1988

WESTERN AUSTRALIA

LEGISLATIVE ASSEMBLY

REPORT
OF THE
SELECT COMMITTEE
APPOINTED TO INQUIRE INTO THE

REPRODUCTIVE TECHNOLOGY WORKING PARTY'S REPORT

PRESENTED BY: DR JUDYTH WATSON, MLA

ON 15 DECEMBER 1988

ORDERED TO BE PRINTED

The Committee presents its report to the House on the Reproductive Technology Working Party's Report which it views as being a thorough and well considered Report addressing problems in the area in a constructive manner. The Committee sees a need for the urgent implementation of legislation in the area of Reproductive Technology and Surrogacy. The Committee hopes the recommendations contained in this Report will constructively help address many of the problems and also expedite that legislation.

The Select Committee is only able to function during the life of the Parliament. It was therefore necessary to expedite proceedings so that a report could be presented to the House prior to prorogation of Parliament when the Committee would cease to exist.

15 December 1988
Perth Western Australia

DR J. WATSON, MLA
(CHAIR)

MR R.L. WIESE, MLA

MRS P.A. BUCHANAN, MLA

MR J.L. BRADSHAW, MLA

MR E. RIPPER, MLA

ACKNOWLEDGEMENTS

Our Select Committee wishes to record its appreciation to the staff of the Legislative Assembly and of Hansard for assistance in the conduct of this inquiry. Hansard reporters and typists provided transcripts, some taken on visits, rapidly and efficiently. Mr John Mandy provided both information and service to the Committee which enabled us to meet a very tight schedule without problems. His knowledge and experience were invaluable.

Special acknowledgement must be made of the efforts and commitment of our Research Officer, Mrs Sandra Webb, from the Health Department. She is a biological scientist with a capacity to set issues related to science and its application in their social context. We consider ourselves privileged to have been considerably challenged by information and views put to us during the course of the inquiry and Mrs Webb has often assisted us by counter–challenge or explanation to clarify and crystalise our thinking. Both she and Mr Mandy have worked long hours to assist the Committee's inquiry. Many individuals and representatives of organisations responded to our call for submissions within a very limited time. There may be few other fields in which such a range of opinion can be argued from what is, for the particular point of view, a coherent, logical and consistent stance. Philosophers of science and ethicists have a fundamental role in this debate. We were aware that personal disappointment, pain and grief lay behind many submissions. The Committee thanks those people who presented oral or written submissions.

We also thank Mrs Catherine Leach, Mrs Lorraine Allen and Mrs Diane Dinnie for the typing of successive drafts of this report.

Finally, our thanks go to the Ministers for Health and for Community Services for the co-operation of their departments during this inquiry. Their response to our report is awaited with interest.

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1. ESTABLISHMENT OF THE COMMITTEE

On 15 November 1988 Dr J. Watson gave notice that she intended to move a motion to appoint a Select Committee of the Legislative Assembly as follows –

> " **That a Select Committee be appointed to consider the report to the Minister for Health from the Reproductive Technology Working Party in order to –**
>
> **1. form a view on the desirability or otherwise of each of the specific legislative recommendations made in relation to reproductive technology and surrogacy;**
>
> **2. make alternative legislative recommendations, which may either diminish or expand the scope of the original report in areas where the Select Committee has a view which differs from that embodied in the original report; and**
>
> **3. make its own report to the Parliament. ".**

(The motion as put and passed is hereinafter referred to as the " Terms of Reference".)

2. APPOINTMENT OF MEMBERS TO THE COMMITTEE.

2.1 Committee Members

The following additional motion was moved by Dr J. Watson and passed by the Legislative Assembly–

> **"That the following members be appointed to serve on the Select Committee together with the mover – the member for Pilbara (Mrs Buchanan), the member for Ascot (Mr Ripper), the member for Murray–Wellington (Mr Bradshaw) and the member for Narrogin (Mr Wiese). " .**

2.2 Chair and Deputy Chairman

The Committee elected, on 16 November 1988, Dr J. Watson as Chair and Mr R. Wiese as Deputy Chairman.

3. COMMITTEE ACTIVITIES

3.1 MEETINGS

The Committee met on the following days:

16 November 1988
23 November 1988
24 November 1988
2 December 1988
8 December 1988
13 December 1988
15 December 1988

3.2 SUBMISSIONS

The Committee received submissions from persons and organisations as listed in the first schedule and took evidence from those persons and organisations listed in the second schedule.

3.3 VISITS

The Committee visited various clinics. These were–

Avro I.V.F. Unit, King Edward Memorial Hospital for Women, Subiaco;

Pivet Medical Centre, Leederville; and

Department of Newborn Services, King Edward Memorial Hospital for Women, Subiaco.

4. MOTIONS OF EXTENSION

Dr J. Watson additionally moved the following motion which was passed in the Legislative Assembly –

> **"That the Committee have power to call for persons and papers, to sit on days over which the House stands adjourned, to move from place to place and to report on 8 December 1988.".**

The Leader of the House moved the following motion on 24 November 1988 which was passed in the Legislative Assembly –

> " **(1) That this House authorises the Select Committee inquiring into the Reproductive Technology Working Party's Report appointed during this present Session to continue its inquiries, without further authority being required than this resolution, for the balance of the present Session.**
>
> **(2) The Committee is empowered to present to the Clerk of the Legislative Assembly, prior to the prorogation of the present Session, its report, or an interim report, together with minutes of proceedings, transcripts of evidence and written submissions received by the Committee.**
>
> **(3) Any report, minutes or transcript of evidence received by the Clerk prior to the prorogation of the present Session shall be deemed to be laid upon the Table of the House and shall be treated for all purposes as a proceeding of the House and the Clerk shall take such steps as are necessary and appropriate to publish those documents. ".**

The Committee realized from evidence already taken that it could only partially complete its investigation prior to the Report date of 8 December 1988 and therefore sought approval of the House to continue its business until prorogation of the House.

5. EVIDENCE

The Committee passed the following resolution –

On 16 November 1988:

> **"That in accordance with Standing Orders, the Committee orders that the proceedings of the Committee, subject to Standing Orders 373 and 374, should be open to the public and available to be published.".**

6. THE REPORT – SUMMARY

While time does not permit analysis or theoretical interpretation, submissions made to the Select Committee have, together with reports of recent relevant inquiries and publications, influenced our thinking.

The single largest consideration which guided us as legislators is that the welfare of children conceived and born as a consequence of these procedures be paramount.

We are concerned, in particular, at the impact that the extra numbers of high multiple and premature births following artificial fertilization procedures have on the demand for neonatal services in this State. Also the impact that triplets or quadruplets make, and for many years, on their families must reduce some of the enjoyment that is due to parents.

We have other concerns, some outside the terms of reference of this inquiry. Without informed public debate of the issues, questions not only of the potential (mis)application of certain technologies and procedures, but also of medical and personal costs and access to programmes will not be asked, let alone answered. While we have recommended that certain criteria should be established for access to reproductive technology, one of those criteria should not be the financial capacity of couples to pay. We are aware that the causes of infertility are complex but that some is preventable: as causes become known, community based prevention campaigns should be implemented through the Health Department.

Nearly all practitioners who spoke to the Committee's hearings expressed a view that legislation is not necessary. There is no ambition nor intention to prevent any beneficial progress in this field, but we are unanimous that legislation such as that we propose is necessary to guide that progress.

It is apparent that technology and science will always be ahead of any legislation, so any effective statute in this field will need to provide a framework of guiding principles, the details of which would be incorporated into regulations or a code of practice which is more quickly responsive to appropriate amendment.

Our Committee claims that its review of the Guiding Principles of the Reproductive Technology Working Party's Report has met the needs of this inquiry, and that its recommendations can, in turn, guide the legislation which we believe should be expedited.

The Committee has made the following recommendations which should be read in conjunction with the appended Report to the Minister for Health from the Reproductive Technology Working Party (1988) –

- That the Guiding Principles, as amended, of the Reproductive Technology Working Party's Report be endorsed.

- That legislation is required to regulate and guide the use of reproductive technology and to discourage and deter people from entering into surrogacy arrangements.

- That these aims are best achieved through two separate Acts of Parliament; a Reproductive Technology Act and a Surrogacy Act.

- That in the administration of both Acts the welfare of children born through artificial fertilization procedures or surrogacy arrangements is of paramount importance.

- That as far as possible, the Reproductive Technology Act should ensure that before the application of an artificial fertilization procedure the potential clients have been adequately assessed as to the appropriateness of such a procedure.

- That the Reproductive Technology Act should establish the Western Australian Reproductive Technology Council which has powers to formulate a code of practice for artificial fertilization procedures and human embryo research, and to enforce this code of practice through its licensing powers, with consideration of the licensing conditions as outlined in section 3.3.4 of the Reproductive Technology Working Party's Report.

- That the Reproductive Technology Council should formulate in its Code of Practice rules which relate to the use of artificial fertilization procedures in surrogacy arrangements.

- That the Reproductive Technology Act should promulgate regulations to establish permanent registers –

  (a) to ensure the adequate monitoring of the reproductive technology and its public health implications; and

  (b) to enable children to obtain at least non–identifying information as to their biological parentage.

- That identifying information about biological parentage should *never* be released retrospectively without written consent.

- That there be further public debate regarding the availability of identifying information to children of donors, although it finds arguments in favour of this persuasive.

- That as far as possible the Code of Practice should aim to minimise the prevalence of high multiple implantations that result from artificial fertilization procedures.

- That the composition of the proposed Council be modified from that suggested in the Reproductive Technology Working Party's Report (sections 3.3.2.1, 3.3.2.2 and 3.3.2.3), such that it could include no more than one member with a direct pecuniary interest in human in vitro fertilization procedures.

- That the Code of Practice, where appropriate, should be based on relevant nationally promulgated ethical and practice guidelines.

- That the register of children born after gamete or embryo donation or surrogacy arrangements be kept in a central location, and if following further public debate the Council should decide that access to identifying information should be made available, this should be administered through the authorisation of the Director General of Community Services, subject to the provisions relating to confidentiality in section 3.3.6 of the Working Party's Report.

- That because a number of specific prohibitions in the Reproductive Technology Working Party's Report defy clear definition and are subject to both rapidly evolving technology and public opinion (sections 3.3.3.3, 4.1.3 and 4.1.4), the Committee recommends that the proposed Reproductive Technology Council should regulate these practices through its Code of Practice, and where necessary make recommendations for legislative control.

- The Committee recommends that where custody of a child has been awarded under other legislation (e.g. Adoption Legislation) to commissioning parents, the unenforceability of the surrogacy contract should create no special rights for the birth mother to regain custody of the child.

- That both the Reproductive Technology Act and the Surrogacy Act be subject to review after 5 years.

7. BACKGROUND

7.1 CURRENT STATUS OF CONTROL OF REPRODUCTIVE TECHNOLOGY IN WESTERN AUSTRALIA.

In Western Australia there is currently no legislation relating directly to the practice of Reproductive Technology nor to Surrogate Motherhood. The Artificial Conception Act 1985 provides however, that children born as a result of these practices are the legal children of the birth mother and her husband, regardless of gamete donation. There is considerable community concern about reproductive technology and surrogacy, and there are many unresolved areas of disagreement within the community. Fundamental issues range from matters of individual conscience, to financial and public health concerns at a State level.

As in most Australian States, reproductive technology in Western Australia is still regulated by non–legislative means, through approval given by institutional ethics committees for specific medical research projects and through professional self–regulation. The newly formed National Bioethics Consultative Committee aims to bring a co–ordinated national approach to important issues such as reproductive technology and embryo research. Compliance with these non–legislative regulations is however voluntary.

7.2 AUSTRALIAN LEGISLATION AND PROPOSALS RELATING TO REPRODUCTIVE TECHNOLOGY AND SURROGACY

In Australia to date only Victoria and South Australia have enacted legislation to deal directly with the practice of reproductive technology. The main provisions of the Infertility (Medical Procedures) Act 1984 (Victoria) were proclaimed to commence on 1 July 1988. This Act and the Reproductive Technology Act 1988 (S.A.) both established councils of broadly based expertise which can enforce licensing and practice guidelines for reproductive technology. In Australia issues surrounding surrogate motherhood have been examined by 6 State committees and one Commonwealth committee. All made recommendations against it, although some alluded to possible future reconsideration. Legislation relating to surrogacy has followed in Victoria, South Australia and Queensland. All three States outlaw commercial surrogacy arrangements, but only Queensland prohibits all surrogate motherhood agreements including altruistic arrangements.

With respect for the widespread lack of community consensus, the N.S.W. Law Reform Commission has recommended a legislative framework for regulation and control of reproductive technology that is still responsive to changes in medical and scientific practice and community attitudes.[1] The Senate Select Committee on the Human Embryo Experimentation Bill 1985 did not consider adequate the present system of voluntary adherence to nationally promulgated ethical guidelines on human embryo research, as overseen by institutional ethics committees.[2] It also recommended some form of licensing of reproductive technology research units by the State Governments.[3]

The Ontario Law Reform Commission in Canada concluded "that the law must impose some degree of intervention in the case of artificial conception that is neither desirable nor possible in the case of natural reproduction."[4] This statement followed consideration of the unresolved areas of community debate on the issues, including areas of public concern.

7.3 BACKGROUND TO THE REPRODUCTIVE TECHNOLOGY WORKING PARTY REPORT.

In Western Australia, as early as 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. The eleven members of this committee represented medical, legal, religious and community viewpoints, and presented an interim report in August 1984 and a final report in September 1986. The recommendations in these reports were as a result of extensive deliberations and public submissions, and with few exceptions were unanimous.

The 23 recommendations included those to establish a Licensing and Supervisory Authority and a Bioethics Committee to supervise the practice of reproductive technology services in this State.[5]

The final report of the In Vitro Fertilization Ethics Committee of Western Australia, the extensive factual report "In Vitro Fertilization and related procedures in Western Australia 1983 – 1987: a demographic, clinical and economic evaluation", and the Reproductive Technology Act 1988 of South Australia formed the basis of discussion, by the Reproductive Technology Working Party formed in July 1988 by the Minister for Health, on specific legislative proposals relating to reproductive technology.

The Reproductive Technology Working Party consisted of 16 members who brought medical, legal, public health, community and welfare, family, women's interests and ethical expertise to the group. Again a high level of consensus was achieved on a broad range of issues, and a report was presented to the Minister for Health by 31 August 1988. The Working Party recommended the implementation of two separate Acts. The Reproductive Technology Act would establish a Western Australian Council on Reproductive Technology, with powers to licence practitioners of reproductive technology and establish conditions of such licences. However it recommended that the Act not be unduly specific or inflexible, as reproductive technology and community attitudes to it were rapidly changing. The Surrogacy Act would discourage people from surrogacy contracts, and provide for the welfare of children born as a result of such contracts.

8. GLOSSARY

"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.

"Authorised person" means a person authorised by the Commissioner of Health to exercise the powers of an authorised 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.

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

"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. (See below).

"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.

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

"Gift" means Gamete Intra Fallopian Transfer.

"Human embryo" means the stage of development of a human being from the time of fertilization to seven 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; and

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

"NH and MRC" means the National Health and Medical Research Council.

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

"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.

"Prost" means Pronuclear Stage Transfer.

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

"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.

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

"Western Australian IVF Ethics Committee" means the Committee appointed by the Western Australian Government to enquire into the social, legal and ethical issues relating to in vitro fertilization and its supervision.

9. TERMS OF REFERENCE

"Form a view on the desirability or otherwise of each of the specific legislative recommendations made in relation to reproductive technology and surrogacy.

Make alternative legislative recommendations, which may either diminish or expand the scope of the original report in areas where the Select Committee has a view which differs from that embodied in the original report. " .".

9.1 GUIDING PRINCIPLES

The Committee closely considered the guiding principles of the Reproductive Technology Working Party's Report and recommends that they should be implemented, as amended by this Committee, into any proposed legislation.

The guiding principles are as follows –

" 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). " .

The Committee recommends that this principle should be adopted because the long history of surrogacy arrangements that did not involve reproductive technology is a clear indication that the two areas should be covered by separate legislation.

" 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. " .

The Committee recommends that this principle should be adopted, with amendment, because –

(a) consideration of the widespread and unresolved public debate on issues surrounding reproductive technology leads to the conclusion that human reproduction with the aid of that technology introduces ethical, social and public health concerns that require wise regulation at the State level. This regulation should ensure adherence to standards that can be modified as the technology and scientific knowledge evolve and in response to informed and widespread public submissions. It is the opinion of the Committee that neither institutional ethics committees nor self–regulation introduce adequate controls or wide enough community input.

The Committee also recommends that one of the objects of the Act should be to ensure, as far as possible, that before the application of an artificial fertilization procedure, the potential client has been adequately assessed as to the need for such a procedure; and

(b) there are ethical and social implications of artificial fertilization procedures that may go beyond the interests of the couple being treated and that welfare of children born of such procedures must be of paramount importance.

The Committee also recommends that paragraph (a) of Principle 3.1.2 be amended by deleting in line one, the word "control" and substituting the word "guide".

The Committee has moved this amendment because beneficial developments within reproductive technology should not be restricted.

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

The Committee recommends that this principle should be adopted because after long and informed debate the In Vitro Fertilization Ethics Committee of Western Australia recommended the formation of two authorities to supervise and control the practice of Reproductive Technology in this State[5]. The Committee recommends that the proposed Council perform the functions of formulating ethical guidelines and guiding the practice of reproductive technology in this State. The Committee also notes that other State IVF Ethics Committees and the Family Law Council[6] recommended the formation of similar multi–disciplinary councils to oversee the practice of IVF at the State or National level.

" 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 (where identifying or non–identifying; see section 3.3.5.2 below) about their biological parents. " .

The Committee recommends that this principle should be adopted because it considers that the composition and functions of the council should be specified in the Act so that this council can be well balanced, permanent body representing all interests in the community. The Council, through its licensing powers, should guide the practice of reproductive technology and human embryo research.

The Committee recommends that until the Council has been established and has formulated a code of practice for reproductive technology in this State, the National Health and Medical Research Council guidelines or other codes or standards of practice (with or without modification) adopted elsewhere, should be used as an interim code of practice.

The Committee recommends that licensing conditions as outlined in 3.3.4 of the report must be considered by the Council.

It also considers that the establishment of permanent registers is the only way to ensure adequate monitoring of social and public health implications of reproductive technology.

The Committee has adopted as its overriding principle that the welfare of children is paramount. It also finds arguments for children to have the right to information which identifies their biological parents persuasive [7–11], but recognises that this is a contentious issue which requires further public debate.

" 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. " .

The Committee recommends that this principle should be adopted because it recognises that both the technology itself and public opinion are still rapidly evolving [12–14]. Without the specific proscription of procedures that may be subject to such change, the details of regulation can adapt, under the guidance of the multi–disciplinary council, with no loss of adequate control over the procedures.

The Committee recommends that legislation be subject to a review after five years.

" 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. " .

The Committee recommends that this principle should be adopted because –

(a) it takes the considered opinion of the legal members of the Working Party that it would not be possible to enforce the illegality of many surrogacy contracts. Oral and written submissions received from a variety of persons and organisations have reinforced that view. The Committee therefore considers that people should be discouraged and deterred from entering these contracts by ensuring that any such contracts are unenforceable. The Committee acknowledges that other related legislation should be fully examined and amended where necessary, with a view to achieving the objectives of Guiding Principle 3.1.6. (a) and (b) (Surrogacy Act); and

(b) it considers that the welfare of children born as a result of surrogacy contracts is best assured if such contracts are not in themselves illegal, as illegality could exacerbate emotional and psychological problems for these children.

The Committee recommends that where custody of a child has been awarded under other legislation (e.g. Adoption Legislation) to commissioning parents the unenforceability of the surrogacy contract should create no special rights for the birth mother to regain custody of the child.

" 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." .

The Committee recommends that these principles should be adopted because –

(a) we recognise that intra–family and other altruistic surrogacy arrangements, as well as commercial surrogacy arrangements, are all potentially detrimental to the well being of children born and to other parties involved and are to be discouraged.

(b) by law in this State (Artificial Conception Act 1985) the birth mother is the legal mother of any child born, and therefore her welfare and the welfare of the child born should be provided for by the Surrogacy Act and related Statutes; and

(c) by making illegal the involvement of any third party in surrogacy or procuration contracts it hopes to reduce the likelihood of the exploitation of birth mothers and of commercial aspects of surrogacy arrangements. The committee recognises that the majority of Australian public opinion and all major reports of Australian IVF Ethics Committees opposed commercial surrogacy arrangements.

The Committee recommends that Guiding Principle 3.1.7 be amended by inserting after "unlawful" in line 2 of paragraph (b) –

"and the Reproductive Technology Council established by the Reproductive Technology Act should address the issues of third parties in its Code of Practice.".

The Committee believes that the overriding principle is to reduce the likelihood of entrepreneurial involvement in surrogacy contracts and arrangements.".

The Committee recommends that legislation be subject to review after 5 years.

10. FINANCIAL STATEMENT

FINANCIAL STATEMENT

REPRODUCTIVE TECHNOLOGY SELECT COMMITTEE

Contingencies Expenditure

Air Fares	545.00
Car Hire	150.00
Parliamentary Refreshment Rooms	9.70
Advertising	200.00
Photocopying Stationery	140.09
Total Expenditure	$1,044.79 *

* Printing of report and recent refreshment costs not included. Advertising costs estimated.

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13. SCHEDULES

13.1 SCHEDULE I SUBMISSIONS

Adoption Jigsaw W.A. (Inc). Mr D Broadbent (President)

This submission is supportive of the Reproductive Technology Working Party Report, especially with regard to the proposal that all children should ultimately have access to identifying information about their biological parentage. It also supports a view totally opposed to surrogacy, and supports the current situation in Western Australia where the child is legally the child of the woman who gives birth.

However, it goes further to state that the rearer of the child should have access to the identity of the donor and that birth records should include donor details.

Mrs J. Armstrong Wagin

This submission from a relinquishing mother compares her traumatic experience with surrogacy, which she totally opposes.

It expresses concern for the mental welfare of surrogate children and promotes research into the causes and prevention of infertility.

Mr & Mrs B. Dawson Floreat

This submission, from a couple who would have to resort to surrogacy to become parents, argues against a blanket law on surrogacy, although it recognises that regulation may be needed in some areas. It calls for recognition of the necessary role that IVF units and lawyers may have to play in what should be essentially a private matter between the parties concerned in surrogacy arrangements. It also suggests that blatant commercial surrogacy should be banned, although this is a vexed issue, and that surrogate births should be registered in the names of the biological parents, i.e. commissioning couple.

Fertility Society of Australia, Reproductive Technology Accreditation Committee — Dr B. Hudson (Chairman)

This submission basically is informative of the existence and functions of the Reproductive Technology Accreditation Committee which relate to the practice of reproductive technology but not to surrogacy. It stresses that in the event that a unit is not accredited by Reproductive Technology Accreditation Committee, it will not be granted free supplies of human gonadophins necessary for ovarian follicular development. However, it is not clear on how any disciplinary action would be enforced.

Details of the guidelines are included and cover clinical, laboratory and ethical areas, which it states must conform with any regulations laid down by individual State legislation.

Finally, the Reproductive Technology Accreditation Committee offers to help the Committee if requested.

Mrs E. Jendry — Inglewood

This submission states the urgent need for legislation to slow the progress of reproductive technology, from which it suggests the major winners are the medical entrepreneurs. It states that as in the proposed Act, the interests of the child must be paramount and that the public must be kept informed of all implications of the technology.

Mrs D. McCudden — Yarnarna Station

In relation to the proposed Reproductive Technology Act this submission expresses concern that such an Act would restrict any further advances in reproductive technology and represents discrimination against infertile people. It also expresses concern over confidentiality aspects of the proposed registers and at the precedent set in the licensing of these medical practitioners. In relation to the proposed Surrogacy Act it is critical that different types of surrogacy are not discriminated and is broadly supportive of surrogacy if the surrogate mother is willing. It proposes that if there is no biological connection to the host the child should go to the commissioning parent at birth, and states that the current bias in favour of the birth mother may represent sexual discrimination against a male sperm donor.

Mrs X — Perth

This submission from a concerned mother of triplets is critical that the proposed Reproductive Technology Act does not specifically refer to the need to control the high numbers of multiple births resulting from IVF practices. It suggests that the attainment of high pregnancy rates is the paramount consideration of IVF practitioners and that the emotional drain on parents and large financial output of taxpayers' money in relation to the multiple births is not a concern.

Dr G. Smith, F.R.C.O.G.
Gynaecologist/Obstetrician — West Perth

This submission from a private obstetrician/gynaecologist argues against the acceptance of the majority view of the Reproductive Technology Working Party's Report with regard to the access of children of donor gametes to identifying information regarding their biological parentage. It suggests that application of such legislation could always be legally challenged and would also produce a decline in the supply of healthy sperm, encourage adultery and stimulate the regrowth of the previous uncontrolled use of fresh sperm from the local community with its attendant health risks.

Ms Jan King — Nedlands
Transactional analyst (Counsellor)

This submission comes from a counsellor with six years' experience working with the staff and some of the patients of an Infertility Clinic. It promotes the opinion that there is a definite need for the availability of counselling by qualified counsellors for patients undertaking reproductive treatment.

Brethren, Christian Fellowship — C.W. Sivewright (Member)

This submission is based on the authority of the scriptures which it states clearly give status and authority to the government, and furthermore guidance as to how to legislate. It states that the instructions in the scriptures go far beyond the controls of reproductive technology and surrogacy suggested by the Reproductive Technology Working Party's Report. In fact IVF in any form, therapeutic and other experimentation with human reproductive material, storage of ova or embryos, gamete donation and surrogate motherhood should all be declared illegal.

Mr Greg Swenson — Leederville, W.A.
(Social Worker)

This submission from a social worker and former sperm donor commends the reasoned fashion in which the inquiry is being conducted, given the potential for such divergent views. The strongest recommendation is to support the guiding principle of the proposed Reproductive Technology Act that the welfare of children born through reproductive technology must be a prime consideration. It suggests that the needs of would be parents have been overriding and that research needs to be undertaken into the social adaptation of reproductive technology children. It also supports the setting of boundaries, as for adoption, to determine who should have access to reproductive technology.

It suggests that the needs of donor children may follow the adoption model, and that such children will wish to trace biological parentage. It also states that the present system of registration of births after gamete donation represents legal fiction.

Furthermore, concern is expressed at the enormous commercialism associated with reproductive technology, where demand exceeds supply and where vested interests may have pushed reproductive technology regardless of social utility.

Baptist Churches of Western Australia, Baptist Union of WA Inc — Neil H Campbell (General Secretary)

This concise submission basically suggests some additional recommendations to those made by the Reproductive Technology Working Party. It recommends that reproductive technology, such as IVF and surrogacy, should only be used as a last resort, and that couples who are involved must be well informed and counselled about the procedures. It supports a user–pay principle, would prefer to see a Minister of Christian religion on the Council and does not support embryo experimentation for genetic engineering purposes.

Dr J.L. Yovich
Medical Director

PIVET Medical
Centre

The opinion clearly stated in this submission is that there is no need for specific legislation in the area of reproductive technology or surrogacy, and that any legislation will inhibit further beneficial developments. To support this opinion it states that the Medical Act and its amendments, the Human Tissue and Transplant Act (1982), guidelines of the National Health and Medical Research Council and the specific supervision of the Reproductive Technology Accreditation Committee obviate the need for such legislation. It fears that there will be negative effects of legislation particularly for the infertile public and infertility workers.

In response to the specific legislative suggestions in the Reproductive Technology Working Party's Report, it offers a number of comments. For example, it is not in favour of access of donor children to identifying information. Regarding the proposed Council, it suggests the size will encourage conservatism and that the exclusion of persons with a pecuniary interest in Reproductive Technology implies the dangerous view that the doctors will act mainly for self–interest, and not in the best interests of their patients.

It is also critical of a number of the suggested absolute prohibitions, and promotes for surrogacy arrangements the type of contract drawn up on the recommendations of the Ontario Law Reform Commission. The submission states a view favourable to compassionate family surrogacy and against commercial arrangements. It considers that IVF practice should not be covered by the term "agency".

Dr M.J. Cohen

This submission promotes a system of professional self–regulation of medical practitioners involved in the management of human reproduction within a broad ethical framework. However it further expresses concern that Western Australia's two IVF Units are operating currently outside the traditional professional peer–review system and also have a strong entrepreneurial sense, such that some of their activities are not held in high regard by other professionals.

It believes the Government should be discouraged from taking an activist role. The Human Reproductive Biology Council proposed in this submission should be empowered to accept conclusions from a purely medical subcommittee in the first instance, and refer the matter to the Medical Board for discipline if necessary. It does support the idea that central registration procedures may be needed to ensure that the procedures are not being used inappropriately or leading to adverse consequences for children or families. This register may be achieved by a notification process.

It states that all children born should be wanted, that only stable heterosexual couples should be treated and the infertile not discriminated against.

It suggests that surrogacy should not be institutionalised although remaining an option for some infertile couples, and should be responsibly handled individual doctors.

W.A. Group against Vivisection — Sally Carryer, (Administrator)

This submission only addresses one point in the Reproductive Technology Working Party's Report and states that human and animal reproductive materials should not be mixed. It further notes that thousands of animals have been sacrificed in research into human infertility in a way that cannot be justified, given that doctors may not be trained animal researchers.

Association of Relinquishing Mothers — Mrs Shirley Moulds (Co–ordinator)

This submission includes a report on recent International Conference of Relinquishing Mothers which unanimously called for a total ban on all surrogate arrangements.

It reports that today in the United States of America there are 1 000–2 000 surrogate mothers and 250 baby brokers. Of the birth mothers 47% are welfare recipients. There is a growing awareness of the anguish of many of these mothers, and of financial and emotional trauma for the families, husbands and children, even in cases of intra–family arrangements.

Mr Michael Boswell — Wembley

In spite of what it states as an impossible time frame, this submission commends and endorses the Reproductive Technology Working Party's Report. It states that the reproductive technology industry should be controlled by the State especially in light of the integration of the industry with common ownership of pathology and supporting facilities. It suggests that ideally reproductive technology should be confined to major teaching hospitals.

It promotes the idea of a national regulatory system for human embryo experimentation.

It offers alternative suggestions for the make–up and terms of office of the proposed Council, suggests that the code of practice should be available for public perusal and that the identification of gamete donors be possible even on a retrospective basis.

Finally it suggests that children born of surrogacy contracts should be subject to adoption procedures with preference given to those involved in the contracts.

Margaret van Keppel (B.Psych. M.Psych.(Clin).) — Subiaco

This submission suggests that there is considerable experience from the adoption model to compare with the implications of surrogacy and the use of donor gametes.

It completely rejects the practice of all forms of surrogacy and states a personal lack of support for the use of donor gametes. In the event of gamete donation there should be a system to access of information on donors, and an alternative method of registering accurate birth details.

Anglican Marriage and Family Counselling	Mr C. Lawson–Smith FRACS (Chairman)

This submission urges the adoption by the Government of guidelines for the practice of IVF that are consistent with those of the Western Australian IVF Ethics Committee. Those guidelines should include restriction of such technology to married couples and make it unavailable to homosexual couples or un–partnered women.

It recommends stringent restriction of selective termination of foetuses.

Mrs Denise White	Dianella

This submission comes from a woman with many years experience with the Abortion Law Repeal Association, and supports the right of women to the available reproductive technology if needed. As such it suggests that the conditions of the Reproductive Technology Working Party's Report may discriminate against infertile women, in particular in abrogation of the patient's rights to medical confidentiality.

In relation to surrogacy it is suggested that the outlawing of commercial surrogacy will unfairly discriminate against some women. It suggests that the Department for Community Welfare could mediate surrogacy contracts in these cases. It also states that legal distinction needs to be made depending on the sources of gametes in the surrogacy arrangements.

For donation of reproductive material there should be monitoring and inspection of research premises as proposed in the Reproductive Technology Working Party's Report, but the donor could specify if the gametes could be used for research or not. With regard to identification of donors it favours "open adoption" type arrangements.

In general the submission commends the call for continuing public debate and the participation on the proposed council, however it is concerned that the ethicist on the Council should be non–sectarian.

Of the absolute prohibitions it expresses an alternative view that embryo culture outside the uterus should be allowed, as should selective termination, often in the best interests of the woman.

Department for Community Services	Mr Des Semple (Director–General) and Mr Terry Simpson (Assistant Director–General)

This submission addresses two issues covered by the Reproductive Technology Working Party's report, surrogacy and access of donor children to identifying information, and expresses concern for the infertile couples while maintaining the central importance of child welfare.

The Department for Community Services considers there to be an urgent need for legislation regarding all types of surrogacy, in part because Western Australia is one of the later States in moving to legislate and gaining a "baby–farm" image. It is concerned that there is little protection

to any party involved in surrogacy arrangements and that the public debate centres mainly on the human–interest aspects and is not based on other areas of immense social consequence. It expresses extreme concern at some potential problems of intra–family surrogacy arrangements.

Recommendations of the Department for Community Services included one that the application of IVF techniques to facilitate a surrogate pregnancy should be an offence.

With regard to the access of donor children to identifying information as to their biological parentage, it states belief in the clear precedent set by the adoptions experience. As such it supports the view that from the age of 18 years donor children have a right to access such identifying information.

It states that potential donors should be thoroughly assessed and then give written consent for the potential release of their identity to a subsequent child. It also states that several studies have shown that a significant proportion of donors will still donate under these circumstances. The procedures should be associated at all levels with counselling by trained and accredited counsellors.

It states that the nature of records kept must ensure the welfare of all concerned, and as such this must include centralized registers which are maintained up–to–date and only accessed by sensitively monitored procedures.

The Department for Community Services believes it is right that donors are free of rights and obligations to their children, but is concerned at the lack of integrity of these birth records.

The oral submission from this Department was more forceful in that it clearly stated a view contrary to the Reproductive Technology Working Party's Report that all parties involved in a commercial contract commit an offence, although custodial parents should never be jailed and that existing pregnancies be excluded from the definition of surrogate pregnancies.

Basically the Department for Community Services supports the report of the Reproductive Technology Working Party.

Ms Andrea Shoebridge Como

The author of this submission has had a long association with the Women's Electoral Lobby's Health Action Group, the ALP's Status of Women Policy Committee and the ALP's Reproductive Technology Working Party. In relation to the proposed Reproductive Technology Act it supports to the majority view on availability of identifying information on donors, but expresses some concerns about the medically–weighted composition of the proposed Council and the lack of sufficient stress on its educational activities. It opposes all experimentation on embryos that are to be implanted, questions the definition used of therapeutic experimentation, and comments on the lack of ethical supervision proposed in the code of practice.

This submission commends the Report's principle that discourages surrogacy contracts, however, it suggests that more attention needs to be paid to possibly mal–adaptive scenarios.

Finally, it is suggest that access should not necessarily be restricted for people whose sexual identity makes natural conceptions unlikely and that the Department of the Premier and Cabinet would be the most appropriate Department to administer the Acts because of their wide ramifications.

Abortion Law Repeal Association of W.A. — Ms Robyn Murphy (Convenor)

The specific matter addressed in this submission relates to the ownership and disposal of human embryos, which it contends cannot in any way be prohibited without grave implications for the existing pregnancy termination services, shown by surveys as acceptable to the overwhelming majority of Australians.

It also supports research on human embryos with parental consent and under guidelines such as those of the National Health and Medical Research Council.

Ms Megan Sassi — Yokine

This submission from a former member of the Women's Advisory Council and its Health Committee, approves of the proposals to discourage surrogacy and that the Council should contain equal numbers of men and women.

However, it argues against restrictions regarding the disposal of embryos and selective termination, which it suggests should be allowable with the consent of the couple, or of the woman if the couple cannot agree.

Cryobiology Unit QE II Medical Centre — Mr J. Bielby (Scientific Director)

This submission suggests that any legislation regarding reproductive technology should be to clarify existing deficiencies, such as to legalise donor insemination and artificial conception procedures. It suggests that the only legislation should be to promote an accreditation scheme by the Fertility Society of Australia, and that ideally legislation should make it easier to recruit gamete donors by ensuring current and future anonymity of the donor, which is vital. It also suggests that the infertile couples be the determinants of the utilisation of advances in reproductive technology.

It is suggested that at least two practitioners of current reproductive technology be represented on the proposed Council, and that a number of points in relation to the practice of artificial insemination need clarification.

Considerable concern is expressed at the excessive powers suggested for authorized persons, and the only registers it supports would be those held by practitioners of reproductive technology, who could allow access to non–identifying information in a good cause.

There is some confusion as to the implications of the Artificial Conception Act 1985.

Reproductive Medical Clinic
QE II Medical Centre

Dr E.J. Keogh
(Medical Director)

The Working Party and the State Government are commended for attempts to improve the delivery of reproductive health care, however, especially in relation to the case of donor sperm, this submission points out serious deficiencies in the Reproductive Technology Working Party's Report. The need for legislation is questioned, as is the possibility that any legislation may inappropriately attempt to dictate medical practice. The fact that only 2 of 10 members of the proposed Council are medical practitioners is of concern.

The proposed register of sperm donors and potential access of donor – children to identifying information it is suggested could result in scientifically invalid situations and in a dangerously reduced number of donors.

The submission is critical of the fact that no information was directly sought from the Reproductive Medicine Research Institute by the Reproductive Technology Working Party and of the short time to respond to the Committee.

Furthermore the submission suggests that the existing specialist medical organisations and Ethics Committees should determine the need for specialist clinics in response to demand from the community. In particular it promotes the use of the Reproductive Technology Accreditation Committee to supervise management, with power to enforce its guidelines through interaction with the Health Insurance Commission.

Several omissions from the Reproductive Technology Act 1988 of S.A., such as an aim to promote research into causes of human infertility are noted, and in conclusion the submission expresses alarm that any legislation could harm the activities of the sperm bank which have successfully been carried on for many years.

The seems to be a confused interpretation of the implications of the Artificial Conception Act 1985 and to the implications of the proposed Reproductive Technology Act for "home insemination".

Right to Life Association, W.A.

Peter O'Meara
(President)

The Right to Life Association of W.A. is on public record as opposing and condemning IVF and its attendant reproductive procedures. Its submission is made in the interest of those children it considers already destroyed by IVF procedures, the many women exploited and disillusioned by the programme and in the hope of proper legislative guidance. It states a need for strict control and accountability for reproductive technology.

In particular, it is promoted here that the proposed Council should include people who uphold the inviolability of the individual from conception, such that any code of practice developed would not allow experimentation on and subsequent destruction of human subjects to perfect scientific knowledge or advance quality of life theories.

In relation to the proposed Surrogacy Act, the submission suggests the outlawing of the practice, not just its discouragement.

The Fertility Society of Australia — Dr J. McBain (Hon. Secretary)

This submission submits that legislative regulation of reproductive technology puts infertile couples at a further disadvantage to couples of normal fertility and states that there are no crises of public confidence about procedures developed to restore human fertility.

It is suggested that an amalgam of self interest groups, not concerned for the infertile, is promoting legislative control, whereas the Reproductive Technology Accreditation Committee could offer a more relevant mechanism.

ALP – State Executive Policy Committee Reproductive Technology Sub–Committee of Health Committee — Judy Edwards (Hon. Secretary)

This submission mentions the estimated $30 million spent on IVF related services in 1987, questions the role of IVF for certain types of infertility and notes that a number of tubal cases resulted from prior tubal ligation.

IVF services it sees as driven by the needs of infertile couples and the service providers, and to exclude care other than medical. The problems and benefits of IVF are discussed.

The submission promotes legislation based on principles that recognise the nature of infertility and the extent of the problem, and on the potential answers to infertility that may exclude treatment. Such legislation must support programmes aimed at infertility prevention and must protect those involved on IVF programmes.

In general the Guiding Principles are endorsed, but some broadening is recommended based on the above comments.

It is noted that prevailing community view is of few problems associated with surrogacy. There is a need for community information on this topic before legislation is framed.

Ken Daniels
Snr Lecturer — University of Canterbury, N.Z.

Some of the evidence presented in this submission came from a lecture given at the Australian and New Zealand Association for the Advancement of Science Centenary Congress, 1988 which is in press and shows that in a recent Melbourne survey 73% of sperm donors would still be prepared to donate if it were possible for the children to trace their identity. Furthermore a quote from the book *Babymaking* by Susan Downie reports that in Sweden where such identifying information is now available under the Law, there is no shortage of sperm donors, as although the number of donors has dropped so has the number of requests for donor sperm. It is reported that in Sweden the usual sperm donor is now an older married

man with children. A third paper submitted in this submission, based on an address given by the Author at the American Society for Law and Medicine Conference of 1986, states that the rights and interests of children in these respects need greater recognition.

Cambridge Private Hospital	Mrs Georgina Barnes (Administrator)

This submission mentions the close working relationship of Pivot laboratory with the hospital, which has seen patients admitted for infertility investigations over eight years.

It reports the work of the compassionate medical team and can see no benefit in introducing any specific legislation in the area of reproductive technology or surrogacy, as this will inhibit further development. It states the opinion that there are already sufficient controls.

Standing Review and Advisory Committee on Infertility	Victoria

This submission takes the form of the first report to the Minister for Health for Victoria of the Standing Review and Advisory Committee on Infertility. This Committee has, under the Infertility (Medical Procedures) Act 1984, now the responsibility to report on its activities each year. Of interest is that early fears expressed by some that such legislation would halt all progress in the area of reproductive technology have proved groundless, as the clinical programmes have continued and developed. The Committee mentions fruitful interaction with workers in the field.

The objects of the Infertility (Medical procedures) Act 1984 are to provide a framework to give force and effect to its principles in part as a balance of community opinions.

T.D. Hoffman & Company	Mr T.D. Hoffman

(No re–submission received following request of the Committee to amend certain parts of the original submission that were outside the terms of reference of the Committee).

12.2 SCHEDULE 2 ORAL EVIDENCE

Dr A. Grauaug	King Edward Memorial Hospital for Women, Newborn Services
Dr T. Thomas	AVRO IVF Unit
Dr J. Yovich	PIVET Medical Centre, Leederville, W.A.
Dr D'Arcy Holman	Health Department of Western Australia.
Mrs Margaret Papaelias	Mount Lawley
Ms Moira Rayner	Law Reform Commission
Dr Michael John Cohen and Sr B. Curd.	Cohen Laboratory Pty Ltd
Ms Barbara Curd	
Mr Terry Simpson and Ms Belinda Other–Gee	Department for Community Service
Professor C. Michael	Department of Obstetrics & Gynaecology, University of Western Australia.

The following witnesses were summoned to give evidence on 20 December 1988. Due to prorogation of the House, the Select Committee ceased to exist and was unable to call them.

Dr. J. Yovich

Dr T. Thomas

Mr T.D. Hoffman

Both Dr Yovich and Dr Thomas have previously given oral evidence.

14. APPENDICES

APPENDIX I REPORT TO THE MINISTER FOR HEALTH FOR WESTERN AUSTRALIA BY THE REPRODUCTIVE TECHNOLOGY WORKING PARTY

ISSN 0816-2972

REPORT TO
THE MINISTER FOR HEALTH FOR WESTERN AUSTRALIA

FROM THE
REPRODUCTIVE TECHNOLOGY WORKING PARTY

PERTH

AUGUST 1988

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.

14.2 APPENDIX II PAPERS RELATING TO SEMEN DONORS BY KEN R. DANIELS

EXTRACTS FROM –

Semen Donors; Their Motivations and Attitudes to their Offspring. Ken R. Daniels.

Address given to the Australian and New Zealand Association for the Advancement of Science Centenary Congress, May 1988 and submitted to Journal of Reproductive and Infant Psychology.

Artificial Insemination Using Donor Semen and the Issue of Secrecy; the views of donors and recipient couples. Ken R. Daniels.

Address given at the American Society for Law and Medicine Conference, Sydney, 1986.

This paper is based on an address given to the Australian and New Zealand Association for the Advancement of Science Centenary Congress, held in Sydney, May 1988.

SEMEN DONORS; THEIR MOTIVATIONS AND ATTITUDES TO THEIR OFFSPRING

ABSTRACT

The results of a study of semen donors in an Australian donor insemination programme are reported. Altruism - a desire to help infertile couples - was the major motivation for becoming a semen donor, although a desire to evaluate fertility and financial considerations were also cited. The desire to evaluate fertility, along with the biographical characteristics - median age of 34.5, mainly professional and technical occupations, over half single and with no children of their own - contributes to the attitudes towards the offspring created as a result of their donation. Almost all donors were interested in knowing the outcome of their donations and almost all said that they thought about their offspring. Donors were happy to provide non-identifying information and 86% were happy to provide identifying information. Almost a half of this group, however, wished to add caveats. Seventy three per cent of the donors said they would still be prepared to donate should it be possible for the children, when 18, to trace their identity. Such findings are in sharp contrast to some of the commonly held views of doctors concerning the importance of anonymity and secrecy. It is suggested that, at least for this group of donors, a psychological bond operates and that this bond is of some importance.

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This paper is based on an address given at the American Society for Law and Medicine Conference, held in Sydney, Australia, in August 1986.

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ARTIFICIAL INSEMINATION USING DONOR SEMEN AND THE ISSUE OF SECRECY

The views of donors and recipient couples

Not published, Social Science & Medicine (U.K).

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ABSTRACT

The issue of secrecy and artificial insemination using donor semen has psychosocial, moral and legal implications. These implications are explored within the context of New Zealand AID practice, and particularly, recent legislation aimed at clarifying the status of the child. The results of two studies, one covering 37 donors involved in six AID programmes and the other covering 55 couples who had been accepted into one of the same six programmes, insomuch as they relate to issues of secrecy, are reported. Recipient couples and donors, while thinking that secrecy is important, have told other people - a not dissimilar situation to what occurred in the adoption field 25 years ago. Forty one per cent of recipient couples and donors do not believe children should be told of their origins. A high 46% of couples had not yet decided if they would tell their child. Donors are almost equally divided over the child's right to non-identifying information about them. Donors are more likely than recipient couples to believe that the child who knows s/he has been conceived via AID will want information about them. Only 11% of donors and 5% of couples believe a child would want to know the identity of the donor, although for three quarters of both groups the issue is far from clear. Donors were not as opposed to the possibility of tracing occurring as some doctors suggest. Response to questions concerning the legal position suggests there is considerable confusion amongst

both groups. The overwhelming majority of couples were intending to place the husband's name on the birth certificate, regarding him as the father. The results of this study are compared with the results of similar studies undertaken in Australia. Secrecy operates to serve the interests of those who have the power to make the decisions. In this respect, the needs and rights of the children are likely to be ignored and this paper calls for greater recognition of their needs and rights.

Key words: Donor insemination, secrecy, legal, psychosocial, children