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EDITORIAL – *Ian Freckelton*

**Coronial law reform: The new wave**

The 2006 Report of the Law Reform Committee of the Victorian Parliament into the *Coroners Act 1985* (Vic) is a substantial and visionary document which has the potential to take coronial law reform in important new directions. It draws upon a range of reforms trialled in other jurisdictions, but proposes to consolidate a new role for the coroner as a public health official with a formally acknowledged focus on facilitating avoidance of avoidable deaths. Some of its Shipman-inspired proposals require further consideration but the general tenor of the Report – to recognise the distinctive functions of inquests and their potential to alleviate community concerns, respond to family members' needs and reduce the potential for dangerous conduct – deserves support. ..... 151

LEGAL ISSUES – *Danuta Mendelson*

**Assessment of competency: A primer**

Determination of testamentary capacity involves not only application of standard tests for decisional competency but also consideration of such special factors as the testator's "moral duty" to those entitled to her or his bounty (also referred to as "common obligations of life"), and the concept of emotional capacity. It is important for medical and legal practitioners who are involved in assessment of testamentary capacity to be aware of these special factors or requirements, their nature and their effect on the validity of the testator's will. The relevant tests and special factors are examined from an historical perspective. ..... 156

MEDICAL ISSUES – *David Ranson*

**Reforming the Human Tissue Acts**

The Human Tissue Acts of the various States and Territories that were enacted following the 1977 Report of the Australian Law Reform Commission on Human Tissue Transplants are in need of an overhaul as a result of rapid advances in medical science and biotechnology, as well as growing public expectations regarding the ethical use of tissues and organs obtained from autopsies and other sources. The author argues that the time is ripe for a comprehensive review and revision of the Acts throughout the country in order to maintain a consistent approach. ..... 167

MEDICAL LAW REPORTER – *Ian Freckelton*

**Natural justice and the coroner**

In *R v Doogan* (2005) 158 ACTR 1; 193 FLR 239; [2005] ACTSC 74 the Full Court of the Australian Capital Territory Supreme Court made what is arguably thus far the most extensive Australian appellate decision on coronial law and procedure. The court made findings on the nature of coroners' inquests into fires and deaths, the ways in which the parameters of inquests should be determined and the circumstances in which the conduct of coroners and the counsel assisting them could amount to conduct which would lead the

 

hypothetical disinterested bystander to conclude that the coroner was biased. The decision is a contextually sophisticated analysis. One of its consequences is that it will be difficult for parties to have coroners disqualified for apprehended bias. More generally, though, the decision will lend significant assistance for the recurrent difficulty of evaluating when matters sought to be traversed are outside the proper parameters of a coroner's inquest. .... 169

**Insightlessness and an unscientific forensic expert**

In *Council for Regulation of Healthcare Professionals v General Medical Council* [2005] EWHC 579 (Admin) Collins J heard an appeal relating to sanctions imposed on a medical practitioner who had provided medically unjustifiable opinions in relation to the person responsible for the death of a child in a notorious case for which a solicitor had been convicted of murdering her two sons. The author analyses and evaluates the considerations determined by Collins J to have justified the imposition of conditions rather than erasure of the practitioner from the Medical Register. ..... 176

ARTICLES

**Nutrition and hydration at the end of life: Pilot study of a palliative care experience** – *Pamela Van der Riet*, *Denise Brooks* and *Michael Ashby*

The issue of medically administered nutrition and hydration (MN&H) at the end of life has generated public, professional and academic controversy in a number of countries. There is a dearth of published documentation of how hospice and palliative care services care for dying patients without routine recourse to these measures, as they almost universally do. This descriptive longitudinal study was therefore conducted to document practice and inform debate. Using grounded theory, it explored the experience of palliative care patients and families with regard to nutrition and hydration at the end of life. It shows that for dying patients there is neither an abrupt cessation of food and fluid nor any sign of suffering attributable to the decline in oral intake. Instead there is a gradual decrease in intake, and providing good mouth care is undertaken, patients do not suffer the ill effects of terminal dehydration. Family members in this study were, however, under the impression that any non-provision of fluid and nutrition would result in suffering for the dying person, indicating that there is an ongoing need for public education and family support regarding this aspect of palliative care. ..... 182

**Issues surrounding a reduction in the use of internal autopsy in the coronial system** – *Belinda Carpenter*, *Michael Barnes*, *Charles Naylor*, *Glenda Adkins* and *Brendan White*

In 2003 it was estimated that 2,700 full internal coronial autopsies were performed in Queensland at a cost of approximately A$5.3 million. This large number of internal coronial autopsies (almost 95% of all matters referred to the coroner) is of concern not only due to the economic cost but also because of the public heath risks, availability of specialist staff and significant religious and cultural sensitivities surrounding internal autopsies. In 2005 the authors began research funded by the Australian Research Council (ARC) to determine if unnecessary internal autopsies are being performed in Queensland and to establish guidelines for when an internal autopsy is required. This article highlights areas of potential concern when the issue of autopsy is reviewed within the coronial system through an examination of international literature on the issue of autopsy diagnosis and error rates more generally, and through preliminary discussion of the data obtained. The article considers the role and purpose of the autopsy generally as well as within the coronial system specifically; compares diagnostic error rates in hospital autopsies with those in the coronial system; the current situation internationally with regard to internal autopsies; and finally the specific circumstances existing in Queensland. ..... 199

**Statistical sampling in a legislative framework for peer review of Medicare services** – *Robin Bell* and *Des Nicholls*

This article discusses problems addressed in developing an efficient way of identifying levels of inappropriate professional practice in delivery of Medicare services, using statistical sampling within a legislative peer-review scheme. An efficient alternative to the current sampling methodology is proposed. ..... 209

**Setting the legal standard of care for treatment and evidence-based medicine: A case study of antenatal corticosteroids** – *Lachlan McMurtrie*

This article argues that liability for negligent medical treatment should be predicated upon a standard of care reflecting what is medically and scientifically reasonable. Legal science (jurisprudence) and medical science (evidence-based medicine) should be reconciled to improve patient care and outcomes. The use of antenatal corticosteroids in obstetrics during the 1990s illustrates how most jurisprudence for setting the standard of care for treatment is ill equipped to meet the fundamental aims of tort law. The proliferation of evidence-based medical practice provides a unique opportunity for the law to encourage best medical practice when setting the standard of care for treatment. It is argued that, eventually, the law should recognise clinical practice guidelines as the prima facie standard of care for treatment. This will provide legal certainty, appropriate medical practitioner accountability, and ultimately improve patient care and outcomes. ..... 220

**Regulating to ensure patient safety in hospitals: Towards a comprehensive framework** – *Anna Macleod* and *Bernadette McSherry*

This article critically examines the successes and failures of the current internal and external regulatory regimes for ensuring the delivery of patient safety in public hospitals. It argues that governments should develop a holistic approach to regulation through the enhancement of existing compliance mechanisms in conjunction with some formal regulation to ensure that public hospital systems deliver high standards of service with minimal patient harm. It recommends that a Patient Safety Authority be established in order to assist with the monitoring of incidents and the enforcement of compliance with patient safety standards. ..... 228

**The legal basis for ethical withholding and withdrawing of life-sustaining medical treatment in children** – *James Tibballs*

Withholding and withdrawing life-sustaining medical treatment are common in paediatric practice, especially in intensive care units. However, not all clinicians apparently adhere to principles in ethical guidelines or to the principles which are to be found in judgments from common law cases arising when doctors and parents dispute treatment. This article examines selected ethical guidelines and compares them to judgments in leading cases. The rationale to forgo treatment is usually the child's "best interests" in both clinical practice guidelines and legal cases but in the former "best interests" may remain ill defined. Although "best interests" must essentially pertain to the individual child, the interests of others are not irrelevant. In legal cases "best interests" of the child are defined in terms such as "burden versus benefit", "futility", "indignity", "intolerability", "prolonging death rather than saving life" and "quality of life". These or like terms should form the basis of ethical decisions in discussions with parents when contemplating withholding or withdrawing life-sustaining treatment. ..... 244

 

**Passing it on: Should health care professionals be permitted to disclose patients' genetic information to their reproductive partners?** – *Agata Bober*

This article considers whether Australian law should permit health care professionals to disclose patients' genetic information to their reproductive partners without the patients' consent. The issue is addressed with reference to four genetic disorders (Huntington Disease, Familial Adenomatous Polyposis, Multiple Endocrine Neoplasia Type 2A and Cystic Fibrosis) which illustrate differences in inheritance traits and availability of effective treatments. The article explores the familial nature of these disorders and the notion that genetic information has implications which extend beyond the individual patient to third parties such as reproductive partners. It addresses the opinions of legal academics and regulatory bodies regarding the potential amendment of Australian laws to permit such disclosure. Ultimately, it is submitted that the application of current laws regarding medical information to the needs of genetics is unlikely to generate adequate results. To allow for a more appropriate response to this debate, health care professionals' duties to patients should be qualified when it concerns reproductive partners. ..... 262

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# Guidelines for Contributors

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