Tracy Maund Lecture

LOUIS WALLER*

This lecture begins with an examination of the impact of judge made law on the practice of medicine, and of medicine on case law, using recent cases on informed decision making as the example. Then it contrasts the force and effect of legislation enacted on medical issues, especially Victoria's enactments on assisted reproduction. The lecture concludes with the argument that the law must not lag behind developments in medical science and clinical practice. It contends that the legislature in a modern, democratic society has both the power and the responsibility to ensure that that does not happen.

I

Law and medicine have an ancient history, a medieval history and a modern history. Both disciplines, both professions, have a contemporary history, with new chapters written each day. Both bodies of learning and practice are taught in the most famous universities in this country, and in the whole civilised world. 'Medicine,' said Lord Bryce, an eminent jurist turned statesman and ambassador, is 'the only profession that labors incessantly to destroy the reason for its own existence.'[1] Law is the instrument whereby justice may be achieved in the society in which all of us live.

But '[t]he roots and foundations of law and medicine are far apart.'[2] That sentence, uttered by Sir Owen Dixon, then Chief Justice of Australia, in his Syme Oration before the Royal Australasian College of Surgeons in 1957, expresses a commonly-held - and in some contexts an accurate - assessment. Dixon continued by saying this:

> The great service which law, particularly English law, has done for society is a commonplace. But among other things it has produced habits of thought which lead us to think that all human conflicts will yield to reason and that if any contentious situation is laid bare in detail by full inquiry and investigation in the manner of the law courts, further controversy must be stilled.[3]

* Emeritus Professor of Law, Monash University. This paper was delivered at the Royal Women's Hospital in Melbourne on 7 August 2001.

1 Lord Bryce in an address at a dinner for General W C Gorgas, 23 March 1914.

2 Sir Owen Dixon, *Jesting Pilate*, (2nd ed, 1997) 2.

3 Ibid 9.

This is a view of the law and the legal system which focuses its and our attention on the resolutions of controversies by courts and judges through the application of principles, standards and rules of law. It is a most important perspective, it is an aspect in the achievement of justice. But it does not define, and was not intended by Dixon to define comprehensively the whole part which the law and the legal system plays in our modern democratic society.

In some of the human conflicts which come before judges and courts, including final courts of appeal, medicine stands before the law. The law's reaches stop before no boundary erected by another profession, no matter how venerable, how eminent, how highly regarded it is. It was in one such case that Windeyer J said this, '[l]aw, marching with medicine but at the rear and limping a little has today come a long way ...'[4]

His attractive expression has been often quoted to introduce and even to support the argument that the law always lags behind medicine, especially behind advances in modern medicine, and so ill-serves the community as a consequence. As always, it is not only instructive but also fair and just to read that sentence in its context. The context is the progress made in the law between 1888, when the Privy Council gave its advice in a leading Victorian case that there was no liability for causing nervous shock or psychiatric injury negligently,[5] and 1970, when Windeyer J wrote his judgment. He immediately went on to state that in 1970, '[a]n illness of the mind ... is not the less an injury because it is functional, not organic, and its progress is psychogenic.'[6]

Along the path, the slow path, from 'precedent to precedent', people who undoubtedly had suffered serious psychological traumas as a consequence of the negligence of others had been denied any compensation by the courts. One of the most poignant of those cases ended its forensic journey before the High Court of Australia in 1939.[7] Three judges of that Court held that Mrs Chester, the appellant, could not recover damages for the serious psychiatric illness she suffered in these circumstances. She and her young family lived in a Sydney suburban street. The local council dug a trench, seven feet deep, at the street's end; a railing barrier surrounded the trench. It rained hard and the trench filled with water. It was unattended. Children easily passed under the barrier, to play in a pile of white sand on the trench's edge. Mrs Chester's seven-year-old son went out to play. He did not come back, and his mother went to look for him. She was at the trench when, hours later, a police officer took her dead child from the water. There was expert medical evidence that she suffered serious psychiatric traumas as a result.

4 *Mount Isa Mines v Pusey* (1970) 125 CLR 383, 395.
5 *Coultas v Victorian Railway Commissioner* (1888) 13 App Cas 222.
6 *Mount Isa Mines v Pusey* (1970) 125 CLR 383, 395.
7 *Chester v Waverley Municipal Council* (1939) 62 CLR 1.

The High Court denied recovery to Mrs Chester because the majority held that it was not 'within the reasonable anticipation of the defendant'[8] [the council] that a mother seeing the dead body of her child would suffer nervous shock. The Chief Justice stated that '[d]eath is not an infrequent event, and even violent and distressing deaths are not uncommon.'[9]

Evatt J, the only dissenter, responded forthrightly that it was nonsense to argue that other parents would not have suffered the shock and trauma Mrs Chester did. 'I think', he stated, 'this is mere assertion and contradicted by all human experience. I think that only "the most obdurate heart" could have gone through the experience without serious physical consequences.'[10]

Forty-five years later, the same High Court of Australia adopted that dissenting judgment as a correct expression of the law.[11] In the Preface he wrote for Dr Danuta Mendelson's monograph *The Interfaces of Medicine and Law - The history of the liability for negligently caused psychiatric injury (nervous shock)*, Sir Anthony Mason, a former Chief Justice of Australia, wrote '[i]t is not a story which reflects a great deal of credit on the law. That is because the law has not always managed to keep pace with advances in medical knowledge.'[12] He went on '[f]ortunately judges are making much more use of the extensive modern medical literature. That will have the effect of ensuring that the law keeps pace with advancing medical knowledge.'[13]

That knowledge encompasses not only pioneering research and its clinical applications but also the ways in which the practice of medicine is undertaken in our own society. A very recent chapter in the work of Australia's final court of appeal tends to show that Sir Anthony Mason's judgment, and his prediction, are accurate. In a quartet of decisions published between 1992 and 2001, the High Court of Australia has moulded new rules of law in the realm of communications between patients and their doctors, and also on the relationship between rules of law and accepted medical practice. The High Court decided, in the now well-known case of *Rogers v Whitaker* that it may not be enough for a doctor to act in conformity with the practice of 'a body of reputable medical practitioners'.[14] That rule of conformity had held almost unquestioned sway in the English courts since its pronunciation by a single judge instructing a jury in a medical negligence case in 1958.[15] Henceforth, said the High Court, it is the judge who will decide (or instruct the jury to determine) if the medical defendant has fallen below the

8 Ibid 10.
9 Ibid.
10 Ibid 25.
11 *Jaensch v Coffey* (1984) 155 CLR 549.
12 Aldershot, 1988 p x.
13 Ibid.
14 (1992) 175 CLR 479, 484.
15 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

appropriate standard of care. In *Naxakis v Western General Hospital*,[16] seven years later, the High Court decided that this rule applied in the law's assessment of all facets of the practice of medicine: diagnosis, treatment, and communications about risks of and choices in treatment.

Information about those risks characterised as 'material' must be communicated effectively by each doctor to each patient. Though the High Court eschewed the language of 'informed consent' and even 'the patient's right of self-determination' in this context, it clearly states that it was moulding the duty to inform in the terms already mentioned, and to be measured by the law's standards, not by medicine's, because patients might make their choices with regard to matters beyond the clinical realm. As Kirby J said in *Chapel v Hart*:

> the requirement to warn patients about the risks of medical procedures is an important one conducive to respect for the integrity of the patient and better health care. In Australia, it is [a] rigorous legal obligation. . . . This is the duty which all health care professionals . . . must observe: the duty of informing patients about risks, answering their questions candidly and respecting their rights, including (where they so choose) to postpone medical procedures and to go elsewhere for treatment.[17]

In the last of the four cases, the High Court reaffirmed its earlier judgments, but explained, at some length, that only a material risk must be revealed, and to succeed a plaintiff claiming that no or insufficient information of risks had been given had to establish, on the balance of probabilities, that she or he would not have elected to submit to the operation or procedure had the risks been revealed. The patient's appeal in this case, *Rosenberg v Percival*[18] was dismissed.

It is important to notice that both the less than praiseworthy chapter in the interfaces of law and medicine, and also the recent, probably unfinished, one on informed decision making, were written by judges in final courts of appeal, and in those courts bound by the doctrine of precedent to follow faithfully the propositions of law in the leading cases. Judge-made law is today recognised without the former conventional fig-leaf - that judges express but never manufacture legal rules - as an important source of law. But its role in the whole business of law-making is a very limited one. The nature of that enterprise is inhibited by the chances of litigation - the forensic lottery - and by the choices of the litigants. Some may settle. Some may seek non-judicial modes of conflict resolution. Good cases may fall at the threshold because of lack of funds to proceed, or the pleading of procedural, evidentiary, or even substantive law issues which strike the hard rocks of *stare decisis*, the doctrine of precedent. Judges and

16 (1999) 197 CLR 269.
17 (1998) 195 CLR 232, 271-276.
18 (2001) 178 ALR 577.

courts may choose to decide a particular case because of an issue identified as of subsidiary kind, in the minds of both lay and legal observers, leaving frustrated expectations that the case would settle the law. It is law-making necessarily incremental. Oliver Wendell Holmes Jr J put it with customary aphoristic pithiness when he said 'I recognize without hesitation that judges do and must legislate, but they do so only interstitially; they are confined from molar to molecular motions.'[19]

II

Law making by legislatures is a wholly different enterprise. Once, the statutes of the Parliament were seen as a gloss to the common law expressed - now, we more honestly say, made - by the courts. Today statute law is clearly in an ascendancy which will not be overthrown by the common law. A statute deals with a particular subject, and addresses all those aspects for which the legislature has decided that provision must be made. A statute may be enacted after extensive research, discussion and public as well as parliamentary debate. Its contents may be subjected to general or specific criticism, in advance of its application in a particular instance. Its administration may be the subject of further research, further discussion, and further public as well as parliamentary debate. A statute may sweep away the common law, however seemingly firmly entrenched. The public outcry in New South Wales following the decision of the High Court of Australia in *Chester v Waverley Corporation*[20] engendered action in the Parliament of that state. In a statute unhelpfully entitled the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), the courts of New South Wales were authorised to take cognisance of injuries resulting from nervous shock.[21] The Act went on to impose liability on any person who negligently killed, injured or put another in peril as a result of which any member of the injured person's family suffered nervous or mental shock.[22] Over ten years later similar legislation was enacted in the Australian Capital Territory and the Northern Territory.[23]

In the past 20 years there has been a number of statutes passed by the Parliaments in Australia which deal with important aspects of the practice of medicine and allied disciplines. These enactments are novel. Some deal with age-old questions: may medical treatment be refused? When may a person be confined because of mental illness? Some deal with quite new developments in medicine: organ donation and replacement; alternative, non-litigious methods of resolving

19 *Southern Pacific Co v Jensen* (1917) 244 US 205, 221.
20 (1939) 62 CLR 1.
21 *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 3.
22 *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 4.
23 *Law Reform (Miscellaneous Provisions) Ordinance 1955* (ACT) s 24, *Law Reform (Miscellaneous Provisions) Ordinance 1956* (NT) s 25.

complaints against health professionals; the new birth technologies which have transformed our thinking about the initiation of life. They are nearly all firmly based on reports of law reform agencies, or parliamentary bodies or ad hoc committees established to consider one specific subject. In that collection in Victoria there are the *Human Tissues Act 1982* (Vic), the *Infertility (Medical Procedures) Act 1984* (Vic), the *Mental Health Act 1986* (Vic), the *Health Services (Conciliation and Review) Act 1987* (Vic), the *Medical Treatment Act 1988* (Vic), the *Infertility Treatment Act 1995* (Vic) and the *Health Records Act 2001* (Vic). The Parliament has provided a preamble for one of these pioneering enactments and in others set out guiding principles to be used in their interpretation.

A statute, that 'most ambitious of documents',[24] employs words to control, to regulate, to prohibit, to effect human behaviour. Words may be ambiguous or uncertain in ambit. It is, in our legal system, the responsibility ultimately of courts and tribunals to fix the meaning of an uncertain or controversial provision in an Act. In the past two decades Parliaments in Australia have enacted interpretation statutes which emphasise that judges and courts must read each statute to give the fullest expression of the purpose or purposes which the legislature enacting it wished to achieve.[25] Courts may today consult not only the statute, where an expression of purposes and of guiding principles will often appear. They may and are encouraged to use the *travaux preparatoires*, the legislative history of the measure including Parliament's debates, to reach a decision on meaning.

Of course there are continuing criticisms of some of these enactments in the field of medicine. Some of that is about the measure itself, and its justification. Some of it is about the language of a particular section. Some of it is about the enforcement and the application of the legislation. I illustrate all of these from the responses to the pioneering birth technology legislation which the Parliament of Victoria enacted in 1984, replaced by the *Infertility Treatment Act 1995* (Vic) Some critics of the IVF legislation have attacked it root and branch, on the ground that Parliament should not interfere in the private lives of adult competent members of our community. Others have said that voluntary professional regulation is sufficient. It is the argument of autonomy, and it is, in general, an argument which commands respect.[26] But this is not the general case. What may,

24 C H S Fifoot, *Judge and Jurist in the Reign of Victoria*, (1959) 130.

25 *Interpretation of Legislation Act 1984* (Vic), *Acts Interpretation Act 1901* (Cth).

26 See for example Sharyn Roach-Anleu, 'Reproductive Autonomy: Infertility, Deviance and Conceptive Technology' (1993) 11(2) *Law in Context* 17 and Belinda Bennett, 'Posthumous Reproduction and the Meanings of Autonomy' (1999) 23 *Melbourne University Law Review* 286 See also Louis Waller, 'Australia: The Law and Infertility - the Victorian Experience', in Sheila A M McLean (ed), *Law Reform and Human Reproduction*, (1992) 17-45, endnotes 10-20, and 'Regulating Birth Technology' (1998) 7(3) *Res Publica* 18.

for example, be said about anti-contraception legislation, where an argument about the law staying outside the matrimonial bedroom had and has a powerful impact, cannot be sensibly propounded in the case of assisted reproductive technologies and particularly where the formation of embryos is concerned. As a community, we all have a powerful interest in what is done in public and private hospitals, however denominated, and even in doctors' surgeries and clinics, where wide variations in genetic parenting may be initiated. As a community, we have an interest in developments in what Australia's *Family Law Act 1975* (Cth) entitles 'the natural and fundamental group-unit of society'.[27] That unit is the family. In parenthesis, I mention that the decision of the Federal Court of Australia in the now famous case of *McBain v Victoria*[28] illuminates that public interest vividly.

What more effective way is there, in our modern democratic society, of enunciating those values which society considers of high importance? Sir Ninian Stephen when he was a Justice of the High Court of Australia, delivering the Southey Memorial Lecture in the University to which this great Hospital is affiliated, in 1981, made that point with great force. Although his purpose was to contrast the law made by courts with the law made by parliaments, his statement applies generally to statutes. He said this:

> The passage of a measure through the legislature confers a unique stamp of democratic legitimacy, valuable in a country possessing democratic traditions. Moreover the legislative process is exposed to, and provides a safety valve for, those community pressures which, if not released in this way, may otherwise build up to levels dangerous to the system itself. An elected legislature as the identified and visible maker of laws can be seen to be responsive to legitimate pressures and to the strongly held views of the community.[29]

There have been criticisms of particular expressions used in the infertility statute. One is *embryo*, a central term. The Act of 1984 did not define it. As a result of an extensive examination by the Standing Review and Advisory Committee of a request for permission to undertake microinjection of single sperm into oocytes, to determine whether the procedure was effective and safe to initiate fertilisation, it recommended that such work before the point of syngamy be permitted.[30] That consideration involved a debate about 'when is an embryo?' It resulted in swift, bi-partisan legislative support which saw the passage of the 1987 amendments to the pioneering statute of 1984.[31] The Act of 1995 does contain a definition of the

27 *Family Law Act* 1975 (Cth) s 43(b).
28 (2000) 99 FCR 116.
29 Sir Ninian Stephen, 'Judicial Independence - A Fragile Bastion' (1982) 13 *Melbourne University Law Review* 334, 342.
30 Standing Review and Advisory Committee on Infertility, Parliament of Victoria, *First Report to the Minister for Health in Terms of Section 29 of the Infertility (Medical Procedures) Act 1984* (1988) Appendix 8D, 150.
31 *Infertility (Medical Procedures)(Amendment) Act 1987* (Vic) s 9A.

word. The Infertility Treatment Authority has therefore used the statute's language in the consideration of important questions, including the very recent and much publicised matter of embryonic stem cells derived from untransferred embryos created in an overseas assisted reproduction program. The Act of 1995, unlike its predecessor, also defines the now famous or notorious word *clone*. Again, any matters in which that issue may arise in Victoria must take account of that word. The current Victorian definition is a precise one: it is stated to mean 'to form, outside the human body, a human embryo that is genetically identical to another human embryo or person'.[32]

Cloning in that sense is prohibited by s 47 of the 1995 statute. In that regard, Victoria is in the real vanguard of the jurisdictions which have already achieved what the leading nations of Europe now seek - such a ban against the cloning of a human being enacted in every country in the world. I shall not canvass the reasons. They are well-known. The microinjection episode in Victoria refutes those critics who claim legislation is ponderous and difficult to amend. If the will be there, it is not.

That there is ongoing controversy on the questions of access to reproductive technology by single women and same sex couples, about the use of gametes and embryos from people known to be dead, about permitting untransferred embryos to be used for experiment, especially in relation to obtaining embryonic stem cells, is no matter for surprise or concern.[33] It is the mark of a thoughtful, concerned democracy that there should be informed, principled debate on these issues. The Parliament, responsible to the people, as Sir Ninian Stephen stated, will be made aware of these discussions, and may then move to amend the legislation. In addition to the 1987 amendments I mentioned, the 1995 statute was amended in 1997, before it came into full force and effect, to admit de facto couples as well as married couples to assisted reproduction programs.[34]

Part of the endeavour of the Infertility Treatment Authority, and its predecessor, has been to consider regulatory arrangements in other jurisdictions in Australia and beyond. These may lead to reconsideration of current Victorian provisions, and even to proposals for change. At the same time, such an examination and evaluation may underscore support for the present provisions. A succession of sad surrogacy stories, for instance, buttresses the unqualified prohibition of commercial surrogacy in the Victorian statute from the beginning. The conferment of a discretion on the Authority to expand storage times for gametes

[32] *Infertility Treatment Act 1995* (Vic) s 3.

[33] See for example Brenda McGivern, 'McBain v Victoria' (2000) 8(2) *Journal of Law and Medicine* 166; Belinda Bennett, 'Posthumous Reproduction and the Meanings of Autonomy' (1999) 23 *Melbourne University Law Review* 286; Christopher Reed, 'Egg Scramble' *The Bulletin* (Sydney), 7 November 2000, 52-53.

[34] *Infertility Treatment (Amendment) Act 1997* (Vic) s 6.

and embryos, together with its careful, comprehensive, and discreet searches for couples with embryos in storage who have not responded to successive enquiries has enabled Victoria to avoid the experiences of other jurisdictions with fixed storage terms and no discretions.[35]

The continually controversial questions of embryo research will soon again be illuminated when the House of Representatives' Legal and Constitutional Committee presents its Report on cloning and related matters. One matter which is being canvassed, not only in Australia but also in other countries, is the acceptability of using untransferred, and perhaps untransferable, embryos in destructive research. The Victorian legislation prohibits it.[36] The pioneering statute of 1984 did not. It may be that as a result of the Legal and Constitutional Committee's publication of the principles and the practical considerations which have animated it that subject will be further considered in the several states which have prohibitive enactments. We do well to remember the reasoning of the Victorian IVF Committee which underpinned its majority recommendation that such experiments be permitted.[37] It was that the intention of the doctors and the scientists was the crucial consideration. They were not to create embryos meant for destruction. But embryos created for transfer, in the course of an infertile couple's treatment program, were clearly not meant for destruction.[38] Cynical comments about 'over-production' of such embryos to meet experimental needs ignore the ethics of a noble profession, and the regulatory powers of the Infertility Treatment Authority - to say nothing of the views and wishes of the patients.

III

We may shout acclaim that we live under a government of laws and not of men. But legislation, which I have denominated as the law's major source today in those areas where it meets medicine, is not self-executing, self-enforcing, self-administering. It is the responsibility of men and of women to administer the law. Even the emergence into full force and effect of a piece of legislation enacted by the Parliament will usually only occur when it is proclaimed. Proclamation may be delayed legitimately to establish procedures and to appoint persons for its proper administration. Thus the pioneering IVF statute of 1984 did not emerge entirely from its last swaddling clothes until July 1988, and the 1995 enactment did so on 1 January 1998.

35 *Infertility Treatment Act 1995* (Vic) s 52(5).
36 *Infertility Treatment Act 1995* s 24.
37 Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, Parliament of Victoria, *Report on the Disposition of Embryos Produced by IVF* (1984) [3.1-3.32].
38 Ibid.

But for a government, responsible for the passage of a measure, to leave it unproclaimed is a perversion of the democratic process. If the legislation is now considered as unnecessary, or unworkable, or unacceptable, the proper course is to secure its repeal. What of a statute which is in full force and effect but whose provisions, or some of them, are left unenforced?

When I was privileged to deliver the 22nd Tracy Maund Lecture in 1986, I chose abortion as my subject. My examination fifteen years ago revealed that while abortion remained a serious offence in Victoria, by virtue of s 65 of the *Crimes Act 1958* (Vic), there had been no prosecutions instituted since 1973. In fact, very shortly afterwards, a prosecution against a Melbourne doctor was instituted but was dismissed in the Magistrates' Court one year later.[39] Since then there have been no prosecutions. But the events which occurred in this hospital earlier this year, where a late termination of pregnancy was performed because the foetus in question was found in a pre-natal examination to be suffering from dwarfism, threw into sharp relief, *inter alia*, questions of criminal responsibility, not only under s 65 on abortion, but also under s 10 of the *Crimes Act 1958* (Vic), which prohibits child destruction and includes the presumption that a child is capable of being born alive after the twenty-eighth week of pregnancy. While it is highly unlikely that any criminal prosecution will ensue, it is a real possibility. Whether the statute is enforced depends on the decisions of the men and the women charged with its administration.

In February 1998, Dr Victor Chan and Dr Ho Peng Lee, of the Nanyara Medical Group in Perth, were charged with effecting an unlawful abortion, contrary to the provisions of the Western Australian *Criminal Code*.[40] The prosecution arose from an almost bizarre sequence of events. It seemed likely to culminate in a full-blown trial before a judge and jury. The event generated an intense and indeed fierce bi-cameral and bi-partisan debate in the Western Australian Parliament, which had its culmination in the enactment of the *Acts Amendment (Abortion) Act 1998* (WA). That Act provides that a medical practitioner will be justified in performing an abortion, 'in good faith and with reasonable care and skill',[41] if the woman concerned has given informed consent, or in the now well-established abortion situations recognized in landmark judicial decisions such as *R v Davidson* in Victoria.[42] But the legislation provides that a late abortion - that is, after 20 weeks gestation - may only be lawfully performed where two doctors drawn from a panel of at least six appointed by the Minister for Health have certified that the mother in question has 'a severe medical condition' which

39 Louis Waller, 'Any Reasonable Creature in Being' (1987) 13 *Monash University Law Review* 37, footnote 45.

40 Natalie O'Brien and Matt Price, 'Abortion Charges Create State of Panic', *The Australian* (Sydney), 11 February 1998, 5.

41 *Acts Amendment (Abortion) Act 1998* (WA) s 4.

42 [1969] VR 667.

justifies abortion. And it must be carried out in an approved facility.[43] The charges against Dr Chan and Dr Lee were dropped in July 1998.[44]

The decision of the New South Wales courts in what came to be called the *Superclinics* case raised the issue of the lawfulness of chosen abortions in that State.[45] Though a civil case, that issue was clearly at the heart of the action for negligence in ascertaining that the plaintiff was pregnant before it was too late safely to have an abortion. The trial judge rejected the plaintiff's claim on the basis that an abortion would have been unlawful under the criminal law of New South Wales, as the pregnancy did not involve serious danger to the plaintiff's life or physical or mental health - the *Davidson* test with which the NSW case of *R v Wald*[46] is in accord. While a majority of the Court of Appeal reversed this decision, the matter remains in the realm of uncertainty and possible selective prosecution. An appeal by the defendants to the High Court of Australia was discontinued when the case was settled.

In my 1986 Lecture, I argued that the Victorian legislation must be amended. Tonight I add 'or repealed', with some consideration given to the Western Australian statutory regime of 1998. It is true that many legislative bodies exhibit no desire to entertain such a question. In Western Australia it took what was regarded as an unexpected, unfair prosecution to fire the parliamentary engines. Sir Ninian Stephen, in that same Southey Lecture, stated that:

> It is not unknown for governments in Australia to avoid, and if possible indefinitely to defer, definitive action upon what they regard as divisive issues, whether they concern abortion, prostitution, conservation or any one of the score of electorally sensitive topics.[47]

It is too late today to procrastinate on this issue. Unenforced criminal legislation brings the whole criminal law into disrepute. There may be the unexpected, perhaps selective, prosecutions. The initiation of a prosecution later discontinued, or dismissed before a full-blown trial, is nonetheless a severe imposition on a medical practitioner, who claims he or she acted in good faith after a clear, informed decision by a pregnant woman.

IV

Abortion and novel assisted reproduction methods are but two prominent items in the list of medico-legal questions of high moment, and of considerable

43 *Acts Amendment (Abortion) Act 1998* (WA) s 7(7).
44 Natalie O'Brien, 'Doctors Celebrate Abortion Law Win', *The Australian* (Sydney), 31 July 1998, 3.
45 *C E S v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47.
46 (1971) 3 DCR (NSW) 25.
47 Stephen, above n 29, 346.

uncertainty in terms of lawfulness. At the beginnings and the ends of human life such hard questions cluster. What may be lawfully done, or not done, to anencephalic babies? To babies with only the smallest brain function?[48] To a person in a persistent vegetative state? To a person who cannot bear the last pains of life? In the now famous case of Tony Bland,[49] a victim of the Hillsborough stadium disaster in England, the House of Lords, as the final court of appeal, decided that it was lawful to discontinue medical treatment and care since Bland had been in a persistent vegetative state for over three years. Two members of the Appellate Committee forcefully stated that it was imperative that the moral, social and legal issues of the case should be considered by Parliament. Lord Browne-Wilkinson said:

> The judges' function in this area ... should be to apply the principles which society, through the democratic process, adopts, not to impose their standards on society. If Parliament fails to act, then judge-made law will of necessity through a gradual and uncertain process provide a legal answer to each new question as it arises. But in my judgment that is not the best way to proceed.[50]

V

The law must not lag behind medicine, especially today. The difficulties in formulating answers to the hardest questions of life and death do not excuse us, and our law-makers, from grappling with and formulating our answers to them. It must be an exercise in human responsibility for our own behaviour in this society in which we live, a society which calls itself just.

We cannot and we should not seek to turn aside from the task of determination and decision, even on the most profound questions I have mentioned. It is our human responsibility to mould rules for the regulation of the remarkable, once thought to be the miraculous discoveries that science and medicine have opened to our eyes.

As Edmund Burke, the great Anglo-Irish philosopher politician, so beautifully put it, two hundred years ago, in his great pamphlet, 'Thoughts on the Cause of the Present Discontents':

> In the meantime we are born only to be men. We shall do enough if we form ourselves to be good ones. It is therefore our business carefully to cultivate in

[48] See K Sanders and B Moore (eds.) 'Anencephalics, Infants and Brain Death Treatment Options and the Issue of Organ Donation', Proceedings of Consensus Development Conference, 1991 (The Law Reform Commission of Victoria, Australian Association of Paediatric Teaching Centres, Royal Children's Hospital, Melbourne.)

[49] *Airedale National Health Service Trust v Bland* [1993] AC 789.

[50] Ibid 880.

> our minds, to rear to the most perfect vigour and maturity, every sort of generous and honest feeling that belongs to our nature. To bring the dispositions that are lovely in private life into the service and conduct of the commonwealth . . . To be fully persuaded, that all virtue which is impracticable is spurious; and rather to run the risk of falling into faults in a course which leads us to act with effect and energy, than to loiter out our days without blame, and without use.[51]

That thinking applies even to the decisions we should expect our legislatures to make on the very beginnings and the very ends of human life. Burke echoed, in his words set in his time, what a great Rabbinic sage had said in his, '[i]t is not thy duty to complete the work, but neither art thou at liberty to desist from it.'[52]

He spoke, through the centuries, to us all. He spoke to the doctors and he spoke to the lawyers, and to the legislators who would serve their professions and their communities in the manner of those two men of medicine to whom I am privileged to pay homage this evening.

[51] Edmond Burke, *The Works of The Right Honourable Edmund Burke* (1887) Vol 1, 534.
[52] TB *Avot* 2:21.