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EDITORIAL – *Ian Freckelton QC*

The privilege against self-incrimination in coroners' inquests – *Ian Freckelton QC*

The privilege against self-incrimination has a venerable history in the conduct of coroners' inquests. However, recent statutory reforms to the privilege in coroners' courts, which have had disuniform outcomes throughout Australia, have complicated the circumstances in which the privilege is extended to those claiming its protection. This editorial reviews the evolving law on the privilege generally and rulings that have been made in high-profile coronial inquests, as well as the modest volume of appellate litigation on this important issue. It identifies that the emerging law on the area prioritises amongst relevant factors for the coroner's discretion to exercise coercive powers over witnesses' objections to give evidence the fact that they are charged with serious criminal offences, and that the need for and utility of the evidence are also functioning as important considerations. 491

LEGAL ISSUES – *Belinda Bennett*

Updating Australia's pandemic preparedness: The revised Australian Health Management Plan for Pandemic Influenza (AHMPPI) – *Belinda Bennett*

In 2014, Australia updated its health management plan for pandemic influenza. This updated plan builds upon the lessons from the 2009 influenza pandemic and revised guidance from the World Health Organization. The 2009 pandemic highlighted the need for flexibility in responding to pandemics so that responses can be tailored according to the severity of a pandemic. Recognition of the need for flexibility is a key feature of both the revised WHO guidance and the revised Australian plan. This column provides an overview of the updated WHO guidance and of the revised *Australian Health Management Plan for Pandemic Influenza*. 506

MEDICAL ISSUES – *Mike O'Connor*

Cruise control: Prevention and management of sexual violence at sea – *Mike O'Connor*

The drug-related death of Dianne Brimble on the P&O cruise liner *Pacific Sky* in 2002 triggered a wide-ranging review of the safety on board cruise ships operating in the Australian market. This column assesses the frequency of recent sexual assaults on cruise ships and examines the findings and recommendations of the Brimble inquest, focusing on the Commonwealth government's response to those recommendations. The problem of jurisdiction on flag of convenience registered ships is discussed, with emphasis on a possible co-operative arrangement between Australian police and foreign flag states. It seems likely that the United States and Canadian models of cruise ship regulation to enhance passenger safety will in part be introduced in Australia. 512

BIOETHICAL ISSUES – *Malcolm Parker*

Clayton's compromises and the assisted dying debate – *Malcolm Parker*

Richard Huxtable has recently argued that while assisted dying has been both repeatedly condemned and commended, a compromise resolution is possible. Following critique of other purported solutions, he argues for a new legal offence of "compassionate killing" as a plausible compromise between supporters and opponents of legalised assisted dying, because it offers something of significance to both sides. However, it turns out that "compassionate killing" would leave both sides with insufficient net benefit for the proposal to qualify as a compromise between them. By analogy with another apparently intractable bioethical debate, concerning destructive embryo research, this column rejects Huxtable's solution as another "Clayton's compromise". True compromise is not possible in bioethical debates involving divisions over deeply held values and world views. Resolving such debates inevitably involves the substitution of one dominant world view with another. 526

MEDICAL LAW REPORTER – *Thomas Faunce*

Professional misconduct: The case of the Medical Board of Australia v Tausif (Occupational Discipline) – *Caroline Colton*

In 2014, the Australian Capital Territory Civil and Administrative Appeals Tribunal (ACAT) made a finding of professional misconduct against a Canberra general practitioner working in two bulk-billing medical practices established by a corporate medical practice service company, Primary Health Care Limited (*Medical Board of Australia v Tausif (Occupational Discipline)* [2015] ACAT 4). This column analyses that case, particularly in relation to the ACAT finding that the practitioner's professional misconduct was substantially contributed to by an unsafe system of care, specifically, the failure of Primary Health Care to provide supervision and mentoring for clinicians working at its medical centres. The case highlights the professional pressures carried by general practitioners who practise medicine within the framework of corporate bulk-billing business models. The column also examines the related issue of general practitioner co-payments in Australia and their impact on business models built around doctors purportedly characterised as independent contractors, bulk-billing large numbers of patients each day for short consultations. 534

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ARTICLES

Health care justice for temporary migrant workers on 457 visas in Australia: A case study of internationally qualified nurses – *Paula O'Brien* and *Melissa Phillips*

Workers and their families in Australia under the Temporary Work (Skilled) Visa (subclass 457) scheme have no access to publicly funded health care. Rather, they are required by the Commonwealth government to purchase costly private health insurance. Our empirical study revealed the serious negative effects of the government's policy on the ability of internationally qualified nurses on 457 visas to meet their basic health care needs and to settle effectively into Australian society. This article argues that the current policy is unjust and evaluates three options for reform which would accord more fully with the government's obligations to minimise harm to people's health and to ensure that all people in society have their health care needs met in a fair manner. 550

A delayed inheritance: The Medical Board of Victoria's 75-year wait to find doctors guilty of "infamous conduct in a professional respect" – *Gabrielle Wolf*

The Medical Board of Victoria (Board) was created in 1844 to register "legally qualified medical practitioners". It was not until 1933, however, that the Board attained the power to remove from its register a doctor who had engaged in "infamous conduct in a professional respect" (the power), even though the General Council of Medical Education and Registration of the United Kingdom on which the Board was modelled had been granted the power 75 years earlier. This article argues that the delay in the Board's inheritance was attributable to successive Victorian Parliaments' distrust of the Board and that this attitude was unwarranted, at least from early in the 20th century. The article maintains that the granting of the power to the Board was a crucial event in the history of the regulation of the Victorian medical profession. This is illustrated both by the difficulty encountered by the medical profession in dealing with doctors' unethical conduct before 1933, and the Board's concern to use its new authority responsibly and appropriately to protect the public and the profession in the three years after it attained the power. 568

Correcting the record: Australian prosecutions for manslaughter in the medical context – *David J Carter*

The failure to prosecute Dr Jayant Patel successfully for any of the deaths associated with his time as Director of Surgery at Bundaberg Base Hospital was received in some quarters as an abject failure of the criminal law to deal adequately with significant wrongdoing. The case itself, the multiple public inquiries and the significant expense to pursue, extradite and prosecute Patel, resulting finally in a finding of guilt on a number of minor fraud charges, seems to compound this sense of failure. This article argues otherwise. When placed within the far longer and forgotten history of the prosecution of manslaughter by criminal negligence in the Australian jurisdiction, this story of prosecutorial failure becomes instead wholly consistent with the case law over time. No adequate account of the history of prosecution in the Australian jurisdiction exists for this area of law. To present Patel in context, the article draws upon archival research to provide a significantly extended account of the history of prosecution for manslaughter in the health care context. The extension of the case law is significant, from four known prosecutions, case histories of another 33 inadequately acknowledged prosecutions are presented. 588

Adapting to concurrent expert evidence in medical litigation – *Tina Cockburn* and *Bill Madden*

In medical negligence litigation expert evidence has long played a dominant role. The trend towards the use of concurrent expert evidence is now well underway. However, for the lawyers and the doctors involved, the pathway is not yet familiar. Disputes have frequently arisen in the context of pre-hearing expert conclaves, given the adversarial nature of litigation and perhaps fuelled by fears of a less transparent process at this increasingly important stage. This article explains the concurrent expert evidence framework and examines areas of common dispute both in the conclaves and at trial, with a view to providing assistance to legal practitioners working in this area and the medical practitioners called upon to provide expert evidence in such litigation. 610

"Loss of situation awareness" by medical staff: Reflecting on the moral and legal status of a psychological concept – *Hugh Breakey*, *Roel D van Winsen* and *Sidney W A Dekker*

This article examines the emergence of "accurate situation awareness (SA)" as a legal and moral standard for judging professional negligence in medicine. It argues that SA constitutes a status, an outcome resulting from the confluence of a wide array of factors, some originating inside and others outside the agent. SA does not connote an action, a practice, a role, a task, a virtue, or a disposition – the familiar objects of moral and legal appraisal. The argument contends that invoking SA becomes problematic when its use broadens to include professional or legally appraisable norms for behaviour, which expect a certain state of awareness from practitioners. 632

Coroners' guidelines for health practitioners: Help or hindrance? – *Sarah Middleton*

In Victoria, New South Wales and Queensland, coroners' guidelines have been developed to assist health practitioners in complying with their coronial reporting obligations. These guidelines, which are intended to work hand in hand with the legislation, leading the health practitioner through the law, its interpretation and its application, have been commended for assisting with a more detailed and structured consideration of often complex issues. However, closer scrutiny of these guidelines shows legal inaccuracies and other errors that have the potential to lead health practitioners into error. In circumstances where failure to comply with reporting obligations can constitute a criminal offence as well as professional misconduct, this situation is unacceptable. This article recommends changes to the guidelines to bring them into conformity with the law ensuring that the guidelines operate as a help, and not a hindrance, to health care practitioners. 638

Unfair employment discrimination of previously depressed individuals – *Kenneth Wei-Qiang Choo* and *Wei-Liang Lee*

Individuals who have recovered from or are in a remissive state of depression are often required to declare their psychiatric history during applications for employment. This practice exposes such individuals to discrimination even though they are no longer afflicted by the condition, leading to the question whether the practice is fair and justified. Such discrimination can also have adverse health implications as individuals with active depression might not want to seek help early for fear of stigmatisation. In this article, constructive dialogue among relevant stakeholders is proposed to encourage appropriate and measured responses to this problem. A more durable solution in Singapore may be to introduce legislation to prevent unfair discrimination. 660

The decision-making of the Mental Health Review Tribunal in New Zealand – *Katey Thom*, *Stella Black* and *Graham Panther*

This article reports the findings of a qualitative research project that explored the decision-making of the Mental Health Review Tribunal in New Zealand, providing "thick descriptions" of the hearing process by closely focusing not only on the content of final written decisions, but also how decisions are made and delivered within the context they are formed. Drawing on interviews with tribunal members (n=14), observation of hearings (n=11), and review of written decisions (n=60), the article illustrates how the MHRT attempts to practise in a way that enhances rather than damages ongoing relationships between applicants and clinicians. The factors that constrain its ability to conduct a hearing perceived as fair and participatory by the applicants is considered, and synergies with the international literature are noted in relation to the heavy use of medico-legal language, dominance of public safety concerns, and the covert interventionist practices of the MHRT. The article concludes by highlighting the value of qualitative observations of

this decision-making body. While written decisions provide a justification for the outcome decided by the MHRT, it leaves out nuances gleaned from in-depth clinical reporting, inquisitorial investigation and unwritten observations during hearings. 667

Re-visiting Re X: Hysterectomy, removal of reproductive capacity and the severely intellectually disabled child in New Zealand – *Jeanne Snelling*

The law governing parental consent to any surgery performed on an intellectually disabled minor that results, directly or indirectly, in the loss of reproductive capacity was first considered in New Zealand in the High Court case of *Re X* in 1991. The decision was remarkable in several respects, not least because it reflected a genuine attempt to obtain a representation of interests beyond those of the particular child and parents involved. However, legal and socio-political developments in the intervening years, both locally and internationally, suggest that a review of the decision is timely. This article questions whether, in light of these events, *Re X* should be revisited and concludes by suggesting a possible legal response. 679

An alternative to Zoe's Law – *James Dalmau*

Under the criminal law of New South Wales, the destruction of a foetus (other than in the course of a medical procedure) constitutes grievous bodily harm to the pregnant woman. Charges can be laid for offences against the woman, but not against the foetus. Many are dissatisfied with this. The *Crimes Amendment (Zoe's Law) Bill 2013 (No 2)* (NSW) aimed to change this by providing that a foetus is taken to be a living person for the purposes of certain offences. The Bill was strongly opposed on the basis that according personhood to a foetus in this way will have undesirable consequences that could erode the reproductive rights of women. The public debate over how the criminal law addresses the destruction of a foetus has centred on Zoe's Law. This article proposes an alternative amendment that aims to accommodate the concerns of the Bill's supporters and its detractors. 698

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