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EDITORIAL – *Ian Freckelton QC*

End-of-life decision-making in India – *Ian Freckelton QC*

The extraordinary circumstances and the tragic life of Aruna Shanbaug, together with the landmark Supreme Court of India decision in *Shanbaug v Union of India* (2011) 4 SCC 454, have provided a fillip and focus to debate within India about end-of-life decision-making. This extends to passive euthanasia, decision-making about withdrawal of nutrition, hydration and medical treatment from persons in a permanent vegetative or quasi-vegetative state, the role of the courts in such matters, the risks of corruption and misconduct, the criminal status of attempted suicide, and even the contentious issue of physician-assisted active euthanasia. The debates have been promoted further by important reports of the Law Commission of India. This editorial reviews the current state of the law and debate about such issues in India.

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LEGAL ISSUES – *Bernadette McSherry*

Locked mental health wards: The answer to absconding? – *Bernadette McSherry*

A recent decision by the Queensland government to lock its 16 mental health inpatient facilities has met with condemnation by a number of professional bodies. This column canvasses some of the legal and ethical issues relating to locked wards and provides an overview of the literature on whether or not locking wards reduces absconding. It is argued that any benefits in preventing absconding through locking all mental health inpatient facilities is outweighed by the adverse effects locked wards have on those detained.

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MEDICAL ISSUES – *Danny Sullivan*

Smoking bans in secure psychiatric hospitals and prisons – *Danny Sullivan and Megan A Rees*

The proposal of complete smoking bans in closed institutions, such as prisons and psychiatric hospitals, creates a tension between individual “rights” and the health of all members of that community. Smokers in closed institutions generally smoke more, suffer more health consequences and are less likely to quit than smokers in other settings. Complete smoking bans do not cause an increase in behavioural problems, nor do bans cause worsening of mental illness or quality of life. Although infrequently tested, the responsibility of public institutions to protect others from second-hand smoke has usually outweighed any individual “right to smoke” in legal judgments. A substantial cultural shift may be required from considering smoking a “rare pleasure” during detention to the realisation that smoking is the most significant reversible health risk factor for this population. The implementation of complete smoking bans in closed institutions is challenging and requires careful and proactive planning by staff. As complete smoking bans are being considered in many institutions and jurisdictions, this column presents a review of the evidence base and ethical issues involved.

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BIOETHICAL ISSUES – *Malcolm Parker*

Unreasonable adjustments: Medical education, mental disorder, disability discrimination and public safety – *Malcolm Parker*

Recently the Civil and Administrative Tribunal of New South Wales found that the University of Newcastle had discriminated against a medical student with borderline personality disorder and bipolar disorder on the grounds of her disability. This column summarises the case, and integrates a psychodynamic account of borderline personality disorder with Fulford’s conceptual analysis of mental disorder as action failure, that is no different in principle from physical illnesses, some instances of which appear to uncontroversially rule out of contention some applicants for medical training. It is argued that some applicants for medical and health care programs with mental disorders should not be selected, because their disabilities are not amenable to satisfactory accommodation in the university training period, and they are incompatible with clinical training and practice. Universities should develop “Inherent Requirement” policies that better integrate their responsibility to support disabled students with the responsibility, currently reserved entirely to regulators, to ensure safe practice by their graduates. 31

MEDICAL LAW REPORTER – *Thomas Faunce*

The Health Legislation Amendment Act 2013 (Qld) and Queensland’s health assets privatisation dispute – *Caroline Colton and Thomas Faunce*

New legislation in Queensland has provided a “pathway” for the privatisation of health assets and services in Queensland, which effectively realigns the health care system to the financial market. This column explores how this legislation contained the antecedents of the Queensland doctors’ dispute when doctors roundly rejected new employment contracts in February 2014. It also argues that such legislation and its attendant backlash provides a valuable case study in view of the federal government’s 2014 budget offer to the States of extra funding if they sell their health assets to fund new infrastructure. The move to privatise health in Queensland has also resulted in a government assault on the ethical credibility of the opposing medical profession and changes to the health complaints system with the introduction of a Health Ombudsman under ministerial control. The column examines these changes in light of *R (Heather) v Leonard Cheshire Foundation* [2001] EWHC Admin 429, a case concerning the obligations of a private entity towards publically funded clients in the United Kingdom. In discussing concerns about the impact of privatisation on the medical profession, the column points to a stark conflict between the duty to operate hospitals as a business rather than as a duty to patients. 54

ARTICLES

The emergence and popularisation of autologous somatic cellular therapies in Australia: Therapeutic innovation or regulatory failure? – *Alison K McLean, Cameron Stewart and Ian Kerridge*

Private stem cell clinics throughout Australia are providing autologous stem cell therapies for a range of chronic and debilitating illnesses despite the lack of published literature to support the clinical application of these therapies. The Therapeutic Goods Administration has excluded autologous stem cell therapies from its regulatory domain leaving such therapies to be regulated by the same mechanisms that regulate research, such as the *National Health and Medical Research Council Research Ethics Guidelines*, and clinical practice, such as the Australian Health Practitioner Regulation Agency. However, the provision of these stem cell therapies does not follow the established pathways for

legitimate medical advance – therapeutic innovation or research. The current regulatory framework is failing to achieve its aims of protecting vulnerable patients and ensuring the proper conduct of medical practitioners in the private stem cell industry. 65

Re Jamie (No 2): A positive development for transgender young people – Michael Williams, John Chesterman and Phil Grano

Re Jamie (No 2) is an important decision of the Full Family Court that significantly clarifies the law concerning “special medical procedures”. The court has held that so-called stage one treatment for gender dysphoria, designed to suppress pubertal development, no longer requires judicial approval. The decision contains an important endorsement of the view that the phenomenon of gender dysphoria could be de-pathologised. Crucially, the decision also confirms that if a young person is found to be *Gillick* competent, the court has no power to override their treatment decisions. However, given the consequences of such treatment, and consistently with the authority in *Marion’s Case*, the court will continue to have a “safeguard” role in determining whether *Gillick* competence exists. The article outlines some cautionary notes about the removal of court oversight at stage one, but argues that the decision is a positive one for enabling access to treatment and ameliorating the financial burden of legal proceedings on the families of transgender adolescents. 90

Australian children living with gender dysphoria: Does the Family Court have a role to play? – Fiona Kelly

A growing number of Australian children are seeking medical treatment for gender dysphoria. Until recently, such treatment was available only to children whose parents received the authorisation of the Family Court. However, the 2013 Full Court of the Family Court decision of *Re Jamie* changed the legal landscape for children living with gender dysphoria by allowing parents to consent to stage one treatment (the administration of puberty “blockers”). The court did not, however, come to the same conclusion with regard to stage two treatment (the administration of testosterone or oestrogen). Stage two treatment was held to be a “special medical procedure” and thus subject to court authorisation, unless the child is *Gillick* competent. While *Re Jamie* improved the process of seeking treatment for gender dysphoria, this article argues that the Full Court failed to correctly apply the test for “special medical procedures” articulated in *Marion’s Case*. Crucially, the court failed to grapple adequately with the distinction made in *Marion’s Case* between therapeutic and non-therapeutic treatment. 105

Storage limits of gametes and embryos: Regulation in search of policy justification – Anita Stuhmcke and Eloise Chandler

In Australia regulatory limits with respect to the storage of gametes and embryos differ according to both the “type” of reproductive material and the jurisdiction the material is stored within. This article examines the differences and similarities in storage limits across Australian States, evaluating the reasons for the introduction of storage limits and identifying historical policy change. The article argues that justifications for current storage limits are not clearly articulated and calls for further debate and discussion in this increasingly important area of law. 121

Barriers for domestic surrogacy and challenges of transnational surrogacy in the context of Australians undertaking surrogacy in India – Louise Johnson, Eric Blyth and Karin Hammarberg

The ethical, social, psychological, legal and financial complexities associated with cross-border travel for reproductive services are gaining attention internationally. Travel abroad for surrogacy, and the transfer of gametes or embryos between countries for use in a surrogacy arrangement, can create conflict in relation to the rights of the parties

involved: commissioning parents, surrogates and their families, gamete and embryo donors, and children born as a result of the arrangement. Australian surrogacy laws are restrictive and limit access to domestic surrogacy. Despite the introduction of laws in some Australian jurisdictions that penalise residents entering into international commercial surrogacy arrangements, hundreds of Australians resort to surrogacy arrangements in India and other countries each year. This article discusses legislation, policy and practice as they relate to Australians' use of surrogacy in India. It reviews current surrogacy-related legislation and regulation in Australia and India and existing evidence about the challenges posed by transnational surrogacy, and considers how restrictive Australian legislation may contribute to the number of Australians undertaking surrogacy in India. 136

Selective reduction of fetuses in multiple pregnancies and the law in Australia – *Colleen Davis and Heather Douglas*

This article considers whether it is lawful in Australia to terminate one or more fetuses in a multiple pregnancy selectively and, if so, under what circumstances. It begins by addressing the preliminary question whether selective reduction is covered by laws relating to abortion and provides a brief outline of the law of abortion in Australian jurisdictions. The article then considers selective reduction of high-order multiple pregnancies, before turning to selective reduction of twin pregnancies in a range of circumstances. The article demonstrates that the law of abortion, as applied to selective reduction of multiple pregnancies, is uncertain and that there are considerable variations from one State to another. It concludes that the law in this area is in need of reform to recognise that some reductions are not performed prima facie to prevent danger to the mother's health and to remove the need for doctors to assert symptomatology of mental illness in order to guard against criminal law consequences. Further, there is a need to clarify whether selective reduction/termination is abortion for the purposes of the law, and to achieve greater consistency across jurisdictions. 155

Interstate dispensing: A case for uniform, intuitive legislation – *Nijole L Bernaitis, Michelle A King and Denise L Hope*

Australian health practitioner registration is national, whereas legislation regarding the handling of medicines is governed by individual States and Territories. To align with the July 2010 national registration scheme some legislative modifications were made concerning scheduled drugs and poisons, but many differences between jurisdictions remain. In Queensland, the *Health (Drugs and Poisons) Regulation 1996* (Qld) allows for dispensing of controlled drugs written by interstate prescribers but not lower scheduled specified restricted and regulated restricted drugs. The aim of this study was to assess awareness of seemingly counterintuitive legislation by pharmacists practising in South-East Queensland. Of 125 Gold Coast pharmacies contacted, 54 (43.2%) agreed to participate. The majority of pharmacists (88.9%) had good knowledge regarding controlled drugs. In contrast, they demonstrated confusion regarding specified restricted and regulated restricted drugs (51.9% correct awareness). Uniform legislation between jurisdictions or more intuitive legislation would ease practitioner confusion. 174

Planning law and public health at an impasse in Australia: The need for targeted law reforms to improve local food environments to reduce overweight and obesity – *Caroline Mills*

Australia's high rates of overweight and obesity, and the associated increased population risk of non-communicable diseases, pose a challenge to policy-makers across sectors beyond the health portfolio. In the last decade, strategies to promote healthy lifestyles and address non-communicable diseases have increasingly interested urban planners in Australia and internationally. However, Australian planning laws continue to operate largely without regard to public health goals, thus limiting the ability of communities to

shape healthy built environments. In recent years, local governments have increasingly taken on responsibility for improving public health through community-based initiatives; however, their efforts are hindered by their limited capacity to influence planning priorities under current State-legislated planning schemes. This article considers the emerging body of research exploring the impact of urban planning on health and non-communicable diseases in Australia. It is contended that planning law in Australia is out of step with the evidence of planning’s potential impact on health, and reforms are required to ensure consistency with public health priorities. 179

Compensating for the harms of family violence: Statutory barriers in Australian victims of crime compensation schemes – Christine Forster

This article considers the compensative capacity of the victims of crime statutory schemes that are present in all eight Australian jurisdictions for primary victims of family violence. It argues that the recommendations of the Final Report on Family Violence conducted jointly by the Australian Law Reform Commission and the New South Wales Law Reform Commission in 2010, although a positive step, are insufficient to facilitate meaningful compensation to victims of family violence. In addition to the primary limitations identified by the Commissions – a requirement to report the crime to the police within a reasonable time and a requirement for multiple acts of violence to be reduced to a single act if they are related – there are other statutory barriers that disproportionately disadvantage victims of family violence. These include time limitation provisions, a requirement to report the crime to police, the restriction of compensation to prescribed categories of loss which exclude many of the social, vocational, emotional and psychological harms suffered by victims of family violence, and significant cut-backs on the non-economic component of the schemes. This article further argues that the statutory barriers cumulatively contribute to the perception of a crime as an isolated event perpetrated by a deviant individual. The article recommends that specific provisions for family violence victims should be introduced. 188

Mandatory reporting of health professionals: The case for a Western Australian style exemption for all Australian practitioners – Hon Nick Goiran MLC, Margaret Kay, Louise Nash and Georgie Haysom

This article discusses the current mandatory reporting obligations for health practitioners in Australia under the Health Practitioner Regulation National Law. It provides a summary of the mandatory notification legislation, and contextualises the introduction of this law. The details of the Western Australian exemption, under which a treating doctor is exempt from mandatory reporting of a doctor-patient, and the rationale for its introduction are examined. This is followed by a consideration of the potential impact of the mandatory reporting obligations. The authors argue that the Western Australian exemption has merit and should be considered for adoption throughout Australia. 209

“CAM-creep”: Medical practitioners, professional discipline and integrative medicine – Walid Jammal, Cameron Stewart and Malcolm Parker

This article examines the problem of applying disciplinary standards to the practice of integrative medicine. The article examines the structure of the National Law and discusses examples of when medical practitioners have been found to have breached professional standards because of their use of complementary and alternative medicine. The article argues there is a danger in medical practitioners who move away from the principles of evidence-based practice and informed consent in their adoption of integrative medicine. The authors posit a concept of “CAM-creep”, situations where practitioners abandon medical professional standards in favour of ones from complementary and alternative medicine. 221

BOOK REVIEW

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