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EDITORIAL – *Ian Freckelton QC*

Criminalising research fraud – *Ian Freckelton QC*

The incidence of research fraud has reached troubling levels. Too often peer review has failed to prevent it. The harm caused by such conduct extends to patients, co-authors, supervisors, employing institutions, funders, journals, publishers, and importantly, the area and direction of the research itself and its potential influence are tarnished. A number of commentators have raised the option of criminal charges being preferred against those responsible for such fraud. This has occurred in the United States, in particular, but also in the United Kingdom, Korea and Australia in high-profile cases. There is much to be said for this form of prosecutorial response to the phenomenon of research fraud given its multi-level ramifications, the considered nature of the conduct, and the fact that it is engaged in by persons well positioned to appreciate the harm that their deceit may cause. The involvement of the criminal law enhances the potential for deterrence from yielding to the temptation and opportunity to engage in research fraud. 241

LEGAL ISSUES – *Danuta Mendelson*

Disciplinary proceedings for inappropriate prescription of opioid medications by medical practitioners in Australia (2010-2014) – *Danuta Mendelson*

An analysis of 32 cases reported between July 2010 and September 2014 by professional disciplinary tribunals in New South Wales and Victoria against medical practitioners found guilty of inappropriately prescribing Sch 8 medications (mainly opioids) and Sch 4 drugs (mainly benzodiazepines) demonstrated, among others, a lengthy delay between the occurrence of the miscreant conduct and the conclusion of disciplinary proceedings. The study also raised questions about the appropriateness of utilising common criminal law theories of punishment and deterrence by non-judicial tribunals. 255

MEDICAL ISSUES – *Ian Freckelton QC*

Legal liability for psychiatrists' decisions about involuntary inpatient status for mental health patients – *Ian Freckelton QC*

The decisions by the High Court in *Hunter and New England Local Health District v McKenna* [2014] HCA 44 and by the majority of the New South Wales Court of Appeal in *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22 create a high level of immunity for psychiatrists and the institutions in which they provide services from tortious liability for failure to impose involuntary detention or maintain involuntary detention of persons who, after release, engage in violent conduct. This column scrutinises the development of Australian law in such matters, including the public policy issues. It argues that the law has gone too far in denying a duty of care on the basis of both the least restrictive principle that is inherent in the power (as against duty) to detain involuntarily and in seeking to avoid the creation of a defensive mindset in psychiatrists or a distortive influence upon their decision-making. 280

BIOETHICAL ISSUES – *Grant Gillett*

Is a cleft lip and palate a serious "handicap"? Jepson v Chief Constable of West Mercia – A legal and ethical critique – *Michael Morrison* and *Grant Gillett*

This column considers the legal and ethical dimensions of the controversial case of *Jepson v Chief Constable of West Mercia*. The purpose of bringing legal proceedings was to judicially review the notion that a cleft lip and palate should be regarded as a serious "handicap" for the purposes of s 1(1)(d) of the *Abortion Act 1967* (UK). The column argues that while Parliament failed to provide a sufficiently precise definition of "seriously handicapped", it is clear that it never intended and positively rejected the notion that a cleft lip and palate was a serious enough condition to warrant the lawful termination of a pregnancy. In determining what constitutes a sufficiently serious disability, the column critiques the medical model of disability and proposes a remedy model in its place. Finally, it argues that an attentive and responsive moral framework is fundamental to any substantial narrative ethics, and it suggests that a life with a disability can generate meaningful stories and that when there is a network of support and relationships around the person living that life, that human life is not only viable but also, in its own way, fulfilling, even if not ordinary. 290

NURSING ISSUES – *Kim Forrester*

Nursing documentation: A valuable clinical activity – *Kim Forrester*

Professional codes and guidelines in combination with organisational and institutional policies and procedures identify and benchmark the standards of good documentation practices within a health care context. The Nursing and Midwifery Board of Australia has adopted, as part of the regulatory framework for nursing and midwifery practice, the principles essential for good documentation. Although these principles have remained unchanged for decades, issues based on poor documentation practices continue to be raised in courts and tribunals. This column seeks to highlight the importance of recognising documentation as a valuable clinical activity and therefore deserving of closer attention and adherence. 302

MEDICAL LAW REPORTER – *Thomas Faunce*

Crimes Amendment (Zoe's Law) Bill 2013 (No 2): Paradoxical commercial impacts of the conservative agenda on fetal rights – *Roseanna Bricknell* and *Thomas Faunce*

In 2013, Liberal MP Chris Spence introduced a Private Member's Bill to the New South Wales Parliament, reinvigorating an earlier Bill introduced by Christian Democrat MP Fred Nile. If passed, the Bill would have bestowed legal personhood on fetuses of 20 weeks or more for the purpose of grievous bodily harm offences in the *Crimes Act 1900* (NSW). The Bill had the potential to undermine freedom of choice for women in relation to abortions prior to the point of viability (capacity for fetal existence outside the womb) as well as other decisions concerning pregnancy and childbirth. One hypothesis is that legislative measures such as this that support the rights of the fetus are well intentioned initiatives by those for whom the fetus is an essentially independent entity or symbol of innocence and moral purity whose existence must be protected over and above the interests and independent decision-making capacity of the mother. This column explores this hypothesis in the context of the paradoxical negative commercial implications of such legislation on multiple areas involving fetal-maternal interaction including surrogacy. 308

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ARTICLES

The bereavement gap: Grief, human dignity and legal personhood in the debate over Zoe's Law – *Hannah Robert*

A Bill before the New South Wales Parliament attempted to re-frame harm to late-term fetuses as grievous bodily harm to the fetus itself rather than (under the existing law) grievous bodily harm to the mother. To achieve this, the Bill extended legal personhood to the fetus for a limited number of offences. The Bill was brought on behalf of Brodie Donegan, who lost her daughter Zoe at 32 weeks' gestation when Donegan was hit by a drug-affected driver. This article asks what the perspective of a grieving mother can bring to the debate, in terms of helping the criminal law accurately come to grips with the complexity of pregnancy and the specific harm of fetal loss. It assesses the likely impacts of a change to fetal personhood and suggests an alternative legislative approach which is less likely to result in an erosion of bodily autonomy for pregnant women. 319

The standard of medical care under the Australian Civil Liability Acts: Ten years on – *Joseph Lee*

It has been more than a decade since the modified *Bolam* test was legislatively enacted by the Australian States following the medical indemnity crisis. Since its implementation, the modified *Bolam* test has been configured by judges as a defence to the common law standard of care in medical diagnosis and treatment. The article argues against this interpretation and suggests an alternative way of implementing this statutory test. It is proposed that the modified *Bolam* test ought to have been applied as a single yardstick to determine the required standard of care in diagnosis and treatment. Changes are also recommended to reform the test with a view to striking a balance between the interests of patients and doctors in medical disputes, and strengthening judicial supervision of the medical profession. These proposed reforms could resolve the shortcomings of the common law more effectively. They may also enhance the standard of medical care in Australia in the long run. 335

Holding unregistered health practitioners to account: An analysis of current regulatory and legislative approaches – *Jon Wardle*

An increasingly large part of health care delivery in Australia is provided by unregistered health practitioners, who have not been historically subject to formal regulatory arrangements and instead have been held to account via a milieu of non-specific regulatory and legislative obligations. This article explores current trends in the regulation of unregistered practitioners in civil law, criminal law and in the development of new regulatory tools such as "negative licensing". In addition, this article conducts an empirical analysis of the favoured model for extending accountability to unregistered health practitioners (negative licensing) by examining its application in New South Wales. Based on this analysis, it is argued that although negative licensing offers greater protections than previous models, it should not be viewed as a replacement for extension of statutory registration to new health disciplines, and instead should be viewed as a complementary measure to existing and new statutory registration arrangements. 350

Voluntary palliated starvation: A lawful and ethical way to die? – *Ben White*, *Lindy Willmott* and *Julian Savulescu*

Increasingly, individuals want control over their own destiny. This includes the way in which they die and the timing of their death. The desire for self-determination at the end of life is one of the drivers for the ever-increasing number of jurisdictions overseas that are legalising voluntary euthanasia and/or assisted suicide, and for the continuous attempts to reform State and Territory law in Australia. Despite public support for law reform in

this field, legislative change in Australia is unlikely in the near future given the current political landscape. This article argues that there may be another solution which provides competent adults with control over their death and to have any pain and symptoms managed by doctors, but which is currently lawful and consistent with prevailing ethical principles. "Voluntary palliated starvation" refers to the process which occurs when a competent individual chooses to stop eating and drinking, and receives palliative care to address pain, suffering and symptoms that may be experienced by the individual as he or she approaches death. The article argues that, at least in some circumstances, such a death would be lawful for the individual and doctors involved, and consistent with principles of medical ethics. 376

Confusing criminal and civil law: When may a hospital refuse to release a dead body? – *Steven B Gallagher*

A United Kingdom bereavement advice group has expressed concern that hospitals in Britain may be acting "illegally" in refusing to release dead bodies to relatives unless they provide evidence that funeral arrangements have been made. In some cases, hospitals may have refused to release a body to anyone other than an undertaker. The charity argues that this behaviour constitutes the common law offence of preventing the lawful burial of a body. This article considers the confusion that may occur between this offence and interference with the right to possession of a body for lawful burial. The conclusion is that it is extremely unlikely a hospital or its employees would fall foul of the criminal law in refusing to release a dead body and may be liable in the civil courts if they release a body to someone who does not have the duty and consequent right to possession of the body for lawful burial. 387

A right to choose how to live: The Australian common law position on refusals of care – *Katherine Curnow*

There has been limited examination of the Australian common law position regarding contemporaneous refusals of care or medical treatment by competent adults since the first two Australian cases to adjudicate on refusals of this type: *H Ltd v J* and *Brightwater Care Group (Inc) v Rossiter*. This article maps the legal position in Australia in light of the two cases with particular emphasis on the finding in *H Ltd v J* that self-starvation is not suicide at common law. Finally, this article highlights the broader relevance of this area of the law and its capacity to inform debates as disparate as whether to legalise voluntary euthanasia and the possible implications for the autonomy of pregnant women of proposed laws giving legal status to fetuses (particularly, Zoe's Law). 398

New Zealand's Mental Health District Inspector in historical context: "The impartial scrutiny of a citizen of standing" – *Kate Prebble*, *Claire Gooder* and *Katey Thom*

The *Mental Health (Compulsory Assessment and Treatment) Act 1992* (NZ) legislates for District Inspectors who ensure that mental health consumers held under the Act are aware of their legal rights. The New Zealand District Inspector role first appeared in 19th century legislation. Its historical longevity does not, however, denote that this role has been consistent since its inception. This article looks at the historical development of the District Inspector and its companion role, the Official Visitor, focusing in particular on the period 1969-1992, when the purpose and scope of the roles was part of a *Mental Health Act 1969* review. This was a time of fundamental social and professional change, shifting ideas of psychiatric practice, new locations of treatment, and growing emphasis on patient/consumer rights. The sometimes heated debates surrounding the roles reflect these changing ideas. An historical analysis of the District Inspector and Official Visitor roles aids understanding of how the social and political contexts affect mental health issues; this has relevance for current mental health law. 415

Wrongful life claims and negligent selection of gametes or embryos in infertility treatments: A quest for coherence – *Noam Gur*

This article discusses an anomaly in the English law of reproductive liability: that is, an inconsistency between the law's approach to wrongful life claims and its approach to cases of negligent selection of gametes or embryos in infertility treatments (the selection cases). The article begins with an account of the legal position, which brings into view the relevant inconsistency: while the law treats wrongful life claims as non-actionable, it recognises a cause of action in the selection cases, although the selection cases bear a relevant resemblance to wrongful life claims. The article then considers arguments that may be invoked in an attempt to reconcile the above two strands of the law. Three of these counterarguments consist in attempts to distinguish the selection cases from wrongful life claims. It is argued that these attempts fail to reveal a valid basis for treating these situations differently. A fourth possible counterargument levels against the present analysis a charge of reductio ad absurdum. It is shown that this argument suffers from a fundamental flaw caused by confusion between different senses of the term "identity". Finally, the article discusses possible changes to the legal position that could rectify the problem. It argues that one of these changes, which focuses on legal redress for violation of personal autonomy, is particularly apt to resolve the problem at hand, but also highlights the need for further inquiry into the broader implications of introducing this form of redress into the law of torts. 426

Young people and medical procedures: Whether or not young people can be competent to make medical decisions in their own interests – *Michael Easton*

Young people, as they grow older, gain increasing competency to make their own decisions – this is reflected in many areas of their lives. Yet, in relation to medical procedures, the case law both in Australia and in England suggests that the area remains uncertain, with courts often resorting to tests of best interests in lieu of personal autonomy, particularly where the medical procedure increases in complexity and/or urgency. In fact, at common law, young people must prove themselves to be more competent than adults in order to have their ethical autonomy respected. Legislation in two States in Australia has addressed the issue. However, reform is needed to prescribe an age at which competency of a young person may be presumed for both consent and refusal of medical treatment. Further, the adoption into legislation of the test of *Gillick* competency would provide for determinations below the age of presumption, and restrict the practice of courts imposing best interests over a young person's own interests. 442

We didn't start this fireless vapour: E-cigarette legislation in Australia – *Dr Marilyn Krawitz*

Electronic cigarettes (or e-cigarettes) are devices that heat a cartridge containing a solution that becomes a vapour for the user to inhale. The vapour may or may not contain nicotine. E-cigarettes do not contain tar and other toxins, which traditional cigarettes do, so they may be less damaging to people's health than smoking traditional cigarettes. However, no studies exist about the long-term effects of using e-cigarettes yet. It is illegal to sell e-cigarettes with nicotine in Australia, though Australians may import a three-month supply from overseas. It is legal to sell e-cigarettes with nicotine in some other jurisdictions, such as the United Kingdom and the European Union. This article argues that the Australian government should consider legalising the sale of e-cigarettes with nicotine in Australia for health, safety and economic reasons and to protect youth. If the sale of e-cigarettes with nicotine becomes legal, the Australian government must strictly regulate it. 462

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