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Infertility treatment and the welfare of the child

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The UK was one of the first jurisdictions to introduce comprehensive legislation regulating fertility treatment. Since the issues and practices regulated by the Human Fertilisation and Embryology (HFE) Act were - and remain - contentious, it is hardly surprising that the Act itself has been controversial.

Section 13(5) of the Act is no exception. This prevents a woman from receiving treatment from a UK fertility clinic 'unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father) and of any other child who may be affected by the birth'.

Since Section 13(5) was a compromise between legislators who wished to place few restrictions on those seeking fertility treatment and those who specifically did not want lesbians and single women accessing fertility treatment, its subsequent fate should have come as no surprise. The Warnock Committee (whose report provided the basis for the legislation) deliberately steered clear of proposing any specific legislative impediment to treatment based on children's welfare. By 1999 the British Fertility Society was complaining that the requirement had become 'the subject of confusion and debate' (1).

In the last three years, the welfare requirement has been subject to several in-depth reviews, the most recent of which appears to take us full circle.

In 2005, driven by concerns from clinics, the Human Fertilisation and Embryology Authority (HFEA) undertook a specific review of Section 13(5), which was designed to assist clinics more effectively and fairly to effect welfare assessments within the parameters of the HFE Act (2), (3). Also in 2005, as part of its review of the entire Act, which it commenced in 2004, the House of Commons Science and Technology Select Committee called for the abolition of Section 13(5) in its existing form, because it is 'impossible to implement and is of questionable practical value in protecting the interests of children born as a result of assisted reproduction' (para 107) (4). The government subsequently initiated its own review of the HFE Act, resulting in, first, a public consultation (5), followed by a White Paper (6) and by draft legislation, the Human Tissue and Embryos (Draft) Bill 2007 (7).

The latter of these indicated the government's intention to retain the duty on clinics to consider the welfare of the child who may be born as a result of treatment, or any other child who may be affected, before offering treatment. However, it planned to remove reference to the child's 'need for a father', a proposal that was consistent with other recent legislation passed by parliament, namely the Adoption and Children Act 2002 and the Civil Partnership Act 2004. The draft Bill was subsequently reviewed by a joint House of Lords/House of Commons Scrutiny Committee (2007), which opposed removal of the requirement to take account of the child's need for a father (8).

Those who advocate removal from the legislation of the child's need for a father are sometimes accused of ignoring research evidence, asserting that children do not need fathers or of simply promoting 'political correctness' (9).

There is certainly incontrovertible evidence that many children raised in fatherless households experience disadvantage, often to a significant extent. However, these findings are not endorsed by the research evidence on the development of children conceived through assisted conception raised in single parent and same-sex parent households. That there is not much of the latter evidence does not mean that it should be discounted. At the very least, its existence suggests caution against assuming heterogeneity among single parent and same sex parent families. It is also somewhat one-sided to cite 'research showing that these children suffer from the inevitably confused and secretive family relationships' (9) without also acknowledging the evidence that it is heterosexual parents of donor-conceived children who are far more likely to be secretive about their child's conception.

Proposing removal of the 'need for a father' requirement in the legislation is also not the same as saying that children do not need fathers. We should pause to wonder, first, why no other jurisdiction that has introduced comparable legislation has considered it necessary to incorporate a 'need for a father' requirement and, second, why other elements of 'welfare', such as adequate levels of food, shelter, health, care and affection etc. are not also specifically identified. Simply because these are not *specified* in any welfare requirement does not mean that they are considered unimportant.

So we may legitimately ask why the need for a father is given special preference, other than to satisfy conservative 'pro-family' sentiments. Such a question seems especially pertinent when most commentators agree that its impact on single women's and lesbians' access to fertility treatment is marginal, since currently for every clinic that will not provide them with treatment there are several more that will.

A more productive way forward would be to ensure a closer fit between any welfare requirements in the revised Human Tissue and Embryos Bill with existing UK child protection legislation. The latter also makes no specific reference to a child's need for a father. However, incorporation of a similar standard would require clinics to take all reasonable steps to satisfy themselves that neither the child to be conceived, nor any existing child affected by that child's birth is likely to experience significant harm as a result of providing the treatment.

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