

JOURNAL OF LAW AND MEDICINE

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EDITORIAL – *Ian Freckelton*

Anglo-Australian coronial law reform: The widening gap

The *Coroners Act 2009* (UK) has made disappointingly little progress toward a modern, integrated, prevention-focused coronial system for the United Kingdom. The opportunities afforded by the Shipman scandal and an exhaustive consultation process have yielded remarkably little by way of substantive reform and professionalisation of what is an increasingly outmoded system for investigating death in England, Wales and Northern Ireland. By contrast, during 2008 and 2009 New South Wales, Queensland and Victoria have each built upon the reform initiatives of New Zealand's *Coroners Act 2006* (NZ) to introduce important and innovative amendments to their coronial jurisdictions' capacity to investigate deaths. It is to be hoped that in due course the diversity of Australian coronial legislation will be addressed by nationally consistent legislation. 471

LEGAL ISSUES – *Bernadette McSherry*

Incorporating carers' rights in mental health legislation – *Prasanna Venkataraman and Bernadette McSherry*

Mental health laws have traditionally been based on notions of individual rather than collective human rights. This column analyses some of the issues raised by the introduction of legislative provisions promoting the rights of carers. The new Scottish system of "named persons" is outlined, as well as other recent provisions enabling access to information and more involvement in decision-making processes. 481

MEDICAL ISSUES – *David Ranson*

The Coroners Act 2008 (Vic): A medical investigator's perspective – *David Ranson*

The legal basis of the medical investigation of deaths for the coroner has changed with the implementation of the *Coroners Act 2008* (Vic) in Victoria. For the first time in Australia the notion of "preliminary examinations" has been created whereby medical investigators, for the most part forensic pathologists, have authority to carry out their own investigations without oversight or specific directions from a coroner. Presentation of a body to a medical investigator is sufficient authority for a range of procedures to be carried out, including external examinations, various forms of imaging, eg CT scans, as well as sampling of the surface of the body, wounds and oral cavities. Forensic odontology examinations may be undertaken and samples of body fluids collected and rapidly analysed (within 24 hours) for the presence of drugs or infections. Although incisions may be made in the body to obtain fluids for analysis, the dissection and removal of tissues may not be carried out without an order from the coroner. The findings of these preliminary examinations are reported to the coroner who, as a result, has access to far more detailed evidence upon which to base a decision as to whether to order an autopsy. In addition, the more detailed medical information allows the coroner to direct the legal aspects of the ongoing investigation in a more efficient and focused manner. The introduction of this new medical process in Victoria has resulted in the autopsy rate diminishing to around 50% of deaths reported to a coroner 487

BIOETHICAL ISSUES – *Malcolm Parker*

Four decades of complaints to a State Medical Board about graduates from one medical school: Implications for change in self-regulation processes – *Malcolm Parker, Jianzhen Zhang, David Wilkinson and Raymond Peterson*

In the context of the impending national registration of health practitioners in Australia including doctors, this column describes the types and patterns of complaints to a State Medical Board across an extended period, about graduates from one medical school. De-identified data concerning complaints about medical practitioners who had graduated from the University of Queensland, made to the Medical Board of Queensland between 1968 and 2006, were analysed. The main outcome measures were category of complaint, total complaint rate per doctor-year, frequency of complaints per practitioner and outcomes of complaints. There were 12 categories of complaints, encompassing different aspects of clinical management, impairment and unethical conduct. Outcomes included “no further action”, a hierarchy of recommendations and conditions on registration, suspension, deregistration, health assessment, or referral to alternative bodies. Complaints predominantly related to clinical standards, and this also applied to those who attracted multiple complaints. Most cases were managed without resort to sanctions of any kind. Sanctions may be underutilised, particularly in cases of apparent recalcitrance. Improved tracking and appropriate re-education and disciplinary measures will assist in better protecting the public under the new national registration arrangements. 493

MEDICAL LAW REPORTER – *Thomas Faunce*

Should only pharmacists hold pecuniary interests in a pharmaceutical business? Attorney General (NSW) v Now.Com.Au Pty Ltd [2008] NSWSC 276 – *Jatine Patel and Thomas Faunce*

The New South Wales legislature’s policy of authorising only registered pharmacists to hold pecuniary interests in a pharmaceutical business is a component of Australian public health policy that accords with foundational principles and virtues of health law and bioethics. The case of *Attorney General (NSW) v Now.com.au Pty Ltd* [2008] NSWSC 276 considered what constitutes a pecuniary interest in this context, and how this should best be deduced from facts that may be contentious. 502

ARTICLES

Accommodating the medical use of marijuana: Surveying the differing legal approaches in Australia, the United States and Canada – *Tony Bogdanoski*

While the scientific and medical communities continue to be divided on the therapeutic benefits and risks of cannabis use, anecdotal evidence from medical users themselves suggests that using cannabis is indeed improving their quality of life by alleviating their pain and discomfort. Notwithstanding the benefits anecdotally claimed by these medical users and the existence of some scientific studies confirming their claims, criminal drug laws in all Australian and most United States jurisdictions continue to prohibit the possession, cultivation and supply of cannabis even for medical purposes. However, in contrast to Australia and most parts of the United States, the medical use of cannabis has been legal in Canada for about a decade. This article reviews these differing legal and regulatory approaches to accommodating the medical use of cannabis (namely, marijuana) as well as some of the challenges involved in legalising it for medical purposes. 508

A right to die? Euthanasia and the law in Australia – Lorana Bartels and Margaret Otłowski

This article examines the legal regulation of active voluntary euthanasia and assisted suicide in Australia. The *Dying with Dignity Bill 2009* (Tas), which was recently defeated by the Tasmanian Parliament, is discussed, as well as other jurisdictions' past and present legislative developments in this context. The recent case law is also considered to ascertain how "mercy killing" or assisted suicide cases are dealt with by the criminal justice system, with particular reference to the case of *R v Justins* [2008] NSWSC 1194. This is followed by a critical evaluation of the key arguments for and against euthanasia. The article concludes by examining the significance of the Tasmanian Bill and the implications of such legislation. 532

Advance directives and the promotion of autonomy: A comparative Australian statutory analysis – Lindy Willmott

Legislation governing advance directives has been enacted in six Australian jurisdictions. As evidenced by parliamentary debates, the goal of enacting legislation was to enshrine the common law and to remove any doubt about whether a competent individual was entitled to complete an advance directive that refused life-sustaining medical treatment. The common law cases contain many judicial pronouncements about the importance of the principle of autonomy in shaping the law in this field. It should therefore follow that the principle of autonomy would also be promoted by the legislation. This article argues that the statutory regimes have, for the most part, eroded rather than promoted the principle of autonomy. While some of the statutory regulation can be justified as seeking to promote autonomous decision-making of a competent person, many of the restrictions about when an advance directive refusing treatment can be entered into or operate, or be disregarded by medical professionals, have effectively undermined an individual's ability to ensure that her or his refusal of medical treatment at the end of life is followed. 556

Donor gametes and frozen embryos: Should there be a right to withdraw consent? – Ursula Adamiec

Several years can pass between the creation of an embryo and its transfer into the body of a woman. This article critically analyses whether a donor should have the right to withdraw consent for the use of their gametes once those gametes have been used to form an embryo. Drawing upon the Canadian case of *Caufield v Wong* (2005) 50 Alta LR (4th) 61; 2005 ABQB 290, it is argued that the Australian regulatory frameworks in this area are deficient because they fail to take account of the divergent roles and expectations of donors. Furthermore, the legislative frameworks in Victoria and South Australia are poorly drafted and need to be clarified. A new framework that overcomes these deficiencies is proposed. 582

Separating conjoined twins: A medical and criminal law dilemma – Colleen Davis

Surgical separation of conjoined twins that results in the death of one of the twins raises complex moral, ethical and legal issues. Of particular concern is the potential for homicide charges against doctors. In two recent cases, one in England and one in Queensland, judges declared the surgery to be lawful but the legal reasoning employed is problematical and may be difficult to apply to future conjoined twins cases, such as infant twins where one is not fully developed, or where it is proposed to separate adult twins. A determination of the threshold issue of whether there are two individual persons capable of being killed may require a reconsideration of existing legal definitions and statutory provisions. Similarly, the excuses and justifications for homicide may need to be clarified or reviewed in the context of separation of conjoined twins. 594

Prospective application of a five-step regulatory assessment model to a proposed federal sperm donor registry in Australia: Is it in the public interest? – Neroli Sawyer

It has been proposed that a nationally mandated donor registry be established in Australia to provide data for estimating the possible number of inadvertent half-sibling matings resulting from the multiple use of anonymous donors in donor insemination and to assist identity-release donors and their donor-inseminated children to establish contact. A five-step regulatory assessment model, as described by Johnson and Petersen in 2008, was applied prospectively to the proposed donor registry to identify public interest issues. The resultant issues concern the public ethical interest in child welfare; the public health interest in avoiding genetic abnormalities/disease; public socio-political and legal interests in avoiding inadvertent consanguineous relationships; public ethical and health interests in avoiding identity issues in the donor-inseminated child; and public socio-ethical interests in providing nationally mandated, comprehensive records of donor insemination outcomes. These results provide a basis for further discussion in regard to donor insemination legislation at the federal level. 608

Queensland's proposed surrogacy legislation: An opportunity for national reform – Tammy Johnson

Surrogacy has existed since Biblical times when Hagar, the maidservant of the infertile Sarah, acted as a surrogate to bear Sarah and her husband, Abraham, a son. Despite the longevity of the practice of surrogacy, modern society has been reluctant to embrace surrogacy arrangements due to the ethical and sometimes practical debates they spark. This reluctance is evidenced by the general lack of legislative support for surrogacy arrangements in Australia and worldwide. In 2009 it was announced that Queensland will decriminalise altruistic surrogacy. While this decision is a step towards bringing Queensland in line with other Australian jurisdictions, it also has the potential to open up a Pandora's Box of legal and ethical issues. This article provides a snapshot of the anticipated new Queensland surrogacy legislation together with a brief overview of the regulation of surrogacy in all Australian jurisdictions. Recommendations are made as to whether there is a need for further reform of surrogacy regulation in certain Australian jurisdictions and if so, whether the proposed Queensland legislation constitutes an appropriate model on which to base such reform. 617

BOOK REVIEW

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