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REPORT TO
THE MINISTER FOR HEALTH FOR WESTERN AUSTRALIA

FROM THE
REPRODUCTIVE TECHNOLOGY WORKING PARTY

PERTH

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HEALTH DEPARTMENT OF WESTERN AUSTRALIA

Occasional paper/29

CONTENTS

1. BACKGROUND, MEMBERSHIP AND TERMS OF REFERENCE

1.1 BACKGROUND

In June 1983 a Ministerial committee, the In Vitro Fertilization Ethics Committee of Western Australia, was appointed by the State Government to report on the social, ethical and legal issues surrounding IVF, to advise on the relevance of recommendations from similar committees in Australia and overseas and to assume a supervisory role in the practice of IVF in Western Australia. In August 1984 the Government accepted the Committee's interim recommendation that the Minister for Health appoint a research officer to conduct an evaluation of IVF in Western Australia, in co-operation with medical practitioners and scientists working in the field. The Government committed funds to support a three year programme to monitor and evaluate IVF in this State.

In September 1986, the IVF Ethics Committee made its final report to the Minister for Health, containing 23 recommendations pertaining to the ethical conduct and supervision of reproductive technology services, and including the establishment of a Licensing and Supervisory Authority and Bioethics Committee. The final report of the independent scientific evaluation of IVF followed in July 1988, and at that time the Minister for Health announced the formation of a Reproductive Technology Working Party, responsible for making specific legislative recommendations to the Minister on the basis of the two reports completed to date and the Reproductive Technology Act 1988 of South Australia. What follows is the final report of that Working Party to the Minister for Health.

1.2 MEMBERSHIP

Mr Michael Daube (Chairman)	Executive Director Health Promotion & Education Services Health Department of Western Australia
Ms Sandy Webb (Executive Secretary)	Scientific Officer Epidemiology Branch Health Department of Western Australia
Ms Bronwyn Blake	Coordinator Legislation Health Department of Western Australia (Retired from the Working Party 29 July 1988)
Dr Lewis Blake	Nominee of the Australian Medical Association
Mr John Booth	Director Southern Metropolitan Region Department for Community Services (Nominee of the Minister for Community Services)
Ms Marion Dixon	Lecturer Law School University of Western Australia
Dr Athel Hockey	Director Clinical Genetics Services King Edward Memorial Hospital
Dr D'Arcy Holman	Director Epidemiology Branch Health Department of Western Australia
Rev Colin Honey	Master Kingswood College University of Western Australia Crawley, WA
Ms Thea Mendelsohn	Executive Coordinator Women's Health Policy Unit Health Department of Western Australia
Prof. Con Michael	Professor Department of Obstetrics & Gynaecology University of Western Australia King Edward Memorial Hospital
Ms Bindi Other-Gee	Advisor on Women and Welfare Department for Community Services (Nominee of the Minister for Community Services)

Ms Moira Rayner	Chairman Law Reform Commission of Western Australia (Nominee of the Law Reform Commission of Western Australia)
Ms Hilary Rumley	Lecturer Department of Anthropology University of Western Australia
Dr Fiona Stanley	Deputy Director NH&MRC Research Unit in Epidemiology and Preventive Medicine Department of Medicine University of Western Australia
Mr George Syrota	Sub-Dean Law School University of Western Australia (Nominee of the Law Reform Commission of Western Australia)

1.3 TERMS OF REFERENCE

1) To advise the Minister for Health on specific legislative proposals that will establish a "Western Australian Council on Reproductive Technology".

2) To recommend the powers of licensing, regulation and monitoring of IVF and other reproductive technologies that should be vested in the Council.

3) To recommend the basis on which the Council shall formulate and enforce a code of ethics for reproductive technology.

4) To recommend the types of registers and records to be maintained by the Council.

5) To advise on specific legislative proposals to enforce 2) - 4) above.

6) To advise on specific legislative proposals in relation to surrogate pregnancy.

7) To make a final report to the Minister for Health by 31 August 1988.

In discharging its brief the Working Party shall base its advice and recommendation substantially on the following papers.

(a) Report of the Committee Appointed by the Western Australian Government to Enquire into the Social, Legal and Ethical Issues Relating to In Vitro fertilisation and its Supervision. September, 1986.

(b) Webb, S. In Vitro Fertilisation in Western Australia 1983-1987. Health Department of Western Australia, Perth, 1988.

(c) Reproductive Technology Act, 1988, Government of South Australia (including the Report of the Select Committee on the Legislative Council on artificial Insemination by Donor, In-Vitro Fertilisation and Embryo Transfer Procedures and Related Matters in South Australia).

2. DEFINITIONS

2.1 DEFINITIONS PERTAINING TO REPRODUCTIVE TECHNOLOGY

"Artificial fertilization procedure" means any medical procedure directed at fertilization of a human ovum by artificial means and includes an in vitro fertilization procedure and artificial insemination, and also includes a "fertilization procedure" as defined in Section 3(3) of the Artificial Conception Act, 1985.

"Artificial insemination" means an artificial fertilization procedure (not being an in vitro fertilization procedure or a surgical procedure) under which human sperm are introduced, by artificial means, into the human female reproductive system.

"Authorized person" means a person authorized by the Commissioner of Health to exercise the powers of an authorized person under the Reproductive Technology Act.

"Biological parent" means a person who is the source of an ovum or semen used in an artificial fertilization procedure, and who is the genetic parent of a human embryo, foetus or child conceived or born of such a procedure.

"Cloning" means a process involving the use of reproductive technology designed to produce from human tissue viable or potentially viable human beings that are multiple and genetically identical.

"Code of practice" means the code of practice formulated by the Council.

"Council" means the Western Australian Council on Reproductive Technology.

"Human embryo" means the stage of development of a human being from the time of fertilization to 7 completed weeks after fertilization.

"Human reproductive material" means a human embryo, human semen, or a human ovum.

"In vitro fertilization procedure" means any of the following procedures -

(a) the removal of a human ovum for the purposes of fertilization within or outside the body;

(b) the storage of any such ovum prior to fertilization;

(c) the fertilization by artificial means of any such ovum within or outside the body;

(d) the culture or storage of a fertilized human ovum outside the body;

(e) the transference of a fertilized or unfertilized human ovum into the human body.

"Participant" means any donor or recipient of human reproductive material, or any person who undergoes an artificial fertilization procedure.

"Reproductive technology" means the branch of medical science concerned with artificial fertilization.

"Therapeutic experimentation" means experimentation upon or with a human embryo for the alleviation or cure of disease or injury of that human embryo.

2.2 DEFINITIONS PERTAINING TO SURROGACY

"Birth mother" means a woman who undertakes or continues a pregnancy under the terms of a surrogacy contract.

"Commissioning parent(s)" means the party or parties for whose benefit a pregnancy or proposed pregnancy is undertaken by a birth mother under the terms of a surrogacy contract.

"Procuration contract" means an agreement, contract or arrangement under which a person agrees to arrange or negotiate or obtain the benefit of a surrogacy contract on behalf of another person, or agrees to introduce prospective parties to a surrogacy contract, whether or not it is entered into for reward or valuable consideration of any kind.

"Surrogacy contract" means an agreement, contract or arrangement between a woman and another person or persons under which the woman either:-

i. agrees to become pregnant, or try to become pregnant, with the intention of causing the child born as a result to be treated as the child of the other (whether by adoption, order for guardianship or custody, or both, or otherwise); or

ii. if she is already pregnant, agrees that the child born as a result of the pregnancy be treated as the child of the other;

whether or not it is entered into for reward or valuable consideration of any kind.

3. LEGISLATIVE RECOMMENDATIONS

3.1 GUIDING PRINCIPLES

The Working Party recommends the following guiding principles.

3.1.1 There should be two Acts of the Western Australian Parliament entitled the "Reproductive Technology Act" and the "Surrogacy Act". Since the issue of surrogate pregnancy transcends reproductive technology, it should be the subject of separate legislation which should apply to all children born of surrogacy contracts, howsoever the pregnancy was commenced or continued (i.e., whether by reproductive technology or some other means).

3.1.2 The objects of the Reproductive Technology Act should be:-

(a) to regulate and control the use of reproductive technology in order to ensure adherence to appropriate standards; and

(b) to ensure that, although artificial fertilization procedures may be undertaken for the benefit of infertile adults or adults whose children are likely to be affected by a genetic abnormality or disease, such procedures will not be administered unless conditions exist for ensuring as far as possible the welfare of children born of such procedures.

3.1.3 The Reproductive Technology Act should establish "The Western Australian Council on Reproductive Technology" (the "Council").

3.1.4 The Reproductive Technology Act should determine the composition and functions of the Council; specify the power to promulgate as regulations a code of practice for reproductive technology; require practitioners of artificial fertilization procedures (including the collection and storage of human reproductive material derived from more than one person, but otherwise excluding practitioners of artificial insemination) as well as practitioners of research involving experimentation with a human embryo to be licensed and to observe certain conditions of licence; establish registers for the purpose of monitoring and evaluating the social and public health implications of reproductive technology, and to enable children to obtain information (whether identifying or non-identifying; see section 3.3.5.2 below) about their biological parents.

3.1.5 The Reproductive Technology Act should empower the Council and authorized persons sufficiently to achieve the objects of the Act, but in general, should not be unduly specific or inflexible, especially in the proscription of certain procedures or practices which may be subject to changes in community attitude over time.

3.1.6. The objects of the Surrogacy Act should be:-

(a) to discourage and deter people from entering into surrogacy contracts; and

(b) to provide for the welfare of children born as a result of such contracts.

3.1.7. The Surrogacy Act should enshrine the principles:-

(a) that the practice of surrogacy is undesirable because of its potential to cause serious disruption to the social and emotional bonds between infants and their parents, and its potential to cause or exacerbate emotional, psychological and physical problems for the birth mother and the child born as a result of such contracts; and

(b) that any involvement by a third party in surrogacy contracts or procuration contracts is contrary to public policy and unlawful.

3.2 A MATTER UNRESOLVED BY GENERAL CONSENSUS

A high level of consensus was achieved by the Working Party on a broad range of issues. However, the matter of access by a person, upon attaining the age of 18 years, to identifying information about their biological parents (section 3.3.5.2) was unresolved by general consensus.

For this area, options supported by the majority and minority of the Working Party are presented in the specific legislative recommendations in section 3.3.5.2. Brief outlines of the arguments which underlie the opposing views are contained in the Appendix to this report.

3.3 SPECIFIC LEGISLATIVE RECOMMENDATIONS ON REPRODUCTIVE TECHNOLOGY

The Working Party recommends that the Reproductive Technology Act should be composed as follows -

3.3.1 Preliminary to the Act

The preliminary part of the Act should achieve the following.

3.3.1.1 It should entitle the Act as the Reproductive Technology Act.

3.3.1.2 It should enable the Act to come into operation on a day to be fixed by proclamation.

3.3.1.3 It should enable the Governor to suspend the operation of specified provisions of the Act until a subsequent day fixed in the proclamation, or a day to be fixed by subsequent proclamation.

3.3.1.4 It should contain an objects clause defining the objects of the Act as those appearing in section 3.1.2 above.

3.3.1.5 It should define the terms in section 2.1 above, and any other terms that require definition for the purposes of interpreting the Act.

3.3.1.6 It should bind the Crown.

3.3.2 The Council

The Act should establish the Council. It should include the following provisions.

3.3.2.1 A provision to establish the Western Australian Council on Reproductive Technology, consisting of 10 members appointed by the Governor, of whom:

(a) One is a nominee of the Royal Australian College of Obstetricians and Gynaecologists;

(b) one is a nominee of the Australian Medical Association;

(c) one is a minister of religion or ethicist;

(d) one is a lawyer;

(e) one is a nominee of the Minister for Community Services;

and

(f) five should be nominated by the Minister for Health to represent the areas of expertise and interest set out in section 3.3.2.2 (b) below.

3.3.2.2 A provision to place on the Minister for Health, and, other nominating persons or bodies where appropriate, a responsibility in selecting nominees to ensure -

(a) that the Council should be constituted by equal numbers of men and women;

(b) that the Council has available to it from the Ministers' nominees expertise in the various facets of reproductive technology and public health, and representation of women's interests, the interests of consumers of reproductive technology and the interests of children born of reproductive technology;

(c) that, as far as possible, no one member of the Council is the sole representative of more than one of the above areas of expertise or interest; and

(d) that the Council's membership is sufficiently representative of the general community.

3.3.2.3 A provision to prohibit the appointment to Council of any person licensed under the Act, or who has a direct or indirect pecuniary interest in reproductive technology.

3.3.2.4 The following provisions with respect to the Council's membership to ensure -

(a) that the Governor may appoint a temporary deputy member to act in place of a member who takes temporary leave of absence for a period exceeding four months;

(b) that the natural term of office of members is three years, and that a member is eligible for re-appointment on the expiration of this term;

(c) that the Governor may remove any member of Council for misconduct, incompetence or neglect of duty, or if that member becomes unqualified by reason of section 3.3.2.3 above;

(d) that the office of a member of Council will become vacant if the member dies, completes a term of office and is not re-appointed; resigns by written notice to the Minister; or is removed from office by the Governor;

(e) that a vacant office shall be filled in accordance with the stipulations of the Act; and

(f) that the Governor may authorize payment to members of such fees, allowances and expenses as the Governor may determine.

3.3.2.5 A provision for the Minister for Health to nominate, and for the Governor to appoint the Chairperson of the Council.

3.3.2.6 A provision to establish procedures of the Council to ensure -

(a) that council members elect a Deputy Chairperson;

(b) that a quorum consists of six members;

(c) that each member present at a meeting of the Council, including the Chairperson and Deputy Chairperson is entitled to one vote on any matter requiring decision by the Council; and

(d) that in the event of an equal vote the motion before the Council is deemed to have failed.

3.3.3 The Council's Functions and Code of Practice

The Act should define the Council's functions and code of practice in the following terms.

3.3.3.1 The Council's functions should be:-

(a) to formulate, and keep under review, a code of practice to govern the use of artificial fertilization procedures and research involving experimentation with human reproductive material;

(b) to advise the Commissioner of Health on the conditions of licences authorizing artificial fertilization procedures, research involving experimentation with human reproductive material, or the collection and storage of human reproductive material;

(c) to conduct or commission research into the social and public health implications of reproductive technology;

(d) to advise the Minister for Health on any matters arising out of, or in relation to, reproductive technology;

(e) to promote informed public debate on the ethical, social, public health and economic issues that arise from reproductive technology;

(f) to communicate with other bodies carrying out similar functions in Australia.

3.3.3.2 There should be a provision to ensure that the code of practice formulated by the council is promulgated in the form of regulations made pursuant to the Act.

3.3.3.3 The Act should contain the following specific prohibitions, and it should be required that the code of practice is consistent with these prohibitions:

(a) A prohibition on the mixing of multiple sources of human reproductive material in the one artificial fertilization procedure so as to render impossible identification of both biological parents of any human embryo, foetus or child conceived or born of the procedure;

(b) a prohibition on the mixing of human reproductive material with reproductive material from the other animals;

(c) a prohibition on the sale or purchase of human reproductive material;

(d) a prohibition on the culture of a human embryo outside the human body, or experimentation on a human embryo, beyond 14 days after fertilization;

(e) a prohibition on therapeutic experimentation on a human embryo beyond 7 days after fertilization;

(f) a prohibition on the transferring of a human embryo into the human body, when the embryo has been the subject of experimentation other than therapeutic experimentation;

(g) a prohibition on the generation of a human embryo solely for the purposes of research involving experimentation; and

(h) a prohibition on any procedure that involves the cloning of a human embryo.

3.3.3.4 A breach of a prohibition in section 3.3.3.3 should be an offence.

3.3.3.5 There should be a provision to enable the Commissioner of Health, with the Minister's approval, to provide the Council with support staff.

3.3.3.6 The Council should be required to present an annual report to the Minister for Health by 31 March each year, detailing -

(a) in statistical terms, the activities of persons licensed under the Act during the previous year;

(b) any significant developments in the use of reproductive technology during the previous year;

(c) any discernible social trends attributable to reproductive technology that became apparent during the previous year;

(d) any breach of the Act or a regulation made under the Act, or any breach of a condition of licence; and

(e) any other matter of importance within the sphere of the Council's responsibilities.

3.3.3.7 The Minister for Health should be required to cause copies of the Council's annual report to be laid before both Houses of Parliament within 10 sitting days after receipt of the report.

3.3.4 Licensing

There should be a section of the Act on licensing that achieves the following.

3.3.4.1 It should be an offence for a person to carry out the following activities, except in pursuance of a licence granted by the Commissioner of Health:

(a) An artificial fertilization procedure other than artificial insemination;

(b) research involving experimentation with a human embryo; and

(c) the collection and storage of human reproductive material derived from more than one person.

3.3.4.2 It should give the Commissioner of Health the discretion to grant a licence if the Commissioner is satisfied that -

(a) the applicant is a fit and proper person to hold the licence;

(b) the applicant has appropriate staff and facilities for carrying out the artificial fertilization procedures, research or storage for which the licence is sought; and

(c) there is a need for the licence not adequately met by existing licences.

3.3.4.3 It should state that a licence granted by the Commissioner of Health shall be for such period as the Commissioner may determine, and unless suspended or cancelled, may be renewed at the discretion of the Commissioner.

3.3.4.4 It should empower the Commissioner of Health to impose any of the following conditions on a licence -

(a) A condition defining the kinds of procedures, research or storage authorized by the licence;

(b) a condition requiring the licensee to keep specified participant-identified records in relation to -

(i) artificial fertilization procedures, any research with a human embryo, storage of human reproductive material or any other procedure or activity conducted in pursuance of the licence; and

(ii) the source of human reproductive material used in the pursuance of the licence;

(c) and without any limitation by the foregoing considerations, such other conditions as the Commissioner may, on the advice of the Council, determine, including conditions concerning the provision of counselling services and the screening of donors of human reproductive material.

3.3.4.5 It should require that a licensee shall observe the code of practice, and that any variation in the Code of Practice is notified to licensees at least 21 days prior to taking effect.

3.3.4.6 It should empower the Commissioner of Health, with respect to a condition of licence -

(a) to include licence conditions in the licence itself, if determined at the time of grant of the licence;

(b) to impose licence conditions by notice in writing given personally or by registered post to the licensee, if determined subsequent to the time of grant of the licence;

(c) to vary or revoke licence conditions by notice in writing given personally or by registered post to the licensee.

3.3.4.7 It should authorize the charging of a licence fee set by the Governor and promulgated as a regulation.

3.3.4.8 It should specify that a licence is not required for the purpose of artificial insemination if carried out by a registered medical practitioner who has notified the Commmissioner of Health of his or her intention to perform artificial insemination, and who has made an undertaking to observe the code of practice.

3.3.4.9 It should empower the Commissioner of Health to withdraw the exemption of a medical practitioner from the requirement to hold a licence for artificial insemination, by notice in writing, if the Commissioner is satisfied on reasonable grounds that the medical practitioner has breached the code of practice.

3.3.4.10 It should empower the Commissioner of Health to refuse to renew, or to suspend or cancel a licence if the Commissioner is satisfied on reasonable grounds that contravention of, or non-compliance with, a condition of a licence or the code of practice has occurred.

3.3.4.11 It should require that, before refusing to renew a licence, or suspending or cancelling a licence, or withdrawing the exemption of a medical practitioner from the requirement to hold a licence for artificial insemination, the Commissioner of Health shall:-

(a) give 21 days written notice to the licensee specifying the grounds for the proposed action;

(b) allow that a licensee notified under section 3.3.4.11(a) may, within 21 days of receipt of the notice, apply to the Commissioner for a review of the proposed decision; and

(c) on receipt of an application under section 3.3.4.11(b), give the applicant an opportunity of making submissions to the Commissioner on the matter.

3.3.4.12 Notwithstanding section 3.3.4.11, it should empower the Commissioner of Health to refuse to renew a licence, or suspend or cancel a licence, or withdraw the exemption of a medical practitioner from the requirement to hold a licence for artificial insemination, without notice and with immediate effect, pending a hearing under section 3.3.4.11, if the Commissioner is satisfied that the continuation of the licence or exemption would expose any person to the imminent risk of serious physical harm.

3.3.4.13 It should provide for an appeal to the Supreme Court against a decision of the Commissioner of Health under section 3.3.4.11 -

(a) to refuse to grant or renew a licence;

(b) to impose a particular licence condition;

(c) to suspend or cancel a licence;

(d) to withdraw an exemption permitting artificial insemination without a licence.

Any such appeal should be made within one month from the day on which the appellant receives notice of the decision against which the appeal lies.

3.3.5 Registers

The Act should establish registers under the following provisions.

3.3.5.1 A provision requiring the Commissioner of Health to designate one or more authorized persons to establish and maintain -

(a) a register of the identities of children conceived through artificial fertilization, including the identities of the biological parents of each child and other clinical information specified in regulations;

(b) a register of the identities of participants, including for each participant such demographic and clinical information as is specified in regulations.

3.3.5.2 A provision which enables access to information in the registers for the following purposes, but otherwise ensures that access is strictly prohibited.

(a) For the purpose of a person having access to non-identifying information about their biological parents;

OPTION 1 (majority)

(b) for the purpose of a person, upon attaining the age of 18 years, having access to identifying information about their biological parents provided that the donation of any reproductive material used in the artificial fertilization procedure of which the person was born occurred on or after the day of proclamation of this section of the Act.

OR

OPTION 2 (minority)

(b) For the purpose of a person, upon attaining the age of 18 years, having access to identifying information about their biological parent or parents provided that written permission for such action is given to the Commissioner of Health from the biological parent or parents;

(c) for the purpose of a person having access to non-identifying information about a child of whom they are a biological parent;

(d) for the purpose of research, which is approved by the Council, by an authorized person into the social or public health consequence of reproductive technology.

[Both options 1 and 2 include (c) and (d).]

3.3.5.3 A provision requiring the Commissioner of Health to consult with the Director-General of Community Services in regard to matters of access to the registers under 3.3.5.2 (b) above.

3.3.6 Confidentiality

The Act should secure the confidentiality of information by use of the following provisions.

3.3.6.1 It should be an offence for any person to divulge or communicate to another person the identity of a donor of human reproductive material except -

(a) in the administration of the Act;

(b) in order to carry out an artificial fertilization procedure; or

(c) with the prior written consent of the donor of the material.

3.3.6.2 It should be a serious offence for any person, other than an authorized person, to gain access to information in the registers established in section 3.3.5, except for the purposes described in section 3.3.5.

3.3.6.3 It should be a serious offence, punishable by imprisonment, for an authorized person, except in the administration of the Act, to make a record of, or to divulge or communicate deliberately to any person, any information which identifies a participant in reproductive technology obtained in the course of duty or contained in the registers established in section 3.3.5.

3.3.6.4 It should be an offence for an authorized person to divulge or communicate negligently to any person, any information which identifies a participant in reproductive technology obtained in the course of duty or contained in the registers established in section 3.3.5.

3.3.6.5 It should state that nothing in the Act prohibits the publication or communication of conclusions based on or statistics derived from information obtained by an authorized person in the course of duty or contained in the registers established in section 3.3.5, but such conclusions or statistics shall not be published or communicated in a manner that enables the identification by name or dwelling of an individual participant.

3.3.7 Miscellaneous provisions

The Act should contain the following miscellaneous provisions.

3.3.7.1 A section defining the powers of authorized persons as -

(a) power to enter and inspect any premises on which artificial fertilization procedures, research involving experimentation with human reproductive material, or the collection and storage of human reproductive material are carried out;

(b) power to inspect any equipment on the premises;

(c) power to put questions to any person on the premises;

(d) power to require any person who is apparently in a position to do so, to produce participant-identified records relating to artificial fertilization procedures, research on, or storage of human reproductive material; and

(e) power to examine those records and take extracts from, or make copies of, any of them.

3.3.7.2 A section requiring that every authorized person shall be furnished with a certificate of appointment and, that on entering any premises in the course of duty, the authorized person shall produce the certificate to the person in charge of the premises.

3.3.7.3 A provision making it an offence to obstruct an authorized person in exercising a power, to fail to answer an authorized person's questions to the extent of full disclosure of relevant information, or to fail to produce records required by an authorized person when in a position to do so.

3.3.7.4 A provision to empower the Governor to make such regulations as are contemplated by the Act, or as are necessary or expedient for the purposes of the Act, including but not restricted to -

(a) the prescription of forms of consent for the purposes of the Act;

(b) the requirement for licensees to furnish periodic returns of participant-identified information, and the prescription of forms for that purpose;

(c) the imposition of penalties for a breach of, or non-compliance with, a regulation.

3.4 SPECIFIC LEGISLATIVE RECOMMENDATIONS ON SURROGACY

The Working Party recommends that the Surrogacy Act should be composed as follows -

3.4.1 Preliminary to the Act

The preliminary to the Act should achieve the following.

3.4.1.1 It should entitle the Act as the Surrogacy Act.

3.4.1.2 It should enable the Act to come into operation on a day to be fixed by proclamation.

3.4.1.3 It should enable the Governor to suspend the operation of specified provisions of the Act until a subsequent day fixed in the proclamation, or a day to be fixed by subsequent proclamation.

3.4.1.4 It should contain an objects clause defining the objects of the Act as those appearing in section 3.1.6 above.

3.4.1.5 It should define the terms in section 2.2 above, and any other terms that require definition for the purposes of interpreting the Act.

3.4.1.6 It should contain a statement of principles to guide the interpretation of Act, which should be the principles appearing in section 3.1.7 above.

3.4.1.7 It should bind the Crown.

3.4.2 Surrogacy Contracts

The Act should:-

3.4.2.1 State that a surrogacy contract is unenforceable.

3.4.2.2 State that -

(a) a procuration contract is unenforceable; and

(b) any person who pays any money or transfers any property under the terms of a procuration contract may recover the money or property so paid or transferred from the person to whom it was so given or paid; and that any such money paid or the value of such property paid or transferred under the terms of a procuration contract may be recovered as a debt.

3.4.2.3 Make it an offence to create or operate an agency whose purpose includes the recruitment of women for surrogacy contracts or the making of arrangements for commissioning parents who wish or may wish to make use of the services of a birth mother under the terms of a surrogacy contract, whether such agency is intended to make a profit or not.

3.4.2.4 Make it an offence for a person:-

(a) to agree to arrange or negotiate or obtain the benefit of a surrogacy contract on behalf of another person;

(b) to agree to introduce prospective parties to a surrogacy contract;

(c) to become or seek to become a commissioning parent by virtue of a procuration contact; or

(d) to act or offer or seek to act as an agent for a person who desires to become a commissioning parent by virtue of a procuration contract.

3.4.2.5 Make it a serious offence, punishable by imprisonment, for any person to negotiate a procuration contract for reward or valuable consideration, or to enter into a procuration contract in the expectation of receiving reward or valuable consideration.

3.4.2.6 Make it an offence to induce any person to enter into a surrogacy contract having received or expecting to receive valuable consideration from a third person who may or may not see the benefit of that contract.

3.4.2.7 Make it an offence to publish, or cause to be published, an advertisement to the effect that a person is or may be willing to enter into a surrogacy contract, or that a person is seeking a person willing to enter into a surrogacy contract.

3.4.2.8 Ensure that in the event that a surrogacy contract is entered into, the birth mother does not commit any offence, and the commissioning parents do not commit any offence other than those appearing in sections 3.4.2.4 and 3.4.2.7 above.

3.4.3 Children Born of Surrogacy Contracts

The Act should state that a surrogacy contract does not create any rights, and that the commissioning parent or parents must seek the order of a court exercising appropriate jurisdiction in an application for guardianship and custody or adoption of a child born of a surrogacy contract.

The Working Party also recommends that the existing Family Court Act should be amended as follows.

3.4.4 Amendments to the Family Court Act

3.4.4.1 Section 62(1) of the Family Court Act should be amended to provide for the recovery, by a woman who is pregnant as the result of a surrogacy contract, of preliminary expenses (the reasonable cost of the pregnancy and birth as are presently recoverable by the mother of any ex-nuptial child from the father of that child). The amended Act should provide that:-

"A person is liable to provide for or contribute towards the payment of the preliminary expenses of a woman who;

(a) not being his wife, is pregnant by him or has been delivered of a child or a stillborn child of which he is the father; or

(b) not being married to that person and whether that person is a male or female person, is pregnant or has been delivered of a child or a stillborn child, or has incurred expense as a result of a pregnancy entered into or continued by that woman, as a result of a surrogacy contact as defined in section (_) of the Surrogacy Act, 1988."

3.4.4.2 Section 62(2) of the Family Court Act should be amended to provide the following:-

[Section 62(2)(a)] "(iii) is pregnant or has been delivered of a child or a stillborn child, or who has been pregnant but has miscarried a pregnancy entered into or continued by that woman, as a result of a surrogacy contract;"

3.4.4.3 Consequential amendments would be required to the balance of Section 62 of the Family Court Act, to reflect the changes in subparagraphs (1) and (2). This change should entitle the birth mother to obtain payment of her medical expenses and maintenance for the child (if born alive) from the commissioning parent or parents, without further amendment.

An alternative route would be to provide in the Surrogacy Act itself for payment of reasonable indemnity in a lump sum to a birth mother, for costs and losses incurred by a surrogacy contract. This option would not give the child an ongoing right to maintenance from the commissioning parents.

OTHER RECOMMENDATIONS PERTAINING TO IMPLEMENTATION AND ADMINISTRATION OF ACTS

4.1 IMPLEMENTATION OF ACTS

The Working Party recommends that:-

4.1.1 A prime responsibility and early priority of the Council should be to formulate the Code of Practice.

4.1.2 The Code of Practice should be predicated on the following considerations before an artificial fertilization procedure is commenced in relation to a woman -

(a) whether the woman is a member of a couple who are infertile, or whose children are likely to be affected by a genetic abnormality or disease;

(b) the welfare and interests of any child to be born as a result of the procedure, including the home environment and stability of the household in which the child would live; and

(c) the age and physical and mental health of the prospective parents.

4.1.3 The Council should give consideration to the following prohibitions for inclusion in the Code of Practice -

(a) a prohibition on human embryo flushing; and

(b) a prohibition on the selective reduction of implanted human embryos.

4.1.4 The Council should give consideration to the following matters which may require future amendments to the Reproductive Technology Act -

(a) the ownership and disposal of human embryos; and

(b) the transferring of a human embryo into the body of a woman after the death of one or both prospective parents, including implications of that procedure on the rights of inheritance.

4.1.5 The Council should seek to evolve over time recognition of special principles applicable in any application for guardianship and/or custody or adoption, or in any other proceedings in which the welfare of a child, the subject of a surrogacy contract, is in issue. The Court should, in addition to its obligation to consider the welfare of the child as the paramount consideration, have regard to the following circumstances -

(a) that the commissioning parent or parents have entered into a surrogacy contract;

(b) whether the applicant or applicants have made full and frank disclosure or have failed to disclose the existence and terms of the surrogacy contract;

(c) the circumstances in which the surrogacy contract was concluded; and

(d) the terms of the surrogacy contract;

and should consider whether these factors adversely affect the suitability of the applicant or applicants for orders with respect to the child.

To give full effect to the above will require amendments to the Family Law Act (Commonwealth), as well as the State Adoption of Children Act and the Family Court Act.

4.1.6 Consideration should be given to the granting of licences to existing practitioners of artifical fertilization, etc, on the day of proclamation of the Reproductive Technology Act.

4.2 ADMINISTRATION OF ACTS

The Working Party recommends that:-

4.2.1 The Reproductive Technology Act should be administered by the Health Department of Western Australia because of its focus on technical procedures generally provided by the medical profession.

4.2.2 The Surrogacy Act is more appropriately administered by the Department for Community Services.

4.2.3 There should be a high level of cooperation between the Health Department of Western Australia and the Department for Community Services in the administration of the two Acts.

4.2.4 The Director-General of Community Services, or his or her delegate, should be made an authorized person under the Reproductive Technology Act to enable and facilitate the administration of access to information in registers contemplated in section 3.3.5.2 (b) above.

4.3 RESOURCE RECOMMENDATIONS

The Working party recommends strongly that if the Council and registers contemplated by the proposed Reproductive Technology Act are established, there should be provided sufficient and specifically designated staff and contingency resources within the Health Department of Western Australia to service a secretariat for the Council and to maintain the registers.

APPENDIX

Expressions of Opposing Views on a Matter Unresolved by General Consensus.

3.3.5.2(b) Registers, Option 1 (Majority)

Issues Related to the Child's Right to Access to Identifying Information about Biological Origins

The objects and guiding principles of the proposed Reproductive Technology Act [3.1.2. (b)] state that:

> "... Such procedures will not be administered unless appropriate conditions exist for ensuring as far as possible the welfare of children born of such procedures".

The right to access to identifying information about biological origins is the absolute basis of this principle.

The donation of human gametes is different in principle from donation of other human tissue, in that the capacity to create new life from donated gametes has significant and far reaching effects on children born of such donations.

Gamete donation should be publically acknowledged as the socially significant and responsible act it is. The considered position of the majority of the Working Party is that gamete donors should at the time of donation give consent in writing to identifying information about them being available upon request to any child born of their gametes, after they reach 18 years of age, and after notification being made to the donor. Appropriate counselling and support would be available to both parties. Donors have no legal rights or responsibilities to the child; the child has no claim on the donor.

Knowledge and practice in the adoption field indicates that adopted children may develop significant self-esteem and identity problems. Healthy identity formation can be facilitated by access to identifying information about biological origins. The integrity of birth records should be maintained to allow for such tracing, should a child upon reaching age 18, wish this.

National trends in adoption practice are towards removing barriers to accessing identifying information, and to maintaining the integrity of birth records. Some States have already legislated in this regard and are already encouraging open adoptions, allowing children knowledge of their biological origins.

In relation to public health data and access to complete genetic and medical histories carried through a biological line, ability to access identifying information would certainly facilitate comprehensive knowledge being attained by an individual.

3.5.2(b) Registers, Option 2 (Minority)

Issues Related to Confidentiality of Gamete Donation

Hitherto it has been normal practice to collect and distribute gametes for artificial insemination (and ovum donation) in a manner that preserves and maintains the anonymity of the donor.

This has

- enabled the birth parents to be relatively free from any sense of having a third party to the marriage or relationship;

- recognised the nature of the donation. It is a non refundable gift and the donor relinquishes any right and abdicates any responsibility for the outcome. Any child born as a consequence of AID, for example, is not able to make any claim of inheritance against the donor's estate. The child's parents are those who have undertaken responsibility for the pregnancy and birth and support of the child;

- recognized the nature of material being donated. It is human tissue. When blood is given it is usually given anonymously, likewise human organs are usually given anonymously. Part of the justification for the movement of blood and organs between people by way of donation is that is is an impersonal gift of tissue rather than of personality or of a human life.

If sperm and ova are impersonal tissue then they can quite appropriately be given in the same way. It seems inappropriate to require identifying information to be given – certainly without the consent of the donor – in any such case.

If, on the other hand, sperm and ova are viewed as having greater status than that of other human tissue there would seem to be serious consequences that follow in the collection, storage, handling and disposal of gametes. It is proposed that limitations be imposed on the storage, transfer, and experimentation upon human embryos. Such limitations do not apply to sperm and ova because they are thought not to have morally relevant similarities to embryos.

This is not to say that it should be impossible for a donor and the product of that donation to learn about one another at a later stage. But such possibility should be conditional upon mutual agreement by both donor and child. If the child is able to protect his or her identity from the donor it would seem to be fair and proper for the donor to be able to exercise a similar right to confidentiality.