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EDITORIAL – *Ian Freckelton SC*

Reforming coronership: International perspectives and contemporary developments

In the 2007-2009 period an important new phase of coronial law reform has commenced. In 2007 New Zealand showed the way with the *Coroners Act 2006* (NZ) coming into force with a broad approach to the role of coroners and an emphasis upon the obligations of coroners to be sensitive to familial and cultural needs. 2007 and 2008 also saw Bills for reform of coronial processes before the Irish, United Kingdom and Victorian parliaments. In 2008 the Goudge Inquiry into errors in paediatric pathology made recommendations for systemic reform of the coronial office and its administration and accountability in Ontario, Canada. In 2008 reviews of the Australian Capital Territory and Western Australian coroners legislation also commenced. This editorial identifies the main features of the reforms and proposed reforms starting in 2007, contextualising the initiatives from an international perspective, and isolating the core issues that confront those advancing proposals to modernise the institution of coronership. It calls for an internationally and empirically informed approach to legislative change in order to facilitate the avoidance of avoidable deaths and to enable clarification of the public record in relation to unclear circumstances and causation of death. 379

LEGAL ISSUES – *Joanna Manning*

Criminal allegations in disciplinary cases involving health practitioners – *Joanna Manning*

Recently the Supreme Court of New Zealand decided that the standard of proof in disciplinary proceedings against a registered health practitioner is the ordinary, civil "balance of probabilities" standard, even in cases where criminal or serious allegations are made. Adopting recent House of Lords' case law, it rejected the existence of a third standard of proof, the "flexible" or "heightened" civil standard commensurate with the seriousness of the issue involved. Neither did the court consider direct application of the criminal, "beyond reasonable doubt" standard appropriate in disciplinary proceedings. Secondly, the court adopted a new principle that it is an abuse of process to bring a disciplinary charge against a practitioner, which is the same or substantially the same as that which he or she faced in the criminal proceedings and which resulted in an acquittal. It is not, however, an abuse to bring disciplinary charges after a criminal acquittal based on the same conduct, providing the disciplinary charges address wider aspects of the practitioner's conduct. The court was split on both issues. This column analyses the decision, supporting it on the first issue, but not the second. 393

MEDICAL ISSUES – *Russ Scott*

Court-ordered treatment for serious offenders with mental illness – *Russ Scott*

The insanity defence was elaborated upon through case authority which paralleled the development of phenomenology and treatment of serious mental illnesses, particularly psychotic disorders. In 1843, the rules in *McNaughton's Case* established a clear formulation for determining whether a person with a mental illness may be held to have

been not criminally responsible at the time of an offence. The current legislative scheme in Queensland incorporates the most modern application of the defence of insanity and diminished responsibility and provides the most efficient mechanism by which mentally ill offenders are diverted into care and treatment. 405

COMPLEMENTARY HEALTH ISSUES – *Ian Freckelton*

Regulating the unregistered – *Ian Freckelton*

A high proportion of health services is provided by complementary health practitioners who are not subject to formal regulation via a statutory registration scheme. The risk is that such practitioners are not subject to effective forms of professional accountability in relation to services which have the potential to be seriously counter-therapeutic for their clients if they breach fundamental norms of propriety generally accepted within their professions and expected by their clients. Consideration has been given in both South Australia and Victoria to increasing the oversight over complementary health professionals. New South Wales and New Zealand have gone further, bringing such practitioners within the rubric of regulation. The operation of these schemes is reviewed and it is argued that there is a need to ensure that all health practitioners are subject to effective regulation in relation to their adherence to fundamental ethical obligations. 413

MEDICAL LAW REPORTER – *Thomas Faunce*

University of Western Australia v Gray: An academic duty to commercialise research? – *Tim Vines* and *Tom Faunce*

In an era of tightening university budgets and pressure to commercialise academic knowledge, many higher education institutions see the exploitation of new inventions and discoveries, through the use of patents, as an additional revenue stream. To that end, many such organisations have in place policies and by-laws which regulate "ownership" and disclosure of inventions created by employees. This can be seen as a continuation of an ongoing process of shifting universities from institutes of "pure research" to commercial operations, seeking to maximise financial gains from the efforts of their researchers. However, new opportunities present new risks. One of the last Federal Court decisions by the High Court of Australia's new Chief Justice, Justice French, in *University of Western Australia v Gray* [2008] FCA 498 explores some of the challenges which Australian university administrators and policy developers will need to overcome if an appropriate balance between private interests and public good is to be maintained in this context. 419

ARTICLES

Death certification: A comparison of the situation in the United Kingdom, Queensland and Victoria – *Howard Munro*

The best way to monitor the death certification process has been examined by numerous law reform inquiries and discussion papers in recent years in the United Kingdom, Queensland and Victoria. The situation in the United Kingdom is of special interest, given its extensive deliberations on the topic and the plethora of discussion papers issued to date by various government agencies. This article focuses on technical legal analysis rather than health policy or resource allocation issues. The existing legislation in each of the jurisdictions plus the proposals for law reform are given detailed consideration. 426

Non-adversarial justice and the coroner's court: A proposed therapeutic, restorative, problem-solving model – *Michael S King*

Increasingly courts are using new approaches that promote a more comprehensive resolution of legal problems, minimise any negative effects that legal processes have on

participant wellbeing and/or that use legal processes to promote participant wellbeing. Therapeutic jurisprudence, restorative justice, mediation and problem-solving courts are examples. This article suggests a model for the use of these processes in the coroner's court to minimise negative effects of coroner's court processes on the bereaved and to promote a more comprehensive resolution of matters at issue, including the determination of the cause of death and the public health and safety promotion role of the coroner. 442

The coronial system in Queensland: The effects of new legislation on decision-making – *Belinda Carpenter*, *Michael Barnes*, *Glenda Adkins*, *Charles Naylor*, *Gordon Tait* and *Nelufa Begum*

The purpose of this article is to detail research completed in 2007 which investigated the way in which coroners made decisions in a death investigation, with a particular focus on their autopsy decision-making. The data were gathered during the first year of operation of a new *Coroners Act* in Queensland, Australia, which required a greater amount of information to be gathered at the scene by police, and this included a thorough investigation of the circumstances of the death, including statements from witnesses, friends and family, as well as evidence-gathering at the scene. This article addresses the outcomes of that increased information on coronial decision-making in three ways: first, whether or not the greater amount of information offered to coroners enabled them to be less reliant on full internal autopsies to establish cause of death; secondly, whether certain factors were more influential in decision-making; and thirdly, whether the information gathered at the scene negates the need for full internal autopsies in many situations, irrespective of the decision-making by coroners. 458

Solicitors and enduring documents: Current practice and best practice – *Lindy Willmott* and *Ben White*

Queensland's guardianship legislation requires that a witness to an enduring power of attorney or advance health directive not only certify that the principal signed the document in their presence, but also that the principal appeared to have the capacity necessary to make the enduring document. This article examines how solicitors fulfil this obligation to certify the principal's capacity when witnessing these documents, drawing on empirical research and a review of publicly available court and tribunal decisions. The article concludes that the current practice of solicitors when certifying the capacity of principals to complete these documents falls short of best practice. 466

"Good character" and the regulation of medical practitioners – *Ian Freckelton SC*

In Australia and the United Kingdom, but not New Zealand, the notions of "good character" and "fitness to practise" are relevant thresholds to registration, deregistration and re-registration of medical practitioners, as well as in a number of other legal contexts. This article surveys different cultural and professional perspectives on "good character" and reviews the extensive case law which has interpreted the expression in relation to doctors' regulation. It acknowledges the conceptual shortcomings of "character" as a psychological construct, especially when it is postulated by way of a simplistic dichotomy between "good" and "bad" character. It argues, though, that the legitimate public expectation that medical practitioners adhere to high standards of ethical conduct justifies a requirement that they conduct themselves in such a way as not to diminish the confidence that members of the public are entitled to have in the profession of medicine and the trustworthiness of its practitioners. This can most effectively be done by replacing the concept of "character" with the requirement that a doctor be, and remain, "a fit and proper person" to be registered. 488

Procedural fairness in medical investigations and disciplinary proceedings – *Timothy Bowen* and *Andrew Saxton*

In recent times, certain well-publicised cases involving allegations of inadequate and dangerous medical practice have led to a number of reviews into, and consequent changes to, the New South Wales medical regulatory and disciplinary system. The overwhelming focus has been upon both whether the existing system provided sufficient protection for the public from dangerous or under-performing medical practitioners and what was needed to ensure such protection. While the focus upon public protection is unquestionable and laudable, this still leaves considerable scope for ensuring a medical practitioner is afforded procedural fairness during the course of investigative and disciplinary processes. It is questionable whether procedural fairness is being afforded where to do so does not compromise the protection of the public. It is argued that only limited changes are required to create a system which affords procedural fairness without compromising the integrity of the system. 512

Newborn screening in Victoria: A case study of tissue banking regulation – *Charles Lawson*

The regulation of human tissue collections is increasingly important in maintaining public trust (and legitimacy) for critical practices and resources directed to public health programs and research. This article examines the governance arrangements applying to VCGS Ltd (under its various incarnations as "Genetic Health Services Victoria", "VCGS Pathology", and so on) and the existing collection of population-wide blood samples maintained on newborn screening cards (or Guthrie cards) in Victoria. The analyses reveal a complex web of regulations (and possibly even no regulation) and the limited role of significant statutory schemes that are generally assumed to apply to human tissue collections and the data and information derived from those materials. The article argues that, without a clear regulatory framework (and in particular meaningful consent), there is likely to be a decline in public trust (and legitimacy) with a consequent decreased participation in what is a public health program with immediate and quantifiable benefits and a valuable research resource for the future. 523

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