Response to the Report of the Commission On Assisted Human Reproduction

Science has given us something new: families that are designed, from the start, to have only a single parent; to have quite a few parents; to have two parents, only one of whom is biologically related to the child, the other of whom is not biologically related, with a third party out there who is biologically related, but often, unknown…parental roles are being divided up and divvied out, outsourced and re-shuffled and even deleted. *Lisa Munday, Everything Conceivable: How Assisted Reproduction is changing, men, women and the world. p.96*

'Should science do everything that science can do?'
Prof Dervilla Donnelly, Chair of the Commission on Assisted Human Reproduction, CAHR Report, p.xi

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Although one of the first recorded cases of donor insemination was in the 1890s, the last forty years have seen an explosion of scientific techniques designed to circumvent infertility. The most celebrated landmark was Louise Brown's birth in 1978. After at least eighty painful failed attempts involving other women and innumerable embryos, and a somewhat cavalier approach to consent, Doctor Edwards and Doctor Steptoe announced the first IVF birth.[1] What began as a way to help married couples conceive rapidly became something else entirely. In 2008, a transgender legal male gave birth to a baby using donor sperm.[2] Today, several techniques are being explored by scientists to produce artificial gametes, for example, by taking a cell from an adult, and inserting its nucleus into an empty egg cell. This is a process akin to cloning, but development would be halted in order to produce stem cells. These could then be stimulated into becoming sperm or egg cells. It has been suggested that same-sex couples could use the technique to produce children who are genetically related to both partners.[3]Should science do everything that science can do? It begins to look like a very important question.

Current Situation

There is no Irish legislation governing Assisted Human Reproduction[4] (AHR). In theory, anyone can set up a clinic. The lack of legal clarity resulted in several court cases, notably, the High Court case of MR vs TR (Nov 2006)[5] MR, who is separated, sought custody of three frozen embryos, hoping to have further children. She lost her case, but

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[1] See Deech, R and Smajdor, A, *From IVF to Immortality – Controversy in the era of Reproductive Technology*, Oxford University Press, London, 2003, p 40.
[2] Mundy, L. *Everything Conceivable: How Assisted Reproduction is Changing Men, Women and the World,* London, Allen Lane, 2007, p.51
[3] Deech and Smajdor, p.96
[4] CAHR defined Assisted Human Reproduction as any procedure that involved the handling of gametes and embryos. Two main types of intervention were understood by this definition: assisted insemination (AI) and in vitro fertilization (IVF). The latter refers to when conception takes place outside the body, literally, 'in glass', and may be undertaken using the potential parents' gametes, or may involve the use of donor gametes and surrogacy.
[5] http://www.courts.ie/judgments.nsf/bce24a8184816f1580256ef30048ca50/e5617d292b7b6b268025724800329992?OpenDocument

appealed to the Supreme Court. A judgment is pending. In another case (McD v L and Anor, April 2008)[6] a gay man donated sperm to a lesbian couple, on the understanding that he would be a 'favourite uncle' figure. Later, wanting a fuller role in his child's life, he applied for visitation rights. In an extraordinary judgement, Hedigan J declared that the lesbian couple constituted a stable de facto family, the bloodlink was of no great weight, and that it was not in the child's interests to have contact with his father. Both cases illustrate a lack of understanding of what constitutes a child's best interests.

Commission on Assisted Human Reproduction

The Commission on Assisted Human Reproduction was set up by Minister Micheal Martin, TD, Minister for Health and Children, on February 25th, 2005, to address the lack of regulation of AHR and to make suggestions as to how to proceed. Under the chairmanship of Prof Dervilla Doherty, it had the following terms of reference.

- to prepare a report on the possible approaches to the regulation of all aspects of assisted human reproduction and the social, ethical and legal factors to be taken into account in determining public policy in this area.

The Commission was to serve two purposes:

- firstly, it would provide the medical, ethical and legal expertise necessary for a detailed examination of the possible approaches;
- secondly, the publication of its report would provide the basis for informed public debate before any policy proposals would be finalised.

Assisted Human Reproduction was defined by the Commission as any procedure that involved the handling of gametes[7] and embryos. Two main types of intervention were understood by this definition: assisted insemination (AI) and in vitro fertilization (IVF). AHR can cover everything from the relatively uncontroversial use of a married couples own gametes, to the much more controversial use of donors and surrogates.

The Commission was required to seek submissions from the public and to consult appropriate interests. It held 23 plenary meetings, and established four work groups. It also held two conferences in Dublin Castle. The first was in September 2001, and looked at social, ethical and legal factors pertaining to AHR. The second, on 6 February 2003 was a large public conference. It focused on the regulation of AHR, legal and ethical issues concerning the in vitro embryo, and creating families through AHR. Complaints were received at this time that the presentations at this conference were unrepresentative of Irish society, including claims that most of the people speaking at the conference were representing vested interests in the AHR industry.

[6] http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/38a622eaeb78969f80257447003cf68e?OpenDocument

[7] Ova and spermatozoa

The Commission also advertised for submissions, and received 1,700 responses. Of these, some 900 were characterized by CAHR as having emerged from 'common authorship, where a memorandum had been drawn up, by for example, a lobby/pressure group, and distributed to a large number of people for signature'. A nationally representative telephone survey was conducted on AHR as a solution to infertility, the use of donors and the rights of donor-conceived children to genetic information, surrogacy, so-called 'surplus' embryos, and embryo research. Given the fact that opinion polls are considered to be at best snapshots in time, it may be seen as odd to have conducted a telephone poll on such sensitive issues with far-reaching consequences. CAHR was also extremely selective in how it used the results of this poll. It refers to being dependent on the telephone survey, for example, when considering the appropriate relationship status of users of AHR, [8]that is, whether AHR should be confined to married couples. However, it recommended that AHR be available to people regardless of gender, marital status or sexual orientation. Yet in its own telephone survey, almost half of respondents did not agree with AHR services being provided to single women, while 60% did not agree that it should be made available to same gender couples, single men or post-menopausal women.[9]

The Commission had access to anonymised results of a survey carried out by the National Infertility Support and Information Group (NISIG) on levels of satisfaction among couples who had sought fertility treatment in Ireland. The Commission carried out three surveys of service providers, one of general practitioners, one of consultant obstetricians and gynaecologists working in maternity hospitals and units, and one of consultant obstetricians and gynaecologists working in specialist fertility clinics. The Commission also consulted with the UK Human Fertilisation and Embryology Authority, and consulted surveys of international legal and medical practice in the area.

While it may be presumed that a significant number of submissions urged caution in relation to AHR, this was not reflected in the recommendations published by CAHR in 2005. The stipulation that the embryo should not attract the legal protection afforded to the unborn in the constitution until after implantation caught most public attention, but many more of the 40 recommendations were controversial. For example, CAHR recommended allowing the donation of sperm, eggs and embryos. It would allow surrogate motherhood provided it was not a commercial operation. It recommended that 'services should be available without discrimination on grounds of gender, marital status or sexual orientation, subject to the best interests of the child'. It accepted the principle of destructive embryo research under certain conditions. It allowed for 'voluntary donation of excess healthy embryos to other recipients, voluntary donation for research or allowing them to perish.' It suggested that children conceived through donor conception should be able to access information about their origins after the age of 18, but decided it could not make it mandatory for parents to inform their children of how they were conceived.

[8] CAHR Report, p.42
[9] CAHR Report, p.40.

Given that the purpose of this paper is to concentrate on the rights of children conceived through AHR, and to suggest strongly that AHR services be confined to stable married couples, only the recommendations that are directly relevant will be looked at in detail. However, something of the general outlook of the 24 members of the Commission can be gauged by the fact that only one member, Prof Gerard Whyte, Associate Professor, in the Law School, Trinity, objected to legal protection only being afforded to the embryo after implantation. There was only one other minority report, from Ms. Christine O'Rourke, Advisory Counsel, Office of the Attorney General, who objected to the recommendation that surrogacy be allowed. For most members of the Commission, commercialisation, human cloning, animal hybrids, generating embryos for research purposes, and research on embryos over fourteen days old were virtually the only unacceptable aspects of AHR. This is in no way representative of the general public in Ireland.

In the foreword to the Report, the Chairperson of the Commission, Prof. Donnelly remarks that "in our emerging multicultural society it is unlikely that any one set of ethical/moral principles could be completely acceptable to all. In making its recommendations the Commission sought to put forward a framework broad enough to be generally acceptable to all individuals and groups in society." This is a curious approach, given that it does not start from the idea the Commission should seek to ascertain what the right approach is, but only what is likely to be acceptable. This relativist approach to what are essentially questions of right and wrong, is likely to lead to the situation currently pertaining in Britain. Legislation was introduced that was very much along the lines of that proposed by CAHR, and in recent times has been broadened still further, to include even the production animal-human hybrid embryos. Of even more relevance to this paper, even the rather weak injunction that the right of a child to a father be taken into account has been removed.

Although the Commission devoted some time to the issue of the welfare of children, or in its preferred term, offspring of AHR, it could not be said to have had a truly children's rights-based approach. The bias throughout was in favour of adults who are seeking infertility treatment. For example, again in the foreword, Prof Donnelly acknowledges that frequently there is 'a deep and unspoken wish to continue a genetic line through a new generation and this need is not fulfilled by adoption.' This shows awareness of the importance of genetic links to adults. There are references to the importance of genetic links and heritage to children, yet when it came to recommendations, these links were not given the same weight as a couple's or single person's desire for a child.

The pain of infertile couples should not be lightly dismissed. It is perhaps best expressed by the National Infertility Support and Information Group, a voluntary organization founded by people who 'needed and wanted to be in contact with others who understood their grief.'

Infertility - *the inability to have a child - has the potential to dominate your life. It can bring great personal despair and suffering. The feelings experienced by infertile couples include disbelief, pain, isolation, exclusion, bitterness, anger, confusion, and depression. Unless addressed, the issues associated with infertility may encroach on your every*

waking moment, impinging on your self-esteem and sense of self – in short, infertility may cast a shadow over your creativity and leave you feeling utterly worthless as a human being.[10]

As acknowledged by CAHR, there is indeed a profound need in human beings to reproduce, and to cherish the next generation. However, as pointed out by some children, now adults, who were conceived through donor insemination or other AHR, very little consideration has been given to the needs of the children. The question is almost entirely framed in terms of 'treating' the infertile couple. However, donor insemination, or egg donation, or surrogacy, does not treat infertility, but merely circumvents it through the use of others' gametes. All the feelings mentioned by infertile couples, such as disbelief, pain, isolation, exclusion, bitterness, anger, confusion and depression, are also experienced by donor-conceived children. Just as some infertile couples come to terms with their situation with relative equanimity, some donor-conceived children may be able to deal relatively well with the circumstances of their conception. However, there is a growing body of first-hand testimony from donor-conceived children, that they feel betrayed and adrift when they realize that their image of themselves does not fit the reality and a profound sense of loss when they discover that they may never be able to have a relationship with a biological parent.[11]

In focusing almost exclusively on the needs of infertile people, understandable though it may be, the needs and rights of children can become secondary, in the assumption that a loving family is enough. Voices like Elizabeth's, who is donor-conceived, and now a mother, need to be heard.

> I am passionately opposed to donor conception, because it deprives children of a basic human right: to know, and be brought up by, their mother and father. It is completely different from adoption, because in that case the child already exists and needs to be cared for. Donor conception exists for the convenience of people who want to be parents. Wanting a baby is a natural desire, but is not to be achieved by unethical means. Why can't infertile people adopt a baby? 'Because it wouldn't be *ours*.' Why do they privilege the genetic link on the one hand and deny it on the other?[12]

For this reason, it is important that the debate about infertility and AHR proceed with the best interests of the child always in mind. The CAHR report implies that this should be the case, but some of its recommendations undermine this principle. For example, Recommendation No. 18 states that:

Where there is objective evidence of a risk of harm to any child that may be conceived through AHR, there should be a presumption against treatment.

This is an excellent recommendation, but is surrounded by others that make it clear that the rights of adults take precedence. For example, Recommendation no. 17 states:

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[10] http://www.nisig.ie/Home/tabid/37/Default.aspx. Accessed July 21, 2008

[11] See, for example, McWhinnie, *Who Am I?*, Rose, 'Rights of donor-conceived children'

[12] http://frabjousdays.blogspot.com/2007/01/brown-eyed-girl.html

Services should be available without discrimination on the grounds of gender, marital status or sexual orientation subject to consideration of the best interests of any children that may be born. Any relevant legislation on the provision of AHR services should reflect the general principles of the Equal Status Acts 2000-4 subject to the qualifications set out in section 4.8.

As will be explored in greater depth later, this presumes that it can be in the best interests of a child to be conceived in order to satisfy the desire for a child by an adult or adults, including adults who will have no genetic link to the child. In the same breath, it presumes that legislation should reflect the general principles of the Equal Status Acts, although it points out in the body of the report that it is not necessary for legislation to reflect this understanding.[13] One can only conclude that the framers of the report believe that the principles of equality can sometimes trump the best interests of the child.

CAHR would have produced an entirely different report if the best interests of the child were always paramount, as required by Principle Two of the UN Declaration of the Rights of the Child.

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.[14]

The whole question of AHR is framed from an adult perspective, where the pain of infertility, real and important though that pain is, trumps the needs of children who will be conceived in order to heal that pain. There is no doubt that children conceived in this way are loved and cared for in the vast majority of cases. However, as Dr. Alexina McWhinnie points out, there are recurring themes of aching loss in people who discover that they have been separated from their heritage.[15] As Dr Jacqueline Laing says, genetic information only begins to scratch the surface of what a donor-conceived person feels deprived of.

> What the man in search of his blood identity desires is not merely genetic information of a certain kind, but also the truth about the manner of his conception, the relationship between his father and his natural mother, his kin, siblings, grandparents, aunts, uncles and a great deal more.[16]

Velleman presents it even more starkly.

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[13] 'However, as Section 14(a)(i) of the Equal Status Act provides that nothing in the Act prohibits the taking of any action required under any enactment, a new statutory code regulating AHR would not be subject to the terms of that act.' CAHR Report, p.26

[14] UN Declaration of the Rights of the Child http://www.unhchr.ch/html/menu3/b/25.htm Accessed July 23rd, 2008

[15] McWhinnie, 2006, p.50-51

[16] Laing, 2006, p.552.

> How odd it must be to go through life never knowing whether a sense of having met a man before is due to his being one's father. How tantalizing to know that there is someone who could instantly show one a living rendition of deeply ingrained aspects of oneself. How frustrating to know that one will never meet him![17]

As Jonathan Glover has said, the normal state for a child is to have one parent of either sex. It is surely right to be cautious about tampering with something so fundamental.[18]

While there are some 40 recommendations, only some of them are directly relevant to the issues of central concern in this paper. The first three recommendations deal with setting up a statutory regulatory body, with compiling national statistics on the outcome of AHR techniques, and with longitudinal studies of children born as a result of AHR. These are useful suggestions, but only if the legislation and subsequent membership of the regulatory body were more representative of a children's right-centred approach, and indeed of Irish society generally, than the Commission was. Also, while longitudinal studies are of value, it may be of more value to consider carefully the kind of couples who should be considered for AHR in the first place.

Currently, assisted human reproduction, that is assisted insemination and in vitro fertilisation, is not subject to any statutory control. There are some nine specialist clinics in Ireland, some attached to major hospitals and some independently run. Virtually the only regulation is by means of Irish Medical Council Guidelines, which doctors are obliged to follow. Briefly, the guidelines may be summarised as follows. IVF should only take place after infertility has been thoroughly investigated resulting in a failure to find a treatable cause. Before IVF, extensive discussion and counselling must take place. Written and informed consent should be obtained. Embryos must not be destroyed or produced for research. 'The creation of new forms of life for experimental purposes or the deliberate and intentional destruction of in-vitro human life already formed is professional misconduct.' [19]Donation of embryos may be considered. Particular care must be taken regarding the biological consequences of Assisted Insemination by Donors (AID), and 'Doctors who fail to advise both donor and recipient about the potential implications of such measures and the possible consequences for the would-be parents and their baby could face disciplinary proceedings.'[20] Gene therapy and genetic testing may be ethical.

However, these guidelines do not cover non-medical personnel in clinics. Also, there are some worrying indications that some practitioners are not complying with the guidelines. Dr Aonghus Nolan, a member of the Commission for Assisted Human Reproduction, gave evidence to the High Court in 2006 to the effect that 'the guidelines are impractical, unworkable, don't reflect the reality of IVF treatment and are not adhered to by most IVF

[17] Velleman, 2005
[18] Glover et al, 1989.
[19] Guide to Ethical Conduct and Behaviour, 2004, Article 24:1, p.35
[20] ibid Article 24:4, p.35

clinics here.'[21] Of particular concern is the fact that the Assisted Reproduction Sub-Committee of the Institute of Obstetricians and Gynaecologists of the Royal College of Physicians has acknowledged that 'assisted donor insemination is readily at present in Ireland without legislation or control.'[22] While Medical Council Guidelines require that adequate records be kept for all medical procedures, it is not at all clear that, for example, records are being kept that will enable young people to identify genetic parents. In some cases this is actively ruled out, as in the use of donor sperm from anonymous donors. Similarly, the Guidelines stress the importance of counselling. In an admittedly small survey, the National Infertility Support and Information Group, a voluntary organization for infertile couples, found that the main complaints by couples who had undergone AHR included 'insufficient factual information and a relative lack of counselling.'[23] A quarter of couples did not find counselling beneficial, although the majority did.

In the absence of regulation, there is no proper register of clinics. In theory, anyone could set up a clinic, and there is no check on whether people working for clinics are properly qualified. There is no mechanism for independently reviewing whether clinics are following best practice. In at least one case, the lack of regulation lead to tragedy. Ms. Jacqueline Rushton, died from ovarian hyperstimulation(OHSS), a condition that only occurs in IVF. An independent report into her death was sharply critical of practices in the clinic in question, the HARI Clinic in the Rotunda. The HSE has since issued guidelines on the management of OHSS, but they have no statutory footing.[24] Nor is there any guarantee that donor-conceived children will be able to identify their genetic parents, or indeed, even be informed that they were conceived in this way. There is no legal limit to the number of children who may be conceived through sperm or eggs donated by one person, or no attempt to ensure that the same biological donor be used in a family for siblings. In theory, a person could have as many as 100 to 300 half-siblings spread throughout the world. There is confusion as to the legal parentage of donor-conceived children, or those conceived through surrogacy. Birth certificates register the husband of a woman who has a donor-conceived child as the father of the child. In the case of surrogacy, the legal presumption is that the birth mother, and her husband if she has one, would be the legal parents of the child, yet couples commissioning such children register them as their own. As a result, there is no obligation to undergo the strict process normally involved in adopting a child who has been born to other legal parents. Another concern is that counselling is currently being provided by the clinics. There is no 'quality control' on the counselling, and best practice would seem to suggest it should be carried out by independent, qualified personnel with no vested interest in the process.

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[21] http://www.irishtimes.com/newspaper/ireland/2006/0728/1153813832134_pf.html Carolan, Irish Times, July 28, 2006. Accessed July 25, 2008

[22] CAHR Report, p.109

[23] Cited in CAHR Report, p. 24

[24] Review of circumstances leading up to the death of Ms. Jacqueline Rushton R.I.P http://www.hse.ie/eng/newsmedia/HSE_published_review_of_circumstances_leading_up_to_the_death_of_Jacqueline_Rushton_RIP_.html Accessed July 25th, 2008

Structure of this paper
For the purposes of this paper, the most relevant recommendations will be grouped together into units. The first three principles can be seen as general recommendations. Recommendations 12 ,13 and 20 deal with counselling. Recommendations 17 and 18 deal with the gender, marital status and sexual orientation of prospective users of AHR, and with the need to refuse treatment if there is an objective risk of harm to the child. Along with these latter two recommendations, an appendix on the welfare of the child will be discussed. A large number of recommendations, Recommendations 19-33 deal with donor programmes and surrogacy, and these will be looked at along with an appendix on donor anonymity. Finally, key principles will be laid down for any future legislation.

CAHR Recommendations 12, 13 and 20
Counselling And Consent

12. Counselling should be provided before, during and after treatment to those considering AHR treatment so that they are adequately informed of the risks involved, the potential benefits that may be obtained, and the possibility of success in their particular situation. Suitably qualified professionals should adequately convey the complex medical and scientific ramifications of different treatment approaches in verbal and written form.

13. It should be obligatory for all recognised providers of AHR services in Ireland to obtain written informed consent for all the services they provide. Each stage of the AHR process should be covered by comprehensive consent procedures. A set of guidelines should be drawn up setting out the specific types of consent that need to be obtained and it should be obligatory for all service providers to observe the terms of these guidelines.

20. Suitably qualified professionals should provide appropriate counselling in advance to all donors of gametes and embryos. Such counselling should be a pre-condition for informed consent by donors.

While it is important that everyone should receive counselling before undergoing AHR, the recommendations given above do not go far enough. Firstly, in line with the common tendency to see AHR as a medical procedure, the emphasis is on 'complex medical and scientific ramifications.' There is no mention of complex ethical, psychological and child-centred ramifications. Also, counselling should be provided by people with no vested interest in the procedure, that is, by qualified, independent counsellors.

While important issues arise for everyone involved in AHR, including the large possibility that it may not be successful, there are very particular issues for those considering DI or IVF using donor gametes. During a consultation process regarding framing of the HFE Bill in Britain, the British Association of Adoption and Fostering made the following important submission.

> We cannot ignore the lessons we have learned from adoption. Parenting a child who is partially, or not at all, genetically related, raises unique issues and this should be acknowledged in legislation. BAAF would like to ensure that future legislation makes it obligatory for prospective parents to attend counselling, preparation and information sessions prior to receiving donated gametes so that they can think about the particular and pertinent issues relating to parenting a child who is not genetically related to either one or both of them.[25]

They go on to say:

> The preparation and information sessions can provide a crucial service to help prospective parents think about the particular and pertinent issues relating to parenting a child who is not genetically related to either one or both of them, and be helped to think about how they will tell their children about their origins. Drawing on practice in adoption we know that parents may need to access support and advice to meet the developing needs of their child. We consider that there needs to be a clear distinction between counselling and preparation.

Several key issues are raised by the BAAF submission. Prior to adoption, prospective parents are required to attend a number of preparation and information workshops before undertaking a home study (an intensive look at the suitability of the candidates to adopt.) In contrast, the approach of the clinics to those wishing to use donor gametes is positively casual. As pointed out before, the National Infertility Support and Information Group, a voluntary organization for infertile couples, found that the main complaints by couples who had undergone AHR included 'insufficient factual information and a relative lack of counselling.'[26]

BAAF make an important distinction between preparation and information, and counselling. The latter may deal more with the stresses and emotions of AHR and a couple's readiness for what may be a gruelling procedure. However, preparation and information should include information about the unique difficulties of deciding to raise a child who will be cut off from half (or in some cases, all) of her or his genetic heritage. While the model of counselling is generally non-directive, this would be inappropriate for a preparation and information procedure. Instead, it should be aimed at making couples aware of the enormity of the decision they are making on behalf of someone who has no possibility of giving consent, that is, a potential child.

There is also the vexed question of suitability of parents. This will be dealt with later in the section on donor IVF and surrogacy. In the case where a couple decides to proceed, preparation and information should also reinforce best practice, as in the case of adoption, by introducing practical strategies as to how to tell any child conceived in this way of her or his origins.

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[25] BAAF written submission regarding the HFE Bill, http://www.baaf.org.uk/res/consultations/consultresponse_tisembill.pdf p.5 Accessed July 25th,2008-07-27

[26] Cited in CAHR Report, p. 24

Challenges can arise at any stage of the life-cycle of parenting, whether it be babyhood, middle childhood, adolescence or young adulthood. There needs to be ongoing support for families and their children. Clinics tend to think that a baby is the end result of the process, and their interest ends there. This is not adequate for such a complex issue.

As will be suggested later, adoption agencies might be funded to provide such ongoing support, including organising contact between offspring and their donor parents in an appropriate way, much as such agencies now facilitate contact between birth parents and adopted children. All of this will require significant government investment and funding, as non-governmental organisations could not be expected to shoulder such a burden.

Much of the above applies to counselling given to donors, also. If, as suggested later, anonymous donation should be outlawed, and children should have a right to access vital information about themselves, donors should be given appropriate preparation and information. Even when anonymity is preserved, as in some states in the United States, tenacious offspring, through the use of the internet and other research, have tracked down donor parents. Donors will have to be prepared for issues such as the fact that future or present partners may not be impressed of children born of their own relationship may have up to ten half-siblings. (At the moment, there are cases where dozens of such half-siblings exist.) At later stages of life, donors may experience intense paternal or maternal feelings towards the children they have helped bring into the world, but have never met. Yet their child, ideally, will have bonded with other adults as parents. Donors will also have to know about the complex emotional world that their offspring will have to navigate. One 'biodad', donor father of five, as well as three marital daughters, has a website alerting others to the pitfalls of donating sperm as he now thinks it is deeply unwise.[27]

Consent

Informed consent is a cornerstone of medical ethics. However, people wishing to conceive are extraordinarily vulnerable, and perhaps not open to hearing the negative aspects of AHR.[28] Different issues of consent arise for all involved. For example, ovum donation is relatively recent, and although significant health risks are already known,[29] the long-term implications are not, and may include premature menopause. [30]

The 'offspring of AHR' cannot give their consent. It is ironic that the people who most desire to have a child are implicitly giving consent on the child's part. As Joanna Rose, who is donor-conceived, has said, adoptees know that the adoptive parents wanting a child was not the reason he or she was separated from his or her biological family, but

[27] See Michael Linden's blog, the 'Donor who dared to say Don't – you wouldn't sell your kids, would you? Well, then don't donate sperm.' http://thedonorwhodared.blogspot.com/
[28] 'Fertility treatments may be expensive, invasive, painful, humiliating and time-consuming.'Deech, p.90
[29] Ovarian stimulation has been linked in trials to pulmonary embolism, stroke, arterial occlusion and other life threatening risks. Dickenson, D, *Body Shopping, The Economy fuelled by Flesh and Blood*, One World Books, Oxford, 2008, p.77
[30] ibid, p.78-79

donor-conceived children have to deal with the fact that their parents planned it that way.[31]

Iona Recommendations

- The welfare of the child demands that extreme care should be taken when proposing to create a family where a biological parent will be replaced by a social parent. Donor conception should be permitted under only the most stringent of conditions as set out below.
- Couples wishing to conceive through the use of donor gametes, should undergo a preparation period similar to that undertaken by prospective adoptive parents.
- Counselling and preparation during the preparation period should be provided by an independent agency with no vested interest in AHR. This should include counselling and information about all the ethical, social, psychological and medical implications of their plans, with particular reference to the need to inform any offspring at an early stage of their origins.
- Information and counselling should be provided to prepare prospective parents to deal with the likely sense of loss of a donor-conceived child, and with any difficulties that it may hold for the prospective parents themselves.
- Preparation and information should also reinforce best practice, as in the case of adoption, by introducing practical strategies as to how to tell any child conceived in this way of her or his origins.
- Funding should be made available to provide ongoing support for anyone affected by donor conception or surrogacy. There are different challenges at different stages of the life cycle.
- Donor anonymity should be abolished. All donors must commit to update personal and medical information on a regular basis, and be aware that offspring may some day seek contact.
- Donors should receive counselling, and in particular be made aware that their donation potentially has life-long consequences.
- Stringent record-keeping should be put in place, including funding for an agency to maintain contact, as in open adoption, between donors and offspring.
- Record-keeping and facilitation of contact might be delegated by any regulatory bodies to adoption agencies, which already have considerable expertise in this area.
- Donors should be screened, not just for medical conditions, but for maturity and the ability to cope with the prospect of offspring wishing to make contact.
- Egg donors should be limited to one donation to minimise the chance of future health difficulties.

[31] Rose, J., 'From a "bundle of joy" to a person with sorrow: Disenfranchised grief for the donor-conceived adult', Queensland University of Technology Applied Ethics Seminar Series, 2001.

CAHR Recommendations 17 and 18

Conditions attaching to those undergoing AHR.

17. Services should be available without discrimination on the grounds of gender, marital status or sexual orientation subject to consideration of the best interests of any children that may be born. Any relevant legislation on the provision of AHR services should reflect the general principles of the Equal Status Acts 2000-4 subject to the qualifications set out in section 4.8.

18. Where there is objective evidence of a risk of harm to any child that may be conceived through AHR, there should be a presumption against treatment.

This section will be considered in conjunction with the appendix in the Report on the welfare of the child, and will concentrate on gender, marital status and sexual orientation. A later section will deal in greater depth with difficulties experienced by children born through donor conception, and reference will be made again to Recommendation 18 in that section.

Appendix VIII of the report, The Best Interests of the Child in Assisted Human Reproduction, is important because it represents the only extended discussion of the welfare of the child. It begins with a valid point, that offspring may be a better term to use than children, as children become teenagers and then adults, at which stages the psychosocial ramifications of having been conceived by AHR will have their greatest impact.

However, after this point, there are a number of puzzling, and on occasion, even inaccurate statements. For example, the author blithely states that there is no consensus on what constitutes good parenting.

> There are no reliable criteria for adequate parenting, and thus, no criteria which can be used to guarantee the best interests of the child.[32]

Yet a few pages on, it appears that there are such criteria. Relying heavily on Golombok (1998), it is declared that what matters in secure attachment is warmth, responsiveness, and sensitivity to the child's needs. A parental style that is both authoritative and warm secures the best outcomes for a child. Parents who have a strong relationship are better parents. Finally, following Golombok,

> It is parental responsiveness rather than biological relatedness that is considered to be important for the development of secure attachment relationships.

This is true. For example, children who are adopted may be very securely attached. However, there are a number of problems with this approach. Firstly, at the time of writing, the average age of the children studied by Golombok et al was six. Secondly, and far more importantly,

[32] CAHR Report, p.117.

> ….not one of the 111 donor insemination parents interviewed, and only one of the 21 egg donation parents, had told their child about his genetic origins.[33]

While acknowledging the robust nature of Golombok's work, there may be ethical questions about research with children who are unaware of their origins.

> To the extent that empirical research has been carried out at all, it is often carried out on children rather than adults. The disadvantages of this are that: the long term effects are not measured; many of the children do not know that they are donor-conceived; where they do, they are not aware of the potential significance of it; often third parties such as teachers are engaged by the researchers to report on the children's behaviour, but the former are kept in as much ignorance as the latter.…it might be objected that the subjects of the research and related assistants in that research need to be kept in ignorance in order for the studies to be blind and controlled. However, where psychological and other evidence can be subtle and even repressed or otherwise far from manifest, it is vital that those gathering the evidence are aware of what it is that they are supposed to be looking for.[34]

Golombok and her colleagues have since carried out follow-up studies, up until the teenage years. Interestingly, the more positive parenting noted in AHR parents at age four had levelled out by age 12, with natural parents scoring better at this stage.

There is a further problem with relying on attachment theory and psychological development. Of course donor-conceived children love the people who rear them and are attached to them. However, there are other concerns. Geraldine Hewitt, a young Australian donor-conceived woman, is very happy with her family, and in fact, has a particularly close relationship with her non-biological father. Her greatest wish is that he were her biological father. But he is not. She was told at an early age of her origins and feels grateful for this, feeling that she was able to be more integrated as a result. Yet she is engaged in an active search for her biological father.

> I think it's important in developing a complete puzzle of myself, having a fuller identity, a fuller sense of self being able to place myself within the greater context of history in a sense.[35]

One persons' desire for greater knowledge would merely be anecdotal. However, there is a growing body of literature[36] that there is a desperate need for donor-conceived people to

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[33] Golombok, S, New Families, Old Values(1998) Human Reproduction, Vol 13, No. 9

[34] Laing J. & Oderberg D., 2005 'Artificial reproduction, the "welfare principle" and the Common Good', *Medical Law Review*, 13, pp.328–356. See also p343.

[35] http://www.abc.net.au/4corners/content/2005/s1488988.htm Accessed July 24th, 2008

[36] See, for example, McWhinnie, A, *Who Am I?Experiences of Donor Conception*, (2006) Warwickshire, Idreos Educational Trust. Rose, 'From Bundle of Joy to Unexpressed Grief'

'complete the puzzle', no matter how happy they are in their families. Hewitt herself conducted a survey of donor conceived children of various ages. Of the 47 donor-conceived people [aged 11-59] who took part in this study, only 3 had not experienced identity issues which they identified as being a result of their conception through anonymous donor sperm.[37]

An analogy with adopted people may be appropriate. Robertson writes of the difficulty in expressing grief.

> Adopted people often raise issues of their sense of identity and sense of belonging. Because they are told that, by virtue of being adopted, they are 'special', 'chosen', and 'fortunate', their grief at the separation from their mother [father, siblings and entire biological family] is denied, by society and often by their adoptive parents. If they try to express their feelings of grief they are often labelled 'ungrateful'[38]

Other researchers have referred to 'genetic bewilderment', a phrase coined by H.J. Sants in 1964, which was influential in the move to allow adopted people to access their origins. It refers to the sense of dislocation and alienation felt by adoptees. Joanna Rose, as a young woman who is donor-conceived, also asks why it is presumed that it is not possible to like oneself and one's life, (that is, to be psychologically healthy) and yet, to still not like the method of one's conception. In other words, being well-balanced and well-functioning may co-exist with a fundamental sense of loss and grief. We are willing to recognize this in the case of adopted children, yet blithely announce that neither having a mother or father or genetic relatedness is of particular significance to donor-conceived offspring. Yet parents go to extraordinary lengths to have a child that is genetically related to at least one parent. If the bloodlink is vital to parents, why is it assumed to be of little significance to children?

Golombok does acknowledge that few studies go beyond adolescence, and that 'little is known about the consequences of conception by assisted reproduction from the perspective of the individuals themselves'. Moreover, she has other questions.

> Also of future interest will be the outcomes for children conceived by gamete donation as they progress through adolescence and into adulthood. How will they feel about their upbringing once they themselves become parents? And what will be the effect of finding out that one or more of their parents is genetically unrelated to them? Or in the case of families created by egg donation or surrogacy, that the person they thought of as an aunt or uncle is their genetic mother or father?[39]

Blizzard, J. Blizzard and the Holy Ghost, Artificial Insemination – a personal account,(1977) London, Peter Owen. There are also numerous

[37] Hewitt, G. 'Missing links: Identity issues of donor-conceived people" Journal of Fertility Counselling, 9(3), 14-20.

[38] Robinson, E. (2000). *Adoption and loss: The hidden grief.* Christies Beach, SA: Clova Publications. P.128

[39] Golombok, S. 'New families, old values' p.2346

These are very good questions. If the genetic link is so vital, will artificial gametes from adult stem cells solve the problem? It may soon be possible for a same-sex couple to have their own "shared baby" and even to manipulate the genetic makeup.[40] This is surely the perfect way to obliterate the mother-father paradigm, if that is our aim. A donor-conceived child may have a biological father or mother only as a shadowy figure, but at least they exist. Children have a right to be born from the union of one natural, unmodified ovum and one natural, unmodified sperm from living adults.[41]

At the very beginning of the CAHR Report, Prof Dervilla Donnelly said that one of the key questions is, 'Should science do everything that science can do?' In focusing almost exclusively on the needs of infertile people, however understandable and even laudable it may be to wish to alleviate their distress, the needs of children can become secondary, in the assumption that a loving family will heal all wounds. It is not ethical to decide to bring into being another person in order to fulfil the needs of adults to be parents if there is substantial risk that this will be a harmful to the child. Saying that donor-conceived children should be grateful for the gift of life side-steps the reality that it is possible to be grateful for the gift of life, but suffer significant grief and loss as a result of decisions taken by adults before one was even born.

Velleman and Almond make similar points in relation to this. In the case of a pre-existing child, the focus is on the need of a child for a family. Adoption is a child-centred and rigorous process. In the case of AHR for an infertile person or a couple, a child will be brought into being. It is impossible to discuss the welfare of such a child in the same way as a child who is already born and separated from the possibility of being raised by biological parents.

> In the case of children born by assisted reproduction, however, the argument is conducted in terms that suggest that they already have a kind of shadow existence in which they confront the alternatives of existing or not existing- it as if there is a queue of children waiting in limbo for a chance to be born, so the onus is on those who stop them being born to justify their decision. But this is nonsense.[42]

Therefore, the idea that people should be considered for AHR subject to the best interests of the child, if framed in terms of whether it is better to be born or not, will obviously always be that it is better to be born. However, if it is framed in terms of whether it is ethical to conceive a child in order to help childless people, but at the same time to deprive the child of a significant source of identity, it begins to look entirely different. As Velleman puts it, having a child who is genetically related to one parent increases the circle of consanguinity for an adult, and cuts it in half for the child so conceived. Once

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[40] Deech and Smajdor, p.96

[41] Somerville, M., 'Brave new babies' Friday, 12 September 2008 http://www.mercatornet.com/articles/view/brave_new_babies/
See also, Somerville, M., 'Gay rights, children's rights' *National Post*, July 14, 2005. http://www.canadiancrc.com/Newspaper_Articles/Nat_Post_gay_rights_childrens_right_Margaret_Somerville_14JUL05.aspx

[42] Almond, B., *The Fragmenting Family*, Oxford University Press, London, 2006, p.103

conceived, a child should be celebrated and cherished by society regardless of the means of conception. There are, however, grave problems in conceiving such a child in the first place if he or she is to be denied access to kinship networks that are profoundly important in the search for self. Humans are not atomized individuals. They learn who they are through relationships with others. There is wisdom in the old saying that blood is thicker than water.

> Knowing one's relatives and especially one's parents provides a kind of self-knowledge that is of irreplaceable value in the life-task of identity formation. These claims lead me to the conclusion that it is immoral to create children with the intention that they be alienated from their biological relatives – for example, by donor conception.[43]

Iona Recommendations

- Insufficient weight has been given in the past to the importance of a child's genetic and social heritage. Removing a child from biological kinship networks deprives her or him of an important and irreplaceable source of identity.

- Children have a right to be conceived from a natural, unmodified sperm from one identified, living, adult man and a natural, unmodified ovum from one identified, living, adult woman. Artificial gametes should not be used in AHR.

Family Form

The Appendix on the Best Interests of the child, having dismissed genetic links, goes on to declare that single parenthood poses no problems either. It declares that whether children from lone parent homes do less well than stable married households 'seems to depend on their financial situation and the extent to which their mother has an active network of family and friends to offer support'. This is simply inaccurate. For example, UNICEF has stated:

> The use of data on the proportion of children living in single-parent families and step-families as an indicator of wellbeing may seem unfair and insensitive. Plenty of children in two-parent families are damaged by their parents' relationships: plenty of children in single-parent and stepfamilies are growing up secure and happy. Neither can the terms 'single-parent families' and stepfamilies do justice to the many different kinds of family unit that have become common in recent decades. But at the statistical level there is evidence to associate growing up in single-parent families with greater risk to well-being – including a greater risk of dropping out of school, of leaving home early, of poorer health and of low pay. Furthermore, such risks appear to persist even when the substantial effect of increased poverty levels in single-parent and stepfamilies have been taken into account.[44]

[43] Velleman, D. 'Family History', Vol.34, No. 3 (November 2005): p. 357

[44] UNICEF, Child poverty in perspective: An overview of child well-being in rich countries, Innocenti Report Card 7, Florence, 2007.

American family scholar, Paul Amato, professor of Sociology at Pennsylvania State University says the research indicates that:

> Children who grow up with a single parent because they were born out of wedlock are more likely than children living with continuously married parents to experience a variety of cognitive, emotional, and behavioural problems. Specifically, compared with children who grow up in a stable two parent (biological), children born outside marriage reach adulthood with less education, earn less income, have lower occupational status, are more likely to be idle (that is, not employed and not in school), are more likely to have a non-marital birth (among daughters), have more troubled marriages, experience higher rates of divorce, and report more symptoms of depression.[45]

In a country with a history of harsh treatment of lone parents, people naturally shrink from standing in judgement on those who are single parent families. There is also a danger of extrapolating from statistical probability to any one individual family. Many lone parents do an excellent job of rearing their children, and do so while combating difficulties that two-parent families may not face. Take the simple matter of time. Not only do children of lone parents often have less contact with the non-resident parent, but also less with the person they live with, because that person (usually a mother) may have to work to support the family.[46]All families deserve support. Many lone-parent families have come about because a mother takes the courageous decision not to abort a child, and may do so without significant support from either the child's father or from family. It is not the aim to condemn such people, but merely to seek to increase the chances of as many children as possible growing up in a stable, two parent biological family, because contrary to what the framers of the CAHR Report appear to believe, marital status matters when it comes to the welfare of children. It is possible to acknowledge and value existing types of family while stopping short of saying that every family form is equally effective at producing the best outcomes for children. In fact, research shows us that we must do that, if we are serious about optimising conditions for children.

Everything that has been said about conceiving a child primarily to meet the need of an adult applies also to single parents, but there is the additional problem regarding fatherhood when speaking of lone mothers. (The need for fathers and mothers is dealt with in more detail below) Not only does AHR in a single woman disenfranchise a biological father, but it is proposed that a child should not have a social father, either. While many single women would doubtless make very good mothers, it is a radical experiment to deliberately deprive a child of a father. It is an experiment being conducted with increasing frequency, as seen in such books as *Single by Chance, Mothers by Choice*, [47]and *Raising Boys without Men: How Maverick Moms are Creating*

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[45] Amato, P. The Impact of Family Formation Change on the Cognitive, Social and Emotional Well-Being of the next Generation, *The Future of Children* Vol.15, no.2, Fall 2005 p.78

[46] Waite, L, and Gallagher, M. *The Case for Marriage: Why Married People are Happier, Healthier, and Better Off Financially*. New York, 2000, p.128

[47] Hertz, R. Single by Chance, Mothers by Choice, Oxford, Oxford University Press, 2006

the Next Generation of Exceptional Men.[48] Interestingly, much of the latter book, which deals with lesbian two-mother families and single mother families, is concerned with the 'masculinity' of boys, and how they will form their masculine identity. (Mind you, in author Drexler's case, the more boys relate in the same way that girls do, the more she approves.) There is also a concern with whether they will change their gender orientation. An over-emphasis on masculinity without role models somewhat misses the point, although it is appropriate to wonder where a boy will find a role model for his own future parenting style as a father. There is a tendency to focus on one aspect of identity, and to completely ignore the need for a different, perhaps more fundamental identity, that of blood kinship. As Drexler blithely states:

> Thanks to the technological revolution of anonymous donor insemination, the identity of the founding father may not even be part of the founding proposition of a two-mother family or a single-mother family.[49]

Drexler dismisses 'father hunger' even when she gives examples of it from her own work. One child, Riley, aged 8, announced 'I have no father'. His mother insisted that he did, a biological father who lived 250 miles away, and her brother Michael. When her son reasonably says that he does not know his father at all, and that his uncle is not his father, Drexler insists that this is not 'father hunger' but that it is 'only natural to long for what you don't have.' She then proceeds to catalogue the failings of fathers in heterosexual two-parent families, an argument that could be summed up as 'Regular dads mess up quite often, so boys don't need Dads if their mothers are supportive.' It is always flawed to compare the worst of one situation with the best of another. It might have been more intellectually honest to compare the most supportive Dads with the most supportive mothers.

As for the initially optimistic conclusions reached by Drexler, they are eerily comparable to the optimistic studies of children of divorce in the 1970s, citing how wonderfully adaptive children are, and all that mattered was a 'good' divorce.

> Children raised without their own married mother and father often have perspectives about their lives that are radically different from how the legal scholars, courts, and would-be parents expected they would feel. For example, studies on the inner lives of children of divorce are showing an enormous downside for children that was never considered in the heady, early days of the no-fault divorce revolution.[50]

Just as adult children of divorce are emerging to tell their stories of loss, donor-conceived children are beginning to make their voices heard. The young boys interviewed by Drexler will have found it very difficult to say anything negative, since to do so would constitute disloyalty to the people they love most in the world, but it will be interesting to

[48] Drexler, P. Raising Boys without Men, Rodale, 2005.
[49] Drexler, 2005, p.23 (or ibid, P.23)
[50] Marquardt, E., The Revolution in Parenthood: The Emerging Global Clash Between Adult Rights and Children's Needs, Institute for American Values, New York, 2006, p.17

see what they will say as adults, as parents, and as grandparents about the choices that their mothers made.

No-one disputes the parenting abilities of same-sex parents, but it is not possible for two mothers to provide a father, or two fathers to provide a mother. Does it matter? Is it all a matter of parenting skills, as Drexler and Golombok and CAHR apparently believe?

Ironically, there is a wealth of research on the need for fathers. The British Care Foundation assembled 100 key texts on the need for fathers.[51] Another scholar, Michael Lamb, who incidentally still dismisses the need for fathers, nevertheless states:

> That being so, the evidence concerning longer-term influences on the child's adjustment may seem somewhat surprising. Maternal 'inputs' are not consistently correlated with indices of their children's development once they enter secondary school, whereas paternal 'inputs' are so correlated. *Indeed, there is an indication that teenagers' sense of self-worth is predicted by the quality of their play with their fathers some 13 years earlier.* (Emphasis added) There are also more consistent associations between father–teenager relationships and the latter's adjustment to adult life than exist between adjustment and mother–teenager relationships (Grossmann et al., 2002). The most detailed of the relevant findings have come from analyses of longitudinal data in the UK National Child Development Study. Eirini Flouri (2005; Flouri and Buchanan, 2002a, 2002b) has demonstrated links between parental reports of father's involvement at the age of seven and lower levels of later police contact as reported by the mothers and teachers (Flouri and Buchanan, 2002a). Similarly, father and adolescent reports of their closeness at age 16 have been correlated with measures of the children's depression and marital satisfaction at age 33 (Flouri and Buchanan, 2002b). [52]

Studies that focus on gay men as fathers (very few in number) or lesbians as mothers somewhat miss the point.

> Study of lesbian mothers show that they are just as child-oriented, just as warm and responsive to their children, and just as nurturing and confident as heterosexual mothers.[53]

Would anyone have expected anything different? That isn't the point. Of course they are good mothers. It is the fathering aspect that is different. Even Hillary Clinton accepted the need for fathers in her book, *It takes a village to raise a child*. She quoted approvingly Daniel Patrick Moynihan's warning that the absence of fathers in the lives of children, especially boys, leads to increased rates of violence and aggressiveness, as well as a general loss of the civilizing influence marriage and responsible parenthood

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[51] CARE, *The Fathers Bibliography*, London, 2008, www.care.org.uk/fathers. Accessed July 10th, 2008

[52] Lewis,C., and Lamb M.E., *Understanding fatherhood*: *A review of recent research*, Rowntree Foundation, Lancaster University 2007 https://www.jrf.org.uk/bookshop/ebooks/understanding-fatherhood.pdf

[53] Golombok, 1998, p. 2344

historically provide any society.[54] She was speaking about lone parenthood, and it could be seen as an extreme view, were it not backed up by extensive research.[55] No-one is suggesting that a child raised by lesbian mothers is going to be violent or dysfunctional. However, it is impossible to escape the conclusion that they will be missing something irreplaceable – being raised by a father.

> Recent research has given us much deeper and more surprising insights into the father's role in child rearing. It shows that in almost all their interactions with children, fathers do things a little differently from mothers. What fathers do – their special parenting style – is not only highly complementary to what mothers do, but is by all indications important in its own right for optimum child rearing.[56]

By declaring that gender and number of parents may be irrelevant, CAHR is overlooking a large body of research that indicates that this is wishful thinking rather than evidence-based.

What of the need for mothers? Gay men as fathers have not been studied to any great extent, but the same principles apply. Gay men may and do make excellent fathers, but it is not possible that they would supply the kind of nurturing that women do. The title of the first chapter of Dr. Kyle Pruett's book on fatherhood may sum it up. 'Fathers do not mother'.[57] Strangely, this does not lead Pruett to conclude that the gender of parents matter, although it is hard not to conclude that his views are more in line with political correctness than with his own writings on the need for fathers.

However, as Almond points out, to be a 'motherless child' has always been seen as a tragedy, and 'it would require a cultural tsunami to sweep this aside.' [58] There is an unavoidable and intrinsic problem with same gender parents. Both boys and girls receive the message that one gender is irrelevant to parenting. This must be particularly damaging if it is their own gender that is in question.

There are some studies purporting to show that children do equally well in same-sex marriages, but in a recent case in the High Court,[59] evidence was given to show that these studies were fundamentally flawed. An exhaustive analysis of hundreds of studies by Stephen Nock came to the same conclusion. Problems include: "a virtual lack of nationally representative samples used: limited outcome measures: a virtual lack of long-term studies: and frequent reliance on a mother's report of her parenting abilities and

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[54] Cited in Stacey, J, 'Dada-ism in the 1990s - Getting past Baby Talk about Fatherlessness'p.60 in Daniels, C. (ed) *Lost Fathers: The Politics of Fatherlessness in America*, St. Martin's Griffin, New York, 1998.
[55] Pruett, K. *Fatherneed: Why Father Care is as essential as Mother Care for your child*, Broadway Books, New York, 2000 p.159
[56] Popenoe, D. Life without Father, p.38, in *Lost Fathers*
[57]. Pruett, K. *Fatherneed:* p.17
58 Almond, B. Fragmenting Family, p. 110

59 Katherine Zappone and Anne Louise Gilligan v Revenue Commissioners, Ireland and the Attorney General

skills rather than objective measures of a child's well-being." [60]

Just as it is wrong to intentionally plan to separate a child from his or her genetic network of blood kin, it is wrong to deprive a child of the presence of a father and mother. It has far-reaching consequences if we decide that gender is irrelevant. Do we wish to have a situation where declaring that a child needs a mother and father offends against equality directives, or becomes something akin to hate speech? Something that has been taken for granted for generations, that children are born out of the love of a man and a woman, suddenly becomes suspect, or something that is seen to discriminate. Yet it is not discrimination to treat different situations differently. Although assisted reproduction technology masks this reality, it still requires a man and a woman to make a baby, something which even small children understand.

> Kids know the numbers, as is clear from what five year old Jake screamed painfully at his grandmother, who told him he did not have a daddy(he did via in vitro donor sperm): 'You lie, Gamma, you lie big! It takes two people to make one.'[61]

There is another concern. There is some evidence that gay and lesbian partnerships are not as long-lived as heterosexual relationships. One study carried out in Sweden and Norway suggests that gay couples were 50% more likely to break up than married heterosexual couples, and the rate of partnership break-up of lesbian couples was about double that for gay couples.[62] This has obvious implications.

Part of the problem with the CAHR approach, as seen in the wording of Recommendation 17, which states that it should reflect the general principles of the Equal Status Acts 2000-4. Equality is an important value in our society, and particularly important for a group like lesbian, bisexual, gay, and transgender people who historically have suffered discrimination. However, there are other important values, and the needs and welfare of children, who are the most vulnerable in our society, must take precedence.

> Sometimes our choice is between bad and good. But often enough in free societies, our choice is between good and good….Unless we concede that rights only exist in community with other rights, that rights can conflict with each other, and that therefore every right must necessarily contain, as part of the right itself, certain limitations and boundaries, the very notions of rights eventually loses its meaning.[63]

60 Marquardt, 2006, p.21

61 Pruett, K. *Fatherneed* p.159

62 Andersson, Gunnar et al., 'The Demographics of Same-Sex Marriages in Norway and Sweden', *Demography*, 43, 2006, pp.79-98

63 Blankenhorn,D. The Future of Marriage, Encounter Books, New York, 2007. p.302

Cohabitation:

There are strong reasons not to grant AHR services to cohabiting couples, not least because such relationships are much more likely to break up. The Bristol Community Trust carried out a study of over 15,000 mothers who gave birth during 2000–2001: the Millennium Cohort Study. It found that cohabiting couples were twice as likely to experience a family breakdown during the early years of parenthood than married couples of a similar income. [64] Analysis of the figures reveals that six per cent of married couples had experienced a family breakdown compared with 32 per cent among all unmarried couples. (This figure includes 'closely involved' as well as cohabiting couples.) When the unmarried figures are broken down, they show that 20 per cent of cohabiting couples experienced breakdown.

> Cohabitation is not just like marriage. On average, cohabiting couples are less sexually faithful, lead less settled lives, are less likely to have children, are more likely to be violent, make less money and are less likely to be happy or committed than married couples.[65]

From the point of view of any children conceived by AHR, their chances of their parents still being together are greatly reduced if they are cohabiting. A stable marriage between biological parents is the gold standard when it comes to positive outcomes for children. Child Trends, an American nonpartisan research centre, concluded that research clearly demonstrates that family structure matters for children, and the 'family structure that helps children the most is a family headed by two biological parents in a low conflict marriage'.[66]

> Children growing up with two continuously married (biological) parents are less likely to experience a wide range of cognitive, emotional, and social problems, not only during childhood but also in adulthood.[67]

And as the authors of the *Case for Marriage* put it:

> When love seeks permanence, a safe home for children who long for both parents, when men and women look for someone they can count on, there are no substitutes. The word for what we want is marriage.[68]

There is a strong case to be made for confining AHR to stable married couples, and for making sure that this stability is evaluated by independent, qualified professionals. Any other situation is likely to be disadvantageous to children, and therefore difficult to justify.

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[64] http://www.bcft.co.uk/Family%20breakdown%20in%20the%20UK.pdf
[65] Waite, L, and Gallagher, M. *The Case for Marriage* p.201
[66] Anderson Moore K, et al, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, And What Can We do About it?* Child Trends Research Brief, Washington DC, 2002. pp 1-2
[67] Amato, P. *The Impact of Family Formation Change*, p.75
[68] Waite and Gallagher, p.201

Iona Recommendations

- The roles played by a mother and father are gender specific in important ways, and their complementary but different nature is vital to the optimum development of the child.
- AHR should be confined to stable, heterosexual married couples, as abundant research shows that this is the family form with the best outcomes for children.
- The right of clinics to choose to treat only stable married couples should be enshrined in law.

Radical Change to Family Stucture

In Chapter Seven of the CAHR Report, which deals with donor programmes and surrogacy, proposals are made which would change dramatically the current understanding of family. This includes changing the constitutional and legal framework which currently protects the family. There are 14 recommendations in this chapter, and they contain the most controversial proposals in the entire report. (Recommendation 20, on counselling, has been dealt with in a previous section.) Given the complexity of the issue, the recommendations will be grouped into several categories, dealing with questions of conditions attaching to donation, identity, legal parentage and radical family policy change, and surrogacy, although there will be considerable overlap between the categories.

CAHR Recommendations
Conditions attaching to donation:

19. Donation of sperm, ova and embryos should be permitted and should be subject to regulation by the regulatory body.

21. Appropriate guidelines should be put in place to govern the selection of donors; to screen for genetic disorders and infectious disease; to set age limits for donors and to set an appropriate limit on the number of children to be born by the use of sperm or ova from a single donor.

23. Donors should not be paid nor should recipients be charged for donations per se. This does not preclude payment of reasonable expenses and payment for AHR services.

29. In general, donors should not be permitted to attach conditions to donation, except in situations of intra-familial donation or the use of donated gametes/embryos for research.

Donation of sperm, ova and embryos are very different things. Sperm donation does not involve stimulation of the ovaries using powerful medication, as CAHR recognises. There is a possibility of ovarian hyperstimulation syndrome, which is a serious condition

and in the past has resulted in death. Embryo donation raises very serious issues. It is, of course, far preferable to have embryos adopted than to allow them to perish or be used for experimentation, but at the same time, it is a form of adoption and should be subject to the same rigorous process. CAHR accepts that in the case of establishing legal parentage when using surrogacy, if the surrogate donates both egg and sperm (presumably they mean a surrogate's partner donates sperm?) the child could only be transferred into the commissioning family through adoption or some similar process not yet legislatively defined. This should also be the case in embryo donation. Currently, a man marrying a woman who already has a child has to undergo a rigorous process before being entitled to declare himself the father of her child. The spouse of a woman undergoing AI or AHR using donor sperm should be required to formally adopt the child.

In relation to appropriate guidelines to govern the selection of donors, the removal of donor anonymity in Britain has led to a shift in who donates. Sperm donors now tend to be older and to be married. This in itself could be problematic for half-siblings born within the marriage, but has the positive benefit that younger men who are less likely to have thought through the consequences no longer seem so enthusiastic about donation.

While a regulatory body is obviously desirable, once the government becomes actively involved in the process of AHR, there can be very strange consequences. For example, if AHR is seen primarily as a medical event, campaigns can be launched to encourage donations in the same way as one might encourage, say, people to carry organ donor cards. Yet the two types of donation are not at all alike. Blood may help to save a life, but it will never bring a child to birth.

At the moment, the UK government is targeting sperm donors. Their current campaign, in what is possibly one of the most crassly titled campaigns that any government has ever put its name to, it is called 'Give a toss.com'. It is obviously designed to appeal to young men, who are exactly the category who are likely to have least understanding of the ramifications of what sperm donation involves. The opening page of the website has an attractive blonde in a very tight t-shirt declaring, 'We want your sperm'. There is an online game, where imitating the action of masturbation with a computer cursor leads to a 'climax' which wins the game. Attempts are made to compare blood donation with sperm donation. Young men are showing ticking four boxes in order to see whether they qualify as sperm donors. 'Are you between 18-35? Are you healthy? Do you want to help others start a family? Have you got the time? Then get in contact with the National Gamete Donation Trust.'[69] It is hard to imagine more minimalist standards. Public money is spent on encouraging young men to do something with far-reaching consequences, using a style that is sexist and shallow. There is no mention that the time involved may not just be the time needed to give a donation, but to deal with the emotional fallout from young people you will father and perhaps never know, or who will desperately want to meet you at some stage.

Currently, the British HFE sets a limit of ten children to be born through sperm donation. It is not clear how this figure could be monitored in Ireland, as private clinics abound.

[69] www.ngdt.co.uk

Joanna Rose, as a donor conceived person, suggests strongly in a Charter of Rights for Donor-Conceived Children[70] that the following guidelines be followed in relation to donation.

- The number of births per donor should be limited to a small number of families with no more than ten offspring in total from donation.
- The same donor should be used within a family to create full genetic siblings.
- Donors need to commit to update personal and particularly medical information on a regular basis.

One can see the sense in these suggestions. It would also cause donors to pause if they realised their donation would have ongoing consequences and responsibilities.

The Sims Fertility Clinic, a privately run Irish clinic which treats many clients from the UK and elsewhere, although they follow the undesirable practice of anonymous donation, limit egg donation to one family, what they call a one-to-one service. This would seem to be very desirable.[71] Age limits are generally set between 18 and 35 for sperm donors, but it would seem desirable that 21-35 would be better for both sperm and egg donors.

The question of payment becomes very vexed when it comes to egg donation and surrogacy. As will be seen later, in the case of surrogacy, where adoption may be required, any payment at all could preclude adoption procedures, as the guidelines are very strict. Women donating eggs may need sick leave, or time taken from work to recover from the procedure. These expenses should be covered, but no more. It is imperative that remuneration for sperm donation should not make it a handy source of income for, say, medical students, as happened in Britain.

While gamete or embryo donation should be on a strictly non-commercial basis, the AHR industry is intrinsically commercial. Fertility specialists are among the highest paid medical specialists.[72] Fertility drugs are highly lucrative. Irish women are going abroad to source egg donors to Spain, the Czech Republic and Crete. An egg can be provided for between 900 and 1,000 euro, although in some cases the donor will only receive 200 to 300 euro.[73] A European Parliament resolution condemning the trade in human eggs followed news stories of several young women who were severely harmed through egg donation in Eastern Europe.[74]

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[70] Ms. Rose presented this charter at a seminar run by the Iona Institute, and the full text of the charter may be accessed here. http://www.ionainstitute.ie/home-persons.php

[71] http://www.sims.ie/Donor_Programmes/Donor_Programmes.490.html

[72] Deech, R and Smajdor, A, p.148

[73] 'Irish head to Europe for egg donation. More women are turning to fertility clinics abroad', Monaghan, G.,The Sunday Times, August 10, 2008

[74] See the cases of Alina and Raluca, both of whom became severely ill after egg donation in the Global ART Clinic, Bucharest. CORE European Seminar; Human Egg Trading and the Exploitation of Women

Iona Recommendations

- Donors should not be paid, and any expenses should not constitute a financial incentive to donate sperm or eggs.
- Ideally, the same donor should be used in any one family in order to ensure genetic links between siblings. Where the same donor is used by more than one family, no more than ten siblings should be born from the same donor.
- Given that so-called 'reproductive tourism', (where people travel to foreign countries to access gametes or embryos) is legal under EU treaties, a public information campaign should be undertaken to inform prospective parents of the need to ensure that donors are not exploited, and that children have a right to know their biological origins.
- Donors should commit to disclosing that they have been donors to significant members of their own family, including children, and the donor's own siblings and their children.

Identity:

CAHR Recommendations

22. Any child born through use of donated gametes or embryos should, on maturity, be able to identify the donor(s) involved in his/her conception.

27. Donors should not be able to access the identity of children born through use of their gametes or embryos.

28. Donors should, if they wish, be told if a child is born through use of their gametes.

32. The child born through surrogacy, on reaching maturity, should be entitled to access the identity of the surrogate mother and, where relevant, the genetic parents.

Questions of identity are among the most vexed of all the issues relating to AHR. It is now universally recognised that keeping secrets does not benefit children. If a parent has told, say, another relative, the child may overhear a conversation. In one case, a child asked in biology class why her eye colour seemed to defy the laws of genetics. Worse still, another child heard a mother declare to a father during an argument that the children were not his, anyway. The effect of finding out in this way is devastating.[75] The earlier a child knows, the better the outcomes appear to be.[76] Finding out too late can be deeply

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www.handsoffourovaries.com/pdfs/appendixg.pdf The European Union has become so concerned about potential exploitation of egg donors that it issued a European Tissues and Cells Directive in 2004 aimed at, among other things, de-commercialising all such transactions, but the agreement is widely flouted.

[75] McWhinnie, *Who Am I*, p.57

[76] Jadva1,V., Freeman,T., Kramer, W., and Golombok, S. 'Age of disclosure and donor offspring's feelings about finding out they were donor conceived.' Paper presented at July 2008 European Society for Human Reproduction and Embryology meeting.

upsetting, as the testimony of Olivia Pratten, who cannot identify her biological father due to the destruction of records. In a presentation to Canadian MPs in September 2006, Pratten said, "I suppose at one point when I'm 40, 50, 60 I'll know that he isn't around anymore and maybe then I'll stop looking for his face - I don't know." In the mean time, she wonders if she'll see glimpses of 'him' on the faces of her future children or if she has perhaps already met 'him,' without even knowing it.

CAHR's recommendations do not go anywhere near far enough to protect children from discovering their origins either too late or in a devastating way. A right to access donor(s) is fine, but how can you vindicate that right if you don't know how you were conceived in the first place? Unlike adoptive parents, a large number of parents have no plans to tell their children of their origins. In the small survey carried out by the National Infertility Support and Information Group, only a quarter of those surveyed had decided to tell their children, 20% had decided not to, and the rest were undecided. These figures may be high for heterosexual couples. (Obviously, single women and lesbians have more pressing reasons to explain where a child came from.) Some studies state that only 10%-20% of parents tell their children.[77] In one group studied by Golombok, not one of the 111 donor insemination parents interviewed, and only one of the 21 egg donation parents, had told their child about his genetic origins.[78]

In this regard, Almond's comment is very apposite. 'The issue is not whether children have a right to know, but whether the government has a right to conceal.'[79] If the state colludes in concealing the circumstances of a child's birth, it would be very serious indeed. The CAHR Report says that although the Commission wishes to encourage parents to tell, it also recognises that to try to enforce this 'would be impracticable and possibly an unjustifiable interference with the constitutional rights of the family.' There is one simple mechanism which would ensure that children are told- the appropriate use of the birth certificate. Rushbrooke has detailed proposals. He suggests that the genetic parents and the legal parents should be listed on the 'long form' of adoption cert, and that only the legal parents are listed on the short form. The long form will include the information that this is a donor-conceived child, but the short form will not, in order to protect a child's privacy. Given that virtually every adult at some stage, whether in an application for a passport or some other reason, will have to access the 'long form' at some stage, it will be a major incentive for parents to tell. (If parents receive proper preparation and information, they should be happy to tell their child as young as possible.) Rushbrooke proposes that the full birth certificate which lists the genetic parents should not be accessible by the young person until the age of eighteen, in accordance with the practice regarding adopted children in Britain. If a child under

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http://www.donorsiblingregistry.com/research.php

[77] Rushbrooke, R. Proposals to bring donor-conceived people's birth certification in line with that of all other UK citizens. http://dcbirthcertification.org/node/4 Accessed July 11th, 2008

[78] Golombok, S, New Families, Old Values(1998) Human Reproduction, Vol 13, No. 9

[79] Almond, B. Fragmenting Family, p.96

eighteen who is adopted applies for the long birth certificate, the registrar writes to his or her parents requesting permission to release it.

> Donor conceived children and adults need protection from parental and institutional deception about their genetic kinship, medical history and ethnicity. Their birth certificates must provide accurate information regarding their genetic parentage in line with good adoption practice.[80]

One issue not addressed by CAHR at all is the issue of half-siblings. Curiosity about siblings and the desire to know them is as strong in some children as the desire to know parents. The Donor Sibling Register was set up to meet just such a need. Wendy Kramer had a son, Ryan, who was donor-conceived. When she realised how wrong she had been to opt for anonymous donation, she set up the website. The site allows parents and offspring to enter their contact information and search for others by sperm bank and donor number. A New York Times story says that donor-conceived siblings, 'who sometimes describe themselves as "lopsided" or "half-adopted," can provide clues to make each other feel more whole, even if only in the form of physical details.' So-called 'patchwork families' often result, where half-siblings are in regular contact with each other, although in some cases there might be more than a dozen identifiable half-siblings. Again, it appears that blood is thicker than water. One mother exclaims, in relation to the nurture debate, 'Wow, there's just something to that nature'. The story concludes with another mother describing how her son introduces his half-siblings. "This is my sister from another mother, and this is my brother from another mother, this is my other sister from another mother' and so on."[81]

In order to prevent half-siblings unknowingly entering incestuous relationships, a register of siblings is vital. Geraldine Hewitt, who is donor-conceived, describes having 'that talk', with every boyfriend, where she discloses that she is donor-conceived, just in case he replies, 'Me, too.'[82] However, how can 'that talk' take place if there is no guarantee the child will be informed of his or her origins, or that records will be preserved in order to vindicate a child's right to know? No private clinic will wish to undertake the level of record-keeping to ensure not only that donor details are regularly updated, but to also ensure that details of siblings are kept, as well. The proposed regulatory body could delegate this task to another agency, possibly as an additional work of adoption agencies, an option that will be discussed in greater detail later.

CAHR appears to think that ending donor anonymity will solve any ethical or moral problems with donor conception. However, it is not so simple. Take for example, the case of Dakota, who at the time of interview was 23. He knew of the circumstances of his birth, and even the identity of his donor who lived nearby from early on. His mother's lesbian partner was threatened by the possibility of a father-like relationship,

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[80] Rose, Charter for Donor Conceived people.
[81] www.nytimes.com/2005/11/20/national/20siblings.html Accessed July 15, 2008
[82] http://www.abc.net.au/4corners/content/2005/s1488988.htm Accessed July 24th, 2008

and so discouraged contact. He went to the graduation party of a half-sibling, and was told his grandparents did not know about him, and not to tell.

> 'I don't even know my other two half-sisters', he added. 'I've seen pictures of them. They look like me. We live parallel lives. I'm angry that so much time has passed and every day I lose more time not knowing these people. I'm never going to get it back.'[83]

The model used in adoption might be appropriate for information to be given to donors, where a donor can approach an intermediary agency for limited information, and the agency will make contact on his or her behalf. The ball, however, remains in the offspring's court, and they make the decision about contact. Given that the child did not chose his or her method of conception, but the donor decided to conceive a child who would not be reared by him or her, this seems to be appropriate.

Iona Recommendations

- Donor conceived offspring have a right to be informed of other half-siblings outside their own family.
- Insofar as possible, any records of past donor conceptions or surrogacy arrangement records kept by individual clinics or in other places should be centralised and made available to donor conceived people who seek them.
- A DNA tracing service should be instituted for people conceived before legislation, on the lines of the UK Donor-Link.
- Birth certification should reflect the truth of people's origins. A long form and short form should be used. The short form should contain only the names of the social parents, but the long form should contain all details of any donors or surrogates involved in the child's conception.
- The long form of the birth cert should be made available on request to any offspring over the age of 18.

Legal parentage and radical family policy change
CAHR Recommendations

24. In donor programmes, the intent of all parties involved - that the donor will not have any legal relationship with the child and that the woman who gives birth to the child will be the child's mother - should be used as the basis for the assignment of legal parentage.

25. In cases involving sperm donation, there should be a requirement that the partner, if any, of the sperm recipient also give a legal commitment to be recognised as the child's parent.

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[83] Mundy, L. *Everything Conceivable: How Assisted Reproduction is Changing Men, Women and the World,* London, Allen Lane, 2007, p.200.

26. In the case of a child born through ovum donation and in the case of a child resulting from an embryo donation, the gestational mother should be recognised as the legal mother of the child and her partner, if any, should be recognised as the child's second legal parent.

33. The child born through surrogacy should be presumed to be that of the commissioning couple.

The words of recommendation 24 contain a radical change in understanding of parentage and guardianship rights. The CAHR proposals suggest that in future, the 'intent' of couples should be sufficient in order to assign parentage. In the comments on Recommendation 24, CAHR suggests

> The application of the principle of intent will necessitate the broadening of traditional family structures to encompass the social family, as opposed to the biological one that has determined the shape of our laws to date. This will protect both the interests of the child and the social parents. In the case of the recipient being a single woman there is no second legal parent.[84]

In one fell swoop, CAHR proposes changing the traditional underpinning of family, and the idea that parenting involves a mother and father. Given that there are no comprehensive recommendations regarding birth certification, in essence, this represents a denial of the role of biology in parenthood. As CAHR recommends that AHR should be available to same sex couples, Recommendations 25 and 26 will mean that the need for a mother and father is no longer recognised in Irish law. Indeed, it could lead to the situation where suggesting a child needs a mother and father could become akin to 'hate speech' or a breach of the rights of the same sex couple.

CAHR's proposals reflect what has been termed a 'revolution in parenthood'[85]. Traditionally, marriage has been a child-centred bond, designed to maximize the possibility that a child will be raised by the two people responsible for bringing him or her into the world.

> A central purpose of the institution of marriage is to ensure the responsible and long-term involvement of both biological parents in the difficult and time-consuming task of raising the next generation.[86]

However, as marriage is re-framed, becoming more and more centred a model which focuses on adult fulfilment , biological parenthood has also been downgraded. (Of course adult fulfilment and happiness is part of what marriage brings, but to focus on it almost as an exclusive good radically alters the meaning of the commitment.) This re-framing of the meaning of marriage and the resulting impact on parenthood has been described in various ways, for example as a move from a model where the biological and

[84] CAHR, p.46
[8585] Marquardt,E. *A Revolution in Parenthood*, Institute for American Values, New York, 2006
[86] Popenoe, D. 'Can the Nuclear Family be Revived? *Society*, Vol 35, No 5, July/August 1999.

social aspects of parenting are combined, to one where the social is all that matters.[87] It has also been explored at length by Dan Cere, using slightly different terms, that is, the move from conjugal marriage to social marriage.[88] Cere explores two recent publications, and their implications for the understanding of family law. The first report is the *Principles of the Law of Family Dissolution*, published in 2002 by the American Law Institute (ALI). This report moves away from the idea that marriage as traditionally understood has any major value, and instead promotes 'family diversity'. In the process the report denies the central place of biological parenthood in family law and focuses instead on the idea of "functional parenthood."

The second report is *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*, published in 2001 by the Law Commission of Canada. The title virtually sums up the report. Marriage is no longer to be a child-centred bond of major significance to society. Instead, it is just one of a number of 'close adult personal relationships.' Unsurprisingly, it argues for the re-definition of marriage, and the extension of marriage-like rights to homosexuals and lesbians. In fact, Canada is one of the countries which shows most clearly that once marriage is re-defined, parenthood soon follows.

> In Canada, the law that recently legalized same sex marriage nationally also quietly erased the term 'natural parent' across the board in federal law, replacing it with the term 'legal parent.' With that provision, the federal understanding of parenthood for every child in the nation was changed in order to bring about the hotly debated legalization of same sex marriage.[89]

Cere identifies 'four troubling directions' in family law. Firstly, there is a move to treat marriage and cohabitation as equivalent, despite the fact that social science data show that it is much less stable and safe for children. Secondly, marriage is re-defined primarily and sometimes exclusively as a 'couple-centred bond,' in order to accommodate same sex couples, thus neutralizing the law's ability to say that children need their mothers and fathers. Thirdly, there is a call to disestablish marriage, to 'get the state out of the marriage business.' However, as Cere says, 'This approach denies the state's legitimate and serious interest in marriage as our most important child-protecting social institution and as an institution that helps protect and sustain liberal democracy.' Finally, since the gendered nature of marriage is under serious challenge, challenges to the two person definition of marriage can only follow. Although Cere does not enumerate this, the numbers of parents a child can be presumed to have is also affected when parenting is no longer seen as something carried out by heterosexual couples. The missing element in all of this is adequate consideration for the needs and rights of children.

> The vision outlined in these two reports frees adults to live as they choose. But social science data strongly suggest that not all adult constructions of parenthood

[87] Blankenhorn,D. *The Future of Marriage,* Encounter Books, New York, 2007. p155
[88] Cere, D. *The Future of Family Law – Law and the Marriage Crisis in North America,*Institute for American Values, New York, 2005.
[89] Marquardt,E. *A Revolution in Parenthood,* p.11

> are equally child-friendly. Further fragmentation of parenthood means further fragmented lives for a new generation of children who will be jostled around by increasingly complex adult claims.[90]

The attempt to separate genetic parenting from 'functional' or 'social' parenting means that children have already been the subject of dispute. For example, in Ireland, a gay man who donated sperm to a lesbian couple and who had entered into an agreement to be a 'favourite uncle' of the child, but the relationship between the adults broke down, was denied guardianship, custody or access to the child in a far-reaching legal decision by Hedigan, J. However, a similar case in Canada in January 2009 reached very different conclusions. A lesbian couple sought out a gay man who was willing to 'co-parent'. The couple and the man signed a "donor contract" before the child was born in 2002, which set out his rights as a "co-parent" including regular access as well as full custody if both women were to die. The agreement included a promise to try for a "three-way" adoption, which would have required a court challenge under the Charter of Rights, although this was never followed through. The relationship between the adults foundered however, which led to the non-biological mother seeking to adopt the child, which would have severed any parental rights of the father. In a landmark decision, Justice Marion Cohen declared that the child had three parents, instead of recognizing the right of the child to a father and mother.[91] This is not the only case of its kind. In theory, a child could have five parents, the egg provider, the sperm provider, the surrogate mother, and the 'commissioning' adults. Could a child end up shuttling between four or five different homes, each containing people with a claim to being a parent? In one case, a teenager whose birth resulted when a gay couple and a lesbian couple agreed to 'co-parent' had four parents, two biological and two social (at least according to the wishes of the adults.) The gay couple split up and found new partners, leaving the boy in a position to announce when he 'needs extra attention' that he has six parents.[92]

One author, writing from the point of view of the psychological health of children conceived through AHR, has said that even King Solomon only had two claimants for the baby whose fate he famously had to decide. In the case of five people claiming parentage of a child, they may not be willing to act as selflessly as the biological mother was in the case decided by King Solomon. These new ethical, psychological and legal quandaries 'threaten to turn a child into a piece of property rather than a human being with rights and needs.'[93]

Family diversity rests on the assumption that adults have the right to marry the person that they choose, and to form the kind of family that they choose. This claim must be looked at carefully, because it rests on concepts such as autonomy and equality that are valuable in our society. However, it is inescapable that it comes into conflict with another right, the right of a child to be cared for where possible by her natural mother and

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[90] Cere, D. *The Future of Family Law*, page 7.
[91] www.nationalpost.com/rss/story.html?id=1233014 - 101k
[92] Mundy, Everything Conceivable, , page 97.
[93] Schwartz, LL.,'A Nightmare for King Solomon; The New Reproductive Technologies' Journal of Family Psychology, Vol 17, No 2, 2003, Page 229.

father.[94] A society is judged on how it treats the most vulnerable, and in this case it is the child who is most vulnerable. A child has no control over the circumstances of her conception, and it is possible to regret the circumstances of one's conception, while still being glad to be alive. For that reason, a morass opens when the biological and social aspects of parenting are separated, in order to satisfy adults' desire for a child.

The CAHR proposals would alter beyond recognition the current situation regarding parentage in Ireland, which is primarily based on ties of blood, or through a highly regulated process of adoption. (There is one anomaly, however, where an unmarried biological father does not have an automatic right to guardianship, but instead must apply to the courts.[95]) In the case of a married couple, the law currently declares that the husband is automatically the legal parent of any child born within the marriage, or born up to 10 months after the death of the husband. This can be rebutted by evidence which proves "on the balance of probabilities" that the husband is not the father of the child".[96] Presumably, the only reason that the husband of a person conceiving through sperm donation would sign an agreement such as proposed in recommendation 25 stating that he will be the legal parent would be to revoke his right to 'rebut' his parentage of the child. To introduce a situation where a child has no second legal parent, not even an unknown one, is to fly in the face of what every child knows, that it takes two people to create a child.

In the case of a child born through ovum donation or embryo donation, recommendation 26 suggests that the gestational mother should be considered to be the mother of the child. However, at the moment, a man who marries a woman who has a child is not automatically entitled to declare himself the father of her child. He has to undergo a rigorous process to assess his suitability. However, CAHR is suggesting that neither mother nor father should undergo this rigorous process, which is strange, given that embryo donation is the most analogous to adoption. It is also strange that in the case of surrogacy, however, (recommendation 33) gestation carries no rights at all. In short, these recommendations enshrine the idea that the intention of the adults wishing to have children should trump all other considerations.

In the one dissenting opinion by Christine O'Rourke, where she says that surrogacy should be outlawed because it commodifies women, she wonders what would happen in the case of a surrogate mother who changed her mind? Would 'reasonable force' be used? This is not an idle speculation. In Britain, the Court of Appeal found against a surrogate mother who changed her mind in favour of the biological father, even though she had had exclusive custody of the child for seventeen months. ' The boy's natural father and his wife will now be escorted by court officials to collect the child and bring him to his new home in Leeds.'[97] In this case, a biological and gestational mother had her rights removed because she had violated a contract. It is hard not to see echoes of a

[94] Art 7.1, UN Convention on the Rights of the Child http://www2.ohchr.org/english/law/crc.htm
[95] Section 6(a) of the Guardianship of Infants Act1964 (as amended)
[96] Shannon, G. Recent Developments in Child Law and Challenges Ahead, Address to The Association for Child and Adolescent Mental Health Conference, 28th November 2008
[97] **http://www.ivf.net/ivf/surrogate_mother_loses_court_battle_to_keep_child-o2861-en.html**

famous case in 1804, when Leonard De Manneville, a poor French emigrant to England, 'forcibly entered his wealthy but estranged wife's house, wrenched his eight-month-old daughter from her mother's breast, and absconded with the naked child in an open carriage in inclement weather. When Mrs. De Manneville applied to King's Bench for a writ of habeas corpus, Lord Ellenborough affirmed what he claimed was the well-known rule—that a father was entitled by law to complete custody and control over the children of a marriage and could even prohibit all access by a mother to her children'.[98] Although this would now be considered to be a primitive patriarchal exercise of power today, apparently it is appropriate for a mother to have a child removed from her, because she is not following the intention of the commissioning parent.

In her excellent presentation of her dissenting opinion on surrogacy, Christine O'Rourke points out that the recommendation that legal parentage should follow the intention of the commissioning couple is 'extraordinarily far-reaching.'

> As our Report points out, in all but a tiny handful of legal systems around the world, the woman who gives birth to the child is regarded as the legal mother of the child until some other event, such as adoption, displaces the presumption. This is uniformly the case within the European Union.[99]

She makes the case that a woman who has not yet given birth is not permitted to sign an adoption agreement until it is clear that she understands fully what the implications of adoption are. She also reminds us that under Article 10(2) of the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), contracting States are obliged to accord special protection to women who have just given birth. Taking a child from a newly delivered woman against her wishes would hardly seem to meet the spirit of the international covenant. Ms O'Rourke's reservations are also highly pertinent to the final recommendations to be examined.

Iona Recommendations

- Couples wishing to use embryo donation to conceive should undergo a formal adoption process.
- Embryos should not be 'commissioned' or created for the purposes of embryo donation.
- A regulatory body should be put in place which will prioritise the rights of the child in AHR.

98Wright, D. 'De Manneville v. De Manneville: Rethinking the Birth of Custody Law under Patriarchy'. http://www.historycooperative.org/journals/lhr/17.2/wright.html

[99] O'Rourke, Dissenting Opinion on Surrogacy, CAHR Report, page 77

Surrogacy

CAHR Recommendations

30. *Surrogacy should be permitted and should be subject to regulation by the regulatory body.

31. Women who decide to participate as surrogate mothers should be entitled to receive reimbursement of expenses directly related to such participation.

It is a very great pity that more weight was not given to Ms O'Rourke's objections, in particular her view that the risks of exploitation and commodification outweigh the benefits to people seeking to have a child by this means. The offensive term commonly used for surrogacy, 'rent-a-womb' illustrates perfectly how in these transactions, a woman's worth is calculated only on her ability to provide a functioning womb. This fact is freely acknowledged in the surrogacy industry. Gail Taylor manages Growing Generations, an agency in Los Angeles founded to facilitate gay men in finding surrogates and egg donors.

> Egg donors should, she argues, be selected on looks, brains, youth, health and psychological soundness, whereas surrogates should be selected on how well they gestate babies and how well they work with others.[100]

One doctor involved in surrogacy was even more blunt.

> Most surrogates I come across are not typical donor caliber as far as looks, physical features, or education. Most egg donors are smart young girls doing it for the money to pay for college. Most surrogates are – you know, they need the money: they are at home, with four kids – of a lower socio-economic class.[101]

Nor is surrogacy a cheap option. At Growing Generations, it is estimated that it costs between $100,000 to $150,000, including payments to a surrogate, an egg donor, one or even two brokering agencies, a fertility clinic, assorted lawyers and other facilitators. No doubt there are many women who are motivated for altruistic reasons to offer themselves as surrogates, but at times, they are asked to make extraordinary sacrifices. When Doug and Eric, a gay couple, wanted to create a child, they confessed that they wanted an 'Ivy League model' to donate the egg, but for the gestational mother settled for Ann, a working class woman, to carry the pregnancy that would result. She was married, and her previous children had been delivered by caesarean section. She became pregnant with twins conceived with one of the men's sperm and a donated egg. She developed placenta accreta, a life threatening condition where the placenta burrows into the uterus, and therefore cannot be expelled. She began to haemorrhage, and had to undergo an emergency hysterectomy shortly after birth. Her child-bearing days were now ended, but the men had their twin baby girls to take away. They were understandably upset at the

[100] Mundy, L. Everything conceivable, page 133.
[101] Dr. Vicken Sahakian, quoted in Mundy, page 133.

sacrifice required to provide them with a family, and said that if they had been aware of the health risks to her, they would have chosen a different surrogate. One wonders how one would measure adequate recompense for risking one's life?

Despite the fact that CAHR acknowledge that under current Irish law, the surrogate mother would more than likely be presumed to be the legal mother, especially where she had also provided the egg, and that adoption would therefore be necessary, they continue to say that a surrogate mother should receive reasonable expenses. Under Irish adoption law, any hint of a commercial aspect to the transaction would rule out the possibility of adoption.

Surrogacy is fraught with difficulty. In one American case, the court found in line with what CAHR is proposing, that is, that the 'intent of reproduction ' should determine legal parentage.[102] A sixty year old man had commissioned a woman as a surrogate, using another younger woman's egg. (She became pregnant with triplets.) A contract was signed designating him as the children's legal parent, and it was indicated that his 62 year old wife would apply to adopt. Although the couple were in daily contact with the hospital after the birth, they did not visit regularly. This troubled the surrogate mother, who decided to take the triplets home. The children were born in November 2003, and by the time the Superior Court of Pennsylvania awarded full physical custody to their biological father, they were already two and half and had known no other parent other than the surrogate mother.

Iona Recommendations

- Surrogacy should be made illegal. It is inherently exploitative and unfair to the child.

Conclusion

Had the Commission been more representative in the first place, it might have come to conclusions that acknowledged the deep need of children and adults to know who they are, to be cared for and protected by the people who are their natural parents, and to have a secure sense of identity.

Iona Recommendations

- The welfare of the child demands that extreme care should be taken when proposing to create a family where a biological parent will be replaced by a social parent. Donor conception should be permitted under only the most stringent of conditions as set out below.
- Couples wishing to conceive through the use of donor gametes, should undergo a preparation period similar to that undertaken by prospective adoptive parents.
- Counselling and preparation during the preparation period should be provided by an independent agency with no vested interest in AHR. This should include counselling

[102] See J.F v. D.B.,D.B. v. J.F. D.B. v. J.R. v. J.F. APPEAL OF: J.R. APPEAL OF: J.F., Superior Court of Pennsylvania.

and information about all the ethical, social, psychological and medical implications of their plans, with particular reference to the need to inform any offspring at an early stage of their origins.

- Information and counselling should be provided to prepare prospective parents to deal with the likely sense of loss of a donor-conceived child, and with any difficulties that it may hold for the prospective parents themselves.
- Preparation and information should also reinforce best practice, as in the case of adoption, by introducing practical strategies as to how to tell any child conceived in this way of her or his origins.
- Funding should be made available to provide ongoing support for anyone affected by donor conception or surrogacy. There are different challenges at different stages of the life cycle.
- Donor anonymity should be abolished. All donors must commit to update personal and medical information on a regular basis, and be aware that offspring may some day seek contact.
- Donors should receive counselling, and in particular be made aware that their donation potentially has life-long consequences.
- Stringent record-keeping should be put in place, including funding for an agency to maintain contact, as in open adoption, between donors and offspring.
- Record-keeping and facilitation of contact might be delegated by any regulatory bodies to adoption agencies, which already have considerable expertise in this area.
- Donors should be screened, not just for medical conditions, but for maturity and the ability to cope with the prospect of offspring wishing to make contact.
- Egg donors should be limited to one donation to minimise the chance of future health difficulties.
- Insufficient weight has been given in the past to the importance of a child's genetic and social heritage. Removing a child from biological kinship networks deprives her or him of an important and irreplaceable source of identity.

- Children have a right to be conceived from a natural, unmodified sperm from one identified, living, adult man and a natural, unmodified ovum from one identified, living, adult woman. Artificial gametes should not be used in AHR.
- The roles played by a mother and father are gender specific in important ways, and their complementary but different nature is vital to the optimum development of the child.
- AHR should be confined to stable, heterosexual married couples, as abundant research shows that this is the family form with the best outcomes for children.
- The right of clinics to choose to treat only stable married couples should be enshrined in law.
- Donors should not be paid, and any expenses should not constitute a financial incentive to donate sperm or eggs.
- Ideally, the same donor should be used in any one family in order to ensure genetic links between siblings. Where the same donor is used by more than one family, no more than ten siblings should be born from the same donor.

- Given that so-called ‘reproductive tourism’, (where people travel to foreign countries to access gametes or embryos) is legal under EU treaties, a public information campaign should be undertaken to inform prospective parents of the need to ensure that donors are not exploited, and that children have a right to know their biological origins.
- Donors should commit to disclosing that they have been donors to significant members of their own family, including children, and the donor’s own siblings and their children.
- Surrogacy should be made illegal. It is inherently exploitative and unfair to the child.