Women's reproductive rights: The legal limits

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Lesbia Harford Oration, Melbourne, 23 July 2003

Periodicity

My friend declares
Being woman and virgin she
Takes small account of periodicity

And she is right;
Her days are calmly spent
For her sex-function is irrelevant.

But I whose life
Is monthly broken in twain
Must seek some sort of meaning in my pain.

Women, I say,
Are beautiful in change,
Remote, immortal, like the moon they range;

Or call my pain
A skirmish in the whole
Tremendous conflict between body and soul.

Meaning must lie
Some beauty surely dwell
In the fierce depths and uttermost pits of hell.

Yet still I seek
Month after month in vain
Meaning and beauty in recurrent pain.

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Lesbia Harford 'remains one of the only Australian poets and one of the few anywhere have written about menstruation and other intimate aspects of women's lives'.[2] In fa women's reproductive lives have been largely shrouded in silence, taboos or, in t context of tonight's address, may seem to have attracted special laws, at least when th need to use reproductive technology for childbearing.

Tonight's paper focuses on two questions. First, why should the state regulate so aspects of reproductive activity but not others? And secondly, to what extent is the law 'intrusion' gender-based?

Why should the state regulate some aspects of reproductive activity but not others

In considering why the state should regulate some aspects of reproductive activity but n others, one might think about the range of decisions that women may make. Look at n and the decisions I could make:

- I can take contraceptive measures to prevent or defer the birth of children; adopt a more permanent, though sometimes reversible, procedure of surgic sterilisation, such as a tubal ligation.
- I can have a sterilisation reversed, so that I can conceive again.
- If I have difficulty conceiving, other surgical options are available, such as repa of my fallopian tubes.
- If I am infertile, or my partner is infertile, I can seek professional help. I can u donor sperm to achieve a pregnancy, either by having sexual relations with t donor or inseminating myself with his sperm; or by artificial insemination b donor (AID).
- I can use *in vitro* fertilisation (IVF) or another form of assisted reproduction su as gamete intra-fallopian transfer (GIFT) to achieve a pregnancy, perhaps wi donated sperm, ova or both, or a donated embryo.
- I can ask my sister or a friend to have a baby for me.
- I may choose to adopt a child.
- And I may terminate a pregnancy if my child is likely to be born disabled, or i do not want to have a child.

Each of these options involves a decision that may offend some members of t community, especially those concerning contraception and abortion. Also, they may affect people other than those directly concerned:

- The *father* of my child (or my potential child) clearly has an interest. He ma want me to have the child - or not have it.
- The *child* obviously has an interest - in being born or not.
- And, if *other people* participate in the conception, they have an interest - game donors, their spouses and even their children and potential children. They ma

2 Questionmark Collective, 'Lesbia Harford: The rebel girl' in forthcoming anthology on Australian Troublemakers to be published Scam Publications. Melbourne: <http://www.takver.com/history/harford.htm> (21 July 2003).

want to see the child; find out specific thing about the child, such as medic information; have an ongoing relationship with the child; or be totally protect from any relationship, especially one involving financial obligations.

Yet some of these decisions I can make entirely by myself. I can take contraceptives, sterilised or un-sterilised (whether my partner wants children or not). If I becon pregnant, I can have the pregnancy terminated (provided my case meets the leg requirements for abortion[3]); and there is no law that my partner can use to prevent r doing so.[4] If I take a lover or ask him to help me to get pregnant by artificial inseminati that I perform myself, there are no legal restrictions to prevent me engaging in tho activities. I can even arrange for someone else to have a child for me, though there m be legal issues later concerning legal responsibilities in rearing the child.

Also, I can do most of these things regardless of my marital status, my sexual orientatic my socio-economic background and my general health. If I am gay or single, dru dependent or manic depressive, the state will not prevent me having children in whatev way I choose. Legally, I can engage in one-night stands or have multiple sexual partne without taking any precautions to avoid pregnancy. I can then take whatever steps I li to achieve pregnancy, provided that does not require the resources of an assiste reproduction program. We live in a liberal democracy and people are free to make the own decisions, especially on personal moral issues. The law will not intervene unless place my child at risk by abuse or neglect and even then, the law will not intervene ur the child is actually born. [5]

To say that there are no laws affecting these activities is somewhat misleading. Even they are not specifically regulated by legislation, there are laws that regulate the incidentally. Hospitals and day care centres, for example, are required to provide sa premises and properly trained staff. Health professionals are required by the law contract and negligence to take reasonable care in looking after their patients. Th includes providing sufficient information to patients about medical procedures to enab

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3 Throughout Australia, the criminal codes in all jurisdictions except the Australian Capital Territory continue to recognise the concept of unlawful abortion: *Crimes Act* 1900 (NSW) ss 82, 83; *Criminal Code Act* (NT) 1983 ss 172, 173, 174; *Criminal Code A* 1899 (Qld) ss 224, 225, 226 and 282; *Criminal Law Consolidation Act* 1935 (SA) ss 81, 82, 82A; *Criminal Code Act* 1924 (Tas) ss 134, 135, 164; *Crimes Act* 1958 (Vic) ss 65, 66; *Criminal Code* 1913 (WA) ss 199, 259, 268–9 and *Health Act* 1911 (WA) s 334. S Natasha Cica, *Research Paper 1*, 1998-99 Abortion Law in Australia Laws and Bills Digest Group, 31 Aug 1998: http://www.aph.gov.au/library/pubs/rp/1998-99/99rp01.htm; Loane Skene, Law and Medical Practice, Butterworths, Sydney, 2nd e (in press) ch 12.

4 Consent of the mother to an abortion is sufficient authority for the doctor to perform it (provided it is lawful). Consent is not need from the father of the child and he has no legal right to prevent an abortion being performed, even if there is a doubt about whether is lawful in the circumstances. In *Attorney-General (Queensland) (ex rel Kerr) v T* [1983] 1 Qd R 404; (1983) 46 ALR 285 (HCA) and *F v F* (1989) FLC 92-03, biological fathers were refused injunctions to prevent abortions being carried out

5 Before birth, the child is protected by the criminal law on abortion and child destruction; see Skene, note 3 above. In the early sta of pregnancy, the mother's wishes are paramount. The English Court of Appeal, on 7 May 1998, confirmed earlier judicial decision England (and also in some American States) that a pregnant woman is entitled to refuse medical intervention even if her unborn ch is at risk: *R v Collins; ex parte S* [1998] 3 All ER 673. See also, M Boyle (2003) 29 (4) Journal of Medical Ethics; and my respons (in press).

them to make informed decisions about them. And there are rules for determining w has responsibility for looking after children and maintaining them financially. These la apply however the child is conceived.

Areas specifically regulated

There are two areas related to reproduction, however, where the law specifically regula the circumstances in which an activity may be undertaken. One is *adoption*, where th are laws limiting the people who are able to adopt a child.[6] In Victoria, you have to married,[7] within a certain age bracket,[8] have a 'good background'[9] and be socially a economically able to look after the child.[10] A formal process is also set out for vetti prospective parents.[11] Relinquishing parents must have counselling.[12] Many people a excluded and you cannot adopt a child unless you follow the rules.

The purpose of these laws is obviously to protect the child[13] - to ensure that the ch goes to a good home and will be well cared for. Note that adoption is different from t other procedures mentioned earlier in that it deals with a child who is already in exister - the question is what should be done to achieve the best outcome for a living child. Th are parallels with the Family Law Act 1975 (Cth) which also applies the standard of t 'best interests of the child' in deciding issues concerning the welfare of children after t breakdown of a marriage.[14]

The other activity that is governed by specific legislation in some jurisdictions is *IV* (and other forms of assisted reproduction). As with adoption, people cannot engage this activity unless they follow the rules. Consider the constraints imposed by t Victorian legislation on IVF (the Infertility Treatment Act 1995), for examp Initially, applicants had to be married: s 8(1)(b). After legal challenges by couples in facto relationships,[15] this was extended to include couples in a stable de fac

6 For example, *Adoption Act 1984* (Vic); *Adoption Regulations* 1998 (Vic).

7 *Adoption Act* 1984 (Vic) s 11(1)(a); married for not less than two years; includes traditional Aboriginal marriages and de factos: s 11(1)(b)-(d). The court may make an adoption order in favour of one person where special circumstances exist: s 11(3). The Family Court can also make adoption orders in favour of marrie d or de facto spouses of a parent (*Family Law Act* 1975 (Cth) ss 60D(1) an 60G) but step-parent adoption is not available to same sex couples.

8 *Adoption Act* 1984 (Vic) s 13(1)(a): at least 18 years; s 13(1)(b): at least 18 years older than the child; s 13(1)(c): not more than 4 years older than a child under 10; s 13(1)(d): not more than 45 years older than a child who has attained the age of 10.

9 *Adoption Regulations* 1998 (Vic) regs 14, 35.

10 *Adoption Regulations* 1998 (Vic) Reg 35,

11 *Adoption Act* 1984 (Vic) s 15(1)(a); *Adoption Regulations* 1998 (Vic) reg 35.

12 *Adoption Act* 1984 (Vic) s 35(1)(a).

13 Section 9 of the *Adoption Act* states that the welfare and interests of the child are the paramount consideration.

14 For example, s 63F(2): court may vary child welfare provisions in a parenting plan if it considers the variation in the best interes of the child; s 68F: how a court determines what is in a child's best interest. The history of the notion of the best interests of the chil being the "paramount consideration" is given in the looseleaf commentary on the Act [s 68F(5)] *Australian Family Law*, Vol 1, *Legislation* (Butterworths, 1997).

15 In *Pearce v South Australia Health Commission* (1996) 66 SASR 486, the South Australian Supreme Court ruled that reproducti technology legislation seeking to limit infertility services to heterosexual married women breached the *Sex Discrimination Act* In

relationship,[16] but single and non-heterosexual people were excluded. Later, th limitation was challenged and single women were allowed access to IVF;[17] but, Victoria, the issue of same-sex couples has not arisen before the courts.[18] It may be th single women will be admitted only if they meet the other criteria for admissio especially being infertile; and that may mean *medically*, not 'socially', infertile.[19] If that so, women who have not tried to become pregnant in the 'usual' way, by sexu intercourse with a male partner, may not qualify unless they have a physical conditi that is proof of 'medical infertility'.[20] Given the uncertainties in this area, it is n surprising that the Victorian Law Reform Commission has a new Reference on *Assist reproductive technology and adoption: social, ethical and legal issues regardir 'eligibility criteria'*, which requires the Commission to make recommendations abo expanding eligibility criteria for assisted reproductive technology and adoption.[21]

There are many other statutory requirements before one can undertake IVF:

- Written consent must be obtained from the woman (and also from her spouse de facto spouse, if she has one[22]) (ss 8(2), 9(1)(a),(b)) and lodged with the cen at which the procedure will be done, or with the woman's doctor: s 9(2)(a),(b).
- Consent must also be obtained from donors and their spouses: s 13 (but not th children, even if they may appear to have an interest).

MW, DD, TA & AB v Royal Women's Hospital [1997] HREOC 6, the Human Rights and Equal Opportunity Commission held that defendant Victorian hospitals had unlawfully discriminated against unmarried couples in IVF programs.

16 *Infertility Treatment Act* 1995 (Vic) s 3; definition of "husband", "wife" and "spouse" includes de facto spouses (defined as livi together on a genuine domestic basis though not married).

17 *McBain v State of Victoria* [2000] FCA 1009 (28 July 2000); Federal and State cases and legislation are available at: <http://www.austlii.edu.au>; discussed by Kristen Walker, '1950s Family values v human rights: In vitro fertilisation, donor insemination and sexuality in Victoria' (2000) 11 *Public Law Review* 1, at 6-8; L. Skene, 'Voices in the ART [Assisted Reproducti Technology] debate' (2001) 20 (1) *Monash Bioethics Review* 9-23. A later appeal to the High Court by the Church was unsuccess Simon Evans and Stephen Donoghue neatly summarise the findings in the High Court Appeal in a post script to their article, 'Stand to raise constitutional issues in Australia'; in Gabriel Moens and Rodolphe Biffot, *The Consequence of Legal Systems in the 21st Century – An Australian Approach*, CopyRight, Brisbane, 2002, 107.

18 Compare *JM v QFG & GK* [1998] QCA 228 (QCA), in which a Queensland lesbian failed in a claim alleging indirect discrimination in being refused access to an infertility program.

19 Premier Bracks was reported to have 'reaffirmed his belief that IVF should be available for infertile women and 'not for those wh choose it for social reasons or for their own life-style choices': Michael Gordon and Darrin Farrant, 'Howard sparks IVF storm', *Th Age*, 2 Aug 2000. Later, the Infertility Treatment Authority (ITA) advised treatment agencies to offer ART only to medically infert single or lesbian women: Infertility Treatment Authority Newsletter (Aug 2000).

20 Compare Infertility Treatment Act 1995 (Vic) s 8(3): persons who may undergo treatment procedures.

21 Terms of Reference. The proposed reference is extensive and includes many of the issues in this paper, including the best interes of the child; and 'the effects of the arrangements and agreements made by people who are having children without the assistance o licensed infertility clinics but who are not conceiving by sexual intercourse': ibid.

22 The statutory requirement for consent by a spouse must be read in the light of Sundberg J's judgment in McBain, note 16 above; under that judgment the Act is invalid to the extent that it excludes unmarried women from access to IVF in Victoria on the ground their marital status.

- All consents must be 'informed' (as with any medical procedure[23]) and there a detailed provisions concerning information-giving.[24]
- The procedure may be performed only at a centre licensed under the Act (s 6(c and the centre must keep the signed consent forms and details of the outcomes all procedures (pregnancy, births, miscarriages): s 62.
- Couples must undertake counselling (s 11); and so must donors: s 16. Matters f counselling are listed in detail in the Infertility Treatment Regulations 1997 (Vic
- The Infertility Treatment Authority established by the Act (s 121(1)) must keep central register of births (s 68) and a register of donor treatment procedures: s 82
- Certain procedures are specifically prohibited, such as cloning (s 47); fertilisi human gametes with animal gametes (s 45(1)(a));[25] and research on an embr after syngamy: s 26.[26]
- IVF must not be used for sex selection except to avoid transmitting genet abnormalities or disease: s 50.
- Commercial surrogacy and advertising in relation to surrogacy are also prohibit (ss 59, 60) and surrogacy agreements are void: s 61.

Reasons for regulating IVF and other ART procedures

The policy reasons for this legislation are multi-faceted. Parts are to promote the *be interests of the child*, like adoption laws. Applicants had to be married (or in a stable facto relationship) because it was assumed that a child would have a happier life in t "ideal family" of heterosexual married parents and child/ren. As noted earlier, the init requirement in Victoria was de jure marriage.[27] That requirement was imposed becau of the general assumption that parents who are married to each other are more likely stay married, creating a stable environment for the child; though various studies sugg that married couples may not, in fact, be much more likely to stay together than de fac ones.

The central registration of details of births from IVF may also provide importa information for the child, both non-identifying and identifying. Under the Infertili Treatment Act 1995 (Vic), identifying information will be available to children wh they reach the age of 18: s 79(1)(b). Counselling is required before identifying inf mation is given (s 80(2)(a)) and the Authority must make reasonable efforts to advise t donor and suggest counselling for the donor: s 80(2)(b)(i)-(ii).[28] Identifying informati

23 *Rogers v Whitaker* (1992) 175 CLR 479 (HCA).

24 *Infertility Treatment Act* 1995 (Vic) ss 10, 21; *Infertility Treatment Regulations* 1997 (Vic).

25 With the exception in s 45 that animal ova may be mixed with human sperm where prescribed by the Regulations and carried ou for diagnostic purposes only.

26 This is distinct from the prohibited procedures in Pt 5 of the Act in that the Authority is prohibited from approving this type of research and it is an offence to conduct research without approval from the Authority

27 *Infertility (Medical Procedures) Act* 1984 (Vic) ss 10(3)(a), 11(3)(a), 12(3)(a), 13(3)(a); 13A(3)(a). Although ss 3(2)(a) and 3(2 refer to de facto spouses, they are limited to couples who were living together when the Act came into effect: s 3(2)(a), (b). See too *Infertility Treatment Act* 1995 (Vic) s 3 which was later amended to include de factos: see note 15 above.

28 The Authority may waive the requirement for counselling: s 81.

will also be available to donors (s 76(1)(b)), provided the child (or the parents if the ch is under 18) consents (s 77(2)(a)(i),(ii)) and the counselling requirements are met: 77(2)(c). The obligation of the state to provide this information, which is not available children conceived in other ways, perhaps arises from the state being involved directly reproductive technology.

Other provisions are directed to ensuring children are properly supported financiall Couples using IVF to have children are irrebuttably presumed to be the child's parents f all legal purposes;[29] and 'social fathers' could not adduce evidence to show that they we not the biological father[30] and thereby evade responsibility for maintaining the child. E that is not peculiar to IVF - any child born to a woman in wedlock is presumed to t child of her husband,[31] though that may be rebutted;[32] and federal child suppo legislation now requires men to support children they have fathered.[33]

Other parts of IVF legislation are intended to promote the *health of the parents*. T reasons for requiring full information and counselling about what to expect in IVF - a consent from both parties - are largely directed to this. Indeed, they reflect what o would expect in caring for the health of the prospective parents (it is difficult differentiate between information giving and counselling; although the latter has a mo 'therapeutic' aspect, there must be a lot of overlap).

But perhaps the main aim of IVF legislation is to *control conduct that is morally suspec* These attitudes remain today. Take the 'mystery of birth' statements of theologian Dr Rosalie Hudson, responding to a paper of mine on access to ART:

> The Christian understanding of creation is the union of male and female. The result this union is a gift not a product … a child is not a product of human will, nor is a child the outcome of a personal project whose meaning and destiny we determine[34] There is mystery, uncertainty and ambiguity surrounding the gift of procreation. Hence, the subtle but profound distinction between procreation and reproduction. Procreation entails a world given in grace by the Creator. Reproduction is the language of the machine and the factory, the language of gross national product.[35]

And there are the 'family values' arguments that were voiced particularly after the *McBain* case. The Prime Minister, John Howard, for example, is reported to have said:

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29 *Family Law Act* 1975 (Cth) s 60H; *Status of Children Act* 1984 (Vic) ss 10A- 10E.

30 *Family Law Act* 1975 (Cth) s 60H; *Status of Children Act* 1984 (Vic) ss 10A-10E.

31 For example, *Status of Children Act* 1984 (Vic) s 5.

32 *Status of Children Act* 1984 (Vic) s 5 ("in the absence of evidence to the contrary").

33 *Child Support (Registration and Collection) Act* 1988 (Cth) ; *Child Support (Assessment) Act* 1989 (Cth).

34 Rosalie Hudson, "The fragility of human rights: Response to Professor Loane Skene's paper `The right to reproduce'", Centre fo Christianity and Society, Armadale Uniting Church, 26 Oct 2000; citing G Meilander "Begetting and cloning" ((June/July 1997) Fi Things 41-43, her emphasis.

35 Ibid.

> This issue primarily involves the fundamental right of a child within our society to have the reasonable expectation, other things being equal, of the care and affection o both a mother and a father. [36]

A similar view was expressed by Justice Chesterman in a recent Queensland case refusing a woman leave to remove sperm from her deceased husband for later use in ART:

> I cannot see how it can be said that the interests of [a child who has been conceived after the father's death] will be advanced by inevitable fatherlessness. The very nature of the conception may cause the child embarrassment or more serious emotional problems as it grows up. More significant, because the court can never know in what circumstances the child may be born and brought up, it i impossible to know what is in its best interests. [37]

There are 'selfishness' arguments - women are putting their own yearning for a child above the child's need for a father; economic arguments - single mothers can't support a child properly, or the limited resources of the state would be better spent on other types of treatment; and the argument of some feminists that women don't need children to 'complete' them. Dr Germaine Greer, for example, is reported to have said recently, whe criticising a British government plan to provide free fertility treatment to women:

> Children bring at least as much pain as joy, they are born not to play roles in their parents' lives, but to live their own. …It would be better medicine, and more mercifu to try to dispel the illusion that a child is necessary to an individual's happiness so as to spare her the protracted ordeal of fertility treatment". [38]

Do we need laws like the Victorian Infertility Treatment Act?

The 1984 Victorian Act, the Infertility (Medical Procedures) Act, was the first in t world and was what one might call a 'criminal model'. It created a number of ne offences, for commission of which a person faced a term of imprisonment up to fo years. (This was dubbed 'white coat crime'!) Thus a doctor who admitted an unmarri woman to an IVF program - or who proceeded without obtaining written consent fro both parties - in fact committed an offence under the Act, although no one was ev prosecuted. Also, as Professor Max Charlesworth (a former member of the Standi Review and Advisory Committee on Infertility established by the Act) remarked, t legislation was also enabling. IVF was permissible if the statutory conditions we observed.

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36 Gordon and Farrant, n 7 above, p 1. This is similar to Principle 6 of the *International Declaration on the Rights of the Child* whi states that a child "shall, wherever possible, grow up in the care and under the responsibility of his parents".

37 *In the matter of Gray* [2000] QSC 390 (12 Oct 2000), para 23.

38 Christine Sams and Maria Hawthorne, "Women with baby obsession unstable: Greer", *Sunday Age* 3 D 2000, 1.

In other jurisdictions, (South Australia,[39] Western Australia[40] and the United Kingdom a 'licensing model' was adopted. In order to do IVF, an institution had to be licensed and a condition of the licence was that the parties be married[43] or stable de factos,[44] a written consent was obtained from both.[45] This is essentially a 'civil' model. The penal for non-compliance is forfeiture of the licence rather than a fine or imprisonment. B there is still a criminal 'backstop' in the penalty for operating without a licence.[46] T 1995 Victorian Act also adopts a licensing approach, with a series of different licences 'approvals' for different people and procedures.[47]

The third type of regulation is the one in the Australian non-statutory jurisdictions. It not true that there is no law on IVF in those jurisdictions. The law that applies is the sa as the law that applies to all doctor-patient consultations - the duty to take reasonable ca in contract and negligence. This law is supplemented by guidelines such as the Dema report in Queensland[48] and the Australia-wide guidelines of the National Health a Medical Research Council (currently under review[49]) and the Fertility Society Australia. Although 'voluntary', these provide a standard which may be considered deciding what is reasonable care in a given case. In this way, they are indirect enforceable in contract, negligence and disciplinary proceedings. Alternatively, statutory body could be established with broad powers to advise government on issu arising from time to time in reproductive technology and to develop and oversee a co of practice or licensing system, which is in effect a form of delegated legislation. T

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39 *Reproductive Technology Act* 1988 (SA); *Reproductive Technology (Code of Ethical Clinical Practice) Regulations* 1995 (SA).

40 *Human Reproductive Technology Act* 1991 (WA).

41 *Human Fertilisation and Embryology Act* 1990 (UK).

42 For example, *Human Fertilisation and Embryology Act* 1990 (UK) s 3; Sch 2 outlines terms, conditions of licences: ss 12-15; s research licences.

43 For example, *Reproductive Technology Act* 1988 (SA) s 13(4): heterosexual married and de facto couples (must have been toget at least five years); *Human Reproductive Technology* Act 1991 (WA) s 23(c): heterosexual couples who are married or have habited for at least five of the six previous years. The *Human Fertilisation and Embryology Act* 1990 (UK) does not specifica address the entitlement to gain access to treatment services but s 13(5) provides that a woman shall not be provided with treatm services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the nee that child for a father).

44 Above n 36.

45 *Human Fertilisation and Embryology Act* 1990 (UK) Sch 3, para 1, donors and reciepients; United Kingdom Code of Practice, Annex C:2 standard consent forms are set out; *Reproductive Technology (Code of Ethical Clinical Practice) Regulations* 1995 (SA) regs 15(1)-(3), 16, 23; *Human Reproductive Technology Act* 1991 (WA) ss 22, 33(2)(d)-(e).

46 *Reproductive Technology Act* 1988 (SA) s 13(1) penalty a fine (summary. offence), s 15(1) suspension, cancellation; *Human Reproductive Technology Act* 1991 (WA) s 6 fine, imprisonment or both.

47 For example, *Infertility Treatment Act* 1995 (Vic) ss 93, 94: licence required by institutions carrying out treatment procedures; storage of gametes, embryos, zygotes; s 101: licence required by research person carrying out treatment procedures or research; s 1 counsellors must be approved. Activities authorised by a licence are specified in the licence: s 97(3).

48 Report of the Special Committee Appointed by the Queensland Government to Enquire into the Laws Relating to *Artificial Insemination, In Vitro Fertilization and Other Related Matters* (1984), Vol 1.

49 The NHMRC Australian Health Ethics Committee released new draft *Ethical Guidelines on the use off reproductive technology clinical practice and research* for public consultation on Feb 2003.

New South Wales Law Reform Commission recommended a scheme of this kind 1988[50] but it was not adopted.

It can be seen from this discussion that many reproductive procedures are not regulat specifically and even with IVF, some jurisdictions have no specific legislation. Tl question arises whether we really need to have laws on IVF, except to provide f children born from donated gametes (who, in any event, are covered by separa legislation).[51] In Victoria, the legislation on IVF has become more, rather than les rigorous. This is especially the case with the provisions on embryo research, which virtually prohibited by the 1995 Act.[52] The Act is complicated and difficult to understar Whenever legislation attempts to cover all imaginable circumstances (especially in a fi of rapid discoveries), it inevitably trips over its own shoelaces. More and more additio and qualifications are needed, as it grows like Topsy. Look at the Income T Assessment Act!

Inc considering whether we really we need this type of legislation, remember that Ne South Wales seems to fare well without it! And, in Victoria, AID was offered for ma years without the regulatory machinery it is now subject to under the 1995 Victorian A (quite consistently with IVF as the issues of access to information are similar whenev donors are involved). Although people may seek treatment in less regulated juris dictio (like the Victorian couples going to clinics in the Australian Capital Territory for IV surrogacy),[53] that is onerous and expensive for those involved. It is also inequitable as t benefit of treatment elsewhere is available only to those who can afford to travel.

To return to my original comparisons, is IVF so different from other 'reproductiv procedures that it needs to be specially regulated? Are the people who are concern about IVF more concerned about it, for example, than contraception and abortion? Wou it not make more sense to identify matters on which laws are needed for legal reaso (and we have these already in the Status of Children Acts and the Family Law Act) where there is real community concern - and prohibit or regulate those? (The latter mig include cloning, perhaps, though the concern about cloning may be less than has bee suggested in the press[54]; or allowing an embryo to develop longer than a certain period;

50 New South Wales Law Reform Commission, Report No 58, *Artificial Conception, In Vitro Fertilization*, pp 48-49 (the body was be called the New South Wales Biomedical Council and would have been accompanied by a licensing system).

51 *Family Law Act* 1975 (Cth) s 60H; *Status of Children Act* 1984 (Vic) SS l0A-10E. Even States that do not have legislation on IV have legislation providing that children born from donated gametes in IVF and related procedures are legally the children of the so parents. Such legislation was advocated by the Standing Committee of Attorneys-General as early as 1980, well before the first IVF legislation in Victoria (the 1984 Act): Waller Committee, *Report on Donor Gametes in IVF* (August 1983), pp 33-35.

52 Approved research may only be undertaken on an egg in the process for fertilisation and must stop at syngamy: ss 24-26.

53 Milburn, C "Childless Turn to ACT Clinic", *The Age*, 21 May 1998.

54 Human cloning has been prohibited by legislation in several jurisdictions including Victoria, the United Kingdom and the Unite States. It is also covered by the ban on germ cell gene therapy in the National Health and Medical Research Council's *Statement on Human Experimentation*, Supplementary Note 7. However, most panellists in a recent *Compass* program on ABC television ("The Cloning Debate", 10 May 1998) were inclined to take a more liberal view: <http://www.abc.net.au/compass/>. A recent discussion paper of the Human Genetics Advisory Commission (HGAC) in the United Kingdom invited submissions on potential medical and

commercial surrogacy.[55]) So much is said about the state's involvement in IVF - but wh does it really mean? Is the state any less involved in surgery to reverse a tubal ligation or remove a blockage from a woman's fallopian tubes?

2. To what extent is the law's intrusion into reproductive decision maki gender-based?

Even if the IVF legislation in Victoria seems unduly restrictive, however, that does not me that it is unfair in the way it treats men and women. The same observations I have ma about the impact of law in relation to some aspects of my reproductive life but not othe could apply equally to my husband. If he wants to undergo a sterilization procedure like vasectomy - or to have that procedure reversed, he can do so without complying wi specific laws on sterilisation. Similarly, if he has other surgery to improve his chances conceiving a child. If he needs to resort to donor sperm so that we can have a child, t same laws apply to us both, whether I have ordinary sexual relations with the donor inseminate myself with his sperm; or use artificial insemination by donor (AID), *in vit* fertilisation (IVF). or another form of assisted reproduction. And if a man wants to ado a child, the laws are the same.

Conclusion

In conclusion therefore, there do seem to be inconsistencies in the application of the laws IVF and other reproductive technologies in Victoria to some reproductive activities and r to others - but they are not based on gender. If I engage in unprotected group sex a conceive a child from mixed semen in my body, I commit no offence, however unwise r conduct. If I am participating in an IVF program it is an offence for a doctor to inseminate with the semen of more than one man. If I (or my partner) engage in multiple relationshi and the paternity of our child is later in issue, the putative child has no legal right to find who is the 'real' father. But if I have used the facilities of the state and donor gametes achieve a pregnancy, then the child does have that right.

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scientific benefits of cloning as well as its ethical implications: HGAC, *Cloning Issues in Reproduction Science and Medicine* (January 1998); <http://www.doh.gov.uk/hgac/papers/papers_c.htm>.

55 Even jurisdictions that have not legislated on IVF have legislated to regulate surrogacy; eg, the *Surrogacy Parenthood Act* 1988 (Qld); *Substitute Parent Agreements Act* 1994 (ACT).