

new developments
*Legislation to Address Assisted Human
 Reproduction in New Zealand:
 The Human Assisted Reproductive Technology
 Bill, and Supplementary Order Paper Number 80*

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Background

In the Foreword to the Department of Justice's Issues Paper, released in March 1985, the then Minister of Justice, Mr Geoffrey Palmer, stated that 'Because the process of discussion, consideration and evaluation is just beginning, no speedy decisions can, or should be, made' (Department of Justice, 1985). Given that it will be almost 20 years from the issuing of this first government document relating to legislation covering Assisted Human Reproduction in New Zealand to when legislation is due to be passed, no-one could accuse the Government of making speedy decisions!

It should be noted that as a result of the Issues Paper, the Government did act on the question of the legal status of children conceived through the use of third party gametes (New Zealand Government, 1987). All other matters, however, were left for further deliberation. The Issues Paper – inappropriately titled 'New Birth Technologies' (the paper was not about birth technologies but about conception) – followed on from a recommendation that was made by the Royal Society of New Zealand, the New Zealand Law Society, the Medical Council of New Zealand, the Medical Research Council of New Zealand, and the Medical Association of New Zealand, who collectively requested that the Government appoint a Standing Committee to consider the legal, moral and social issues arising from IVF, 'Artificial Insemination by Donor', and related problems in bio-technology (Royal Society of New Zealand *et al.*, 1985).

New Zealand is not alone in having a long history of calls for, or attempts at, legislative responses to developments in assisted human reproduction. The Canadian government, for example, first attempted to introduce legislation in 1996 and its current attempt (2003) is encountering concerted and organised opposition. On the other hand, some countries have moved quite quickly in terms of developing a policy and legislative framework. It might be concluded that four main reasons emerge as to why New Zealand and some other jurisdictions have experienced difficulties in moving to a legislative framework.

The first of these is that in a pluralistic society, there are many viewpoints and it is difficult to find legislation that acknowledges that pluralism. Secondly, there are strongly held moral viewpoints regarding assisted human reproduction and concern for these moral viewpoints has made it difficult to arrive at legislation that is acceptable. Thirdly, the field of assisted human reproduction is developing very quickly and it is difficult to arrive at legislation which will provide for current and future developments. Finally, and specific to New Zealand, the issues for Maori that emerge from assisted human reproduction are significant, and need to be considered in a careful and consultative manner.

The first move to introduce legislation in New Zealand was in the form of a Private Members' Bill – Human Assisted Reproductive Technology Bill (HART Bill) – introduced to

Parliament by Dianne Yates (Yates, 1996), the MP for Hamilton East. The Bill was referred to the Health Select Committee, who considered the submissions that were made. Before the Committee reported, the then Government introduced the Assisted Human Reproduction Bill (New Zealand Government, 1998). Again, submissions were invited to this bill. With the change of government, in 2001, a significant shift occurred. The present Government made a decision to progress legislation in this area, by amending the Human Assisted Reproductive Technology Bill via the Supplementary Order Paper (SOP) No. 80 (New Zealand Government, 2003).

The Human Assisted Reproductive Technology Bill and the Supplementary Order Paper

The mechanism of using a supplementary order paper to amend a bill is not unusual. What is unusual about this supplementary order paper, however, is that it drastically alters the Human Assisted Reproductive Technology Bill and in fact, very little of the original bill remains. One of the main changes that is provided for in the Supplementary Order Paper is the way in which the management of assisted human reproduction in New Zealand will be structured. In Dianne Yates' Private Members' Bill, she proposed a system which would see the licensing of clinics, with a licensing authority being established to regulate and ensure proper monitoring of services. The licensing would inhibit improper use of reproductive technology and surrogacy. Such a licensing authority would be similar to those established in the United Kingdom and in the State of Victoria, Australia.

The Supplementary Order Paper, on the other hand, proposes that there be a two-fold system operating in New Zealand. The first system would see the establishment by the Minister of Health of The Advisory Committee on Assisted Reproductive Procedures and Human Reproductive Research. This advisory committee, which in effect will fulfil a policy role, would advise the Minister or an ethics committee on aspects of, or issues arising out of, kinds of assisted reproductive procedures or human reproductive research. It will issue guidelines, monitor developments and advise the Minister as to whether any procedure, treatment, or application should be declared an established procedure. Once a procedure has been declared as being established (i.e. acceptable in New Zealand), it will then be the task of an ethics committee, or committees if they are jointly charged with this task, to review

individual applications. The ethics committees are the second part of the system of approvals. In other words, the advisory committee will provide the broad general framework and the ethics committees will monitor applications within that framework. This is in sharp contrast to the present situation, where the National Ethics Committee on Assisted Human Reproduction (NECAHR) in effect makes both the policy and ethical decisions. The SOP provides for the Minister to establish an ethics committee – like NECAHR – or to designate existing committees to be responsible for providing ethical review.

As with the appointment of all such committees, there has been some concern expressed about membership issues and the decision-making processes – particularly in relation to the latter, in that it places considerable authority in the hands of the Minister, who may recommend to the Governor General that an order in council be made regarding what procedures may or may not be carried out in New Zealand. The expectation is that all currently practised treatment procedures will continue to be accepted and that the Advisory Committee will be responsible for new developments only. A list of potential new developments appears in the SOP and these include embryo donation, embryo cloning for non-reproductive purposes, embryo selection, embryo splitting, germ line genetic modification, storage of embryos, and the use of gametes derived from foetuses.

Some concern has been expressed regarding the new procedures that are listed, particularly embryo donation and embryo selection. These are now widely accepted in overseas jurisdictions and there has been concern that placing them on the new procedures list, and therefore subject to Advisory Committee consideration, will lead to lengthy delays in their introduction to New Zealand. It is of interest that these two areas are currently the subject of the development of guidelines by NECAHR. NECAHR has conferred with the Minister of Health regarding the status of its current work in these two areas, given the implications of the appending legislation, and the Minister has asked NECAHR to continue with its work. This is in part because NECAHR has currently before it applications from providers seeking approval to implement programmes which would involve embryo donation and embryo selection.

The SOP outlines six principles that are set out to guide the providers of services and these include:

- (1) the health and well-being of children born as a result of the performance in assisted reproductive procedure
- (2) human health, safety and dignity being preserved and promoted
- (3) no reproductive procedure should be performed on an individual unless the individual has been given the opportunity to make an informed choice and to submit or refuse to submit to the procedure of the research
- (4) donor offspring should be made aware of their genetic origins and be able to access information about those origins
- (5) the needs, values and beliefs of Maori should be considered and treated with respect
- (6) the different ethical, spiritual, and cultural perspectives in society should be considered and treated with respect.

In relation to part one, above, this commentator has expressed concern that the health and well-being of children is only stated as 'should' be paramount in all decisions about the procedure. This in fact represents a weakening of the position adopted in the HART bill, in which the statement was that the paramount importance of the welfare of any child born as a consequence of assisted reproductive procedures was a guiding principle.

A major component of the Bill and SOP concerns the information about donors, donated cells and donor offspring (part four of the SOP). The provisions of the Bill require that providers of services must obtain and keep certain information about the donors of gametes, and that donors are to be given advice concerning possible access to that information at some future date. In addition, providers of services are required to give information to the Registrar General when the birth of a living donor offspring has occurred. The Registrar General is to keep all such information indefinitely. The donor offspring will be able, once they have reached 18 years of age, to seek information from a provider concerning the gamete donor. There is also provision for guardians of donor offspring under the age of 18 to ascertain if information is being held and to be able to access that. A provider may refuse to give a person access to information about a donor if satisfied on reasonable grounds that the disclosure is likely to endanger any person. Donor offspring, again when they have reached 18 years of age, are able to ascertain if the Registrar General is keeping any information about the donor and if so, the Registrar General is to provide access for the donor offspring to that information. These clauses are of considerable importance,

in that they represent a move to recognising the rights and needs of donor offspring to access information concerning their genetic histories.

With the passing of this legislation, New Zealand will become one of some eight jurisdictions in the world to have such provisions. The debate concerning the rights of offspring to access information has been extremely acrimonious worldwide, and it is significant that New Zealand will be joining a growing number of countries who have moved in the direction of providing access to information. In most other countries, such moves have been met with considerable opposition but it is most unlikely that this will be the case in New Zealand. The reason for this is that New Zealand providers of services have in effect been practising according to this policy, without legislative requirement. For the last 15-20 years, most clinics have been advising couples that they should be sharing information with their offspring about the nature of the conception and for the last 15 years, clinics have not been prepared to accept donors who were not prepared to be identified to offspring in the future. New Zealand is unique in the world in terms of having reached this position without legislation. The legislation is, however, important in that it establishes in statute these rights and it ensures that adequate information systems are established. Daniels and Caldwell (2002, p. 240) have argued that 'only the enactment of legislation can ensure that the interests of children yet to be born are properly identified and addressed'.

It is important to note that the legislation does not make these provisions retrospective and that the changes will only occur from enactment of the legislation. However, it needs to be acknowledged that there have been a number of instances where contact between offspring and gamete donors has been facilitated by the clinics. The Bill requires providers to have in place an efficient system for being notified of births of donor offspring and for keeping information up to date. This is likely to present some difficulties in terms of monitoring, not only the outcomes of treatment but also the movements of people. There are also clauses relating to donor offspring giving consent to disclosure of identifying information to the donor.

Another section of the Bill and SOP relates to prohibitive and regulated activities. Prohibited actions are:

- cloning for reproductive purposes;

- the creation of human-non-human hybrids embryos for reproductive purposes;
- the implantation of human and hybrid embryos into animals;
- the implantation of animal and hybrid embryos into humans;
- commercial surrogacy (including advertising); and
- commercial supply of embryos and gametes.

It is significant that the prohibition relating to cloning is specified as being for reproductive purposes, thus leaving the way open for consideration of cloning for research and treatment. Prohibitions also relate to the commercial supply of embryos or human gametes.

There is provision for payment of expenses in relation to surrogacy arrangements but these expenses are circumscribed and relate primarily to the treatment aspects, rather than being associated with travel to clinics or loss of income.

Apart from the prohibitions, the Bill provides for arrangements that will operate regarding activities that need ethical committee approval. In the Ministry of Justice briefing paper concerning the Bill, it is noted that human reproductive research and technologies will continue to be developed and introduced, and accompanying these changes there are likely to be changes in societal values. The Briefing Paper states

To future-proof the legislation, the Government has decided to establish a framework for ethical decision-making, rather than prescribing what may or may not be done in relation to procedures and technology that are known now. As practitioners within New Zealand seek to use new AHR procedures or undertake associated

research, these activities will be considered by an ethics committee or referred to the Ministerial Advisory Committee.

At the time of writing this review of the Bill, the Health Select Committee is hearing submissions and is expecting to report back to Parliament by the end of 2003.

While the road to legislation has been long and on many occasions frustrating, there can be considerable optimism that an end is in sight.

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