

whakapapa needs), and the need to add a section to the Australian accreditation standards (RTAC) that apply to New Zealand.

The longest chapter in the Report is devoted to information exchange and the moves towards greater openness between the different parties involved in assisted reproduction. There is little doubt that New Zealand leads the world in its approach to this topic, in thinking, policy and practice. The Report endorses and reinforces the current position by recommending the setting up of a central register for the collecting of records on donation of gametes and embryos, and by arguing for the development of a special code under the Privacy Act to ensure donors are identifiable to the offspring in the future. The seriousness with which this issue is regarded is reflected in the fact that the code should incorporate procedures for endeavouring to obtain from past donors their consent to identification.

Surrogacy is discussed and the conclusion that is reached is that IVF compassionate surrogacy should not be objected to (thus disagreeing with the decision of INECART), that the professional control of providers should ensure commercial entrepreneurs and unqualified people do not engage in surrogacy and that monitoring of the area needs to be ongoing.

Research is also discussed with strong support being given for psychosocial research and the recommendation being made that it become unlawful to undertake research into cloning, animal/human hybrids, and the implantation of human and animal embryos in the opposite species.

The report includes an appendix which summarises and analyses the written submissions that were received by the Committee. While this is useful, it is somewhat frustrating not to know the numbers of submissions made on various matters, or who was making these submissions. The main Report frequently refers to "many", "some", in relation to the submissions and from this it is impossible to compare the "public interest" as reflected in these submissions with the Report's conclusions.

The Report is now with the Minister of Justice and it can be expected that the responses to it from the public and providers will have some impact on the action that is taken.

The Report of the Ministerial Committee on Assisted Reproductive Technologies many questions - few answers

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It is a massive task to come to grips with the legal and moral issues which so called "Assisted Reproductive Technologies" (ART) pose. Bill Atkin and Paparangi Reid are to be congratulated for producing a report which raises key issues, shows the different perspectives on them, provides information on current practice in New Zealand and discusses overseas responses. Disappointingly, the Report provides few answers.

Why control ART?

The Report starts with the presumption that the use of artificial methods of human reproduction are a legitimate means of addressing

raise "deep metaphysical questions" for most people. The Report goes on to say issues of ART are issues for the whole community not just a section, because the interests of children, the promotion of human rights, and justice are all at stake. These are the bases upon which the Report argues that the state has a clear interest in regulating ART services.

What is the appropriate control?

The recommendations of the Report are a politician's dream - no immediate legislative change is required, difficult issues are to be handed over to a new body (The Council on Assisted Human Reproduction) who will advise on

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problems of infertility. There is a strong argument to be made that it is no business of the state how a couple conceive their genetic child, whether "au naturale" or otherwise. After all, at this very moment many people whether intentionally or otherwise are conceiving children and the state does not regulate their activity. There is a distinction between assistance to have a child who is the genetic offspring of both parents who will rear that child, and assistance to have a child who is not the genetic offspring of the rearing parents. The Report writers gloss over this fundamental issue. The Report lumps them together because both use ART. A better approach, and one more sensitive to the issues, would have been to begin with a focus on children born to parents where one or both parents are not genetically related to the child. Instead, the prime focus of the Report is on the methods of ART. The Report says ART services give rise to fundamental questions about what it is "to be human" and

them. The Report says the Council does not even require legislation to be set up. The Report is vague on who should be on the Council, saying a "balance" between experts and lay people is essential. If ART really is a matter for the whole community, it is difficult to see how a body which is not legislatively accountable and which is separate from the political process really does achieve wide involvement and accountability. It's great news for politicians. They can point the finger at the Council if public opinion erupts. If ART really is about the interests of children, human rights and justice then surely legislative provision is essential. Legislation is part of the democratic process and it is binding on all.

Who should provide ART? The Report recommends tighter control on those who provide ART services. It is recommended that the revised Medical Practitioners Act contain provision that "nobody" can practice

assisted reproduction or set up an agency or business associated with assisted reproduction unless they come within the Act. This is good news for medical fertility clinics. It guarantees them a closed shop. It also allows the Report to evade the key issue of which situations of assisted reproduction should be allowed and which not. Placing control in medical hands leaves it for those hands to decide.

Who is entitled to ART services?

The Report reminds ART providers of the Human Rights Act 1993, which in essence states that those providing services (which ART is) must not discriminate on the basis of marital status, sexual orientation, age, disability or race. The Act does allow an out if there is "genuine justification" - application must be made to the Complaints Review Tribunal. The Report then goes on to exercise its own discrimination by suggesting that single parent homes are more "at risk" environments for a child than a two parent family.

The Report suggests that fertility providers should be sure that a single person can provide proper care before offering the service. The UK legislation incorporates a "provider conscience" clause whereby there is no duty to provide the service to a particular person if there is "conscientious objection" to it.

The right to know genetic origins

Article 7 of the United Nations Convention on the Rights of the Child (which New Zealand ratified in March 1993) guarantees every child the right to know their parents. Article 8 of the same Convention guarantees every child the right to preserve their identity. These provisions make it clear there is a right to know genetic origins.

The issue of information about genetic origins is recommended to be dealt with by the Privacy Commissioner providing a special Code under the Privacy Act to ensure that donation of gametes and embryos will in future be on the basis that the donor is identifiable to the offspring. It is also recommended that the Code incorporate procedures for endeavouring to obtain consent to identification from past donors. If there is no consent, then legislation

would be required to identify past donors. The Report is tentative about this which highlights the problem of proceeding on a non-regulated basis. In many cases clear records may not have been kept, so there may be a reluctance to pass legislation where donors may have given under guarantees of secrecy. The interests of the child to know are sacrificed to the interests of others. This lesson should alert us to the need to clarify legal frameworks before new procedures are undertaken. The Report writers do not appear to have learnt this lesson very well. There is a recommendation that ART providers keep information about donation and subsequent births. The preference is for this to be dealt with by professional control, although

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there is recognition that such a duty could be spelt out in the Medical Practitioners Act or the Health Act.

Surrogacy

There is currently no regulation specifically governing surrogacy in New Zealand. The Status of Children Amendment Act 1987 has the effect that if an embryo was implanted in a surrogate mother, she and her partner, if he consented, would be the legal parents at birth. The donors of the embryo could only become legal parents by adoption. The Report recommends for ethical approval to be given to IVF compassionate surrogacy. IVF compassionate surrogacy is not clearly defined in the Report. It is contrasted with commercial surrogacy. The Report says IVF compassionate surgery enables a child to be brought up by two parents to whom the child is "most likely" to be biologically related. This clouds the key issue. There is a distinction between a situation where the genetic mother and her partner are able to provide an embryo but she is not able to carry it through pregnancy, and when they are not able to create their own embryo. The case which attracted publicity before the writing of the Report, because it

was denied ethical approval, involved a woman and her husband in the first situation. They wanted their embryo placed in the woman's sister. The sister would give birth and hand the child over to the child's genetic parents; the genetic parents would still have to adopt the child because of the Status of Children Amendment Act. The Report approves this arrangement and equates it with the situation where the child is not necessarily genetically related to both commissioning parents. For example the implanted embryo may result from the use of donor sperm and donor ovum.

After acknowledging that any system on surrogacy should have "safeguards" to protect the vulnerable (said to include all parties, the surrogate, the child and the commissioning couple) the Report leaves it to "professional control" and "monitoring" by the Council on Assisted Human Reproduction. This leaves unaddressed a whole host of issues; whether it is in the interests of children to be born from

such arrangements, what should happen if there is a dispute between the surrogate and commissioning parents, whether the child has a right to know its origins (this is recommended as part of policy but who will enforce it?)

The thrust of the Report is that regulation may drive surrogacy underground and that openness is more likely to foster positive relationships between surrogate, commissioning parent and child. But if the only bodies who can become involved in surrogacy are professional ones, where does that leave those who want to make their own arrangements? All the Report does is to add surrogacy to the services offered by ART providers. The cases which get publicity on surrogacy are cases where commissioning parents do not want the child because of a disability or because of the child's sex, or cases where there is renegeing on the contract. Children's interests are deeply at stake in such situations. The Report suggests that such cases can be dealt with by the Family Court as custody or care and protection cases. This is the ambulance at the bottom of the cliff. The US Uniform Act, for example, requires court approval of surrogacy

arrangements to ensure the interests of all parties including the prospective child are scrutinised in advance. This is analogous to hearings on adoption placement, the difference is the hearing takes place before conception. The Report rejects this approach because it may be seen to be "smoothing the path for surrogacy". Doing nothing also smooths the path and puts at risk the interests of all involved.

Spare Embryos and Gametes

What to do with spare embryos and gametes is a difficult issue. The Report recommends that the power to decide should rest with gamete providers. If there is not mutual consent then the Council's Code on the use and disposal of gametes or embryos will supposedly fill the gap.

There are at least three approaches: treating the embryo as property; as a person; or as something with a status of its own. This is the kind of situation where legislation has much to offer moral debate. Legislation is democratically accountable and can be amended when new understanding arises. As Honore (1993)¹ has shown:

Inherent in morality, given the world as it is, is the need to have certain issues settled not by reasoning alone but by institutional means. The necessary legal determinations have only a provisional authority, but the authority is moral. Otherwise there would be a moral vacuum.

Legislation is the most democratically accountable institutional means. The fact issues are difficult is not excuse to leave a moral vacuum.

Experimentation and research

The following are recommended to be made unlawful and this is to be put in legislation at the appropriate time: cloning; animal hybrids; implantation of human and animal embryos in the opposite species; and the supply of gametes and embryos for valuable consideration (other than nominal time and fee). What is left open is experiments on embryos and fetuses. This is a controversial matter sidestepped by the Report. The Report writers are satisfied that current ethical bodies and the Council are sufficient to ensure that unacceptable research

on embryos does not take place. So much for involvement of the whole community, the matter is left entirely to sectional interests. The Human Fertilisation and Embryology Act 1990 (UK) sets out rules on the storage and usage of embryos. Authorised research purposes are stated in the Act, eg promoting advances in the treatment of infertility, increasing knowledge about the causes of miscarriages. As Caldwell and Daniels argue it is strange that we have abortion laws to protect the embryo in utero, but no laws to protect the embryo in vitro - "should the location of the embryo be so crucial?"² As far back as 1984 the Royal Society of New Zealand, the New Zealand Law Society, the Medical Council of New

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Zealand, and the New Zealand Medical Association noted in a submission to the government that the "most important" question in vitro fertilisation raised was access to embryos for therapeutic and research purposes. Ten years later there still is no clear answer.

Insurance

A bonus for fertility clinics is that the Report recommends that infertility is a disability and should be covered by medical insurance.

Gaps in the Report

In medical and psychological terms the Report has major gaps. As Sandra Coney has pointed out³ the Report

does not go into the fact that ART has a small positive success rate nor does it go into the medical risks of ART such as the risks for women donating eggs. Coney says some fertility clinics are injecting the sperm of subfertile men directly into women's eggs. This raises the possibility that the children born of such procedures will be defective in some way. The Report does not address a key issue, what are the consequences for the children conceived by different types of ART? The Report recommends further research into this, but should we be proceeding without this knowledge? In legal terms the Report is a non-event. The talk of the need for regulation, because of human rights, justice, and the interests of children fades as the Report progresses. Nearly all matters are left to be decided by committees.

The Report passes the buck to these committees to make the hard decisions.

The committee members will navigate our future, not the law, not the public, not the politicians. The most that can be hoped for is clear codes of practice which are widely debated and which do provide answers.

¹ Honore. (1993) The Dependence of Morality on Law. Oxford Journal of Legal Studies 13 : 1

² Caldwell, J. and Daniels, K. (1992) "Assisted Reproduction and the Law". In Family Law Policy in New Zealand, Henaghan, M. and Atkin, B. (eds), Oxford University Press p.278

³ Coney, S. (1994) Article in Sunday Star Times, Sunday 28 August

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