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EDITORIAL – *Ian Freckelton QC*

Medicinal cannabis law reform in Australia – *Ian Freckelton QC*

Attempts at medicinal cannabis law reform in Australia are not new. However, in historical perspective 2015 and 2016 will be seen as the time when community debate about legalisation of medicinal cannabis reached a tipping point in a number of Australian jurisdictions and when community impetus for change resulted in major reform initiatives. In order to contextualise the changes, the August 2015 Report of the Victorian Law Reform Commission (VLRC) and then the *Access to Medicinal Cannabis Bill 2015* (Vic) introduced in December 2015 into the Victorian Parliament by the Labor Government are scrutinised. In addition, this editorial reviews the next phase of developments in the course of 2015 and 2016, including the Commonwealth *Narcotic Drugs Amendment Act 2016* and the Queensland *Public Health (Medicinal Cannabis) Bill 2016*. It identifies the principal features of the legislative initiatives against the backdrop of the VLRC proposals. It observes that the principles underlying the Report and the legislative developments in the three Australian jurisdictions are closely aligned and that their public health approach, their combination of evidence-based pragmatism, and their carefully orchestrated checks and balances against abuse and excess constitute a constructive template for medicinal cannabis law reform. 497

LEGAL ISSUES – *Joanna Manning*

Non-consensual clinical research in New Zealand: Law reform urgently needed – *Joanna Manning*

In New Zealand non-consensual research studies on incapacitated adults are of doubtful legality under current laws. This column argues that the current situation goes too far, inevitably depriving incompetent participants as individuals and as a group of access to medications for which there is good reason to be confident may be directly beneficial to them, as well as to future patients and society. At the same time, incapacitated participants are particularly vulnerable to exploitation and harm. All jurisdictions in which non-consensual research is undertaken have to balance these competing ethical considerations. In the United Kingdom, three different pieces of legislation have been enacted which permit non-consensual research to proceed, subject to a comprehensive regime of strict protections for participants. The column analyses these and argues that an excellent model can be constructed from them. In late 2014, the New Zealand Health and Disability Commissioner agreed to investigate this issue with a view to proposing law reform, but the promised public consultation has never eventuated. It must do so without further delay for the protection of participants and researchers, and in the interests of society. 516

The treatment of intersex and the problem of delay: The Australian Senate inquiry into intersex surgery and conflicting human rights for children – *Mike O'Connor*

When a child is born with indeterminate genitalia (so-called intersex or disordered sex development), it becomes very difficult to balance the child's right to determine their own sexual future against the problems of living as a child with an indeterminate gender. Moreover, the initial assignment of gender may prove to be inappropriate and major psychological disturbances in the recipient can arise during adolescence and adult life. The problems of these children were explained to the Australian Senate Committee during its inquiry into intersex surgery in 2013. As a result, the Committee made a number of recommendations, including a proposal that all surgery be deferred until the child is able to consent to treatment. The author argues that the Committee's proposal to delay all modifications of indeterminate genitalia is impractical. The inclusion in the definition of intersex of common conditions (such as hypospadias in genetic male infants) means that necessary and uncontroversial surgery will be delayed until after puberty. This delay may be harmful and adverse to some children's best interests. 531

Regulation of Australian medical professionals and national security: Lessons from three case studies – *Thomas Faunce, Michael McKenna, Johanna Rayner and Jazmin Hawes*

In recent times, Australia's national security concerns have had controversial impacts on regulation of Australian medical practitioners in areas related to immigration detention. This column explores three recent case studies relevant to this issue. The first involves the enactment of the *Australian Border Force Act 2015* (Cth), which has a significant impact on the regulation of medical professionals who work with people in immigration detention. The second involves the decision of the High Court of Australia in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 that an amendment to Australian federal legislation justified sending children back to immigration detention centres in Papua New Guinea and Nauru. This legislation was previously heavily criticised by the Australian Human Rights Commissioner. The third concerns the deregistration of Tareq Kamleh, an Australian doctor of German-Palestinian heritage who came to public attention on ANZAC Day 2015 with his appearance online in a propaganda video for the Islamic State terrorist organisation al-Dawla al-Islamiya fil Iraq wa'al Sham, also known as Islamic State of Iraq and Syria (ISIS) or Daesh. Australia's professional regulatory system should presumptively respect professional virtues, such as loyalty to the relief of individual patient suffering, when dealing with doctors (whether in Australia or ISIS-occupied Syria) working under regimes whose principles appear inconsistent with those of ethics and human rights. 544

ARTICLES

The New Zealand Coroners Amendment Bill's proposed approach to health care-related deaths that are reportable to the coroner – *Jennifer Moore, Tim Stokes and Ben Gray*

When must a death that occurs in a health care setting be reported to the coroner? This article explores this question by analysing the *Coroners Act 2006* (NZ) and the amendments to the health care-related deaths provisions in the *Coroners Amendment Bill 2014* (NZ). At the time of writing, the Bill was at the Select Committee stage. This article examines whether the amendments may improve the inconsistent clinical and coronial

practices with respect to reportable health care-related deaths. It concludes that, while the proposed amendments are an improvement on the current legislative drafting, doubt remains about whether they will solve the challenges presented by health care-related reportable deaths. The second and third readings of the Bill should give serious consideration to the submissions received by the New Zealand Law Commission that express the view that the Queensland and Victorian legislation should be used as models. 557

Decision-making in a death investigation: Emotion, families and the coroner – *Gordon Tait, Belinda Carpenter, Carol Quadrelli and Michael Barnes*

The role of the coroner in common law countries such as Australia, England, Canada and New Zealand is to preside over death investigations where there is uncertainty as to the manner of death, a need to identify the deceased, a death of unknown cause, or a violent or unnatural death. The vast majority of these deaths are not suspicious and thus require coroners to engage with grieving families who have been thrust into a legal process through the misfortune of a loved one's sudden or unexpected death. In this research, 10 experienced coroners discussed how they negotiated the grief and trauma evident in a death investigation. In doing so, they articulated two distinct ways in which legal officers engaged with emotions, which are also evident in the literature. The first engages the script of judicial dispassion, articulating a hierarchical relationship between reason and emotion, while the second introduces an ethic of care via the principles of therapeutic jurisprudence, and thus offers a challenge to the role of emotion in the personae of the professional judicial officer. By using Hochschild's work on the sociology of emotions, this article discusses the various ways in which coroners manage the emotion of a death investigation through emotion work. While emotional distance may be an understandable response by coroners to the grief and trauma experienced by families and directed at cleaner coronial decision-making, the article concludes that coroners may be better served by offering emotions such as sympathy, consideration and compassion directly to the family in those situations where families are struggling to accept, or are resistant to, coroners' decisions. 571

Negotiating grief and trauma in the coronial jurisdiction – *Marc Trabsky and Paula Baron*

This article is placed within the wider context of lawyer wellbeing research, which evidences abnormally high levels of depression, substance abuse and suicide among the legal profession. To date, however, relatively few works have sought to explore the phenomenon of lawyer distress in particular segments of the legal services industry. This article seeks to explore and understand the affective experiences of legal professionals working in the coronial jurisdiction. It examines the ways in which solicitors, barristers and coroners negotiate grief and trauma in the performance of a public role. The point of departure is an enduring conflict between the responsibilities of office and the cultivation of intimate relations. In exploring the likelihood of distress among legal personnel in the coronial jurisdiction, this article looks not only to research on the wellbeing of legal personnel, but to the literature on vicarious or secondary trauma reactions and compassion fatigue among professions dealing with trauma. In examining the different ways in which legal personnel manage and negotiate grief and trauma, the article draws on the sociological concept of intimate citizenship to suggest that the operational model of the court, informal networks among professionals and strong personal relationships may serve to ameliorate distress. 582

“Blowed off by a side wind”? Coronial inquests following criminal acquittals – John Aberdeen

For three decades, Australian coroners have been moving steadily away from an historical partnership with the criminal law, and have emerged as independent judicial investigators with a dedicated court, and forensic and administrative support structures. Occasionally, however, a situation may arise where the ghosts of coronial law’s quasi-criminal past threaten to reappear, to the detriment of the coronial function. One of these situations might develop following an acquittal on a criminal charge which involved the causing of a death. Issues pertaining to a coroner’s duty may remain unresolved following criminal proceedings; and the question has to be posed as to whether the result of the previous criminal prosecution restricts or confines, in any way, the scope of permissible findings by a coroner in a later inquest. This article attempts to address this question in the particular context of Queensland law and its historical antecedents – many of which are common to other jurisdictions – in the hope that it might provoke consideration of the underlying practical and theoretical issues to the future benefit of coronial legal theory 595

The coronial investigation of suspected deaths: Prevalence and outcomes in New South Wales – Stephanie Dartnall and Jane Goodman-Delahunty

In Australia, the investigation of a missing person who remains unlocated may be reported to the coroner as a suspected death. In the first study of its kind in Australia, archival records on suspected deaths investigated by New South Wales coroners from 2000 to 2013 were aggregated to assess the number of inquests, investigation timeframes, findings, recommendations and responses thereto. Of 322 suspected deaths, 96% resulted in an inquest, with the majority (94%) yielding a finding that the missing person was deceased with the cause (81%) and manner (73%) of death predominantly unknown. In one-third of the cases, more than 20 years lapsed from the date of disappearance to closure of the coronial investigation. Formal recommendations were made in 15% of the cases. These findings on the processes and outcomes of suspected death investigations are of particular import to relatives of missing people. Challenges in accessing records and the broader implications of the findings are discussed. 609

Does the removal of anonymity reduce sperm donors in Australia? – Damian H Adams, Shahid Ullah and Sheryl de Lacey

The National Health and Medical Research Council’s guidelines implemented in 2005 removed a sperm donor’s ability to remain anonymous in every Australian State except Victoria, which had removed anonymity completely by 1998. To assess the impact of these changes on sperm donor numbers in Australia, Assisted Reproductive Technology clinics were surveyed to obtain sperm donation figures between 2000 and 2012, with additional data collected from State-based oversight groups. There was an increase in total sperm donor numbers over the study period, including the year anonymity was removed as well as the non-anonymous period. Variations in total donor numbers and numbers of new recruits observed during the period could not be attributed to any specific change in policy or practice. As total sperm donor numbers have been increasing, the removal of a donor’s ability to remain anonymous has not been detrimental to the availability of sperm donors in Australia. 628

Recall and understanding of risk in endodontics: A questionnaire survey – Mark Johnstone, Stephen Harlamb and Peter Parashos

The aim of this study was to determine the factors affecting the quantity and quality of information recalled by patients following endodontic consultations and their effect on anxiety. New patients attending the Royal Dental Hospital of Melbourne and University of Melbourne Dental Clinic were asked to complete a questionnaire assessing the amount of

information retained following their consultation, determining a patient's threshold for information disclosure and the effect of the consultation on patient anxiety. Only 9% of patients recalled more than two complications. Males ($P = 0.02$), patients older than 65 years ($P < 0.001$), and patients with education limited to high school ($P < 0.001$) recalled significantly less information. Most respondents (71.3%) wanted information about complications with a prevalence of less than 1%. Only 11 patients (8%) developed more anxiety as a consequence of the consultation. Patients had overall poor recall of complications following endodontic consultations. 637

Health complaints and regulatory reform: Implications for vulnerable populations? – Terry Carney, Fleur Beaupert, Mary Chiarella, Belinda Bennett, Marilyn Walton, Patrick J Kelly and Claudette S Satchell

Complaints and disciplinary processes play a significant role in health professional regulation. Many countries are transitioning from models of self-regulation to greater external oversight through systems including meta-regulation, responsive (risk-based) regulation, and “networked governance”. Such systems harness, in differing ways, public, private, professional and non-governmental bodies to exert influence over the conduct of health professionals and services. Interesting literature is emerging regarding complainants' motivations and experiences, the impact of complaints processes on health professionals, and identification of features such as complainant and health professional profiles, types of complaints and outcomes. This article concentrates on studies identifying vulnerable groups and their participation in health care regulatory systems. 650

Defining deviation: The peer professional opinion defence and its relationship to scope expansion and emerging non-medical health professions – Jon Wardle

The law imposes a duty to exercise reasonable care and skill in the provision of professional advice and treatment on all health practitioners, which in Australia is assessed via a modified Bolam principle. In an era of medical dominance, this standard was clearly related to the standards of the medical profession. However, the evolving nature of the Australian health workforce has fuelled speculation as to how non-medical professions are assessed to be practising in accordance with established standards. This article explores the peer-professional defence in relation to new, emerging and established non-medical professions practising in areas that were not historically part of their remit, and finds that individual health professions – even those which do not possess traits historically defined by professionalism – have ultimate discretion in determining the standards by which they are assessed, though such standards may be rejected by courts if they are deemed irrational. 662

A Hospital-based Patient Legal Clinic – Liz Bishop, Hana Shahkhan and Bebe Loff

The HeLP Patient Legal Clinic has provided free legal advice to public hospital patients with health-related problems since March 2014. This article reports on the findings of a study of the first six months of HeLP's operation. The study adopted qualitative methods informed by grounded theory and sought to understand patient and social worker experiences of HeLP. Interviews were conducted with 13 patients and 10 next of kin. Focus group discussions were carried out with 19 social workers who referred patients to HeLP. Locating the legal service in the hospital's social work department enabled and expedited access to legal advice; a team-based approach to patient problems emerged that enhanced patient outcomes; and provision of legal advice relieved the anxiety experienced by patients, allowing them to focus better on their health concern. 678

Beyond the corporeal: Extending propertisation of body parts to derivative information – *Wendy Bonython and Bruce Baer Arnold*

Jurisprudential consideration of property in the human body has typically conceptualised it as tangible, of finite lifespan, with limited end uses. This article offers an alternative conceptualisation: the body as information – intangible, infinite, and perpetual. Global markets in health “big data” – including population genomic data – trade this information. Emerging jurisprudence on source rights in this information are derived from jurisprudence based on the traditional, tangible, finite conceptualisation of the body – itself controversial – criticised in part for disregarding property rights vesting in the self, while recognising them in strangers. As such, it provides an uncertain foundation for extension to govern rights over derivatives, enabling disregard of legitimate concerns about health, commercialisation and genetic privacy, concerns compounded by the intergenerational nature of genetic information. A more nuanced approach, recognising that donors and strangers alike hold only weak custodial rights over access, use, and dissemination of tissues and derivative information, is required. 688

Biobanking: Relational obligations – *Valmaine Toki*

The nature of the relationship between the donor and donee within a biobanking framework is complex and dynamic. Issues such as ownership, rights and benefits often influence outcomes and access for researchers. In New Zealand, a raft of soft and hard law measures exist unconvincingly to govern this relationship. This article examines the current legislative provisions in New Zealand and explores possible avenues such as dynamic and broad consent, equity and contract that may provide a more appropriate framework for biobanking donors and donees. 710

BOOK REVIEW

Saviour Siblings: A Relational Approach to the Welfare of the Child in Selective Reproduction by Michelle Taylor-Sands 727