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EDITORIAL – *Editor: Ian Freckelton AO KC*

Medical Termination of Pregnancy: Law and Controversies in the United States and Australia – *Ian Freckelton AO KC*

This editorial reviews the changes over two decades in the United States and Australia in relation to the law governing access to drugs enabling medical termination of pregnancy. It also scrutinises three contentious decisions by the United States Supreme Court between 2022 and 2024 in relation to abortion. It argues that the receptive environment in the United States Supreme Court, as it is currently constituted, to challenges to the lawfulness of terminations of pregnancy and abortion medications is likely to inspire comparable challenges as part of the "Abortion Wars" in other countries, including Australia. However, a combination of factors are likely to protect access to terminations, particularly first trimester medical terminations. These include the clinical trajectory of changes made gradually over two decades by the Food and Drug Administration in the United States, the Therapeutic Goods Administration in Australia and Medsafe in New Zealand; evolving attitudes in the community; and the subversive accessibility of "mere pills". 447

HEALTH LAW REPORTER – *Editor: Cameron Stewart*

Injecting Tighter Regulation: Implications of the TGA's Clampdown on Cosmetic Injectables Advertising – *Christopher Rudge and Cameron Stewart*

Recently, the Therapeutic Goods Administration (TGA) updated its guidance on cosmetic injectables advertising. The updates confirm that all direct or indirect advertising of cosmetic injectable products, including botulinum toxins or dermal fillers, is prohibited in Australia. While some commentators have lamented these updates, they present no changes to the law. As cosmetic injectables are prescription-only medicines, they have long been subject to the statutory prohibition on direct-to-consumer advertising of medicines in Australia. The updates, however, signal a real change to the TGA's enforcement stance and attitude. In this way, the updated guidance illustrates the practical application of the TGA's responsive and risk-based approach to regulation – a focus of this column. The changes also bring into view some of the emerging dangers associated with cosmetic injectables and related cosmetic treatments. This column explores the regulation of cosmetic injectables, the TGA's changing approach, and its implications. 464

LEGAL ISSUES – *Editor: Charles Lawson*

Decisions about Medical Treatment and Care, the Legality Assumptions and Sovereign Power – Empowering Patients Out of the State of Bare Life? – *Charles Lawson, Edwin Bikundo, Laurie Grealish, Todd Berry, Jayne Hewitt and Jo-anne Todd*

The framing of patients making decisions about their medical treatment and care as traditional legal decisions, thresholds and formalities is a means to avoid legal liabilities through a rationalisation of decision-making, autonomy and choice. A credible account for the actual place of patients posits the sovereign power (founded in the works of Carl Schmitt

and Giorgio Agamben) of the health care professional deciding the state of exception – a discrete legal space where the authority of health care professionals is both lawful and beyond the law. This reveals that dealing with broadly conceived consent issues with more law, more process and procedure but without addressing the inherent legality assumptions that empower health care professional will always be flawed. This section piece concludes that the resolution of consent issues is about a culture of consent rather than a frame of legal process and limiting legal liability. 483

MEDICAL ISSUES – *Editor: Mike O'Connor*

Psychological Screening of Medical School Applicants and Medical Students – *Mike O'Connor and Cameron Stewart*

Should medical schools psychologically screen medical school applicants and students? Arguably, psychological screening could be used to identify at-risk candidates who have psychological conditions that make them more likely to act unprofessionally. In this column we analyse the arguments for and against such screening. We argue that psychological testing should be used by medical schools as part of a program to support students so that they are at less risk of engaging in poor professional behaviour. 505

MENTAL HEALTH LAW ISSUES – *Editor: Bernadette McSherry*

Predicting the Risk of Future Terrorism: Lessons for Mental Health Experts from the *Benbrika* Case – *Bernadette McSherry and Piers Gooding*

Risk assessment is an important component of judicial decision-making in many areas of the law. In Australia, those convicted of terrorist offences may be the subject of continued detention in prison or extended supervision in the community if there is an "unacceptable risk" of them committing future terrorism offences. Forensic psychologists and psychiatrists may provide evidence of risk through identifying and measuring risk factors with the aid of tools that use scales based on statistical or actuarial risk prediction. This column focuses on criticisms of the use of the second revision of the Violent Extremism Risk Assessment tool (VERA-2R) in determining the risk of future terrorist acts. 515

ARTICLES

Termination Laws in Australia and Aotearoa New Zealand – Do They Align with Midwives' Scope of Practice? – *Susanne Armour, Bashi Hazard, Hazel Keedle, Andrea Gilkison and Hannah Dahlen*

This article examines whether the current termination laws of Australia and Aotearoa New Zealand align with the midwifery scope of practice. It begins with an introduction to termination of pregnancy from a health care perspective. An overview of previous and current legal frameworks in Australia and Aotearoa New Zealand that impact upon the provision of termination of pregnancy health services is provided. Midwives' scope of practice is explained and the legal and administrative factors obstructing midwives' ability to work to their full scope are discussed. Midwives' needs to enable the provision of termination care are considered. The article concludes that the current laws are not supportive of midwives as termination care providers and their needs to realise their full scope of practice are not being met. 523

Voluntary Assisted Dying and Conscientious Objection: An Analysis from Victoria, Australia – *Ronli Sifris*

This article analyses qualitative empirical research conducted by this author to gain a deeper understanding of the rationale behind conscientious objection (CO) to voluntary assisted dying (VAD) and its impact on the operation of VAD in Victoria, Australia. It begins by providing an overview of the Australian legal approach to CO in the context of VAD. It then discusses the spectrum of attitudes that exist towards VAD, illuminating some of the nuance and complexity of the individual and institutional approaches. The article then focuses on the reasons behind CO, noting that there are a range of moral reasons why people may oppose VAD. Finally, the article turns to consider the impact of CO on patient access to VAD, concluding that CO is affecting patient access in Victoria, and that Victoria should modify its legal approach so as to more appropriately balance the right to CO against the legal right to access VAD. 539

Cough Syncope and Fatal Motor Vehicle Accidents: Two Australian Cases – *Christopher Brook, Peter Trembath, Kerry J Breen and Jonathan Burdon*

Cough syncope is an uncommon but well-recognised medical condition diagnosed primarily on the history provided by the sufferer. In situations where the sufferer is in control of a motor vehicle, syncope can lead to accidents involving death and injury. In the medico-legal setting, cough syncope can be a contested cause of such accidents. Here we report two recent Australian cases which illustrate the issues involved for legal and medical practitioners. 555

'Truly, Madly, Deeply': Using Law to Compel Health and Lifestyle Influencers to Tell the Truth – *Aaron Salter and Marilyn Bromberg*

Influencers are content creators who post online about their lives and can amass a significant following. Influencers can be dangerous by negatively affecting their followers' body image and marketing products in a deceptive way. The limited academic writings which consider influencer regulation note an incongruency between influencer conduct and the corresponding regulatory system. This has been recognised by the Australian Competition and Consumer Commission which has flagged potential reforms. Similarly, the United Kingdom is conducting a review in response to comparable issues and developing draft legislation, while France has introduced new laws to regulate the sector. This article capitalises on the current appetite for legislative reform and proposes to analyse the adequacy of the current regulatory framework for influencers with respect to protecting vulnerable consumers and provides recommendations for reform. 561

Tasering Patients – A Bioethical Assessment of Taser Use Against Mental Health Inpatients in New Zealand – *Christina ET Pikiuha-Billing*

Tasers, a form of police weaponry causing neuromuscular incapacitation and extreme pain, were confirmed in 2010 to be used in New Zealand inpatient mental health units. Their use on patients, or ta¯ngata whai ora (persons seeking wellbeing), raises ethical concerns about harm prevention, moral duties, and human rights in healthcare. The New Zealand healthcare system, grounded in principles and rights, regulates procedures to uphold fundamental rights. This article explores the ethical justifications and criticisms of taser use in mental health wards from a principlist perspective. It questions the ethical limits of State power regarding non-maleficence, beneficence, and autonomy, arguing that tasers pose disproportionate harm to vulnerable patients and undermine ethical healthcare standards. Concerns are raised to promote policy development, monitoring, and reporting, aimed at addressing the ethical issues associated with taser use in mental health settings. 587

Is the Time Right to Enact Autonomy-Only Assisted Dying Laws? – *Kerstin Braun*

An increasing number of jurisdictions worldwide have enacted assisted dying laws allowing persons to end their lives with assistance. All existing frameworks have in common that they restrict access to persons who (1) act autonomously and (2) suffer from certain illnesses. The second restriction has been criticised on the basis that it makes judgments about which lives are worth living by only allowing persons with specific medical conditions, but not others, to die with assistance. To avoid such judgments, some scholars endorse an autonomy-only view which requires autonomy as the only necessary condition for assisted dying. After considering the criticism the second access restriction has attracted, this article analyses the complexities of enacting autonomy-only assisted dying laws using Germany as a case study. It concludes that the challenges this approach faces in practice will likely prevent autonomy-focused assisted dying frameworks from becoming law in the near future. 601

Does the Failure to Provide Equitable Access to Treatment Lead to Action by NHS Organisations? The Case of Biologics for South Asians with Inflammatory Bowel Disease – *Affifa Farrukh and John Mayberry*

The purpose of this study was to identify whether NHS Trusts where discrimination in the delivery of care to patients from the South Asian community had been demonstrated had taken any actions to address the issue over the subsequent year. Freedom of information requests were sent to three trusts which had provided evidence of disparate provision of biologic therapy to patients with Crohn's disease, their associated Clinical Commissioning Groups and Healthwatch organisations to seek evidence whether they had remedied the situation. Requests were also sent to the Care Quality Commission, NHS Improvement and the Equality and Human Rights Commission seeking examples where they had responded to inequitable delivery of care related to ethnicity. No organisation had any evidence of responses to the situation, many unable to accept its existence. Legal duties are discussed, and the only remedy appears to be through the tort of negligence. 615

Section 19(2) of the *Health Insurance Act 1973* Prevents Prisoners Accessing Medicare: Fact or Fiction? – *Margaret Faux, Damien Linnane and Anthony Levin*

This article explores the origins and operation of s 19(2) of the *Health Insurance Act 1973 (Cth)* and argues that it may not now and may never have created a barrier to Medicare access for prisoners as is commonly thought. Advocates have long asked for a s 19(2) exemption to allow Medicare access in custody. However, even if such an exemption were granted, it may not provide the access to Medicare necessary to have meaningful benefit for prisoners and may have other unintended consequences. We offer an alternative solution to the unquestionable need for Medicare access in prisons that requires no political intervention. This is based on our finding that denial of Medicare access to prisoners has always been practically rather than legally imposed, and the established fact that prisoners do not lose their entitlements to Medicare benefits while incarcerated. 624

Deception and Fraud in the Justification of "Pediatric Drug Development": A Challenge at the Interface of Medicine and Law – *Klaus Rose, Jane M Grant-Kels, Pasquale Striano, Emilio Russo and Earl B Ettienne*

United States and European Union laws demand separate clinical studies in children as a condition for drugs' marketing approval. Justified by carefully framed pseudo-scientific wordings, more so the European Medicines Agency than the United States Food and Drug Administration, "Pediatric Drug Development" is probably the largest abuse in

medical research in history. Preterm newborns are immature and vulnerable, but they grow. Adolescents are bodily no longer children. Younger children are not another species. Instead of reasonable dose-finding, most "pediatric" studies replicate at best what is known already; others withhold effective treatment and/or harm by substandard comparison, triggering "pediatric" drug labels and "pediatric" careers. Researching deception and fraud focuses currently on individuals. The mechanisms by which lawmakers and the public were and are deceived need elucidation in our increasingly complex society, including new types of conflicts of interest. Candidly addressing deception and fraud at the interface of medicine and law will help unmasking pseudoscience. 635

BOOK REVIEW

Mental State: Navigating Australia's Insane Mental Health System and How to Fix It, by Mark Cross – *Reviewed by Professor Ian Freckelton AO KC* 645