

JOURNAL OF LAW AND MEDICINE

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EDITORIAL – *Ian Freckelton*

Bioethics, biopolitics and medical regulation: Learning from the Nazi doctor experience

The phenomenon of abuse committed by medical practitioners during the Nazi era generated the creation of a series of important human rights instruments. Its evolution from sterilisation of persons with intellectual disabilities and euthanasia of those with mental illnesses constituted a dreadful fusing of legal and medical initiatives. Together these made possible the dehumanising rhetoric and then actions against Jews, the creation of the death camps by doctors, and the commission of human experiment atrocities by medical practitioners at the camps. There remains much that we must remember and learn if we are to formulate effective checks and balances to reduce the risk or repetition of such conduct. Numbered among these is a preparedness to name “evil” when it occurs so as to facilitate distinctions being drawn between conduct that is professionally acceptable and that which is repugnant and inconsistent with all principles of ethical conduct by medical practitioners. 555

LEGAL ISSUES – *Bernadette McSherry*

Hospital orders for offenders with mental illnesses: An appropriate diversionary option? – Bernadette McSherry

Hospital orders provide an option for sentencing judges to divert offenders with mental illnesses away from the criminal justice system and into the civil commitment system for treatment purposes. Such an option exists in Victoria, Tasmania and at a Commonwealth level. However, hospital orders have been rarely used. This column explores some of the practical difficulties associated with such orders, with the lack of resources for proper treatment and services an ever-present issue. It outlines the recent changes to the Victorian scheme and argues that if properly resourced, hospital orders can provide a means for adequately addressing the treatment needs of offenders with mental illnesses. 568

MEDICAL ISSUES – *Ian Freckelton*

Regulation of health practitioners by trade practices and fair trading legislation – Ian Freckelton

In a variety of situations, particularly those characterised by commerciality, corporate structures and unregistered practitioners, there are major limitations to traditional regulation by health boards and councils, as well as hearings by external tribunals. Part of the difficulty lies with the ability of external bodies to award compensation to complainants/notifiers proved to have suffered adverse consequences from proven unprofessional conduct. This column advances suggestions for reform of the powers of external tribunals to redress this deficit. It also reviews the benefits of an associated form of regulation by the Australian Competition and Consumer Commission and offices of fair trading to enable consumer protection. It reviews recent decisions in the Federal Court of Australia and the Supreme Court of Victoria in such matters as well as recommendations in 2008 by the Victorian Health Services Commissioner. 574

BIOETHICAL ISSUES – *Malcolm Parker*

Naked regulators: Moral pluralism, deliberative democracy and authoritative regulation of human embryonic stem cell (hESC) research – *Malcolm Parker*

Bioethical issues pose challenges for pluralist, democratic societies due to the need to arbitrate between incompatible views over fundamental beliefs. The legitimacy of public policy is increasingly seen to depend on taking public consultation seriously, and subsequently regulating contested activities such as therapeutic cloning and hESC research. In December 2006, the Australian Federal Parliament lifted the ban on therapeutic cloning, following recommendations of the Legislation Review Committee (Lockhart Committee), which recently reported on its approach and methods in this journal. This column analyses recent accounts of democratic deliberative processes, authoritative regulation and the committee's own account. Authoritative regulation turns out to be largely an appeasement strategy, directed towards the losers of the contest, in this case the opponents of therapeutic cloning and hESC research. This is because regulation fails to minimise harm as perceived by the losers, and fails to meaningfully limit what it is the winners wish to do. Moreover, regulation adds an unnecessary layer of red tape to the work of the winners. Committees of inquiry in bioethical matters should be more open about their processes and their normative recommendations, at the risk of eroding trust in parts of their processes. 580

MEDICAL LAW REPORTER – *Thomas Faunce*

New Australian federal organ and tissue donation legislation: Enhanced transplant services but no “opt-out” – *Thomas Faunce and Tim Vines*

Seriously ill people who could achieve many years of high-quality life with organ donation continue to die on waiting lists due to the scarcity of donated organs. Recent advances that suggest donor organs can be coated with host stem cells to reduce or remove the need for long-term recipient immuno-suppressive medication highlight the importance of encouraging such donation. A wide variation in organ donor rates in developed nations suggests this is one issue in which the right regulation can make a difference. Australia has now passed federal legislation on the topic. This column considers whether that legislation is headed in the right direction. 590

ARTICLES

The impact of the Cartwright Report upon the regulation, discipline and accountability of medical practitioners in New Zealand – *DB Collins and CA Brown*

The Cartwright Report instigated a profound change in thinking about patient-doctor relationships and the need for public involvement in the processes by which doctors are censured. It was also the key catalyst to legislative reforms designed to ensure the accountability of practitioners to their patients. This article considers the effect of the Cartwright Report on the incidence of disciplinary hearings against medical practitioners in New Zealand. Perhaps contrary to expectations, the statistics show a pronounced decline in disciplinary hearings. The authors argue that this should not necessarily be considered an adverse development, and that these statistics in fact reflect the working of multi-layered, more constructive and open processes for regulating doctors and holding them accountable. 595

Turning a blind eye: Physical standards for surgeons – *Mike O'Connor*

Requiring professionals in high-risk industries to regularly meet minimal physical standards is a well-accepted principle. Pilots in both civil and military aviation must meet

rigorous physical standards, including visual acuity, colour and peripheral vision. Australian medical practitioners have a general obligation to notify their medical registration board if they have suffered an illness which might affect their physical or mental capacity to practise medicine. However, no specific minimal physical standards are defined. It would be possible for a surgeon to be ineligible for an unrestricted motor vehicle driver's licence yet continue to perform surgical procedures. The visual requirements for a surgeon differ from those of a driver, the surgeon requiring good acuity for fine detail at close range, good depth perception as well as good colour vision. The driver needs good peripheral vision and adequate visual acuity at longer distances. However, a good yardstick for any doctor intending to perform surgical procedures would be that he or she should at least meet the Australian standard for an unrestricted driver's licence. That requirement could easily be incorporated into the annual declaration which each doctor must make when seeking renewal of her or his medical registration. 614

Under the knife: An analysis of the Medical Council of New Zealand's Statement on Cosmetic Procedures – Kelly Scott

The lack of regulation in the field of appearance medicine has long been a cause for concern in New Zealand. As an industry, it has fallen outside the protective ambit of the regulatory framework that governs all other areas of medicine. This article examines the Medical Council of New Zealand's attempt to address some of the concerns that have existed by producing a *Statement on Cosmetic Procedures*. The author concludes that this statement goes a long way towards better ensuring consumer safety and wellbeing in this area. It also offers valuable guidance to practitioners in the areas of advertising and promotion, obtaining consent and providing care. The author does, however, propose and discuss several possible changes that could be made to improve the statement that has been produced. 625

Legislative intervention in Queensland to restrict access to solariums and cosmetic procedures by children and young persons – Tina Cockburn and Bill Madden

Breaking new ground, Queensland has enacted laws restricting access to cosmetic surgery by those under 18 years of age. Legislation in other Australian jurisdictions is narrower in scope, focusing on niche areas such as solarium use, tattoos and body piercing. Even in those niche areas there are inconsistencies of approach and now the unique Queensland cosmetic surgery restrictions further raise the prospects of "medical tourism" and highlight the difficulties of differing legislation throughout Australia. All implementations, however, face the same challenge: to balance protection of vulnerable children, respect for a young person's autonomy and due regard to parental consent. 653

Striving for quality use of medicines: How effective is Australia's ban on direct-to-consumer prescription medicine advertising? – Sonja Brown

The potential for both positive and negative effects arising from direct-to-consumer advertising of prescription medicines challenges health policy-makers to develop regulatory schemes which selectively capture the positive aspects of the practice. Australia has dealt with this quandary by banning the practice, while New Zealand and the United States permit it. However, in recent times pharmaceutical companies have been increasingly successful in introducing promotional materials into the Australian market. This article demonstrates that the Australian ban is consistent with striving for the major policy goal of quality use of medicines, thus providing the basis for arguing that solutions to strengthen the ban against the identified threats ought to be implemented. Quality use of medicines can be most effectively achieved via the combined effect of the strengthened ban and the mimicking of the limited positive aspects of direct-to-consumer advertising by government provision of non-promotional information to consumers. 666

The law(s) of the rings: Boxing and the law – RG Beran and JR Beran

To threaten harm is to assault and to realise that threat is to batter. To do so intentionally for the purpose of producing injury amounts to causing harm with intent and one cannot consent to be the victim of such violence. Despite these clearly enunciated legal principles, such conduct is routinely practised in the name of sport. Boxing is widely accepted as a highly paid professional sporting activity in which the ultimate goal is to inflict a concussive head injury upon an opponent or at least cause sufficient damage to render an opponent incapable of further self-defence. Spectators pay to watch the anticipated systematic abuse of one human being by another in much the same way they delighted in gladiators who were forced to fight for the pleasure of others. This article reviews these concepts and challenges the legal ethics of authorised violence associated with these activities undertaken in the name of sport. 684

Scaring us all to death: The need for responsible legal scholarship on post-mortem organ donation – Ngairé Naffine, Bernadette Richards and Wendy Rogers

This article considers the legal, medical and policy issues arising from post-mortem organ donation. It explains the basis of relevant law, and examines the diagnosis of death and the ethics of medical aspects of post-mortem donation. While the law in this area may well be imperfect, it provides an appropriate and ethical framework within which health care professionals can function. The current medico-legal framework protects and preserves the public interest, such that the broader society can be confident that the dead donor rule is observed irrespective of the way that death is diagnosed. This article also acknowledges the human fear of death and calls for responsible scholarship in this area. 696

BOOK REVIEWS

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