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EDITORIAL

Doctors Suing Patients: Wrestling with Doing No Harm – *Ian Freckelton QC*

The obligation to abstain from doing harm to patients (non-maleficence) and the duty to engage in conduct which does good (beneficence) has a lengthy ethical history in medicine, dating back to the Hippocratic Corpus of writings. Generally, for a health practitioner to initiate litigation against a patient would be inconsistent with such precepts. However, the conduct of some patients constitutes a waiver in this regard. The circumstances surrounding the Supreme Court action in New South Wales of *Al Muderis v Duncan (No 3)* [2017] NSWSC 726 illustrate that such conduct by health practitioners may not only be ethically defensible but prudent in the modern online environment in which a very small subsection of patients are prepared to calumny their practitioners in the belief that they have impunity to publish their aggrievements to the world via the internet regardless of the harm that attaches to their publications. 749

LEGAL ISSUES – *Editor: Bernadette McSherry*

Supporting People with Decision-Making Impairments: Choice, Control and Consumer Transactions – *Yvette Maker*, *Bernadette McSherry*, *Lisa Brophy*, *Jeannie Marie Paterson* and *Anna Arstein-Kerslake*

A key goal of the National Disability Insurance Scheme is to increase the choice and control that people with disabilities have over the goods and services they purchase. However, research indicates a range of barriers to the participation of people with disabilities as consumers. These barriers can have an impact on individuals' health and social and economic participation, especially when they affect access to basic and essential services such as utilities and telecommunications. There are particular challenges for consumers with cognitive or psychosocial disabilities who may experience decision-making impairment. This column explores these challenges and discusses options for providing support for people with decision-making impairments to participate in consumer transactions on an equal basis with others. 756

MEDICAL ISSUES – *Editor: David Ranson*

Novel Psychoactive Substances: The Challenges for Health Care, Analytical Science and the Law – *Victoria Bicknell*, *Dimitri Gerostamoulos* and *David Ranson*

Designer or synthetic drugs of abuse are a growing problem for legislators, law enforcement and health care providers. The rapidly modified chemical structure of such substances means that not only are their legislative categorisations uncertain and fluid but their health effects remain largely unclear with little opportunity for timely research that could be used to support patients with problems. For the forensic medical and scientific community the lack of validated drug standards for these newly emerged chemicals makes analysis problematic. The need for drug intelligence communication and drug surveillance systems has never been greater. The creation of, as well as wider access to, national and international data bases of new and emerging synthetic drugs would go some way to address the forensic analytical and health care problems that these substances create. 763

BIOETHICAL ISSUES – *Editor: Grant Gillett*

Taking the Moral Measure of Mental Capacity: Interpretation and Implementation – *Grant Gillett*

A new report on mental capacity and revisions to mental health law has highlighted the need to soften the hard-edged autonomy/rights framework of much legislation and its increasing encroachment into health law. Ethics allows us to introduce into this area moral perception and a sense of life as requiring sensitive attunement, awareness and responsiveness to the lives of others. That inflection of our reading of mental health law and provisions for impaired capacity and vulnerability makes the science of law a more natural science which takes nuanced account of the human predicament and its fragility in the face of ill-health in general and mental health in particular. Concepts such as supported and relational autonomy and the holding in being of individuals struggling to retain a sense of their own identity in a complex world of shifting relationships and power imbalances then becomes part of the pragmatic anthropological project in which our legislative interventions must aim to help and not hinder or disrupt our mutually interwoven journeys of self-formation and self-understanding. 767

MEDICAL LAW REPORTER – *Editor: Thomas Faunce*

Public Health Legislation Prohibiting Sports-Embedded Gambling Advertisting – *Madeleine Farrar* and *Thomas Faunce*

Federal Labor, Green and Independent politicians have recently called for a blanket ban on sports-embedded gambling advertising (SEGA), and the Prime Minister has announced that such advertising would be banned during live sporting telecasts before 8.30pm. A considerable body of research establishes the adverse public health impacts of such gambling. The decision of the Australian High Court in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 paved the way, however, for an expansive online Australian sports-betting market for both interstate operators and internationally located gambling companies. The combination of widespread internet access and smart phone usage has resulted in an environment where placing a bet is more likely to occur in the home in front of children, hence the concern about its "normalisation". Elite sports people have made public pronouncements that SEGA is now excessive, inconsistent with blanket prohibitions on gambling by elite sports people and damaging to public health. This column critically examines the regulatory landscape governing the advertisement, sponsorship and promotion of SEGA within Australian sport and why the current Bills on this topic do not go far enough. 774

ARTICLES

Complementary Health Practitioners Disciplined for Misconduct in Australia 2010-2016 – *Jenni Millbank*, *Miranda Kaye*, *Anita Stuhmcke*, *David Sibbritt*, *Isabel Karpin* and *Jon Wardle*

This article examines disciplinary proceedings brought against complementary medicine (CM) practitioners in Australia at tribunal level since the inception of the *Health Practitioner Regulation National Law*. The article looks at all 32 such cases and identifies trends in the kinds of misconduct established, and the orders imposed. These findings are compared with earlier and more sizable studies of tribunal-level outcomes for disciplinary proceedings against doctors in Australia and New Zealand. While there are some clear comparisons – such as the gender ratio of respondent practitioners and the most common type of misconduct, ie sexual misconduct – there were also notable differences. Specifically, the rate of removal from practice, either by suspension or cancellation of registration, of CM practitioners was found to be significantly higher than that reported in earlier studies of cases against doctors. More research needs to be done to explore the reasons for this apparent disparity. 788

Professional Discipline of the New Zealand Nursing Residential Care Workforce: A Mixed Methods Analysis of HPDT Decisions 2004-2014 – *Kate Kersey*, *Kate Diesfeld*, *Lois J Surgenor* and *Michael Ip*

Allied to the growing demand for aged residential care services, with a shifting mix to higher levels of care for those with complex co-morbidities, is concern about the standard of care provided to those residing in such facilities. In the course of their work in aged residential care, nurses may face complaints about conduct or practice amounting to allegations of elder abuse or neglect. The ultimate step in the complaints process in New Zealand is a disciplinary charge laid before the Health Practitioners Disciplinary Tribunal (HPDT), a civil disciplinary body set up under the *Health Practitioners Competence Assurance Act 2003* (NZ). This study examines the entire bank of published HPDT decisions from 2004 to 2014 relating to nurses' misconduct in the aged residential care setting, and explores systemic issues in residential care that may contribute to elder neglect and abuse. By using a mixed-method approach to examine accumulative HPDT data, this research seeks to contribute to the educative and preventive value of professional discipline decisions concerning care for some of society's most vulnerable members. 803

The Legal System and the Legitimacy of Clinical Guidelines – *Fiona McDonald*

Clinical guidelines have proliferated in the last 20 years, with thousands created by a variety of groups for a variety of purposes. This proliferation has seen the legitimacy of some guidelines being called into question and has resulted in an increase of self-regulatory mechanisms (meta-guidelines) that aim to regulate the processes through which clinical guidelines are developed and hence to provide standards against which a user can measure the legitimacy of a guideline. However, clinical guidelines are also subject to forms of regulation by other actors, including the courts, and these actors have their own norms. This article examines the norms established by the courts concerning the legitimacy of clinical guidelines, and the factors considered when assessing the legitimacy of such guidelines, including expertise, consensus, consultation, evidence, bias and conflicts of interest, and compliance with relevant law. 821

Wastewater Analysis of Substance Use: Implications for Law, Policy and Research – *Jeremy Prichard*, *Foon Yin Lai*, *Emma van Dyken*, *Phong Thai*, *Raimondo Bruno*, *Wayne Hall*, *Paul Kirkbride*, *Coral Gartner*, *Jake O'Brien* and *Jochen F Mueller*

This article seeks to encourage informed cross-disciplinary discourse about wastewater analysis (WWA) – a method of estimating substance use in very large populations via the analysis of samples of sewage water. It examines Australia's policy platform for responding to substance use, the National Drug Strategy (NDS), and considers the evidence base underpinning it, particularly the metrics that are provided by national drug-monitoring systems. The article discusses the strengths of WWA and suggests the method could usefully augment existing monitoring systems. To demonstrate the flexibility, efficiency and scope of WWA, key findings are presented from the first national WWA study, which encapsulated sewage samples from approximately 40% of the Australian population. Opportunities for WWA to inform time-sensitive issues in particular communities are also explored. The article encourages health and criminal justice portfolios to engage with WWA to ensure it is put to best effect for policy purposes. 837

to encompass the field of dreams that frozen embryo storage and retention creates for many infertile couples and individuals. This article uses qualitative interview data collected in 2013 from 45 Canadian fertility treatment patients to explore how these women and men negotiated liminal spatial and temporal reproductive boundaries as they made decisions about their stored embryos. It sheds light on the investments made by patients in "hope technologies", examines the destabilisation and category mixing that fertility preservation can generate, and investigates the liminal places in which patients and their stored embryos dwell and experience time. Canada imposes no embryo storage retention time limits. This article argues that to do so confuses notions of embryo storage time with that of reproductive purpose and would lead to further ambiguity and liminality. 886

Coercive Community Treatment in Mental Health: An Idea Whose Time Has Passed? – *Sascha Callaghan* and *Giles Newton-Howes*

Community treatment orders (CTOs) emerged in the 1970s as an innovative, "less restrictive" alternative to involuntary inpatient orders for people with chronic and severe mental illness. Now, after three decades of practice, numerous studies have concluded that CTOs do not achieve their main clinical aims, while involuntary orders in mental health continue to be strongly criticised in light of the requirements of the *Convention on the Rights of Persons with Disabilities*. The question now arises whether CTOs are still a justifiable option for treatment. This article reviews the history and features of community treatment orders in Australia and New Zealand, concluding that the CTO system was based on goals that were both normatively and epistemically flawed. In light of these facts, the article argues that CTOs can no longer be justified if the goals of non-discrimination and supported decision-making enshrined in the Convention are to be taken seriously by states parties. 900

Blood Libel: An Analysis of Blood Donation Policy As It Affects Gay Men in Australia – *Edward Davis*

The Red Cross' donor selection policy dictates that a man cannot donate blood if he has had sex with another man in the preceding 12 months. This policy is entrenched by legislation at the State, Territory and federal level. This article argues that the policy reproduces a homophobic discourse that was borne out of the "AIDS crisis" and instils a negative self-conception within homosexual subjects themselves. It examines whether the policy is supported by the scientific evidence and the exact way in which the policy is mandated by the law. A queer theory framework is used to critically interpret these findings. As an alternative, this article advocates for a gender and sexuality neutral selection policy based on the risk of certain sexual behaviours. This is supported by the experience of foreign jurisdictions that have implemented similar policies. Such a reform would include homosexual men in an important field of social participation and help reverse the negative perception of homosexuality to which the current policy contributes. 915

Stigma, Homosexuality and the Homosexual Advance Defence – *Anthony Gray* and *Kerstin Braun*

This article considers developments in the law regarding homosexuality through the prism of stigma, which retains an important role in psychology theory. It explores the role of law in perpetuating, or tackling, stigma. While the decriminalisation of homosexual practice between consenting adults has been important in reducing the stigma attached to homosexual activity, it is evident that stigma, and its associated serious psychological effects, persists in relation to sexuality. The recent High Court of Australia decision permitting a "homosexual advance defence" to be used by an offender accused of murdering the person making the unwanted advance is argued to reflect and perpetuate the continued stigmatisation of homosexual practice. There is reason to doubt whether the

BOOK REVIEWS

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