

Submission to the Review of the Human Reproductive Technology Act 1991 and the Surrogacy Act 2008

by *Defend Human Life!*

Prepared by Richard Egan

Defend Human Life! is a prolife venture by Richard Egan who has closely monitored developments in the law and practice of reproductive technology, experimentation on human embryos, cloning and surrogacy for over 30 years.

HUMAN REPRODUCTIVE TECHNOLOGY ACT 1991

Research involving human embryos, cloning or parthenogenesis

The human embryo, whether brought into being by the fertilisation of a human egg by a human sperm or by cloning, parthenogenesis or any other means, is simply an individual member of the species *homo sapiens* from the first moment of its existence.

It is one of us.

As such the human embryo is entitled to full respect for its right to life, its integrity and its irreplaceable value as a unique human being (its uniqueness is not dependent on having a unique genetic code but simply in being *this* particular human embryo).

The only honest alternative to this posture of full respect for the life, integrity and humanity of the human embryo is to treat it as a piece of property that can be used instrumentally for any purpose the owner sees fit (just as the Supreme Court of the United States in the 1857 case *Dred Scott* declared in regard to the relationship between a runaway slave and its owner).

Baroness Warnock's committee famously proposed a supposed middle view that involved treating the human embryo with a certain measure of respect.

*We found that the more generally held position, however, is that though the human embryo is entitled to some added measure of respect beyond that accorded to other animal subjects, that respect cannot be absolute, and may be weighed against the benefits arising from research.*¹

However, on 5 December 2002 she retracted her support for this view, admitting it was incoherent:

*I regret that in the original report that led up to the 1990 legislation we used words such as "respect for the embryo". That seems to me to lead to certain absurdities. You cannot respectfully pour something down the sink—which is the fate of the embryo after it has been used for research, or if it is not going to be used for research or for anything else.*²

¹ Report of the Committee of Inquiry into Human Fertilisation and Embryology, p. 62

http://www.bioeticacs.org/iceb/documentos/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf

² House of Lords, Hansard, 5 Dec 2002,

https://publications.parliament.uk/pa/ld200203/ldhansrd/vo021205/text/21205-15.htm#21205-15_spnew8

Robert P. George and Christopher Tollefsen in their definitive work, *Embryo: A Defense of Human Life* put the case for respecting a human embryo as one of us, a human being in his or her earliest stage of life:

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

But does this mean that the human embryo is a human person worthy of full moral respect? Must the early embryo never be used as a mere means for the benefit of others simply because it is a human being? The answer that this book proposes and defends with philosophical arguments through the course of the next several chapters is "Yes."³

Despite the amendments made to the *Human Reproductive Technology Act 1991* in 2004, permitting, subject to licensing, research involving so-called excess ART embryos, there has not been a single license issued for such research in Western Australia.

Recommendation 1:

Given that these provisions have never been used and that such research involves wrongly treating a human embryo as a disposable object, able to be used for instrumental purposes, rather than as, what it is – one of us – the provisions introduced to the Act in 2004 insofar as they permit such research, should be repealed.

Since several other jurisdictions, including the Commonwealth, amended their laws to permit the deliberate creation of human embryos by cloning or parthenogenesis for the purpose of research to be followed by the destruction of the human embryo there have been just 5 licenses issued for such research. Each of these licenses has since expired after the research spectacularly failed to produce any useful results whatsoever.

Genea Limited reported that *"A total of 509 clinically unsuitable eggs have been entered into the SCNT projects. While several SCNT constructs developed to the 8-cell stage, unfortunately no further development was observed. Four constructs were plated for attempted derivation of an SCNT stem cell line, but no outgrowth occurred. Various improvements were tried. These included methods for in vitro maturation of immature eggs, different nuclear transfer techniques, various agents to support reprogramming and stem cell derivation. It was determined that the low quality of eggs deemed*

³ Robert P. George and Christopher Tollefsen, *Embryo: A Defense of Human Life*, 2008, Chapter 1, Extract available online at: http://www.denverpost.com/excerpts/ci_8084925

clinically unsuitable by clinical staff was ultimately the lead reason why the project could not be successful.”⁴

Fertility Australia Trust reported similar failure of its attempts to obtain stem cells from pathenogenetic activation of immature eggs.⁵

Internationally while there have been some developments in human cloning, the absurd hype surrounding the parliamentary debates in 2007 has evaporated.

Adult stem cells and induced pluripotent stem cells remain much more promising sources for stem cell therapies than stem cells from somatic cell nuclear transfer.

The Western Australian Legislative Council did well to reject by 18 votes to 15 the *Human Reproductive Technology Amendment Bill 2007* which would have permitted human cloning.

The Hon Ed Dermer MLC made the case against the Bill persuasively:

Claims will be made that, regardless of what progress is made with the induced pluripotent stem cell method, there is still a role for cloning. I cannot see it. I cannot see what cloning can achieve when we can essentially get the same cells—if not today then very soon given the rate of progress—from the induced method. If we were dealing with an insignificant matter, we could understand the logic of using both methods.

I want to remind members of the enormity of what we are being asked to approve in this bill.

We are being asked to approve the deliberate creation of human embryos for the purpose of destroying those embryos to derive these cells, when there is every indication that those cells can be derived with the same qualities through the induced pluripotent stem cell method, which does not involve either cloning or human embryos. It is an enormous proposition for us to be asked to approve the deliberate creation of embryos for a destructive purpose.

Maybe I could have understood it before this research came out in November, to the extent that people were saying that we need these pluripotent stem cells and that the only way to get them is by cloning and destroying the embryos. That is no longer a valid proposition, because the induced pluripotent stem cell method has emerged and research on that method has gathered momentum. I ask members to consider that.

All things considered, when we remember that this bill is asking us to legalise the creation of human embryos for their destruction and that the reasons put forward to justify this extraordinary

⁴ NHMRC Embryo Research Licensing Committee, Report to the Parliament of Australia For the period 1 September 2015 to 29 February 2016, p. 8, https://www.nhmrc.gov.au/files/nhmrc/file/research/embryos/reports/27th_nhmrc_embryo-research-web_1.pdf

⁵ NHMRC Embryo Research Licensing Committee, Report to the Parliament of Australia For the period 1 March 2014 to 31 August 2014, p. 9 https://www.nhmrc.gov.au/files/nhmrc/publications/attachments/hc45_embryo_licensing_report_march_august_2014.pdf

*proposition are evaporating as the research progresses, logic must lead members to the conclusion that this bill should be defeated.*⁶

There is nothing that has happened since to require the Parliament to reconsider its rejection of human cloning.

Recommendation 2

The deliberate creation of a human embryo by any means, including by somatic cell nuclear transfer or cloning, should remain unlawful in Western Australia.

Genetic testing of embryos and saviour siblings

All testing of human embryos which is intended to lead to the discarding or destruction of those human embryos which fail the test – those which do not have the desired characteristic – is plainly contrary to the respect owed to the human embryo as one of us as it treats those human embryos that fail the test as disposable objects.

Additionally all screening for disabilities is inherently eugenic. It is designed to select only human embryos without certain characteristics as having lives worth living. It is profoundly discriminatory. It sends a message to people living with such characteristics that we despise them to the extent that if possible we would have disposed of them at the first stage of their life.

Selecting a human embryo based on its possible usefulness as a source of bone marrow or other body parts to treat another specific human being is similarly discriminatory. No matter what attempt is made subsequent to the birth of the child so selected to value him or her for his or her own sake the indelible reality is that if the child had not had the desired characteristic he or she would have been discarded.

How free is such a child to refuse to be used as a source for bodily parts for another family member?

Recommendation 3

All testing of human embryos that is designed to result in selective discarding of those without the desired characteristics is discriminatory and fails to treat the human embryo justly. Those provisions in the Act which permit such testing should be repealed and replaced by prohibitions of such testing.

Mitochondrial donation

Depending on the method used so-called mitochondrial donation may involve the fertilisation and subsequent destruction of one or two human embryos in order to create a human embryo with the desired characteristic. Such techniques are plainly lacking in the respect due to those human embryos cannibalised by this process.

⁶ Legislative Council, Hansard, 10 Apr 2008, p 2153,
[http://parliament.wa.gov.au/Hansard/hansard.nsf/0/777F8607D00EA4AFC825758A001A9B3C/\\$File/C37%20S1%2020080410%20All.pdf](http://parliament.wa.gov.au/Hansard/hansard.nsf/0/777F8607D00EA4AFC825758A001A9B3C/$File/C37%20S1%2020080410%20All.pdf)

Additionally mitochondrial transfer will result in an inheritable change in the human embryo which, in the case of females will be passed on to future offspring. The precautionary principle suggests that such change should not be made.

Also the resulting child will, in some sense, have at least three parents. This, like several other forms of artificial reproduction technology, imposes a burden of identity confusion on a child without the child's consent.

Recommendation 4

The creation of a human embryo using so-called mitochondrial donation should not be permitted in Western Australia.

Posthumous collection, storage and use of gametes and embryos

While the desire of a surviving widow or partner to conceive a child using her deceased husband's or partner's sperm is understandable this practice does not accord with the best interests of the child.

The practice necessarily involves bringing a child into existence with no living father.

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

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

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

Any attempt to use sperm posthumously without prior consent would also clearly violate the reproductive rights of the man involved. Such consent is inherently personal and can never be presumed or implied.

Any attempt to retrieve sperm from a deceased man under any circumstances, or from a man in post coma unresponsiveness or in any other condition where he cannot give informed consent, unless he had explicitly given prior authorisation for retrieval in those circumstances, would be a violation of his bodily integrity – a form of reproductive rape.

Recommendation 4

The Act should be amended to clearly and absolutely prohibit any posthumous use of gametes in an assisted reproductive technology procedure; any retrieval of sperm from a deceased person; and any retrieval of gametes from a person in a state where they are unable to give informed consent unless the person has given prior explicit consent for retrieval in those circumstances.

The Act should be amended to require the disposal of any stored gametes of a deceased person.

Rights to storage of gametes and embryos

Stored gametes may only properly be used with the effective consent of the person whose gametes they are.

Stored embryos are already existing human beings. They should be given any possible chance at continuing to develop its life by being implanted as soon as practicable in the body of the woman for whom it was conceived even if her relationship with another person who consented to the creation of the human embryo has ended by divorce, separation or death .

Once a human embryo is in existence, regardless of how it came into existence, it is appropriate if the woman for whom it was conceived is unable or unwilling to proceed with implantation that an embryo adoption takes place.

This should not be ruled out for human embryos conceived using donor gametes once they have been conceived and subsequently relinquished or abandoned. It is the use of donor gametes that should be prohibited not the subsequent rescue of human embryos conceived in this way.

“On-donation” of a human embryo should be seen as parallel to a failure to proceed with an adoption. There is no reason to prohibit a subsequent successful adoption so there is no reason to prevent another woman offering to have the human embryo implanted,

Recommendation 5

Any human embryo in storage should be implanted as soon as practicable in the body of the woman for whom it was conceived even if her relationship with another person who consented to the creation of the human embryo has ended by divorce, separation or death.

Any human embryo that is already existence but that has been relinquished or abandoned by the woman or couple for whom it was conceived should be made available for adoption.

Storage of human embryos

Data from the annual reports of the Western Australian Technology Council reveal that the number of human embryos in storage has grown more than fourteen fold (1445%) since 1993 from 1,706 to 24,664 as at 30 June 2017, growing by 7.11% in the previous twelve months with an additional 1,638 human embryos added to the stockpile.⁷

⁷ Western Australian Reproductive Technology Council, *Annual Report 2013-14*, Table 7 on p. 27, <https://www.rtc.org.au/wp-content/uploads/2016/12/1-July-2013-30-June-2014.pdf> ; Western Australian Reproductive Technology Council, *Annual Report 2008-09*, Table 2 and Figure 3 in Appendix 3, <https://www.rtc.org.au/wp-content/uploads/2016/12/1-July-2008-30-June-2009.pdf> ; Western Australian Reproductive Technology Council, *Annual Report 2016-17*, Table 6 on p. 26,

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

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

YEAR	Number of embryos in storage at 30 June
1993	1,706
1998	6,108
2003	12,097
2008	15,828
2013	18,455
2016	23,026
2017	24,664

A recent Cochrane review reported that:

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

The current practice of stockpiling human embryos in storage for possible future use in a reproductive project reduced the human embryos to the equivalent of a TV dinner. Only by this reductionism can we speak in such a cavalier manner about disposal of human embryos after a use by date.

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

<https://www.rtc.org.au/wp-content/uploads/2017/09/reproductive-technology-annual-report-16-17.pdf>

⁸ Allersma, T., Farquhar, C., and Cantineau, A. "Natural cycle in vitro fertilisation (IVF) for subfertile couples", *Cochrane Database of Systematic Reviews*, 2013, Issue 8, <http://onlinelibrary.wiley.com/doi/10.1002/14651858.CD010550.pub2/pdf>

Recommendation 6

The Act should be amended to require that In the course of clinical practice, clinicians must limit the number of embryos created to those intended to be transferred fresh and only use storage when transfer is unavoidably prevented.

NOTE: the following matters are not explicitly listed in the terms of reference. However, as the introductory sentence uses the word ‘including’ these are additional matters that are relevant to the operation and effectiveness of this Act .

Significance of biological connection and donation of gametes

Human beings are embodied and relational beings. The genetic makeup of every human being is derived from a combination of genes inherited from his or her father and the genes inherited from his or her mother. This pattern of inheritance creates natural, biological, genetic relationships written into every cell of a person’s body. These relationships extend through the genetic father and mother to siblings, either full or half, grandparents and more distant ancestors, and other collateral relations.

Any use of assisted reproductive technology should take fully into account this fundamental human reality.

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

Donor conception intentionally seeks to separate genetic fatherhood or motherhood from all other responsibility for the child that is to be conceived.

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

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

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

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

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

This should be distinguished from the case where an embryo that has been initially created for assisted reproductive treatment of a couple is no longer wanted for this purpose. Where such an embryo is implanted in another woman this could be seen as an earlier form of adoption – embryo adoption rather than postnatal adoption. It shares some of the characteristics of postnatal adoption, such as providing a home – in this case initially a womb – and parental care for a child (in this case in the embryonic stage of development) who can't be cared for by its parents or has been abandoned.

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

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

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

In a submission to the News South Wales Legislative Council Inquiry into Altruistic Surrogacy by Tangled Webs Inc., this group of donor conceived persons argued, on the basis of their lived experience, that *"A child's best interests are served when it is conceived and gestated by; born to and nurtured by, one mother. To fragment maternal roles through ova donation/gestational surrogacy is to deny a child its entitlement to a whole mother"*¹⁰

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

⁹ *"Who Am I? Experiences of Donor Conception"* Idreos Education Trust, 2006

¹⁰

[http://www.parliament.nsw.gov.au/prod/PARLMENT/committee.nsf/0/996784755f12f19dca2574ea00187d5b/\\$FILE/Submission%2021.pdf](http://www.parliament.nsw.gov.au/prod/PARLMENT/committee.nsf/0/996784755f12f19dca2574ea00187d5b/$FILE/Submission%2021.pdf)

[Y]oung adults conceived through sperm donation are hurting more, are more confused, and feel more isolated from their families. They fare worse than their peers raised by biological parents on important outcomes such as depression, delinquency and substance abuse. Nearly two-thirds agree, "My sperm donor is half of who I am."¹¹

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

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

The role of money in their conception disturbs a substantial number of donor offspring. Forty-five percent agree, "It bothers me that money was exchanged in order to conceive me." Forty-two percent of donor offspring, compared to 24 percent from adoptive families and 21 percent raised by biological parents, agree, "It is wrong for people to provide their sperm or eggs for a fee to others who wish to have children."¹²

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

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

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

Nearly half of donor offspring (48 percent) compared to about a fifth of adopted adults (19 percent) agree, "When I see friends with their biological fathers and mothers, it makes me feel sad." Similarly, more than half of donor offspring (53 percent, compared to 29 percent of the adopted adults) agree, "It hurts when I hear other people talk about their genealogical background."¹³

More than half say that when they see someone who resembles them they wonder if they are related. Almost as many say they have feared being attracted to or having sexual relations with someone to whom they are unknowingly related. Approximately two-thirds affirm the right of donor offspring to know the truth about their origins. And about half of donor

¹¹ Marquadt, E. et al. *My daddy's name is donor: a new study of young adults conceived through sperm donation*, Institute for American Values, 2010, p. 5, <http://www.scribd.com/doc/32495612/My-Daddy-s-Name-is-Donor>

¹² Ibid. p.7

¹³ Ibid

*offspring have concerns about or serious objections to donor conception itself, even when parents tell their children the truth.*¹⁴

These issues are very serious.

While it may be the case that some people conceived using donor gametes do not experience their origin as a source of distress it is impossible to predict this ahead of time for any individual conceived in this manner. Therefore, every proposed instance of donor conception must take into account the significant likelihood that the person so conceived may experience serious distress as a direct result of the manner in which they were conceived.

This justifies a moratorium on all practices that involve an intentional fracturing of parenting before the conception of a child. This includes all forms of donor conception as well as all forms of surrogacy.

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

Where legislation on assisted reproductive technology or surrogacy requires that before treatment or before a surrogacy arrangement is approved the best interests of the child must be taken into consideration it should now be plain that to do so authentically would indicate that treatment involving donor gametes or any form of surrogacy should never proceed.

Recommendation 7

The Act should be amended to reflect the position that there should be no use of donated gametes in artificial reproductive technology procedures because by intentionally fracturing parenthood before the conception of the child this would necessarily impose intolerable burdens of identity bewilderment on the child. Such procedures are never in the best interest of the child to be conceived.

Limiting the number of children conceived with the sperm from each donor

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

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

However, the problem is more fundamental than the issue of possible consanguine romantic relationships. In the normal course of human life it would not be rare for a man to father children to two or more women. Obviously the more different women he has children with the more complex are the familial relationships created.

With sperm donation these complex familial relationships are intentionally created. It is unjust to the children so conceived that they have siblings being created intentionally in up to four other

¹⁴ Ibid. p.5-6

families. Each child may have siblings they have no real chance of getting to know until they have all turned 18 (or 16 depending on State laws). This is reckless and thoughtless. It can't be justified by adult desires for children.

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

Recommendation 8

The Act should be amended to limit the sperm donated by any one man to being used by only one family. This is necessary to prevent the intentional conception of siblings who will be raised apart from one another.

Compensation for sperm donation

Australia, unlike the United States, has to its credit resisted allowing payment of valuable consideration for the provision of gametes.

However there have been instances of Australian clinics trying to avoid get around this prohibition.

Fertility First has offered \$100 for each of up to twenty donations, or a maximum of \$2,000 to its sperm donors.¹⁵ This could be a significant inducement to a cash-strapped student.

In 2004 IVF Albury offered travel reimbursement packages valued at \$7000 to Canadian men to come to Albury and make ten donations over a two week period.¹⁶

If, contrary to our recommendation above, donation is allowed to continue then if sperm donation is meant to be genuinely altruistic it would be better to prohibit all payments including so-called reimbursement payments. Altruistic blood donors are not paid for travel or loss of earnings.

Recommendation 9

The Act should be amended to explicitly prohibit all payment for sperm donation, including so-called reimbursement for reasonable expenses.

Compensation for egg donation

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

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

¹⁵ Fertility First, *How to be a good sperm donor: FAQs*, <http://donatedontwaste.com.au/faqs/>

¹⁶ <http://news.bbc.co.uk/2/hi/health/3410351.stm>

In 2010 a Dutch study reported that there had been six deaths directly related to egg retrieval for IVF treatment between 1984 and 2008 - a mortality rate of six per one hundred thousand.¹⁷

In 2003-05 there were four deaths in Britain directly associated with ovarian hyperstimulation syndrome, giving a rate of 2.52 per 100,000.¹⁸

Deaths from OHSS include 32 year old Irish woman Jacqueline Rushton, who died in Dublin on 14 January 2003¹⁹. She suffered a gradual deterioration of her organs, virtually all of which were slowly destroyed.

Temilola Akinbolagbe, a young woman who died in April 2005 in London, suffered a more sudden death from a massive heart attack linked directly to OHSS²⁰.

Dianne Beeson, Professor Emerita of Sociology, has given evidence to a US Congressional hearing²¹ on the dangers that egg extraction for cloning poses to women's health and life. Up to 14 percent of patients undergoing superovulation experience some form of ovarian hyperstimulation syndrome, or OHSS.²² Symptoms of mild OHSS include abdominal discomfort, ovarian enlargement, nausea and vomiting while women who develop severe OHSS may experience loss of future fertility, kidney or multiple organ failure, and death. The frequency of severe OHSS may be as high as 10 per cent.²³

If, contrary to our recommendation above, ova donation is allowed to continue then in the light of these dangers to women's health, it is reckless to propose payment for women which could induce them to submit to a procedure that they would otherwise be unlikely to risk undergoing.

Recommendation 10

The Act should be amended to explicitly prohibit all payment for ova donation, including so-called reimbursement for reasonable expenses.

No use of imported gametes

¹⁷ Braat DDM et al. "Maternal death related to IVF in the Netherlands 1984-2008", *Human Reproduction*, 25 (7): 1782

¹⁸ *Saving Mothers' Lives: Reviewing maternal deaths to make motherhood safer – 2003-2005 the Seventh Report of the Confidential Enquiries into Maternal Deaths in the United Kingdom*, p. 24-25, [http://www.cemach.org.uk/getattachment/26dae364-1fc9-4a29-a6cb-afb3f251f8f7/Saving-Mothers%E2%80%99-Lives-2003-2005-\(Full-report\).aspx](http://www.cemach.org.uk/getattachment/26dae364-1fc9-4a29-a6cb-afb3f251f8f7/Saving-Mothers%E2%80%99-Lives-2003-2005-(Full-report).aspx)

¹⁹ <http://www.handsoffourovaries.com/pdfs/appendixc.pdf>

²⁰ Woman died after starting IVF treatment, *Richmond & Twickenham Times*, 20 April 2005 at: <http://www.richmondandtwickenhamtimes.co.uk/mayor/other/display.var.589076.0.0.php>

²¹ Dianne Beeson, Congressional Hearings, March 7, 2006, House Government Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources -- Hearing on Stem Cell Research at: <http://handsoffourovaries.com/images/beesontestimony.pdf>

²² Hugues, in Vayena, E. et al. (eds). *Current Practices and Controversies in Assisted Reproduction*. World Health Organization, Geneva, Switzerland, pp 102-125 (2002).

²³ Magnus, D. and M .K. Cho, Issues in Oocyte Donation for Stem Cell Research, *Scienceexpress* May 19, 2005, p.1 at: <http://www.scienceexpress.org>

The use of imported gametes would add an extra burden to those already imposed on people conceived using donor gametes because the donor parent would be located overseas, significantly increasing the difficulty for a donor conceived person to establish contact, let alone an ongoing relationship, with his or her genetic father or mother.

If, contrary to our recommendation above, gamete donation is allowed to continue then, in the light of the additional burden that would be imposed on donor conceived people, any use of imported gametes should be prohibited.

Recommendation 11

The Act should be amended to prohibit the use of gametes imported from outside Australia.

Sex selection

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

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

The preference for a male child is very deeply rooted in some cultures.

The availability in recent times of ultrasound technology which allows the prenatal determination of the gender of an unborn child has led to the use of abortion to prevent the birth of baby girls in these cultures. Allowing sex selection in ART would provide another avenue for identifying a girl embryo before birth and discarding her.

Demographers have reported sex ratios at birth outside the biological norm (102-108 boys for every 100 girls²⁴) in the following countries:

*China (118.06); Vietnam (112.3); India (110.4); Azerbaijan (117.6); Georgia (111.9); Armenia (115.8); Montenegro (111.6); Kosovo (111.7); Albania (111.5)*²⁵

In 2011 the Council of Europe passed two resolutions addressing prenatal sex selection including sex selection abortion.

Resolution 1829 on Prenatal Sex Selection was adopted by the Parliamentary Assembly of the Council of Europe on 3 October 2011.²⁶ It reads in part:

²⁴ Fabio Parazzini et al, “Trends in male:female ratio among newborn infants in 29 countries from five continents”, *Human Reproduction*, 1998, v.13:1394–1396, <http://humrep.oxfordjournals.org/content/13/5/1394.full.pdf>

²⁵ Christophe Z Guilmoto, *Sex imbalances at birth in 2010: some theory and a few recent estimates*, http://www.ceped.org/IMG/pdf/sex_imbalance_at_birth.pdf

²⁶ <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1829.htm>

1. A preference for sons and discrimination against women are so widespread in the world that, spontaneously or under pressure, millions of women decide not to give birth to daughters, who are considered as a burden for their family and unable to perpetuate the family lineage.

2. Sex selection is a huge problem in some Asian countries, where the selective abortion of females, together with the killing of female newborns has been practised for decades. Prenatal sex selection is indicated by a "skewed sex ratio", meaning a departure from the natural average sex ratio at birth of 105 boys for 100 girls. This tends to increase as the number of children goes up in a family, or when there are legal or economic restrictions to the size of the family.

3. There is strong evidence that prenatal sex selection is not limited to Asia. In recent years, a departure from the natural sex ratio at birth has been observed in a number of Council of Europe member states and has reached worrying proportions in Albania, Armenia and Azerbaijan, where the sex ratio at birth is 112 boys for 100 girls and in Georgia where it is 111 boys for 100 girls.

4. The Parliamentary Assembly condemns the practice of prenatal sex selection as a phenomenon which finds its roots in a culture of gender inequality and reinforces a climate of violence against women, contrary to the values upheld by the Council of Europe.

5. Recalling the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210), the Assembly believes that the social and family pressure placed on women not to pursue their pregnancy because of the sex of the embryo/foetus is to be considered as a form of psychological violence and that the practice of forced abortions is to be criminalised.

6. The Assembly wishes to warn Council of Europe member states against the social consequences of prenatal sex selection, namely population imbalances which are likely to create difficulties for men to find spouses, lead to serious human rights violations such as forced prostitution, trafficking for the purposes of marriage or sexual exploitation, and contribute to a rise in criminality and social unrest.

7. In line with the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164), the Assembly believes that, in the context of assisted reproduction technologies such as preimplantation genetic diagnosis, prenatal sex selection should be resorted to only to avoid serious hereditary diseases linked to one sex.

8. In view of these considerations, the Assembly calls on the member states to:

8.1. collect the sex ratio at birth, monitor its development and take prompt action to tackle possible imbalances;

8.2. **encourage research on sex ratios at birth among specific communities;**

8.3. collect data on sex selection in the context of the use of all techniques of medically assisted procreation;

8.4. promote research on the causes of prenatal sex selection and its social consequences;

8.5. encourage national ethics bodies to elaborate and **introduce guidelines for medical staff, discouraging prenatal sex selection by whatever method**, unless justified for the prevention of serious sex-linked genetic diseases;

8.6. recommend that all relevant public authorities issue guidelines to all medical staff who work in this field so that when information is provided on the sex of the foetus – in line with existing legal regulations – such information is presented positively, irrespective of the sex;

8.7. **introduce legislation with a view to prohibiting sex selection in the context of assisted reproduction technologies and legal abortion**, except when it is justified to avoid a serious hereditary disease;

The second resolution more specifically addressed the situation in member states Albania, Armenia, Azerbaijan and Georgia. Its second paragraph is insightful and pertinent to this inquiry:

Prenatal sex selection calls into question the core values upheld by the Council of Europe, such as equality and dignity of human beings, non-discrimination and the protection of the individual's dignity and fundamental rights with regard to the applications of biology and medicine. It also touches upon core activities of the Council of Europe such as the promotion and protection of human rights, the promotion of gender equality and the prevention of and fight against gender-based violence.²⁷

These values which are violated by prenatal sex selection are core human values shared by Australians.

The Council of Europe's call for research into the sex ratio at birth among specific communities is noteworthy.

There is research evidence from Canada, the United States and the United Kingdom of sex ratios at birth outside the biological norm for specific migrant communities in those countries.

This evidence points clearly to the use of gender selection abortion to give effect to cultural preference for a male child.

A detailed analysis of Canadian census data (2001, 2006) by Douglas Almond and colleagues found that the sex ratio at birth was 108 boys to 100 girls for Indian and East Asian immigrants compared to 105 to 100 for Canada as a whole for first children. For third children were the first two children were girls the data showed very significant distortions in the sex ratio at birth - 190 boys per 100

²⁷ Parliamentary Assembly, Council of Europe, Resolution 1979 (2011) Prenatal Sex Selection, Adopted 3 October 2011, <http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/EREC1979.htm>

girls for Indian families; 139 boys per 100 girls for families from China, Korea and Vietnam – compared to 106 boys per 100 girls for Canada as a whole.²⁸

This finding was mirrored in research on singleton live births in Ontario from 2002 to 2007 which found that the male-female ratio for second births was 120 to 100 for women born in South Korea and 111 to 100 for women born in India. For women born in India the ratio for third children was 136 boys to 100 girls; for fourth or subsequent children the ratio was 125 boys for 100 girls.²⁹

A corresponding analysis by Jason Avebrea of United States data revealed a sex ratio at birth for Indian and Chinese immigrants having third or fourth children of between 112.7 and 119.2 boys per 100 girls. Avebrea concludes that there are over two thousand girls missing due to gender selection among these communities in the United States between 1991 and 2004.³⁰

Additional US research by Douglas Almond and Lena Edlund using census data from 2000 shows that among Chinese, Korean and Indian families the sex ratio of the second child if the first child was girl was 117 boys per 100 girls. If the first two children were girls the sex ratio for the third child was 151 boys per 100 girls.³¹

Research in England and Wales by Sylvie Dubuc and David Coleman shows that among India-born women the sex ratio at birth for all third children was 114.4 boys per 100 girls for births between 2000 and 2005.³²

SBS recently commissioned a similar study on Australian data.

The study examined Australian Bureau of Statistics data on births to parents who were both born in either India or China, comparing the sex ratio of these births for each year from 2003 to 2013 for these two groups with that of the overall Australian sex ratio of births.

The study found that over this period the national sex ratio at birth was 105.7 boys for every 100 girls. For children born to two Chinese born parents the sex ratio was 109.5 boys for every 100 girls

²⁸ Douglas Almond, Lena Edlund and Kevin Milligan, *O sister, where art thou?: The role of son preference and sex choice: Evidence from immigrants to Canada*, National Bureau of Economic Research, October 2009, p. 38, www.aeaweb.org/aea/2011conference/program/retrieve.php?pdfid=48

²⁹ Joel G. Ray, David A. Henry, Marcelo L. Urquia, "Sex ratios among Canadian liveborn infants of mothers from different countries", *Canadian Medical Association Journal*, 2012, 184:E492-E496, <http://www.cmaj.ca/content/184/9/E492.full.pdf>

³⁰ Jason Abreveya, "Are There Missing Girls in the United States?: evidence form birth data", *American Economic Journal: Applied Economics*, 2009,1(2):1–34, Table 4 on p.13 and p.27, <https://www.utexas.edu/cola/files/417316>

³¹ Douglas Almond and Lena Edlund, "Son-biased sex ratios in the 2000 United States Census", *Proceedings of the National Academy of Sciences*, 2008, 105:5681-5682, <http://www.nrlc.org/Sex-SelectionAbortion/ColumbiaUniversityStudySexRatios.pdf>

³² Sylvie Dubuc and David Coleman, "An Increase in the Sex Ratio of Births to India-born Mothers in England and Wales: Evidence for Sex-Selective Abortion", *Population and Development Review*, 2007, 33:383–400, Table 4 on p. 389, http://www.spsw.ox.ac.uk/fileadmin/documents/pdf/WP35_Sex-ratio_of_births_to_India-born_mothers.pdf

and for children born to two Indian born parents the sex ratio was 108.2 boys born for every 100 girls.

Demographer Christophe Guilmoto concluded from the data that there were 1,395 missing girls from the Indian and Chinese communities in Australia between 2033 and 2013.³³

Sex selection using any means in ART procedures should be prohibited by law.

Recommendation 12

The Act should be amended to explicitly prohibit sex selection.

SURROGACY ACT 2008

Surrogacy involves the making of an arrangement before the conception of a child, in which a woman who intends to become pregnant and to carry a child during pregnancy (the *birth mother*) agrees that she will surrender the child after his or her birth to be raised by the person or persons who commission her to carry the child (the *intending parent or parents*).

Surrogacy arrangements should be clearly distinguished from adoption, including embryo adoption. Adoption, is an arrangement made after the child is already in existence, in the best interests of the child. The process of adoption allows birth parents who feel unable to support or rear the child, to decide freely to give up their position as the legal parents of a child and allow other persons to become the legal parents of the child. Embryo adoption involves a woman carrying and then caring for a child relinquished or abandoned as an embryo.

Adoption, including embryo adoption, primarily serves the needs of an existing child for parents who can raise him or her. Adoption may also serve the needs of relinquishing parents who freely decide that they are not able to raise a child, and the needs of well balanced, healthy and committed childless couples who wish to raise a child. However the needs of the relinquishing parents and adopting parents are secondary. The primary concern in adoption is the best interests of an existing child.

Surrogacy, by its very nature, reverses the order of these concerns. Surrogacy primarily serves the wishes of the intending parents (or parent) to procure a child. In surrogacy, the child, who does not yet exist, is brought into existence as the result of an arrangement between the intending parents (or parent) and the surrogate mother. The child is the object of this arrangement, essentially treated as a “deliverable commodity”, notwithstanding the ban on commercial surrogacy and the need for courts to make parentage orders. Surrogacy subordinates, to the interests of the intending parent or parents, the best interest of the child by ignoring or downplaying the natural bonding of a child to the birth mother during pregnancy as well as his or her lifelong needs for a sense of identity, family and belonging.

³³ Naomi Tsvirko, “How Australian parents have shamefully aborted more than 1,400 unborn babies in the last decade – just because they were girls”, *Daily Mail*, 19 August 2015, <http://www.dailymail.co.uk/news/article-3203013/Gender-selection-abortions-happening-Australia.html> ; “The news ‘it’s a girl’, still unwelcome in some cultures in Australia”, *SBS Radio*, 17 August 2015, updated 21 August 2015, <http://www.sbs.com.au/radio/storystream/news-its-girl-still-unwelcome-some-cultures-australia>

Surrogacy puts into effect a plan that, before the child is conceived, intentionally fractures the child's life by separating the gestational mothering of the child from its subsequent upbringing.

Surrogacy may result in harm to the child whom the birth mother relinquishes, breaching the natural bond and potentially leading to identity problems in the child.

Children born as a result of a surrogacy contract are likely to share the "identity bewilderment" experienced by children born as a result of donor insemination as discussed above. Issues of identity, belonging and wantedness are likely to be important for children conceived as a result of a surrogacy contract. They may yearn to know, "*Who am I? How could my mother give me away?*"

Other harms to the child that could follow from allowing surrogacy include the possible risk of rejection by one or both parties due to disability or other unwanted characteristics. The very fact of "commissioning" a child tends to reduce the child to an object rather than a person in his or her own right.

The birth mother could abort the pregnancy in the event of a prenatal diagnosis of disability or imperfection or the non-preferred sex with or without the consent or urging of the intending parent or parents, although she could not be required to do so. A child born with a disability could be rejected by both the commissioning parents and by the birth mother, with no-one willing to take parental responsibility for the child.³⁴

Harm may arise if more than one baby were to be conceived when only one baby was desired. In 2001 a UK surrogate mother carrying twins sued a Californian couple who disavowed the contract when she refused to abort one of her unborn babies.³⁵ Then again, the birth mother might take action to end the life of one or more of the unborn twins against the wishes of the intending parent or parents.

A persuasive case against permitting surrogacy was published in the progressive French journal *Liberation* by Myriam Szejer, a child psychiatrist and Jean-Pierre Winter, a psychoanalyst.

Szejer and Winter write that:

For the defenders of surrogacy, parental love will prevent the child from suffering from the after-effects of this mode of conception. It is forgotten that the prescription of in-vitro fertilisation (IVF) necessary for surrogacy is the equivalent of 'an order to abandon one's child'.

The importance of epigenetics on the physical and psychological development of the fetus is known, as well as the emotional bond between the pregnant woman and the child she is carrying and the deleterious effects of the separation mother and baby at birth. In order not to cut this link, doctors place the newborn on the mother's womb after delivery, so as to restore its antenatal benchmarks which are stored and recorded for him as identity. They invented kangaroo care, the 'skin to skin' contact of mother and baby while in hospital, because it is in the early postpartum period that the foundations of self-image are built. Pediatricians and

³⁴ "Spurned baby sparks action on surrogate births" in *The Australian*, 27/1/1983.

³⁵ "Surrogate mother sues California couple", 14/8/2001:
<http://archives.cnn.com/2001/LAW/08/13/surrogate.dispute/index.html>

midwives have seen how these practices improved the prognosis of survival, length of hospitalization, and the success of breastfeeding. How could doctors now prescribe abandonment of the newborn child? It is not gametes that the newborn recognizes as mother, but the woman who bore him. We know that the wounds of abandonment function as a bilateral amputation of Self. The most successful adoptions fail to erase the traces, conscious and unconscious of this abandonment, both for the psyche of the child and for the mother who gave up part of herself.

In the case of surrogacy this separation is legally programmed and not the result of a tragedy of life, as in adoption.

We should oppose a practice of which the child is the victim and which opposes the interest of the mother against that of the child, and even of other players. We need to be concerned about the future of all the players in surrogacy: the mother, the baby, but also the husband of the surrogate mother or her own children. The whole family is affected by this act, as would society be, as a result of the transformation of the laws on filiation that would derive from it. When it ratifies this theory that separates mind from body, the social structure is responsible for doing so.³⁶

Recommendation 13

The Surrogacy Act 2008 should be amended to ban all attempts to enter into a surrogacy arrangement of any kind and to nullify all such arrangements at law.

International commercial surrogacy arrangements

Since the passage of the *Surrogacy Act 2008*, similar laws passed in Queensland³⁷ and New South Wales³⁸ have incorporated an explicit provision to ensure that it is an offence for a person ordinarily resident in the respective state to enter into a commercial surrogacy arrangement even if all the relevant acts take place outside the State. A similar provision is in place in the Australian Capital Territory³⁹.

This is an important provision given the known practice of seeking surrogate mothers in countries such as India where they are subject to exploitation.

A January 2012 article by Ishika Arora in *Prospect* the journal of international affairs from the University of California, San Diego, entitled *Wombs for rent: outsourcing surrogacy to India*, helpfully outlines some of the issues involved.⁴⁰ Indian women are paid about \$7000 to act as surrogate mothers. The standard contract does not give the surrogate mother any rights over the child after it

³⁶ <http://www.liberation.fr/rebonds/340657.FR.php>

³⁷ Surrogacy Act 2010 [Qld], Section 54

³⁸ Surrogacy Act 2010 [NSW], Section 11

³⁹ Parentage Act 2004 [ACT], Section 45

⁴⁰ <http://prospectjournal.ucsd.edu/index.php/2012/01/wombs-for-rent-outsourcing-surrogacy-to-india/>

is delivered. It is essentially an enforceable commercial contract. Up to five embryos are routinely implanted in surrogacy procedures to maximise the chance of pregnancy despite this being contrary to IVF best practice which limits embryo transfers to two at a time because of the dangers both to women and to children from possible multiple births. Many surrogate mothers are illiterate and unable to understand the risks of these procedures even when they are specified. Lower class women in India tend to live in joint families for both social and economic purposes. In such housing situations, the woman can be subjugated by her husband and mother-in-law, the matriarch of the household, who force her into a surrogacy contract in order to maintain the family's financial stability.

In May 2012 a 30-year-old surrogate mother died at an Ahmedabad hospital while carrying a child for an American couple. The woman, Premila Vaghela, was eight-month pregnant and is survived by two children. The medical director of a surrogacy clinic in Anand, Dr Nayana Patel is reported to have said, "*At present, the contracts signed between the surrogate mother and the couple (whose baby she is carrying) does not talk of any compensation in case of death of the surrogate mother. Those who agree to become surrogates are told well in advance about the complications involved in pregnancy.*"⁴¹

It would clearly be appropriate for the Western Australian *Surrogacy Act 2008* to have a provision ensuring that persons ordinarily resident in Western Australia cannot engage in conduct overseas in relation to a commercial surrogacy arrangement that is illegal in Western Australia and in many cases would involve the exploitation of women.

Recommendation 14

The Surrogacy Act 2008 should be amended by inserting a new Section 5A as follows:

5A. Application of Part outside Western Australia

This Part applies to and in respect of conduct engaged in outside Western Australia by a person who is ordinarily resident in Western Australia at the time the conduct is engaged in.

Parentage testing

Former MLA, Mr Peter Abetz observed during the Legislative Assembly debate on the *Surrogacy Amendment Bill 2008* that up to twenty per cent of children allegedly conceived pursuant to a surrogacy arrangement were in fact the natural children of the surrogate mother and her husband or de facto male partner.⁴²

The obvious potential for heartbreak and tragic complications that could follow if this were discovered after a parentage order has been made could easily be avoided by making parentage testing a required element for the approval of a surrogacy arrangement and the making of a parentage order.

⁴¹ Avinash Nair "Govt mouthpiece bats for surrogacy tourism", Express India, 21 May 2012, <http://www.expressindia.com/latest-news/govt-mouthpiece-bats-for-surrogacy-tourism/951861/>

⁴² Hansard, Legislative Assembly, Tuesday 2 December 2008, p. 748 [http://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/8F822FE13878F9C2C825758A001A9BCC/\\$File/A38%20S1%2020081202%20All.pdf](http://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/8F822FE13878F9C2C825758A001A9BCC/$File/A38%20S1%2020081202%20All.pdf)

As well as the psychological and social aspects, the child has a fundamental right to accurate information on his or her genetic parentage, not least because of the implications for having a complete medical history.

Recommendation 15

The Surrogacy Act 2008 should be amended as follows:

(1) In section 14 insert in alphabetical order:

parentage testing procedure has the meaning given in the Family Court Act 1997 section 5(1).

(2) After section 17(d) insert:

(ea) the Council is satisfied that the birth mother and her husband or de facto partner have agreed to give consent for the child to undergo a parentage testing procedure following the child's birth; and

(3) After section 20(5) insert:

(6) Before the court considers the application, a certified copy of the results of a parentage testing procedure undertaken to determine the parentage of the child must have been lodged with the court.

(4) After paragraph 21 (2) (f) insert:

(ga) the child is not the genetic child of the birth mother and her husband or de facto partner; and

(5) Delete section 21 (5) and insert:

(5) For the purposes of subsection (2)(ga), a child is the genetic child of the birth mother and her husband or de facto partner if the child was conceived from the egg of the birth mother and the sperm of the birth mother's husband or de facto partner.

Surrogacy arrangements should be unenforceable

Section 7(1) of the Act wisely enunciates the public policy position that surrogacy arrangements are unenforceable.

A surrogacy arrangement is not a contract for one party to produce and hand over a child to another party.

However, it seems that during the passage of the *Surrogacy Bill 2008* this clear public policy position was muddled by other understandings of surrogacy that treat it as an enforceable contract where the birth mother is considered to be merely a living incubator. This view demeans the inherent dignity of women and their capacity for motherhood.

For example section 13(2) of the Act provides that *“For the purposes of this Act it is presumed to be in the best interests of the child for the arranged parents to be the parents of the child, unless there is evidence to the contrary.”*

This presumption is unwarranted.

There is scientific evidence that during pregnancy and child birth the unborn child and his or her mother form a strong mutual bond which is based on human biochemistry and other deeply rooted biological factors.

Oxytocin levels in a pregnant woman have been shown to predict her bonding behaviour with the child after birth.

Oxytocin levels at early pregnancy and the postpartum period were related to a clearly defined set of maternal bonding behaviours, including gaze, vocalizations, positive affect, and affectionate touch; to attachment-related thoughts; and to frequent checking of the infant.⁴³

At birth, the baby’s physiology is fully functional to sustain life, but needs nurturing and protection. So that, from the moment of birth the infant is stormed with sensations and is programmed to learn from constant repetitions. The sensations that the baby receives while being nurtured and kept safe, provide the stimuli that triggers the Bonding Process. The experiences of touch (mouth while feeding, massage, skin-to-skin), sight (mother’s face), and sound (mother’s voice), all become imprinted in the brain, and stimulate the pleasure pathways and release endorphins. It is now understood that the hormone oxytocin, produced after delivery and during lactation, plays a vital part in initiating and sustaining the neurological bonding process in the baby, and in influencing the mother’s specific bonding behaviours with the baby.⁴⁴

Removing a child from the birth mother is not self-evidently in the best interests of the child. This legal presumption is a legal fiction without foundation in scientific fact.

Abolishing this provision would allow a court to consider all relevant matters, including the natural bond between a child and its birth mother, in determining child’s best interests.

The provisions allowing the court to dispense with consent from the birth parents are simply not compatible with the public policy position that a surrogacy arrangement is unenforceable.

Recommendation 16

The Surrogacy Act 2008 should be amended as follows:

(1) Section 13 (2) should be deleted

⁴³ Ruth Feldman et al., “Evidence for a neuroendocrinological foundation of human affiliation : plasma oxytocin levels across pregnancy and the postpartum period predict mother-infant bonding”, *Psychological Science*, 2007, 18:965-970

⁴⁴ Arturo Giustardi et al., “Mother infant relationship and bonding myths and facts”, *Journal of Maternal-Fetal and Neonatal Medicine*, 2011; 24: 59-60

[Note: This section provides that “For the purposes of this Act it is presumed to be in the best interests of the child for the arranged parents to be the parents of the child, unless there is evidence to the contrary”.]

(2) In section 21(3) delete “In the circumstances identified in subsection (4) or if” and insert:

If

(3) Delete section 21(4).

Rights of the birth parents: comparison with the Adoption Act 1994

There is a clear discrepancy between how birth parents are treated under the *Surrogacy Act 2008* and the provisions of the *Adoption Act 1994*.

Under the *Adoption Act 1994* the consent of the birth parents to the adoption can only be dispensed with in extraordinary circumstances. Additionally a cooling off or revocation period of twenty eight days is required after consent is given before an adoption order can be finalised.

Under the *Surrogacy Act 2008* the consent of birth parents can be readily dispensed with under very broad circumstances and there is no opportunity to revoke consent before the finalisation of a parentage order.

Given that the provisions in the *Adoption Act 1994* reflect the sensibilities the community has developed toward relinquishing mothers based on long experience with adoption it would seem more prudent to follow the same approach to relinquishing mothers involved in a surrogacy arrangement rather than assume, in effect, that these women are mere incubators whose consent and feelings can be ignored.

The *Surrogacy Act 2008* should be amended so that the rights given to birth parents under that Act mirror those given to birth parents under the *Adoption Act 1994*.

Recommendation 17

The Surrogacy Act 2008 should be amended as follows:

In section 21(2):

(a) delete paragraph (d) and insert:

(d) except to the extent that subsection (3) authorises the court to dispense with the requirement for a birth parent’s consent —

(i) the birth parents have, no sooner than 28 days after the birth of the child, freely consented to the making of the order; and

(ii) a period of at least 28 days has elapsed since the consent was given and the consent has not been withdrawn; and

This submission was prepared by Richard Egan for *Defend Human Life!* [REDACTED]
[REDACTED]

Richard J. Egan

16 March 2018