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EDITORIAL – *Ian Freckelton SC*

**The ethics and regulation of overcharging: Issues in the commerciality of the health practitioner-patient relationship** – *Ian Freckelton SC*

Overcharging by health practitioners is a difficult issue with few guidelines available for practitioners or patients. For the most part it has not been the subject of disciplinary censure and has been dealt with by conciliation processes. However, during 2013 the Singapore High Court twice addressed the commerciality of the health-practitioner-patient relationship, acknowledging that this is a fundamental attribute of the contemporary dynamic between providers and recipients of health services. In *Lim Mey Lee Susan v Singapore Medical Council* [2013] SGHC 122, it concluded that the obligation to refrain from overcharging is an inherent ethical responsibility of practitioners and affirmed the suspension for three years of a surgeon with Australian training and tertiary connections for what it classified as grossly excessive charging. In *Pang Ah San v Singapore Medical Council* [2013] SGHC 266, it observed that medical practitioners have a legitimate right to appropriate levels of remuneration but that the right balance has to be struck between professional virtues and business considerations. The Singapore High Court’s decisions raise the question of whether professional associations and practitioner regulators have a responsibility to provide guidelines and, potentially, processes by which practical assistance can be provided to medical and other health care practitioners so that they can avoid unacceptable charging practices. .... 497

LEGAL ISSUES – *Joanna Manning*

**Changing disciplinary responses to sexual misconduct by health practitioners in New Zealand** – *Joanna Manning*

In response to societal changes, a more flexible disciplinary response to sexual relationships between health practitioners and patients has developed over the last 15 years in New Zealand. The new approach involves a close focus on the circumstances of the particular case, balancing relevant aggravating and mitigating factors, to determine whether a disciplinary finding is called for and the appropriate penalty. Relationships between parties in relatively equal power positions, without strong evidence of patient exploitation or vulnerability, where prompt steps are taken to disengage the professional relationship, or involve minor health services only, may not result in a disciplinary finding at all. Even where patient vulnerability is present, there has been movement away from automatic de-registration to suspension for periods often less than the maximum, provided there are sufficient mitigating factors. There is early indication of a stricter approach in the relatively new category of case of downloading and accessing objectionable material than in cases of sexual relationships, although there are too few cases yet to enable an appropriate disciplinary benchmark to have emerged. The rhetoric of the need for severity and public protection in one such case was not, however, matched by the imposition of the most serious of penalties. .... 508

MEDICAL ISSUES – *Mike O'Connor*

**The Australian National Disability Insurance Scheme for cerebral palsy: An end to the “forensic lottery”?** – *Mike O'Connor*

The new Australian National Disability Insurance Scheme (NDIS) is set to revolutionise disability support for an estimated 440,000 disabled persons and in particular for over 35,000 victims of cerebral palsy. The current support for sufferers of cerebral palsy is fragmented and their families and carers expend great time and effort accessing a range of different support agencies. The present “forensic lottery” means that only a small percentage of cerebral palsy victims whose injuries have been caused by medical negligence can secure large settlements under civil tort litigation. The NDIS promises a much more equitable scheme where severely disabled children can receive the necessary early intervention, which is so important to their long-term outcome. Such support will be provided irrespective of “fault”, although recouping the costs of lifelong care through civil litigation in medical negligence remains an option. Debate continues about the affordability of such an ambitious Scheme. This is no doubt fuelled by the perceived New Zealand experience of its no-fault Accident Compensation Scheme. The NDIS advantage over almost all “no fault” schemes internationally is that it provides unified comprehensive care and support to cerebral palsy sufferers irrespective of a “treatment injury”. Determinations for eligibility will no doubt involve extensive medical documentation. Uncertainty remains about the preparedness of the Chief Executive Officer of the NDIS to pursue health providers in civil negligence where treatment injuries may have been causative. ....

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**Sexual violence in armed conflict: The least condemned of war crimes** – *Mike O'Connor*

Sexual violence in armed conflict has traditionally received poor attention until recent years. It has been the “least condemned of war crimes” although, with the inception of the International Criminal Court and various other international courts and tribunals, convictions of high-profile aggressors are increasing. Only recently, Charles Taylor, the President of Liberia, was convicted of war crimes and crimes against humanity which included rape and sexual slavery. He was sentenced to 50 years imprisonment. Is prosecution of these crimes sufficient to minimise sexual violence in war? That seems unlikely given the potential for such violence to be a cheap and effective strategy to terrorise a civilian population and “ethnically cleanse” the newly won territory. However, there is a remarkable variation in the levels of sexual violence in armed conflicts. Some, such as the Israeli-Palestinian conflict, have extremely low levels, whereas in Bosnia and many African states the prevalence of sexual violence is at epidemic levels. The reasons for such differences are many, however, some precipitating factors may be improved by strong military discipline, improved gender balance in armed forces, better political awareness by combatants of the aims of a campaign and pre-deployment ethical training. ....

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BIOETHICAL ISSUES – *Malcolm Parker*

**“See you next week – Unless I’m dead”** – *Malcolm Parker*

The common law, statutes and professional codes of medical and health care uphold the right of competent patients to refuse treatment that they have been advised is in their best medical interests, recognising that they have the right to decide whether such medical advice aligns with their self-determined, global interests. But sometimes, there can be ambivalence within the treating practitioner’s mind as to what the patient’s best medical interests consist of in the first place. The case presented here of chronic mental health

problems illustrates this ambivalence or clinical equipoise, and raises clinical, conceptual, ethical, legal and conscience issues for individual practitioners and the wider community. The case evades clarity and consensus over the doctor's legal obligations, but the complex emotional, psychodynamic, attachment and existential issues that it raises also render any ethical analysis ultimately unsatisfactory, unless it be agreed that some people can only be helped by suspending judgment and treatment, and by just being there. .... 543

COMPLEMENTARY HEALTH ISSUES – *Ian Freckelton SC*

**Aboriginal and Torres Strait Islander health practitioner regulation** – *Ian Freckelton SC*

An aspect of the much needed efforts to “close the gap” in Indigenous health disadvantage in Australia has been workforce reform. This has included targeted training for general practitioners and has also been characterised by sensitising of psychiatrists to the particular mental health needs of persons of Aboriginal and Torres Strait Islander background. It has also incorporated increasing involvement by Indigenous persons in providing health services. In 2012, each Australian State and Territory constituted the Aboriginal and Torres Strait Islander Health Practice Board to regulate and register Indigenous health practitioners. This marked an important recognition of the contribution able to be made by this complementary component of the Australian health workforce which is particularly enabled to understand and meet the needs of Indigenous persons. This column chronicles the first steps of the new regulatory board and identifies issues which face it. .... 550

MEDICAL LAW REPORTER – *Thomas Faunce*

**Commissions of audit in Australia: Health system privatisation directives and civil conscription protections** – *Caroline Colton and Thomas Faunce*

The use of commissions of audit as vehicles to drive privatisation policy agendas in areas such as health service delivery has become popular with conservative federal and State governments. Such commissions have characteristically been established early in the terms of such governments with carefully planned terms of reference and membership. The policy directions they advocate, unlike election policies, have not come under the intense scrutiny, wide public debate or the opportunities for (dis)endorsement afforded by the electoral process. Governments do, however, anticipate and often accept recommendations from these reviews, and use them as justification to implement policy based on their findings. This highlights the power entrusted to review bodies and the risks to the public interest arising from limited public consultation. An example can be seen in the proposed privatisation of important aspects of Australia's public sector, particularly including those related to health systems delivery, currently entering a new iteration through the work of the National Commission of Audit (NCA) appointed in October 2013. The NCA follows on from various State audit commissions which in recent years have directed the divestment of government responsibilities to the private and not-for-profit sectors. Through a discussion on the formation of policy frameworks by the NCA and the Queensland Commission of Audit, this column examines the ideological thrust of the commissions and how they synergise to produce a national directive on the future of public sector health services. The practical impacts on health service procurement and delivery in critical areas are examined, using the case of the federally contracted out medical service for asylum seekers and two hospitals in Western Australia, a State which is well advanced in the privatisation of public hospitals. The column then examines the release to the media early in the NCA's process of the submission to introduce a \$6 general practitioner co-payment as a means of testing the response of the medical profession and public. The column also examines how the civil conscription clause in

s 51(xxiiiA) of the Australian *Constitution* may serve to protect practitioner and patient rights should some of these privatisation changes to Australia's health system be challenged in the High Court of Australia. .... 561

ARTICLES

**Intake rigour: Ensuring only “reportable deaths” become coroners’ cases – Michael Barnes, Ainslie Kirkegaard and Belinda Carpenter**

The failure of medical practitioners to discharge their obligation consistently to report sudden or unnatural deaths to coroners has rightly prompted concern. Following recent public scandals, coroners and health authorities have increasingly developed procedures to ensure that concerning deaths are reported to coroners. However, the negative consequences of deaths being unnecessarily reported have received less attention: unnecessary intrusion into bereavement; a waste of public resources; and added delay and hindrance to the investigation of matters needing a coroner's attention. Traditionally, coroners have largely unquestioningly assumed jurisdiction over any deaths for which a medical practitioner has not issued a cause of death certificate. The Office of the State Coroner in Queensland has recently trialled a system to assess more rigorously whether deaths apparently resulting from natural causes, which have been reported to a coroner, should be investigated by the coroner, rather than being finalised by a doctor issuing a cause of death certificate. This article describes that trial and its results. .... 572

**Coronial law and practice: A human rights perspective – Ian Freckelton SC and Simon McGregor**

Coronial law and practice inevitably impact upon the human rights of those affected by deaths. It is important that such rights be incorporated in how death investigations, up to and including coronial inquests, take place. This article explores the significant impact of the jurisprudence emanating from the European Court of Human Rights, as well as the application of such law by the courts of the United Kingdom and potentially in other countries. It argues that viewing the work of coroners through the lens of human rights is a constructive approach and that, although in the coronial legislation of Australia and New Zealand, many human rights, especially those of family members, and civil liberties are explicitly protected, there remain real advantages in reflecting upon compliance with human rights by death investigation procedures and decision-making. .... 584

**An empirical approach to the New Zealand government's review of the coronial jurisdiction – Jennifer Moore**

Given the public profile of New Zealand coroners, it is surprising that there has been limited empirical research about coroners' decision-making. This article uses evidence from New Zealand's first empirical study of coroners' recommendations to discuss the New Zealand government's recent review of the coronial jurisdiction. In June and October 2013, New Zealand's Courts Minister announced proposed changes to the coronial system. Several of the Minister's proposals are consistent with the empirical evidence, but there are also significant gaps in the review. The Minister's review acknowledges the importance of coroners' preventive function, but will the proposals enable New Zealand's coronial law to achieve its full preventive potential? The empirical evidence suggests that the prophylactic potential of coroners' recommendations is not being maximised. .... 602

**An absurd inconsistency in law: Nicklinson's case and deciding to die – Michael Douglas**

*R (Nicklinson) v Ministry of Justice* [2012] EWHC 2381 was a tragic case that considered a perennial question: whether voluntary, active euthanasia is murder. The traditional position was affirmed, that is, it is indeed murder. The law's treatment of decisions to

refuse treatment resulting in death is a stark contrast to the position in respect of voluntary, active euthanasia. In cases of refusing treatment, principles of individual autonomy are paramount. This article presents an overview of the legal distinction between refusing medical treatment and voluntary, active euthanasia. It questions the purported differences between what are described as acts of “active” or “passive” euthanasia. It also highlights the inconsistency of the law’s treatment of different ways that people decide to die. .... 627

**Consent versus scrutiny: Restricting liberties in post-Bournewood Victoria** – *Michael Williams, John Chesterman and Richard Laufer*

The article considers the problem of people with impaired capacity who face restrictions on their liberty but who are compliant with such practices. The issue has bedevilled courts and law reform commissions throughout the common law world since *HL v United Kingdom* [2004] ECHR 471 exposed the legal “gap” in which such people were languishing. Proposals to address it have either been excessively complex, or largely concerned with the mechanism for lawful consent to restrictive practices rather than scrutinising the practices themselves. The article critically discusses these proposals and argues that a suitable, if not ideal, regime for regulating the problem already exists in the Victorian *Disability Act 2006*. ..... 641

**Safety, risk and mental health: Decision-making processes prescribed by Australian mental health legislation** – *Jennifer Smith-Merry and Andrew Caple*

Adverse events in mental health care occur frequently and cause significant distress for those who experience them, derailing treatment and sometimes leading to death. These events are clustered around particular aspects of care and treatment and are therefore avoidable if practices in these areas are strengthened. The research reported in this article takes as its starting point coronial recommendations made in relation to mental health. We report on those points and processes in treatment and discharge where coronial recommendations are most frequently made. We then examine the legislative requirements around these points and processes in three Australian States. We find that the key areas that need to be strengthened to avoid adverse events are assessment processes, communication and information transfer, documentation, planning and training. We make recommendations for improvements in these key areas. .... 661

**Medical practitioner regulation: Is it all about protecting the public?** – *Katie Elkin*

This article explores the purpose of professional regulation as it applies to medical practitioners in Australia and New Zealand. Purpose is considered in terms of regulatory theory, legislative statement, judicial commentary, and the realities of who and what is regulated and by whom. It is considered both in relation to the regulatory framework as a whole, and more specifically in relation to the disciplinary system that operates as a critical component of that framework. The author concludes that the dominant purpose of medical practitioner regulation should be the protection of the public, particularly when it comes to disciplinary decision-making. While it may be reasonable for broader public interest considerations, such as workforce supply, to be taken into account when it comes to making registration decisions, extreme caution should be exercised in allowing such considerations to influence disciplinary decisions. .... 682

**An analysis of Australia’s legal regime for imposing liability on manufacturers of pharmaceutical drugs** – *Mabel Tsui*

Following a trial in June 2009 where the Federal Court heard submissions regarding whether Merck Sharpe and Dohme Australia (MSDA) should be held liable for an increased risk of cardiovascular conditions noted in patients who had taken the anti-inflammatory drug Vioxx, a judgment was handed down against MSDA in March

2010. MSDA then appealed to the Full Federal Court, where it was successful. A subsequent special leave to appeal application to the High Court of Australia was rejected in May 2012. This article examines the themes raised in the trial judgment and the appropriateness of Australia’s statutory consumer protection regime through the lens of pharmaceutical drug injuries and side effects. .... 700

**The art of apportionment: Working out responsibility for health care misadventures – Timothy Bowen**

When something goes wrong in the provision of health care, it is often unclear who might be at fault, and whether they actually are at fault. A necessity and strength of modern health care is the variety of professionals who participate in it, who differ in their respective roles and expertise. Trying to work out who did what can be difficult, and whether they did something wrong often more so. So when one arrives at the task of working out whether one party is more to blame than the other, it is rarely a straightforward exercise. Arriving at a percentage figure to identify a party’s blameworthiness might seem superficially simple, but it often requires the balancing of a bewildering array of various factors, over which different minds are commonly at odds. .... 717

**Ethical, legal and social issues to consider when designing a surrogacy law – Merryn Elizabeth Ekberg**

The aim of this article is to address the ethical, legal and social issues that arise when a woman becomes pregnant and gives birth to a child with the intention of surrendering this child to another woman or couple. The secondary aim is to offer some recommendations that will be beneficial for the lawmakers, policymakers and regulators who design and enforce the rules and regulations that govern surrogacy arrangements. The article considers both commercial and altruistic surrogacy and highlights some of the similarities and differences between the two. Beginning with the initial question of whether surrogacy should be legal, the controversial questions raised relate to the time before conception, during the pregnancy and after the birth of the child. The article concludes that surrogacy arrangements are ethical and should be legal because they enable the medically and socially infertile, including singles and same-sex couples, the opportunity to become parents and to enjoy the lifelong pleasures of parenthood. For many, this will be the strongest argument for the legalisation of surrogacy and the greatest benefit to arise from surrogacy arrangements. .... 728

**BOOK REVIEW**

*Damned If I Do* by Philip Nitschke with Peter Corris ..... 739