JOURNAL OF LAW AND MEDICINE

Volume 31, Number 1

2024

EDITORIAL – *Editor: Ian Freckelton AO KC*

Banning Engineered Stone: A Landmark Australian Public Health Law Reform – *Ian Freckelton AO KC*

Union activism, medical lobbying and occupational health and safety prosecutions led to a major public health initiative in Australia – the banning from 1 July 2024 of work with engineered/artificial stone, including manufacturing, supplying, processing and installing it. This editorial contextualises within the history of regulation of workers' exposure to risks of contracting silicosis the growing international awareness of the dangers posed by working with engineered stone, particularly in relation to making and installing kitchen and bathroom benchtops made from engineered stone. It argues that the Australian initiative is an important public health decision that has a sound justification, is likely to save many lives and should be emulated internationally. 5

HEALTH LAW REPORTER – *Editor: Cameron Stewart*

The Anatomy Act 1977 (NSW) Dissected: Review and Reform – *Jonna-Susan Mathiessen and Cameron Stewart*

This column discusses the *Anatomy Act 1977* (NSW) and its regulatory environment. The column begins with examining the history of anatomy regulation in the United Kingdom and Australia. It then goes on to analyse the history of the current anatomy regulation in New South Wales, pointing out areas for reform. 24

LEGAL ISSUES – *Editor: Gabrielle Wolf*

Addressing a Human Rights Crisis: Health Care for Prisoners in Australia – *Gabrielle Wolf and Mirko Bagaric*

People are sent to prison as punishment and not to experience additional punishment. Nevertheless, this principle is habitually violated in Australia: prisoners frequently receive health care that is inferior to health care that is available in the general community. Numerous official inquiries have identified deficiencies in prisoner health services, notwithstanding the apparent intention of legislative provisions and non-statutory guidelines and policies in various jurisdictions to ensure prisoners receive appropriate health care. This article proposes law reforms to address this human rights crisis. It recommends the passage of uniform legislation in all Australian jurisdictions that stipulates minimum prison health care service standards, as well as mechanisms for ensuring they are implemented. The article also suggests that, in the short-term, until prison health care is significantly improved, substandard health care for prisoners should be treated as a potentially mitigating sentencing factor that can reduce the length of a defendant's prison term. 42

MEDICAL ISSUES – *Editor: Michael O'Connor*

Sexual Boundary Violations by Doctors – Context, Regulatory Consequences and Preventive Strategies – *Mike O'Connor, Christopher Rudge and Cameron Stewart*

While sexual boundary violations by doctors (SBVs) are viewed with utmost seriousness by disciplinary bodies and tribunals, complaints of SBVs in Australia continue to increase. In 2023, the Australian Health Practitioner Regulation Agency (Ahpra) outlined a "blueprint" to protect patients better from sexual misconduct in healthcare: reform being considered in 2024, by Australian health ministers. Few analyses or studies have offered an overview of the prevalence, effects, and causes of SBVs, nor the duties, liabilities, possible disciplinary action against, and potential treatment of, doctors who commit them. This column offers such an overview, and considers, additionally, whether doctors who may have psychiatric disorders associated with their boundary violations would be suitable candidates for treatment. Ultimately, we contend that a purely "responsive" approach is inadequate, and preventive measures such as screening and more effective education should be considered in medical schools as a way of reducing the incidence of SBVs. 70

ARTICLES

When is a Health Practitioner Not "a Fit and Proper Person" to Practise Their Health Profession in Australia? – *Chris Corns*

Prior to implementation of the Health Practitioner Regulation National Law Act 2009 (Qld) (National Law) the term "good character" was used in the statutory regulation of health practitioners in Australia. "Good character" has been jettisoned in the National Law and replaced with the concept of "fit and proper person". The term "fit and proper person" plays an important role in the regulation of health practitioners under the National Law. "Fit and proper person" is not defined in the National Law, but case law has narrowed the term to refer to "moral integrity" and "rectitude of character". These considerations can be applied in the context of application for registration, immediate action, and disciplinary proceedings in relevant tribunals. Application of the "fit and proper person" test serves to enhance public confidence in the integrity of the health professions and the integrity of the regulatory regime, as distinct from protecting the public from unsafe and incompetent health professionals. 88

Untested Stem Cell Treatments: An Analysis of Australia's Current Regulatory Regime – *Nicolas Cavasinni and Patrick Foong*

Stem cell therapies have emerged as a miracle cure that could treat diseases and conditions. The past decade has seen the rapid growth of private clinics in some nations, including Australia, offering stem cell treatments largely untested and unsupported by clinical trials. These putative treatments have caused adverse events, some of which were serious and even fatal. The unscrupulous businesses exploit vulnerable and desperate patients who falsely believe these unproven therapies are their only salvation to cure different illnesses and conditions. This article emphasises the importance of strict oversight to ensure that only safe stem cell products reach patients, given the largely vulnerable patient base and the magnitude of risks involved. It examines the effectiveness of Australia's regulatory environment governing stem cell therapies to restrict the advertisement of dangerous and unproven stem cell therapies and the enforceability of these measures. 105

Professional Standards for Specialist Medical Administrators: Over-the-top Down-under? – *Owen M Bradfield and Erwin Loh*

In Australia, there are only two publicly reported disciplinary cases against specialist medical administrators. In the most recent decision of *Medical Board of Australia v*

Gruner, the Victorian Civil and Administrative Tribunal confirmed that specialist medical administrators owe patients and the public the same professional obligations as medical practitioners with direct patient contact. More controversially, the Tribunal also held that medical administrators have a professional obligation only to accept roles with clear position descriptions that afford them sufficient time and resources to ensure the safe delivery of health services. We argue that this imposes unrealistic expectations on medical administrators engaged by rural, regional, or private health services that already struggle to attract and retain specialist medical expertise. This may exacerbate existing health inequalities by disincentivising specialist medical administrators from seeking fractional appointments that assist under-funded areas of workforce shortage. 122

Clinical Teaching and Consent: An Analysis of New Zealand's Legal Requirements for Obtaining Consent to Clinical Teaching Involving Consumers of Health and Disability Services – *Lydia Wadsworth*

Student involvement in patient care without consent has attracted recent attention in New Zealand. New Zealand's Code of Health and Disability Services Consumers' Rights (Code) gives patients the right to give or refuse consent to participate in clinical teaching, but its practical application to clinical teaching, particularly postgraduate, is unclear. This article explores the history and precedent of the Code and ethical considerations, to inform where amendment to the Code is desirable in the interests of clarity, pragmatism, and to reflect better the legislature's intent. 130

Medical and Legal Uncertainties and Controversies in "Shaken Baby Syndrome" or Infant "Abusive Head Trauma" – *James Tibballs and Neera Bhatia*

Uncertainties and controversies surround "shaken baby syndrome" or infant "abusive head trauma". We explore *Vinaccia v The Queen* (2022) 70 VR 36; [2022] VSCA 107 and other selected cases from Australia, the United Kingdom and the United States. On expert opinion alone, a "triad" of clinical signs (severe retinal haemorrhages, subdural haematoma and encephalopathy) is dogmatically attributed diagnostically to severe deliberate shaking with or without head trauma. However, the evidence for this mechanism is of the lowest scientific level and of low to very low quality and therefore unreliable. Consequently, expert opinion should not determine legal outcomes in prosecuted cases. Expert witnesses should reveal the basis of their opinions and the uncertainties and controversies of the diagnosis. Further, the reliability of admissions of guilt while in custody should be considered cautiously. We suggest abandonment of the inherently inculpatory diagnostic terms "shaken baby syndrome" and "abusive head trauma" and their appropriate replacement with "infantile retinodural haemorrhage". 151

Facilitating Safe Access to Health Care through Legislative Reform – The Australian Experience – *Tania Penovic and Ronli Sifris*

The realisation of the right to health is vulnerable to the interventions of strangers, acting on the belief that certain health care should not be permissible under the law or accessible in practice. In Australia, the key arena for such interventions has been abortion services. Drawing on empirical research undertaken by the authors, this article examines the impact of these interventions and the effectiveness of "safe access zone" laws that now operate nationwide to constrain them. After examining the unsuccessful constitutional challenge to these laws in the High Court of Australia, it considers whether safe access zones may have utility in other health care contexts. 185

How Does Narcotic Control Impact upon Human Individual Rights: An Islamic and International Human Rights Perspectives – *Sarah Balto*

Illegal trafficking of narcotics and problems associated with illegal substance abuse have attracted great deal of attention over the years. However, there are concerns about how to solve this problem while still respecting individual rights. In general terms, it has been alleged by numerous international observers that in many instances human rights have not been fully respected or observed in the fight against illicit drugs. When it comes to Shari'a law, the fundamental premise is that narcotics abuse and trafficking is clearly in violation of Islamic principles. This article highlights the importance of adopting a human rights-based approach to policies regarding narcotics and discusses the potential conflict and the State's obligation to enforce laws which protect their citizens with individual citizen's rights. It will focuses on Islamic laws and takes Saudi Arabia as an example given the fact that the Saudi Arabia bases its constitution on Sharia. 201

BOOK REVIEW

The Great Dead Body Teachers: An Adventure into the World of Anatomy and Dissection, by Jackie Dent – *Reviewed by Professor Ian Freckelton AO KC* 210