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THE LIBERAL PARTY OF AUSTRALIA

SOUTH AUSTRALIAN DIVISION

WOMEN'S COUNCIL CONFERENCE

ADELAIDE, FRIDAY 8 JULY 1983

IN VITRO FERTILISATION : THE STATE OF THE DEBATE

June 1983

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The Hon Mr Justice M D Kirby CMG  
Chairman of the Australian Law Reform Commission

THE BIOETHICAL REVOLUTION

I am delighted to be invited to address the conference. I congratulate the organisers on choosing such an important and perplexing topic. It is vital that citizens take a part in the political processes of our country. It is especially vital that those who do should not turn their backs on the really vexing and difficult topics which are presented for today's society by science and technology.

In the eight years of the operation of the Australian Law Reform Commission, we have frequently had to consider the impact on the law of science and technology. A number of our inquiries require us to examine the impact of computer technology on the law. But in some ways the bioethical questions of our time are more difficult and more intractable. In 1976 Attorney-General Robert Ellicott asked the Law Reform Commission to report on the law on human tissue transplantation. I must confess that I considered he had chosen an odd assignment for us. But he was right and I was wrong. He was essentially asking whether the Law Reform Commission could help the political process to tackle, with the aid of expert and community opinion, a difficult and controversial subject of bioethics. The report of the Australian Law Reform Commission on human tissue transplants has now become the basis of the law in all jurisdictions of Australia, save Tasmania. But now, even more taxing and difficult questions await attention : human cloning; the use of foetal tissue; artificial insemination donor; surrogate parentage; genetic engineering; patenting of life forms; living wills; the right to die and euthanasia, to name but a few.

The purpose of this paper is to outline the state of the debate in Australia and beyond as we reach the middle of 1983. The Australian Law Reform Commission has no project on in vitro fertilisation. Attorney-General Durack took the view that this was basically an area of State law. We now have five inquiries in Australia examining the law, society and in vitro fertilisation. I cannot express concluded views on the difficult issues that are raised for us all by this remarkable technique of human fertilisation. But I can outline for you the main developments that have occurred and some of the controversies that are facing the scientists, governments and citizens of Australia.

#### FROZEN EMBRYOS

These are angry days in the Monash Research Team, which is leading Australia's research into in vitro fertilisation (IVF). The team, under Professor Carl Wood and Dr Alan Trounson, is responsible for about 50 births by the IVF procedure, known popularly as 'test tube babies'. But then in April 1983, apparently in response to the opinion in the report of the Victorian IFV Committee, the Premier and Attorney-General, Mr John Cain, requested a moratorium on the use of donor sperm and eggs in the State's two IVF programs — the Monash University-Queen Victoria Medical Centre Program and the Royal Women's Hospital Program in Melbourne. As a result, Dr Alan Trounson threatened to resign, declaring that the moratorium was 'unfair and discriminatory'. He said that approximately 200 women were on the waiting list for donor ova. He pointed out that artificial insemination donor (AID) had been a common procedure in Victoria for more than 20 years and that discrimination between the use of ova and sperm was illogical and unreasonable. Mr Cain was unmoved:

All we are asking is that people in the field hold back a little until we find the solution to some of the enormous moral, legal and ethical problems that we are going to have to deal with.

In late April 1983, the Victorian IFV Committee released a summary of its views on the issue of donor 'gametes'. This paper relates to the use of sperm, ova or embryos provided by people other than the couple seeking the child. The committee's summary did not include any specific recommendations to the Victorian Government. However, it invited comment for the assistance of the IVF Committee. The committee is headed by the Victorian Law Reform Commissioner, Professor P L Waller. An early interim report, submitted in September 1982, dealt with IVF procedures where sperm and ova were taken from the husband and wife in a married relationship. The April 1983 paper deals with 'one of the most discussed areas of IVF', the use of donor sperm, ova or embryos.

Approximately one out of every 12 married couples in Australia is reported infertile, not by choice. Accordingly it is no surprise that the patient waiting list for treatment at the Queen Victoria Medical Centre is more than a thousand anxious women. By the middle of 1982, the Wood/Trounson team was achieving pregnancy at rates even higher than those which healthy fertile young couples could expect. Inquiries were flooding in from all over the world. Although success remained somewhat 'erratic and unpredictable', a steady rate of 25% was being talked of. Discussions were even being held with the Mercy Hospital, run by the Catholic Church, about the possibility of fertilisation inside the womb, in an endeavour to overcome Roman Catholic objections. Then came the State Government's request for the moratorium. It was not heeded at first, according to Dr Trounson. Now it seems as if it is in force. But will it be successful?

Something of an outcry in Australia in May 1983 centred around the revelation of the storing by freezing of human embryos. This procedure is no longer experimental. The embryo, invisible to the naked eye, is freeze-dried and stored in a liquid nitrogen freezer in a laboratory. The procedure was established long ago for animal breeding and is now being adapted to combat human fertility. Some media commentators, however, did not like the idea at all. When the news got out that a Victorian woman was 14 weeks pregnant with an apparently healthy foetus, after having been reimplanted with one of her own fertilised ova which had been frozen for four months, the President of Pro Life Victoria, Mr Alan Baker, said that the pregnancy had been achieved only at the expense of the 'lives' of 18 other normal embryos produced from the same couple, which were thawed and later died. The Victorian President of the Right to Life Association, Mrs Margaret Tighe, said she 'mourned the loss of those hapless embryos ... treated with as much respect as frozen peas. She called on the Victorian Government to 'ban this gross experimentation with human life'.

A public opinion poll held in Australia in 1983 showed growing uncertainty about the freezing process of IVF. Forty-four percent favoured embryo freezing. Thirty-three percent were against. Twenty-three percent were undecided. But a spokesman for the Anglican Church said that as long as the IVF procedures were restricted to married couples 'they are simply a technological extension of a natural process'. Just the same, the voices of doubt, some of them stimulated by the Victorian IFV Committee, began to be heard in the land — and beyond.

AN INSIGNIFICANT UNIVERSITY?

Perhaps the unkindest cut of all was an item in the English weekly The Spectator (30 April 1983). Mr J Hughes-Onslow, 'Nine Months to 1984', declared that the Monash test tube team was working in an 'insignificant university with no moral, legal, theological, or political right to make decisions that involve all of us'. Mr Hughes-Onslow began his essay with a swipe at Monash Philosophy Professor Peter Singer, whom he described as 'an international guru amongst anti-vivisectionists and vegetarians'. Obviously shocking to Hughes-Onslow was the notion that other forms of animal life were 'no more sacred' than human life. Responding to the Spectator article, Dr Trounson said that he could not believe its tone and the allegations of the Australian team had made 'hurried decisions' before establishing ethical and moral guidelines. He said that technical criticisms of the Monash team had been answered by him in the British Medical Journal and were 'completely untrue'. Professor Peter Singer had his swipe back:

It seems that Mr Hughes-Onslow is still living in the great days of the British Empire in which anything that happened outside Britain was necessarily insignificant and should, in any case, be subject to imperial rule from London. People in Britain do not like the idea that they are not making the front running.

The reference to the British Medical Journal was to an article in the March 1983 issue in which Dr Trounson claimed that he had achieved the world's first pregnancy after an embryo transfer from one woman to another. Five eggs were removed. Three were fertilised in vitro with the donor's husband's sperm and then given back to her. These failed to become established. But one of the spare ova was then fertilised by frozen sperm from an anonymous donor and transferred to another woman. It did succeed in starting a pregnancy which lasted ten weeks. The English leaders in IVF, Doctors Steptoe and Edwards, asked in the British Medical Journal:

Was it not indeed fortunate for the in vitro fertilisation team that this foetus was aborted? The history of this case is strongly suspicious of hurried decisions taken under pressure and it illustrates the need for firm ethical guidelines and codes of conduct to be set up.

The London Times (4 May 1983) contained comments critical of the Melbourne experiment, offered by several medical and church bodies in Britain. Dr Clive Froggatt, Chairman of the Royal College of General Practitioners said:

The development of deep frozen embryos is extremely worrying. It is impossible to give any guarantees about the safety of such an experiment. No one knows if the process of freezing may cause damage to an embryo in the short term or the long. It is unethical to experiment without such guarantees and assurances. Nor is it possible to be certain that in 10 or 15 years the individuals born from frozen embryos may not become victims to a latent defect.

The freezing of human embryos is among eight procedures which the Royal College of General Practitioners declares are unethical, in a submission offered to the British Government Committee of Inquiry into Human Fertilisation and Embryology, chaired by Mrs Mary Warnock, Senior Research Fellow at St Hughes College, Oxford. That committee is due to report in 1984. Comments the Times, 'A date which those with doubts over recent medical developments regard as having ironic Orwellian undertones'.

#### IN VITRO; IN LIMBO

Meanwhile, it is not really accurate to say that there has been little debate at Monash University or in Australia. A whole series of seminars and conferences has been arranged by the Bioethics Centre at Monash University. On 4 May 1983 a conference on the ethical use of donor sperm, eggs and embryo in the treatment of human infertility was held at Monash University. One of the many papers delivered was by Mr Justice Austin Asche, Senior Judge of the Family Court of Australia in Melbourne. Amongst the many topics dealt with in his paper, one of the keenest concern is the discussion of surrogate motherhood; made increasingly possible by external fertilisation of the human ovum.

The concept of surrogate motherhood carries with it two very real dangers which, in legal terms, could be summed up as duress and blackmail. Duress, because the surrogate mother may take on the task through sheer poverty and desperation; and blackmail, because the surrogate mother might endeavour to increase the original price agreed upon by threatening to keep the child ... In Australia, the child or person acting on behalf of the child would be entitled to take proceedings for maintenance and support against the biological parent or parents; so that it seems that there would be some safeguards there.

But the safeguards are not considered enough by many commentators:

- . On 21 April 1983 it was reported that the English Law Society had urged that it should be a crime for a woman to offer to have a baby for other people in return for payment. The Law Society was reported as saying that couples were paying very large sums for babies to be borne by other persons, and thereby circumventing adoption laws.
- . In Australia, New Idea magazine, 21 May 1983, reported the case of 'Jane Smith' who had carried to birth a baby, Jesse, for Sue and Terry Clark. 'Jane', 20, was refused treatment by IVF and conceived the baby 'normally' to Terry, handing him over immediately after birth. She told a national television program audience on 11 June 1983 that she had gone ahead with it initially for the mother and was glad to have helped the couple who were desperate for a child. (ABC, Four Corners, In vitro; in limbo).
- . On 11 May 1983 Dr Gabor Kovacs of Melbourne's Prince Henry's Hospital said that women with infertile husbands had been treated with the sperm of male in-laws in attempts to achieve pregnancy from donors within the family. 'All were of European background. They felt that they could continue the family line that way'. Dr Kovacs said that the clinic was reluctant to use the technique because of the 'identity problems' that any offspring might suffer. Responding, a spokesman for the Anglican Social Responsibility Commission urged hospitals to have these issues 'debated in public before they launch into the practice'.
- . Serious commentators in the print media are constantly returning to the 'unresolved issues' about embryo freezing and external transfer: the fate of the embryo if the donors are divorced or separate; the length of time that embryos should be preserved in a frozen state; the risks of deformity; the inheritance rights; the protections that should be given to the embryo; the question of sale and purchase of embryos including spare embryos; the choice of specially attractive or desirable donors and so on.

#### NATURE IS PRODIGAL

It is in these circumstances of uncertainty that church leaders and others called for the moratorium that is now in force in Victoria. On 13 May 1983 it was announced that Britain's Roman Catholic Bishops had called for sweeping laws to ban what they considered fundamentally unacceptable aspects of in vitro fertilisation techniques, particularly any form of freezing or other storage, unless there is a definite prospect of transferring each embryo unimpaired to its own mother.

Under the banner 'a basic moral question' the Australian newspaper (5 May 1983) observed:

Aldous Huxley's 'Brave New World' and George Orwell's 'Nineteen Eighty Four' appear to have come a little early. The Melbourne in vitro fertilisation team which has suddenly catapulted us into science fact, rather than fiction, is to be congratulated on its dedication, its inventiveness, even its imagination. It suddenly made real the freezing of the human embryo and its thawing and reimplantation in the uterus, a procedure which had previously belonged to the realm of fantasy rather than fact ... But the procedure raises a large number of ethical questions which will be considered soon by the Victorian Government's Waller Committee ... The questions go to the very heart of our beliefs about the creation of human life and the legal, moral and ethical considerations which govern it subsequently. The recent discoveries undoubtedly will have the effect of enabling couples, hitherto unable to do so, to have children. While this in itself may increase the sum total of human happiness, there must be many who will doubt whether we should so change the nature of our society to grant power over the creation of life to any scientist, however strict the regulations that govern his professional conduct. Until there has been a thorough-going national debate on the ethical issues involved, we should be unwise to encourage or permit so fundamental a restructuring of the nature of human relations.

Writers to newspapers took a similar line. The Rev Father William Daniel SJ troubled to write from Rome urging that Dr Trounson 'should be encouraged to confine his work to veterinary science'. Mr B A Santamaria (Australian, 17 May 1983) raised the prospect of deep frozen embryos being thawed into life in an entirely different epoch, long after both parents were dead. The possibility of cloning or 'carbon copies' of the same being were also raised. Other writers urged that IVF issues were too complex for the common law and needed a thorough-going statutory examination. On the other hand, Mr J Gerrard, President of the Humanistic Society of Victoria, wrote to the Melbourne Age (4 May 1983) urging that ethical problems raised by IVF were 'minimal' in comparison to such major issues of legitimate ethical debate as the nuclear threat and mounting unemployment.

The problem of community opinion lagging behind scientific practice in the field of bioethics stems to a major degree from some religious leaders relying on theology which bears little relation to human life ... Mother nature is prodigal with ova and even more so with spermatozoon. This is the basis of our n



atural evolution. He induces natural abortions ... If these discarded foetuses were important, then a scientific research program should be mounted to find out what and why there is such a high failure rate in natural abortions. Surely it is not beyond the intelligence of church leaders to update their theology in this field from its very uncertain biblical and pre-biblical bases.

The in vitro fertilisation debate is unfinished. But in the last few months a number of further debates affecting abortion and neonaticide have come to the notice of the Australian community. I want now to spend a few minutes on each of them.

#### ABORTION CASES

As if to signal that bioethical issues cannot be escaped by practising lawyers, a number of cases have now begun to come before the courts requiring instant solutions to litigation raising enormous social and moral problems. On 30 March 1983 a Queensland man's bid to stop the mother of his unborn child from having an abortion failed in the High Court of Australia. The Chief Justice, Sir Harry Gibbs, refused an application for special leave to appeal against a decision of the Queensland Supreme Court, given in the previous week. The Chief Justice said there were limits to the extent to which the law could intrude into personal liberty and privacy. The case followed the dismissal by Mr Justice G Williams of the Queensland Supreme Court of an application by the father, Mr David Kerr, of an application for injunction. This order was confirmed by the Queensland Full Court. The Attorney-General, Mr S Doumany joined in the action by Mr Kerr. However, Sir Harry Gibbs said that the court would not intervene to prevent the mother from committing what was alleged to be the criminal offence of abortion. He said that it appeared unjustifiable to assume that the woman would necessarily be convicted by a jury of a criminal offence and that the grant of an injunction against the abortion could usurp the function of the criminal jury which might have to decide the issue if the operation went ahead in Queensland.

Needless to say, the decision sparked off much controversy throughout Australia. Overseas, there have also been a number of relevant developments concerning the vexed issue of abortion:

- . In Britain, the columns of the Times have been agitated by discussion of the so-called 'morning after' pill and other methods of post-coital contraception. Dr Ian Kennedy, Reader in Law at Kings College, London, expressed the view that, provided they were used as an emergency measure, such treatments would be lawful and not an unlawful abortion. Life, the British anti-abortion organisation, is seeking a test case on the issue under current British abortion law.
  
- . In New Zealand, court rulings on abortion law in late 1982 have not daunted Dr Melvyn Wall, who last year unsuccessfully sought an injunction to prevent a Taranki girl of 15 from having an abortion. The New Zealand Court of Appeal ruled that Doctor Wall could not intervene in the case. Dr Wall has said that he will seek a ruling from the Privy Council, if given leave to appeal. He said that he would continue his battle for 'the rights of the unborn child' under the New Zealand Contraception, Sterilisation and Abortion Act.
  
- . In Canada, Mr Justice William Matheson in the Saskatchewan Court of Queen's Bench, has completed 3 weeks of evidence in May 1983 in a test case, likely to go on to the Supreme Court of Canada, concerning the protections, if any, given by the new Canadian Charter of Rights to an unborn child. Judgment reserved. Advocate 16 June 1983.
  
- \* In the United States, in June 1983, a decade after the historic decision in Roe v Wade, the majority of the Supreme Court reaffirmed the 'basic principle that a woman has the fundamental right to make the highly personal choice whether or not to terminate her pregnancy ... Only when the foetus can be viable outside the womb, generally not until the third trimester, can the State seek to protect the life of the unborn child. Time, 27 June 1983, 38. Strong dissents were written by Justices White and Rehnquist and also by the new Supreme Court Justice Sandra Day O'Connor.

#### DEFORMED NEONATES

Associated issues to agitate opinion in Australia in recent weeks include the treatment of deformed and mentally retarded neonates. This issue too illustrates the likelihood of difficult bioethical cases coming before the courts. Relevant developments:

- \* In Canada, the Supreme Court of British Columbia (Mr Justice McKenzie) overruled a provincial court and, in effect, required that positive operative intervention should take place, against the wish of the parents, for the treatment of a severely retarded boy approaching seven years, blind, partly deaf, incompetent, unable to stand, walk, talk or hold objects. Family and Child Service v Dawson, 19 March 1983.
  
- \* The Australian College of Paediatrics has issued a working paper in March 1983 on 'Non-Intervention in Children with Major Handicaps : Legal and Ethical Aspects'. The paper, prepared under Chairman Mr Douglas Cohen, Vice President of the College, recommends the establishment of a Medical Intervention Advisory Board, including members of the medical and legal profession, with powers to develop uniform guidelines relating to non-intervention in children with major handicaps.
  
- \* At the annual scientific meeting of the College in May 1983, Dr Susan Hayes, Senior Lecturer in the Department of Behavioural Sciences in Medicine at the University of Sydney, delivered a paper suggesting that, under current practices in some hospitals in Australia, some infants had been allowed to die who would have developed into adults with only moderate permanent physical or mental disability if promptly treated. Also speaking at the same conference, I suggested that a choice had to be made between continuing to turn a blind eye to present hospital practices; seeking rigorously to enforce current laws or inviting public and professional discussion in the hope of developing clearer rules to govern life and death decisions affecting disabled neonates. One interesting point made at the meeting was the extent to which scientific changes have aggravated the moral and legal problems. With computerised humidicribs and heroic medical efforts, some 'normal' babies, born underweight, can be nursed into life. If such efforts are not to be used for deformed or retarded babies, is there not already an acceptance of a government principle of 'quality of life', leaving debate to be about the details?

#### THE NEW FRONTIERS?

Meanwhile, for a distracted and anxious population, reports keep coming in of new territory for the scientists, posing more problems of bioethics that deserve the consideration of all of us:

- \* On 19 April 1983 it was reported in the Australian that Sydney researchers are using human foetal tissue obtained from therapeutic abortions to develop a technique to fight diabetes. A team at the University of Sydney confirmed that it was investigating the possibility of transplanting pancreatic tissue from aborted human foetuses into mice as a first stage to experimental human pancreatic transplantation. A spokesman for the team said that the experiment had shown that cultured human foetal pancreatic tissue would survive long-term in six non-diabetic mice.
  
- \* On 28 May 1983, the Australian recorded that scientists at the Medical Research Council's reproductive biology unit in Edinburgh had seen a human embryo develop without being fertilised. The Edinburgh unit reported to the science journal Nature that the embryo had developed without any male chromosomes at all. Triggering off the egg development to form an embryo had been done 'by physical injury or mechanical damage'. Monash Professor Carl Wood reportedly commented that such a development might prove men 'redundant'. Dr Robert Edwards wrote that 'concrete grounds exist to confirm predictions that early human developments can begin without fertilisation'.
  
- \* A report from San Francisco in April 1983 indicates that a women declared clinically dead in January 1983 gave birth to a healthy boy. The woman's body functions had been kept running for two months by a life support system at the University of California's Hospital. Immediately after the operation in which the child was born, the mother's respirator was disconnected and she stopped breathing.

In his Hamlyn Lectures in mid-May 1983, the English Lord Chancellor, Lord Hailsham, endorsed a statement by ex-President Jimmy Carter that 'the single purpose pressure group' had become 'the greatest enemy of individual liberty'. Lord Hailsham did not suggest that such groups should be made illegal. Nor did he suggest that it was possible to differentiate between pressure groups with 'desirable' and 'undesirable' objectives. However, he suggested that there was a danger in pressure groups, founded on perfectly legitimate efforts to achieve a particular or social or political objective, tending to lose their sense of proportion. Lord Hailsham's warning was that a liberal democracy can 'if it is careless' be destroyed from within. Only by self-discipline and mutual tolerance will the democratic system survive.

I believe that Lord Hailsham's advice, from a man who is at once the top judge, a leading administrator and important politician in Britain, bears lessons for us all. Only by self-discipline and mutual tolerance -- a little wisdom and not a little public discussion and consultation -- can our busy Parliaments and law makers possibly cope with the enormous dilemmas of bioethics which it is the fate of our generation to be called upon to answer.