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EDITORIAL – *Ian Freckelton QC*

Medically assisted suicide: Recent jurisprudence and the challenges for law reform – *Ian Freckelton QC*

Decisions on the issue of medically assisted suicide were delivered within a two-year period by the Supreme Court of Ireland (*Fleming v Ireland* [2013] IESC 19), the Supreme Court of Canada (*Carter v Canada (Attorney General)* [2015] 1 SCR 331; 2015 SCC 5), the High Court of South Africa (*Stransham-Ford v Minister of Justice and Correctional Services* 2015 (4) SA 50; [2015] 3 All SA 109; [2015] ZAGPPHC 230 (GP)), and the High Court of New Zealand (*Seales v Attorney-General* [2015] 3 NZLR 556; [2015] NZHC 1239). This editorial scrutinises the jurisprudence generated by the decisions, identifies their ramifications and argues that it is likely that the combination of the carefully constructed judgments, together with their reception by the legal, medical and general communities, will lead to an increasing impetus for end-of-life law reform in many countries. It reviews the June 2016 report of the Legal and Social Issues Committee of the Legislative Council of the Victorian Parliament as an example of such reform initiatives. The challenge for those who wish to construct such changes to the law is to fashion legislative regimes which provide adequate protection to patients, as well as to the life-saving culture of medicine, and to safeguard dignity but ensure that respect for the quality of life is not eroded by pressures to end lives that some regard as no longer having value. 735

LEGAL ISSUES – *Danuta Mendelson*

Mental health legislation (civil) in Australia and China: A comparative perspective – *Danuta Mendelson* and *Nuannuan Lin*

This comparative review of statutory provisions of Australian and Chinese law focuses on accessibility of mental health care, diagnosis, admission and treatment orders for involuntary patients in civil cases as well as discharge procedures. The introduction contextualises the object of the comparative study, including key rights and principles that are used as the basis for analysis. Such factors as different political and legal systems, history, culture, and infrastructure resources of China and Australia form the background for the legal examination. Not surprisingly, these five factors, rather than statutory texts per se, are found to be the most important drivers of each country's approach to the law of mental health. Two cases, *XX v WW* [2014] VSC 564 in Australia and *Xu Lixin v Xu Canxing, Qingchun Psychiatric Rehabilitation Hospital of Shanghai* [2015], known as the *Right to Liberty Case*, in China illustrate practical differences in legal approach to involuntary treatment. The comparative analysis concludes by identifying the most problematic aspects of the legislation in each country. 762

MEDICAL ISSUES – *David Ranson*

Family violence and clinical forensic medicine – The forgotten service? – *David Ranson*, *Angela Williams*, *Barbara Thorne* and *Jennifer Ryan*

The recent national focus on family violence has had an impact on many areas within the Australian community. The setting up of a Royal Commission into Family Violence in Victoria is just one of these responses and in turn the recommendations of this Royal Commission have implications for government, the courts as well as a range of State and Territory organisations. While issues affecting courts, police and social services provision have received significant media attention, the role of clinical forensic medical services is less well known. While only one of the Royal Commission's recommendations specifically refers to clinical forensic medicine, a review of the report indicates that almost 30 recommendations have relevance to the practice of clinical forensic medicine. These recommendations deal with areas such as data collection, including information sharing and analysis, education, the development of specialist family violence service models, integration with family violence agencies and service providers, and the importance of research. A striking feature of the provision of services to those involved as parties to family violence, particularly victims, is the relative lack of engagement of clinical forensic medicine services in providing both medical support and evidential medical assessment. Greater utilisation of clinical forensic medical services has the potential to improve the utilisation and effectiveness of courts in addressing some of the issues arising out of family violence. 780

BIOETHICAL ISSUES – *Grant Gillett*

Justice, restoration and redress: Error, no-fault and tort-based systems – *Georgina Richardson* and *Grant Gillett*

Justice after harm in health care is often framed in terms of recompense for the patient and redress against a professional. These two facets are linked by requiring the professional to compensate the victim. But that tort-based approach requires proof of causation and fault and that proof is difficult to achieve in a world where systems are complex and the doctor only one of the actors in it. Therefore a number of patients are left without any remedy or relief for what they have suffered. New Zealand's no-fault compensation de-links the proven failings of health care professionals and the patient's need for help or restoration, but does it, in doing so, remove a vital element of responsibility and the duty of care from the review and adjudication of medical harm? There are also other needs such as communication and the assurance that others will not suffer the same harms that a system of response to medical error and medical harm needs to meet. This column assesses the New Zealand system against the intuitive profile of justice for medical harm and considers professional answerability and competence. 785

NURSING ISSUES – *Kim Forrester*

Nurse-to-patient and midwife-to-patient ratios – *Kim Forrester*

The Queensland Government has recently passed the *Hospital and Health Boards (Safe Nurse-to-Patient and Midwife-to-Patient Ratios) Amendment Act 2015* (Qld) which legislatively mandates minimum nursing and midwifery staff ratios. Though there is both national and international research which demonstrates the impact of nursing and midwifery workloads and skill mix on the quality of patient care and patient outcomes, there has been little legislative response to address the issue. Queensland is the second State, after Victoria, to mandate minimum nursing and midwifery ratios as a mechanism to address the delivery of safe high-quality patient care. 795

MEDICAL LAW REPORTER – *Thomas Faunce*

NuCoal Resources Ltd v New South Wales: The mining industry and potential health impacts of investor-state dispute settlement in Australia – *Thomas Faunce* and *Shaneel Parikh*

The Climate Council and Climate and Health Alliance have detailed the adverse health impacts of coal on Australian citizens and their environment. Such reports confirm established evidence that coal mining not only releases atmospheric toxins but destroys prime farming land and rivers. This column examines how the revocation of coal mining leases after proven corruption by disgraced New South Wales politicians, upheld by the High Court (*NuCoal Resources Ltd v New South Wales* (2015) 255 CLR 388; [2015] HCA 13), was challenged using mechanisms in the *Australia-United States Free Trade Agreement*, and potentially the *Trans-Pacific Partnership Agreement* (TPP). It is likely that foreign investors in the Australian coal mining and fracking industries will circumvent imprecise exceptions and use investor-state dispute settlement clauses in the TPP to initiate claims for damages before panels of conflicted investment arbitrators, alleging appropriation of their investments as a result of Australian legislation or policy taken against the coal industry on public health grounds. This issue is explored through analysis drawn from an extant investor-state dispute involving the mining industry in North America. 801

ARTICLES

Refusal of potentially life-saving treatment for minors: The emerging international consensus by courts – *Ian Freckelton QC* and *Simon McGregor*

A series of decisions by superior courts exercising their *parens patriae* jurisdiction in Australia, New Zealand, the United Kingdom and Canada has overturned decisions by parents, and by minors, including some close to the age of 18, to decline life-saving treatment on the basis that such treatment is "in the best interests" of the children concerned. This article reviews the reasoning in such cases and analyses the justifications proffered for giving limited weight to the expressed wishes of children and even of their parents in such matters. It identifies that the issues have particularly arisen in respect of families that are Jehovah's Witnesses and also where there is strong opposition to the application of mainstream medicine in the context of burdensome treatment for life-threatening conditions. It acknowledges the seriousness of such decisions and the potential for collateral influences that are difficult to identify to exert significant impact upon wishes expressed in respect of children who are seriously ill. It also accepts the complexities of identifying the "real wishes" of children. However, it contends that in appropriate cases flexibility in determining children's overall best interests is necessary and that the autonomy otherwise given to mature minors should play a more significant role in courts' decision-making in respect of the authorisation of treatment that children have purported to decline. 813

How should Australia respond to media-publicised developments on euthanasia in Belgium? – *Neera Bhatia*, *Ben White* and *Luc Deliens*

This article considers the implications that recent euthanasia developments in Belgium might have for the Australian debate on assisted dying. Through media database and internet searches, four significant developments in Belgium were identified: three cases involving individuals who requested access to euthanasia, and recent changes to the *Belgian Act on Euthanasia 2002*, allowing children access to euthanasia. The article outlines these developments and then examines how they have been discussed in Australia by the different sides of the euthanasia debate. It concludes that these developments are

important considerations that legislators and policy-makers in Australia should engage with, but argues that that engagement must be rational and also informed by the significant evidence base that is now available on how the Belgian (and other) assisted dying regimes operate in practice. 835

Aid in dying in New Zealand: Recent legal developments – *Andrew Geddis* and *Colin Gavaghan*

The issue of "aid in dying" (also called assisted suicide or euthanasia) in New Zealand is deeply contentious. However, until comparatively recently its legal status had not been conclusively determined. That changed in mid-2015 when the case of *Seales v Attorney-General* [2015] 3 NZLR 556; [2015] NZHC 1239 was heard by the High Court. This article considers the case against the background of existing legal regulation of the dying process. It critically analyses the reasoning in the decision and its potential consequences, as well as noting important factual findings made in the ruling. It concludes by drawing attention to contemporary parliamentary developments in relation to aid in dying, which have come about largely as a result of this case being heard. 849

End-of-life decision-making in a health services setting: An access to justice lens – *Katherine Curnow*

This article uses an access to justice lens to draw links between the diffuse body of bioethics, health services and legal literature about end-of-life decisions and decision-making in a health services setting. It establishes that effective conflict engagement can be beneficial and conflict avoidance strategies, including ones commonly used by health professionals, detrimental. It also reveals factors that may affect the ability of parties to participate in end-of-life decision-making. First, formal law has a variable and fragmented role. This diminished role for law may impede the capacity of family members to overcome the significant knowledge/information power differential with health professionals. Secondly, effective communication with health professionals is critical to family member participation. Based on these findings, this article recommends training for health professionals regarding conflict, communication and power differentials. Further, it is argued appropriate information and advice about formal law is needed, particularly for those from disadvantaged socio-economic backgrounds. 864

Lawyers and advance care and end-of-life planning: Enhancing collaboration between legal and health professions – *Nola M Ries*

In Australia and internationally, advance care planning (ACP) is emphasised as an important means by which individuals can express their wishes for health care during future periods of incapacity. ACP has mainly been promoted in health care settings and very little is said about the role of lawyers, despite the fact that some people are more likely to discuss their health care wishes with a lawyer than with a doctor. This article addresses this significant gap and advocates for collaboration between legal and health professionals to assist clients with advance care and end-of-life planning. It articulates the importance of law and lawyers in ACP and discusses the medical-legal partnership model as a means to increase inter-professional collaboration. It analyses how collaboration can tackle client, practitioner and system-centred barriers and recognise ACP as a preventive legal and health care practice that supports clients' interests and promotes their autonomy. 887

Does Australia need compulsory immunisation? – *Wendy Jane Nixson*

There are a significant number of factors that influence whether parents choose or refuse to immunise their children. The primary reasons appear to be civic duty, financial incentive, understanding of the medical implications, and complacency. This article

considers these factors in light of Australia's immunisation strategy, in particular the National Immunisation Program and the new No Jab No Play campaigns in various Australian jurisdictions. In assessing the effectiveness of these measures, the article concludes that some compulsory measures are required to maintain Australia's immunisation rates against transmissible disease. 907

Discharge against medical advice – *Audrey Laur*

It is established in law that patients are entitled to consent or refuse medical treatment. They can therefore leave hospitals "against medical advice" (AMA). This is a growing phenomenon worldwide that may result in adverse medical outcomes and malpractice litigation. "Discharge AMA" (DAMA) is a conflict between patients' rights and doctors' duty of care. Health care providers usually refer patients to a DAMA form, but this does not completely waive doctors' liability. Even if patients are partly responsible for bad health outcomes, health care providers may nevertheless be liable for negligence. Medical providers' decision-making should follow a protocol based on strong communication skills and appropriate documentation to protect against liability. This article analyses DAMA in Australia by reviewing reasons for the phenomenon, the population affected, its legal consequences, and recommendations to prevent lawsuits in negligence. Lastly, the dichotomy between doctors' duties of care and patients' rights to refuse is analysed. 921

The role of photographic and video documentation in the investigation and prosecution of child sexual assault – *Annie Cossins*, *Amanda Jayakody*, *Christine Norrie* and *Patrick Parkinson*

Despite its widespread acceptance by medical investigators, the use of colposcopy to document ano-genital examinations after sexual assault allegations has attracted controversy. Concerns have been expressed about potentially negative effects arising from the misuse of photo-documentation with some arguing that colposcopic photo-documentation should not occur. We discuss the extent to which these concerns, so far as they relate to the medical examination of children and young people, are supported by the research evidence. We raise and answer four questions: are there negative impacts for children and young people from the use of colposcopy in the medical assessment of suspected child sexual assault? Does the use of colposcopy improve the reliability of the medical assessment? Does the use of colposcopy affect the outcomes in trials, and in particular, criminal prosecutions? Is there any legal or medical benefit to the retention of photo-documentation when the ano-genital examination reveals no abnormalities? We discuss whether the current practices in the use of colposcopy should continue, and what reforms to the law might be needed to protect against the misuse of photo-documentation of ano-genital examinations. 925

Consent to innovative treatment: No need for a new legal test – *Bernadette Richards* and *Katrina Hutchison*

The provision of advice prior to medical treatment raises the perennial question of how much information is sufficient and how can patients truly understand the nature of the risks and benefits of any proposed treatment? This issue is potentially heightened in the context of innovative treatment where health care providers themselves do not know the full range of risks and benefits and thus cannot hope to communicate these to the patient. This potential issue in turn raises the question of whether or not there needs to be a specific legal framework around consent to innovative treatment. This article draws together the findings of a study into innovation in surgery and an analysis of the existing legal framework to demonstrate that while concerns around consent to innovative treatment are valid they are not unique and apply equally to the provision of all health care. The article concludes that to suggest a framework which specifically addresses innovative treatment

would be to add an artificial and unnecessary formality to any pre-treatment consultation. In short, the current legal framework adequately addresses the concerns raised by the surgeons in the study and there is no need for a new legal test. 938

Rethinking the "harmonisation" of international trade and public health – *Ania Lang*

The World Health Organization's *Framework Tobacco Convention on Tobacco Control* marks the most significant international legal initiative to control, reduce, and ultimately eliminate, tobacco use. Yet as the global community mobilises to fight the increase of non-communicable disease associated with tobacco use, calls for international co-ordination and novel legal interventions have driven tobacco corporations to exploit international trade and investment agreements to undermine governments' resolve in implementing progressive public health measures. The observable focus of the literature addressing these challenges has been on solutions that reinforce the compatibility of the public health and the international trade and investment regimes. Such consistency efforts have allowed international trade rules to encroach on a state's right to pursue public health measures, as unequivocally affirmed under the Tobacco Convention. In certain situations, it may lead to the conclusion that free trade values are not as inherently applicable to public health policy as efforts of harmonisation would prompt us to assume. 949

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