

Reproductive Technology - An Opinion

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Advances in the techniques of artificial insemination have presented numerous quandaries to medicine, ethics and the law. The issues presented by artificial insemination donor (AID) were soon overtaken by in vitro fertilisation (IVF) and gamete intra fallopian transfer (GIFT). The Parliaments of most Australian States have enacted legislation of varying detail to regulate aspects of reproductive technology. Typically, they have provided for statutory bodies to develop codes of ethical practice, to promote informed public debate and to carry on dialogue with bodies elsewhere in Australia looking at the same issues. Alas, much of the debate promoted in the general media has been sensationalist and ill informed.

The Australian Law Reform Commission was in the midst of its highly successful examination of the laws on human tissue transplants when the first birth by IVF was foreshadowed "within a short time". The report was produced in 1977. Louise Brown, the first baby successfully produced after IVF procedures, was born in 1978. The Commission decided that the issues of human reproduction were different in quality from transplantation of specific organs and body parts. The result, however, of putting that question to the side for future attention has been a lack of clear Federal leadership in Australia and the development of different legislative standards in the Australian States - or in some cases none.

In Canada, a national Royal Commission produced a rather cautious report *Proceed with Care* in 1993. This suggested legislation forbidding commercialisation of reproductive technology and the introduction of criminal sanctions on advertising for, or bringing about, preconception arrangements or the payment of moneys to anyone acting as an intermediary.

By way of contrast, an Australian opinion survey conducted by the NSW Law Reform Commission in its inquiry into surrogate motherhood showed that 51% of the respondents were not opposed to surrogacy. Only a third of respondents objected to surrogate motherhood as a means of helping married couples to overcome problems of infertility. Forty percent were quite happy to countenance payment to a surrogate mother of her medical expenses together with "an agreed fee". Only 17% thought that no payment at all should be permitted. Perhaps this was but another illustration (along with the strategies to combat HIV/AIDS) of the comparatively confined impact of *a priori* religious and like opinions upon most members of the Australian community today.

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The issues presented to medicine, ethics and law by reproductive technology will not go away. They deserve more coherent (and preferably national) attention in Australia. Unless this can be achieved, it will be left to judges in particular cases to do their best to fashion the applicable legal principle from common law rules expressed long before reproductive technology came along.

Some of the issues which require urgent attention include:

The keeping of, and access to, records of donors, particularly for follow-up in the case of genetic disease and disability; but with due protection to the privacy of donors and immunity from civil liability when things go wrong;

The introduction of quality controls to avoid the risk of consanguinity;

The provision of laws to assimilate the position of the social (but non-genetic) parent with that of the genetic parent; and

Attention to the rights of children born as a result of these procedures and not simply to the claims of adults which have hitherto dominated the making of legal rules.

Amongst the most difficult questions presented by advances in reproductive technology are:

The high economic cost of technologically assisted conception, given that only about 10% of IVF and 16% of GIFT procedures result in conception under current conditions. The claims made for alternative expenditures need to be judged by the community's representatives but with due consideration to the high motivation of patients involved in IVF and GIFT programmes and the likely advances in the relevant technology which can be expected in the decade ahead;

The availability of reproductive technology to non-heterosexual couples. An increasing number of legal commentators are pointing to the contradiction between legislation forbidding discrimination on the ground of marital status and sexual orientation and the typical reproductive technology statutes in Australia which limit the availability of the techniques to married heterosexual couples or those in stable heterosexual relationships; and

The experimentation on discarded or surplus gametes and on foetal tissue which still engender passionate debates. Yet if the NSWLRC survey is any guide, there is less passion in Australia than in many developed countries. Attempts to forbid or restrict experimentation in this country are likely to send research and researchers off shore.

The fundamental issue presented by new reproductive technology relates to the capacity of democratic legislatures to cope with such problems. If they can do so, with expert help (including from the medical profession) as they did following the report on human tissue transplants, that is for the good of medical science and democratic lawmaking in a technological age. The fear of many scientists is that lawmakers will react with undue conservatism in response to perceived public opposition. That explains why, all too often, these problems stay in the politicians' and bureaucrats' too-hard basket.

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The beginning of a better approach to these issues is the initiation of informed public debate. It is unfortunate that the trail-blazing work of the Australian Law Reform Commission on human tissue transplants in the early 1970s was not followed up with other tasks of like sensitivity and urgency in the field of life sciences to which lawyers, ethicists and medical experts could contribute together.

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* Justice Michael Kirby, Court of Appeal, Sydney. This note is based on the author's experience in chairing, on 19 April 1994 in Adelaide, a public forum called by the South Australian Council on Reproductive Technology established under the *Reproductive Technology Act 1988* (SA). Other relevant statutes include the *Infertility (Medical Procedures) Act 1984* (Vic) and *Reproductive Technology Act 1991* (WA).