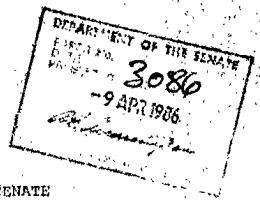

THE AUSTRALIAN SENATE

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Seventy-Eighth Report

April 1986

Report on the Artificial Conception Ordinance 1986

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SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Members of the Committee

THIRTY-FOURTH PARLIAMENT

First Session - Second and Third Period

Senator B. Cooney (Chairman)[1]
Senator A.W.R. Lewis (Deputy Chairman)
Senator the Hon. Sir John Carrick[2]
Senator J. Coates
Senator P. Giles[3]
Senator M.C. Tate[4]
Senator A.E. Vanstone
The Rt. Hon. R.G. Withers[5]
Senator A.O. Zakharov[6]

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1 Elected Chairman 14 November 1985

2 Discharged 19 February 1985

3 Appointed 11 September 1985

4 Discharged 14 November 1985

5 Appointed 19 Feburary 1986

6 Discharged 11 September 1985

Principles of the Committee

(Adopted 1932; Amended 1979)

The Committee scrutinises delegated legislation to ensure :

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependant upon administrative decisions which are not subject to review of their merits by a judicial or other independant tribunal; and

(d) that it does not contain matter more appropriate for parliamentary enactment.

RECOMMENDATIONS OF THE COMMITTEE

(i) As a matter of priority, legislative proposals should be developed and be widely discussed to identify and perfect those rights of artificially conceived children which arise from their peculiar genetic status.

(ii) As a matter of priority, legislative proposals should be developed and widely discussed to amplify, where necessary, other specific aspects of the Artificial Conception Ordinance as described in Chapter 3 of this Report.

(iii) All future A.C.T. legislation arising from the impact and effects of the new biological technology should be by means of enactment made in the Federal Parliament.

CHAPTER 1

BACKGROUND TO THE COMMITTEE'S SCRUTINY

Introduction

1. At its meeting on 13 March 1986 the Committee agreed that it should table a Report in the Senate on the Artificial Conception Ordinance 1985 (A.C.T. Ordinance No.57 of 1985, tabled in the Senate on 11 November 1985). On the 13 February 1986 the Committee through its Chairman gave notice of motion for disallowance of the Ordinance to enable it to properly consider the matter. The Committee has considered the Ordinance under its terms of reference. It has given particular attention to Principle (d) which provides that the Committee shall scrutinise delegated legislation "to ensure that it does not contain matter more appropriate for parliamentary enactment." Having considered the matter the Committee does not recommend to the Senate disallowance of the Ordinance. The Committee proposes to give notice of intention to withdraw its notice of motion of disallowance on the day this report is tabled.

2. In considering this matter the Committee has attempted to weigh carefully a number of differing factors. In particular the Committee balanced the need to have the Ordinance in place against the need for the Parliament to be involved in law-making in this sensitive area. In the final analysis the Committee has decided not to proceed with its notice of disallowance.

3. The Ordinance deals with vital and fundamental issues such as parenthood, the identity of children and the proper place of science in conception and impregnation. These issues deserve searching consideration by Parliament. Parliament has had and will have the opportunity of debating issues raised by this Ordinance in other contexts. For example the

Constitutional and Legal Affairs Committee tabled a report on In Vitro Fertilisation and the Status of Children in the Senate in December, 1985. Presently a Select Committee is investigating matters arising out of a bill entitled A Bill for an Act to Prohibit Experiments Involving the Use of Human Embryos Created by In Vitro Fertilisation introduced by Senator Harradine. The report from that body will provide a basis for a future debate in the Senate.

4. This is an Ordinance of the Australian Capital Territory. Generally the Committee is most reluctant to move for a disallowance of an Ordinance under Principle (d) of its terms of reference. Given the competing factors in this matter, the Committee, in deciding not to proceed with its notice of disallowance, nevertheless considered it proper to draw the Senate's attention to the issues raised by the Ordinance. The Committee respectfully reminds the Senate however that a decision by the Standing Committee on Regulations and Ordinances to withdraw its notice of motion of disallowance in no way limits the ability of the Senate to take such actions as it is otherwise empowered to do.

The Artificial Conception Ordinance

5. The Explanatory Statement accompanying the Ordinance indicates that the object of the Ordinance is to rectify the anomalous situation at common law where contrary to the wishes of the mother and her husband, the donor of sperm would be regarded as the father of any resulting child, with concomitant rights and responsibilities. At common law, such a child could enjoy no rights of inheritance from its mother's husband. Further, the Ordinance seeks to make clear that the woman who bears a child, not the donor of the ovum, is to be regarded as its mother.

6. The preamble to the Ordinance states that it is "to provide for the parentage of a child conceived as the result of an artificial fertilization procedure". To achieve this it

establishes certain conclusive presumptions as to paternity, maternity and the status of the semen donor. Where certain conditions are satisfied these presumptions are intended to be conclusively operative "for all purposes".

7. The relevant artificial fertilization procedures defined in section 3 of the Ordinance are (a) "artificial insemination" or (b) "the procedure of transferring into the uterus of a woman an embryo derived from an ovum fertilised outside her body". The Ordinance is designed to apply where there is a relationship between a male and a female who, although not necessarily married to each other or to someone else, are now living together as spouses on a bona fide domestic basis. The expressions husband and wife are intended to include this extended meaning.

8. The Ordinance is retrospective in its operation. It applies to any artificial pregnancy and the child born of such a pregnancy, whether the pregnancy or the birth occurred before or after the commencement of the Ordinance. It applies whether the procedure or the birth occurred in the Australian Capital Territory or elsewhere. The retrospectivity however, does not affect the vesting of any property that occurred before the commencement of the Ordinance. The interlocking conclusive presumptions created by the Ordinance are as follows.

Paternity

9. When a wife, with the consent of her husband, becomes pregnant by artificial means then

   - for all purposes, her husband shall be conclusively presumed to be the father of any resulting child; and

   - for all purposes, the donor of semen used, other than that of the husband, shall be conclusively presumed not to be the father of any resulting child.

That the wife has acted with the husband's consent is presumed, though that presumption is rebuttable.

Maternity

10. When a woman becomes pregnant by artificial means then

- for all purposes, the woman shall be conclusively presumed to be the mother of any resulting child; and

- for all purposes, the donor of the ovum used, other than that of the woman, shall be conclusively presumed not to be the mother of any resulting child.

Semen Donor

11. Where a woman becomes pregnant by artificial means and

- either she is not married (i.e. no bona fide domestic relationship with a man); or

- she is married but acts without the consent of her husband; then

- for all purposes the donor of the semen used, other than that of the husband, if applicable, shall be conclusively presumed not to be the father of any resulting child.

CHAPTER 2

THE COMMITTEE'S SCRUTINY

Introduction

12. The Committee applies four specific tests in scrutinising subordinate legislation. None of these invite the Committee to pronounce on the policy behind an instrument. They guide the Committee into its proper function of appraising the impact of legislation on personal rights and liberties and of considering the propriety of its enactment by extra-parliamentary process. The Committee examined the Ordinance from these points of view. In doing so it wrote to and received letters from the Attorney-General.

Committee's Correspondence

13. The Committee's correspondence with the Attorney-General is included in Appendix 2 of this Report. The following is a summary.

The Committee raised issues that the Ordinance:

- might be innovative in character;
- changed some fundamental common law rights of parents and children;
- was made on 31 October 1985 before the Constitutional and Legal Affairs Committee tabled its Report on IVF and the Status of Children in December 1985 which meant that it did not address important points arising from that Report [for example, the retention of legal links between genetic parents and artificially

conceived children for the limited purposes of the criminal law (incest) and marriage law (consanguinity rules)];

- did not address the social, psychological and medical implications likely to arise for artificially conceived offspring who, in maturer years, may wish to identify their genetic parents;

- may have come within Principle (d) by virtue of being a ministerial instrument with profound effects the full ramifications of which might not be felt for some years; and

- raised matters which called for far reaching professional inquiries and community consultations before laws were enacted.

Attorney-General's Reply

14. The Attorney-General, in a detailed reply, indicated that the Ordinance -

- was not strictly innovative since it follows the trend taken in the States and is based on the model Bill approved in the late 1970's by the Standing Committee of Attorney's General (ACAG);

- arguably does not change fundamental rights - social rather than genetic parents will be legal parents; as has always been the case the person who gives birth to a child will be the mother of that child; the previously rebuttable presumption that that woman's legal husband is the child's father becomes irrebuttable where the woman, with the consent of her spouse, gives birth to an artificially conceived child who has other genetic parents;

- was in final draft form on 3 May 1985 several days before the Senate Constitutional and Legal Affairs Committee obtained its IVF reference (and the Committee in any case had access to the draft);

- does not address the question of retaining certain limited legal relationships between genetic parents and offspring because of their complexity and the need to consult with the States;

- does not address the important questions of long term future impact and record keeping since it was designed to deal with immediate problems - future consultations will consider the implementation of Family Law Council recommendations which focus on personal issues, particularly record keeping - indeed the removal of legal responsibilities may facilitate better record keeping by eliminating the legal consequences of eventual identification of genetic parents;

- was based on numerous inquiries conducted in the States with extensive community consultations, and was drafted after receipt of written submissions from interested A.C.T. legal and health bodies - the A.C.T. House of Assembly also approved; and

- should not be subject to the application of Principle (d) because the Governor-General's plenary powers under the Seat of Government (Administration) Act made the Principle an inappropriate one for A.C.T. Ordinances the enactment of which by Bill would necessitate amendment by Bill with an eventual de facto transfer of A.C.T. law making powers to the National Parliament.

Recourse to the Senate

15. The Committee acknowledges the force of the Attorney-General's comprehensive arguments on the substance of the Ordinance. However, the Committee cannot accept the Attorney-General's proposition that Principle (d) of the Committee's terms of reference should never be applied to A.C.T. Ordinances. In its Seventy-Seventh Report (March 1986, Chapter 2) the Committee set down guidelines for its future application of Principle (d). The Committee will be less ready to move for the disallowance of an Ordinance of the Australian Capital Territory than for disallowance of a regulation but the function given it by the Senate includes scrutiny of ordinances and it must act in accordance with that circumstance. There is no question of the Senate's power to disallow an ordinance.

16. Under Principle (d) the Committee looks carefully at delegated legislation, including any ordinance which -

- manifests itself as a fundamental change in the law, intended to alter or redefine rights, obligations and liabilities;

- is a lengthy and complex legal document;

- introduces innovation of a major kind into existing legal, social or financial concepts;

- impinges in a major way on the community;

- is calculated to bring about radical changes in relationships or attitudes of people in a particular aspect of the life of the community;

- is part of a major uniform, or partially uniform, scheme which has been the subject of debate and analysis in one or more of the State or Territory Parliaments but not in the Commonwealth Parliament; and

- takes away, reduces, circumscribes or qualifies the fundamental rights and liberties traditionally enjoyed in a free and democratic society.

17. The Committee scrutinises delegated legislation to determine the extent to which it can be characterised according to these criteria. This process is ultimately one of fine judgment for the Committee which does not comment on the policy or on the merits of delegated legislation.

18. Having considered its principles and these guidelines the Committee decided that it would not recommend disallowance of the Ordinance under Principle (d). Standing alone,the instrument did not contravene these guidelines in a way to warrant the Committee's express disapproval. The Committee noted that the legislative proposals to which the Ordinance gives effect have been adopted in most of the States. Although limited in the extent to which it produces a coherent code to detail the rights and liabilities of those involved in artificial conception, the Ordinance strives to define and protect the parentage of an artificially conceived child in a reasonable way. It rightly seeks to make the interests of such a child paramount. Nevertheless much more examination and definition is required to ensure that artificially conceived children experience no unnecessary uncertainties as they reach maturity. The Attorney-General acknowledges that this process is under way. However as the Committee pointed out in its letter of 18 February 1986, the Regulations and Ordinances Committee

> "... is not by reason of its composition, its resources or the time available to it, equipped to examine properly the fundamental questions of law reform which the Ordinance has addressed".

It is for this reason that the Committee agreed to table a Report in the Senate without recommending disallowance. It is hoped that this action will ensure that the large issues to which the Ordinance gives rise will receive appropriate parliamentary scrutiny at a level of knowledge and expertise greater and more varied than that on which this technically orientated Committee can call.

19. This particular approach to dealing with difficult or significant Ordinances which in the Committee's view fall short of Principle (d), was discussed by the Committee in its Seventy-Fifth Report (September 1984, paragraph 50). References to the device of drawing the Senate's attention to a particular matter exist in the Committee's Seventieth and Seventy-Second Reports (June 1981 and April 1982) at paragraphs 31 and 8 respectively. In the Seventieth Report it was stated that

> "The Committee is concerned to establish a mechanism whereby the attention of the Senate may be drawn to a matter which, while not necessarily warranting disallowance under the Committee's principles, is nevertheless of such significance as to merit substantive discussion in the Senate...."

20. The Committee respectfully recommends that the Senate should not disallow the Artificial Conception Ordinance 1985. That does not mean however, that the Committee underwrites the Ordinance in toto. It cannot, because although the legislation does not strictly infringe rights or liabilities or contain unreasonable provisions, it leaves many relevant questions unanswered.

CHAPTER 3

PROBLEMATIC ASPECTS OF THE ORDINANCE

21. It was apparent from its lack of detail and the Attorney-General's later remarks that the Ordinance was intended to be a holding measure only. It was formulated to overcome the immediate problem of the unwritten terms of common law rules which had been evolved without regard to the legal problems of artificial conception. Thus the Ordinance does not represent a comprehensive enactment of laws to regulate all the aspects of this difficult matter. For example, questions concerning a woman's right to conceive artificially where there is no bona fide domestic relationship with a man who may become a father to any resulting child, are placed on a par with a woman's right to conceive naturally regardless of such relationships. It may be that there should be no distinction whatsoever between a woman's rights in these respective situations. However, as far as the A.C.T. is concerned, the question has been resolved by an executive act of the Attorney-General.

22. The Ordinance does not provide vital legal answers to certain crucial questions which inevitably arise in its wake.

23. The status of existing artificially conceived children is retrospectively altered. Likewise the existing status of genetic donors as "parents" is retrospectively eliminated. The Committee has no means of assessing how this retrospectivity may have affected children or donors who may have wished to retain parental links. The Committee cannot assess whether this retrospectivity is seriously prejudicial in terms of, for example, the loss of nationality,

citizenship or inheritance. The future rights and responsibilities of such persons inter se are, of course, eliminated. That is the intention of the Ordinance.

24. The Ordinance has been put in place before final decisions have been reached concerning future impact of the Ordinance, in particular on offspring who, as they mature, may query their genetic origins and medico-ethnic inheritance. The Ordinance does not deal with an artificially conceived child's right, if any, to know the identity of its genetic parents, their ethnicity or psychological or medical history. Nor does it address the donor's right, if any, to absolute or qualified anonymity by contract or otherwise other than in an negative sense. The status of donors is not dealt with, again, presumably, because donors are to have no status. While this is the policy of the Ordinance and thus beyond the scope of comment by the Committee, it bodes ill for the issue of whether or not there should be legally required and protected record keeping procedures. In this context, questions concerning relevant medical and social record keeping, the privacy and security of such records, and legal access to such records, remain to be resolved while the Ordinance continues in force. Such resolution will necessitate at best retrospectivity or at worst inconsistent standards of record keeping.

25. Artifically conceived offspring of a woman without a spouse shall under the Ordinance "for all purposes" be fatherless. The man who produced the semen used in the procedure cannot be the father of the resulting child even if he and the woman subsequently marry. It is suggested that if it is possible for a single woman to become pregnant by artificial procedures then it is not necessarily fanciful that a relationship with a donor could subsequently arise. The Ordinance does not directly address those cases where, by agreement, genetic material has already been implanted in a surrogate mother to the extent that none of the surrogate mother's genetic characteristics will be part of the child's

genetic inheritance. Given that under the Ordinance the surrogate would be the mother, and the child would have no legal father, this could give rise to implications for all concerned. As mentioned above, the complete severance "for all purposes" of links between the genetic donors and resulting children in the future affects the legal and biological definitions of incest. Equally it could remove socio-biologically determined prohibitions on marriage within the prohibited degrees of consanguinity, creating a variety of emotional and physical risks for the offspring of persons who were artificially conceived. This problem has serious implications for the issue of record keeping, donor identification and the child's rights, if any, to be made aware of its genetic origins.

26. The Committee has not made a detailed examination of the implications of this Ordinance. That is not its brief. Nor is it its role to query the policy which lies behind the instrument. Its concern is with the application of certain terms of reference relating to personal and parliamentary rights and proprieties. These terms are principles which have been formulated in a sufficiently flexible way to permit the Committee's scrutiny of legislation to reflect the changing and widening requirements of parliamentary democracy, individual freedom and personal rights. The Committee considered that all of the issues discussed above warrant evaluation under its principles without the Committee intruding inappropriately on questions of policy. From the point of view of personal rights and liberties, the Ordinance is incomplete and without development and implementation of the proposals referred to in the Attorney-General's letter it could adversly affect such rights and liberties.

27. However, the Committee is not equipped to suggest to the Attorney-General workable solutions for the protection of the rights of the numerous parties involved in artificial conception: the child at conception, the child at birth and

the child at maturity; the woman who conceived such a child and the woman who gives birth to such a child; the donor of semen and the donor of the fertilized ova. It is generally the work of Parliament to approve legislative solutions in the light of community opinion, specialist advice and parliamentary debate. In defence of the Ordinance the Attorney-General has pointed out that

- the solutions embodied in the Ordinance are the product of such democratic processes in the States; and

- the solutions to other consequential problems or related problems require and will progressively receive answers in the light of continuing consultations.

28. The Committee acknowledges the Attorney-General's concern about the whole issue of artificial conception and the care and sensitivity with which it needs to be addressed. The Committee commends him for this and urges him to use his best endeavours to resolve the problems left outstanding as a consequence of the Ordinance.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

29. For the reasons given in this Report the Committee does not recommend disallowance of the Ordinance under Principle (d). The Ordinance represents a serious attempt to resolve immediate problems of defining the legal parentage of artificially conceived offspring.

30. The Committee does not recommend disallowance of the Ordinance under any of its other Principles. Although there appear to be unresolved and serious questions of significance to the rights of those persons involved in artificial conception, the identification, formulation and protection of these rights is a task beyond the scope of the Ordinance and the Committee. The Ordinance as such does not in the Committee's view infringe its principles concerning personal rights and liberties.

31. However, given the pace of technological advances in biological research, there is a need for such rights to be the subject of authoritative legislative definition by Parliament. Moreover it would not be appropriate for matters of this kind to be the subject of legislation by a minister whether in the A.C.T. or elsewhere. The implications of new biological technology demand wide community and parliamentary consultation, study and debate. This process must occur within an ever-shortening time frame if legal responses to scientific developments are not to risk becoming socially irrelevant. In this area the traditional tardiness of the law is matched only by the pace of new scientific experiments which may ultimately defeat the ideals of the law with unfair consequences for children least able to bear them.

32. As far as the ACT is concerned questions concerning the rights and liberties of those on whom the new biological sciences are practiced, and of those children who are thereby created, should in future be dealt with in legislation made by the Federal Parliament rather than by means of an Ordinance. Such an approach would better reflect the seriousness of the legal and ethical issues raised by these new procedures.

33. It is therefore the recommendation of the Committee that:

(i) as a matter of priority legislative proposals should be developed and be widely discussed to identify and perfect those rights of artificially conceived children which arise from their peculiar genetic status; and

(ii) as a matter of priority, legislative proposals should be developed and widely discussed to amplify, where necessary, other specific aspects of the Artificial Conception Ordinance as described in Chapter 3 of this Report

34. The Committee is of the view that, in the future, legal consequences that arise from biological procedures should not be determined in any delegated instrument. Thus the Committee further recommends that:

(iii) all future A.C.T. legislation arising from the impact and effects of the new biological technology should be by means of enactment made in the Federal Parliament.

Barney Cooney
Chairman
9th April 1986

AUSTRALIAN CAPITAL TERRITORY

Artificial Conception Ordinance 1985

No. 57 of 1985

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Ordinance under the *Seat of Government (Administration) Act 1910*.

Dated 31 October 1985.

N. M. STEPHEN
Governor-General

By His Excellency's Command,

LIONEL BOWEN
Attorney-General

An Ordinance to provide for the parentage of a child conceived as the result of an artificial fertilization procedure

Short title

1. This Ordinance may be cited as the *Artificial Conception Ordinance 1985*.[1]

Commencement

2. This Ordinance shall come into operation on such date as is fixed by the Minister of State for Territories by notice in the *Gazette*.

Interpretation

3. (1) In this Ordinance, unless the contrary intention appears, "procedure" means—

(a) artificial insemination; or

(b) the procedure of transferring into the uterus of a woman an embryo derived from an ovum fertilized outside her body.

(2) A reference in this Ordinance to a married woman shall be read as including a reference to a woman who is living with a man as his wife on a *bona fide* domestic basis although not married to him.

(3) A reference in this Ordinance to the husband or wife of a person shall, where the person is living with another person of the opposite sex as the spouse of that other person on a *bona fide* domestic basis although not married to that other person, be read as including a reference to that other person to the exclusion of the spouse (if any) of the first-mentioned person.

14655/85 (Ord. 60/83)—Cat. No. 85 4918 2

Application

4. (1) The provisions of this Ordinance apply—

(a) in respect of a pregnancy referred to in section 5, 6 or 7, whether the pregnancy occurred before or after the commencement of this Ordinance and whether or not it resulted from a procedure carried out in the Territory; and

(b) in respect of any child born before or after the commencement of this Ordinance as a result of a pregnancy referred to in section 5, 6 or 7, whether or not the child was born in the Territory.

(2) Nothing in this Ordinance affects the vesting in possession or in interest of any property that occurred before the commencement of this Ordinance.

(3) Nothing in this Ordinance affects the operation of sections 9, 33, 42 and 43 of the *Adoption of Children Ordinance 1965*.

Presumption of paternity

5. (1) Where a married woman has, with the consent of her husband, undergone a procedure as a result of which she has become pregnant—

(a) her husband shall, for all purposes, be conclusively presumed to be the father of any child born as a result of the pregnancy; and

(b) if any of the semen used in the procedure was produced by a man other than the woman's husband—that man shall, for all purposes, be conclusively presumed not to be the father of any child born as a result of the pregnancy.

(2) In any proceedings in which the operation of sub-section (1) is relevant, the consent of a husband to the carrying out of a procedure in respect of his wife shall be presumed, but that presumption is rebuttable.

Presumption of maternity

6. Where a woman has undergone a procedure as a result of which she has become pregnant—

(a) the woman shall, for all purposes, be conclusively presumed to be the mother of any child born as a result of the pregnancy; and

(b) if the ovum used in the procedure was produced by another woman—that other woman shall, for all purposes, be conclusively presumed not to be the mother of any child born as a result of the pregnancy.

Donor of semen—other circumstances

7. Where a procedure is carried out in respect of—

(a) a woman who is not a married woman; or

(b) a married woman otherwise than with the consent of her husband,

any man who produced semen used in the procedure (not being, in the case of a married woman, her husband) shall, for all purposes, be conclusively presumed not to be the father of any child born as a result of a pregnancy occurring by reason of that procedure.

Amendment of *Seat of Government (Administration) Ordinance 1930*

8. The Second Schedule to the *Seat of Government (Administration) Ordinance 1930* is amended by inserting in Part 1—

"*Artificial Conception Ordinance 1985*"

after—

"*Amendments Incorporation Ordinance 1929*".

NOTE

1. Notified in the *Commonwealth of Australia Gazette* on 7 November 1985.

Printed by Authority by the Commonwealth Government Printer

EXPLANATORY STATEMENT

Australian Capital Territory

Artificial Conception Ordinance 1985

No. 57 of 1985

The purpose of the Ordinance is to create in certain circumstances a conclusive presumption as to the parentage of a child born as a result of artificial insemination by donor, or in vitro fertilization involving donor semen and/or a donated ovum. In all cases where a child is born to a woman who has become pregnant as a result of such a procedure, the woman is to be deemed to be the mother of the child. In addition, where a child is born to a married woman who has undergone such a procedure with the consent of her husband, the husband is to be deemed to be the father of the child. Where at the time of the procedure, a woman was living in a stable de facto relationship, then that man is treated as her husband for the purposes of the Ordinance.

Background

The Ordinance is necessary to rectify the anomalous situation at common law, whereby, contrary to the wishes of the mother of a child born as a result of an artificial conception procedure and of the mother's husband, the donor of sperm would be regarded as, and have the rights and responsibilities of, the father of the child. For example, if aware of the donor's

identity, the child would be able to seek financial support from the donor under the Maintenance Ordinance 1968. Similarly, the child at the moment would have no rights of inheritance from his mother's husband, even though he or she may have been raised from birth in that family and have always been regarded as an integral part of it.

Likewise, in the donated ovum situation, the Ordinance is necessary to make clear that it is the woman who bears the child, rather than the donor of the ovum, who is to be regarded as the mother of the child.

The Ordinance is broadly based around principles agreed in the Standing Committee of Attorneys-General. Legislation is already in force in New South Wales, Victoria, South Australia and Western Australia.

Section 1 provides that the Ordinance may be cited as the Artificial Conception Ordinance 1985.

Section 2 provides for a date of commencement to be determined by the Minister.

Section 3 is an interpretation section.

> Sub-section (1) defines "procedure", for the purposes of the Ordinance, as artificial insemination or in vitro fertilization (that is, the transferring into the uterus of a woman an embryo derived from an ovum fertilized in vitro).

Sub-section (2) extends references in the Ordinance to a married woman, to include a woman living with a man as his wife on a bona fide domestic basis. In that situation the man with whom such a woman is living is to be deemed to be her husband.

Similarly, sub-section (3) extends references in the Ordinance to a husband or wife, to include a man or woman, respectively, living with another person of the opposite sex as that person's spouse on a bona fide domestic basis. The sub-section also provides that this is to be to the exclusion of the actual spouse (if any) of that other person.

Section 4 is an application section.

Sub-section (1) applies the provisions of the Ordinance to a conception or birth, whether occurring before or after the commencement of the Ordinance, and whether occurring in the Australian Capital Territory or not.

Sub-section (2) modifies the generality of sub-section (1) by specifically removing from the operation of the Ordinance any vesting of property occurring before the commencement of the Ordinance.

Sub-section (3) provides that the Ordinance does not affect the operation of sections 9, 33, 42, and 43 of the Adoption of Children Ordinance 1965. This ensures that the law as to adoption applies to children born as a result of artificial insemination by donor or in vitro fertilization as it does to other children.

Section 5 is the first of the operative provisions of the Ordinance, and deals with paternity.

Sub-section (1) provides that where a married woman, with her husband's consent, undergoes a procedure leading to pregnancy -

(a) her husband shall be conclusively presumed for all purposes to be the father of any resulting child; and

(b) the donor of semen shall be conclusively presumed for all purposes not to be the father of any resulting child.

Sub-section (2) provides that the consent of the husband to the carrying out of the procedure shall be presumed, although the presumption may be rebutted by evidence led to prove that he did not consent.

Section 6 deals with maternity. It provides that where a woman undergoes a procedure leading to pregnancy -

(a) she shall be conclusively presumed for all purposes to be the mother of any resulting child; and

(b) the donor of the ovum shall be conclusively presumed for all purposes not to be the mother of any resulting child.

Section 7 deals with the donor of semen where the procedure is carried out on an unmarried woman or on a married woman without her husband's consent. It provides that, in these circumstances, the donor of semen shall be conclusively presumed for all purposes not to be the father of any resulting child. The section does not operate to sever the father/child link where the man who produced the semen was the woman's husband at the time of the procedure.

Section 8 is a machinery provision amending the Seat of Government (Administration) Ordinance 1930 to add the Ordinance to the list of those administered by the Attorney-General.

(Authorised by the
Attorney-General)

Ord. 60/83

Family Law Amendment Act 1983

No. 72 of 1983

TABLE OF PROVISIONS

PART I—PRELIMINARY

(ii) a child adopted by either of them (whether alone or together with another person or other persons),

if, at the relevant time, the child was ordinarily a member of the household of the husband and wife; and

(f) a child (other than a child mentioned in any of the preceding paragraphs) who has been, and was at the relevant time, treated by the husband and wife as a child of their family, if, at the relevant time, the child was ordinarily a member of the household of the husband and wife,

shall be deemed to be a child of the marriage and a child of the husband and wife (including a child born before the marriage) who has been adopted by another person or other persons shall be deemed not to be a child of the marriage.

"(2) For the purposes of sub-section (1), the relevant time, in relation to any proceedings, is—

(a) if the husband and wife were not living together at the time when the proceedings were instituted—the time immediately preceding the time when the husband and wife separated, or, if they have separated on more than one occasion, the time immediately preceding the time when they last separated before the institution of the proceedings; or

(b) if the husband and wife were living together at the time when the proceedings were instituted—the time immediately preceding the institution of the proceedings.

"(3) The provisions of this section apply in relation to a purported marriage that is void as if the purported marriage were a marriage and as if the parties to the purported marriage were husband and wife.

Certain children deemed to be children of mother's husband

"5A. (1) A child born to a woman as a result of the carrying out, during the period in which the woman was married to a man, of a medical procedure in relation to that woman, being a child who is not biologically the child of that man, shall, for the purposes of section 5, be deemed to be a child of that man if—

(a) the medical procedure was carried out with the consent of that man; or

(b) under an Act or under a law of a State or Territory the child is deemed to be the child of that man.

"(2) The provisions of this section apply in relation to a purported marriage that is void as if the purported marriage were a marriage and as if the parties to the purported marriage were husband and wife.

"(3) In this section, 'medical procedure' means artificial insemination or the implantation of an embryo in the body of a woman.".

ARTIFICIAL CONCEPTION ACT, 1984, No. 3

New South Wales

ANNO TRICESIMO TERTIO

ELIZABETHÆ II REGINÆ

* *

Act No. 3, 1984.

An Act with respect to the status and paternity of persons conceived by artificial means; and for other purposes. [Assented to, 5th March, 1984.]

See also Children (Equality of Status) Amendment Act, 1984.

P35914C (50c)

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as the "Artificial Conception Act, 1984".

Commencement.

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) This Act, except sections 1 and 2, shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette, and a reference in this Act to the commencement of this Act is a reference to the commencement of the provisions of this Act, except those sections.

Interpretation.

3. (1) A reference in this Act to a married woman includes a reference to a woman who is living with a man as his wife on a bona fide domestic basis although not married to him.

(2) A reference (however expressed) in this Act to the husband or wife of a person—

(a) is, in a case where the person is living with another person of the opposite sex as his or her spouse on a bona fide domestic basis although not married to the other person, a reference to that other person; and

(b) does not, in that case, include a reference to the spouse (if any) to whom the person is actually married.

Application of Act.

4. (1) The provisions of this Act apply—

(a) in respect of a pregnancy referred to in section 5 or 6, whether the pregnancy occurred before or after the commencement of this Act and whether or not it resulted from a procedure carried out in New South Wales; and

(b) in respect of any child born as a result of a pregnancy referred to in section 5 or 6, whether or not the child was born before or after the commencement of this Act and whether or not the child was born in New South Wales.

(2) Nothing in this Act affects the vesting in possession or in interest of any property that occurred before the commencement of this Act.

(3) The provisions of this Act have effect subject to the provisions of section 18A (2) of the Children (Equality of Status) Act, 1976.

Fertilisation procedure: presumption as to status of child of married woman.

5. (1) A reference in this section to a fertilisation procedure is a reference to—

(a) the artificial insemination of a woman; or

(b) the procedure of implanting in the womb of a woman an ovum produced by the woman and fertilised outside her body,

where the semen used for the artificial insemination or the procedure—

(c) was produced by a man other than her husband; or

(d) was a mixture of semen, part of which was produced by a man other than her husband and part of which was produced by her husband.

(2) Where a married woman, in accordance with the consent of her husband, has undergone a fertilisation procedure as a result of which she has become pregnant, the husband shall be presumed, for all purposes, to have caused the pregnancy and to be the father of any child born as a result of the pregnancy.

(3) The presumption of law that arises by virtue of subsection (2) is irrebuttable.

(4) In any proceedings in which the operation of subsection (2) is relevant, a husband's consent to the carrying out of a fertilisation procedure in respect of his wife shall be presumed, but that presumption is rebuttable.

Artificial conceptions: presumption as to semen donors.

6. (1) Where a woman becomes pregnant by means of—

(a) artificial insemination; or

(b) the procedure of implanting in her womb an ovum (whether or not produced by her) fertilised outside her body,

any man (not being, in the case of a married woman, her husband) who produced semen used for the artificial insemination or the procedure shall, for all purposes, be presumed not to have caused the pregnancy and not to be the father of any child born as a result of the pregnancy.

(2) The presumption of law that arises by virtue of subsection (1) is irrebuttable.

In the name and on behalf of Her Majesty I assent to this Act.

J. A. ROWLAND,
Governor.

Government House,
Sydney, 5th March, 1984.

BY AUTHORITY
D. WEST, GOVERNMENT PRINTER, NEW SOUTH WALES—1984

CHILDREN (EQUALITY OF STATUS) AMENDMENT ACT, 1984, No. 6

New South Wales

ANNO TRICESIMO TERTIO

ELIZABETHÆ II REGINÆ

* *

Act No. 6, 1984.

An Act to amend the Children (Equality of Status) Act, 1976, with respect to certain presumptions arising under that Act and under the Artificial Conception Act, 1984. [Assented to, 5th March, 1984.]

P 35916G (50c)

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as the "Children (Equality of Status) Amendment Act, 1984".

Commencement.

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on the day appointed and notified under section 2 (2) of the Artificial Conception Act, 1984.

Amendment of Act No. 97, 1976.

3. The Children (Equality of Status) Act, 1976, is amended in the manner set forth in Schedule 1.

Application of Act.

4. (1) The provisions of section 18A of the Children (Equality of Status) Act, 1976, as amended by this Act, apply—

(a) in respect of a pregnancy, whether the pregnancy occurred before, on or after the day referred to in section 2 (2) and whether or not it resulted from a procedure carried out in New South Wales; and

(b) in respect of a child, whether or not the child was born before, on or after that day and whether or not the child was born in New South Wales.

(2) Nothing in this Act affects the vesting in possession or in interest of any property that occurred before the day referred to in section 2 (2).

SCHEDULE 1.

(Sec. 3.)

AMENDMENTS TO THE CHILDREN (EQUALITY OF STATUS) ACT, 1976.

(1) Section 3—

Omit "18", insert instead "18A".

(2) Section 18A—

After section 18, insert:—

Effect of Artificial Conception Act, 1984.

18A. (1) The presumption that arises by virtue of section 5 of the Artificial Conception Act, 1984, prevails over any conflicting presumption that arises by virtue of this Part.

(2) Where—

(a) a woman becomes pregnant by means of—

(i) artificial insemination; or

(ii) the procedure of implanting in her womb an ovum (whether or not produced by her) fertilised outside her body; and

(b) a presumption under section 5 of the Artificial Conception Act, 1983, does not arise in relation to the pregnancy,

then—

(c) the provisions of section 6 of that Act do not operate to prevent a presumption that arises by virtue of section 10 (3), in relation to any child born as a result of the pregnancy, from being rebutted, but any evidence given in rebuttal of the lastmentioned presumption shall not be taken to establish that any man who produced semen used for the artificial insemination or procedure was the father of any child born as a result of the pregnancy; and

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CHILDREN (EQUALITY OF STATUS) ACT, 1976—*continued.*

(d) the presumption that arises by virtue of section 11 (1) prevails over any conflicting presumption that arises by virtue of section 6 of that Act.

(3) The presumption that arises by virtue of section 6 of the Artificial Conception Act, 1984, prevails over any conflicting presumption that arises by virtue of section 13.

(4) This section has effect notwithstanding any other provision of this Act.

In the name and on behalf of Her Majesty I assent to this Act.

J. A. ROWLAND,
Governor.

Government House,
Sydney, 5th March, 1984.

BY AUTHORITY
D. WEST, GOVERNMENT PRINTER, NEW SOUTH WALES—1984

ANNO TRICESIMO TERTIO
ELIZABETHAE SECUNDAE REGINAE
VICTORIA

Status of Children (Amendment) Act 1984

No. 10069

An Act relating to the status of persons conceived by certain means, to amend the *Status of Children Act* 1974 and for other purposes.

[Assented to 15 May 1984]

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

Short title.

1. This Act may be cited as the *Status of Children (Amendment) Act* 1984.

Principal Act No. 8401 as amended by No. 9863.

2. In this Act, the *Status of Children Act* 1974 is called the Principal Act.

Commencement.

3. This Act shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette*.

Amendment of Principal Act—Parts.

4. The Principal Act is amended as follows:

(*a*) Before section 1, there shall be inserted the heading "PART I.—PRELIMINARY";

(*b*) Before section 11, there shall be inserted the heading "PART III.—GENERAL".

Insertion of new Part II

5. After section 10 of the Principal Act, there shall be inserted the following Part:

"PART II.—STATUS OF CHILDREN—MEDICAL PROCEDURES

Interpretation

10A. (1) A reference in this Part to a married woman includes a reference to a woman who is living with a man as his wife on a *bona fide* domestic basis although not married to him.

(2) A reference, however expressed, in this Part to the husband or wife of a person—

(*a*) is, in the case where the person is living with another person of the opposite sex as his or her spouse on a *bona fide* domestic basis although not married to the other person, a reference to that other person; and

(*b*) does not, in that case, include a reference to the spouse (if any) to whom the person is actually married.

Application of Part.

10B. (1) The provisions of this Part apply—

(*a*) in respect of a pregnancy referred to in section 10C, 10D or 10E, whether the pregnancy occurred before or after the commencement of the *Status of Children (Amendment) Act* 1984 and whether or not it resulted from a procedure carried out in Victoria; and

(*b*) in respect of any child born as a result of a pregnancy referred to in section 10C, 10D or 10E, whether or not the child was born before or after the commencement of the *Status of Children (Amendment) Act* 1984.

(2) Nothing in any provision of this Part affects the vesting in possession or in interest of any property that occurred before the commencement of the *Status of Children (Amendment) Act* 1984.

Artificial insemination: presumption as to status of child.

10C. (1) A reference in this section to a procedure is a reference to the artificial insemination of a woman where the semen used for the artificial insemination—

(*a*) was produced by a man other than her husband; or

(*b*) was a mixture of semen, part of which was produced by a man other than her husband and part of which was produced by her husband.

(2) Where a married woman, in accordance with the consent of her husband, has undergone a procedure as a result of which she has become pregnant—

(*a*) the husband shall be presumed, for all purposes, to have caused the pregnancy and to be the father of any child born as a result of the pregnancy; and

(*b*) any man, not being her husband, who produced semen used for the procedure shall, for all purposes, be presumed not to

have caused the pregnancy and not to be the father of any child born as a result of the pregnancy.

(3) A presumption of law that arises by virtue of sub-section (2)—

(*a*) is irrebuttable; and

(*b*) prevails over any conflicting presumption that arises by virtue of section 8 or 10.

(4) In any proceedings in which the operation of sub-section (2) is relevant, a husband's consent to the carrying out of a procedure in respect of his wife shall be presumed, but that presumption is rebuttable.

Implantation procedures' presumption as to status of child where donor semen used.

10D. (1) A reference in this section to a procedure is a reference to the procedure of implanting in the womb of a woman an embryo derived from an ovum produced by her and fertilized outside her body by semen produced by a man other than her husband.

(2) Where a married woman, in accordance with the consent of her husband, has undergone a procedure as a result of which she has become pregnant—

(*a*) the husband shall be presumed, for all purposes, to have produced the semen used for the fertilization of the ovum used in the procedure and to be the father of any child born as the result of the pregnancy; and

(*b*) the man who produced the semen used for the fertilization of the ovum used in the procedure shall, for all purposes, be presumed not to have produced that semen and not to be the father of any child born as the result of the pregnancy.

(3) A presumption of law that arises by virtue of sub-section (2)—

(*a*) is irrebuttable; and

(*b*) prevails over any conflicting presumption that arises by virtue of section 8 or 10.

(4) In any proceedings in which the operation of sub-section (2) is relevant, a husband's consent to the carrying out of a procedure in respect of his wife shall be presumed but that presumption is rebuttable.

Implantation procedures presumption as to status of child where donor ovum used.

10E. (1) A reference in this section to a procedure is a reference to the procedure of implanting in the womb of a woman an embryo derived from an ovum produced by another woman, being an ovum that has been fertilized by—

(*a*) semen produced by the husband of the first-mentioned woman; or

(*b*) semen produced by a man other than the husband of the first-mentioned woman.

(2) Where a married woman, in accordance with the consent of her husband, has undergone a procedure as a result of which she has become pregnant—

(*a*) the married woman shall be presumed, for all purposes, to have become pregnant as a result of the fertilization of an ovum produced by her and to be the mother of any child born as the result of the pregnancy,

(*b*) the woman who produced the ovum from which the embryo used in the procedure was derived shall be presumed, for all purposes, not to be the mother of any child born as a result of the pregnancy;

(*c*) where the semen used for the fertilization of the ovum from which the embryo used in the procedure was derived was produced by the husband of the married woman, the husband shall be presumed, for all purposes, to be the father of any child born as the result of the pregnancy; and

(*d*) where the semen used for the fertilization of the ovum from which the embryo used in the procedure was derived was produced by a man other than the husband of the married woman—

(i) the husband shall be presumed, for all purposes, to have produced the semen and to be the father of any child born as the result of the pregnancy; and

(ii) the man who produced the semen shall be presumed, for all purposes, not to have produced that semen and not to be the father of any child born as a result of the pregnancy.

(3) A presumption of law that arised by virtue of sub-section (2)—

(*a*) is irrebuttable; and

(*b*) prevails over any conflicting presumption that arises by virtue of section 8 or 10.

(4) In any proceedings in which the operation of sub-section (2) is relevant, a husband's consent to the carrying out of a procedure in respect of his wife shall be presumed but that presumption is rebuttable.

Donor of semen used in artificial insemination of certain women.

10F. (1) Where semen is used in a procedure of artificial insemination of a woman who is not a married woman or of a married woman otherwise than in accordance with the consent of her husband, the man who produced the semen has no rights and incurs no liabilities in respect of a child born as a result of a pregnancy occurring by reason of the use of that semen unless, at any time, he becomes the husband of the mother of the child.

(2) For the purposes of sub-section (1), the rights and liabilities of a man who becomes the husband of the mother of a child so born are the rights and liabilities of a father of a child but, in the absence of agreement to the contrary, do not include liabilities incurred before the man becomes the husband of the mother.".

ANNO TRICESIMO TERTIO

ELIZABETHAE II REGINAE

A.D. 1984

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No. 102 of 1984

An Act to amend the Family Relationships Act, 1975; and to make related amendments to the Adoption of Children Act, 1966, the Community Welfare Act, 1972, the Guardianship of Infants Act, 1940 and the Sex Discrimination Act, 1975.

[Assented to 20 December 1984]

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

Short title.

1. (1) This Act may be cited as the "Family Relationships Act Amendment Act, 1984".

(2) The Family Relationships Act, 1975, is in this Act referred to as "the principal Act".

Commencement.

2. This Act shall come into operation on a day to be fixed by proclamation.

Amendment of s. 3—Arrangement of Act.

3. Section 3 of the principal Act is amended by inserting after the item:

PART II—CHILDREN

the item:

PART IIA—CHILDREN CONCEIVED FOLLOWING MEDICAL PROCEDURES.

Amendment of s. 5—Interpretation.

4. Section 5 of the principal Act is amended—

(a) by striking out the definition of "child born outside marriage" and substituting the following definition:

> "child born outside marriage" includes a child born to a married woman of which a man other than her lawful spouse is the father;

and

(b) by inserting after the definition of "the Court" the following definition:

"father" or "natural father", of a child, includes a person who is presumed to be the father of the child under Part IIA:.

Amendment of s. 8 on Presumption as to parenthood

5. Section 8 of the principal Act is amended by striking out the passage "A child" and substituting the passage "Subject to Part IIA, a child".

Insertion of new Part IIA

6. The following Part is inserted after section 10 of the principal Act:

PART IIA

CHILDREN CONCEIVED FOLLOWING MEDICAL PROCEDURES

Interpretation.

10a. (1) In this Part—

"fertilization procedure" means—

(a) artificial insemination;

or

(b) the procedure of fertilizing an ovum outside the body and transferring the fertilized ovum into the uterus:

"married woman" or "wife" includes a woman who is living with a man as his wife on a genuine domestic basis; and "husband" has a correlative meaning.

(2) A reference in this Part to the "husband" of a woman shall, where the woman has a lawful spouse but is living with some other man as his wife on a genuine domestic basis, be construed as a reference to the man with whom she is living and not the lawful spouse.

Application of Part.

10b. (1) Subject to this section, this Part applies—

(a) in respect of a fertilization procedure carried out before or after the commencement of the Family Relationships Act Amendment Act, 1984, either within or outside the State;

and

(b) in respect of a child born before or after commencement of the Family Relationships Act Amendment Act, 1984, either within or outside the State.

(2) This Part does not apply in respect of a fertilization procedure carried out on or after the thirty-first day of December 1986, either within or outside the State;

(3) Nothing in this Part affects the vesting of property in possession or in interest before the commencement of the Family Relationships Act Amendment Act, 1984.

Rule relating to maternity.

10c. A woman who gives birth to a child is, for the purposes of the law of the State, the mother of the child, notwithstanding that the child was conceived by the fertilization of an ovum taken from some other woman.

Rule relating to paternity.

10d. (1) Where a married woman undergoes, with the consent of her husband, a fertilization procedure the consequence of which she

becomes pregnant, then, for the purposes of the law of the State, the husband—

(a) shall be conclusively presumed to have caused the pregnancy;

and

(b) is the father of any child born as a result of the pregnancy.

(2) In every case in which it is necessary to determine whether a husband consented to his wife undergoing a fertilization procedure, that consent shall be presumed, but the presumption is rebuttable.

Donor of genetic material.

10e. (1) Where—

(a) a woman becomes pregnant in consequence of a fertilization procedure;

and

(b) the ovum used for the purposes of the procedure was taken from some other woman,

then, for the purposes of the law of the State, the woman from whom the ovum was taken is not the mother of any child born as a result of the pregnancy.

(2) Where—

(a) a woman becomes pregnant in consequence of a fertilization procedure;

and

(b) a man, (not being the woman's husband) produced sperm used for the purposes of the procedure,

then, for the purposes of the law of the State, the man referred to in paragraph *(b)*—

(c) shall be conclusively presumed not to have caused the pregnancy;

and

(d) is not the father of any child born as a result of the pregnancy.

Amendment of s. 11— Putative spouses.

7. Section 11 of the principal Act is amended by striking out paragraph *(b)* of subsection (1) and substituting the following paragraph:

(b) a child, of which he and that other person are the parents, has been born (whether or not the child is still living at the date referred to above).

Amendment of certain Acts.

8. (1) The Adoption of Children Act, 1966, is amended as indicated in the first part of the schedule to this Act.

(2) The Community Welfare Act, 1972, is amended as indicated in the second part of the schedule to this Act.

(3) The Guardianship of Infants Act, 1940, is amended as indicated in the third part of the schedule to this Act.

(4) The Sex Discrimination Act, 1975, is amended as indicated in the fourth part of the schedule to this Act.

THE SCHEDULE

PART I

AMENDMENT OF THE ADOPTION OF CHILDREN ACT, 1966

Provision Affected	How Affected
Section 4	By striking out from subsection (1) the definition of "child born outside marriage" and substituting the following definition: "child born outside marriage" includes a child born to a married woman of which a man other than her lawful spouse is the father;.

PART II

AMENDMENT OF THE COMMUNITY WELFARE ACT, 1972

Provision Affected	How Affected
Section 6	By striking out from subsection (1) the definition of "child born outside marriage" and substituting the following definition: "child born outside marriage" includes a child born to a married woman of which a man other than her lawful spouse is the father;.

PART III

AMENDMENT OF THE GUARDIANSHIP OF INFANTS ACT, 1940

Provision Affected	How Affected
Section 3	By striking out from subsection (1) the definition of "child born outside marriage" and substituting the following definition: "child born outside marriage" includes a child born to a married woman of which a man other than her lawful spouse is the father;.

PART IV

AMENDMENT OF THE SEX DISCRIMINATION ACT, 1975

Provision Affected	How Affected
After section 37 Fertilization procedures.	Insert new section as follows: 37a. (1) A reference in this Act to the provision of a service does not include, and shall be deemed never to have included, the carrying out of a fertilization procedure. (2) In this section— "fertilization procedure" means— *(a)* artificial insemination; or *(b)* the procedure of fertilizing an ovum outside the body and transferring the fertilized ovum into the uterus.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

D. B. DUNSTAN, Governor

BY AUTHORITY: D. J. WOOLMAN, Government Printer, South Australia

WESTERN AUSTRALIA.

ARTIFICIAL CONCEPTION.

No. 14 of 1985.

AN ACT relating to the status of persons conceived by artificial means and for related purposes.

[*Assented to 12 April 1985.*]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as the *Artificial Conception Act 1985*.

Commencement

2. This Act shall come into operation on a day to be fixed by proclamation.

37829—7 200

Interpretation.

3. (1) A reference in this Act to a married woman includes a reference to a woman who is living with a man as his wife on a genuine domestic basis although not married to him.

(2) A reference (however expressed) in this Act to the husband or wife of a person—

(a) is, in a case where the person is living with another person of the opposite sex as his or her spouse on a genuine domestic basis although not married to the other person, a reference to that other person; and

(b) does not, in that case, include a reference to the spouse (if any) to whom the person is actually married.

(3) A reference in this Act to a fertilization procedure is a reference to—

(a) artificial insemination; or

(b) the procedure of fertilizing an ovum outside the body and transferring the fertilized ovum into the uterus.

Application.

4. (1) The provisions of this Act apply—

(a) in respect of a fertilization procedure carried out before or after the commencement of this Act either within or outside Western Australia; and

(b) in respect of a child born before or after the commencement of this Act either within or outside Western Australia.

(2) Nothing in this Act affects the vesting of property in possession or in interest before the commencement of this Act.

Interpretation.

3. (1) A reference in this Act to a married woman includes a reference to a woman who is living with a man as his wife on a genuine domestic basis although not married to him.

(2) A reference (however expressed) in this Act to the husband or wife of a person—

(a) is, in a case where the person is living with another person of the opposite sex as his or her spouse on a genuine domestic basis although not married to the other person, a reference to that other person; and

(b) does not, in that case, include a reference to the spouse (if any) to whom the person is actually married.

(3) A reference in this Act to a fertilization procedure is a reference to—

(a) artificial insemination; or

(b) the procedure of fertilizing an ovum outside the body and transferring the fertilized ovum into the uterus.

Application.

4. (1) The provisions of this Act apply—

(a) in respect of a fertilization procedure carried out before or after the commencement of this Act either within or outside Western Australia; and

(b) in respect of a child born before or after the commencement of this Act either within or outside Western Australia.

(2) Nothing in this Act affects the vesting of property in possession or in interest before the commencement of this Act.

Rule relating to maternity.

5. (1) Where a married woman undergoes, with the consent of her husband, a fertilization procedure in consequence of which she becomes pregnant and the ovum used for the purposes of the procedure was taken from some other woman, then for the purposes of the law of the State, the married woman is the mother of any child born as a result of the pregnancy.

(2) In every case in which it is necessary to determine for the purposes of this section whether a husband consented to his wife undergoing a fertilization procedure, that consent shall be presumed, but the presumption is rebuttable.

Rule relating to paternity.

6. (1) Where a married woman undergoes, with the consent of her husband, a fertilization procedure in consequence of which she becomes pregnant, then for the purposes of the law of the State, the husband—

(a) shall be conclusively presumed to have caused the pregnancy; and

(b) is the father of any child born as a result of the pregnancy.

(2) In every case in which it is necessary to determine for the purposes of this section whether a husband consented to his wife undergoing a fertilization procedure, that consent shall be presumed, but the presumption is rebuttable.

Donor of genetic material.

7. (1) Where—

(a) a woman becomes pregnant in consequence of a fertilization procedure; and

(b) the ovum used for the purposes of the procedure was taken from some other woman, then in a case to which section 5

applies, for the purposes of the law of the State, the woman from whom the ovum was taken is not the mother of any child born as a result of the pregnancy.

(2) Where—

(a) a woman becomes pregnant in consequence of a fertilization procedure; and

(b) a man (not being the woman's husband) produced sperm used for the purposes of the procedure,

then in a case to which section 6 applies, for the purposes of the law of the State, the man referred to in paragraph (b)—

(c) shall be conclusivly presumed not to have caused the pregnancy; and

(d) is not the father of any child born as a result of the pregnancy.

Consequential amendments of Acts.

8. The Acts mentioned in the first column of Schedule 1 are amended to the extent to which and in the manner in which they are in the second column of that Schedule expressed to be amended.

SCHEDULE 1. (Section 8).

AMENDMENTS.

Short title of Act	*Amendment*
Administration Act 1903	In section 12A, after subsection (2) insert the following subsection— "(2a) Paragraph (b) of subsection (2) does not apply to or in respect of a relationship established by the Artificial Conception Act 1985. ".

Adoption of Children Act 1896	In section 2, in the definition of "relative" after "affinity" insert "or established by the Artificial Conception Act 1985".
Criminal Code Act 1913	In section 197 of The Criminal Code set out in the Schedule to the Criminal Code Act 1913 appearing in Appendix B to the Criminal Code Act Compilation Act 1913, before "natural" insert "established by the Artificial Conception Act 1985 or". In section 198 of The Criminal Code set out in the Schedule to the Criminal Code Act 1913 appearing in Appendix B to the Criminal Code Act Compilation Act 1913 before "natural" insert "established by the Artificial Conception Act 1985 or".
Evidence Act 1906	In section 38, after "blood relationship" insert "or relationship established by the Artificial Conception Act 1985".
Property Law Act 1969	In section 31A, after subsection (5) insert the following subsection— " (5a) Subsection (5) does not apply to or in respect of a relationship established by the Artificial Conception Act 1985. ".
Wills Act 1970	In section 31, after subsection (2) add the following subsection— " (3) Paragraph (b) of subsection (2) does not apply to or in respect of a relationship established by the Artificial Conception Act 1985. ".

By Authority: WILLIAM C. BROWN, Government Printer

APPENDIX 2

050

PARLIAMENT OF AUSTRALIA · THE SENATE VI

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

18 February, 1986

The Hon. Lionel Bowen, M.P.
Attorney-General,
Parliament House,
CANBERRA A.C.T. 2600

Dear Attorney-General,

At its meeting on 13 February 1986 the Committee considered the Artificial Conception Ordinance 1985 (being A.C.T. Ordinance No. 57 of 1985, tabled in the Senate on 11 November 1985). As you may know, Thursday 13 February 1986 was the last day on which the Committee could give notice of motion of disallowance of the Ordinance and such notice was given to enable the Committee to correspond with you about certain aspects of the Ordinance.

The Ordinance, which provides in some circumstances for the making of a conclusive presumption of parenthood of a child born as a result of the new artificial conception techniques, is innovative in character and changes some fundamental common law rights of parents and children. It also appears that the Ordinance was made only a short time before the Senate Standing Committee on Constitutional and Legal Affairs tabled its report in December 1985 on "IVF and the Status of Children". One of the recommendations of that Report, which does not appear to be reflected in the thinking behind the Ordinance, was that consideration be given to whether legal links with the genetic parents of a child should be retained for the limited purposes of the criminal law on incest and for the prohibition of marriage within prohibited relationships.

The Committee is concerned about the legal, social, psychological and medical implications of the Ordinance for the lives of legal parents, genetic parents and children. These implications exist now but they may have a more disturbing impact in 15 or 20 years time when the identification of genetic parents may be a matter of medical or psychological significance to artificially conceived children and others.

The Committee is also concerned that the Ordinance may have been made without the most far reaching professional inquiry and community consultations as to the implications of the thinking that lies behind it.

As you are aware this Committee is charged by the Senate with responsibility for scrutinising delegated legislation to ensure that it conforms with certain principles of legality, civil

liberty, and legislative propriety. However, it is not, by reason of its composition, its resources or the time available to it, equipped to examine properly the fundamental questions of law reform which the Ordinance has addressed. As you will appreciate it is part of the Committee's remit to determine whether an instrument of delegated legislation is of such legal or social significance as to warrant enactment by Bill after debate in the Houses of Parliament, rather than by ministerial action alone. It may be that the Artificial Conception Ordinance is such an instrument notwithstanding that it may be based around principles agreed in the Standing Committee of Attorneys-General.

While it may be that the provisions of the Ordinance are reasonable on their face today, in the absence of wide community and parliamentary debate, there may be misgivings that a ministerial instrument can have such far reaching effects on the status of children in the future.

The Committee would be very grateful to receive your comments and advice on these issues.

Yours sincerely,

Barney Cooney
Chairman

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

M86/2716:VB

11 MAR 1986

Dear Barney,

I refer to your letter of 18 February 1986 in relation to the Notice of Motion for disallowance of the Artificial Conception Ordinance 1985 (the Ordinance) moved by you on behalf of the Standing Committee on Regulations and Ordinances.

Your concerns are noted and, as discussed below, some require further consideration and action. To say, however, that the Ordinance is innovative in character is not strictly correct. It follows the trend taken in other States and Territories in legislation on this matter and follows closely the model bill approved by the Standing Committee of Attorneys General (SCAG) in the late 1970's.

As to the common law it is true to say that there is some change brought about by the Ordinance, in that the legal relationship of parentage will be transferred to the 'social', as opposed to the 'biological', parent. The common law, however, assigns the notion of parenthood on the assumption of some physical relationship between the biological mother and father. The common law establishes a rebuttable presumption that a child born to a married woman is a child of her husband. This Ordinance (and similar State legislation) makes that presumption irrebutable in certain circumstances. It is therefore arguable that no "fundamental" rights are changed. The concepts involved in reproductive technology are totally unknown to the common law and it is therefore ill-equipped to deal properly with them. The Ordinance speaks only to the legal parentage of these children, it does not presume to encroach on other areas such as custody and guardianship (in relation to which see sections 5(1)(c) and (d), 5A of the Family Law Act 1975).

With regard to the referral of matters relating to IVF and the status of children to the Senate Standing Committee on Constitutional and Legal Affairs I point out that my Department was in touch with that Committee and made available a copy of the draft Ordinance to that Committee. Preparation for presenting a draft ordinance commenced some time ago. The draft ordinance was approved by me on 3 May 1985 and forwarded for submission to the House of Assembly by the Minister for Territories on 8 May 1985. The referral of related matters to the Senate Standing Committee on Constitutional and Legal Affairs only took place on 15 May 1985. The process was therefore well underway before the Committee began its deliberations.

The matter of legal links with genetic parents being retained for the purposes of the criminal law is a complicated issue and requires considerably more attention before it is incorporated in legislation. This aspect was not discussed in SCAG. Now that the Senate Committee's Report has been received by my Department I will be looking at that issue further. It requires consultation with the States as does any decision on the marriage aspect, even though that issue is within Commonwealth power. It would be inappropriate to make a decision as to prohibited marriages in isolation from the criminal law decision.

The third paragraph of your letter expresses the committee's concern about legal, social, psychological and medical implications of the Ordinance. These are indeed important issues which the Family Law Council has recently addressed in its report "Creating Children: A Uniform Approach to the Law and Practice of Reproductive Technology in Australia". This Ordinance was not directed to these issues; instead it was designed to deal with present problems faced by children and their parents in the ACT now. The intention was to address the other issues later. I plan to consult with the Minister for Territories with a view to seeing which of the recommendations of the Family Law Council should be implemented in the A.C.T., particularly in relation to record keeping.

Current practices as to the keeping of records and assurances of privacy etc., do need to be further addressed. I should point out, however, that the Ordinance may in fact encourage proper record keeping and participation in AID and IVF programs because it removes concerns which a potential participant may have in relation to future responsibilities for the child born as a result of their donation of gametes.

The fourth paragraph of your letter raises the concern that the Ordinance may have been made without proper consultation with both professional bodies and the community. It is true that there has been no public enquiry in the A.C.T. as to reproductive technology and its consequences, but there have been numerous such enquiries and reports in other States, the majority of which have concluded that this kind of legislation is desirable. The Family Law Council report to which I have referred above lists State by State the enquiries which were undertaken and an examination of the reports of those enquiries shows a consistent practice of extensive consultation with the community. Written submissions were received and the bodies consulted with included medical practitioners, women's groups, church groups, family planning associations, medical researchers, lawyers, health services and other interested groups. In some States interim reports have been produced and in all but one State legislation has been passed in similar terms to this Ordinance. In preparing the draft Ordinance all available reports were carefully considered.

In addition, in the course of preparation of the Ordinance the usual practice was followed of inviting submissions from interested bodies in the Territory. The ACT Law Society, the Capital Territory Health Commission and the Commonwealth Departments of Health and Education were consulted. The House of Assembly in its consideration of the Ordinance, also received submissions from interested members of the public, including local medical practitioners and a local infertility support group.

The fifth paragraph of your letter suggests that an instrument of delegated legislation such as this Ordinance might be of such legal or social significance as to warrant enactment by Bill. I take this to be a reference to principle (d) applied by the Committee in scrutinizing delegated legislation and referred to in its 75th report. I reiterate the view I expressed in my letter to the Committee of 29 May 1985 in connection with the Committee's consideration of the Credit Ordinance 1985, that the principle should not be applied to local A.C.T. Ordinances. In particular, I believe this would be inconsistent with the will of Parliament as expressed in the Seat of Government (Administration) Act 1910 which confers legislative power in the Governor-General to make Ordinances "for the peace, order and good Government of the Territory". The provision in the same Act for the tabling and disallowance of an ordinance is a means of control over the exercise of that legislative power.

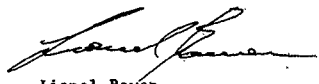
It is inevitable that some substantive legislation will be contained in ordinances for the A.C.T. Should the Ordinance be required to be embodied in an Act subsequent amendment of the legislation would need also to be by Act. I have already canvassed the probability of the need for amendment of this legislation. This would result in de facto transfer of responsibility for domestic territorial legislation to the National Parliament. Account needs to be taken of the role the A.C.T. House of Assembly has taken in the making of this legislation. The Ordinance was placed before and approved by the House of Assembly following a meeting with officers of my Department. The House of Assembly is an elected body representative of the A.C.T. community and the Ordinance has been properly scrutinised by it.

I have given very careful and detailed consideration to the question of the application of principle (d) to ACT Ordinances - as did my immediate predecessors Senator Durack and Senator Evans. I believe it would be fair to say from our letters to the Commiteee that all of us come to conclude that rarely would it be appropriate for ACT legislation to be made by Act.

It is important also to have regard to the likely effect on the A.C.T. community of disallowance of needed legislation which has been passed as a result of the consultative process mentioned above and scrutiny by the House of Assembly.

In conclusion, while I share the Committee's concerns about issues such as identification of genetic parents, I believe this is a matter which needs to be separately resolved, and repeat my assurance that I intend to consult with my colleague the Minister for Territories on this and related issues to do with regulation of AID and IVF procedures in the Australian Capital Territory.

Yours sincerely



Lionel Bowen

Senator B. Cooney,
Chairman,
Senate Standing Committee on
Regulations and Ordinances,
Parliament House,
CANBERRA ACT 2600

PARLIAMENT OF AUSTRALIA · THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

M85/4852
Your ref: M86/2716:VB

19 March 1986

The Hon. Lionel Bowen, MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,

At its meeting on 13 March 1986, the Committee considered your letters of 4 March 1986 and 11 March 1986 in connection with the Evidence (Amendment) Ordinance (No. 2) 1985, the Crimes (Amendment) Ordinance (No. 5) 1985 and the Artificial Conception Ordinance 1985. The Committee expresses its appreciation for the very detailed and thorough explanations you have given in connection with these Ordinances.

After the discussing the issues, the Committee decided that it should not recommend disallowance of any of these instruments under principle (d) of its terms of reference. The existing notice of motion of disallowance given in respect of the Artificial Conception Ordinance will accordingly be withdrawn and no notice will be given, on behalf of the Committee, regarding the other two Ordinances.

However, the Committee has decided that, prior to withdrawing its notice of motion in connection with the Artificial Conception Ordinance, it will table in the Senate a report on its scrutiny of this particular instrument.

Yours sincerely,

Barney Cooney
Chairman

APPENDIX 3

IVF AND STATUS OF CHILDREN

Report of Constitutional and Legal Affairs Committee

RECOMMENDATIONS

TABLED: DECEMBER 1985

1. The long term goal should be uniformity in consolidated legislation dealing with the status of all children, whether born through the application of reproductive technology or entirely naturally (paragraph 1.27).

2. It is highly desirable that there be uniformity, both in substance and in wording and/or legal structures, in the law relating to the status of children born through the application of IVF procedures (paragraph 2.10).

3. The Attorney-General should give consideration to the possibility of enacting uniform choice of law rules under s. 51(xxv) of the Constitution (paragraph 6.46).

4. The basic uniform rule should be that a consenting married couple entering an IVF program involving donor gametes should be the legal parents for all purposes of any child born as a result (paragraph 7.5).

5. Consideration should be given to whether legal links with the genetic parents should be retained for the limited purposes of the criminal law on incest and for the prohibition of marriage within the prohibited relationships (paragraph 7.10).

6. Subject to constitutional constraints on the Commonwealth all legislation dealing with the status of children born through IVF should treat an unmarried man and woman living together on a genuine domestic basis on the same footing as a married couple for the purpose of determining status (paragraph 7.14).

7. Appropriate steps should be taken to ensure that the status of children born through all methods of artificial reproduction involving donor genetic material is resolved in a uniform way by legislation (paragraph 7.17).

8. In order to avoid status legislation being overtaken by scientific developments such legislation should focus on status issues arising out of the use of donor genetic material, independently of any specific method of achieving artificial reproduction (paragraph 7.20).

9. It should be uniformly provided explicitly that in all cases the woman who gives birth to a child is its legal mother (paragraph 7.24).

10. The Commonwealth should seek to obtain from the States the power to enact legislation to deal with all issues of the status of children in law (paragraph 7.35).

11. As an interim solution the Attorney-General should attempt to secure, as a matter of priority, to SCAGS the functions of monitoring the impact on status law of scientific developments and of attempting to achieve a greater degree of uniformity in that law (paragraph 7.40).

12. As part of an interim solution the Commonwealth should:

(a) enact legislation for the External Territories to deal with status issues arising from artificial reproduction;

(b) amend the Family Law Act 1975 (Cth) s. 5A and the Australian Citizenship Act 1948 (Cth) s. 5(6)-(8) so as to deal with maternity issues where donor female genetic material has been used; and

(c) amend these same two provisions so that the consent of a husband to his wife's participation in an artificial reproduction program is rebuttably presumed to have been given, in the same way as is done in all State and Territory IVF status legislation (paragraph 7.42).

13. Pending the possible establishment of a permanent monitoring body such as the proposed National Council on Reproductive Technology, the Standing Committee of Attorneys-General should consider the question of record keeping and access to information relating to the donors of gametes, and should monitor the operation of any regime adopted (paragraph 8.18).

APPENDIX 4

CREATING CHILDREN 059

A uniform approach to the law and practice of reproductive technology in Australia
Family Law Council 1985

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

At the request of the Family Law Council, the Asche Committee has carefully analysed the issues arising out of the research and practice of reproductive technology, examined the reports and recommendations of the various committees of enquiry in Australia and overseas, carefully considered the legislation which has been introduced in this area, and has made its report to the Council. As a consequence of this report, the Family Law Council has reached the following conclusions:

CONCLUSIONS:

- REPRODUCTIVE TECHNOLOGY DIFFERS FUNDAMENTALLY FROM OTHER RECENT DEVELOPMENTS IN SCIENCE, TECHNOLOGY AND BIO-TECHNOLOGY IN THAT IT ENABLES THE CREATION OF NEW LIFE, THE CREATION OF A CHILD WHO WOULD NOT OTHERWISE BE BORN - RATHER THAN SIMPLY SUSTAINING AND PROLONGING A LIFE WHICH ALREADY EXISTS.

  Reproductive technology therefore should not be confused with other areas of bio-technology which involve, for example, procedures such as tissue transplants. The latter enable an existing life to be prolonged or improved - they do not create a new life, as does reproductive technology. Fundamentally different questions are raised by reproductive technology, and these must be addressed separately from issues raised by bio-technology.

- RECOGNITION THAT THE QUESTIONS RAISED BY REPRODUCTIVE TECHNOLOGY WHICH ENABLES THE CREATION OF CHILDREN AND THE FORMATION OF FAMILIES ARE NOT EXCLUSIVELY OR EVEN PRIMARILY MEDICAL OR SCIENTIFIC MATTERS. RATHER THEY RAISE FUNDAMENTAL SOCIAL, MORAL, LEGAL AND ETHICAL ISSUES WHICH INVOLVE THE WHOLE COMMUNITY.

  Along with the Warnock Committee in the United Kingdom and the various Australian committees of enquiry, the Family Law Council recognises that the issues raised by reproductive technology are concerned essentially with broad and fundamental questions of public policy, and of the public interest - of which medical procedures are but one component. These questions involve broader matters such as the creation of children and the formation of families, the well-being and interests of Australian families and children, women's health and welfare, access to and allocation of public resources, the keeping of records, the introduction of legislation, and questions of government regulation and control - and should not be seen as medical issues or dealt with in a medical framework.

- THE WELFARE AND INTERESTS OF THE CHILD BORN OF REPRODUCTIVE TECHNOLOGY MUST BE THE PARAMOUNT CONSIDERATION. REPRODUCTIVE TECHNOLOGY PROCEDURES SHOULD ONLY BE ADMINISTERED WHEN APPROPRIATE CONDITIONS EXIST FOR ENSURING THE WELFARE OF THE FUTURE CHILD THUS BORN.

  Given that the major purpose of reproductive technology is to create a child who would not otherwise be born, and that a substantial allocation of public resources is required to enable this, it is clear that the community has a particular responsibility to promote and protect the

interests, needs and welfare of that child when born. These interests are evident in respect of a number of factors and may from time to time conflict with the interests of the adults involved. In such circumstances, legislators have a responsibility to ensure that the welfare and interests of the child thus born shall be the paramount consideration, particularly where donor gametes are used.

The Council believes, along with those responsible for drafting similar provisions for the Council of Europe and Sweden, that reproductive technology procedures should only be permitted where appropriate conditions exist for ensuring that the child will grow up in favourable conditions.

- THERE MUST BE FULL, INFORMED AND EFFECTIVE PUBLIC PARTICIPATION IN THE EVALUATION OF, AND DECISION-MAKING REGARDING, THE RESEARCH AND PRACTICE OF REPRODUCTIVE TECHNOLOGY.

The rapid march of science and technology in this important area of reproduction will continue long after the life of existing committees. This will require effective and ongoing community scrutiny and participation in the evaluation of such developments and in the decision-making concerning the important moral, social, legal and ethical questions which will be raised - and in the application of this technology in the everyday lives of ordinary Australians and their families. Along with the South Australian Minister for Health, Dr John Cornwall, the Council believes that 'We must look to legislative action to spell out those safeguards and the conditions under which, as a community, we can allow medical scientists to utilise the technological advances they have engineered ... Medical scientists, however well-intentioned, must not be allowed to move at a pace which outstrips the knowledge and clearly expressed opinion of the community.'

- THERE MUST BE, AS A MATTER OF PRIORITY, A NATIONAL APPROACH TO THE ISSUES ARISING OUT OF REPRODUCTIVE TECHNOLOGY.

Above all else, the Council is convinced that the questions and issues raised by reproductive technology are not capable of effective resolution by means of a fragmented and disjointed State-by-State approach. Over the past three years, Australia has seen 10 committees established, 16 reports/discussion papers presented or foreshadowed, and 14 pieces of legislation introduced or foreshadowed. Such reports and legislation concern the development of policies, services, programs and legislation affecting the well-being of children, parents and families in Australia. These concerns are not confined by State borders - they require a national approach so that policies concerning children and families be uniform throughout Australia if the family is still to be regarded as the cornerstone of Australian society.

- THE IMPORTANCE OF ESTABLISHING A NATIONAL COUNCIL ON REPRODUCTIVE TECHNOLOGY TO ADVISE AUSTRALIAN GOVERNMENTS, FEDERAL, STATE AND TERRITORY, AND TO PROVIDE SUCH A NATIONAL APPROACH TO THE CREATION OF CHILDREN AND FAMILIES.

The primary role of a National Council on Reproductive Technology will be to develop and foster a national approach to reproductive technology and the creation of children and families and to the questions of public policy thus raised. Its terms of reference should include: to identify, evaluate and advise on the fundamental social, moral, legal and ethical issues raised by reproductive technology, and to foster and facilitate full and effective public participation in the decisions being made concerning the research and practice of reproductive technology.

The proposed National Council on Reproductive Technology should be an independent multidisciplinary body whose role would be to advise the Federal, State and Territory Governments, through the relevant ministers, on matters relating to reproductive technology which creates a family by enabling infertile couples to parent a child who would not otherwise be born. The membership of such a body should be wide-ranging and, in particular, lay interests should be well-represented. It should maintain close links with other bodies, Federal and State, working in the area.

- THE HIGH COST TO THE PUBLIC PURSE OF FUNDING REPRODUCTIVE TECHNOLOGY PROGRAMMES REQUIRES, AS A MATTER OF PRIORITY, THAT URGENT ATTENTION BE GIVEN TO ESTABLISHING A CLEARLY DEFINED HEALTH CARE POLICY WHICH *ESTABLISHES PRIORITIES FOR THE ALLOCATION OF HEALTH CARE FUNDS.*

Funding for reproductive technology programmes currently comes from a variety of sources, both public (funding of hospital facilities and equipment, hospital staff salaries and expertise, funding of research, education and training of doctors and other professional staff, medical benefit payments) and private. It is, however, a matter of considerable concern to this Council that extensive enquiries have been unable to elicit any accurate figures as to the cost to the public purse of reproductive technology research and programmes - other than that the figure runs into millions of dollars.

It is a matter of some urgency therefore that Federal and State governments take action to establish both the real cost of these programmes in terms of public funding, and criteria for the allocation of health care funds. Particular attention must be given to the questions raised by competing demands on public health care resources: Does the community place greater value on maintaining an existing life or on creating a new one? How does a community resolve such questions? To what extent should decisions regarding the funding of reproductive technology programmes take into account not only the high cost of such procedures, but also their relative success/failure rates in terms of the number of babies born as against the greater number of couples who fail to have a child?

- ATTENTION NEEDS TO BE GIVEN TO IDENTIFYING THE OBJECTIVES OF REPRODUCTIVE TECHNOLOGY PROGRAMMES AND TO DECIDING FOR WHOM SUCH SERVICES SHOULD BE PROVIDED.

It is generally believed in the community that reproductive technology programmes are assisting childless infertile couples to have children. What is not generally known is that couples who already have children are also accepted onto these programmes - including, in a number of

instances, couples where a decision has previously been taken to have no further children and to undergo a sterilization procedure. The Council questions whether this is an appropriate use of limited health care resources.

Further because of the high cost of each treatment cycle, access is generally limited to those of higher socio-economic status. This is further accentuated by the fact that much of the treatment, particularly IVF, *is carried out largely within the private, not the public,* health care system. This creates the dilemma referred to by Professor Charlesworth who comments that "those who benefit from IVF are for the most part middle class couples. Is this a just use of resources?" Clearly the question of access to such services raises not only important questions of public policy but questions relating to the allocation of limited health care resources referred to above. These are questions which the community, ultimately, must determine.

- AS A MATTER OF PUBLIC POLICY, SURROGACY ARRANGEMENTS SHOULD BE PROHIBITED.
- THERE SHOULD BE A PROHIBITION ON EXPERIMENTATION ON HUMAN EMBRYOS.
- THE COMMUNITY NEEDS TO GIVE CAREFUL CONSIDERATION TO THE APPROPRIATENESS OF PERMITTING THE COMMERCIAL EXPLOITATION OF REPRODUCTIVE TECHNOLOGY - AND, IF THE LATTER IS TO BE PERMITTED, TO ITS REGULATION.

CREATING CHILDREN - A uniform approach to the law and practice of reproductive technology in Australia. Family Law Council 1985

RECOMMENDATIONS:

Recommendation 1
That the Report of this Committee, Creating children: a uniform approach to the law and practice of reproductive technology in Australia, be made public. (1.12)

Recommendation 2
That the principle of the paramountcy of the welfare and interests of the child born of reproductive technology be incorporated into all Federal, State and Territory legislation governing the operation and administration of reproductive technology programmes, including the provision that reproductive technology procedures only be administered when appropriate conditions exist for ensuring the welfare of the future child thus born. (6.1.9)

Recommendation 3
That the proposed National Council on Reproductive Technology consider the most effective means of ensuring the welfare and interests of children born of reproductive technology programmes, especially where donor gametes have been used, with a view to advising Federal, State and Territory governments. (6.1.10)

Recommendation 4
That the Standing Committee of Attorneys-General consider introducing amendments to State and Territory legislation on the Status of Children which take the approach of the United States Uniform Parentage Act, which provides for the parental rights and obligations of the donor of gametes to be extinguished and replaced by a new set of rights and obligations vested by law in the social parents. (6.2.9)

Recommendation 5
That the proposed National Council on Reproductive Technology review Status of Children legislation with a view to advising Federal, State and Territory Attorneys-General on the most appropriate means of defining the parent-child status. (6.2.10)

Recommendation 6
That steps be taken as soon as possible by the Standing Committee of Attorneys-General to ensure complete uniformity in law throughout Australia with respect to the status of children born following the use of donor gametes. (6.2.13)

Recommendation 7
That the proposed National Council on Reproductive Technology consider the most effective means of achieving uniform Status of Children legislation with a view to making recommendations to the Standing Committee of Attorneys-General as to how uniformity can be achieved. (6.2.14)

Recommendation 8

That, *S.5A of the Family Law Act 1975* be amended to provide that, with respect to a child (born as the result of the carrying out of a medical procedure involving donor ova on a woman), parental rights and obligations be vested in that woman. (6.2.17)

Recommendation 9

That, in recognition of the importance of access to knowledge and information of genealogical origins, legislation and practice provide for access to such information by the child/adult:

- that such information be of a non-identifying nature prior to the child reaching 18 years of age, and
- that identifying information be available for adults over 18 years of age.

(6.3.11)

Recommendation 10

That couples be counselled concerning the importance to their child of honesty, openness and information about family origins and conception; and that donors of gametes be counselled as to the importance to the child/adult of information on origins, and of the implications of later access to such information, retrospectively or otherwise.

(6.3.12)

Recommendation 11

That the proposed National Council on Reproductive Technology give consideration to the means of providing children/adults born of donor gametes with information as to their genealogical origins with a view to providing advice on the most effective ways of providing such information to the child/adult born following the use of donor gametes - and that the practice and experience of adoption agencies in these matters be utilised to assist such a review. (6.3.13)

Recommendation 12

That the procedures and guidelines governing the registration of births of children born of donor gametes be reviewed with a view to the State and Territory Registrars of Birth Records maintaining a record of both the biological and the social parent/s of the child, thus ensuring the integrity of birth records. That in carrying out this review, account be taken of the way in which the registers of birth records currently record both the biological and social/adoptive parents of adopted children.

(6.4.10)

Recommendation 13

That the proposed National Council on Reproductive Technology address the issue of the registration of the birth of children born of donor gametes with a view to establishing uniform guidelines and procedures which will maintain the integrity of birth records. (6.4.11)

Recommendation 14

That counselling be an important and integral part of all infertility and reproductive technology programmes and that:

- recognition be given to the nature and purpose of the different components of counselling: that is, the provision of information; confidential supportive counselling; and selection/screening. (6.5.13)

- counselling should be provided by those professionals and agencies with relevant expertise and experience in the area of children and families and in social and psychological counselling - and who are independent of the medical unit which performs the procedures. (6.5.11)

- the current criteria governing admission to reproductive technology programmes need to be reviewed so that criteria take into account social and psychological factors along with medical considerations, and appropriate procedures be established for determining eligibility for admission to such programmes. (6.5.15)

and that a uniform approach to these matters be taken throughout Australia. (6.5.16)

Recommendation 15

That the proposed National Council on Reproductive Technology, as a matter of priority, give consideration to the most effective means of providing counselling services in reproductive technology programmes, as outlined in recommendation 13, on a uniform basis throughout Australia. (6.5.19)

Recommendation 16

That as a matter of public policy, surrogacy arrangements are seen to be contrary to the welfare and interests of the child. (6.6.19)

Recommendation 17

That there be a prohibition on the exchange of money for surrogate motherhood services, for arranging surrogacy services and for advertising surrogacy services; that the legislation provide that surrogacy contracts or agreements are null and void because they are contrary to public policy and are therefore unenforceable; and that complete uniformity between the States and Territories be established in respect of these matters. (6.6.20)

Recommendation 18

That the use of donor gametes in reproductive technology programmes be permitted but that more adequate standards and guidelines be established to govern the operation of donor gametes programmes; that such guidelines be uniform throughout Australia; and that the guidelines be based on the paramountcy of the welfare and interests of the child. (6.7.7)

Recommendation 19
That the use of known donors of gametes who are related to the recipient couple be not permitted because such use is contrary to the welfare and interests of the child. (6.7.13)

Recommendation 20
That the use of donors of gametes who are not related to the recipient couple should not be prohibited; but that such donors and couples be given information as to the implications for each of them and for the child of such arrangements, and access to special counselling prior to entering such arrangements. (6.7.16)

Recommendation 21
That the proposed National Council on Reproductive Technology give consideration,as a priority, to the establishment of uniform standards and guidelines which would apply throughout Australia to govern the operation of donor gametes programmes; and to guidelines governing the use of gametes from a donor who is known, but unrelated, to the recipient couple. (6.7.17)

Recommendation 22
That the production of human embryos for the sole purpose of research/experimentation be prohibited. (6.8.17)

Recommendation 23
That the use of 'spare' human embryos for research/experimentation be prohibited (majority opinion). (6.8.21)

Recommendation 24
That the proposed National Council on Reproductive Technology consider, as a priority, and keep under review the question of research/experimentation on human embryos. (6.8.23)

Recommendation 25
That all forms of reproductive technology (including AID, IVF and ET) be subject to regulation and control by government, by legislative and administrative means; that such regulation and control be of a multidisciplinary nature; and that there be uniformity throughout Australia as to the regulation and control of reproductive technology research and programmes enabling the creation of children and families. (6.9.16)

Recommendation 26
That the National Council on Reproduction Technology give urgent attention to the most appropriate and effective means by which governments can regulate and control reproductive technology, and to achieving uniformity of regulation throughout Australia. (6.9.17)

Recommendation 27
That criteria be established for ranking priorities for the allocation of health care funds, with particular consideration given to the fundamental question of allocating resources between treatment and prevention. (6.10.12)

Recommendation 28

That the proposed National Council on Reproductive Technology advise on guidelines to assist in the allocation of health care resources; and on the allocation of funding to reproductive technology research and programmes. (6.10.13)

Recommendation 29

That the proposed National Council on Reproductive Technology consider, in order to advise Federal, State and Territory Governments, the following issues:

- the commercial exploitation of reproductive technology
- the provision of Australia-wide information and community education programmes
- the critical importance, and urgency, of fostering/developing research projects to study, amongst other things, the social and psychological implications of reproductive technology for the child, the couple, the donor, the family and the community. (6.11.1)

Recommendation 30

That a national approach be taken by Federal, State and Territory Governments to the issues arising out of the research and practice of reproductive technology in Australia. (7.5.1)

Recommendation 31

That an independent national multidisciplinary body, to be known as the National Council on Reproductive Technology be established by Federal Cabinet on the recommendation and advice of the Federal Attorney-General following consultation with State and Territory Attorneys-General, and with Federal, State and Territory Ministers for Health and for Community/Welfare Services; and that the role of this National Council be to advise Federal, State and Territory Governments through the relevant ministers on matters relating to reproductive technology with a view to establishing a national/uniform approach to such matters. (7.8.5)