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EDITORIAL – *Ian Freckelton*

Employers' liabilities for bullying-induced psychiatric injuries

Important opportunities exist for employees who are bullied in the work place to take civil action against employers for failing to provide them with a safe work environment. However, many logistical impediments lie in the way of successful actions for harm caused by bullying. This editorial scrutinises two important cases, *Naidu v Group 4 Securitas Pty Ltd* [2005] NSWSC 618; *Nationwide News Pty Ltd v Naidu; ISS Security Pty Ltd v Naidu* [2007] NSWCA 377 and *Green v DB Group Services (UK) Ltd* [2006] EWHC 1898 where workers were successful in such actions and explores the repercussions of their success. 9

LEGAL ISSUES – *Bernadette McSherry*

The United Nations Convention on the Rights of Persons with Disabilities

The United Nations *Convention on the Rights of Persons with Disabilities*, which came into force on 3 May 2008, marks the culmination of over five years of negotiations between States Parties and non-governmental organisations as to what constitute the human rights of and governmental obligations to individuals with disabilities. It differs from other Conventions in that, while it still sets out general rights, it also details the steps that should be taken to ensure equality of treatment. This column provides a general overview of the Convention, focusing in particular on Art 25 which sets out the right to health and Australia's obligations under the Convention. 17

MEDICAL ISSUES – *David Ranson*

The use of the term "obesity" in deaths reported to coroners in Australia

There is growing government awareness of the increasing incidence of obesity in the Australian community and its potential impact on health policy issues. This column considers the appropriateness of the WHO definition of the term "obesity" and analyses its use by Australian forensic pathologists and coroners as a cause of death in "medical cause of death" statements. While families may have concerns about the use of this term in reference to a deceased family member, the use of "obesity" in medical cause of death statements could have considerable influence on coroners' recommendations with regard to health policy in this area. 21

BIOETHICAL ISSUES – *Malcolm Parker*

Patient competence and professional incompetence: Disagreements in capacity assessments in one Australian jurisdiction, and their educational implications

The determination of capacity to make medical, personal and financial decisions has significant individual and social implications. Medical and other health professionals are traditionally relied on by courts and tribunals to provide clinical and psychometric evidence of the presence or absence of capacity, or competence. Concern has long been expressed over the variability of these assessments. A survey of 285 decisions of the

Queensland Guardianship and Assessment Tribunal (GAAT) between 2005 and 2008 was conducted to estimate the incidence of disagreement between health professionals in capacity assessments; to provide examples of conflicting assessments and models of assessment used; and to consider the educational implications of disagreements. While the final capacity determinations by the GAAT appear sound, this case series, and other studies in the capacity literature, strongly suggest the need to improve the education of health professionals, especially doctors, at undergraduate and postgraduate levels, in the practical assessment of capacity as a fundamental clinical skill. 25

MEDICAL LAW REPORTER – *Thomas Faunce*

Selim v Lele and the civil (industrial) conscription prohibition: Constitutional protection against federal legislation controlling or privatising Australian public hospitals

Selim v Lele (2008) 167 FCR 61; [2008] FCAFC 13 was a decision of the Federal Court which interpreted s 51(xxiiiA) of the Australian *Constitution*. This section accords the federal government, among other things, power to make laws with respect to the provision of "medical and dental services (but not so as to authorise any form of civil conscription)". The Federal Court decided that the phrase "civil conscription" was analogous to "industrial conscription". In that sense the Federal Court held that the prohibition was designed to preserve the employment autonomy of Australian medical practitioners or dentists, preventing federal laws that required them, either expressly or by practical compulsion, to work for the federal government or any industrial employer nominated or permitted by the federal government. The specific question in *Selim v Lele* was whether the imposition of standards and prohibition of "inappropriate practice" under the *Health Insurance Act 1973* (Cth), ss 10, 20, 20A and Pt VAA, amounted to civil conscription. The court held they did not. The Federal Court also discussed in that context the sufficiency of "practical compulsion" in relation to the s 51(xxxiiiA) prohibition. The constitutional prohibition on "any form" of civil conscription provides one of the few rights protections in the Australian *Constitution* and may have an important role to play in shaping the limits of health care system privatisation in Australia. 36

ARTICLES

UNCROC and the prevention of childhood obesity: The right not to have food advertisements on television – *Richard Ingleby*, *Lauren Prosser* and *Elizabeth Waters*

This article discusses how legal rights-based discourse could inform the response of Australian State and federal governments to the increasing prevalence of childhood obesity. The authors contend that the principles in the United Nations *Convention on the Rights of the Child* (a treaty which has been ratified but not implemented) are capable of providing a basis for a legislative program to prevent childhood obesity. It is argued that an approach to legislation which is grounded on the basis of children's rights would require that there be restrictions on advertising food to children. The authors set out specific proposals for legislative reforms which the federal Parliament could enact to implement the Convention so as to restrict advertising to children. The scope of the discussion is then expanded to consider the implications of rights-based discourse in broader public health contexts. 49

Public expectations of health professionals when patients telephone for medical advice – *Saxon Smith* and *Julia Werren*

This article focuses on the ethical, social and liability implications of patients obtaining unsolicited medical advice over the phone. The ethical discussion centres on the demise of paternalism and the increase in patient autonomy and individualism and the growing

public expectations of health professionals. The article then discusses the advantages and disadvantages of telephone consultations from a social and policy perspective. In light of these considerations it considers what the liability implications are for phone consultations. It argues that the ethic of individualism, coupled with recent Australian tort reforms, suggests that only in limited circumstances would a doctor be found liable for negligence in relation to telephone consultations. However, the increasing expectations being placed on medical personnel, as evidenced by the increase in unsolicited telephone consultations, if left untempered, may lead to a situation with which the health care system is ill equipped to deal. 57

End-of-life decision-making, the principle of double effect, and the devil's choice: A response to Roger Magnusson – *Helen McCabe*

Recently, the principle of double effect has come under scrutiny by Magnusson who believes it provides a subterfuge for those who act so as to end the lives of their patients. Specifically, he argues that the conceptual distinction between foresight and intention is dubious and, moreover, renders patients vulnerable to involuntary euthanasia. At the same time, Magnusson wants to protect doctors from criminal liability when faced with (what he understands to be) a "devil's choice" between ending the life of a patient or under-treating pain. Hence, Magnusson proposes that, subject to specific conditions, a so-called "defence of necessity" be recognised through either common law doctrine or legislation. However, to safeguard this defence, he must rely on what he most wants to reject: a fundamental aspect of the principle of double effect. 74

The Human Rights Review Tribunal and the rights of health and disability consumers in New Zealand – *Theo Baker*

In New Zealand where there is a statutory bar on the right to sue for compensatory damages arising out of personal injury, and therefore injury arising out of negligent health care, the Human Rights Review Tribunal, in certain circumstances, provides relief for people who are aggrieved by the care they have received from a provider of a health or disability service. That relief may range from a declaration that the provider has breached the *Code of Health and Disability Services Consumers' Rights* to awards of compensatory and exemplary damages. The article explores the use of this tribunal by the Director of Proceedings of the Office of the Health and Disability Commissioner in holding providers of health and disability services accountable and obtaining relief for consumers and their families. 85

Herceptin®, Pharmac and the New Zealand District Health Boards: Keeping abreast of the Code of Health and Disability Services Consumers' Rights? – *Katherine Graham*

In an era of resource limitations, the problem of matching public expectations with health care provision will always be difficult. In New Zealand there has been recent debate surrounding the potential funding by the Pharmaceutical Management Agency (PHARMAC) of an expensive chemotherapy agent called Herceptin® (trastuzumab). Taking the proposed funding options in turn, this article looks at the obligations PHARMAC and the New Zealand District Health Boards might then be subject to with respect to the legislation and the Code of Health and Disability Services Consumers' Rights, and the impact this might have on a health system already subject to resource constraints. 103

Developments in pharmacists' disciplinary processes and outcomes – *Laetitia Hattingh*, *Nerida Smith*, *Judy Searle* and *Kim Forrester*

Pharmacy disciplinary processes and outcomes protect consumers by deterring pharmacists from unacceptable practices and maintaining the reputation and standing of the pharmacy profession. It is important that pharmacists are informed of disciplinary

processes and outcomes in order to predict what is regarded as unacceptable behaviour and the potential consequences thereof. Disciplinary procedures and outcomes also play an important role in maintaining public trust in the pharmacy profession and it is therefore important that the public has confidence in the disciplinary structure. The outcomes of pharmacy disciplinary cases that reflect the patient care role of pharmacists are particularly important in helping to determine pharmacists' changed professional responsibility and potential legal liability in the provision of these patient care services. 109

Reviewing regulation of assisted reproductive technology in New South Wales: The Assisted Reproductive Technology Act 2007 (NSW) – *Malcolm Smith*

In November 2007, the *Assisted Reproductive Technology Act 2007* (NSW) was passed to deal with a number of issues under the spectrum of reproductive technologies. The legislation was the outcome of a review conducted by the New South Wales Health Department and adopts a different approach to other Australian statutory regulation. This article considers the approach of the new legislation and whether there are some issues that require further consideration under the new regulatory regime. In particular, discussion is focused on the failure of the new legislation to address eligibility for reproductive treatments as well as the use of pre-implantation genetic diagnosis for the creation of tissue-matched children. 120

The Lockhart Committee: Developing policy through commitment to moral values, community and democratic processes – *Loane Skene*, *Ian Kerridge*, *Barry Marshall*, *Pamela McCombe* and *Peter Schofield*

The Lockhart Committee was appointed by the federal government in 2005 to review the *Prohibition of Human Cloning Act 2002* (Cth) and the *Research Involving Human Embryos Act 2002* (Cth). The issues in the review are ones on which community views differ widely and many people hold strong and diverging opinions. Yet all members of the committee were able to agree on their recommendations when the committee reported to Parliament in December 2005 and since that time, most of its recommendations have been implemented in amendments to federal and State legislation. This article describes the committee's process in considering the issues in the review, in consulting stakeholders and the broader community and in formulating its recommendations. 132

Therapeutic cloning in Australia: One small stem from man, one giant leap for mankind – *Irene Nemes*

In 2002 the Australian Parliament enacted legislation which prohibited both therapeutic and reproductive embryonic cloning. Just four years later, in December 2006, this same legislation was amended, reversing the prohibition on therapeutic cloning, while retaining the ban on reproductive cloning. The Prime Minister, sensing the political mood, allowed a conscience vote. This contrasted with his decision several months earlier against introducing any changes to the 2002 Act, despite 54 recommendations having been made by a Statutory Review Committee. Approval of the legislation had as much to do with the careful drafting of the provisions as with any rational, social or scientific factor. The legislation is narrow in scope, retains an absolute prohibition on reproductive cloning and contains strict regulations with heavy criminal penalties. The Act requires a review after three years. A number of questions remain. Does stem cell research demand a global rather than a local approach, by way of an international Covenant? Does the legal status of a cloned embryo need further examination? Will the embryo have a separate legal standing recognised by law? These are some of the questions which will need addressing as the law tries to keep up with science. 139

Reconstructing the hymen: Mutilation or restoration? – *Mike O'Connor*

Female genital mutilation (FGM) – previously known as female circumcision – was criminalised in many countries in the 1990s. This occurred mainly in Western nations and responded to the perception that FGM was intended to subjugate women and was an abuse of human rights. However, other female genital surgical procedures have a totally different intent and are designed to restore the integrity of the hymen, correct deformity or simply enhance the appearance of the female genitalia. Such procedures, unlike FGM, are performed on women who have reached the age of consent and who request the surgery themselves. Restoring the integrity of the hymen (so-called "hymenoplasty") can erase evidence of the sexual history of a woman. "Revirgination" may have particular importance to women contemplating marriage in cultures where a high value is placed on virginity. Some commentators have equated hymenoplasty with corrective surgery intended to restore the condition of female circumcision – techniques which are prohibited by most Australian criminal statutes. However, the medical, ethical and human rights arguments against FGM are not easily extended to revirgination and other cosmetic genital surgery. This article examines whether revirgination surgery has effectively been criminalised in Australia and whether this is appropriate from a medical and ethical perspective. 161

BOOK REVIEW
A Good Death: An Argument for Voluntary Euthanasia by R Syme 176

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