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EDITORIAL – *Ian Freckelton SC*

Fetal Alcohol Spectrum Disorder and the law in Australia: The need for awareness and concern to translate into urgent action – *Ian Freckelton SC*

Awareness of the social tragedies and legal difficulties caused by Fetal Alcohol Spectrum Disorder has been emerging since the 1960s. However, although a great deal is now known clinically about the disorder, its diagnosis and what needs to be done by way of prevention and management, a co-ordinated therapeutic and public health response in Australia has thus far been lacking. In turn, this is having a range of repercussions for the courts in evaluating accused persons’ criminal responsibility and culpability. Two high-quality and extensive reports during 2012 from Western Australian and Commonwealth parliamentary committees have documented the problems and provided a blueprint for a collaborative and comprehensive intergovernmental response. The challenge for government is now to implement the proposals throughout Australia (and be guided by them in New Zealand) as a matter of urgency. 481

LEGAL ISSUES – *Joanna Manning*

Criminal responsibility for the non-disclosure of HIV-positive status before sexual activity – *Joanna Manning*

In 2012 the New Zealand Court of Appeal, in a radical change in direction, held that the non-disclosure of HIV-positive status prior to unprotected sexual relations could amount to fraud vitiating consent, so that the offence of sexual violation is committed. The court applied *R v Cuerrier* [1998] 2 SCR 371, a controversial Canadian decision, which held that for the offence to be established the Crown has to establish that the dishonesty had the effect of exposing the person consenting to “a significant risk of serious bodily harm”. In 2012 in *R v Mabior* [2012] SCC 47 the Supreme Court of Canada reviewed the correctness of its own decision in *Cuerrier*. The court considered first whether, in holding that non-disclosure of HIV can make sexual intercourse non-consensual and lead to conviction for the serious offence of aggravated sexual assault, *Cuerrier* overextends the criminal law. Secondly, the court considered issues left open in *Cuerrier*: whether condom use and/or a low viral load in the partner with HIV prevents failure to disclose HIV status before intercourse from posing “a significant risk of serious harm”. This column analyses these two recent high-level decisions. 493

MEDICAL ISSUES – *Ian Freckelton SC*

Eyewitness identification law reform: The need for persistence – *Ian Freckelton SC*

The overturning of many convictions, including by DNA evidence, and an extensive body of experimental psychology evidence have demonstrated unequivocally the dangers of eyewitness identification evidence. In many countries this risk has been marked by procedures mandating identification parades, judges’ warnings, discretionary exclusion of such evidence and heightened awareness of the dangers on the part of trial lawyers. In the United States there has also been an additional check and balance – the due process check. In the Supreme Court decision of *Perry v New Hampshire* 132 S Ct 716; 181 L Ed 2d 694

(2012) the majority declined to extend the ambit of the check, determining that it should only be enlivened when police misconduct is established. Such an approach failed to acknowledge in a significant way the core risk of unreliability of such evidence when identifications are contaminated by factors such as suggestion. However, rather than bemoaning another failure of the law to draw adequately upon the fruits of social science, the quest should continue internationally to find ways to build upon the knowledge generated by experimental psychology in order to reduce the risks of miscarriages generated by misidentifications. 503

BIOETHICAL ISSUES – *Malcolm Parker*

“Forced sterilisation”: Clarifying and challenging intuitions and models – *Malcolm Parker*

In the context of the current Senate Community Affairs Reference Committee Inquiry entitled “The Involuntary or Coerced Sterilisation of People with Disabilities in Australia”, this column considers the history of judicial decisions and associated reports and articles concerning the issues raised by sterilisation and menstrual management for intellectually disabled women and girls in Australia. It is by no means an exhaustive coverage, but it critically analyses a number of concepts and arguments, including terminological questions, models of disability, conceptualisations of human and reproductive rights, definitions of last resort treatment, usage of the therapeutic/non-therapeutic distinction, ideas about eugenics, and the contested notion of best interests, among others. It is intended as a critical, conceptual contribution to the current debates concerning “forced sterilisation”. 512

MEDICAL LAW REPORTER – *Thomas Faunce*

Planetary medicine and the Waitangi Tribunal Whanganui River Report: Global health law embracing ecosystems as patients – *Tim Vines, Alex Bruce and Thomas Faunce*

A recent decision of the Waitangi Tribunal granted legal personhood to New Zealand’s Whanganui River (appointing guardians to act in its interests). Exploring the impacts of this decision, this column argues that new technologies (such as artificial photosynthesis) may soon be creating policy opportunities not only for legal personhood to be stripped from some artificial persons, but for components of the natural world (such as rivers and other ecosystems) to be granted such enforceable legal rights. Such technologies, if deployed globally, may do this by taking the pressure off ecosystems to be exploited for human profit and survival. It argues that, by also creating normative space for such an expansion of sympathy, global health law begins to incorporate the vision of planet as patient. 528

ARTICLES

A right to refuse: Legal aspects of dealing with intoxicated patients who refuse treatment – *Lisa Butson, Mandy Shircore and Ben Butson*

Doctors in hospital emergency departments are frequently confronted with intoxicated patients who may be uncooperative, aggressive and refuse to undergo diagnosis and treatment. In the chaotic environment of the emergency department, the doctor must decide whether to override the patient’s refusal and detain the patient for treatment or respect the refusal and allow the patient to leave and potentially suffer further injury. A preliminary pilot survey of emergency doctors in a regional Queensland hospital indicated that those surveyed had limited understanding of the circumstances in which they could, or could not, legally detain and continue to treat an intoxicated patient who refuses treatment,

and the concomitant legal consequences. This article considers the complex common law and statutory framework existing in Queensland to determine the legal position of doctors treating intoxicated patients who refuse treatment. 542

Manufacturing mental illness (and lawful abortion): Doctors’ attitudes to abortion law and practice in New South Wales and Queensland – *Heather Douglas, Kirsten Black and Caroline de Costa*

Around one-quarter of Australian women will have an abortion during their lifetime but access is affected by the way health care providers interpret the law about abortion. In Queensland and New South Wales abortion is a criminal offence although it is defensible in certain circumstances. Drawing on interviews with 22 doctors who provide abortion services to women in New South Wales and Queensland, this article examines doctors’ responses to two common scenarios in which women may request an abortion. The two scenarios discussed in this article are a request for a first trimester abortion in circumstances where the woman does not feel ready to have a baby; and a request for abortion in the second trimester where the fetus has been diagnosed with an abnormality. This article explores doctors’ understanding of the law related to the provision of abortion in these two States and their views about the effect of the law on their practice. 560

Personalised medicine in the Genome Era – *Don Chalmers, Dianne Nicol, Margaret Orlowski and Christine Critchley*

The “Genome Era”, a term that has been used to describe the period following the sequencing of the human genome, has heralded significant changes in biomedical research and clinical practice. Personalised medicine aims to use this increased genetic knowledge base to identify predisposition to disease and to tailor treatment to the individual based on an analysis of their genome. In 2003, the Australian Law Reform Commission and the Australian Health Ethics Committee released a report recommending regulatory reform to ensure adequate protection of genetic information. There have been significant developments in this area since that report was released, and the authors argue that it is time to reconsider the regulatory framework of personalised medicine in Australia. The authors identify a number of ethical concerns that need to be addressed if the promise of personalised medicine is to be fully realised. 577

Epidemiology, quality control and consumer access in the medical marketplace: The changing landscape of human genetic technology regulation in Australia – *Jacqueline Savard*

Advances in genetics, genetic therapeutics and the application of genetic technologies to many aspects of human life have challenged the capacity of regulatory authorities and legislative processes the world over. In Australia, developments in the “new genetics” prompted the government to initiate a major inquiry into the protection of human genetic information, resulting in the production and publication of Report 96, titled *Essentially Yours: The Protection of Human Genetic Information in Australia* in 2003. This article examines the recommendations set out in this report and how they have provided Australia with a framework to deal with the advances in human genetic technologies, using the examples of direct-to-consumer personal genome testing and whole-genome sequencing. 595

Using economic policy to tackle chronic disease: Options for the Australian Government – *Lauren Kaplin and Anne Marie Thow*

Australia suffers from one of the highest prevalences among developed countries of persons being overweight and obese, these conditions arising from the overconsumption of energy-dense, nutrient-poor foods that are generally less expensive than healthier options. One potential avenue for intervention is to influence the price of foods such that healthier options are less expensive and, therefore, are an easier choice to make. This article

considers the potential for fiscal policies that would realign food prices with health incentives. Through a review of consumption taxes, consumer subsidies, trade policies, agricultural support policies, and other incentive programs as possible avenues for intervention, this article asks what the Commonwealth Government has already done to help improve Australian diets, and looks at where further improvements could be made. 604

What counts as a health service? Weight loss companies through the looking glass of New Zealand’s Code of Patients’ Rights – Megan J Neill

In New Zealand, the *Code of Health and Disability Services Consumer’s Rights* is a key innovative piece of legislation for the protection of health and disability service users. It provides rights to consumers and imposes duties on the providers of such services, complemented by a cost-free statutory complaints process for the resolution of breakdowns in the relationship between the two. The Code has a potentially liberal application and is theoretically capable of applying to all manner of services through the generalised definitions of the *Health and Disability Commissioner Act 1994* (NZ). As the facilitator of the Code, the Health and Disability Commissioner has a correspondingly wide discretion in determining whether to further investigate complaints of Code breaches. This article considers the extent to which the Code’s apparent breadth of application could incorporate commercial weight loss companies as providers and the likelihood of the Commissioner using the discretion to investigate complaints against such companies. 621

Property rights in human gametes in Australia – Vanessa White

It has long been a basic tenet of the common law that there can be no property interest in human bodies or body parts. However, exceptions to the rule have been recognised from the mid-19th century and developed over time. In the early 21st century, there have been interesting developments in the common law of Australia and England, with Australian Supreme Court judges and the English Court of Appeal casting aside existing exceptions, and finding property rights in human body parts, including gametes, by relying instead on a “rational” and “logical” basis to identify property interests in human body parts. 629

Back to the future: Prohibiting surrogacy for singles, same-sex and shorter-term heterosexual couples in Queensland – Malcolm K Smith, Lindy Willmott, Pip Trowse and Ben White

This article considers the regulatory position concerning altruistic surrogacy in Queensland, focusing on the intended changes to the current legal framework announced by the government in June 2012. The previous government had made significant progress by reforming surrogacy laws in 2010. However, that progress is at risk of being reversed. The proposed changes to the law would make it a criminal offence to enter into an altruistic surrogacy arrangement for certain individuals or couples. If enacted, the offence would only apply in altruistic surrogacy cases where the intended parent or parents are either single, in a same-sex relationship, or are in a heterosexual relationship of less than two years. Moreover, if enacted, the offence would apply extra-territorially. The authors argue that these changes represent a retrograde step for the law and urge the government to reconsider. This is based on the fact that they are out of step with current social attitudes, are contrary to the spirit of anti-discrimination laws, and that they are unjustified in terms of child welfare concerns. 638

Access to information about donors by donor-conceived individuals: A human rights analysis – Sonia Allan

While assisted reproductive treatment using donated gametes is widespread, and in many places, widely accepted, it has historically been shrouded in secrecy. Over time, however, there has been an increasing call from donor-conceived people, recipient parents and some donors to end the secrecy, and to release identifying information about donors to

donor-conceived people. “Rights-based” arguments have at times been used to justify this call. This article examines whether a human rights framework supports the release of information and how such a framework might be applied when there are competing rights. It argues that the current balancing approach used to resolve such issues weighs in favour of release. Legal action has the potential to be legitimate and justifiable. A measure such as a contact veto system, which would serve to prevent unwanted contact with the person lodging the veto (either the donor or the donor-conceived person), would ensure proportionality. In this way, both donor-conceived people’s rights to private life, identity and family, and donors’ rights to privacy may be recognised and balanced. 655

Cain v Australian Red Cross Society: The case for universal blood donation reform – Rodney Croome and Benedict Bartl

This article reports on a recent Australian decision in which an Anti-Discrimination Tribunal was asked to rule on whether the exclusion of homosexual men from blood donation amounted to discrimination. While the tribunal ultimately found that the Red Cross’s policy of “deferring” all donors who are men who have sex with men (MSM) within the last 12 months was “reasonable”, the case is an important step forward for advocates of blood donation reform, given the consensus reached by many of the experts who gave evidence and importantly the tribunal’s implicit rejection of the MSM donor deferral policies of most of the world’s industrialised countries, including the United States of America, Canada and much of continental Europe. The article concludes by calling on governments, research institutes and universities to initiate the needed medical and sociological studies so that ultimately blood donor suitability is determined on the specific question of sexual behaviour and not the clumsy, awkward and ultimately discriminatory MSM question that remains in operation. 671

BOOK REVIEW

The Good Doctor, What Patients Want by R Paterson 692

