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EDITORIAL – *Ian Freckelton QC*

Fitness to stand trial under international criminal law: The historical context – *Ian Freckelton QC and Magda Karagiannakis*

Decision-making about fitness to stand trial and the consequences of a finding of unfitness are fundamental to the integrity of any criminal justice system. They create thresholds for when mentally and physically unwell people are mandated to participate in criminal proceedings and they address the outcomes of such decisions for unwell accused persons. The jurisprudence relating to fitness to stand trial under international criminal law has particular challenges and complexities. The origins of contemporary controversies and the bases for modern decisions lie in rulings by the Nuremberg and Tokyo tribunals in the immediate aftermath of the Second World War. The decisions relating to Gustav Krupp, Rudolf Hess, Julius Streicher and Shumei Okawa wrestled with issues that have since recurred in respect of how trial systems should respond to unwellness going to the heart of whether persons can participate meaningfully in their own trials but dealing too with the temptation for persons accused of matters as serious as crimes against humanity and genocide to malingering, exaggerate symptomatology and to generate delays for strategic objectives.

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LEGAL ISSUES – *Danuta Mendelson*

Minors’ decision-making capacity to refuse life-saving and life-sustaining treatment: Legal and psychiatric perspectives – *Danuta Mendelson and Ian Haywood*

Laws in Belgium and the Netherlands permit euthanasia and assisted suicide for seriously ill children who experience “constant and unbearable suffering” – they have the capacity to request death by lethal injection if they convey a “reasonable understanding of the consequences” of that request. The child’s capacity to understand death is therefore a prerequisite to the implementation of the request. However, modern neuro-psychological and fMRI (functional Magnetic Resonance Imaging) studies of the relationship between the neuro-anatomical development of the brain in human beings and their emotional and experiential capacity, demonstrates that both are not fully developed until the early 20s for girls and mid-20s for boys. Unlike Belgium and the Netherlands, the clinical and legal implications of the immaturity of the brain on medical decision-making of minors, in particular life and death decisions, have been implicit in the Australian courts’ approach to the refusal of life-saving and life-sustaining treatment by minors. This approach is exemplified by *X v Sydney Children’s Hospitals Network* [2013] NSWCA 320 (and a series of earlier cases).

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MEDICAL ISSUES – *David Ranson*

The role of post-mortem imaging in preliminary examinations under the Coroners Act 2008 (Vic): A forensic pathologist’s perspective – *Matthew J Lynch and Noel WF Woodford*

Changing community attitudes and expectations, allied to the recent incorporation of sophisticated clinical imaging techniques into the medico-legal death investigation

process, have presented significant challenges for Coroners and pathologists alike. The traditional functions of coronial systems have expanded from the relatively narrow confines of a judicial determination as to the cause of death on the basis of autopsy findings. Today they include broader responsibilities in death and disease prevention and a more enlightened approach to the social and familial consequences of a death. The *Coroners Act 2008* (Vic) reflects this evolution with the introduction of a so-called preliminary examination process allowing for the performance of certain initial processes and procedures in relation to the medical investigation into a death, and with the aim of increasing the quality and robustness of the pathologist's advice to the Coroner before a decision is made as to whether the Coroner will order an autopsy. The post-mortem computed tomography scan (PMCT) is an important component of the preliminary examination process and significantly increases the information available in the early stages of a death investigation. The use of such new technology carries with it the necessity for a re-evaluation of the roles and responsibilities of the participants in the coronial death investigation system, including those of the next of kin. Three coronial case studies are presented to illustrate the impact and consequences of these developments. 774

BIOETHICAL ISSUES – *Grant Gillett*

Was the tragedy of Tovia Laufau caused by an absence of trust? – *Ben Gray and Grant Gillett*

The case of Tovia Laufau concerned a Samoan boy who died of osteosarcoma of the leg. He was diagnosed after a delay and eventually died after his parents did not present him for the treatment recommended for his condition. His parents were given a suspended sentence under s 152 of the New Zealand *Crimes Act* for failing to provide a child with necessary medical treatment. The case is analysed in terms of the need to enter into a conversation in which trust is the underpinning of a constructive discussion of the possibilities of treatment and the formulation of mutually acceptable regimens of care for difficult and uncertain treatments. This need is heightened when there are cultural barriers to be overcome and a significant divergence in understandings of an illness and value commitments between parents, or patients, and their caregivers. 780

NURSING ISSUES – *Kim Forrester*

Legal capacity in a health care context: An opportunity to review – *Kim Forrester*

The Commonwealth government, as a signatory to the United Nations *Convention on the Rights of Persons with Disabilities*, is committed to the equal recognition, before the law, of persons with disability. Consistent with the obligations imposed under the Convention, the Commonwealth government has initiated an inquiry and report from the Australian Law Reform Commission (ALRC). The ALRC is to examine and report on the laws and legal frameworks within the Commonwealth jurisdiction that deny or diminish the rights of persons with disabilities to equal recognition before the law and their ability to exercise their legal capacity. The Commonwealth inquiry provides an opportunity for all State and Territory jurisdictions to examine their respective legislative provisions which benchmark standards of legal capacity for decision-making and the resulting appointment and role of substitute decision-makers. 789

Hippocratic obligation to shareholder profit? Medical treatment patents and the Australian High Court in *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* [2013] HCA 50 – *Tim Vines* and *Thomas Faunce*

The method of treatment of suffering in patients, including through surgery and the administration of therapeutic drugs, are essential features of medical professionalism. Few, if any practitioners committed to developing the core professional virtue of loyalty to relief of patient suffering through consistently implementing the basic principles of medical ethics, would consider that such beneficial methods of practice are, or should be, the subject of a patent – requiring the practitioner utilising them to pay a royalty or risk infringement proceedings. Indeed a formal opinion of the American Medical Association declares “the use of patents, trade secrets, confidentiality agreements, or other means to limit the availability of medical procedures places significant limitation on the dissemination of medical knowledge, and is therefore unethical”. Yet this could be the direction in which Australian patent law is heading. The decision of the High Court of Australia in *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* [2013] HCA 50, upholding a patent over a method of using a known drug to prevent or treat psoriasis, may ultimately force practitioners to re-consider whether their basic ethical obligations to patients are secondary to a requirement to maximise profit for shareholders in companies holding medical patents. This column reviews this decision and its possible implications for health practitioners. It places it in context of other recent court decisions that have expanded the intrusion of corporate-owned intellectual property monopolies into Australian medical practices, and how legislative restrictions upon them in the *Patents Act 1990* (Cth) place practitioners and patients at risk of more costly, ineffective or restricted health care. This column concludes by cautioning that Australia’s scope to address policy problems caused by this case may be limited should it sign up to the *Trans-Pacific Partnership Agreement*, particularly if that preferential trade and investment deal includes an Investor-State Dispute Settlement clause that creates a mechanism for multinational corporations to challenge offshore, Australian federal and state policy decisions they perceive undercut their investments. 797

LETTER TO THE EDITOR 810

ARTICLES

Unfitness to stand trial decision-making in the Extraordinary Chambers in the Courts of Cambodia – *Ian Freckelton QC* and *Magda Karagiannakis*

In the small number of trials for matters such as genocide and crimes against humanity that have taken place before the Extraordinary Chambers in the Courts of Cambodia, by 2014 three occasions had arisen in which the fitness of the accused persons to participate in their trials had become contentious. This is hardly surprising given that the key period of Khmer Rouge government occurred a very long while ago – between 1975 and 1979. The accused persons are all aged. In two instances, the Trial Chamber of the Courts of its own motion sought expert evaluations of the accused persons’ fitness to stand trial and, promptly, upon receipt of such reports, determined them to be fit by reference to criteria utilised by the Appeal Chamber of the International Criminal Court for the Former Yugoslavia (the ICTY). In the other instance an accused person, Ieng Thirith, was found unfit to stand trial and a range of important issues was traversed as to the measures that can properly be taken to try to render a person fit for trial and how legitimate the imposition of detention for that purpose is, and then how legitimate encroachments on a person’s civil liberties are to monitor them if there is only a remote possibility that their

mental state might improve. It is likely that the balance adopted by the Supreme Court Chamber in the Courts of Cambodia in making significant efforts to render an accused person fit for trial and then in continuing to monitor their mental state when such efforts do not bear fruit, instead of simply releasing them back into the community, will stand as an important precedent for future occasions under international criminal law when issues of fitness to stand trial and how they should be handled arise. 813

Legal risk management and injury in the fitness industry: The outcomes of focus group research and a national survey of fitness professionals – *Patrick Keyzer, Ian R Coyle, Joachim Dietrich, Kevin Norton, Betul Sekendiz, Veronica Jones and Caroline F Finch*

The Australian Fitness Industry Risk Management (AFIRM) Project was set up to explore the operation of rules and regulations for the delivery of safe fitness services. This article summarises the results of recent focus group research and a national survey of risk management practices by the AFIRM Project. Our focus group research in four States identified the following most important concerns: (1) the competency of fitness professionals; (2) the effectiveness of pre-exercise screening and the management of de-conditioned clients; (3) poor supervision of fitness service users and incorrect use of equipment; (4) fitness trainers failing to remain within their scope of practice; (5) equipment misuse (as distinct from incorrect use); and (6) poor fitness training environments. This information was then used to develop 45 specific items for a questionnaire that was disseminated throughout the fitness industry. The survey, which is the largest ever conducted in the Australian fitness industry (n=1,178), identified similar concerns. Our research indicates that efforts to improve risk management in the fitness industry should focus, first and foremost, on the development and monitoring of safety policy, and improvements in the education and training of fitness instructors to ensure that they can incorporate risk management practices. 826

Just a little bit more: When sports scientists cross the line – *Tyler Fox*

Sports science has attracted controversy for the role it plays in an athlete’s career and health, but Australian jurisprudence lacks any discussion of their criminal and civil liability when athletes suffer personal or professional harm. This article explores how liability may attach to both sports doctors and sports scientists in the future based on principles from current case law. It finds that criminal and civil liability attaching to personal harm could be proven, provided that consent to the risks or the treatment has not been given. Establishing professional harm caused by negligent advice regarding whether a substance does not comply with the *World Anti-Doping Code* is arguable considering the athlete’s vulnerability to be exposed to sanctions. Expert evidence regarding what, and how a substance, is taken will be crucial to establishing causation in manslaughter prosecutions. 845

Beauty is only photoshop deep: Legislating models’ BMIs and photoshopping images – *Marilyn Krawitz*

Many women struggle with poor body image and eating disorders due, in part, to images of very thin women and photoshopped bodies in the media and advertisements. In 2013, Israel’s *Act Limiting Weight in the Modelling Industry, 5772-2012*, came into effect. Known as the Photoshop Law, it requires all models in Israel who are over 18 years old to have a body mass index of 18.5 or higher. The Israeli government was the first government in the world to legislate on this issue. Australia has a voluntary Code of Conduct that is similar to the Photoshop Law. This article argues that the Australian government should follow Israel’s lead and pass a law similar to the Photoshop Law because the Code is not sufficiently binding. 859

Medical use of cannabis in Australia: “Medical necessity” defences under current Australian law and avenues for reform – Charles Martin

The possession of cannabis is an offence in all Australian jurisdictions. No exception is made for medical use under any of the State and Territory Drug Acts, nor the Commonwealth’s pharmaceutical regulation scheme. Nevertheless, questions remain about the scope for defences argued on the basis of necessitous medical use. More fundamentally, the increasingly favourable light in which the medical use of cannabis is growing to be seen by state and national legislatures overseas raises important questions about the need for reform of Australian drug laws. This article explores those questions. 875

Patents and the obligation to protect health: Examining the significance of human rights considerations in the protection of pharmaceutical patents – Olasupo Ayodeji Owoeye

This article discusses the human right to health in the context of patent protection and access to medicines. It considers the limitations in international human rights law, especially in relation to socioeconomic rights, that make it difficult for the right to health to be a potent justification for derogation from trade or intellectual property agreements. The article takes the view that while the right to health may be somewhat unenforceable in international law, its close association with enforceable rights such as the right to life can be a legitimate basis for making maximum use of the flexibilities in the international intellectual property regime to protect public health. It also argues that trade and intellectual property agreements must be interpreted in a way that endeavours to resolve where possible any seeming inconsistency with the right to health. 900

“Best interests” and withholding and withdrawing life-sustaining treatment from an adult who lacks capacity in the parens patriae jurisdiction – Lindy Willmott, Ben White and Malcolm K Smith

Disputes about withholding and withdrawing life-sustaining treatment are increasingly coming before Australian Supreme Courts. Such cases are generally heard in the parens patriae jurisdiction where the test applied is what is in the patient’s “best interests”. However, the application of the “best interests” test, and its meaning, remains unclear in this context. To shed light on this emerging body of jurisprudence, this article analyses the Australian superior court decisions that consider an adult’s best interests in the context of decisions about life-sustaining treatment. It identifies a number of themes from the current body of cases and considers how these themes may guide future decision-making. After considering the law in the United Kingdom, the article suggests an approach for assessing best interests that could be adopted by Australian Supreme Courts. 920

Transparency in mental health: Why mental health tribunals should be required to publish reasons – Alison Smith and Andrew Caple

There is a need for greater transparency and accountability in Australia’s civil commitment system, which governs the involuntary detention and treatment of people with mental illness. This article explains how transparency and accountability may be addressed by Australia’s mental health tribunals publishing reasons more frequently. The principles of open justice, therapeutic jurisprudence, and human rights provide justifications for an increase in the publication of reasons. The right to privacy is important in civil commitment cases but the use of redacted reasons would appropriately balance the right to privacy with the need for transparency and accountability. Ideally, mental health tribunals should provide redacted reasons in all cases. If resource constraints prevent this, then redacted reasons should be published, as a minimum, in cases which involve a novel issue or complex factual circumstances, or when a patient makes a competent request for the reasons to be published. 942

Government databases and public health research: Facilitating access in the public interest – Carolyn Adams and Judy Allen

Access to datasets of personal health information held by government agencies is essential to support public health research and to promote evidence-based public health policy development. Privacy legislation in Australia allows the use and disclosure of such information for public health research. However, access is not always forthcoming in a timely manner and the decision-making process undertaken by government data custodians is not always transparent. Given the public benefit in research using these health information datasets, this article suggests that it is time to recognise a right of access for approved research and that the decisions, and decision-making processes, of government data custodians should be subject to increased scrutiny. The article concludes that researchers should have an avenue of external review where access to information has been denied or unduly delayed. 957

The spectre of court-sanctioned sacrificial separation of teenage conjoined twins against their will – Colleen Davis

In a recent decision of the Indian Supreme Court, judges foreshadowed authorising separation of teenage conjoined twins where both would die if not separated but where the operation could save only one. The absence of medical information advising separation precluded such a decision in the case at hand. However, the case raises a number of difficult legal and ethical questions that judges would have to consider before authorising sacrificial separation of these or other non-infant conjoined twins. 973

Judicial virtues and decision-making in the VCAT Guardianship List – Richard Polkinghorn

The contemporary legal theory of virtue jurisprudence provides great insight into the proper practice of Australian tribunal members and the desired operation of tribunals. Virtue jurisprudence identifies the attributes of “good” tribunal members and provides guidance on how legal disputes should be decided. This article focuses on the fundamental virtues relevant to tribunal practice in the Guardianship List of the Victorian Civil and Administrative Tribunal. The special features of this tribunal jurisdiction, particularly the disadvantaged nature of its primary client group, require tribunal members to undertake a fact-finding, inquisitorial role, as well as a support and advisory role. Decision-makers must also become conversant with expert evidence and the process of testing expert evidence. This analysis considers the fundamental breaches of human rights that occur when tribunal members fail to execute this multilevel task properly. 984

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