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EDITORIAL – *Ian Freckelton QC*

The Complementary Medicine Insurance Wars: The Unresolved but Politicised Australian Theatre of Combat

Debates have taken place for many years internationally, including in Australia, about the therapeutic effectiveness and safety of complementary/alternative medicine (CAM). The issues raised in such disputation go beyond the capacity for patients to make choices informed by contemporary knowledge about the status of such disciplines and the accuracy of claims made by the various stakeholders. As government subsidises rebates under private health insurance for a number of modalities of health care, the entitlements of CAM disciplines to such rebates have become controversial. This editorial traces Australian reports since 2010 about the eligibility for insurance rebates of a number of CAM disciplines and calls for the current 2019–2020 review by the Chief Medical Officer to engage in a fair, rigorous and conclusive evaluative process, utilising as its yardstick contemporary evidence about treatment efficacy. Such a process has the potential to bring to an end disputation that has only served to confuse patient decision-making, cater to vested interests and incur for government costs that cannot properly be justified. 7

LEGAL ISSUES – *Guest Editors: Ian Freckelton QC and Tina Popa*

Doctors, Defamation and Damages: Medical Practitioners Fighting Back

In three judgments in favour of New South Wales medical practitioners between 2017 and 2019 the Supreme Court awarded ordinary and aggravated damages for harm done to professional reputations. The decisions in *Al Muderis v Duncan* (No 3) [2017] NSWSC 726, *O'Neill v Fairfax Media Publications Pty Ltd* (No 2) [2019] NSWSC 655 and *Tavakoli v Imisides* (No 4) [2019] NSWSC 7 are considered in the context of international decisions and analysis of doctors taking defamation action arising from online publications. Reflections are provided about the repercussions of the phenomenon, its commercial justification and the inhibitions that should be experienced before defamation and injurious falsehood actions are taken by medical practitioners. 20

MEDICAL ISSUES – *Editor: Danny Sullivan*

Post-sentence Detention and Supervision: The Role of Multi-agency Panels – *Bernadette McSherry, Rajan Darjee and Danny Sullivan*

Victoria's Complex Adult Victim Sex Offender Management Review Panel recommended that an independent body be established to manage high-risk offenders with input from multi-agency panels. The Panel's recommendations were influenced by the Multi-Agency Public Protection Arrangements that exist across the United Kingdom. This column compares the operation of the sole Multi-Agency Panel that has been established in Victoria with that of the Multi-Agency Public Protection Panels (MAPPPs) in Scotland and the Risk Assessment and Management Panels set up to combat family violence in Victoria. It then provides a comparison of how information-sharing has been implemented in Victoria and Scotland. It concludes that, although the legislation governing each is similar,

the implementation and operation of the two has been very different. This difference in approach has implications for how clinicians and health services interact with the process, and how issues of information-sharing and confidentiality are addressed. 29

BIOETHICAL ISSUES – *Hannah Maslen*

Responsible Use of Machine Learning Classifiers in Clinical Practice – *Abhishek Mishra*

Machine learning models are increasingly being used in clinical settings for diagnostic and treatment recommendations, across a variety of diseases and diagnostic methods. To conceptualise how physicians can use them responsibly, and what the standard of care should be, there needs to be discussion beyond model accuracy levels and the types of explanation provided by such classifiers. There needs to be consideration of how the explanations are provided and how historical accuracy rates can together constitute the overall epistemic status of the model, and how models with different epistemic statuses should subsequently be deferred to by medical practitioners. Answering this will require a multi-disciplinary consideration of the literature on automation bias in human factors and ergonomics to higher-order evidence in social epistemology. Adjudicating physician responsibility will also require assessing when a physician's ignorance of the appropriate ways to engage with such classifiers, as outlined above, will be culpable and when not. ... 37

COMPLEMENTARY HEALTH ISSUES – *Editor: Ian Freckelton QC*

Guidance on Prescription of Homeopathic Treatments: Ramifications of a Failed Administrative Law Challenge

In *R (on the application of British Homeopathic Association) v National Health Service Commissioning Board* [2018] EWHC 1359 (Admin) Supperstone J of the High Court of England and Wales delivered an internationally significant judgment on the processes required to be engaged in when guidance is given to medical practitioners about their involvement in homeopathic prescribing. This column explores the bases upon which the challenge by the British Homeopathic Association was lost and the repercussions of the judgment for the practice of non-evidence-based modalities, such as homeopathy. 50

MEDICAL LAW REPORTER – *Guest Editor: Ian Freckelton*

Concussion, Defamation and the Ringside Doctor

Ringside doctors play a vital public health role in protecting fighters from the deleterious effects of concussive and other injuries which are reasonably foreseeable from the contests in which they engage. This column reviews a landmark action for defamation taken by a ringside doctor against a media organisation that published a critique of his performance of his role in a high-profile boxing bout in Sydney, Australia. It reviews the judgment of McCallum J in *O'Neill v Fairfax Media Publications Pty Ltd* (No 2) [2019] NSWSC 655 (O'Neill) and reflects on the broader significance of the decision for the role played by ringside doctors while boxing and other martial arts contests continue to be permitted by law. 55

ARTICLES

Medicare Billing, Law and Practice: Complex, Incomprehensible and Beginning to Unravel – *Margaret Faux, Jonathan Wardle and Jon Adams*

Australia's Medicare is still widely considered one of the world's best health systems. However, continual political tinkering for 40 years has led to a medical billing and payment system that has become labyrinthine in its complexity and is more vulnerable

to abuse now, from all stakeholders, than when first introduced. Continuing to make alterations to Medicare without addressing underlying structural issues, may compound Australia's health reform challenges, increase the incidence of non-compliance and expenditure and thwart necessary reforms to develop a modern, data-driven, digitally informed health system. For the medical practitioners who are required to navigate the increasing complexity and relentless change, they will remain at high risk of investigation and prosecution in what has become an anarchic operating environment that they cannot avoid, but do not understand. 66

Untangling the Threads: Stakeholder Perspectives of the Legal and Ethical Issues Involved in Preparing Australian Consumers for Commercial Surrogacy Overseas – *Lana Zannettino, Lauren Lines, Julian Grant and Sheryl L de Lacey*

This article focuses on the complexities of regulating Australians' access to commercial surrogacy overseas. Altruistic surrogacy is allowed in Australia but access to women willing to act as surrogates is limited and many Australians now seek surrogacy arrangements via commercial agencies overseas. This qualitative study interviewed key stakeholders in Australia, including clinicians providing reproductive medicine, lawyers providing legal services, consumer advocates, counsellors and health policy regulators. The aim of the study was to explore perceptions of various experts concerning commercial surrogacy overseas so as to identify issues for the establishment of ethical guidelines and surrogacy policies in Australia. A number of issues relevant to Australians seeking commercial surrogacy overseas were identified and in particular, relating to the level of informed decision-making required by intending parents as well as concerns for the welfare of children born. Amendments to current ethical guidelines and protections for children born and entering Australia are recommended. 94

Disclosure of Genetic Results to At-risk Relatives without Consent: Issues for Health Care Professionals in Australia – *Rebekah McWhirter, Carolyn Johnston and Jo Burke*

Disclosure of genetic information without consent of the patient (proband) challenges the legal frameworks of privacy and confidentiality. Changes to privacy legislation enable and provide guidelines for undertaking disclosure, with the purpose of reducing the harm to genetic relatives who, armed with such information, may seek predictive testing themselves. Nevertheless, significant uncertainty remains for health care professionals in the application of the discretion to disclose genetic information to at-risk relatives. First, jurisdictional inconsistencies in privacy legislation present challenges for the provision of genetic services across the country. Second, the current guidelines provide insufficient clarity regarding the justification for disclosure of genetic information to reduce psychological harm to relatives. Third, the implications of a potential expansion of a legal duty of care to inform genetic relatives in some circumstances indicates that such a duty would be unduly burdensome for health care professionals, and suggests that revision of the threshold for use – rather than disclosure – of depersonalised genetic information may represent a pragmatic way forward. 108

Obesity and Taxation – Is Australia Ready? – *Lidia Xynas*

Obesity is a growing epidemic spreading across the developed world, including Australia. It negatively affects the health of individuals and puts pressure on a country's food and health systems, the environment and its economic status. In this article, three taxation approaches are considered as policy tools available to the Australian Government which could assist them in the fight against obesity: tax on the person, tax on inputs and taxes on the product. A critical analysis of each taxation approach is undertaken, existing international methodologies examined and, on this basis, suggestions are made to impose taxes on Highly Processed Foods and Sweetened Sugary Beverages. Particular focus is

given to reform to the Australian Goods and Services Tax regime. It is argued that through this specific taxation approach, the fight against obesity in Australia can be positively addressed. 122

In the Footsteps of Teiresias: Treatment for Gender Dysphoria in Children and the Role of the Courts – *Mike O'Connor and Bill Madden*

The Family Court of Australia has stepped back from a previously perceived need for involvement in the approval of stage 1 and stage 2 treatments, for children requiring gender transformation. At present those children and their families who are in agreement need not seek authorisation of the Family Court to undertake either Stage 1 (pubarche blockade with gonadotrophin-releasing hormone agonists) or Stage 2 treatment (cross-hormone therapy such as oestrogen for transgender males). Stage 1 treatment to suppress pubarche would nowadays be commenced at Tanner stage 2 which commences as early as 9.96 years in girls and 10.14 years in boys. Suppression of puberty continues until the age of 16 years when cross hormonal treatment commences. This article questions the assertion that suppression of puberty by GnRH analogues either in cases of precocious puberty or gender dysphoria is "safe and reversible" and argues that it warrants ongoing caution, despite the Family Court having broadly accepted that assertion. 149

A Doctor's Discretion Not To Offer Life-sustaining Treatment – *James Cameron*

A doctor may make a unilateral decision to withdraw or withhold life-sustaining treatment from a patient. Recent cases involving critically ill children in Australia, England and Wales have demonstrated how doctors may determine a child's life is not worth maintaining despite parental demands for treatment. The breadth of a doctor's discretion to not provide treatment is ambiguous though, and the extent to which a doctor may make unilateral quality of life judgments is not clear. The ambiguity arises because of different framing of a doctor's obligations, a lack of clear role delineation between relevant decision-makers and differences in opinion about the appropriate scope of inquiry when applying concepts like "futility" and "best interests". This ambiguity is likely to cause confusion in practice and may be the difference between a child receiving life-sustaining treatment. 164

Why Do I Have To Keep Waking Up? Terminal Sedation and the Law in Australia – *Kieran Tapsell*

Terminal sedation is a medically induced coma from which the patient does not recover. Professional guidelines for palliative care restrict its use to within a few days of death. The law relating to its use in Australia is governed by the law of homicide, assisted suicide and the law of trespass. In this article, I argue that the law in Australia does not justify the restrictions on its use imposed by the professional guidelines, and that, ethically and legally, it can be made available to patients with a terminal disease, those who are likely to suffer serious physical or existential pain by remaining conscious, and for those who refuse food and water. Its use should be regulated to ensure that those asking for it are competent to do so, and that they are suffering from a medical condition that makes life intolerable for them. 178

An Objective Approach to Decisions to Withdraw or Withhold Life-sustaining Medical Treatment – *Julian Savulescu and James Cameron*

Courts in England and Wales, Australia, and New Zealand have insisted the question of when it is acceptable to withdraw or withhold life-sustaining medical treatment from a child must be considered on a case-by-case basis. Over the last 40 years a number of cases have considered whether treatment is objectively in the child's best interests. This article seeks to identify whether there are factors identified and weighed in a consistent manner

across cases. Thirty cases involving decisions about the provision of life-sustaining medical treatment to children three years old or younger were identified. Judges regularly refer to the need to weigh benefits and burdens and these factors were identified and assigned scores. Eight key factors were identified, and a scoring range was assigned to each. The factors focus on the condition and position of the child and the burdens of invasive medical treatment. The review demonstrates there are factors consistently identified and despite criticisms of the indeterminacy of the best interests test, there may be a broadly consistent approach to decision-making. Cognitive capacity and unavoidably imminent death appear to be the two most influential factors in determining whether life-sustaining treatment should be provided. 192

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