

***Second Annual Lecture St Thomas More Forum Lecture
Public Ethics in Bioethics***

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The Australian Parliament and the Council of Australian Governments now need to decide what legislative changes, if any, are required in response to the Lockhart review of the 2002 laws prohibiting human cloning and regulating research on human embryos. For the last decade, lawmakers have wrestled with the profound legal and policy challenges arising from the new technology and moral arguments surrounding cloning and experimentation on human embryos. On 5 July 1996, a new era of scientific possibilities dawned when the sheep Dolly was born having been cloned by somatic cell nuclear transfer. The scientists succeeded in transferring the nucleus of an adult sheep mammary cell into the enucleated egg of a sheep. The embryo was then implanted in the womb of a ewe which carried Dolly to term. The lead scientist Ian Wilmut from the Roslin Institute later told the US Congress:¹

Our own experiments to clone sheep from adult mammary cells required us to produce 277 ‘reconstructed’ embryos. Of these, twenty-nine were implanted into recipient ewes, and only one developed into a live lamb. In previous work with cells from embryos, three out of five lambs died soon after birth and showed developmental abnormalities. Similar experiments with humans would be totally unacceptable.

Ever since, lawmakers have been wrestling with this new technology debating where to draw the line on human cloning, attempting to regulate scientists in their search for cures to many diseases using human embryonic stem cells as well as adult stem cells. Embryonic stem cells are presently taken only from human embryos. Thus the harvesting of embryonic stem cells presently requires the destruction of the embryo. Scientists would like to be able to experiment with embryonic stem cells as well as adult stem cells. The moral quandary confronting law makers has been determining what respect, if any, is due to the entity which is created by means of the successful transfer of the nucleus of a human adult cell into an enucleated human or animal egg. Some scientists and commentators now assert that such an entity is not a human clone or a human embryo but merely a collection of cells which should be available for experimentation and research just like any other cells which might be taken from the human body without harm to the body. If it be simply a collection of cells, there should be no objection to its creation with an enucleated animal egg rather than an enucleated human egg. It would even be preferable to use animal eggs, avoiding the

¹ Hearing before the Subcommittee on Public Health and Safety of the Committee on Labor and Human Resources, United States Senate, 12 March 1997, p. 22

need to harvest a large number of human eggs from women, with or without the payment of a fee.

In August 2001, the House of Representatives' Standing Committee on Legal and Constitutional Affairs was unanimous in recommending a ban on the deliberate creation of human embryos for experimentation. But the committee saw that there might be a case to be made at some time in the future for somatic cell nuclear transfer. They unanimously supported "a moratorium on the creation of embryos by means of somatic cell nuclear transfer techniques for three years at which point the issue can be re-examined".² The committee conceded that Australian decisions on cloning would require a co-operative approach by Commonwealth, State and Territory parliaments. The committee envisaged that scientists would want to experiment on embryos surplus to assisted reproductive technology programs.

In Australia, as elsewhere there has been a consensus among lawmakers that cloning to produce children should be prohibited. The contest has been over the limits to impose on cloning for biomedical research, sometimes mistakenly called therapeutic cloning. It is a mistake because nothing therapeutic is done to the particular cloned embryo which will never benefit from any experimentation or research performed upon it. It will be destroyed or left to succumb once it has been interfered with.

Cloning for biomedical research by means of somatic cell nuclear transfer (SCNT) is already permitted in the United Kingdom, as well as Israel, Singapore, and Sweden. Some US states permit SCNT, though the Bush administration remains opposed. President George W Bush set up the President's Council on Bioethics which presented its report *Human Cloning and Human Dignity: An Ethical Inquiry* in July 2002. This seventeen member council included leading scientists, lawyers and ethicists from a variety of viewpoints. Recognising the "complex and often competing moral positions" on biomedical questions, the President insisted that there was no need for the Council to be constrained by "an overriding concern to find consensus".³ And they did not. While all were agreed on the need to ban cloning to produce children, seven favoured the regulation of the use of cloned embryos for biomedical research, including SCNT, while ten favoured a four year moratorium on SCNT and any use of cloned embryos for biomedical research. The Council squarely faced the war of words in defining terms in this debate:⁴

There is today much confusion about the terms used to discuss human cloning, regarding both the activity involved and the entities that result. The Council stresses the importance of striving not only for accuracy but also for fairness, especially because the choice of terms can decisively affect the way questions are posed, and hence how answers are given. We have sought terminology that most accurately conveys the descriptive reality of the matter, in order that the moral arguments can then proceed on the merits. We have resisted the temptation to solve the moral questions by artful redefinition or by denying to some morally crucial element a name that makes clear that there is a moral question to be faced.

² House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Human Cloning: Scientific, Ethical and Regulatory Aspects of Human Cloning and Stem Cell Research*, 2001, p. xii

³ Quoted in President's Council on Bioethics, *Human Cloning and Human Dignity: An Ethical Inquiry*, Washington DC, 2002, p. xix

⁴ Ibid., p. xxiii

If SCNT involves the creation of a human embryo and if biomedical research entails the destruction of a human embryo, the debate about policy options and legislative possibilities is best informed by a candid admission of these facts. A legal order which permits abortion on demand is equally able to accommodate the creation and destruction of human embryos for biomedical research without the need for recourse to artful redefinition whereby value is ascribed not to an entity in itself but only to an entity which is created with a particular purpose in mind or which is destined for a particular use.

The Presidential Council asked, “What shall we call the product of SCNT?”⁵ Despite their varying moral assessments of the value of the human embryo, they were unanimous in their approach:⁶

The technical description of the cloning method (that is, SCNT) omits all reference not only to cloning but also to the *immediate product* of the activity. This obscurity enables some to argue that the immediate product of SCNT is not an ‘embryo’ but rather ‘an egg’ or ‘an unfertilized egg’ or ‘an activated cell’, and that the subsequent stages of development should not be called embryos but ‘clumps of cells’ or ‘activated cells’. To be sure, there are genuine difficulties and perplexities regarding what names to use, for we are dealing with an entity new in our experience. Partly for this reason, some people recommend avoiding the effort to describe the nature of the product, preferring instead to allow the *uses we human beings have for it* to define its being, and hence its worth. But, for reasons of both truth and ethical conduct, we reject this approach as improper. We are all too familiar with instances in which some human beings have defined downward the status of other beings precisely to exploit them with impunity and with a clear conscience. Thus, despite the acknowledged difficulties in coming to know it accurately, we insist on making the effort to describe the product of SCNT as accurately and as fairly as we can.

The Council then concluded that the product of SCNT should be defined as a cloned human embryo, regardless of the reason for producing it:⁷

The initial product of somatic cell nuclear transfer is a living (one-celled) cloned human embryo. The *immediate* intention of transferring the nucleus is precisely to produce just such an entity: one that is alive (rather than nonliving), one that is human (rather than nonhuman or animal), and one that is an embryo, an entity capable of developing into an articulated organic whole (rather than just a somatic cell capable only of replication into more of the same cell type).

In Australia, it has not been possible to conduct the debate with even this degree of agreement about terminology. One of the key advocates for SCNT has been Professor Bob Williamson who chairs the National Committee for Medicine, Australian Academy of Science. Back in March 2000, he informed the Standing Committee on Legal and Constitutional Affairs about what he envisaged in using SCNT in the future at his Murdoch Children’s Research Institute:⁸

Embryonic stem cell research seems to imply that a stem cell is derived from an embryo. Let’s consider the sort of situation that I envisage in the next two to three years. A seven-, eight- or nine-year-old child has leukaemia, has been thrown into remission and then goes into relapse. A skin cell from that child is taken and the mother of that child donates eggs, not embryos. The eggs are enucleated. The child’s skin cell is passed through the egg to generate a clone of cells in a tissue

⁵ Ibid., p. 47

⁶ Ibid., pp. 47-8

⁷ Ibid., p. 49

⁸ Standing Committee on Legal and Constitutional Affairs, House of Representatives, Hansard, 1 March 2000, LCA 8

culture dish. That clone of cells is then differentiated, in ways we do not yet have the full power to do but are beginning to develop, down a cell pathway which means it can be used to replace the bone marrow of that child. It is wrong to call these embryonic stem cells because no embryo has been involved. No embryo has been created or destroyed. What we have done is to turn a skin cell into a cell that is totipotent and has the potential to redifferentiate, to reform, into a bone marrow cell.

He was not helped by his colleague Professor Alan Trounson who had no hesitation in describing the products of SCNT as embryos:⁹

As practical scientists, we would use exactly the same techniques to derive the initial embryos for therapeutic cloning as we would for the embryonic stem cells, except that we would use a nuclear transfer procedure to establish those embryos. In calling them embryos, very few of those embryos at the present time in any species will go through to term. It is a very low efficiency process, if you like.

Under close questioning by the parliamentary committee, Williamson said, “I know that some people, including some people in this room, have a major problem with the idea of the destruction of an embryo. Some people do not. The process I am describing does not involve the destruction of an embryo.”¹⁰ The Australian Academy of Science later submitted to the Lockhart Committee that “cells that are studied entirely *in vitro* in a research context, and are not formed from a fertilised embryo, should not be regarded as embryos...This includes pluripotent cells derived by nuclear transfer.”¹¹ On 3 January 2006, when reviewing the Lockhart report, Williamson wrote, “Nuclear transfer from a skin or muscle cell into an inactivated egg does not give an embryo; it gives cells that are genetically identical to the cells of the sick person from whom the cell was taken. These cells have none of the genetic uniqueness we associate with a child compared with his or her parents.”¹²

The Australian Parliament first considered legislation on cloning and embryo experimentation in 2002. All politicians were permitted a conscience vote by their parties. Introducing the legislation the Prime Minister John Howard explained how he reached his decision:¹³

I spent considerable time informing myself of the views of community opinion leaders on ethical matters and of the views of scientists with expertise in this area of research. Amongst others, I talked to His Grace George Pell, the Catholic Archbishop of Sydney, and to His Grace Peter Jensen, the Anglican Archbishop of Sydney, both of whom are publicly opposed to research using IVF embryos. They are both men whose views I greatly respect, although I do not agree with them on all occasions. I also talked to a number of leading scientists, including the Chief Scientist Dr Robin Batterham, Professor Hearn, Dr McCullagh and Professor Alan Trounson. In the end, as I guess all members will do, I made up my own mind, according to my own conscience.

No parliamentarian spoke in favour of creating embryos for the purpose of research and experimentation. The point of division between the parliamentarians was whether experimentation on excess embryos produced during *in vitro* fertilisation (IVF) and other procedures of artificial reproductive technology (ART) should be permitted with

⁹ Ibid., LCA 10

¹⁰ Ibid., LCA 11

¹¹ Australian Academy of Science, Submission to the Legislation Review Committee, LRC 18

¹² “A line is drawn on human cloning” *Sydney Morning Herald*, 3 January 2006

¹³ 2002 CPD (HofR) 4542; 27 June 2002

the consent of the donors. The majority of the parliamentarians took an approach similar to the Prime Minister who told Parliament:¹⁴

A key fact shaping my view was that at present surplus IVF embryos are disposed of after a set period of time in storage, in consultation normally with the donor where that is possible, and largely through exposure to room temperature.

I could not find a sufficiently compelling moral difference between allowing embryos to succumb in this way and destroying them through research that might advance lifesaving and life-enhancing therapies. That is why, in the end, I came out in favour of allowing research involving excess IVF embryos to go ahead.

I believe strongly, however, that the special character of embryos warrants a strict regulatory regime for research involving excess IVF embryos. It is also my very strong belief that human embryos should not be created for any purpose other than IVF treatment.

Mr Simon Crean, then Leader of the Opposition told Parliament:¹⁵

But whilst I have supported a conscience vote for Labor members, the policy of the federal parliamentary Labor Party is to support the use of excess embryos for research. Our policy does not support human cloning. It will only support research on embryos created for IVF purposes that would otherwise be destroyed. It is policy also that, where the specific consent of the donor is given, research will be allowed, and only then for research where there is a real likelihood of a significant advance in knowledge.

Originally the legislative package was presented to the House of Representatives as one bill. But, as Simon Crean told the House, there was a proposal to “split the bill into two parts— those sections that would ban human cloning, which everyone supports, and those sections that deal with the regulation of stem cell research.”¹⁶ Stephen Smith who had been the Shadow Minister for Health told the House at the commencement of the debate: “The ban on human cloning is sensible and I think unanimously and universally supported.”¹⁷ Even members like Warren Entsch who strongly supported research and experimentation on excess embryos said, “With regard to...human cloning, let me state now that I totally and fully support the ban on human cloning. I am totally opposed to human cloning in any shape or form. I think it is absolutely abhorrent and I would never support it.”¹⁸

Concluding the mammoth debate on human cloning in the House of Representatives in 2002, the Attorney General Daryl Williams told the house that all members who had participated in the debate “unanimously agreed that a ban on human cloning and other unacceptable practices is crucial”¹⁹. Stephen Smith leading the debate for the ALP reiterated his claim made almost four months earlier at the commencement of the debate: “A ban on human cloning is sensible, is necessary and, on the basis of the debate both here and in the Senate, has the universal and unanimous support of the parliament”.²⁰

The *Prohibition of Human Cloning Act 2002* created a list of offences including:

¹⁴ Ibid.

¹⁵ 2002 CPD (HofR) 5242; 20 August 2002

¹⁶ Ibid, 5245

¹⁷ Ibid, 5249

¹⁸ Ibid, 5252

¹⁹ 2002 CPD (HofR) 10113; 11 December 2002

²⁰ Ibid, 10114

9 Offence—creating a human embryo clone

A person commits an offence if the person intentionally creates a human embryo clone.

Maximum penalty: Imprisonment for 15 years.

13 Offence—creating a human embryo other than by fertilisation, or developing such an embryo

A person commits an offence if the person intentionally creates a human embryo by a process other than the fertilisation of a human egg by human sperm, or intentionally develops a human embryo so created.

Maximum penalty: Imprisonment for 10 years.

14 Offence—creating a human embryo for a purpose other than achieving pregnancy in a woman

- (1) A person commits an offence if the person intentionally creates a human embryo outside the body of a woman, unless the person's intention in creating the embryo is to attempt to achieve pregnancy in a particular woman.

Maximum penalty: Imprisonment for 10 years.

20 Offence—creating a chimeric or hybrid embryo

- (2) A person commits an offence if the person intentionally creates a hybrid embryo.

Maximum penalty: Imprisonment for 10 years.

A hybrid embryo includes: “an animal egg into which the nucleus of a human cell has been introduced” (s.8(1)).

Members of Parliament voting to ban all human cloning and legislating such a specific raft of criminal offences were cognisant that the ban would cover SCNT. In the House of Representatives debate, Mr Peter Andren noted on 27 August 2002, “The unacceptable practices disallowed by this legislation will include the creation of embryos using somatic cell nuclear transfer.”²¹ The Attorney General told Parliament that Professor Alan Trounson had sent newsletters to parliamentarians advocating the use of SCNT. Mr Kevin Andrews who had chaired the parliamentary committee on cloning in 2001 was unimpressed by some attempts by scientists to influence public policy by misleading claims and emotive pleas:²²

This brief survey suggests that the goalposts are continually being shifted by the reproductive technologists, always with the effect of pushing the regulatory parameters further and further out. Now we learn that Dr Trounson has been peddling a lie about the magical cure of a rat to support his case. When questioned by a number of people, Dr Trounson insisted that the rat had recovered mobility through the use of embryonic stem cells, yet the research paper that he referred to and said that he had read clearly indicates that the study involved adult stem cells. And at that very time during the same presentation Dr Trounson called for scientific integrity! Is this parliament going to enact legislation based on hype, gross exaggeration and lies?

²¹ 2002 CPD (HofR) 5891; 27 August 2002

²² 2002 CPD (HofR) 6107; 28 August 2002

This raises the basis upon which we make public policy. Many in this debate have referred to personal experiences and to the suffering of people they know or have known. This is an admirable position, but the tug of emotions should not be the basis for public policy. Like others, I have the experience of family and friends who have suffered debilitating illness. All of us wish to overcome such conditions, but sentiment is hardly the basis for good public policy. Indeed, in all other areas of policy we ask rational questions and seek to understand the desired outcomes as well as the unintended consequences of any decision.

In the Senate, there was more detailed consideration of SCNT, in part because Senator Natasha Stott Despoja was very informed about the developing technology and Senator Brian Harradine was concerned to ensure a comprehensive ban on embryo experimentation. Stott Despoja told the Senate that the bill in banning SCNT was “relatively conservative by international standards” given that SCNT was by then “permissible in the UK, Israel and non-national institutes of health funded research in the USA”.²³ Senator Ron Boswell told the Senate, “The bill expressly prohibits somatic cell nuclear transfer.”²⁴ Senator Kay Patterson, the Minister for Health and Ageing, defended the bill’s definition of “embryo” as one that “encompasses all embryos, regardless of how they were created....This includes embryos created by somatic cell nuclear transfer.”²⁵

The *Prohibition of Human Cloning Act 2002* required the responsible Minister to set up an independent review of the operation of the Act so that a report could be provided to the Council of Australian Governments and both Houses of Parliament before the third anniversary of the Act’s operation. Section 25(4) provided:

The persons undertaking the review must consider and report on the scope and operation of this Act taking into account the following:

- (a) developments in technology in relation to assisted reproductive technology;
- (b) developments in medical research and scientific research and the potential therapeutic applications of such research;
- (c) community standards;
- (d) the applicability of establishing a National Stem Cell Bank.

During the Senate debate on this provision, Senator Harradine was suspicious that the three year review of the legislation could result in a weakening of the comprehensive ban on cloning. He suspected that Senator Stott Despoja wanted to leave the door open to therapeutic cloning. He urged:²⁶

We really have to be quite open as to what we are saying in this debate. Is it a fact, as I suspect it is, that this legislation will pave the way for such cloning by the use of the review system, which will be a private review undertaken by ministerially appointed members? Let’s be open about what we mean.

Harradine failed in his attempts to amend the provisions for the review. He unsuccessfully moved an amendment to section 25 which set down the requirements for the review. He wanted a clause providing:²⁷

²³ 2002 CPD (S) 5823; 11 November 2002

²⁴ Ibid, 5837

²⁵ Ibid, 6145; 12 November 2002

²⁶ Ibid, 6340; 14 November 2002

²⁷ Ibid, 6292; 13 November 2002

The Minister must not choose a person to undertake the review if the person has a continuing personal, professional or pecuniary conflict of interest with the matter being reviewed.

As well as a consideration of community standards and medical developments, he also wanted the committee to take into account:

- (a) the need to preserve and protect human life;
- (b) the need to ensure that in any medical research on human subjects, considerations relating to the wellbeing of a human subject will take precedence over the interests of science and society.

The committee of two lawyers and four medico-scientific experts with their own research interests was chaired by the late Mr John Lockhart AO QC. The other lawyer Professor Loane Skene was known to be sympathetic to human cloning for biomedical research. In her own submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs in March 2000, she had written:²⁸

Even if one regards reproductive cloning as contravening human dignity, surely the same is not true of therapeutic cloning. A person's 'dignity' is best respected by trying to save the person's health and life. Even if embryonic cells are used, I do not believe that any 'dignity' interest of the embryo outweighs the interests of a dying or diseased person.

One of the scientists, Professor Ian Kerridge, was the chief author of a freshly published article in the *Medical Journal of Australia* raising three major concerns about the establishment of the first Catholic medical school in Australia:

1. the adequacy of the medical education provided and potential resulting limitations on patient access to health services and provision of comprehensive care
2. equitable access to medical education in an increasingly competitive environment
3. academic freedom and tolerance of diverse beliefs

Kerridge and his co-authors stressed that "education at secular as well as religious medical schools should always be grounded in dominant and morally justifiable societal norms, such as tolerance, equity, justice and care". The authors insisted that the selection of applicants "should proceed in a manner that is non-discriminatory and that actively seeks to promote diversity of beliefs and values" and they saw a need for ongoing external assessment of "the abilities of graduates to deliver care that is consistent with the varying needs, and values of the broader Australian community."²⁹ Religious groups advocating the moral status of the human embryo were justifiably wary about the reception they would receive from the Lockhart committee. Despite Professor Kerridge's concerns, Catholic medical schools have long existed in the United States, making a significant contribution to medical education and research there. Religious groups had good grounds for suspecting that committee members

²⁸ Submission by Associate Professor Loane Skene, 1 March 2000, para 3.2.3.

²⁹ I Kerridge, R Ankeny, C Jordens, and W Lipworth, "Increasing Diversity at the Cost of Decreasing Equity? Issues raised by the establishment of Australia's first religiously affiliated medical school", *The Medical Journal of Australia* 2005; 183 (1) 28-30

like Kerridge would discount their religiously informed objections to the creation of human embryos specifically for destructive experimentation.

As part of its public consultation process reviewing both the *Prohibition of Human Cloning Act 2002* and the *Research Involving Human Embryos Act 2002*, the Lockhart committee circulated an *Issues Paper* in which it acknowledged:³⁰

It is not the purpose of the reviews to revisit the underpinning community debate and rationale for the two Acts. Rather, the purpose is to review the Acts in the light of any changes in scientific or community understanding of standards since 2002, and any indications that the provisions are no longer appropriate and/or practical in their application.

In its reviews, the Committee dedicated a whole chapter to “Community standards on status and use of embryos”, observing that “community standards” is a concept that includes “beliefs, values, expectations and preferences”.³¹ In light of the limited developments in scientific research since 2002, the committee needed to detect a significant change in “community standards” if it were to recommend the legalisation of SCNT given that it was banned by Parliament without a dissenting voice in 2002 following a parliamentary committee which had recommended a three year moratorium three years previously. Had community standards changed, at least in the opinion of the committee?

The committee found the need to take account of community standards to be “a challenging requirement”. The committee was troubled as to how to make any assessment of “community standards”. It observed:³²

Australian society is composed of many ‘communities’, each of which may have differing perspectives, interests and values. Furthermore, the standards evidenced by these communities may not be articulated or developed, may differ between individual members of these communities, may change with time or circumstance, and may not be binding. Consequently, the Committee considers that the social and moral concerns raised by embryo research and human cloning may not be explained simply by reference to a single set of values, beliefs, and interests (or ‘standards’) held by a single ‘community’.”

This was a novel approach to the interpretation of “community standards” in an Australian statute. Commonwealth laws such as the *Broadcasting Services Act 1992* and the *Australian Communications and Media Authority Act 2005* require regulatory authorities to assist providers to develop codes of practice that, “as far as possible, are in accordance with community standards”³³. In the area of industrial law, the *Workplace Relations Act 1996* provides for Commission decisions to promote community standards in relation to youth employment.³⁴ In these statutes, there is no sense that community standards can be broken down into different standards commanding assent only from discrete groups in the community. There is a need to articulate standards which are sufficiently general as to command assent from the

³⁰ Legislation Review Committee, *Issues Paper: Outline of Existing Legislation and Issues for Public Consultation*, August 2005, p. iv

³¹ Legislation Review Committee, *Reports, Legislation Review: Prohibition of Human Cloning Act 2002 and Research Involving Human Embryos Act 2002*, December 2005, p. 69

³² Ibid., p. 69

³³ See s. 158 *Broadcasting Services Act 1992*, s. 10, *Australian Communications and Media Authority Act 2005*

³⁴ See ss. 3, 88A, 88B(3), 143, *Workplace Relations Act 1996*

majority of citizens, even though those standards might then apply differently to different groups in society.

Whenever the High Court has considered “community standards” it has done so with the presumption that there are general standards ascertainable and approved by most reasonable members of the community. Back in 1968, the court had to consider community standards in the context of obscenity. Justice Windeyer in *Crowe v Graham* said that “community standards are those which ordinary decent-minded people accept. They are not what those who peddle obscenities and indecencies urge should be accepted.”³⁵ He adopted Sholl J’s observation in the Victorian Supreme Court that “the court is not called upon to overlook or minimise what is really obscenity, merely in order supposedly to show its own judicial broadmindedness or tolerance or imperturbability or even cynicism.”³⁶ Referring to *Crowe v Graham* in 1990, Justices Toohey and McHugh in *DPP v United Telecasters Sydney Ltd* said, “In appropriate cases juries may be, and often are, required to apply their own knowledge as to community standards such as honesty, reasonableness, obscenity, etc.”³⁷ In the context of stem cell research, community standards would then be those standards which “ordinary decent-minded people” would accept, rather than the standards of scientists.

In a testator’s family maintenance case, *White v Barron*, Justice Stephen said there was a need “to apply prevailing community standards of what is right and appropriate since it is by those standards that the content both of the moral duty owed by a just husband and father to his wife and children and of departures from it will be measured.”³⁸ The will provided for an annuity which was inadequate for the widow’s proper maintenance. The residue of the estate was to go to the testator’s children of a former marriage. One issue was whether the court should delete the provision in the will by which the annuity to the wife ceased on her remarriage. Justices Stephen and Aickin each wrestled with changing community standards. Justice Mason saw a need to adjust “the court’s approach to the application of the Act so that it conforms more closely to current community standards”.³⁹ Aickin could not agree with the majority of the Court of Appeal which had decided there had been a change in community standards with the result that it would be improper to make the annuity cease on remarriage. Aickin thought the annuity should cease on remarriage, as specified in the will, as “it is still the fact that both the law and the community regard a husband, including a second husband, as under an obligation to provide support for his wife.”⁴⁰ Community standards may change over time, but the decision maker applying community standards needs to make an assessment of what reasonable contemporary people think is an acceptable range of behaviour.

More recently, in *Marion’s Case*, the High Court considered the power of a court to authorise the non-therapeutic sterilisation of a mentally disabled girl. Justice Deane thought that which constitutes “the welfare of a child in a particular case falls to be determined by reference to general community standards, but making due allowance

³⁵ (1969) 121 CLR 375 at p. 399

³⁶ Ibid., quoting Sholl J in *Mackay v Gordon Gotch (Asia) Ltd*, [1959] VR 420 at p. 426

³⁷ (1989-1990) 168 CLR 594 at p. 607

³⁸ (1980) 144 CLR 431 at p. 440

³⁹ Ibid., at p. 445

⁴⁰ Ibid., at p. 452

for the entitlement of parents, within limits of what is permissible in accordance with those standards, to entertain divergent views about the moral and secular objectives to be pursued for their children.”⁴¹ In dissent Justice Brennan said that the rule he articulated for resolution of the case might be said to be “too idealistic and...out of touch with contemporary community standards”.⁴²

Community standards have been invoked regularly by the court in negligence cases. In *Gala v Preston*, Justice Brennan said, “And, once the facts are proved, all that remains for the court to do in determining the standard of care is to apply community standards – the standards of a hypothetical reasonable person in the defendant’s position.”⁴³ Adopting a similar approach to Chief Justice Mason and Justices Deane and Gaudron in *Bryan v Maloney*⁴⁴, Justices McHugh and Callinan each employed a notion of community standards in *Pierre v Apand Pty Ltd*⁴⁵ in determining the limits of liability for mere economic loss. Chief Justice Gleeson in *Tame v New South Wales* has said that “proper regard must be paid to the need for the law of negligence to reflect community standards and understandings of what is meant by ‘reasonable’.”⁴⁶ Espousing the role of juries in determining disputed issues of fact including whether a defendant’s conduct conforms to a requirement of reasonable care, Chief Justice Gleeson has pointed out that “decision making by the collective verdict of a group of citizens, rather than by the reasoned judgment of a professional judge, is a time-honoured and important part of our justice system. It also has the important collateral advantages of involving the public in the administration of justice, and of keeping the law in touch with community standards.”⁴⁷ When considering the law of contributory negligence, five members of the High Court including Justice Heydon who has expressed some misgiving about judicial reliance on such indeterminate justifications, said in *Thompson v Woolworths (Qld) Pty Ltd* :⁴⁸

If the obviousness of a risk, and the reasonableness of an expectation that other people will take care of their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration.

In *Reader’s Digest Services Pty Ltd v Lamb*, Justice Brennan said, “The defamatory nature of an imputation is ascertained by reference to general community standards, not by reference to sectional attitudes.”⁴⁹ This brief overview of the High Court’s reliance on community standards in judicial decision making confirms the amorphous content of such standards. But such standards do have an ascertainable content, determined by asking what a reasonable person who is a non-specialist would decide is fair, reasonable, and decent taking into account the variety of viewpoints in the community. In the past, parliament and the courts have set “community standards” as

⁴¹ (1992) 175 CLR 218 at p. 295

⁴² Ibid., at p. 277

⁴³ (1991) 172 CLR 243 at p. 269

⁴⁴ (1995) 182 CLR 609 at pp. 617-9

⁴⁵ (1999) 198 CLR 180 at pp. 220, 321

⁴⁶ (2002) 211 CLR 317 at p. 332

⁴⁷ *Swain v Waverley Municipal Council*, (2005) 220 CLR 517 at p. 522. These observations were later quoted with approval by Justices Gummow, Callinan and Heydon in *Laybutt v Glover Gibbs Pty Ltd*, (2005) 221 ALR 310 at p. 317

⁴⁸ (2005) 221 CLR 234 at p. 247

⁴⁹ (1981) 150 CLR 500 at p. 507

a criterion for decision making in relation to matters which are familiar to the community in their ordinary daily lives. Non-specialist citizens have had experience of and have made their own judgments about those matters which are to be assessed against community standards. It is a much more difficult task to apply community standards to moral and scientific questions which are novel and beyond the experience of most of the community. However, it was not as if the Lockhart Committee was being asked to assess community standards in this realm for the first time. The committee saw its task as assessing whether there had been any changes in “community understandings of standards since 2002”. The Australian Parliament had debated the matter at length in 2002 after a committee of the parliament had received hundreds of submissions and many days of testimony. After this democratic process, the parliament had passed, without a sole dissentient, a law which prohibited all human cloning including SCNT.

The Lockhart committee considered the survey of community attitudes by Biotechnology Australia which conducted regular random phone polls of 1,000 people at a time, asking the question, “In relation to human stem cell issues, for each of the following situations, do you see them as being morally acceptable to society or not?” For the situation of “human stem cells being derived from embryos”, 53% of respondents approved or strongly approved in 2002, and 65% of respondents approved or strongly approved in 2005. The committee thought the survey provided an important insight into Australian attitudes but it was justifiably wary of the results observing:⁵⁰

The terms used were not defined, the survey did not seek to measure knowledge, and the focus groups suggested that many participants had limited understanding of cloning or stem cell research, all of which suggest that some caution is required when interpreting the results of this research.

The committee report sets out lengthy quotations from submissions and evidence detailing varying views about the moral status of the human embryo. Some ethicists like Dr Leslie Cannold from the Centre for Applied Philosophy at the University of Melbourne argued that the moral significance of the human embryo is determined in part by the general community understanding that an embryo is formed by sperm penetrating an egg. According to Cannold:⁵¹

Whether sexual reproduction is involved in the cell’s creation, as well as whether it is intended to be part of a parenting project – contribute to the moral status. A dividing cell created by SCNT is importantly different because of the intentions of those forming it.

Professor Julian Savulescu surmised that the embryo “has a lower moral status when it’s not part of that parental project.”⁵² Seventy-five third year Bachelor of Biomedical Science students from the University of Melbourne submitted:⁵³

⁵⁰ Legislation Review Committee, *Reports, Legislation Review: Prohibition of Human Cloning Act 2002 and Research Involving Human Embryos Act 2002*, December 2005, p. 87

⁵¹ Transcript of Melbourne Hearings quoted in Legislation Review Committee, *Reports, Legislation Review: Prohibition of Human Cloning Act 2002 and Research Involving Human Embryos Act 2002*, December 2005, at p. 70

⁵² Transcript of Sydney Hearings quoted in Legislation Review Committee, *Reports, Legislation Review: Prohibition of Human Cloning Act 2002 and Research Involving Human Embryos Act 2002*, December 2005, at p. 71

⁵³ Quoted in Legislation Review Committee, *Reports, Legislation Review: Prohibition of Human Cloning Act 2002 and Research Involving Human Embryos Act 2002*, December 2005, at p. 81

It is difficult to see how an embryo created and destroyed for research purposes can be considered to have been harmed; it is in no worse a position than if it had not been brought into existence in the first place.

The same might be said of third year university students or any other group you wanted to define down so that you might “exploit them with impunity and a clear conscience”. The committee noted that many submissions and much of the evidence heard by the committee related to citizens’ varying perceptions of the moral status of the human embryo and the moral obligations owed to it. The committee noted the caution issued by some witnesses “about the dangers of making biological definitions do moral work”⁵⁴. But they did not heed the caution.

The committee thought that “use of excess ART embryos for research under a strictly regulated licensing regimen, although not supported by all respondents, appears to have been relatively well accepted as a pragmatic solution” to the moral dilemmas.⁵⁵ That is why the Parliament in 2002 split the bills and gave its approval to experimentation on excess ART embryos only. In just seven lines of reasoning, the committee then managed to decide the critical question of whether to approve SCNT in these terms.⁵⁶

Attitudes towards creation of human embryos for research purposes, however, appeared to be much more complex and reflected, not only beliefs regarding the moral status of the embryo, but also the cultural significance of reproduction and the social relevance of family and community relationships. For these reasons, the Committee found that, while it was difficult to logically define a moral difference between embryos formed by fertilisation and those formed by nuclear transfer or related methods, it appeared that embryos formed by fertilisation of eggs by sperm may have a different social or relational significance from embryos formed by nuclear transfer.

This cleared the way for the committee to recommend not only SCNT using human eggs but also to recommend the more convenient use of animal eggs to form hybrid embryos with the nucleus of a human cell. The committee put to one side Parliament’s unanimous prohibition of all cloning in 2002 and unanimously recommended cloning even with the use of enucleated animal eggs on the ground that there were diverse views in the community and therefore any scientific exploration should be permitted provided there were not strong arguments against it from all groups, including those who discounted the moral significance of the life of the human embryo. The government had chosen a group of scientific liberals to conduct the review and they would err on the side of freedom for scientific research unless there was compelling evidence of community revulsion or objection to a suggested practice.

The committee conceded there was community disagreement about the moral significance of the life of the human embryo. There was a greater community consensus about the differing social or relational significance of an embryo formed specifically for destructive experimentation and one formed with the prospect of implantation and growth. So the committee put to one side the moral significance of

⁵⁴ Legislation Review Committee, *Reports, Legislation Review: Prohibition of Human Cloning Act 2002 and Research Involving Human Embryos Act 2002*, December 2005, p. 71

⁵⁵ Ibid., p. 87

⁵⁶ Ibid., pp. 87-8

the embryo and recommended allowing experimentation on all embryos other than those with social or relational significance. The outcome would be that those persons with concerns about the moral significance of the embryo would not engage in destructive experimentation. Those with no such concerns would be free to engage in the creation and use of embryos provided only they did not allow the embryo to develop any social or relational significance.

There can be no doubting the general community consensus against human cloning for the production of children. Had there been a change in community standards or in scientific developments or scientific understanding that would warrant a revisiting of Parliament's unanimous banning of all human cloning including SCNT? The Victorian Government thought so, advocating "that the legislation should be extended to allow the promising technique of SCNT under an effective regulatory and ethical framework".⁵⁷ The Victorian Government argued that the product of SCNT was not a normal embryo but rather "an SCNT embryonic construct". While continuing to oppose the implantation of an SCNT embryonic construct into a womb, the Victorian Government submitted that "permitting SCNT for research purposes provides the greatest scope for accelerating the health and economic short term benefits offered by stem cell research".⁵⁸ What have been the developments in science or the change in community standards warranting a change to the 2002 law? The Victorian government asserted, "There have been substantial changes in the technology supporting stem cell research since the legislation was originally drafted in 2002".⁵⁹ This assertion is unsupported and contested by respected scientists such as Professor Jack Martin who noted in his submission to the Lockhart review:⁶⁰

- The potential benefits of treatment of diseases with human ES cells have been greatly exaggerated, with many of the suggested cures only long term possibilities and some not even remotely possible. There has been no proof of concept provided from animal experiments that animal ES cells can be used effectively and with long term safety.
- The use of somatic cell nuclear transfer (SCNT) to generate ES cells to tailor cells for individual patients is a process that is beset with many practical difficulties, including the requirement for a large supply of donor eggs, and the inevitable very great expense of the project per patient.
- In addition to requiring animal studies to establish efficacy, safety issues are paramount, with ES cell transplantation still being associated with a substantial rate of formation of serious tumours. The causes of that complication must be determined and tumour formation prevented before any human therapeutic studies could be contemplated.
- Currently there is no evidence to justify even the most limited trials of ES cells in treatment of human subjects.
- With no adequate evidence to show that human ES cells are essential to provide treatments for disease, the argument has been made that research should be permitted on human ES cells obtained by SCNT, to study mechanisms of specific diseases. The validity of this claim must also be established through animal experimentation, to show that the potential benefits are sufficient to overcome some of the ethical objections.

The Lockhart Committee unanimously recommended legislative changes which would permit human cloning provided the cloned embryos are not permitted to thrive

⁵⁷ Submission by the Victorian Government to the Reviews of Australia's Human Cloning and Embryo Research Acts, September 2005, LRC Submission No 537, p. 5

⁵⁸ Ibid, p. 6

⁵⁹ Ibid., p. 8

⁶⁰ T. J. Martin, Submission to the Legislation Review Committee, LRC552, p. 1

beyond 14 days and are not permitted to be implanted in any womb. Such changes would not have been recommended by a scientist like Professor Martin if he had been a member of the Lockhart Committee. And yet, Minister Julie Bishop who had appointed the members of the Lockhart Committee later appointed Martin to the Human Genetics Advisory Committee, describing him as one of Australia's "research giants".⁶¹

In assessing the status of the embryo, the committee was assisted by the threefold division of positions put forward by the United Kingdom House of Commons Science and Technology Committee's report, *Human Reproductive Technologies and the Law*:⁶²

1. The embryo is human life and therefore is entitled to conferral of full human rights
2. The development of personhood is a gradual process and the embryo is entitled to some protection
3. The embryo is no more than a collection of cells, albeit with potential to develop into a human being.

The committee noted that the first position was "more likely to be expressed by community and religious groups" and the third position was "more likely to be expressed by scientists". However, the committee noted that "this was not universally the case, and differences of opinion were evident within every professional and social group".⁶³ The committee opted for the third position in relation to those embryos deliberately created by scientists for the purposes of research and experimentation. By prohibiting development beyond fourteen days and prohibiting implantation in the womb, the committee was satisfied that the potential to develop into a human being was legally negated so that the law could then treat such an embryo during the course of its life as "no more than a collection of cells". Any fair reading of the lengthy parliamentary debate in 2002 reveals that most of our elected representatives adopted the second position with very few opting for positions one or three.

The Lockhart Committee unanimously made 54 recommendations including two recommendations permitting human somatic cell nuclear transfer using either human or animal oocytes. Recommendations 23 and 24 provide:

Human somatic cell nuclear transfer should be permitted, under licence, to create and use human embryo clones for research, training and clinical application, including the production of human embryonic stem cells, as long as the activity satisfies all the criteria outlined in the amended Act and these embryos are not implanted into the body of a woman or allowed to develop for more than 14 days.

In order to reduce the need for human oocytes, transfer of human somatic cell nuclei into animal oocytes should be allowed, under licence, for the creation and use of human embryo clones for research, training and clinical application, including the production of human embryonic stem cells, as long as the activity satisfies all the criteria outlined in the amended Act and these embryos are not implanted into the body of a woman or allowed to develop for more than 14 days.

⁶¹ Julie Bishop, Media Release, 13 January 2006

⁶² Quoted in Legislation Review Committee, *Reports, Legislation Review: Prohibition of Human Cloning Act 2002 and Research Involving Human Embryos Act 2002*, December 2005, at pp. 73-4

⁶³ Ibid., p. 74

Anna Lavelle, chief executive of AusBiotech, welcomed these recommendations, claiming, “After considerable research, consultation and reflection, the independent umpire has laid out his decision. It is time to accept it and move on.”⁶⁴ She is anxious to avoid a return to the intense parliamentary debate of three years ago.

The so called independent umpire made it clear from the outset of its deliberations that it had no brief “to revisit the underpinning community debate and rationale for the legislation”. Rather its role was to review the legislation “in the light of any changes in the scientific or community understanding or standards since 2002, and any indications that the provisions are no longer appropriate and or practical in their application”.⁶⁵

The committee conceded that “it is not known at this stage whether embryonic or adult stem cell research will provide greater benefits (if any)”⁶⁶. It acknowledged that in 2005, as in 2002, embryonic stem cell research “is mainly confined to preclinical (animal) studies because the cells are not yet characterised well enough for use in clinical trials and there are significant risks (such as tumour formation)⁶⁷”.

The review committee found that there was strong community division about the acceptability of cloning for biomedical research. Those less worried about the status of the embryo favoured the creation of embryos for research and experimentation by means of SCNT which creates an embryo unsatisfactory for implantation and growth. Lavelle says the egg in this instance “is used purely as an incubator for copying the patient's own cells”. There could be no objection to the destruction of an incubator once it had performed its task. But there is no getting away from the fact that the incubator becomes one with the incubated nucleus and is an embryo, regardless of the “creator's” intention.

Everyone wants cures for terrible diseases. There is agreement that embryonic stem cell research has not yet born any results in the cure of disease. The community disagreement in 2005 focused on the same question as it did in 2002. What respect is owed to an embryo regardless of its age, regardless of its mode of creation, and regardless of its intended use? Some, including many scientists, think that an embryo should be accorded some special “human” status only if it be created by the union of an egg and sperm, be more than 14 days old, and be intended by its “creators” for implantation in a womb. Others think that an embryo should be accorded special respect from the moment of creation regardless of means, intention or age.

Given that some excess embryos remain when a couple have completed an IVF program, lawmakers have given approval to the parents permitting experimentation on the excess embryos. Does that mean that we as a community no longer have a universal respect for embryos, even if we arguably did in the past? The committee sided with those who view this exception as an open door for the creation, experimentation and destruction of embryos. They argue: “To permit one (production

⁶⁴ Anna Lavelle, “Why we all need stem cell research”, *The Australian*, 21 December 2005

⁶⁵ ⁶⁶ Legislation Review Committee, *Issues Paper: Outline of Existing Legislation and Issues for Public Consultation*, August 2005, p. iv

⁶⁶ Legislation Review Committee, *Reports, Legislation Review: Prohibition of Human Cloning Act 2002 and Research Involving Human Embryos Act 2002*, December 2005, p. 80

⁶⁷ Ibid, p. 53

and destruction of ART embryos) but not the other (production and destruction of nuclear transfer and other bioengineered embryos) would be inconsistent and appear to attach more importance to the treatment of infertility than to the treatment of other diseases and conditions that could be helped as a result of this activity".⁶⁸

But the moral argument is the same as it was in 2002. We can still show some respect for all embryos, not just treating them as a means to an end, by giving every embryo created an opportunity to be selected for implantation and growth to term. At the end of an IVF procedure, we then have the choice of letting the excess embryos succumb or permitting experimentation for the good of humanity. We abandon universal respect for embryos, and simply use them as a means to an end, when we create some embryos with no intention of giving them the opportunity to be selected for implantation, creating them with the sole purpose of experimentation and destruction, creating them for someone else's good, not their own.

Even those politicians who approved experimentation on excess ART embryos in 2003 saw the validity of this moral distinction between means and ends. Some Australians hope they will continue to see it in 2006. To date, there is not even hard scientific evidence of utilitarian benefits from embryo creation, experimentation and destruction to cloud that moral vision. In 2002, our elected politicians decided that we would not permit the creation of embryos unless they were created with the possibility of implantation in a womb. To create embryos with no intention of permitting implantation is to cross a moral Rubicon. It should not be crossed by politicians simply endorsing the report of an unelected committee whose mandate was to report on scientific developments and changes to community standards. The Lockhart committee was not mandated to make moral changes or leaps. Respecting our own humanity, we need good grounds to follow their recommendation that some embryos be made less equal than others.

Those who continue to oppose the use of even excess ART embryos for research argue that the moral Rubicon is already crossed when we permit experimentation and destruction of any human embryo or person. They point to "slippery slope" and "thin edge of the wedge" arguments to suggest that if we treat any human embryo as a means to an end, there is nothing to stop some in the community then justifying experimentation upon the dying, lonely, semi-conscious person "who is going to die anyway" as "they will not suffer; and this could help others in the future".

Some proponents of experimentation on embryos created for that purpose, and not just those excess to ART requirements, argue that once this moral Rubicon is crossed with community support (as they argue it now has been in Australia), then it is open slather. Associate Professor Malcolm Parker put it well in his submission to the Lockhart Committee:⁶⁹

...opponents of therapeutic cloning often rely on the argument that it is less morally serious to use spare IVF embryos in research than to create and destroy embryos specifically for research. This argument cannot be sustained...In both cases, embryos are created and destroyed in pursuit of human welfare...Both kinds of embryos have the potential to develop into a person, so a moral distinction

⁶⁸ Ibid., p. 170

⁶⁹ Submission LRC 311, quoted at p. 80

between them cannot be grounded on potentiality...Furthermore, a moral distinction can not be made on the basis that spare IVF embryos had a chance of becoming a person, whereas those created expressly for research never did, and that this constitutes greater instrumentalisation and exploitation of these embryos.

There are three moral positions that might be put. First, experimentation on any human embryo, not for the benefit of that embryo, is wrong. Second, experimentation on a human embryo which was created with the possibility of implantation and as part of a group of embryos created to maximise the prospect of successful implantation of a healthy embryo, is permitted once it is no longer required. Third, the creation of embryos specifically for experimentation and destruction is permitted provided only that the experimentation is aimed at improving the lot of humanity. In 2002, the majority of our Parliament thought the community standard was reflected in position two, though a significant minority of the Parliament thought it was reflected in position one. Now the Lockhart committee has unanimously expressed the view three years later that the community standard is reflected in position three. This may well be the personal preference of each member of the Lockhart Committee, and it may well have been their personal preference back in 2002. But the committee has not adduced any evidence of a change in community standards since 2002 and there is no evidence adduced by the Committee of "developments in medical research and scientific research and the potential therapeutic applications of such research".

On the vast plain of embryo research, there are two Rubicons. The Australian community may well have crossed the first in 2002, given the lack of community reaction to the Parliament's decision to permit experimentation on excess embryos which were created with the intention of their being part of a project aimed at successful implantation of one of the batch, and with the strict requirement that there not be any more embryos created than were required for a successful implantation of a healthy embryo. But there is a second Rubicon. That is where we now stand. Beyond this second Rubicon is a city where the scientist is justified in creating human life only so that he might experiment upon it and destroy it without the need for any respect of the dignity of that potential human life. The US Presidential Commission found that there is a diversity of viewpoints in the US community looking across the second Rubicon to that city of morally unbounded scientific research. Some of the Australian community are not even prepared to cross the first Rubicon. Our parliament having crossed the first Rubicon in 2002 and having deliberately stopped short of crossing the second, there is still no evidence of a change in community standards that would warrant the second crossing.

There is still the prospect that embryonic stem cells could be produced without the need first to produce a human embryo and then destroy it. Norman Ford, the Director of the Caroline Chisholm Centre for Health Ethics, has recently reviewed a proposal "to modify the somatic cell nucleus so that after transfer to an enucleated egg only a pluripotent stem cell could be formed – not a totipotent cell or embryo."⁷⁰ Community standards and the near universal condemnation of SCNT by our elected politicians just four years ago point to the need for Australians to wait until conscientious scientists have exhausted all efforts to find ethical sources of

⁷⁰ N. Ford, "Human Pluripotent Stem Cell Research and Ethics", 2006 *Monash Bioethics Review* Vol 25, No 1, January 2006, pp. 31-41, at p.38

pluripotent stem cells for research and therapies available to all. The ethical dilemmas cannot be solved by redefining the product of SCNT as anything but a human embryo. In what circumstances would reasonable members of the Australian community think it proper to create human or hybrid embryos by somatic cell nuclear transfer with the primary intention of experimenting upon them such that their destruction was an inevitable consequence? The situation is unchanged from 2001 when the Standing Committee on Legal and Constitutional Affairs, of which Julie Bishop was a member, stated: “Currently there is no therapeutic purpose to be served by the creation of such embryos as research has identified no specific opportunities that require the deliberate formation of embryos.”⁷¹ There has not been sufficient change in the state of scientific knowledge nor in community acceptance of deliberate creation of human life for destructive experimentation to warrant a revisiting of the Australian Parliament’s unanimous 2002 condemnation of all forms of human cloning for biomedical research, regardless of whether the eggs used are human or animal. Recommendations 23 and 24 of the Lockhart Committee should be left in cold storage or left to succumb in the light of day.

⁷¹ House of Representatives, Standing Committee on Legal and Constitutional Affairs, Human Cloning: Scientific, Ethical And Regulatory Aspects Of Human Cloning And Stem Cell Research, 2001, para 12.42