# The Lockhart Committee: Developing policy through commitment to moral values, community and democratic processes

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*The Lockhart Committee was appointed by the federal government in 2005 to review the Prohibition of Human Cloning Act 2002 (Cth) and the Research Involving Human Embryos Act 2002 (Cth). The issues in the review are ones on which community views differ widely and many people hold strong and diverging opinions. Yet all members of the committee were able to agree on their recommendations when the committee reported to Parliament in December 2005 and since that time, most of its recommendations have been implemented in amendments to federal and State legislation. This article describes the committee's process in considering the issues in the review, in consulting stakeholders and the broader community and in formulating its recommendations.*

## INTRODUCTION

In July 2005, the Australian federal government established the Legislation Review Committee to review the *Prohibition of Human Cloning Act 2002* (Cth) and the *Research Involving Human Embryos Act 2002* (Cth).[1] The Hon John S Lockhart AO, QC, a retired Justice of the Federal Court of Australia, chaired the committee which became known as the Lockhart Committee. Its report was tabled in both Houses of the Australian Parliament in December 2005, and many politicians, scientists and members of the wider community welcomed its recommendations, though others opposed them. Ultimately, a private member's Bill sponsored by Senator Kay Patterson, a former health minister, implementing the committee's recommendations, was passed by a majority of one vote in the Senate and by a substantial majority in the House of Representatives.

Since then, discussion has continued on many of the issues considered in the Lockhart Report and some that were raised only briefly, such as the use of animal eggs to derive human embryonic stem cells for research. The Lockhart Report has received two prestigious awards for scientific research and writing and Professor Loane Skene, Deputy Chair and official spokesperson of the committee after the sudden death of Mr Lockhart shortly after the Report was tabled in Parliament, was named by the *Australian Financial Review's* "Power issue" as among the 10 most "culturally powerful" people in Australia in 2007, largely for her work on the committee. Other committee members have continued to speak publicly and among themselves about the issues and their thought processes in preparing their recommendations and writing the report. These issues and processes are described in this article with a view to dispelling suggestions that the committee's recommendations were based on utilitarian considerations, as some commentators have suggested; in fact, they had a much broader and carefully

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[1] The Lockhart Report and other documents and information are available at http://www.lockhartreview.com.au/reports.html and http://www.lockhartreview.com.au viewed 26 March 2008.

reasoned basis. It is hoped also that the committee's processes that are outlined here may assist other committees that have to investigate and make recommendations on complex ethical and medico-legal issues.

## PROCESS OF THE LOCKHART COMMITTEE

The questions raised by human embryo research are complex and difficult to resolve:

- When does human life begin?
- Should research be allowed on human embryos and, if so, what safeguards should be imposed?
- How should a "human embryo" be defined?
- Should scientists be permitted to form embryos specifically for research?
- Is there a difference between forming an embryo by fertilisation of an egg with sperm, or by somatic cell nuclear transfer (SCNT), where a somatic or body cell is transferred into the egg?[2]

One can imagine that if these issues were put to the community without careful thought and planning, the result would be a deluge of responses that would give little guidance on how to proceed.

The Lockhart Committee undertook extensive consultation to engage the community. It published a discussion paper calling for public submissions and held public meetings in all States and Territories. More than 1,000 submissions were received and published verbatim on the committee's website for everyone to read. This was part of the committee's approach in ensuring that the decision-making process was fully informed, fair and transparent.

A major factor in the committee's deliberations was an agreement from the outset that members would not discuss the committee's ultimate recommendations until late in its deliberations. This was suggested by Mr Lockhart who had found this approach useful in other aspects of his legal career. However, until that time, members were encouraged to express their thoughts and to ask questions freely, without feeling that they should hold the same views throughout the process. This meant that members' ideas could evolve, solidify or change in response to the submissions and oral presentations made to the committee and subsequent debates and discussions. What mattered most, it was agreed, was what the committee ultimately wrote in its report, especially its recommendations to the Parliament when responding to its terms of reference. One consequence of this approach was that members had unrestricted opportunities to explore issues from all perspectives, asking "devil's advocate" type questions where necessary. There was no need to justify hypothetical arguments or "musings" and members could change their minds without criticism or shame. (Indeed, when members compared their thought processes after the report had been finalised, they found that they had all changed their minds on some issues during the consultation process and that the "open discussion" approach had been so effective that they did not know until the final report was being compiled what other members would ultimately recommend.)

At an early committee meeting, the Chair described a process that he called "hot-tubbing". He suggested that, instead of people with different views arguing with each other about particular issues from predetermined positions removed from the specific complexities of those issues, it sometimes helped if they could work out together what the solutions should be. Figuratively, they can "take off their clothes and get into a hot tub" (or jacuzzi for North American readers) for frank discussions. Divested of their usual attire, they can be more down to earth with one another – there is less chance of "faking it". This, in turn, made possible a more robust, honest and transparent conversation and a greater likelihood of consensus. This was a process in which members readily agreed to participate. And, in the intellectual hot tub together, members engaged in rigorous argumentation, at the same time seeking common ground. During the consultation process, the committee encouraged many of those who made submissions to do exactly the same thing, often asking people from different sides of the debate how they would resolve the differences in the community. In so doing, the committee encouraged people to acknowledge for themselves that there were different views and that the committee had the difficult job of trying to reconcile them.

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[2] This process is sometimes called the "Dolly the Sheep technique" or "therapeutic cloning".

## MORAL FRAMEWORK/METHOD USED IN THE REVIEW

### Discussion of ethics, ethical theory and moral frameworks

Early in its deliberations, the committee discussed the approach it should take in analysing the ethics, ethical theory and moral frameworks underlying the issues raised by human cloning and human embryo research in the review. The committee considered the methods of other reviews involving contentious ethical issues, such as the widely esteemed report of the Australian Law Reform Commission and the Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia*.[3] The committee noted that some of these reports have a preamble referring to moral theory, or, more often, a reference to broadly accepted ethical principles, or specifically sometimes using the "principles-based" approach to ethics promulgated by authors such as Beauchamp and Childress.[4] The committee also noted that where the moral theory or ethical principles were included in the preamble to such reports, they were not always evident in the body of the reports or in the recommendations themselves; indeed, the ethical theory or framework described in the preamble is rarely referred to beyond the introduction. For this reason the committee decided not to apply any single normative theory or aspect of "principlism". Noting the limited utility or adequacy of normative ethical theories or "principlism" in the development of legislation or health policy, the committee chose instead to adopt an approach based upon fundamental (shared) moral values, an acceptance of pluralism and diversity in community(s), and on processes of deliberative democracy. The ethical approach that the committee adopted was later described by Associate Professor Ian Kerridge, the specialist ethicist on the committee, as an approach of *pragmatic discourse, or communicative morality*, similar to that described by Habermas.[5] It was pragmatic because it attempted to find a way to reconcile the inevitable conflicts inherent in pluralism and liberal democracy. It was moral for two reasons: it argued that while communities may differ, they all share certain fundamental values, including human flourishing, ontological security and (social) justice; and it assumed that while these fundamental values will remain unchanged, the ethical views or perspectives that communities adopt may change and evolve with time, circumstances, context and technical feasibility. And it was discursive or communicative because:

- it rejected the epistemic and moral authority of any single normative theory (including utilitarianism, deontological approaches or principle-based approaches);
- it explicitly recognised that different (discourse) communities exist and that they may have different values and perspectives;
- it recognised that, in areas of complex social/health policy, many moral concerns may be at stake and that different communities may give primacy to different moral concerns. (Thus, eg, Christian communities may give primacy to the moral status of the embryo, health communities may give primacy to care or compassion, and patient communities may give primacy to health outcomes.)
- it recognised that the views of each community/stakeholder group must be respected and heard;
- it constructed a process that was fair, rigorous, transparent and based on tolerance and mutual respect;
- it took a position in which the "unforced force of the better argument" prevailed[6] and
- it assumed that some acquiescence, or a negotiated compromise, could be achieved by the discursive process and that conclusions reached through (fair) process have an imperative force.

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[3] Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC 96 (2003), http://www.alrc.gov.au/inquiries/title/alrc96/index.htm viewed 26 March 2008.

[4] Beauchamp TL and Childress JF, *Principles of Biomedical Ethics* (5th ed, Oxford University Press, Oxford, 2001).

[5] Apel K-O, "Is the Ethics of the Ideal Community a Utopia? On the Relationship Between Ethics, Utopia and the Critique of Utopia" in Benhabib S and Dallmayr F (eds), *The Communicative Ethics Controversy* (MIT Press, Cambridge, Mass, 1991); Habermas J, "Discourse Ethics: Notes on a Program of Philosophical Justification" in Benhabib and Dallmayr, n 5.

[6] Nussbaum MC, "Non-relative Virtues: An Aristotelian Approach" in Nussbaum MC and Sen A (eds), *The Quality of Life*, (Oxford University Press, Oxford, 1993) pp 242-276.

However, throughout the committee's deliberations, members were constantly aware that their report concerned legal issues and Acts of Parliament that included criminal penalties. The focus was therefore not on what could have been a theoretical discussion of ethical issues but on the very solid and practical issues raised by the legislation.

## Understanding the science

The committee had the advantage of having four members with extensive experience of the science associated with embryonic stem cell research, both as pure science and its potential clinical applications. However, while each of the scientific members had a sound knowledge of the field of embryonic stem cell research, none were direct practitioners in the field. Of the scientific and clinical members of the committee, Professor Peter Schofield, a renowned neuroscientist, had supervised research using animal neural stem cells and undertaken many previous roles in scientific advocacy. Associate Professor Ian Kerridge, a specialist haematologist, had been involved in bone marrow transplantation which is a practical application of stem cell research, as well as being a highly regarded clinical ethicist. Professor Barry Marshall, a scientist and community advocate, had been awarded the Nobel Prize for Medicine for his discovery of the role of Heliobacter pylori in gut ulcers; and Associate Professor Pamela McCombe, a consultant neurologist, brought to the committee her clinical experience with patients whose hopes had been needlessly raised and disappointed in the past by exaggerated accounts of scientific discoveries. The committee was assisted by Biotext, a science information company offering research, writing and editing services, and especially by the Director, Dr Janet Salisbury, who did extensive scientific research for the committee and prepared detailed background papers for discussion.

The scientific members of the committee not only provided advice to the non-scientific members (Mr Lockhart and Professor Skene) and to the secretariat. They also used their expertise during the consultation process to challenge submissions based on a misunderstanding of scientific matters and to ensure that the final report was scientifically accurate. Their contribution was invaluable when the committee's recommendations were discussed in the media after the report was tabled in Parliament, when it was particularly important for the debate to be properly informed. Throughout the committee's deliberations, however, all members of the committee knew that they each had to understand the ethics, the science and the law and that it was the responsibility of the other members to explain matters within their own expertise.

## Development of ideas

An important early discussion led the committee to acknowledge specifically in its report the complexity of assessing community attitudes in a diverse society and the difficulty of making recommendations when views in the community are polarised. The committee decided that in any review of contentious health legislation it is impossible to try to identify the Australian community as a single organism that has a single view on issues such as embryo donation, stem cell research or somatic cell nuclear transfer. The committee took the view that there are many diverse "communities" within Australian society, "with different perspectives, interests and values" (p xiii) and that individuals may simultaneously be members of a number of different communities (a church member, a scientist, a person caring for a sick relative, etc). The committee also thought that the values and perspectives of both these communities and the individuals who make up these communities may change with time, experience and contact with others with different needs, values and perspectives. Because of this divergence of views, the committee realised from the outset – and said in its report – that disagreement in the wider community would be inevitable.

However, instead of focusing on the issues on which there was most likely to be disagreement (such as the moral status of the human embryo and whether it is ever justified to destroy an embryo for "research"), the committee looked for moral values, social principles and matters related to the specific scientific and medical issues on which the community generally agreed. For example, the submissions showed a good deal of support from both the scientific community and general public for the regulatory framework put in place to administer the 2002 legislation and this became a significant point of agreement on which to build. There was also widespread agreement that some practices that were prohibited by the 2002 legislation should continue to be prohibited. These included reproductive cloning (using SCNT to create a genetically identical child; allowing an embryo to develop for more than 14 days outside the body of a woman; and placing a human embryo in the body of an animal or vice versa). Because of the very strong and widespread feelings in the community about these practices, the committee readily agreed that they should continue to be prohibited. That would apply even if the community view might be open to challenge. For example, some commentators have said that reproductive cloning should not be prohibited as it provides the only means for a man who is infertile to have a child who has his DNA. Nevertheless, even without the health and safety issues associated with reproductive cloning, the committee concluded that the widespread rejection of the concept of reproductive cloning in the community dictated that it should not be considered further, at least for some time.

Another matter on which the committee found broad agreement was a desire to help sick people and infertile couples. As Mr Lockhart said in his foreword to the report (p v):

> [T]he Committee found that there is strong community support for medical research to help people who suffer from debilitating or incurable diseases or conditions, through better understanding of the processes of those diseases or conditions, and the development of new treatments. There is also considerable community support for medical research to help people to have children, including a general acceptance that this process involves the "wastage"[7] of some embryos.

Having identified points of general agreement, the committee then examined the issues on which views differed by examining closely the scientific and moral claims made about stem cell research and SCNT. On the one hand, the committee heard extensive enthusiasm expressed in relation to the scientific and clinical potential of stem cell research – by scientists, health professionals, patients and health care advocates. Many people with serious medical conditions provided testimony that they believed that stem cell research might provide knowledge and therapies that could help them personally, or at least help others with similar conditions. They wanted the law to permit research not only on "spare" embryos, as was the case under the 2002 legislation, but also on embryos created by SCNT, because that would enable stem cells to be derived from an embryo that are specifically matched to the nucleus donor and therefore much more likely to be successful in treatment because they would be less likely to be rejected by the body's immune system.

At the same time, however, the committee was aware of the deeply felt conviction expressed in many letters to the committee concerning the intrinsic moral value of a human embryo. According to this view, a human embryo is an entity deserving full protection from the moment of its creation. It is wrong, therefore, to create such an entity except in order to help a woman to have a baby and it should not be intentionally destroyed, even for research that may benefit many other people. According to this view, while embryos originally created for use by infertile couples that are judged to be in excess of their requirements may be removed from storage and allowed to "succumb", this is morally different from deliberately destroying them.

It might seem that these two views are inevitably inconsistent. However, the committee was able to make progress in several ways. First, the committee recognised that we live in a community in which activities are permitted unless they are specifically prohibited by law (in contrast to a community in which activities are permitted only if they are authorised by law). For particular conduct to be prohibited there needs to be general agreement in our community that it should be considered a crime. While the committee respected moral objections to stem cell research and SCNT, members felt that in a liberal, secular democracy where there are a range of moral perspectives, the moral values of one particular community should not be permitted to override the beliefs and interests of others. Rather, in situations where there is not general agreement but some people have strong moral objections to a particular activity, it may be justifiable to restrict that activity by an appropriate

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[7] This occurs because participants in ART programs are legally entitled to dispose of their "surplus" embryos if they no longer need them to achieve a pregnancy, Indeed, the legislation on fertility procedures mandates that frozen embryos must be destroyed after a certain period.

regulatory regime, but without making it a criminal offence. This was the approach of the 2002 legislation which established a federal licensing committee to oversee the research on surplus embryos that was permitted at that time.

Secondly, the committee agreed that the predominant issue was not whether the potential benefit of the research would override the moral objections of those who opposed it. On the contrary, it rejected a utilitarian approach and emphasised that we do not know what the research will ultimately achieve and even the greatest benefits do not always justify the means of achieving them. Indeed, throughout its deliberations, the committee tried not to be unduly swayed by the potential benefits of the research which are unknown and frequently overstated, at least at this stage. Instead, the committee focused on the full range of arguments underlying human embryo research, listening carefully to all of the submissions and trying to evaluate them in forming its recommendations. In this, its approach was a civil libertarian one, taking account of the views of everyone and, so far as possible, giving effect to people's beliefs and wishes so far as that did not unduly restrict the beliefs and wishes of other people. This is different from a utilitarian approach in which some views are disregarded or overridden in the interests of the "greater good".

Thirdly, the committee agreed that scientists do not have to prove that their research will produce positive outcomes for health care in order to be permitted to do it. On the contrary, if there is any chance that research will help the sick and infertile, then those who oppose that research bear the onus of persuading the regulators that it should be banned. The more likely and promising the treatments that may be developed, the higher the burden becomes of convincing the community that the research should not be allowed. For example, the committee found it almost inconceivable that a treatment that would enable people paralysed with spinal injuries to walk could be denied on the basis of moral objections held by one particular part of the community to the research that enabled the discovery and testing of this therapy.

Finally, the committee tried to "balance" competing views concerning the moral status of the early embryo. The committee found that even those who favour the creation of embryos by SCNT for research acknowledged that SCNT embryos are different from those created by fertilisation of an egg by sperm. SCNT embryos made solely for the purpose of producing stem cells for medical treatment could be regarded as being somewhat akin to culturing a person's own cells for a transfusion, rather than creating a new person. The contrast was especially evident when the committee heard women in fertility programs talk about the significance of the embryo for them. Their embryo is their future baby, bearing the combined genes of the parents. For this reason, the committee recommended that the law should continue to prevent the creation of an embryo for research by fertilisation of an egg with sperm, but that SCNT should be permitted to create an embryo for research, provided that it could never be implanted in a woman.

This suggestion will not, of course, persuade all people, some of whom are quick to point out that the SCNT embryo could possibly, if not used in research, develop in the same way as a "sperm-egg embryo", if it were placed in a woman's uterus. But the crux of the committee's recommendations was that SCNT embryos created to produce stem cells must not be implanted. Indeed, one might say that no SCNT embryos have a chance of development because implantation is always prohibited.

Nevertheless, the fact that many people do view early human embryos as having special moral status cannot be discounted. For this reason, the committee recommended that the use of human embryos in research should continue to be strictly regulated. For example, it should continue to be permitted only with a licence, subject to reporting and careful scrutiny. Scientists should also be required to justify the need to use embryos in research, to use the smallest number of embryos possible and to handle and dispose of the embryos "with respect".

In reaching these conclusions, the committee formulated its own "values" as a guide in making consistent decisions. These values evolved as members thought about the issues. They were a starting point for more focused discussion. As mentioned above, the committee agreed that activities should not be made illegal simply because some people have moral objections to them. This is especially the case in a multicultural country like Australia. One person's moral views should not limit another person's freedom of action. If some people object to particular activities on moral grounds, they have a high onus of persuasion that those activities should be prevented when there are other people who might benefit from them. On the other hand, scientists do not have to prove in advance that their research will produce benefits. The issue is not whether they should be permitted to do the research but rather whether there are cogent reasons why they should be prevented from trying to do the research to see where it will lead.

### Writing the report

The writing of the report and the formulation of the recommendations was a joint effort. Much of the technical and factual description in the early chapters was drafted by staff from Biotext, especially the Director, Dr Janet Salisbury, though it was, of course, checked and edited by all members of the committee.[8] However, the final and the most important chapter, containing the committee's views and recommendations, was written by members jointly, with the text displayed on a screen as it was dictated by all of the members who were present, so that members could see the developing draft as it was written (though it was later subjected to extensive editing and amendments). This was a novel experience for all members but the fact that members were able to work in this way shows the confidence that they had developed in one another and in the process of their deliberations. Members trusted one another and were thinking and working as a group.

The aim of the report was to make recommendations to the Parliament that could be implemented in legislation, given the parliamentary will. The committee's report therefore was intended to have a clear and practical outcome, different from a scientific or philosophical discussion which could set out a range of views without attempting to rationalise them. Although consensus between committee members was not essential, it was highly desirable. Unanimous recommendations would give Parliament a clear message of what should be done, and a message that it could not easily ignore. Members knew that the government had appointed them to advise on issues that are too complex to put to the electorate as a whole. The government trusted the members' expertise, experience and integrity to investigate the issues, to consult widely and to advise the government accordingly. If the members could not reach agreement, that would undermine the credibility of their advice.

## CONCLUSION

It can be seen that the process adopted by the Lockhart Committee members towards each other and to those who made submissions to the Review was one of respect, regard, openness, trust and collaboration. Members were prepared to compromise in order to ensure that the committee's recommendations were unanimous, knowing that that would make them more persuasive for the Parliament and the wider community. The recommendations were not based solely on utilitarian analysis, on commitment to a single "duty-bound" moral theory or perspective, or on a simplistic "Rawlsian" approach which simply led to the realisation of an elite (scientific) prejudice. Rather, the report was grounded in a commitment to shared moral values, to a sophisticated understanding of community, and to democratic moral discourse factors. But it was also based on broad community consultation and careful analysis of all the issues, giving effect to the views of as many people as possible, so far as implementing those views did not unduly restrict the interests of other people. While some may feel that this approach is "messier" than simply adopting a single normative theory, the committee members would argue that this approach provides a better means by which the complex range of scientific, moral, legal, socio-cultural, political and economic issues raised by emerging technologies may be examined and is better suited to the development of policy in relation to contentious issues.

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[8] The report later won two awards in a national technical writing competition run by the Society for Technical Communication.