

A DISCUSSION OF ‘REGRET’ AS A MODEL FOR ETHICAL DISCOURSE GENERALLY AND IN THE CONTEXT OF THE PROVISION OF LIFE SUSTAINING MEASURES IN QUEENSLAND (OR: ‘WHY ARE THERE NO ETHICAL CHILD PRODIGIES?’)¹

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The child prodigy has long been standard fare for human interest television shows: 5 year olds that play Mozart sonatas; 6 year olds that have memorized all the biographical details of every American president; and one memorable prodigy I particularly recall who, as a 4 year old, could recite in either chronological or alphabetical order all the Oscar winners for best male lead. But there is one notable omission from the pantheon of prodigies: to date there has not been an 8 year old prodigy purporting to be a bioethicist.

As with chimpanzees and parrots, it may be possible to train children to play pianos and recite litanies but a child prodigy whose speciality is ethics is something we may never live to see. Of course, we all look forward to that great day when a precocious child takes to the television screen and recites the provisions of the *Guardianship and Administration Act 2000* (Qld) as amended and consolidated with ancillary regulations, but would we want to appoint that child a substituted decision-maker under the Act? In short, in the event of our own incapacity and lack of any agent duly appointed by

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¹ This article draws on a research work in progress and is offered here with a view more to instigating discussion at than to present a comprehensive treatment of the topic. Hence, the article is characterised more by the number of questions that it asks rather than its answers.

ourselves, would we want such a child to make a decision about refusing us life-sustaining measures or withdrawing such measures from us?

Perhaps one reason why the juvenile ethical prodigy is unprecedented (if not actually impossible) is because the skill or art that is ethical decision-making requires something more of the decision-maker than the mere ability to identify the relevant heuristic framework, mode of discourse or (as is the case with statutory substituted decision-making) spectrum of statutory criteria relevant to end of life decisions such as to refuse or withdraw life-sustaining measures. Perhaps experience and maturity, the bitter tears of frustration or regret which often flow from confronting our limitations in a world containing many harsh realities, are an equally necessary if albeit also insufficient criterion for ethical decision-making?

This last question as to the role of experience, maturity, frustration and regret in ethical decision-making generally has specific relevance to decisions touching on the refusal or withdrawal of life-sustaining measures by a substituted decision-maker. Due to the likely finality of its consequences, the comity or fellow-feeling between the decision-maker and the impaired individual for whom the decision is taken, and the ever increasing range of medical possibilities in the area, it is difficult to conceive of a more poignant and challenging ethical decision. The poignancy and challenge arises if only because of the many speculative, 'what if' and 'if only' type questions that arise in these scenarios which clash against the blunt, intransigent physical facts of the scenario. It is understandable in just such a scenario for the substituted decision-maker and/or many of the people in the constellation of individuals affected by the decision, to seek some measure of comfort and reassurance that the decision (whatever it may have been) was ultimately morally as well as legally correct.

The argument presented in this paper is that it may be the case that a certain measure of discomfort and lack of assurance is both an unavoidable concomitant of decisions made in this scenario as well as a hallmark of a properly conducted, ethical decision. According to this argument, when involved in substituted decision-making in these scenarios, if we seek the composure and the confidence, the sense that we are unassailably right, that is commonplace amongst child prodigies then it is possible that we have misconstrued ethical decision-making in general and the responsibilities of substituted ethical decision-making in particular.

Due to my professional and personal experiences working within hospital chaplaincy and ethics advisory groups, I have a keen interest in the area of substituted decision-making especially in the context of end of life decisions regarding the refusal or withdrawal of life-sustaining measures (colloquially if inaccurately lumped under the umbrella of euthanasia issues). Some excellent work in respect of the *Guardianship and Administration Act 2000* (Qld) has recently been done by way of a discussion about proposed law reforms on this topic in Queensland where I practice and, accordingly, aspects of the paper outlining those proposed reforms provide the starting point (but only the starting point) for the discussion in this article. However, whilst the starting point for the discussion is particular to Queensland, the questions and discussion which follow in this article are hopefully of more general application.

Of particular importance to the argument in this article is how to advance the law reform discussion on this topic by reference to the insights gained from the particular

understanding of ethics proposed here: namely, that if experience, maturity, frustration and even regret (as narrowly understood in this context and explained in more detail in the course of the article) are possible hallmarks attesting to the integrity of, for instance, ethical substituted decision-making, then how can that phenomenon be accommodated in the law covering that subject?

Hence, several short points arise from my initial observation about the absence of ethical child prodigies and those several short points are the subject of discussion in this article, to wit:

- What do we learn from the observation that there are no ethical child prodigies?
- What does the general absence of such a phenomenon tell us about ethics?
- Guided by those insights, what might follow by way of law reform in respect of, for instance, the *Guardianship and Administration Act 2000* (Qld)?

I WHAT DO WE LEARN FROM THE OBSERVATION THAT THERE ARE NO ETHICAL CHILD PRODIGIES?

As was noted in the introduction to this article, the starting point for discussion are the proposed law reforms relevant to the issue of the refusal or withdrawal of life-sustaining measures in respect of the current law covering that subject in Queensland. This starting point is adopted mostly because it is a prominent issue in the jurisdiction where I practice. However, this starting point is also adopted because, with the greatest respect to all concerned, various aspects of the Issues Paper risk overlooking some of the potential merit that arises from my initial observations about the peculiar character of ethical discourse which character is highlighted by the lack of child prodigies in the field. A convenient way to illustrate that possibility is by reference to the most recent Law Reform Commission paper on the subject.

In Queensland, a number of law reforms in respect of both the *Guardianship and Administration Act 2002* (Qld) and the *Enduring Powers of Attorney Act 1998* (Qld) are currently under consideration. A major factor in that process of law reform is the document authored in February 2005 by Associate Professor Lindy Willmott and Dr Ben White, both of the Faculty of Law at the Queensland University of Technology, entitled *Rethinking Life – Sustaining Measures: Questions for Queensland*.² This was an Issues Paper prepared in collaboration with the Queensland Adult Guardian and Palliative Care Queensland. This article does not pretend to provide a comprehensive response to that Issues Paper. Rather, I simply propose using some of the building blocks which I identify in that Issues Paper the better to illustrate my approach to two issues:

- The first concerns the law reform of both euthanasia generally and the issue of whether to provide (or continue to provide) life-sustaining measures in particular;³ and

² B White and L Willmott, *Rethinking Life – Sustaining Measures: Questions for Queensland* (QUT Printing Services, 2005).

³ I am acutely conscious that the Issues Paper, consistent with current literature on the subject, makes a strong distinction between euthanasia and the withdrawal/withholding of life-sustaining measures. For the purposes of this article it is of no importance whether such a distinction is accepted or rejected. This is because the consequences of the argument in this article apply equally to both phenomena whether they be heterogeneous or not.

- The second concerns one aspect of methodology in ethical discourse.

Of these two concerns it is the treatment of the latter issue, relevant to methodology in ethical discourse, which is fundamental to this article and hence provides the narrow analysis offered here of the much wider Issues Paper. Accordingly, by way of preliminary remarks, I need to identify the building blocks I am borrowing from the Issues Paper. These particular building blocks are selected because of their potential, if too glibly or uncritically applied, to overlook the kinds of insights about ethical decision-making that have already been identified in this article.

The first of the building blocks that I borrow from the Issues Paper is what, for convenience, I will term the '*consent proposition*'. At a number of places in the Issues Paper, the working assumption is adopted that an adult who enjoys full legal capacity has the right to give consent to the withdrawing or withholding of life-sustaining measures either at the time or *in futuro*.⁴ The justification for that proposition is identified as a melange of statutory rights and maxims drawn from the common law.⁵

For present purposes, this article does not purport to take issue with the prudence or otherwise of this consent proposition either as a matter of ethical theory or its accuracy as a proposition of law. Rather, for the purposes of this article, this consent proposition will be assumed as a given for the sake of the argument in order to arrive at a consideration of how best to respect the statutory right which it underpins. This statutory right -not a right that is postulated in the Issues Paper as a self-evident, natural or inherent human right- this statutory right underpinned by the consent proposition can be understood by reference to a number of different paradigms.

A Rawlsian-type approach to jurisprudence and human rights might understand the consent proposition as part of the social contract whereby a society respects and confers protection on the full-informed and freely-made choices of adult citizens.⁶ A Dworkinian-type approach to jurisprudence might justify the consent proposition by arguing that the individual's rights to autonomy and self-actualisation trump the interests of the broader society.⁷ A natural rights-type approach to jurisprudence as typified by Finnis, could also arguably be adapted to support the consent proposition.⁸ In such an adaptation, one might argue there are circumstances when it is self-evident that the basic human good of an individual can no longer be served by refusing to withdraw or, alternatively, fail to withhold life-sustaining measures.

The next step in this article is to take the consent proposition, which is one of the building blocks borrowed here from the Issues Paper, and join it with another building block which I will term the '*reasoned decision-making proposition*'.

⁴ White and Willmott, above n 3, 15, para 3; 79, para 13.4; 55, para 8.4; 50, para 6.4; 40, para 4.

⁵ See: *Enduring Powers of Attorney Act 1998* (Qld) and *Guardianship and Administration Act 2000* (Qld); as well as *Re B* [2002] All ER 449.

⁶ See: J A Rawls, *Theory of Justice* (Harvard University Press, 1972).

⁷ See: R Dworkin, *Taking Rights Seriously* (Duckworths, 1977).

⁸ Notwithstanding Finnis' well-known opposition to euthanasia generally and his support for, at most, a circumscribed definition of palliative care, it is possible to adapt the logic of his natural law approach to jurisprudence to support a conclusion different from his own. See: J Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980).

The reasoned decision-making proposition arises out of the Queensland legislation's statutory criteria for identifying the best interests of a person who is the subject of a statutory power exercised by a substituted decision-maker. In the final analysis, those criteria ultimately collapse into a quasi-exercise in utilitarian calculus.⁹ This is so because the decision-making in respect of the refusal or withdrawal of life-sustaining measures revolves around the schedules attached to the relevant legislation, such as the *Powers of Attorney Act 1998* (Qld) and *Guardianship and Administration Act 2002* (Qld). The first schedule to each of those Acts provide the statutory criteria for an exercise that is reminiscent of at least the methodology of utilitarian calculus inasmuch as the decision in a particular case is made by reference to a constellation of primary and secondary considerations that are intended to identify the best interests of a particular person.

As previously noted in this article, if these two propositions (the consent and reasoned decision-making propositions) are applied too glibly or uncritically,¹⁰ one risks setting up a form of ethical decision-making, whether by a substituted decision-maker or otherwise, which is of a kind that might lapse into a form of discourse that is (unintentionally) amenable to the supposed ethical child-prodigy performing the role of, say, substituted decision-maker. This is because if the criteria for reasoned decision-making are identified as a necessary if not sole criterion for fully informed consent, then it arguably follows that adherence to or facility with the former justifies or validates the latter.

By way of illustration, let us adopt in a very simplistic way the earlier reference to substituted decision-making under either of the Acts as a quasi-exercise in utilitarian calculus. A simplistic approach to that proposition begs the following syllogism:

1. Calculus is a branch of mathematics;
2. Child prodigies are a common enough occurrence in mathematics;
3. Therefore a child mathematical prodigy could apply this exercise in quasi-utilitarian calculus in the role of substituted decision-maker.

This is an obviously flawed syllogism, but why and how? The thought of a child prodigy fulfilling the role of substituted decision-maker is counter-intuitive: but why? If adults of full legal capacity can, at least as a matter of law:

⁹ For present purposes, all that is meant here by '*quasi-exercise in utilitarian calculus*' is that the relevant legislation seemingly provides a checklist of factors which a decision-maker must consider. Accordingly, it seems trite to observe that notwithstanding the detail in the legislation to the contrary, the greater the number of factors in the checklist which suggest a given outcome then the more likely it is that the combined weight of those factors will determine a result; *ie* If factors in the checklist in favour of x-result outnumber the factors in favour of alternative results, it is plausible to suppose that this numerical superiority in and of itself will constitute a further factor that influences a decision-maker. It is this phenomenon of numerical superiority influencing a decision-maker which is reminiscent of utilitarian calculus inasmuch as, in the context of substituted decision-making exercised by reference to the legislation, it is akin to a finding of a surplus of happiness (synonymous here with 'best interest of the patient') in one alternative which alternative ought then be implemented.

¹⁰ I hasten to add that it is not argued here that the Issues Paper adopts just such a glib, uncritical approach. Rather, it is simply argued here that the building blocks in the Issues Paper that have been identified here are capable of being extracted from the Issues Paper and applied in just such a way by others.

- Consent to the future withdrawal or withholding of life-sustaining measures; and/or
- Can either give guidelines to substituted decision-makers or appoint substituted decision-makers would will be guided by the relevant legislation; and
- If the fact that a greater number of factors (identified in the relevant legislation) are suggestive of one result over another is of itself of significance;

Then why cannot a child prodigy, one who is capable of both reciting the relevant legislation and parsing the facts with the legislation, act as the substituted decision-maker?

The answer, obviously, is the varying significance to be placed on a given factor across a range of cases: the substituted decision-makers across a range of cases might identify the same relevant statutory criteria but come to different conclusions because of the different significance or weight of those identical statutory criteria across the range of cases. As accessible and transparent as the reasoned decision-making process is intended to be under the legislation, it does not follow that this process is merely a question of adding up the number of factors for and against every possible decision.¹¹

The self-evident character of this last proposition is reinforced by the analogous consideration that whilst it is conceivable that a child prodigy could memorize and recite every historical fact on record about Australian history, it does not follow that such a child would be entrusted with the interpretation either of that history or of current events in light of the past whether as the holder of a professorial chair in history or as a political commentator.

¹¹ For the sake of clarity, I repeat: my earlier reference to a quasi-exercise of utilitarian calculus only refers to the likelihood that if there is a greater number of factors in favour of a particular decision in a given situation then that numerical superiority itself might understandably be of significance to a substituted decision-maker notwithstanding that the tenor of the legislation is contrary to such a factor being determinative of the ultimate decision.

II WHAT DOES THE ABSENCE OF CHILD ETHICAL PRODIGIES TELL US ABOUT ETHICS?

Notwithstanding the obvious character of the reason why a child prodigy could not be a proper substituted decision-maker, it is argued that a lesson nonetheless emerges for methodology in ethical discourse (especially as it intersects with legislation) from the question that I have posed in that regard. The entry point to understanding that lesson is an understanding of the purposes of legislation of this kind and the purposes to which it is put. This entry point suggests itself because of what is argued to be a fundamental misconception in the approach of the relevant legislation.

The relevant fundamental misconception is that substituted decision-making is primarily if not exclusively an exercise in law, ethics, logic or decision-making *before* the fact.

In the hurly burly of courtrooms and hospitals, it is understandable that this fundamental misconception should arise. It arguably arises because ethicists, lawyers, health care providers and (*via* the elected Parliament) the entire body politic seeks to provide, in advance, guidelines to assist decision-makers in difficult situations at times of crisis. Either from the fruit of our collective experience over time or from some identified and agreed first principles, we try to provide *guidance* to those decision-makers.

However, the sad reality is that the governing authorities of hospitals, the professional negligence insurers who cover health care providers, the lawyers who advise aggrieved relatives, also all look to those guidelines for something more than mere guidance for decision-makers. They also look to those guidelines for *legitimacy*: in short, to test whether a particular decision was lawful or whether it is variously actionable as a breach of the legislation; actionable as a lapse of duty in tort or contract; or, and perhaps ultimately, an offence under the criminal law.

Accordingly, it follows that reform of tort law relevant to medical negligence would likely have a huge influence on the content of euthanasia law reform generally and substituted decision-making in respect of withholding or withdrawing life-sustaining measures in particular. This is because reform of tort law on this point could better distinguish between the guidance and legitimacy tests. For if governing authorities of hospitals, the professional negligence insurers who cover health care providers and the lawyers who advise aggrieved relatives were to find that a reformed tort law better identified, first, the duties of a given health carer to provide or withhold life-sustaining measures and, second, the criteria for best practice or such like in health care generally, then fewer people would turn to the hospital ethicist for advice.¹²

In short: I surmise that the fear,¹³ even if an unspoken or unconscious fear of being sued plays a disproportionate role in producing what might be regarded as conservative approaches to providing life-sustaining measures in circumstances where no advance health directive or substituted decision-maker is readily available. Hence the various professionals involved turn to the ethicist, the doctor or the lawyer and say: In this

¹² Hence the proposition that, as a matter of applied ethics, the best quarter for addressing the legal issues surrounding euthanasia generally and the withholding or withdrawing of life-sustaining measures in particular is from the area of tort law rather than a jurisprudence of human rights.

¹³ And I stress, it is only a surmise based on my personal experience first as a clinical pastoral counsellor in hospitals for several years and later as a lawyer involved in both personal injuries and professional (medical) negligence litigation.

situation, what should we do? Implicit to which enquiry is the question: *before* the fact, please assure us that we are doing at least that which is legal if not also that which is right?

It is regrettably argued that the methodology best suited to ethical discourse does not generally permit of such reassurance. This is because the question, at least as posed in this manner, is reminiscent of scientific method (a phrase that is employed here, only for the purposes of clarifying the argument, in a pejorative sense). It is an analytic question which assumes that past experience or first principles (perhaps derived from experience but, in the circumstances this discussion, derived from the schedules to the legislation) can be used to correctly identify *before* the fact an appropriate result in the circumstances of a particular case. It is a question which also assumes that, for the purposes of this discussion, the schedules to the legislation and/or the caselaw interpreting past applications of the criteria in those schedules, can serve as a heuristic framework to identify at least the legal if not the right thing to do.

It would be tempting to avoid the challenge of these questions by making a strong distinction between the *legal thing to do* (which is likely reasonably accessible) and the *right thing to do* (which is likely to be not merely difficult to access but perhaps also difficult to articulate). However, in the scenario of euthanasia and/or the provision of life-sustaining measures the intersections of ethical and legal values are so visceral as to risk colouring a strong distinction between the legal thing to do and the right thing to do as mere avoidance.

To date, my research has explored the following question: Do we only really gain a sense of reassurance that we have done the right thing *after* the fact of a decision and/or action rather than beforehand? This question is only partially interested in the psychological phenomenon of reassurance and is mostly interested in an analogy of ethics with historical method: Is it only with the passage of time that the wisdom or otherwise of our actions becomes clear? Or as is commonly attributed to Zhou Enlai in discussion with Dr Kissinger in regard to what the former thought of the good done by the French Revolution of 1789: It is too soon to tell.

Euthanasia is one of a handful of human experiences where that observation is particularly pertinent and, for similar reasons notwithstanding it being a different (albeit arguably related) phenomenon, the same is true of substituted decision-making in respect of the withholding or withdrawing of life-sustaining measures.¹⁴ This is because for the same reason that we will never see a child ethical prodigy similarly the reassurance that we have done right in a situation such as substituted decision-making in the provision of life-sustaining measures, is a phenomenon which generally comes *after* the fact.¹⁵

¹⁴ Those of us who have had to make a decision to withhold or withdraw life-sustaining measures as well as those of us who have worked with people who, in extreme circumstances, had to make split second decisions which led to the deaths of co-workers, comrades in arms and even family members, know that quite often there simply is not the luxury of time (or emotional calm) in which to even pretend that a fully informed, unpressured decision was reached. From my experience, many of those who have lived through such situations only come to see (if they ever do come to see) the prudence of their actions long after the event.

¹⁵ Personally, I would draw greater comfort from the knowledge that the substituted decision-maker who determined my doom was tinged with regret that the vicissitudes of life had brought us both to

As already noted, this proposition is understandable by reference to the earlier analogy with the child prodigy historian: an ability to recite the facts of history that are on record is not the same as an ability to comprehend or otherwise exhibit a consciousness of history as a human skill, insight or art. The historian's ability to recite facts may well be of assistance in gaining insight and comprehension but it is not a sufficient condition for its achievement. Just as works of art commonly change in significance with continued interpretation over time, is it not the case that we too reflect on our lives and interpret differently the significance of certain of our past actions and decisions? Is it not the case that the wisdom (or limitations) of our past actions and decisions only emerges with the perspective of retrospectivity?

In short: is the pang of regret a hallmark of a proper engagement with ethical discourse and decision-making? Here '*regret*' is not employed only or simply as synonymous with either remorse or sorrow. Regret here also refers to the bitter-sweet phenomenon that the vicissitudes of life have forced on us a circumstance which we would have wished to avoid had we the luxury of living in either an ideal world or at least a world of our own design.

It is true that we may regret those decisions and actions which we later feel were wrong. That experience can itself be a point of learning about the ethical life. Equally however, it is true that we may regret that which was unavoidable and necessary and wistfully reflect that if only the world was otherwise then both ourselves and those whom have been affected by our decisions and actions might have been spared some of the seemingly unavoidable pain of life. It is that experience which is emphasised here as a crucial part of an ethic of regret. This is because if we focus our enquiry and standards before the fact on the process of our decision-making then the subjective experience of regret that may eventually follow after our decision or action can serve as hallmark of the integrity with which we engaged in the process.

Hence, just as a hallmark attests to the quality of a silver item so too regret may serve to identify the extent to which we did (or did not) engage with integrity in the relevant decision-making process. As I have previously noted, those of us who have had to make a decision to withhold or withdraw life-sustaining measures as well as those of us who have worked with people who, in extreme circumstances, had to make split second decisions which led to the deaths of co-workers, comrades in arms and even family members, know that quite often there simply is not the luxury of time (or emotional calm) in which to even pretend that a fully informed, unpressured decision was reached *before* the event. From my experience, many of those who have lived through such situations only come to see (if they ever do come to see) the prudence of their actions long *after* the event.

If these observations resonate with us as true then, at the very least, does it not follow that it is in the nature of a Wittgensteinian category-mistake to ask before the fact of, for instance, withholding or withdrawing life-sustaining measures, whether the content of our decision is right?¹⁶ Given the category of the language game that is ethics or the

such a circumstance than I would from the thought of some juvenile prodigy engaging in the same exercise with blithe certainty.

¹⁶ According to Wittgenstein, examples of a category mistake include trying to measure time with a ruler – the subject matter is not amenable to the frame of enquiry or reference applied to it. At least

nature of ethical discourse, is not the more appropriate question before the fact simply this: What reassurance can we have that we are acting ethically, acting rightly before the fact irrespective of the content of the particular decision? In the result, the focus of enquiry perhaps ought be more on the rectitude of the process or art of decision-making and less on the rightness of the decision itself? In the context of this discussion about substituted decision-making and the refusal or withdrawal of life-sustaining measures, the touchstone of rectitude in the process would be the decision-making process and guidelines identified in the statutory regime.

It is argued that these observations highlight both the potency and relevancy of classical Aristotelian virtue ethics. In Aristotle's *Nicomachean Ethics*¹⁷ the ingénue ethicist is admonished (and I paraphrase) to hitch their wagon to an older, wiser adept and imitate them. It does not follow from this admonition that our accumulated experience over the centuries of a long line of ethical theorists (in whose wagon wheel ruts we now follow) means that we, all these roughly 2,500 years after Aristotle, have any greater certainty or reassurance that we are doing right than Aristotle when asked to advise, *before* the fact, whether life-sustaining measures ought be given or withheld in a given situation.¹⁸ If that last observation is correct and nearly 2,500 thousand years of collective experience and discussion about agreed first principles for ethical decision-making *etc* does not necessarily put us in a superior position to Aristotle when faced with ethical dilemmas, then it is reasonable to infer that no matter how many times, either as a species or as individuals, we seek guidance that we are doing right *before* the fact there are always going to be situations of human experience in which the analytic approach is inadequate.

In short: perhaps there are occasions when we ought not to seek reassurance that we are doing right *before* simply by reference to analytic reasoning. Rather, we ought focus less on the search for the *right content* of a decision *before* the fact and instead draw comfort from Aristotelian ethics that perhaps our proper goal is that we *act rightly before* the fact. In this circumstance, the giving or withholding of life-sustaining measures, for example, is one such occasion where the prudence or otherwise of that decision is best assessed only in retrospect (not prospectively) and the assayer's scales should be calibrated with an eye more to the integrity of the decision-making process and the goals and objectives of that process (*acting rightly*) rather than to the (*right*) content or effect of the decision itself.

An immediate and obvious advantage of this approach is that there is no need for a distinction of any kind (whether strong or weak) between the legal thing to do and the right thing to do. This is because both the legal thing to do and the right thing to do will merge into the same issue for forensic investigation: whether the decision-making process was rightly followed. In the context of the provision of life-sustaining measures

in the early philosophy of Wittgenstein, category mistakes accounted for most of the confusion and mistakes in philosophy. See: L Wittgenstein, *Tractatus Logico-Philosophicus* (C Ogden trans, Routledge & Kegan Paul, 1922).

¹⁷ See Aristotle, *Nicomachean Ethics* (W D Ross trans, Oxford University Press, 1980).

¹⁸ The classic examples given by Aristotle are to compare ethics with various human arts and skills, such as music or archery. Even though musicians and archers today have the benefit of those insights passed on by previous musicians and archers, it does not follow that the musicians and archers of today can, because of their forebears, skip any lessons or avoid any of the practice necessary to achieve their art or skill. It is as if each generation does have to learn to invent the wheel again.

this would result in an assessment of whether the statutory guidelines and criteria obviously played a role and influenced the decision-making process.

III GUIDED BY THESE INSIGHTS, WHAT MIGHT FOLLOW BY WAY OF LAW REFORM IN RESPECT OF THE GUARDIANSHIP AND ADMINISTRATION ACT 2000 (QLD) ?

It needs to be emphasised that this discussion of substituted ethical decision-making whether in the context of end of life decisions generally or the withdrawal/refusal of life-sustaining measures in particular, occurs in the context of a pluralist, secular, democratic society. Accordingly, it is argued that any suggested reform would ideally both enhance the understanding of ethical decision-making advanced here as well as at least respect if not actually promote pluralist, secular, democratic values. The suggested law reform advanced here is a mechanism for giving the community a voice early in any process that deals with a complaint about the appropriateness or otherwise of a particular exercise of substituted decision-making under the Act. Consistent with the paradigm for ethical decision-making advanced in this article, the suggested mechanism focuses less on assaying the content or effect of the decision itself and instead assays the probity of the decision-making process itself.

From at least mediaeval times until the Stuart dynasty, there was in England the phenomenon of the '*grand jury*'. Akin with the function of the grand jury in most U.S. jurisdictions today, this jury did not make findings of guilt at a trial but instead was assembled *before* a trial occurred in order to determine whether it was proper to charge a person with an offence.¹⁹ As such the processes and functions of the grand jury mirror those of committal proceedings in Queensland's Magistrates courts.²⁰

A benefit of the grand jury system is that it provides community input at a very early stage of the criminal process. It is argued that within a secular, pluralist, democratic society it is difficult to under-estimate the importance of inviting the voice of popular wisdom or common sense into an assessment of the criminality or otherwise of, for instance, withholding or withdrawing life-sustaining measures. This is important not because the views of a grand jury are more likely to be right (whether at law or as an exercise in ethical discourse) than those of a substituted decision-maker or court. Rather, the primary importance of giving a voice to the general public through the grand jury at an early stage of the process is that it acts as a weather vane for the prevailing popular consensus at a given point in time on a given issue.

The secondary importance of giving a voice to the general public through the grand jury at such an early stage is that it increases the transparency of decisions whether or not to prosecute, decreases the pressures attendant with a broad exercise of prosecutorial discretion, and provides more timely input of the prevailing popular consensus.²¹

¹⁹ See: J Baker, *An Introduction to English Legal History* (Butterworths, 2nd ed, 1979) 64, 415.

²⁰ The notable difference being that the grand jury's function was to determine, *before* the fact of arrest and charge, whether a true bill of indictment could be maintained whereas, in Queensland, that same question is asked by a magistrate in committal proceedings *after* the fact of arrest and the charge being laid.

²¹ The difficulties with broad prosecutorial discretion whether, for instance, to prosecute for murder in circumstances suggestive of voluntary, assisted euthanasia have been highlighted in research over the past decade. See: M Otlowski, 'Mercy Killing Cases in the Australian Criminal Justice System' (1993) 17 *Australian Criminal Law Journal* 10-39.

Accordingly, the submission is that if a question arises as to whether a particular decision to provide or withhold life-sustaining measures was illegitimate, that issue could be tested in a preliminary way by this special court of coronial enquiry or special sitting of the Guardianship Tribunal with the assistance of a grand jury. The grand jury would sit as the tribunal of fact on a specific question: namely, whether the decision-maker both abided by the processes required by the legislation and was guided by (and only by) the criteria for decision-making that is identified in the legislation.

There are obvious difficulties with this proposition not the least of which is how the grand jury could purport to get into the mind of the substituted decision-maker and be satisfied that the decision-making process was guided by (and only by) the relevant statutory criteria. However, this is a forensic difficulty that is true of every jury finding in respect of crimes or civil torts that involve an element of intention. Indeed, this potential weakness is a possible strength as it makes the complaint process about substituted decision-making consistent with a good number of other judicial processes.

The matter could be finally determined in that forum *except* if the finding was to the effect that the particular decision was *prima facie* illegitimate in which case, much like committal proceedings in the criminal jurisdiction, the matter would be referred on for further consideration in a higher court (whether of civil or criminal jurisdiction being moot for present purposes). Some of the advantages of such a proposal are reasonably obvious:

1. If the complaint is that life-giving measures were illegitimately withheld, it avoids the need for prosecutorial discretion (or other mechanisms whereby decisions about whether to investigate or commence legal proceedings are made) it avoids the need for such discretion to occur behind closed doors and without much accountability;
2. If the complaint is that life-giving measures were illegitimately provided, it gives the relevant decision-maker a forum for vindication without being directly in any kind of legal jeopardy;
3. This forum provides an expedient mechanism for adding to the case law, and therefore the standards expected of decision-makers, those measures that arise due to changes in technology without always playing a game of 'catch up' with the Parliament;
4. Similarly, this forum provides an expedient mechanism for testing public opinion and popular mores without, again, the need for playing 'catch up' with the Parliament;
5. And finally, in a democratic and egalitarian society committed to the rule of law as inherited from the common law tradition, there is a special appeal in having the common sense of disinterested lay members of the public involved in determining just such a question rather than leaving it simply to the professionals.

It is also appropriate to consider the advantages of this proposal from the perspective of ethical theory or method. And, in outlining these advantages, I return to my dilemma about the lack of child prodigy bioethicists.

Perhaps the lack of child prodigy bioethicists is due to the fact ethics is best understood as an art rather than a science – a virtue acquired with experience rather than a method that can be acquired from pedagogy. Accordingly, like all art it is best judged:

- By others rather than the artist alone;
- After the work of art is completed rather than in the planning stage;
- Has to be experienced either in its performance or the interaction of its display rather than simply imagined or be the subject of speculation;
- Over time and allowing for changes in perception, opinion and regard for the artwork as society changes rather than frozen once and for all in the mind of the artist.

The final question asked in this article is whether, like how we judge and discuss or appreciate art, are ethical decisions best understood by reference to such factors as the measure of regret we feel at the passing, ephemeral experience of our interaction with art; the regret which we feel after we encounter a work of art (perhaps profound if disappointed by the experience and tinged as bitter sweet if pleased with the experience and sad at its passing)? Just as these factors can legitimately influence our reaction to art, are these not also legitimate factors in appreciating ethical decisions? Hence, a profound work of art will likely elicit the regret that we have failed or otherwise are incapable of producing the same art. Whereas a flawed work of art will likely elicit regret in the artist; or the artist's sponsors when the public judgement is known. For those reasons the author will now desist from this discursus and leave the reader to assess the measure of regret occasioned by the time spent reading it.