

# Submission

on the

## Review of the ART Act 1988

to the

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# 1. Introduction

On 1 September 2010, the regulation of assisted reproductive treatment (ART) in South Australia underwent significant changes. Parliament passed the *Reproductive Technology (Clinical Practices) (Miscellaneous) Amendment Bill 2009* to amend the *Reproductive Technology (Clinical Practices) Act 1988 (SA)*.<sup>1</sup> The law requires that this Act must be reviewed five years after the date of enactment and the review is now due.

The review will focus upon the operation and effectiveness of the Act in relation to:

- the requirement that the welfare of any child born as a consequence of assisted reproductive treatment (ART) is to be treated as being of paramount importance, and accepted as a fundamental principle, in respect of the operation of the Act, as well as in the provision of assisted reproductive treatment;
- the replacement of the previous licensing scheme with a registration scheme for ART clinics;
- the dissolution of the SA Council on Reproductive Technology and its Code of Ethical Clinical Practice;
- amending eligibility for access to ART services—noting that such conditions relate to the circumstances in which, and to whom, ART may be provided;
- allowing for the establishment of a donor conception register; and
- provisions for record keeping and confidentiality.<sup>2</sup>

FamilyVoice Australia is a national Christian voice – promoting true family values for the benefit of all Australians. Our vision is to see strong families at the heart of a healthy society: where marriage is honoured, human life is respected, families can flourish, Australia’s Christian heritage is valued, and fundamental freedoms are enjoyed.

We work with people from all mainstream Christian denominations. We engage with parliamentarians of all political persuasions and are independent of all political parties. We have full-time FamilyVoice representatives in all states.

Submissions to the inquiry are due by 15 April 2016.

## 2. Ethical Principles for Clinical Practice of ART

### 2.1. *Paramountcy of the welfare of the child in ART*

Adult desires or demands for a child, however deeply felt, ought not to be given equal weight, let alone ever be allowed to override, the interests and welfare of the child.

Section 4A of the *Assisted Reproductive Treatment Act 1988* provides that:

*The welfare of any child to be born as a consequence of the provision of assisted reproductive treatment in accordance with this Act must be treated as being of paramount importance, and accepted as a fundamental principle, in respect of the operation of this Act.*<sup>3</sup>

The current emphasis on the welfare of the child should be kept within the Act because all other participants are involved in ART procedures voluntarily. The child conceived using ART has no choice.

Naturally, “the persons who may be born” as result of an ART procedure come into existence, and have interests before, as well as after, they are born.

As the United Nations Convention on the Rights of the Child explains:

*[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.<sup>4</sup>*

This fundamental principle of the right of the child being paramount should be retained in the Act.

**Recommendation 1:**

***The rights of the child should be considered paramount when considering ART.***

## **2.2. Respect for human embryos**

The review needs to consider the importance of respect for human embryos.

Leon Kass, former chair of the (US) President’s Council on Bioethics, strongly argues the notion of respect for the human embryo:

*[T]he blastocyst is not nothing; it is at least potential humanity, and as such it elicits, or ought to elicit, our feelings of awe and respect. In the blastocyst, even in the zygote, we face a mysterious and awesome power, a power governed by an immanent plan that may produce an indisputably and fully human being. It deserves our respect not because it has rights or claims or sentience (which it does not have at this stage), but because of what it is, now and prospectively.*

*The human embryo is not mere meat; it is not just stuff; it is not a “thing.” Because of its origin and because of its capacity, it commands a higher respect.<sup>5</sup>*

In their work “Embryo: A Defense of Human Life”, Robert P. George and Christopher Tollefsen put the case for respecting a human embryo as a human being in his or her earliest stage of life (emphasis added):

*Human embryos are not, that is to say, some other type of animal organism, like a dog or cat. Neither are they a part of an organism, like a heart, a kidney, or a skin cell. Nor again are they a disorganized aggregate, a mere clump of cells awaiting some magical transformation. **Rather, a human embryo is a whole living member of the species Homo sapiens in the earliest stage of his or her natural development.** Unless severely damaged, or denied or deprived of a suitable environment, a human being in the embryonic stage will, by directing its own integral organic functioning, develop himself or herself to the next more mature developmental stage, i.e., the fetal stage. The embryonic, fetal, child, and adolescent stages are stages in the development of a determinate and enduring entity – a human being – who comes into existence as a single-celled organism (the zygote) and develops, if all goes well, into adulthood many years later.*

*But does this mean that the human embryo is a human person worthy of full moral respect? Must the early embryo never be used as a mere means for the benefit of others simply because it is a human being? The answer that this book proposes and defends with philosophical arguments through the course of the next several chapters is “Yes.”<sup>6</sup>*

### 2.3. Limiting the number of human embryos

Limiting the number of human embryos is another consideration the current review into ART should take into consideration.

Data from the annual reports of the Western Australian Technology Council reveal that the number of human embryos in storage has increased over ten times (1086%) since 1994, from 1,870 to 20,323 as of 30 June 2014.<sup>7</sup>

| YEAR | Number of embryos in storage at 30 June |
|------|-----------------------------------------|
| 1994 | 1,870                                   |
| 1999 | 7,317                                   |
| 2004 | 12,529                                  |
| 2009 | 17,334                                  |
| 2014 | 20,323                                  |

The only way to significantly reduce the excessive creation of human embryos – most of whom will never be implanted – would be to shift practice away from the current standard approach. This involves ovarian stimulation to achieve multiple egg retrieval followed by storage of embryos not transferred in the first treatment cycle for (possible) use in subsequent cycles.

A recent review from global healthcare specialists, the Cochrane Collaboration, reported that:

*No evidence of a statistically significant difference was found between natural cycle and standard IVF in live birth rates. Findings suggest that for a woman with a 53% chance of live birth using standard IVF, the chance using natural cycle IVF would range from 34% to 53%.<sup>8</sup>*

The alternative is to use natural cycles to retrieve just one egg each cycle. This approach has obvious health benefits for women as well as preventing the unnecessary creation and stockpiling of human embryos.

#### **Recommendation 2:**

*To limit the number of embryos created, clinicians should avoid ovarian stimulation, fertilise only the number of embryos intended to be transferred fresh and only use storage when transfer is unavoidably prevented.*

### 2.4. Significance of biological connection (Donor Conception Registers)

Human beings are embodied and relational beings. The genetic makeup of every human being is derived from a combination of genes inherited from his or her father and the genes inherited from his or her mother. This pattern of inheritance creates natural, biological, genetic relationships written into every cell of a person's body. These relationships extend through the genetic father and

mother to siblings, either full or half, grandparents and more distant ancestors, and other collateral relations.

Accounts written by adults who were conceived as a result of donor insemination describe the profound problems of identity and belonging they experienced both as children and as adults.<sup>9</sup> Some of these problems were related to secrecy – not being told the truth about their origins, but intuiting that they were different. However, problems also persisted after the truth was revealed or discovered, including a longing to know the absent genetic parent.

Children conceived by donor insemination have a right to know the identity of the donor. No one has the right to anonymous fatherhood – that is, to deliberately contribute to the possible conception of a child – regardless of any assurances given at the time of donation.

Currently the *Assisted Reproductive Treatment Act 1988* states:

*The Minister may keep a register of donors of human reproductive material used in, or in relation to, assisted reproductive treatment provided in accordance with this Act and resulting in the birth of a child.*<sup>10</sup>

This should be amended to state that the Minister must keep a register so that all information relating to the ART is readily available to any child who is conceived through donor insemination.

**Recommendation 3:**

*The Act should be amended to make provision for the creation of a donor registry that would facilitate, to the maximum extent possible, the ability of all children conceived using donor gametes to identify their genetic parents.*

**Recommendation 4:**

*The importance of biological connections for all human beings should be fully acknowledged and no assisted reproductive technology procedure should be commenced that would lead to confusion of biological origins for the child that may be conceived.*

## **2.5. Rights of children to be born**

Fact Sheet 5 examines the issue of equal access to ART services for individuals and couples regardless of their circumstances. Removing all forms of discrimination for ART applicants appears valid and all-inclusive on the surface; however, in reality it fails to take into account what is best for the child to be born.

According to the UN Declaration of the Rights of the Child, to which Australia is a signatory, a child needs love and understanding from both of their parents for the purpose of their full and harmonious development. Principle 6 states that children shall, wherever possible:

*“Grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother.”<sup>11</sup>*

This submission expands on some of the issues potentially created by ART through donor conception – specifically the separation of genetic fatherhood and motherhood from the responsibility of child rearing. No child should be intentionally conceived in a manner that imposes significant burdens on

them for the rest of their life – and adult desires should not be permitted to trump the rights of children.

## **2.6. Access to ART for same-sex couples**

There is no discrimination against homosexuals in the provision of assisted reproductive therapy (ART). The provision of ART should be on the basis of infertility, not sexuality. Section 9 of the *Assisted Reproductive Treatment Act 1988* provides that as a condition of registration, ART must not be provided except in a number of circumstances, including:

*if a woman who would be the mother of any child born as a consequence of the assisted reproductive treatment is, or appears to be, infertile;*<sup>12</sup>

If a lesbian woman is unable to conceive naturally, she is equally able to access ART. In 1993, the South Australian Supreme Court case of *Stella Yfantidis v Dr Warren Jones and Flinders Medical Centre* found that it was unlawful to discriminate against a woman on the basis of her marital status.<sup>13</sup> There is therefore no impediment to an infertile lesbian – whether single or in a relationship – receiving ART.

Whatever one's views of the ethics of assisted reproductive technology, its purpose is to assist women to conceive who are otherwise unable to do so naturally. Assisted reproductive technology does not exist to aid those who are fertile and, for whatever reason, have no interest in engaging in procreative sex acts.

### **Recommendation 5:**

***South Australia's ART laws are based on infertility, not sexuality. This should remain the case.***

### **Recommendation 6:**

***The ART Act must protect the right of children to be conceived and raised by their biological parents. In situations where ART services would compromise this relationship, by discriminating against the fundamental right of the child to be raised by both biological parents, the rights of the child should trump the desires of adults seeking ART services.***

## **3. Donation of gametes**

Donor conception involves the use of gametes – sperm or egg or both – in the conception of a child where the intention is for the donor of the gametes not to otherwise be a father or mother of the child.

In other words donor conception intentionally seeks to separate genetic fatherhood or motherhood from all other responsibility for the child to be conceived.

This notion is contrary to our deepest instincts about fatherhood and motherhood. Those who conceive children incur parental obligations to those children. Society provides for those who feel incapable of fulfilling these obligations the possibility of relinquishing a child for adoption. However, this is something done after the birth (or at least after conception) of a child and is a response to the child's need for adequate parenting when the natural parents are unable or unwilling to provide this.

Donor conception has been seen as a means of helping those who are unable to have a child derived from their own gametes.

Male gametes (sperm) have been used for married and partnered women whose husbands or partners are infertile. It has also been used by single women or by women in a same-sex relationship.

Female gametes (eggs or ova) have been used where a woman (married or partnered) has been unable to conceive with her own eggs. The donated egg is fertilised in vitro with the husband or partner's sperm and is implanted in the woman.

In couples where both partners are infertile an embryo may be used which has been fertilised in vitro with an egg from another woman and sperm from another man. In this case the child will have no genetic relationship to either parent. If the embryo is created specifically for this purpose then it is a form of donor conception.

### **3.1. Donation of gametes and the good of the child**

The practice of donor conception focuses on the interests of the adults involved – particularly infertile couples, the single women and same-sex couples, who seek this service as a way of obtaining a child.

As artificial insemination using donor sperm has been practiced for some decades now, there is a cohort of adults who were donor conceived. We can now hear their voices and consider the outcomes of donor conception on the children who result from this practice.

Recent accounts written by adults who were conceived as a result of donor insemination describe the profound problems of identity and belonging they experienced both as children and as adults.<sup>14</sup> Some of these problems were related to secrecy – not being told the truth about their origins but intuiting that they were different. However, problems also persisted after the truth was revealed or discovered, including a longing to know the absent genetic parent.

In a submission by Tangled Webs Inc. to the New South Wales Legislative Council Inquiry into Altruistic Surrogacy, a group of donor conceived persons argued, on the basis of their lived experience, that:

*A child's best interests are served when it is conceived and gestated by, born to and nurtured by, one mother. To fragment maternal roles through ova donation/gestational surrogacy is to deny a child its entitlement to a whole mother.<sup>15</sup>*

The first detailed survey of children conceived by donor insemination, fittingly titled *My Daddy's Name is Donor*, compared outcomes and opinions of these children with children who were adopted and with children who were raised by their own biological parents.

*[Y]oung adults conceived through sperm donation are hurting more, are more confused, and feel more isolated from their families. They fare worse than their peers raised by biological parents on important outcomes such as depression, delinquency and substance abuse. Nearly two-thirds agree, "My sperm donor is half of who I am."<sup>16</sup>*

*Young adults conceived through sperm donation (or "donor offspring") experience profound struggles with their origins and identities.*



*Sixty-five percent of donor offspring agree, "My sperm donor is half of who I am." Forty-five percent agree, "The circumstances of my conception bother me." Almost half report that they think about donor conception at least a few times a week or more often.*

*The role of money in their conception disturbs a substantial number of donor offspring. Forty-five percent agree, "It bothers me that money was exchanged in order to conceive me." Forty-two percent of donor offspring, compared to 24 percent from adoptive families and 21 percent raised by biological parents, agree, "It is wrong for people to provide their sperm or eggs for a fee to others who wish to have children."<sup>17</sup>*

*Family relationships for donor offspring are more often characterized by confusion, tension, and loss.*

*More than half (53 percent) agree, "I have worried that if I try to get more information about or have a relationship with my sperm donor, my mother and/or the father who raised me would feel angry or hurt."*

*Seventy percent agree, "I find myself wondering what my sperm donor's family is like," and 69 percent agree, "I sometimes wonder if my sperm donor's parents would want to know me."*

*Nearly half of donor offspring (48 percent) compared to about a fifth of adopted adults (19 percent) agree, "When I see friends with their biological fathers and mothers, it makes me feel sad." Similarly, more than half of donor offspring (53 percent, compared to 29 percent of the adopted adults) agree, "It hurts when I hear other people talk about their genealogical background."<sup>18</sup>*

*More than half say that when they see someone who resembles them they wonder if they are related. Almost as many say they have feared being attracted to or having sexual relations with someone to whom they are unknowingly related. Approximately two-thirds affirm the right of donor offspring to know the truth about their origins. And about half of donor offspring have concerns about or serious objections to donor conception itself, even when parents tell their children the truth.<sup>19</sup>*

These issues are very serious. They justify a moratorium on all practices that involve an intentional fracturing of parenting before the conception of a child. This includes all forms of donor conception.

No child should be intentionally conceived in a manner that we now know imposes significant burdens on the child for their entire life – and adult desires are insufficient to justify these practices.

***Recommendation 7:***

***There should be no use of donated gametes in artificial reproductive technology procedures, because intentionally fracturing parenthood unnecessarily imposes burdens of identity bewilderment on the child.***

### **3.2. Limit the number of persons born from a single donor**

It is clear from reports of donor conceived children that there is a real concern about the possibility of becoming romantically involved with an unknown donor sibling.

Australian practice currently limits the number of families for whom each sperm donor can provide sperm to five. Depending on the geographical elements – whether the families live in Sydney or in a small country town – there may be a very low statistical chance of such problematic encounters.

However, the problem is more fundamental than the issue of possible incestuous romantic relationships. In the normal course of human life it is possible for a man to father children to two or more women. Obviously the more women he has children with the more complex are the familial relationships created.

With sperm donation these complex familial relationships are intentionally created. It is unjust to the children so conceived that they may have siblings created intentionally in up to four other families – siblings they have no real chance of getting to know until they have all turned 18. This is reckless and thoughtless. It can't be justified by adult desires for children.

If sperm donation is not banned altogether then the use of sperm from any one man should be limited to one family only. This is demanded by the best interests of the children concerned.

***Recommendation 8:***

***The current Act should limit the sperm donated by any one man (and eggs donated by any one woman) to use by only ONE family other than that of the donor. This is necessary to prevent the intentional conception of siblings who will be raised apart from one another.***

### **3.3. Compensation for egg donation**

Sperm donation is free of any risk to the physical health of the man who donates.

However, egg donation involves considerable risks to the physical health of a woman who donates.

In 2010 a Dutch study reported that there had been six deaths directly related to egg retrieval for IVF treatment between 1984 and 2008 – a mortality rate of six per one hundred thousand.<sup>20</sup>

In 2003-05 there were four deaths in Britain directly associated with ovarian hyperstimulation syndrome (OHSS), giving a rate of 2.52 per 100,000.<sup>21</sup>

Deaths from OHSS include 32 year old Irish woman Jacqueline Rushton, who died in Dublin on 14 January 2003.<sup>22</sup> She suffered a gradual deterioration of her organs, virtually all of which were slowly destroyed.

Temilola Akinbolagbe, a young woman who died in April 2005 in London, suffered a more sudden death from a heart attack linked directly to OHSS.<sup>23</sup>

Dianne Beeson, Professor Emerita of Sociology, has given evidence to a US Congressional hearing on the dangers that egg extraction for cloning poses to women's health and life.<sup>24</sup> Up to 14 percent of patients undergoing superovulation experience some form of ovarian hyperstimulation syndrome.<sup>25</sup> Symptoms of mild OHSS include abdominal discomfort, ovarian enlargement, nausea and vomiting while women who develop severe OHSS may experience loss of future fertility, kidney or multiple organ failure, and death. The frequency of severe OHSS may be as high as 10 per cent.<sup>26</sup>

If ova donation is allowed to continue, it is reckless to propose payment which could induce women to submit to a procedure that they would otherwise be unlikely to risk.

**Recommendation 9:**

***No proposal to allow payment to be given in exchange for human eggs should be accepted. This should include so-called “reimbursement for reasonable expenses”, such as time, travel, and lost earnings.***

### **3.4. No posthumous use of gametes**

Fact sheet 5 notes that the current law allows for limited use of gametes of deceased persons if the woman’s “deceased genuine domestic partner/spouse has left written instructions (prior to his death) that his sperm could be used by his widow to conceive a child (posthumously)”.<sup>27</sup>

The practice of allowing a surviving widow to conceive a child using her deceased husband’s sperm does not align with the best interests of the child as it involves bringing a child into existence with no living father.

This is to be distinguished from those circumstances in which the child comes into existence before the death of the father, including when a human embryo has already been conceived by assisted reproductive technology and is in frozen storage, or when a child is naturally conceived by a married couple who are aware the father is terminally ill.

The essential difference is that in the case of posthumous use of sperm a child is being brought into existence using sperm from a man who is already dead. It is unjust to impose on a child in his or her very origin the burden of having been conceived by a dead man.

This applies even if the man has consented to posthumous use of his sperm.

Any attempt to retrieve sperm from a deceased man, or in any other condition where he cannot give informed consent, would be a violation of his bodily integrity – and arguably a form of rape.

**Recommendation 10:**

***Posthumous use of gametes in an assisted reproductive technology procedure should be disallowed by the Act.***

## **4. Storage**

### **4.1. Limiting storage of human embryos to emergencies**

The current practice of stockpiling human embryos in storage for possible future use in a reproductive project dehumanises them. Only by this devaluation can so-called “ethical” guidelines speak in such a cavalier manner about disposal of human embryos after a use-by date.

The storage of a human embryo should only be permitted in an emergency when embryo transfer is unavoidably prevented, following fertilisation of an egg retrieved in a natural cycle.

**Recommendation 11:**

***Future storage of a human embryo should only be permitted when transfer is unavoidably prevented.***

## 5. Sex selection

One of the ethical questions raised with ART is the possibility of sex selection. Sex selection by whatever means for its own sake – whether cultural or personal preference, family balancing or to “replace” a lost child – is contrary to viewing the child as a gift. It is eugenic in principle – deciding that only a child with certain characteristics is worthy to come into, or remain in existence.

Methods of sex selection that take place after fertilisation are additionally abhorrent as they necessarily involved the wanton destruction of a human embryo merely because it is male or female.

There should be no change that would allow for sex selection within the Act.

***Recommendation 12:***

***There should be no change to allow for sex selection within the Act as it is clearly unethical and contrary to sound public policy.***

## 6. Conclusion

While all individuals deserve respect, the desires of adults requesting ART services should never be allowed to override the rights of children who may be conceived. As a person in an early stage of development, an embryo deserves respect and the protection of our laws.

ART legislation should seek to prevent the fracturing of biological ties by, wherever possible, restricting ART services to situations where children are conceived and raised by both of their biological parents.

## 7. Endnotes

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- <sup>10</sup> YourSAy, "Fact Sheet 6 – Donor Conception Register", *Review of the Assisted Reproductive Treatment Act 1988 (SA)*, p 2: <http://www.sahealth.sa.gov.au/wps/wcm/connect/40f797004b5a6389976affbde771dbf2/16004.6-Donor+FS+%28v3%29WebS.pdf?MOD=AJPERES&CACHEID=40f797004b5a6389976affbde771dbf2>
- <sup>11</sup> "Declaration of the Rights of the Child (1959; 1990): <http://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf>
- <sup>12</sup> Section 9(c)(i), *Assisted Reproductive Technology Act 1988 (SA)*
- <sup>13</sup> *Stella Yfantidis v Dr Warren Jones and Flinders Medical Centre* (1993)61 SASR 458, para 57.
- <sup>14</sup> O Montuschi, "Who Am I? Experiences of Donor Conception", Idreos Education Trust, 2006: <http://www.tandfonline.com/doi/abs/10.1080/14647270701544040?journalCode=ihuf20>
- <sup>15</sup> "Inquiry into Legislation on Altruistic Surrogacy in NSW", Tangled Webs Australia, 2 October 2008: [http://www.parliament.nsw.gov.au/prod/PARLMENT/committee.nsf/0/996784755f12f19dca2574ea00187d5b/\\$FILE/Submission%2021.pdf](http://www.parliament.nsw.gov.au/prod/PARLMENT/committee.nsf/0/996784755f12f19dca2574ea00187d5b/$FILE/Submission%2021.pdf)
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