicates that the NSW guideline for resource-based decision making includes the "use of allocation frameworks and tools" with a reference (but no link to) a document entitled the "NSW Health COVID-19 intensive care guidance drawn from principles in the NSW Health Influenza Pandemic Plan (PD2016_016). Sydney: NSW Health; 2020". This 2020 document is based on the NSW Health Influenza Pandemic Plan (PD2016_016), which references the NSW Health policy "Influenza Pandemic – Providing Critical Care (PD2010_028)". PD2010_028 contains a triage tool (https://www1.health.nsw.gov.au/pds/Pages/a-z.aspx). However, as the updated COVID-19 intensive care guidance is not publicly available, we cannot confirm that it contains the same guidance as PD2016_016 or the PD2010_028 triage tool.	Triage protocol and ethical and operational guidelines	No
Northern Territory	None located on the NT Health Department website (https://health.nt.gov.au).		
Queensland	On 20 April 2020, Queensland Health released a comprehensive ethical framework (developed in consultation with numerous stakeholders) but this has since been removed from its website.[9]	Ethical guidelines	No (initially available but subsequently recalled)
South Australia	None located on the SA Health website (https://www.sahealth.sa.gov.au).		
Tasmania	None located on the Tasmanian Department of Health website (https://www.health.tas.gov.au/).		
Victoria	None located on the Victorian Department of Health and Human Services website (https://www.dhhs.vic.gov.au/clinical-guidance-and-resources-covid-19).		
Western Australia	The WA Health Department website includes a framework to guide decision making on the appropriateness of intensive care management during the COVID-19 pandemic (last updated 26 June 2020) in its section on COVID-19 guidance for health professionals.[10]	Ethical guidelines	Yes

making COVID-19 triage decisions.[14,15] No such laws exist in Australia, and they do not appear to have been considered. Absent such laws, triage protocols may provide the next strongest legal defence. Under civil liability legislation, a clinician will generally not be negligent if acting in a manner widely accepted in Australia by peer professional opinion as competent medical practice (professional practice defence).[12,13]

Concrete advice on the legal significance of triage policies is difficult because the relationship between law and professional guidance is complex and each case is evaluated according to its unique facts. Whether the professional practice defence applies generally depends on the guideline's nature, author and purported authority.[17,18] A policy may create additional obligations beyond those imposed by law (eg, a specific hospital COVID-19 triage protocol that must be followed by its clinicians), which may inform the legal standard of care.[18] However, policy is not necessarily determinative of the standard of care, especially when couched as broad guidance (eg, COVID-19 ethical guidelines from a professional college).[18] Rigid adherence to policy can also be problematic; to meet the standard of care (and broader public decision-making standards), clinicians must use judgment appropriate to the circumstances.[17]

Moreover, while policy can establish obligations in addition to the law, law may also impose more onerous obligations than a policy.[18] When this occurs the legal standard will prevail. In other words, COVID-19 triage policies can shape a regulatory response but only within the boundaries of the law. COVID-19 triage policies may infringe laws in various nuanced ways.[14] Liddell and colleagues note that the utilitarian "save the most lives possible" principle underlying most triage policies can infringe patients' legal rights, many of which are unchanged in a disaster.[14] In the United Kingdom, a legal challenge to the National Institute for Health and Care Excellence (NICE) COVID-19 critical care protocol was initiated on the basis that its heavy

2 Examples of potential areas of legal risk in response to pandemic triage decisions*

Civil law

Withholding or withdrawing beneficial life-sustaining treatment from one patient to provide it to a patient with a better prognosis could amount to a breach of the duty of care and liability in negligence (subject to the peer professional practice defence for clinicians and the resource allocation defence in the case of hospitals).

Criminal law

Withdrawing a ventilator from one patient who is stable to provide it to another patient with a greater chance of survival could lead to charges of murder or manslaughter if the first patient dies as a result (charges would be subject to prosecutorial discretion and jurisdiction-specific defences such as necessity).

Commonwealth and state antidiscrimination laws

A triage protocol could violate state and territory antidiscrimination legislation if the decision was made on the basis of a protected attribute such as age, disability or race (although specific protections may apply under the legislation for decision makers).

Guardianship legislation

This applies to patients who lack decision-making capacity; for example, because they are unconscious, sedated or have cognitive impairment.
At common law, medical practitioners have no legal duty to provide treatment that is non-beneficial. However, the *Guardianship and Administration Act 2000* (Qld) makes it an offence to withhold or withdraw life-sustaining treatment from patients who lack capacity without the consent of an appropriate decision maker, even if providing that treatment would be "inconsistent with good medical practice" (ie, even if that treatment is non-beneficial). This may preclude some triage decisions in Queensland.
A decision to withhold or withdraw beneficial life-sustaining treatment from a patient who lacks capacity to provide it to someone with a better prognosis may violate state or territory guardianship legislation, which requires health care decisions to be made in a person's best interests. (This could also result in an emergency application to the Supreme Court to intervene in its parens patriae jurisdiction to protect the patient's best interests.)

* This is a non-exhaustive list of examples. For an expanded discussion of legal challenges in Australia, see Close et al.[13] See further Liddell et al[14] for the UK context, which has some similarities to Australia. ◆

reliance on the Clinical Frailty Scale constituted unlawful discrimination.[19] In response, NICE revised the protocol to reduce reliance on the Clinical Frailty Scale for some patients.

These issues have significant implications for clinicians:

- Absent a COVID-19 triage policy, not providing beneficial life-sustaining treatment is potentially risky because it may be harder to establish the professional practice defence in a negligence action. An institution's failure to promulgate a policy could also result in claims. Additionally, a triage protocol (with its greater degree of specificity) would generally provide more legal protection than ethical guidelines.
- While it is lawful for governments and professional bodies to issue COVID-19 triage policies, these policies should rely on appropriate evidence and must comply with specific jurisdictional laws, such as guardianship and human rights legislation (Box 2).
- Triage policies promote quality and consistency in decision making and guide clinicians to consider appropriate factors. However, clinicians must still exercise judgment which is reasonable and responsive to individual circumstances.
- Policies should provide guidance for when an individual is denied life-sustaining treatment, since the duty to exercise reasonable care remains. Where reasonably possible, this may include communicating to the patient (or family) the reasons for the decision, providing appropriate palliative care, and information about complaints or dispute resolution processes.

Transparency — not just about ethics

From an ethical perspective, legitimate triage decisions require "accountability for reasonableness" — a fair process based on relevant criteria, a publicly accessible rationale, and (to the extent possible given the urgency of decisions) mechanisms for appeal, review and enforcement.[20]

Transparency is also important from a legal perspective because it subjects triage policies to public scrutiny before public health emergencies reach crisis levels. While internal legal advice on triage policies may have been sought, the NICE example illustrates that public scrutiny, consultation and litigation play an important role in testing legal boundaries. In addition to protecting individual patients, this promotes rigorous policy development and evaluation, and also benefits clinicians who are then not relying on policy later found to be deficient.[17] It may also alleviate stress caused by uncertainty about protocols. Disclosure of triage policies also delivers a measure of natural justice by providing notice to patients and their families of decision-making criteria and processes.

Conclusion

So far, Australia has avoided the scale of pandemic that has overwhelmed health systems elsewhere. While in this context, governments' reluctance to develop and/or release triage protocols until a crisis has arrived is politically understandable, such a course of action carries significant risks.

Public confidence is enhanced when governments have the political courage to embark on these difficult

public debates in advance of need. Prioritising some individuals over others when the demand for resources exceeds supply is confronting for clinicians and the community alike, and challenges us to reflect on our deeply held values as a society. When clinicians are allocating scarce resources, they need standards to support their decisions which have been subject to public consultation and rigorous legal review. Australia's successful management of the COVID-19 pandemic is offering us the luxury of time to consult and reflect.

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