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Comments on Reproductive Ethics and the Family by Professor James Lindemann Nelson

Principal Family Court Judge Mahony, New Zealand

Professor Lindemann Nelson's visit to New Zealand and his illuminating address on Reproductive Ethics and the Family (Nelson, 2000) coincides with the New Zealand Law Commission's (NZLC) examination of our Adoption law. It was passed in 1955 in a social climate and against a set of values, which were in place really to protect the position of the adults in the secrecy surrounding the creation of new family relationships for a child, at the expense of the child's biological connections, which were in law extinguished.

There is more than the hint of an analogy with what can happen through the use of assisted reproduction technology especially using donated gametes in creating children for couples who together are unable to have children by traditional procreation. Here also, in assisted reproduction technology, the immediate sphere of concern is the rights and needs of the adults with very little attention given to the rights of the offspring to be conceived and born by this process.

The Professor's analysis will reassure the authors of the Law Commission's discussion paper about their proposal to replace the concept of adoption with a new concept of legal parenthood which would confer parental rights and responsibilities towards the child in a new family, leaving intact with openness, the child's birth connections (NZLC, pp. 8-10). His address also provides compelling reasons why in New Zealand, assisted reproduction technology should be moved out of the narrowly based framework of medical law and ethics for the providers of technology under the supervision of a National Ethics Committee on Assisted Human Reproduction as the sole framework within which competing rights and interests are considered and reconciled and practice is regulated.

The new birth technologies do require regulation within a medical framework, and there are human rights issues to be considered, both for the adults and I add with some emphasis, the as yet unborn children.

Professor Lindemann Nelson directs our attention to the broader context of family structures and the importance and interaction of family relationships for a child as an ethical basis for considering assisted reproduction technology, especially with donated gametes and responsibilities to the child. In doing so he plants it firmly within the realm of family law.

It is a basic premise for him that "humans are brought into the world as moral and social beings, and not simply as biological individuals"(Nelson, 2000, p.4). He refers to "social reproduction" that is "what goes on in families, is a key to what structures, ideologies, and beliefs help form new persons"(Nelson, 2000, p.5).

On the other hand he also stresses that "human beings are not simply bundles of ideas and impressions" but are "embodied creatures" (Nelson, 2000, p.8) consequently "elective affinities" as a basis for founding responsibilities to children and meeting their developmental needs seems to be fundamentally lacking. Just making what you want of biological ties does not go far enough in explaining their significance as a factor in the social development of children.

In that context, the Professor refers to families as "an important site where people look to find intimacy, impact and self understanding" (Nelson, 2000, p.9). For children in particular, they provide the environment and connection through which they learn to understand and identify themselves.

In considering the role of law and legal structures and safeguards to promote and protect the interests of children and their well-being within the family, the importance of biological connection becomes apparent from an examination of two New Zealand based examples. The first relates to Maori families and their social and cultural values and the second, the outcome of our experience with adoption law.

Maori Families: Social and Cultural Values

Professor Lindemann Nelson, in his paper refers to the motivation behind the use of assisted reproductive technology with donated gametes namely the desire of adults to have

children of their own giving rise to socially recognized biological connections to the children that they raise" (Nelson, 2000, p.5). Biological connection to the child is a strong bonding factor, at least for some of those parents. It has also led to disputes in the Courts between commissioning parents and surrogate mothers who cannot bring themselves to give up a child which they have borne.

In one of several reports to the Australian Government on surrogacy, the Family Law Council of Australia referred to the experience of one surrogate mother which illustrates the point. She said:

> What I would like to explain to any other women contemplating this method of helping others is that, in the cold light of the non-pregnant state, it is easy, as I felt myself, to believe that this is not my child. But as the baby grows and moves, the attachment is the same as it was for other children you have borne. The grief for the loss of your baby begins long before the baby's birth. It began for me with the baby's first movements, and the realisation that the couple who I don't know, who will receive my baby, don't appear to care for my feelings or welfare. This will affect my life until I die. There is no thanks – no real remuneration. You don't help anyone – Least of all the-couple you intend helping, least of all the child. ...It has certainly affected my family's life in a negative way, for how long we are yet to find out, the worst is to come. (Family Law Council, 1985, p.69)

If there are similarly strong needs for children to have connections with their natural parents including the authors of their genetic makeup, then those needs should be protected by the law.

New Zealand's most modern statute affecting children within family is the Children, Young Persons and Their Families Act 1989 which is our law for dealing with cases of care and protection of children arising from abuse or neglect within families and for dealing with juvenile offending. This Act is pertinent here for its reinforcement of the role of family for children, in providing legal accommodation for different family forms, and explicit recognition of Maori and Maori family values. Section 4 refers to the object of the Act

> to promote the well-being of children, young persons and their families and family groups by
>
> (b) assisting parents, families, whanau, hapu, iwi and family groups to discharge their responsibilities to prevent their children and young persons suffering harm, N treatment, abuse, neglect, or depravation.

Basic to the approach taken by this Act is the principle referred to in s5 that;

> Wherever possible the relationship between a child or young person and his or her family, whanau, hapu, iwi and family group should be maintained and strengthened.

There is a duty on the Government's Social Agency to; "have particular regard for the values, culture and beliefs of the Maori people and to support the role of families, whanau, hapu, iwi and family groups" (s 7(2) (c)). Those provisions are also consistent with values more generally expressed in the United Nations Convention on the Rights of the Child for example in Article 8 which refers to

> the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by Law without unlawful interference.

In Maoridom, children are born into their whanau which signifies

> a group of relatives defined by reference to a recent ancestor (Tupuna) comprising several generations, several nuclear families and several households, and having a degree of on-going corporate life focused in group symbols such as a name, a land base (Turangawaewae) and Taonga. (Durie-Hall and Metge, 1992, p.61).

Whanau in turn are linked into hapu as an extended kin group and then iwi, the tribe, the descent group consisting of many hapu. Whanau cannot be considered in isolation from whakapapa or genealogy through which Maori origins are traced back to the beginnings of life.

The Law Commission Report 53 (Henare, 1999) refers to the Maori world view as "expressed in and through whakapapa, the connection between human beings and all things in the universe being described in terms of marriage, pro-creation and descent" (Henare, 1999, p.12, para 40). Nor can whanau be considered in isolation from whanaungatanga or kinship –

the web of relationships through descent and marriage; it is the ultimate source of Maori collective responsibility and the practices that bond and strengthen the kinship ties of whanau making it a strong and stable unit (Pere, 1991).

In a 1997 case, the full Court of the High Court in BP v Director-General of Social Welfare [1987] NZFLR 642, dealing with a grandmother's appeal against a Family Court decision refusing her custody of her granddaughter, referred to the place of children in whanau quoting from Dame Joan Metge: "children were to be seen as members, not as possessions of the whanau. They were highly valued treasures held collectively and in trust for future generations." *(BP v Director-General of Social Welfare* (1997) 15 FRNZ 501, 505; [1997] NZFLR 642, 645).

In the same case, the High Court said:

> the welfare of the child can never be considered in isolation. The cultural background of a child is significant and the special position of a child within a Maori whanau, importing as it does not only cultural concepts, but also concepts which are spiritual and which relate to the ancestral relationships and position of the child must be kept in the forefront of the mind of those people charged with the obligation of making decisions as to the future of the child. *(BP v Director-General of Social Welfare* (1997) 15 FRNZ 501, 505; [1997] NZFLR 642, 647)

I hope that the brief references which I have made to the place of the child as the taonga within whanau, with connections through genealogy and kinship are sufficient to stress the vital importance of biological connections, which are part of the basis for social development. In this context, Dyall of Ngati Maniopoto says:

> The nurturing of the development of people and the importance of people knowing who they are is an integral part of the tikanga of being Maori and belonging to any whanau, hapu or iwi. (Dyall, 1999, p.35)

It is not surprising then that Maori customary adoption or whangai as a means of addressing infertility and supporting members of the community who wish to have or care for children, nevertheless does not extinguish the relationship of those children with their natural parents.

As Dyall notes:

> The children in this situation generally grow up knowing fully who they are in terms of their whakapapa and the reasons why their care has been shared. (Dyall, 1999, p.37)

The Maori woman who referred to her child adopted in this way as "...though not born of my womb is born of my heart" (Metge, 1995, p.213) would nevertheless never deny such a child access to the birth parents or an understanding and acceptance of the child's natural origins. This would be an essential part of the child learning to identify him or herself in relation to the child's kinship.

The New Zealand Adoption Laws

The second example relates to the adoption experience in New Zealand. The current law, the Adoption Act 1955 was enacted 45 years ago and the change of climate from then to now has led to a reversal of values surrounding adoption practice which bears directly on Professor Nelson's central theme. The Law Commission's current discussion paper sums up the earlier position:

> The Adoption Act was based on an assumption that the best way to conduct adoption was in secret. The birth mother could then forget the ordeal and get on with her life; the new adoptive family unit could develop like any other family unit and an illegitimate child was legitimized. (NZLC, p.3, para 13)

A further underlying assumption is that the child's birth connections do not matter and can be ignored.

The English Tomlin Committee in 1925 had observed:

> The notion of secrecy has its origin partly in a fear (which a legalised system of adoption should go far to dispel) that the natural parents will seek to interfere with the adopter and partly in the belief that if the eyes can be closed to the facts, the facts themselves will cease to exist, so that it will be an advantage to an illegitimate child who has been adopted if in fact its origin cannot be traced. (Cited in NZLC, p.3, para 13)

But the expectations of the 1955 Act were not fully realised.

As the Commission further observes:

> Birth mothers do not just forget about the child and carry on with life, rather it has been shown that they go through a complex grieving process, similar to that undergone when a child dies. (NZLC, p.3, 4, para 15)

From the other end:

> some adoptees report problems in establishing a sense of identity. Simple things like common interests, common thinking patterns, common behavioural and personality characteristics and common physical attributes may be lacking in an adoptive environment. Most people gain knowledge of one's family as part of normal development yet an adopted person will never experience that in an environment of secrecy. (NZLC, p.4, para 16)

Those conclusions are the outcome of research. For birth parents and adoptees they evidence the powerful and ongoing forces behind the physical connections between parent and child, and from the child's side they bear heavily on the way in which offspring establish their self identity.

Parliament passed the Adult Adoption Information Act 1985 facilitating access to information relating to adoptions for adult adopted persons and their birth parents, in order to alleviate the effects of adoption surrounded by secrecy, sometimes referred to as closed adoption by strangers. In her book *A Question of Adoption* Ann Else in 1991 says "Closed stranger adoption can now be seen for what it was - a social experiment with unknown and uninvestigated outcomes, conducted on a massive scale" (Else, 1991, p.l97).

The response to this legislation which came into force on 1 September 1986 as an alleviating measure far exceeded official expectations. Else reports that by the end of 1989 10,803 adopted persons – well over a quarter of the number adopted by strangers between 1944 and 1969, and 2609 birth parents had applied. By 1991 there were about five times as many applications from adopted people as from birth parents (Else, 1991).

I have dealt with too many applications over the years to open adoption records in the Court, to underestimate the deep yearnings and hunger and unfulfilled human needs driving the search for biological links – in the main by adult children. Social work practice also directed at alleviating the long-term consequences of closed adoption in New Zealand, as it has overseas, has created a climate of openness across adoption. Recent research is summarised in the Law Commission paper as follows:

> Birth mothers have found that contact with the adoptive family and the child assists them in alleviating their sense of loss and helps them come to terms with their adoption. Adoptees are better able to establish a sense of self, come to terms with feelings of abandonment, and feel secure in their adoptive family environment. ... evidence suggests that adoptive children are more able to develop a successful attachment to their adoptive parents when there is contact with birth parents. (NZLC, p.4, para 19)

The impact of open adoption is described in a way relevant to the theme of Professor Nelson's paper by Melina and Roszia in their book *The Open Adoption Experience* where they say:

> There is an awareness among everyone involved that regardless of the way adoption changes parental roles, both legally and in practice, the genetic and historical link between the child and the birth family cannot be abolished. Children reflect both nature and nurture, though the exact interplay between those factors is still a mystery. Consequently the child has a connection to both the birth parents and the adoptive parents because each has made a significant contribution to the child's development. This dualresponsibility for who a child is and who he or she becomes also creates a connection between birth parents and adoptive parents. Through them a human life is created and nurtured into someone who will become an adult, influence others, and connect previous generations to the future. (Melina and Roszia, 1993, p.xv)

The authors go on to indicate their view that the same considerations apply with respect to assisted reproductive technologies involving donated gametes. The Children,Young Persons and Their Families Act is an example of family law built around family values. It protects Maori children by being protective of whanau – the Maori family unit. In stressing the desirability of the child remaining within whanau, the legislation respects the importance of

whanau for the developing child. The 1955 Adoption Act, on the other hand, failed to protect children in that way and there is room for the lament – "It's all secrets and lies".

Its subsequent history shows that openness is the key to truth and the opportunity for individuals to connect with the origins of their lives and the people who contributed to making them what they are. It also shows that biological connections within families are indispensably important and that "elective affinities" for children are just not enough.

The Adult Adoption Information Act has gone part of the way to creating openness and opportunities for contact between adults who have been adopted and birth parents.

Open adoption practices, though variable, have also radically changed the climate for adoptions and a far better deal for birth mothers and hopefully in due course, for children being adopted, although their birth certificates still conceal the true position of their origin.

It will take new legislation to provide more complete protection for children's rights. It may involve law which, in line with Maori customary adoption, is based on openness and preserving natural birth connections. I suggest that we are in danger of repeating the mistakes around adoption with assisted reproductive technology by concentrating on medical issues and satisfying the needs and rights of adults. The immediacy of those concerns tends to divert attention from the best interests of children not yet in existence. Nor can we identify and deal with those questions through an ethics supervisory body on a case-by-case basis. However you view new birth technologies, essentially they are about the creation of new human beings for already made families. The value of their lives, their rights and well-being, must become the overriding consideration for everyone involved in the process. In my view, that will not be achieved without legislation to establish the guiding principles, mandating what must be done, and prohibiting, with sanctions, unlawful practices. An unregulated environment is out of step with the international movement to define and protect children's rights and interests, for example, through the United Nations, European, and Hague Conventions. Establishing what should be the rights and interests to be protected will be an important function of the law for which the Children, Young Persons and Their Families Act is a useful precedent.

The Assisted Human Reproduction Bill before Parliament since 1998 is a first step, conveying a policy of openness. It institutes a central bank of information about donors which providers must collect for children and their families, and there are limited provisions for identifying information to be shared. Although it prohibits some fundamentally unethical activities, including cloning of humans, it does not deal with practices relating to best interest issues, such as inter-racial donation of gametes and inter-generational donation of gametes which grossly distort family relationships; the use of gametes from dead persons or foetuses.

This Bill followed an earlier Private Members "Human Assisted Reproductive Technology Bill" introduced by Dianne Yates in 1996. This Bill provided for clinics to be licensed and monitored by a nine member Human Assisted Reproductive Technology Authority. It also provided for a central register for children born through assisted reproductive technology. In addition to outlawing human cloning, it banned commercial surrogacy and the sale of human sperm, ova, embryos, and babies. Legislation must require an assessment of the applicants and their suitability to be parents, their ability to provide a stable home and ongoing care. Closer to the theme of Professor Nelson's paper is the content of information. For example, for Maori, should it not include genealogy and opportunities for contact? We should not discount opportunities which can be created by a modern family law framework for counselling and information sharing. Sandra Coney, an advocate for genuine openness, refers to guidelines for a meeting between donors and recipients before assisted human reproductive technology is used, for detailed realistic discussion and counselling about the process of telling – of informing children about the circumstances of their conception and birth.

If children have a right to know the truth about their origins, must there not be a corresponding obligation to disclose? That would be the beginnings of responsible parenthood for those involved in the process including donors and would shift the focus back to children's interests, to families for children, rather than children to satisfy adult needs and aspirations.

References

BP v Director-General of Social Welfare (1997). 15 FRNZ 501, 505; [1997] NZFLR 642, 645

Durie-Hall, D. and Metge J. (1992). Kua Tutu Te Puehu, Kia Mau: Maori Aspirations and Family Law. In *Family Law Policy in New Zealand*, M. Henaghan, and B. Aitken, B. (eds), Oxford: Oxford University Press

Dyall, L. (1999). Assisted reproductive technologies: Protecting the generations. In *Protecting our Future*, S. Coney and A. Else (eds). Auckland: Women's Health Action Trust

Else, A. (1991). *A question of adoption: closed stranger adoption in New Zealand*, Wellington (NZ): Bridget Williams Books

Family Law Council (1985). *Creating Children: a uniform approach to the law and practice of reproductive technology in Australia.* Canberra, July

Henare (1999). *Justice: the experiences of Maori women* New Zealand Law Commission, R53

Metge, J. (1995). *New Growth from Old: The Whanau in the Modern World,* Wellington (NZ): Victoria University Press

Melina, L. and Roszia, S. (1993). *A complete guide for adoptive and birth families – from making the decision through the child's growing years*. New York: HarperPerennial Library

Nelson, J. L. (2000). Reproductive ethics and the family. *New Zealand Bioethics Journal*, 1:1 pp.4-11

New Zealand Law Commission. *Adoption: options for reform*, PP 38

Pere, R. (1991) *Te wheke: a celebration of infinite wisdom.* Gisborne: (NZ) Ako Ako Global Learning New Zealand