FOREWORD

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The closing years of the twentieth century have witnessed considerable activity within the legislatures, the courts and the community along the borderland between law and medicine, reflecting a widespread desire not merely to debate, but actually to resolve contentious issues by articulating standards, enacting responses and enforcing obligations. This special issue of the University of New South Wales Law Journal devoted to the theme "Law and Medicine" represents timely recognition that specific solutions to many perplexing legal, ethical and practical problems for the medical profession are being supplied with increasing frequency by the legislatures, the courts, and more particularly from within the medical profession itself.

In this consumer age, it is trite to acknowledge the need to carefully weigh, as distinct from ritually genuflect towards, community expectations when examining appropriate modes of professional interaction with that community, and of institutional controls on that interaction. This need flows from ethical concepts of professional responsibility and public accountability. The most widely accepted and least controversial example of paying attention to public attitudes lies in the area of informed decision-making by patients, where respect for personal autonomy and concern for quality care form a predictably happy marriage. However, at a more pragmatic level, there are regular reminders that community opinion (or perceptions by legislators of which such opinion is or might become) sometimes imposes heavy restrictions upon what governments, both National and State, will dare to attempt. The recent Federal Government veto of a decision by the Australian Ministerial Council on Drug Strategy to approve a heroin trial in the Australian Capital Territory contains adverse implications for the future possibility of medicinal use of marijuana in Australia, as Dr Kyriagis in his paper on that topic regretfully observes. Moreover, it fortifies the general sense of pessimism that the criminal law enforcement model will remain entrenched in its ascendancy over the medical treatment model in Australian drug policy, so long as legislators see electoral advantages in taking a 'tough' line on illicit drug use and fear voter retaliation if they yield to the growing force of informed medical opinion.

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The reluctance of legislators to move ahead of community views in politically sensitive areas reflects the reality that public opinion, like public policy, can prove an unruly horse. However, the legislature sometimes moves not behind but in advance of public opinion, as shown by the recent enactment by the Northern Territory Legislature of the *Rights of the Terminally Ill Act* 1995 (NT), and the vigorous public debate which followed. The paper by Mr Williams and Mr Darke provides an important constitutional dimension to the euthanasia debate in Australia. This debate, notwithstanding the recent legislative setback caused to reform initiatives by the *Euthanasia Laws Act* 1997 (Cth), will undoubtedly increase in intensity, hopefully attended by unnecessary semantic confusion of the type accurately exposed by Dr Somerville's paper.

The optimal assurance of professional competence and integrity is one goal upon which public opinion and professional bodies policies are in complete accord. In the past decade all professionals have come under greater scrutiny, with the consistent demand for increased accountability of professional decision-makers, including doctors and pharmacists, being enforced by a growing range of external agencies, and the greater willingness of alleged victims of medical incompetence or error to change roles from passive, grateful patient to active, hostile litigant. The paper by Ms Furness explores the disciplinary jurisdiction governing medical practitioners, and in particular, the manner in which necessary investigation of complaints of incompetent or unethical unprofessional conduct by doctors can perform its essential protective function without inflicting unnecessary reputational damage or infringing procedural fairness requirements. Moreover, as Mr Dwyer's paper shows, current recognition that pharmacists now have a direct treatment role in patient care, requires greater responsibility to be undertaken by pharmacists, inevitably accompanied by enhanced disciplinary controls.

It is obviously easier to describe the past than to predict the future. However, certain trends in the future interplay between law and medicine are discernible with some confidence, vastly increased by reading these thematic papers.

First, the professional governing and advisory bodies will assume a more prominent role in articulating express standards and requirements in an ever increasing number of medical specialties and treatment situations. The growing use of clinical practice guidelines will have, as the paper by Ms Bennett indicates, important ramifications for medical professional practice, apart from their intended focus on improving quality assurance and cost containment. The inculpatory and exculpatory functions of such guidelines in medical negligence litigation will occupy the attention of future courts.

Secondly, mass toxic tort cases involving pharmacological products and medical devices, brought on a contingent fee basis by lawyers representing large numbers of alleged victims, will impose upon Australian courts the same problems of litigation management, and validation of scientific testimony as have beset USA courts in the Agent Orange product liability litigation, and the

long drawn out Bendectin litigation, which is analysed by Mr Edmond and Dr Mercer in their paper.

Thirdly, the legislature, rather than courts, will play the most decisive role in determining and defining rights in the more contentious areas of medical jurisprudence. Dr Reynolds' paper demonstrates the truth of this observation in relation to public health law. There is also growing evidence that governments, aided by law reform bodies, are more willing to introduce legislation to deal in a relatively comprehensive manner with matters of joint medico-legal significance. However more disturbing is the observed willingness of legislatures to prefer politically optimistic solutions in any area where the clamour of popular, ill-informed feeling is sufficiently loud to dictate official resistance to necessary change.

Fourthly, the legislative solutions to a wider range of health care issues will be formulated by the international community, particularly by the work of distinguished organisations such as UNESCO, and prestigious conferences of lawyers, scientists, philosophers and ethicists from numerous countries and differing traditions. Justice Kirby charts what for many has been unknown legal territory but which indisputably represents an exciting scientific domain, namely the Human Genome Project, and possible legal responses of the international community to what can be described without hyperbole, as a truly awesome development in human history.

This issue contains much stimulating discussion of topical medico-legal issues by knowledgable contributors, and will advance professional understanding in many areas of joint interest and concern to both the legal and medical professions.