Regulation, Consultation and Divergent Community Views: The Case of Access to ART by Lesbian and Single Women

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In the many countries which have some form of regulation of ART, a public consultation of some sort is a frequent feature of either the process leading up to regulation or of the regulatory mechanism itself. Not surprisingly, widely divergent views on the moral and political acceptability of ART are expressed during such consultations. And while such diversity of opinion is to be expected, and some even argue welcomed, in pluralist liberal democratic societies, it is often unclear how these divergent community views are and ought to be fed into the opinion-forming and decision-making processes of governments or the bodies that advise them.

This article discusses first why regulation of ART may be justified, even when there is radical moral disagreement in the community, and why public consultations should play a central role in the work that advisory bodies undertake in making regulatory recommendations to government. Then, it both proposes and justifies a method for dealing with the contradictory moral views expressed by interested parties during the consultation process. To illustrate this method, the example of the attempt by single and lesbian women to access donor insemination services and ART is used.

Introduction

Since the birth of the world's first "test-tube" baby in 1978, societies have grappled with the question of whether and in what ways assisted reproductive technologies should be regulated. In many countries, committees and statutory bodies have been exposed to, and often have solicited through the mechanism of public consultation, widely divergent views on the moral and political acceptability of ART. And while such diversity of opinion is to be expected, and some even argue welcomed, in pluralist liberal democratic societies,[1] it is often unclear how divergent community views are and ought to be fed into the opinion-forming and decision-making processes of governments or the bodies that advise them.

This lack of clarity is evident in the way advisory bodies report on their processes. One example from Australia is the Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation (commonly known as the Waller Committee). The Waller Committee was established by the Victorian Government in 1982 to determine

[1] T H Engelhardt Jr, "Consensus: How Much Can We Hope For? A Conceptual Exploration Illustrated by Recent Debates Regarding the Use of Human Reproductive Technologies" in K Bayertz (ed), *The Concept of Consensus: The Case of Technological Interventions in Human Reproduction* (Kluwer, Dordrecht, 1994).

whether IVF should be conducted in the State and, if so, what procedures and guidelines "should be implemented in respect of such processes in legislative form or otherwise".[2] The Waller Committee invited "interested parties" to make written submissions to the Committee or to give their views at public hearings. The Committee also invited a number of "experts" to attend its meetings and "assist it by providing information and material". However, while appendices to the Waller Committee's September 1982 *Interim Report* scrupulously detail which "interested parties" made written or oral submissions to the Committee and whom the Committee invited to provide it with "expert advice", the report provides little information about how the submissions or advice contributed to the Committee's findings and recommendations.[3]

Similarly, in the United Kingdom, organisations such as the Human Fertilisation and Embryology Authority, which prides itself on its "unusual" development of the consultation process, provide little insight as to how information received from the public is used by the Authority to develop policy.[4]

In searching for detail as to the way in which advisory bodies utilised information collected during consultations, we were mindful of a problem – identified in the literature – that can plague such bodies: namely, how to deal with the radically disparate views often expressed by community members and experts who make submissions. Loane Skene, a veteran of several advisory bodies, has noted:

> "Invariably, community consultation results in numerous submissions from lobby groups, with many sending a pro forma submission devised by a leader on behalf of a group. How should the various submissions be 'weighed' and what account should be taken of them in policy development?"[5]

A brief glance at those submitting evidence to various consultations conducted by the Waller Committee, for example, suggests such conflicts are inevitable. Those making submission included numerous ministers of various religions, Concerned Parents, the Ethnic Communities Council, the Women's Refuge Referral Service, the Humanist Society of Victoria, IVF Friends, the Knights of the Southern Cross, Pro-Life Youth, the National Catholic Rural Movement, Right to Life Victoria, the Uniting Church, the Victorian Standing Committee on Adoption, Women Who Want to Be Women, the National Council for the Single Mother and Her Child and the Australian Relinquishing Mothers' Society.[6] Likewise, after publication by the United Kingdom Government of a consultation document entitled *Legislation on Human Infertility Services and Embryo Research*, the approximately 200 submissions received expressed "sharply divided" opinions on issues of "embryo research, and the information which should be available to children born as a result of donation".[7]

The first section of this article discusses why we believe regulation of ART may be justified, and why public consultations should play a central role in the work that advisory bodies undertake in making regulatory recommendations to government. We will then both propose and justify a method for dealing with the contradictory moral views expressed by interested parties during the consultation process. To illustrate this method, the attempt by single and lesbian women to access donor insemination services and ART is used as an example. This issue of access is contentious in

[2] Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation, *Interim Report* (1990).

[3] Ibid, pp 4-5. The report does note that "common" IVF (where the gametes of a husband and wife are used) commands "substantial support in the Victorian community". It is not made clear, however, whether this support is the reason, or is numbered among the reasons, for the Committee's recommendation that it be "recognised": ibid, pp 27-28, 32.

[4] L Haggar, "The Role of the Human Fertilisation and Embryology Authority" (1997) 3 *Medical Law International* 1 at 12-16. Like the Waller Report, however, tantalising clues are provided as to the meaning the Authority gives to public views. For instance, at one point it is suggested that consultation enables "on-the-record" decision-making whereby the "process is made as open as possible and reasons are given for policies ultimately adopted": Haggar, ibid at 12. As well, it is suggested that the consultation process enables the Authority to make an "informed decision": ibid at 13. It is not made clear, however, how the Authority understood and made use of the disparate views expressed during consultations to achieve either of these goals.

[5] L Skene, "Why Legislate on Assisted Reproduction?" in I Freckelton and K Petersen (eds), *Controversies in Health Law* (Federation Press, Sydney, 1999), p 266.

[6] Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation, op cit n 2.

[7] J Gunning and V English, *Human In Vitro Fertilisation: A Case Study in the Regulation of Medical Intervention* (Dartmouth, Aldershot, 1993), p 84.

many countries that offer ART, and is currently the subject of ongoing judicial and political activity in Australia.

Justifying regulation

One response to the problem of the radical moral disagreement unleashed by regulatory bodies' efforts at public consultation is to say that it simply indicates a good reason why the state should not seek to regulate ART at all. This view, that external regulation is unwarranted, has been advanced by a number of writers for a range of different reasons. It has been argued, for example, that it is not the function of the law to enshrine or enforce particular positions on private morality. This is the case because there is disagreement within the community on such moral issues and no agreed method of establishing the moral truth of the matter, even though some people believe that there is a moral truth, and that their own view represents that truth.[8] This is widely taken to be the outcome of the Hart/Devlin debate over laws on homosexuality.[9] Indeed, the standard position in moral and legal philosophy is that there is "no general direct connection between law and morality".[10] What justifies legislation or regulation is not simply that an activity is (regarded by some to be) morally wrong – there must be additional reasons, which do not appeal to intrinsic morality. Devlin, for example, argued that the law should set only minimum standards, refrain from interfering in private matters, and only intervene where a behaviour is truly intolerable, and not merely disliked by some members of the community.[11] This is similar to J S Mill's harm principle – that we are only justified in interfering with another person's liberty when there is a genuine risk of harm to a third party, rather than merely a belief on some people's part that some particular type of conduct is morally wrong.

The notion of private morality is, of course, problematic, as also is the concept of harm. There is no clear dividing line between public and private morality, nor between conduct which does and does not harm others. What counts as a harm is not a purely factual matter, but in itself involves a value judgment. (This can be seen in the debate over female circumcision, where the loss of ability to experience sexual pleasure is seen as a significant harm by some, and as no harm at all by others.) Hence, framing public policy on the basis of avoiding regulation of matters of "private morality" would be a fraught undertaking. Despite this, however, we believe there is a defensible liberal presumption that the state should interfere as little as possible in the ways that citizens choose to live their lives, unless a good case can be made that their conduct may cause significant harm to others. As a society, we may need to argue and reflect about what constitutes harm in a particular instance, so the liberal presumption may not always be straightforward in application. Nevertheless, this is the presumption that we believe should underpin public policy-making.

On this view of law and regulation, there very definitely should not be restrictive laws about ART, since the degree of moral disagreement on issues related to ART is very high, and is tied up in a range of intimate personal matters, such as sexual relationships, reproduction and parenthood. Any moral position that was enshrined in law would undoubtedly conflict with strongly held moral convictions of some sections of the community. Further, it is not at all clear that ART does involve risk of harm to others significant enough to warrant interference (even if it is granted that embryos count morally as others who can be harmed). It is true that some embryos die in the ART process, but it is also true that this happens in the normal process of reproduction, and it has never been suggested that this provides a reason to intervene in those normal processes. ART presents no more risk of harm to embryos than does sexual intercourse without contraception. The same lack of harm is evident in relation to children born as a result of ART. Without ART, these children would never have been born at all, so they can only be harmed overall by their birth if it can be shown that being born in this way was so bad that no life at all would have been preferable. It is hard to imagine how such a case could be made, except in the circumstance of very severe disability – certainly not in cases where a child is born into a

[8] R M Hare concisely states this argument in his *Essays in Bioethics* (Clarendon Press, Oxford, 1993), p 120.
[9] P Devlin, *The Enforcement of Morals* (Oxford University Press, London, 1965); H L A Hart, *Law, Liberty and Morality* (Oxford University Press, London, 1968).
[10] R Lee and D Morgan, *Human Fertilisation and Embryology: Regulating the Reproductive Revolution* (Blackstone, London, 2001), Ch 2.
[11] Devlin, op cit n 9.

situation that some people think is sub-optimal (such as a single-parent family).

The view about the proper function of the law will form an important part of our argument later on. However, we do not believe that it rules out any and all regulation of ART. Regulation of ART need not enshrine substantive moral views about sex, embryos, personal relationships and/or parenthood. It can be procedural, enabling rather than restrictive, and can operate in ways that represent areas of very widespread moral agreement.

Another critical response to laws about ART is the argument that they are an unjustified infringement on the autonomy and reproductive rights of those who wish to use these medical technologies. This seems to be Skene's point, when she makes the observation that the state does not interfere in the reproductive decisions of women who are fertile.[12] This observation implies that the reproductive rights of the infertile are the same as those of the fertile, and questions the justification for regulating the infertile when the fertile are not similarly regulated. McBain makes a similar point when he contends:

> "If society wanted to arrange it so that it would certify who was fit to be a parent and if they would take that active step to give out licences to people certified fit to be parents then we'd go along with that, that would be fine. But where it remained that people could conceive as they chose outside of reproductive medicine programs, I thought it was intensely discriminatory to the children conceived through these reproductive medicine programs and those participating in them on the treatment side and on the being treated side to have artificial laws regulating access."[13]

We would agree that liberal democratic societies do not, by and large, seek to regulate the fertile (although there are some laws that do affect sexual and reproductive behaviour in indirect ways, such as laws about the age of consent, and regulation of contraceptive and sterilisation procedures for women with an intellectual disability). However, this is not because such regulation is, in principle, an unjustified infringement of the fertile population's autonomy and reproductive rights. Rather, it is a combination of practical and consequent moral considerations related to the different circumstances in which fertile and infertile people find themselves.

One practical consideration is the procedural difficulty of enforcing regulation of fertile people in this area. As Cannold has argued elsewhere:

> "The impulse to differentiate between those who should and should not be entrusted with the responsibilities of parenthood is a ubiquitous, understandable and – at times – honourable one. Who among us hasn't at some time muttered, 'there oughtta be a law' after a news report of child abuse or neglect? Thoughts of restricting the freedom to parent, however, founder on the rocks of implementation. When, how often and in what manner would the parental fitness of the enormous population of fertile people be assessed, and by whom? How would a person deemed unfit to parent be stopped from having a child: mandatory weekly pregnancy tests and forced abortions?"[14]

As alluded to in the quote above, one moral consideration is privacy. Attempting to regulate the reproductive behaviour of fertile people would involve a very significant ongoing invasion of their privacy, in most cases out of proportion with the moral reasons that motivated the desire to regulate in the first place. So to the extent that regulation of ART would cause infertile people to be treated differently from their fertile counterpart, there is good reason for this, and it does not constitute an inherent injustice: the two groups are not similar in all relevant respects, and hence there is no absolute requirement that they be treated in exactly the same way.

Having argued that objections to regulation of ART are not well-founded, we next put forward the view that there are some positive reasons in favour of claims that regulation is justified. First, the state has an obligation to protect the interests of its citizens and regulation is a legitimate method of achieving this. It is possible that ART can be practised in ways that threaten the interests of at least some citizens and so, in principle, it is ethically permissible for the state to regulate in such

[12] Skene, op cit n 5, p 266.
[13] ABC Television, *Family Matters – Birthrights* (Compass, Sydney, 2001).
[14] L Cannold, "Calling All Single Childless Women", *The Age*, 20 March 2000, p 15.

situations. One example might be the use of experimental or highly risky drugs; another is the use of gametes without people's consent. Both of these could occur in ART clinics, and, given the threat to the interests of individuals, the state would be justified in intervening.

Further, insofar as the state is funding infertility treatments, it has a legitimate claim to make decisions about how that treatment is offered. One might even argue that it has an obligation to make such decisions. The fact that some individuals have made autonomous choices to use ART in particular ways does not oblige the state to give these individuals whatever they want or need. The moral power of one person's autonomy does not extend to compelling others to provide her with whatever she needs in order to fulfil her life-plan, or bring her desires to fruition. This is a well-recognised point about the limits to personal autonomy.

This is not to say that the state is justified in enacting any sort of regulation at all. One might still want to say that there are constraints, perhaps moral constraints, on the state in this regard. For example, it may be that regulation must conform to principles of non-discrimination and equality. Our point is simply that there can be justification for state regulation of ART – we are not yet saying anything about what the content of that regulation should be.

So we reject the idea that the difficulty faced by regulatory bodies is merely one further piece of evidence to show that ART should not be regulated by the state. Instead, we contend that regulation may be justified, and that, while there are many different ways of regulating ART, advisory bodies[15] can be an excellent means of exploring and making decisions about different regulatory options. One practical advantage of this arrangement for regulation is that it provides flexibility and the ability to respond to new developments in science and medical practice in ways that legislation alone cannot. Another, much more fundamental, advantage is that such bodies have the capacity to play an important role in clarifying public debate on contentious matters, and contributing to broad-based and more informed decision-making by governments. Perhaps it will even lead to consensus of some sort. Consensus, of course, will not always be possible: indeed, Engelhardt argues that it will never be possible in relation to ART.[16] This may be true, but even so, it does not mean that the process of consultation has been futile, since, as we will argue, the primary aim of consultation is to contribute to informed decision-making, not to produce unanimity in the community.

This is the role that we see regulatory bodies taking when they conduct public consultations. However, we contend that public consultation can only fulfil this sort of role if the regulatory bodies conceive of and carry out their function in particular ways. If they do not have a clear and appropriate view of their role and procedures, along the lines proposed below, they will serve merely to highlight community confusion and tension, and leave themselves without a way to sort through the morass and formulate a way forward. So we propose that advisory bodies first explicitly clarify what they are trying to achieve, and then set parameters for receiving and considering submissions, in terms of

- the issues that submissions address;
- who has a voice in the submission process; and
- how much weight is accorded to what they say.

Clarifying the role of regulatory bodies

We suggest that there are at least three different ways in which a regulatory body could conceive of its task of public consultation. For reasons that will be explained, we reject two of these as inappropriate, and put the third forward as the best model.

One possible option is to view the task of the regulatory body as being to advise the government of the correct moral view on the issue at hand. Thus, a body would call for submissions about the morality of access by lesbian and single women to ART, and would receive submissions from various groups expressing strong but conflicting moral views on the subject. The members of the body would then carefully scrutinise the content of these submissions and try to discern from them, perhaps with the aid of other sources of moral enlightenment

[15] The remit of advisory bodies is very much determined by their terms of reference, or, in the cases of statutory authorities, the description of their function set down by law. Thus their capacity to be flexible – to remain abreast of changing community attitudes or to revise their views in light of new information – can be a function of their legal status and structure. For a brief discussion of this, see Gunning and English, op cit n 7, p 67.

[16] Engelhardt, op cit n 1.

or ethical expertise, where the moral truth lay. In such a scheme, community opinion is valued as a possible source of insight into moral truth. But this notion of being able reliably to discern the moral truth, let alone being justified in putting it into legislation, has already been rejected. If law-makers cannot justifiably claim that they know the moral truth on an issue of private morality and have no remit to put morality into legislation, then appointing a committee to find the moral truth for them would likewise be a fundamentally flawed undertaking.

A different interpretation of the task of regulatory bodies would be that it is to advise government on the state of public opinion on the issue. So regulatory bodies would, in their consultation processes, find out who supports and who opposes access to ART by single women and lesbians, how strongly held their views are, what proportion of the community holds such views, and so on. This is the sort of information that governments would find valuable, and may well use as a basis for legislation. Insofar as an advisory or regulatory body needs to provide what politicians want, then it must provide information about public opinion. But to think that this is the *only* aim of a public consultation is, we suggest, to have an impoverished notion of what public consultation is and what it can achieve. In terms of democratic theory, this conception of public consultation is going down the path of either majoritarianism or interest group bargaining, in which the issues are not really considered on their merits, but viewpoints are simply measured in some way, or traded off against each other. We suggest that regulatory bodies have a more robust role to fulfil than this. If they advise on public opinion, they do more as well.

We propose that the proper role of regulatory bodies is to advise government on the likely social impact of options for regulation in the area of ART. We will expand on the notion of social impact below, but in essence, we are referring to the effects that regulation will have on the lives of individuals and social groups. Assessing social impact requires posing and attempting to answer the question: "How will life be for this individual or social group if ART is regulated in one or another way or not at all?" More precisely, we suggest that changes to quality of life and dispositional autonomy (by which we mean the ability to live one's own life according to one's own conception of what a good life is) be used to measure social impact. Admittedly, autonomy and quality of life are moral concepts, so the consultation process which we propose would not be restricted entirely to non-moral matters. However, they are "thin" concepts, largely without substantive content – they point to the importance of people being able to live and evaluate their own lives, but they do not prescribe any set way of doing this. Our proposal, then, is that the focus in public consultation be on how people's lives will be affected, from their own point of view.

This may sound like a simple, almost trivial, idea but we believe it gives significant direction to regulatory bodies about how they should go about their work. We will demonstrate this below in relation to the issue of access to ART by lesbian and single women. But first we need to give an account of why social impact should be the focus of advisory bodies' consultation and recommendation processes.

Why social impact?

Our proposal that regulatory bodies should focus on the social impact of proposed regulation is based foremost on the view that those who are directly affected ought to have a say in such regulatory decisions, and that special weight ought to be accorded to their views of how they will be affected.

Having a say

Feminist theorists have probably been amongst the most influential in arguing against the legitimacy of decisions that profoundly affect women's lives but are made without women's input: decisions about abortion access, birthing arrangements and access to and quality of ART, for example.[17] Likewise, indigenous activists in many parts of the globe regularly assert a right to "self-determination" – a controlling stake in decisions that affect their lives. The philosopher James Bohman takes a similar view. He argues that the goal of public deliberation is consensus, which he defines as "the agreement of all those affected by a

[17] L Cannold, *The Abortion Myth: Feminism, Morality and the Hard Choices Women Make* (Allen & Unwin, Sydney, 1998); B Jordon, *Birth in Four Cultures: A Crosscultural Investigation of Childbirth in Yucatan, Holland, Sweden and the United States* (4th ed, Waveland, Prospect Heights, Illinois, 1993); R Rowland, *Living Laboratories: Women and Reproductive Technologies* (Pan MacMillan, 1992).

decision".[18] Whilst we do not agree that consensus is the goal, what is important here is the recognition that it is those affected who need to have a say.

Interestingly, groups which assert that those affected by a decision have a moral claim to be included in its making tend to see this assertion as self-evident. Little explanation for why this should be the case is offered. A basic understanding of the meaning and requirements of autonomy, however, seems to provide the necessary link. Young argues that an autonomous person

> "must not be subject to external interference or control but must, rather, freely direct and govern the course of his (or her) own life. The autonomous person's capacities, beliefs and values will be identifiable as integral to him and be the source from which his actions spring … such a conception of human thought and action requires more than just the absence of constraints and instead extends to the charting of a way of life for oneself."[19]

An agent is "recognised as having dignity that moral agency bestows," says Young, only if she is able to "determine her own ends (at least to some degree)". Moreover, from the agent's own point of view, "autonomy promotes self-esteem".[20] Thus, if a person has autonomy, she has some degree of control over her life. If people have some degree of control over their life, they respect themselves and are respected by others. Be that person a pregnant woman, a citizen in a democratic state or an indigenous person, a primary path to the exercise of autonomy (and the social and personal benefits that this exercise provides) is a say in decisions that affect his or her life. People not directly affected by a decision may benefit in other ways (for instance, financially) through their exercise of control over it. But if, in exercising control, they are in fact determining what other people's life options will be, they risk using those others as a means to their own ends. This would be a stark failure in respect for autonomy, and it is vital to ensure that this does not happen. Focusing on social impact is a way of avoiding this problem.

What weight is accorded

Focusing on social impact is also important because it allows due weight to be given to those who will be most affected by any proposed regulation of ART.

We take the view that claims made by those most directly impacted about the effects of a certain form of regulation on them should be given extra weight, on epistemic grounds. That is, that they are in the best position to know how they will be affected, in terms of both the impact on their quality of life, and on their ability to make and carry out their own life plans.

Using the procedure: The example of lesbian and single women's access to ART

In order to best explain the procedure we are proposing, we will rely on a test case – a scenario in which a regulatory body conducts a public consultation on the issue of access of lesbian and single women to ART. We will speak hypothetically about how a public consultation might be conducted, and will not be referring specifically to any particular consultation that has actually been undertaken. In particular, we will not be referring to the consultation process that was undertaken by the Australian Senate Legal and Constitutional Legislation Committee on this issue in 2000. However, some background on the circumstances surrounding this particular consultation will be helpful in understanding our proposals, and the sorts of problems they are designed to address.

Background

Debate in Australia regarding the access of single women and lesbian couples to infertility treatments began in earnest following the 1997 ruling of the Queensland Anti-Discrimination Tribunal that allowed lesbians access to donor sperm. In 1999 the HREOC found that a hospital had discriminated on the basis of marital status when it denied a woman access to donor sperm because she was single.[21] The Commission noted that the *Sex Discrimination Act* 1984 (Cth) prevails over discriminatory sections of State law, and awarded damages against the

[18] J Bohman, "Survey Article: The Coming of Age of Deliberative Democracy" (1998) 6 (4) *Journal of Political Philosophy* 400.

[19] R Young, *Personal Autonomy: Beyond Negative and Positive Liberty* (Croom Helm, London, 1986), p 1.

[20] Ibid, p 2.

[21] *W v D and Royal Women's Hospital* HREOC H97/221 (21 Dec 1999). See subsequent decisions above at 392.

hospital. Not long after that, Dr John McBain brought a case in the Federal Court – in relation to his proposed treatment of a single medically infertile woman named Lisa Meldrum – and achieved a similar ruling. In *McBain v Victoria*[22] the court ruled that part of the *Infertility Treatment Act* 1995 (Vic) were invalid as they discriminated against single women and were thus inconsistent with s 22 of the *Sex Discrimination Act* 1984 (Cth).

In response to *McBain*, the Victorian State Government reinterpreted State law to focus on an existing provision allowing only clinically infertile couples to access ART. This requirement was applied to single and lesbian women, enabling only women in these categories who were medically, rather than socially, infertile to have access to the technologies.[23] This was done, said the Victorian Premier Steve Bracks, in order to preserve the State government's right to ban fertile women from seeking treatment such as donor insemination on the basis of a "lifestyle'' choice. The Victorian Opposition leader praised both the Premier's stance and the move by the Federal Government to introduce a Bill into the Commonwealth Parliament to amend the *Sex Discrimination Act* 1984 (Cth). The Bill has now lapsed.[24] The amendment would have given State governments the power to restrict access to assisted reproductive services to single and lesbian women. The Prime Minister of Australia described the problem posed by the *McBain* ruling as "overwhelmingly" about the "right of children in our society to have the reasonable expectation, other things being equal, of the affection and care of both a mother and a father".[25] The Federal Attorney-General urged the Labor Party, which opposed the Bill, to "put the interests of the children who may be born as a result of ART ahead of petty point scoring".[26]

The introduction of the federal legislation, while vociferously criticised by the Federal Sex Discrimination Commissioner, was welcomed by the Australian Family Association (AFA) which praised the Prime Minister for moving "so quickly to stop a situation which was patently against the interests of a child".[27]

In a highly unusual move, the Catholic Church and the Australian Catholic Bishops' Conference (ACBC), who were not parties to the original action, sought review of the Federal Court ruling in the High Court of Australia.[28] The ACBC described its motivation to intervene in the case as its concern for the "welfare of the child".[29] The High Court granted

[22] [2000] FCA 1009.

[23] Late in 2001, the Infertility Treatment Authority proposed revisions to the guidelines for eligibility for infertility treatment in Victoria. These revisions would note that "infertility may encompass psychological as well as physical symptoms". If enacted, such guideline revision would enable a fertility specialist to provide donor insemination to a woman who is unable to participate in heterosexual intercourse. This would include "women who cannot have sex with a man; partners in a lesbian relationship; women in a heterosexual relationship (whether married or not); and single women who have been unable to sustain a heterosexual relationship because of this condition". Political concern about the proposal led the ITA to withdraw the suggested revisions and the State Liberal Opposition to promise legislation that would restrict ART access to those who are physically infertile. See Infertility Treatment Authority, "Infertility Treatment Authority Press Release", 19 Nov 2001; R McNair, "Press Release: Fertility Access Rights: Call for Urgent Referral to Law Reform Commission", 20 Nov 2001; R McNair, "Proposed Guideline Revisions", personal communication, 2 Nov 2001.

[24] The Bill lapsed because it was not passed by the Senate prior to the dissolution of Parliament for the November 2001 election. Walker argues that the re-election of the Liberal/National Party Coalition makes it likely the Bill will be reintroduced, but the balance of power in the Senate means it remains unlikely to pass. If it were to pass, it would revive the operation of the Victorian legislation and thus reinstate the exclusion of lesbians and single women from access to assisted reproductive services. For further discussion of the legal issues involved, see K Walker, "Should There Be Limits on Who May Access Assisted Reproductive Services? A Legal Perspective", Paper delivered at the "State of ART Regulation" Conference, Melbourne, Australia, 23 Nov 2001.

[25] Prime Minister the Hon John Howard MP, "Sex Discrimination Act, IVF and States' Rights", Transcript of Press Conference, Parliament House, Canberra, 1 Aug 2000.

[26] Attorney-General Daryl Williams, "Sex Disrimination Amendments Pass the House", Press Release, 4 April 2000.

[27] M Metherell and J Whelen, "PM Fights IVF for Singles", *Sydney Morning Herald*, 2 Aug 2000, p 1.

[28] Walker, op cit n 24, p 5, notes that it was not possible for the Church or the bishops to appeal as they were not parties to the proceedings, having elected only to present arguments as amici curiae. In seeking review, they utilised procedures under s 75(v) of the Constitution and s 30 of the *Judiciary Act* 1901 (Cth) to attempt to have Sundberg J's decision quashed by the High Court. Walker believes there is "some doubt about whether the court will permit the ordinary appeals process to be circumvented in this way". As well, doubt exists as to the standing of the bishops and the Church to seek review. However, she notes that "the need to demonstrate standing was avoided in part by the grant of a fiat to the Church by the Commonwealth Attorney-General. The fiat allowed the Church to proceed with the case in the Attorney's name without needing to demonstrate standing."

[29] Australian Catholics Bishops' Conference, "Catholic Bishops

the Human Rights and Equal Opportunity Commission and the Women's Electoral Lobby (a feminist grass-roots organisation) leave to intervene in the case as the major contradictor to the ACBC, now joined by the AFA. At the last moment, the Federal Government moved to intervene in the case in partial support of the ACBC's position. However, the application was denied by the High Court of Australia.[30]

Describing the proposed assessment procedure

With this background in mind, we will describe the procedures that we propose for advisory bodies inquiring into such matters. The essence of the procedure is that the advisory body focus on the impact on people's lives of options for regulation. The critical factors for distinguishing between views and according them weight would be the directness, certainty and type of impact the proposed regulatory intervention would have on the party making the submission.

Format of submissions

The first step would be to call for submissions in such a way that social impact issues are clearly addressed. Interested parties would be encouraged to make submissions using a pro forma. The pro forma would ask the party explicitly to address the way(s) in which they or those they are seeking to represent would be impacted by the proposed regulation. The pro forma would request interested parties to articulate the nature of this impact in terms of agreed notions of dispositional autonomy and quality of life. These requests would discourage, although not prohibit, interested parties from putting forward arguments based on speculative or controversial moral claims. Of course, people making submissions cannot be forced to address the set criteria, and perhaps quite a number would not. But even in those cases, the advisory body would at least know what it was looking for in the submissions, and would have an explicit basis on which to interpret and weight them. Here we are not putting forward what would arguably be the more radical version of our argument, that people should be prevented from *expressing* moral views on issues other than those related to personal autonomy and quality of life. But we are proposing that such views be regarded as not germane to the task of the body conducting the consultation, which should be seeking to assess social impact (in the terms we have defined) and not moral outrage.

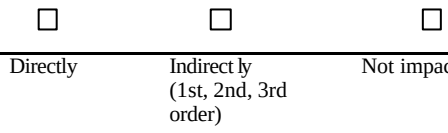
Evaluating submissions

Once submissions are received, the advisory body would use the notion of social impact to evaluate them. This evaluation would address three aspects: the directness, certainty and type of impact that is claimed in the submission.

Directness of impact

Advisory bodies should first inquire about the directness or indirectness of the involvement of the party making the submission. In asking the question, "In what way would you be impacted by the proposed regulatory intervention?", the advisory body would seek to categorise answers along a continuum.

Figure 1. In What Way Would You be Impacted by Regulatory Intervention?



At one end of the continuum would be those directly impacted, in the middle those indirectly impacted, and at the other end those not impacted at all. At the directly impacted end of the continuum would be individual single and lesbian women or couples, children who would be born to these women should they be given access to the technology, and the infertility treatment specialist who would provide or be prohibited from providing treatment to these women. In the middle would be those indirectly affected, who may be categorised as experiencing a particular order of indirect impact. By this we mean the impact on them would be contingent on the regulatory intervention first

will Urge Court to Uphold Existing Laws Supporting Essential Bond Between Parents and Children" (2000a); Australian Catholics Bishops' Conference, "McBain Ruling Raises Fundamental Questions Regarding Family, Marriage and the Rights of the Child" (2000b).

[30] See Editorial above at 377.

impacting on another individual or group. So, for example, women as a social group might be categorised as likely to experience second-order impact. This is because the consequences they might suffer – for example, a reduction in their legal protection from discrimination on the grounds of marital status or other grounds – would only occur if the *Sex Discrimination Act* 1984 (Cth) was weakened to enable discrimination against single and lesbian women in the provision of ART. Third-order impact might be married heterosexual couples who could argue they would be impacted if single and lesbian women were given access to ART and, as a second-order consequence, the legal and social status of single women and lesbian couples increased so that, as a third-order consequence, they suffered a decline in their relative legal and social relationship and parenting status. It is difficult to see how the Catholic Church, which has been highly involved in the public debate and legal activity surrounding the issue to date, could argue that it was impacted at all, or in a higher-order way, by regulatory intervention around ART.

Certainty of impact

The second category is concerned with the certainty of impact on the person or entity making the submission. In response to the question, "How likely are you to be impacted by regulatory intervention?", the regulatory body would again seek to categorise answers along a continuum.

Figure 2. How Likely are You to be Impacted?

☐	☐	☐	☐	☐
Very likely	Likely	Possibly	Unlikely	Very unlikely

Moving from the left to the right side of the continuum, there are those who will "very likely" be impacted, those "likely" to be impacted, those "possibly" impacted, those "unlikely" to be impacted and (on the far right side) those "very unlikely" to be impacted. An advisory body might categorise single and lesbian women, children born to these women and infertility treatment specialists as "definitely" affected. Uncertainty would likely arise about the proper placement on the continuum of other interested parties, for instance social groupings like "women" or "married couples" and institutions like the Catholic Church. This is because determining the likelihood of these groups experiencing predicted outcomes is not straightforward. In seeking to evaluate submissions from these groups, the advisory body may wish to seek expert advice (see below).

Type of impact

The third category is concerned with the type of impact that regulatory intervention might have. Here the advisory body would ask: "What type of impact would you experience as a consequence of regulatory intervention?" Single and lesbian women might describe the impact regulation would have on their capacity to control their reproduction, and to fulfil their desire to have a child. Infertility treatment specialists might set out the way in which restrictive regulation would affect their professional autonomy and earning capacity, while married heterosexual couples might talk about the negative impact legislation might have on their capacity to retain sole access to the social, legal and economic benefits society now reserves for heterosexual married couples. Institutions like the Catholic Church might address the impact a regulatory intervention might have on its congregations' and the wider community's views of the sacredness of marriage, and hence the general credence given to the Catholic Church as a source of moral authority.

As we suggested above, impact would primarily be addressed in terms of dispositional autonomy and quality of life. Some of those making submissions may prefer to cast their views in terms of rights being overridden, or moral wrongs being done. For example, the Catholic Church may want to argue that allowing lesbian women access to ART would result in children being born outside marriage, which (they would claim) is morally wrong, or infringes on the rights of children. Although we do not believe advisory bodies ought to try and prevent interested parties from expressing such views, we believe the advisory body should inform interested parties that their role prevents them from passing judgment on the truth of such claims. Further, the advisory body needs to inform interested bodies that its procedures for evaluating the social impact of regulatory options would make the systematic and transparent evaluation of such claims highly problematic.

Expert advice

The advisory group should also seek out the advice of experts on questions of fact. However, as Bayertz[31] notes, the difficulty of reaching consensus in the area of ART is not only a consequence of pluralist values in multicultural societies, but also the ambiguity of so-called empirical facts:

> "The more fragmentary the knowledge of a particular field, the greater the room for reasonable disagreement; the newer the field in question the more fragmentary the knowledge … the options are too new and their consequences too unclear for society and its members to have gathered sufficient information and to have given them sufficient moral reflection… As long as reliable answers are unavailable, there remains room for controversial estimates."

Thus advisory bodies should be encouraged to be active in seeking out expert advice, and to triangulate: to seek knowledge of the "facts" from numerous and diverse sources, so as to arrive at the most comprehensive empirical picture possible.

Submissions made on behalf of others

How should the advisory group view submissions from interested parties describing the impact of any or no regulatory intervention on other parties – perhaps ones unable to speak for themselves? In the current debate, for instance, the Women's Electoral Lobby has sought to articulate the impact on "women" of proposed changes to the *Sex Discrimination Act* 1984 (Cth), and the Catholic Church has sought to describe the impact of regulatory change on children's rights and welfare. If the advisory body accepts that "voiceless" individuals or groups like these may be impacted by proposed regulatory change, then it is imperative that the advisory body be apprised of the degree, certainty and type of that impact. But how can this be done?

We believe the advisory body should actively seek out the best individual/s or group/s to describe the impact of proposed regulation on the "voiceless". The best individual/s or group/s may not necessarily be those who offer themselves for the job. Asking a few simple questions, however, will enable an assessment of those who step forward. Such questions might include:

- Are you the "closest available fit" with the individual/s or group/s being represented?
- How many members of this group do you represent?
- Have you been authorised to represent some or all of the people in this group? In what ways?
- Are you the only individual or group that can legitimately describe the impact on the voiceless?
- What is the basis of your claim to knowledge of likely impacts?

From the responses to these questions the advisory body may:

- accept the party that stepped forward to describe the impact on the voiceless as the only party to be heard;
- accept the party that stepped forward as only one of a range of individuals or groups that should be heard;
- reject the party that stepped forward as unsuitable for informing the advisory body of the impact on the voiceless.

In cases where no individual or group has stepped forward to discuss the impact on the voiceless, or where the party or parties that have come forward are deemed unsuitable to solely inform the advisory body, or to advise it at all, then the advisory body ought to solicit other individuals/groups to provide it with the necessary information about impact. Individuals or groups may be solicited who are, in the advisory body's view, a good enough fit with the voiceless group that they can represent them exclusively (for instance, adult children of single and lesbian women might be solicited to discuss the way regulatory change might impact on children who might be born to single or lesbian women as a consequence of regulatory change). Alternatively, a range of "imperfect" sources may be sought to provide as balanced a view as possible of the impact on the voiceless of regulatory intervention.

Objections considered

To some, our proposal may seem excessively restrictive of free speech: denying the right of everyone in the community to make whatever submission in whatever terms they wish and to be equally heard. We would respond in three ways.

First, in our view, this is a small loss for considerable gain, if indeed it is a loss at all. It may seem anti-democratic to restrict free speech in this

[31] K Bayertz, "Introduction", in Bayertz, op cit n 1, p 9.

way, but our view is that in a liberal democratic society, it is quite appropriate to conduct public consultation about regulation of ART in this way. ART, though it involves lots of complex technology, is about personal reproductive and family decisions, which are ultimately private matters. In a liberal democracy, the state is to refrain from interfering in the private lives of its citizens as much as is possible (provided third parties are not exposed to risk of non-trivial harm). This is what liberalism is all about – allowing individuals to live according to their own conceptions of a good life. If a person makes a choice about how and when to have a child, and someone else proposes to intervene to prevent this, then it is entirely legitimate to ask, "In what way does this affect you?" Our proposal is that every person or group wanting to make a submission should make the case. If they cannot, their claim to have their views influence the decision-making process is considerably weakened.

Secondly, we would suggest that in a consultation process where no such procedures are used to manage submissions, it is unlikely that advisory bodies give equal or appropriate weight to all submissions anyway. Rather, bodies will accord greater and lesser weight to submissions on the basis of idiosyncratic criteria that are never made public and for which they are never held accountable. Thus, while some may disagree with the specific procedures we have proposed, we believe it is incumbent upon them to propose an alternative, as the current situation where deliberations are guided by no transparent procedure is clearly inadequate. Our proposal has the merit of being straightforward, relatively easy to put into practice, and is founded on a principled refusal to allow a single substantive moral position to dominate public policy-making.

Thirdly, we note that while this proposal lacks precedent in the field of ethics, the values and objectives embodied in it have long been articulated and enacted through the legal concept of "standing". In Australia, those who wish to be heard in the courts must be able to demonstrate standing. The law of standing is the "set of rules that determine whether a person who starts legal proceedings is a proper person to do so".[32] The effect of these rules is that

> "the plaintiff generally has to demonstrate some special connection with the subject matter of the proceedings – namely that he or she is specially affected, or has a special interest, or has an interest going beyond the interests of ordinary members of the public".[33]

In its 1985 report on the existing laws relating to standing, the Australian Law Reform Commission argued that the law of standing should be reformed to facilitate the capacity of "public-spirited citizens" to take on the role of "guardian of the public interest without undue restriction". However, this requirement needed to be balanced with the "prevention of mere meddlers" in proceedings who had "no personal stake in the matter" and were "clearly" unable to "represent the public interest adequately".[34]

It was on the issue of standing that numerous legal and political commentators objected to the ACBC's decision to ask the High Court to overturn *McBain*. Senior Lecturer at Melbourne University, Kristen Walker, argued that the Catholic Bishops lacked "sufficient interest" to bring the case because the grounds on which they claimed to be personally and concretely affected by the ruling (that they provide adoption and obstetric services to married couples only) were weak. In addition, Walker questioned the capacity of the Church adequately to represent the views of "unborn children" by noting:

> "there's very little that the Church can offer by way of any particular ability to speak for the unborn child any more than the single woman who wants to bear the unborn child can speak for that child."[35]

Standing seeks to ensure that only those whose interests are directly affected have their views considered by decision-makers. It also seeks to ensure that those seeking to represent the interests of others, especially those unable to speak for themselves, are qualified to do so. In addition, the law of standing attempts to ensure that the judicial system functions efficiently and that its processes are not disrupted by "busybodies" who have

[32] Australian Law Reform Commission, *Standing in Public Interest Litigation*, ALRC 27 (Australian Law Reform Commission, 1985), Summary.

[33] Ibid.

[34] Ibid, Recommendations.

[35] ABC Radio National, *Catholic Bishops and IVF: Teaching Western Culture* (The Law Report, 2001).

> "no claim to be treated as qualified to represent in a concerned and capable manner a class or group of individuals within the community whose legal rights or whose interests, in a general sense, are directly involved in the proceeding".[36]

Whilst it is true that there has been a trend in law to expand the grounds on which standing may be granted, so as to allow the involvement of the "public-spirited citizens" referred to by the Australian Law Reform Commission, the notion of standing itself, and the objectives which it is intended to achieve, have not changed, and are still regarded as central to legal process.

We believe that advisory bodies have similar interests in encouraging civic-minded individuals to represent the public interest on matters to do with ART. And likewise, such bodies need processes similar to the rules of standing, that enable them to function efficiently. They also need transparent procedures that allow due weight to be given to the testimony of those whose capacity to control their own lives may be affected by the advice they give. The procedure we have advanced in this article for use by advisory bodies seeks to balance these requirements by enabling a differential weighting of disparate views according to the directness, certainty and type of social impact that regulation can be expected to have on an individual or social group.

One possible response to our argument to this point is to accept its apparent legitimacy in relation to regulation of ART, but to question whether it would prove equally satisfactory in quite different public policy disputes, such as the debate over logging of forests in Australia, or the legality of fox hunting in the United Kingdom. If it does not seem to produce satisfactory results in those situations, it might be argued, then it cannot be a justifiable approach to public consultation and regulation in any area. This argument, of course, relies on the assumption that mechanisms for making public policy decisions must be universally applicable in order to be ethically justifiable. This assumption could be disputed, but we will accept it here for the sake of argument. The important point is that our procedure, properly understood, does not produce counterintuitive results in other areas. To take the logging example, it might seem that our procedure would give the greatest voice to timber workers who would lose their jobs if logging were to cease, and would rule environmental concerns out of court. But this is not so. One way of understanding environmental concerns is to cash them out in terms of the negative impact of environmental degradation on future generations. Hence our procedure would clearly include this concern – future generations would be affected, this does matter, and evidence would need to be taken from groups or individuals who could speak to the nature and degree of impact on this voiceless group. This may not completely satisfy some deep ecologists, who attribute intrinsic value to the environment, but it is quite enough to get environmental concerns squarely on the table.

So whilst criticisms of our proposed procedure can be made, we believe that we can adequately address them. We are not claiming that this procedure is morally perfect – there are moral gains and moral losses. But we believe that the moral gains, in terms of the ethical conduct of public consultation about regulation, are important, and that our procedure is the best way yet proposed of achieving these gains, with minimal moral losses.

Conclusion

In this article we have tried to address one practical problem faced by advisory and regulatory bodies when they conduct public consultations on issues related to ART. We have argued that, despite the difficulties of dealing with radically opposing submissions, the process of public consultation as part of state regulation is well justified, and indeed vital to the democratic process. However, radical moral disagreement does not necessarily lead to fruitful deliberation, so we propose a procedure by which advisory bodies could transparently manage consultation to both promote a more productive engagement over the issues, and fulfil the task of assessing the social impact of proposed regulation. We expect our proposal to provoke disagreement, but our aim is for fruitful debate to follow from it.

[36] Australian Law Reform Commission, op cit n 32, Summary.