

Chapter 9

Posthumous Use

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Posthumous use is the use of a person's sperm, eggs or embryos after his or her death.

The *Infertility Treatment Act 1995* controls the use of gametes and embryos after the death of the people from whom they originate. As part of our review of the eligibility criteria for all forms of assisted reproduction, the commission has considered whether to allow posthumous use of gametes and embryos and if so, under what conditions. We have identified four situations where conception of a child could involve posthumous use of gametes.

- A person who has been involved in an assisted reproduction treatment program has gametes in storage at a clinic. If that person dies, the surviving partner may want to use the stored gametes in a treatment procedure. At present, this usually occurs when a woman wants to use her male partner's stored sperm for fertilisation after he has died. In the future, as medical technology develops, it may also arise in relation to stored eggs. Eggs could be used by a surviving partner to create an embryo, which could be implanted in a female partner or in a surrogate.
- A person who has donated gametes to a clinic for use by unknown recipients dies.
- A person whose gametes have been used to create an embryo dies after the embryo is created and it is proposed to implant a woman with the embryo.
- A person is dying or has just died. The person's partner seeks to take gametes from the body for use in a treatment procedure after death. For example, a woman may want to have the sperm of her partner removed so it can be used to conceive a child after he has died.¹

CURRENT LAW

At present, the law does not permit use in an insemination procedure of the gametes of a person who has died. However, there is no prohibition on implanting a person with an embryo which was created using gametes from a person who has died before or after the creation of the embryo. It is also possible to retrieve gametes from people who have died, without their consent. The current law is explained in more detail below.

POSTHUMOUS USE

The law states that stored gametes or donated gametes cannot be used if the person who has provided them has died. Section 43 of the *Infertility Treatment Act* prohibits:

- inseminating a woman with sperm from a man known to be dead
- transferring to a woman a gamete from a person known to be dead.

This prohibits insemination of a woman with sperm from a man known to be dead and transferring into a woman an egg from another woman who is dead.

Although the Act prohibits posthumous use of gametes, there is no ban on a woman being implanted with an embryo which was formed from the gametes of a person while alive but who died after the fertilisation procedure. The *Infertility Treatment Authority (ITA)* has set conditions for this use,² including:

- A woman whose male partner has died and who wishes to use the couple's stored embryos must receive counselling which addresses relevant issues. The deceased's consent is not required, nor does the woman have to meet eligibility requirements for treatment.³
- A woman who re-partners but wishes to use an embryo created using her deceased ex-partner's gametes must be reassessed to be eligible for treatment in a clinic. Counselling requirements apply.⁴
- A person who wishes to use a donor embryo where a donor has died may use the embryo, but the recipient must receive counselling about the potential impact on any child born.⁵

Apparently, the Act does not prevent an embryo being created outside a woman's body using gametes from a dead person and that embryo being implanted into the woman.⁶ Similar conditions exist irrespective of the relationship between the deceased and the recipient of the gametes. Section 12(3) of the Act states that:

(3) An embryo must not be used in a treatment procedure to be carried out on a woman, if the sperm used to form the embryo is not the sperm of the husband of that woman, unless—

(a) before the embryo is formed, the man who produced the sperm consented to the use of the sperm to form an embryo to be used in the kind of procedure proposed.

A woman seeking treatment using her deceased partner's sperm, or using the sperm of a deceased donor, must meet the eligibility criteria for treatment under the Act and must receive counselling. Critically, a man who provided the sperm must have consented to it being used 'in the kind of procedure proposed'. This means that a man must specifically consent to his sperm being used posthumously, not simply to it being used to create an embryo. These provisions have been tested in Victorian courts.

The case of *AB v Attorney-General* concerned a woman (called AB) who approached the ITA seeking to use her deceased husband's sperm to become pregnant. The woman's husband had died following a car accident and the Supreme Court had authorised the retrieval and storage of his sperm.⁷ Before AB could use that sperm, she had to apply to the court for approval. In *AB v Attorney-General*, AB sought a declaration that section 43 of the Act did not prohibit the use of her deceased husband's sperm. As noted above, the prohibitions in section 43 do not refer to the *creation* of an embryo. AB wished to use the sperm to create an embryo using the IVF procedure called intracytoplasmic sperm injection (ICSI).⁸

Justice Hargrave found that section 43 of the Act did not prohibit the creation of an embryo using the deceased's sperm. However, he considered the eligibility, counselling and consent requirements of the Act and said that these

prohibited the procedure. Section 12(3), which requires the deceased's written consent to the use of his sperm, was applicable to the proposed treatment procedure. Without the deceased's express consent, use of the sperm would be unlawful.⁹

Justice Hargrave's interpretation highlights the anomalies in the Act:

- It is not possible to inseminate a woman with her partner's sperm after he dies.
- It may be possible for a woman to use her deceased partner's sperm to create an embryo outside her body if he has consented to such use.
- It is possible to use an embryo already created with the deceased's sperm even if he did not consent to such use after his death.

Following recent litigation and the commission's interim recommendations, the ITA created an advance directive interim form for people undergoing treatment procedures or wishing to store gametes. People can record their wishes with respect to posthumous use of gametes, including time limitations or other conditions.¹⁰ Clinics may also ask donors of gametes and embryos to express their wishes about use in the event that they die or become incapacitated.

Regulation around Australia

Posthumous use of gametes and embryos is also specifically regulated in South Australia and Western Australia. In South Australia, gametes or embryos must not be used for any purpose unless the people who produced them have consented to their use.¹¹ Stored sperm may only be used posthumously if the deceased consented in writing and the recipient meets the eligibility criteria for infertility treatment.¹² Embryos in storage should be destroyed if a person who has contributed gametes dies, unless they have specified how that embryo should be used.¹³ In Western Australia, clinics must not knowingly use gametes in a fertilisation procedure after the death of the gamete provider.¹⁴

- 1 The prospect of achieving a pregnancy with sperm extracted from a dead or dying man depends on the amount and quality of the sperm obtained. The underlying condition of the patient and events surrounding death may have impaired sperm production and quality, reducing its viability. At present, it is generally not possible to retrieve eggs from a dying or dead woman. While it may be theoretically possible to store and then use unfertilised oocytes (egg cells produced in the ovary) in a treatment this has not yet been done in humans: information supplied to the commission by Professor Gordon Baker, Melbourne IVF, 5 April 2005.
- 2 Infertility Treatment Authority, *Guidelines on the Posthumous Use of Gametes and Embryos* (2006).
- 3 *Ibid* 3.
- 4 *Ibid* 3–4.
- 5 Specifically, counselling 'must address the impact the death of the donor may have on the recipient(s) intention and ability to tell the child about their donor origin': *ibid* 6.
- 6 This seems to be an unintentional consequence of a 2003 amendment to the Infertility Treatment Act. The Act was amended by the *Health Legislation (Research Involving Human Embryos and Prohibition of Human Cloning) Act 2003* s 22(4)(d)(ii). These amendments, made to bring the Victorian Act in line with the *Prohibition of Human Cloning Act 2002* (Cth) and *Research Involving Human Embryos Act 2002* (Cth), changed the definition of 'embryo' which resulted, in turn, in the repeal of all references to 'zygote' in the Victorian Act. Before the amendment, there was a prohibition on the use of gametes from a person known to be dead for the formation of a zygote. When the reference to zygotes was removed, this prohibition was also repealed. Therefore, it is now possible to use a gamete from a dead person to form an embryo, provided the woman is eligible for treatment and provided consent has been given to the use of the sperm for a treatment procedure.
- 7 *AB v A-G (Vic)* [1998] (Unreported, Supreme Court of Victoria Practice Court, Gillard J, 23 July 1998).
- 8 This procedure is described in Chapter 1.
- 9 *AB v A-G (Vic)* (2005) 12 VR 485.
- 10 An 'Advance Directive Consenting to Posthumous Use of Stored Gametes by a Partner: Interim Form' is available from the ITA's website <www.ita.org.au> at 31 January 2007.
- 11 Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995 (SA), r 20. A single woman must also be infertile to access treatment: r 11.
- 12 South Australian Council on Reproductive Technology, 'Memorandum 9: The posthumous harvesting of sperm and its subsequent use', *Annual Report for 2002* (2002), 34.
- 13 Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995 (SA), r 26.
- 14 Western Australian Government, *Directions Given by the Commissioner of Health to set the standards of practice under the Human Reproductive Technology Act 1991 on the advice of the WA Reproductive Technology Council*, Western Australian Government Gazette No 201, 30 November 2004, Direction 8.9, 5435.

In other states and territories, posthumous use of gametes is permitted in accordance with National Health and Medical Research Council (NHMRC) guidelines. The guidelines note that 'circumstances where the child born will never know one of his or her genetic parents is, by analogy, a serious act of profound significance for the person born'.¹⁵ Posthumous use is only permitted where:

- the deceased person has left clearly expressed and witnessed directions consenting to the use of his or her gametes¹⁶
- the prospective parent received counselling about the consequences of such use
- the use does not diminish the fulfilment of the right of any child who may be born to knowledge of his or her biological parents
- clinicians involved 'seek advice and guidance from a clinical ethics committee ... and if necessary, seek advice regarding application of relevant laws'¹⁷
- an appropriate time is allowed for the surviving spouse or partner to grieve before conception is attempted.¹⁸

POSTHUMOUS RETRIEVAL

People involved in fertility treatment must consent to the use, and where necessary retrieval, of their gametes for use in a treatment procedure. If a person is dying or has died and consent cannot be freely obtained, the following laws apply.

If a man is dying, but is able to communicate, he can agree to the removal of sperm for use to inseminate his partner. If the man is incapable of consenting, it is arguable that the *Guardianship and Administration Act 1986* allows the Victorian Civil and Administrative Tribunal (VCAT) to authorise removal of sperm from him.

The *Human Tissue Act 1982* regulates the removal of tissue from a person who is dead. This includes the case of a person whose heart is still beating but where there has been 'irreversible cessation of all function of the brain'.¹⁹ Sections 25 and 26 of the Act allow removal of tissue for transplantation or other therapeutic, medical or scientific purposes if the person consented to removal of the tissue before his or her death, or if the senior available next of kin consents to the removal. Spouses and domestic partners are considered senior available next of kin.

These provisions were considered by the Supreme Court in the case of *Y v Austin Health*.²⁰ In this case, Y's husband fell rapidly and severely ill. Y sought permission for sperm and tissue to be removed from her husband's body, or alternatively, for it to be removed upon his death. Justice Habersberger found that the removal of gametes is subject to section 26(1) (c) of the Human Tissue Act as removal for 'medical purposes'. Y, as the deceased's senior available next of kin had the capacity to consent to the removal of her husband's gametes.²¹ Therefore under the Act, the deceased's consent is not required for retrieval after death. In *AB v Attorney-General*, Justice Hargrave also found that the deceased's wife had the capacity to consent to the retrieval of his gametes. However, as AB's husband had died in a motor vehicle accident, the consent of the Coroner to the procedure was also required.²²

Tribunal.²⁴

EXPORT OF GAMETES AND EMBRYOS

The issue of export of gametes and embryos has arisen in the context of posthumous use cases because people may want to take gametes or embryos stored in Victoria to other parts of Australia where there are different restrictions on posthumous use.

The import and export of gametes and embryos is regulated by the Infertility Treatment Act in recognition that people may relocate within Australia and wish to continue treatment in another state or territory. Section 56 of the Infertility Treatment Act makes it an offence to import or export gametes and embryos without the written approval of the ITA. The ITA has discretion to give approval to a particular case, or class of cases, and may impose conditions. The ITA has also issued guidelines that outline procedures for import or export regarding donated gametes, posthumous use and surrogacy treatment.²³

Import and export of gametes and embryos has also been the subject of litigation in Victoria. The case of *AB v Attorney-General* was discussed above in the context of the posthumous use of gametes. The applicant in that case subsequently applied to the ITA to export her deceased husband's sperm to Sydney IVF, who agreed to provide treatment. The ITA refused the woman's application and she sought a review of this decision at the Victorian Civil and Administrative

- 15 National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2004), 6.15.
- 16 Use of gametes is also permitted if a person in a post-coma, unresponsive or persistent vegetative state, or a dying person, has given consent to the use of their gametes: *ibid* 6.15.
- 17 *Ibid* 6.15.1.
- 18 *Ibid* 6.15–6.16.
- 19 *Human Tissue Act 1982* s 41.
- 20 [2005] VSC 427 (Unreported, Habersberger J, 28 October 2005).
- 21 The court ordered that a further court order would be required prior to use: *Y v Austin Health* [2005] VSC 427 (Unreported, Habersberger J, 28 October 2005), [67–8].
- 22 *AB v A-G (Vic)* (2005) 12 VR 485.
- 23 Infertility Treatment Authority, *Guidelines for the Import or Export of Gametes and Embryos* (2006).
- 24 *YZ v Infertility Treatment Authority* [2005] VCAT 2655 (Unreported, Morris P, 20 December 2005).
- 25 *YZ v Infertility Treatment Authority* [2005] VCAT 2655 (Unreported, Morris P, 20 December 2005) [37].
- 26 The guiding principles of the Infertility Treatment Act are discussed in Chapter 5.
- 27 *YZ v Infertility Treatment Authority* [2005] VCAT 2655 (Unreported, Morris P, 20 December 2005) [68].
- 28 Infertility Treatment Authority (2006), above n 23, 3.2.
- 29 Submissions CP 90 (Diane Blood), CP 224 (Victorian Biotechnology Ethics Advisory Committee).
- 30 Submission PP1 337 (Infertility Treatment Authority).
- 31 Submission CP 90 (Diane Blood).
- 32 Submission PP1 341 (Dr Elizabeth Short); Access roundtable (9 February 2006).

Justice Morris reconsidered the woman's application (in this case called YZ) and found that export should be permitted. Justice Morris said that the Infertility Treatment Act contains a broad discretion to permit import or export of gametes and the guiding principles in the Act direct how these discretionary powers are to be exercised. In particular, he said the principle that the ITA must consider 'the welfare and interests of a person to be born' means to consider whether a person born as a result of treatment procedure 'will be nourished, loved and supported'.²⁵ After applying each of the guiding principles to YZ's case,²⁶ Justice Morris gave approval for export. He said it was not decisive that the export of the sperm was designed to overcome the ban on its use in Victoria. Justice Morris was satisfied that 'the sperm ... [would] be used responsibly' by Sydney IVF.²⁷

Following this decision, the ITA advised that it would assess each application for export of gametes where the gamete provider has died on its merits, taking into account the following factors:

- The ITA's discretion is not limited to considering whether export is consistent with the Act as a whole.
- The ITA will examine whether the child 'will be nourished, loved and supported' when looking to the welfare and interests of any person born from a treatment procedure.
- The ITA will consider what weight to attach to the NHMRC ethical guidelines on the use of assisted reproductive technology in clinical practice and research.²⁸

PROBLEMS WITH THE LAW

As the above summary illustrates, the current operation of the law leads to a number of anomalies and inconsistencies. The law is also unclear, making it necessary for people to seek approval for treatment through the courts. This can be a costly, lengthy and stressful process.

In submissions, some people argued that the prohibition against posthumous use of gametes is an appropriate response to concerns about the health and welfare of a child who is conceived after the death of one parent. However, if this is the case, the distinction between posthumous use of gametes and posthumous use of embryos cannot be justified.²⁹ It is also anomalous that the consent of the deceased is required for some treatments (such as where an embryo is to be

created) but in other situations it is not (such as where an embryo is already in storage).

It is not possible to ensure that the gametes of a donor who has died are *never* used, because clinics will not necessarily always be notified of a donor's death. The ITA submitted that monitoring cases of posthumous use where donor gametes are used would be administratively difficult.³⁰ This could potentially result in a situation where a woman who is involved in treatment before her husband dies cannot be inseminated using her dead husband's sperm, but if she remains eligible for treatment she could be inseminated with the sperm of an unknown donor who the clinic does not know has died.³¹

Courts in Victoria have allowed sperm to be taken from the body of a man who is dead for intended use in a reproductive procedure, despite the use of such sperm being prohibited for certain treatment procedures. Some submissions argued that it was anomalous to allow removal of the sperm, but not to permit its use.³²

The anomalies and inconsistencies in the law make reform necessary. The commission has considered the following questions in the process of drafting recommendations:

- Is there a justification for retaining the existing prohibition on posthumous use of sperm or eggs or should it be permitted and if so, under what circumstances?
- Should the law continue to allow posthumous use of embryos and if so, under what conditions?
- Should time limits apply to the posthumous use of gametes and embryos?
- In what circumstances, if at all, should it be possible to remove gametes from a dead or dying person for use in a treatment procedure? Who should be allowed to consent to such removal?
- What should be the status of the relationship between a deceased person and any child born from the posthumous use of gametes or embryos?

PRINCIPLES

WISHES OF THE DECEASED

Policy on posthumous use of gametes should take account of the wishes of the deceased. Posthumous use of gametes without a person's consent could be seen as breaching the principle that a person's reproductive capacity should not be exploited, which is discussed in Chapter 5.

There are a number of ways these wishes could be taken into account. Some submissions suggested that *express* consent of the deceased person should be required before gametes (and/or embryos) could be used.³³ This view is consistent with NHMRC guidelines. It is argued that *express* consent:

- is necessary to establish an intention to conceive a child when one partner has died, which is distinct from an intention to conceive while living
- 'signals to a child conceived in these circumstances that their biological father intended for them to be born'³⁴ and may assist a child to deal with possible concerns they might have about having been conceived in these circumstances.
- provides 'an unambiguous and administratively feasible standard to determine when posthumous use should be permitted'.³⁵

However, other submissions said that *express* consent was an unjustly onerous requirement. They argued that although written consent may provide legal certainty, it may not be a full or accurate account of someone's wishes. In some cases, a person may die suddenly without recording consent.³⁶ Alternatively, people may change their minds after documenting their wishes but may not record their new intentions. Some submissions argued that requiring *express* consent created an inconsistency in the law by allowing some women to use gametes after their partner's death and preventing others from doing so, simply because in the latter case, their partners had not recorded their wishes about posthumous use. For these reasons, some submissions preferred consent to be implied from the deceased's words and conduct, and considered on a case by case basis.³⁷

Some submissions said it should be possible to infer consent in particular situations, for example where a couple was involved in treatment before one of them died.³⁸ These submissions argued that the current ban on posthumous use prevents consideration of the circumstances of the person seeking treatment. Women who wish to become pregnant using their dead partner's gametes may have the support of their late partner's family.³⁹ However, it is also possible to envisage situations where the views of the deceased's partner and the deceased's family are in conflict.⁴⁰ Another approach would be to assume consent to posthumous use of gametes by the person's partner, unless the person explicitly said he/she did not want this to occur.⁴¹

Consent requirements have been an issue in litigation in the United Kingdom. Diane Blood sought to use her deceased husband's sperm to conceive a child. The couple had been intending to have children before Mrs Blood's husband contracted meningitis and died. While Mr Blood was on life support, his sperm was extracted and stored. Mrs Blood later applied to the Human Fertilisation and Embryology Authority (HFEA) to use Mr Blood's sperm in the UK, or to export it to another country in the European Union. Mrs Blood's application was denied by the HFEA and she appealed to the Queen's Bench and later to the Court of Appeal.

As part of her case, Mrs Blood argued that the consent of her husband need not be *express* but could be implied from the circumstances of their relationship.⁴² The Court of Appeal maintained that *express* written consent is required for the storage and use of gametes in the UK, but permitted Mrs Blood to export her deceased husband's sperm to Belgium where she received treatment.⁴³

The commission believes that respect for the wishes of the deceased is integral to any consideration of posthumous use of gametes or embryos. We have considered the arguments about how to determine the deceased's wishes when making our recommendations.

- 33 Submissions CP 19 (Anita Stuhmcke), CP 78 (Andrew McLean), CP 224 (Victorian Biotechnology Ethics Advisory Committee), CP 231 (Victoria Legal Aid).
- 34 Submission PP1 203 (Professor Marian Pitts and Associate Professor Kerry Petersen).
- 35 Submission PP1 337 (Infertility Treatment Authority).
- 36 From a medical perspective, retrieval of sperm may be more successful from a person who dies suddenly than a person who has suffered a long illness. If a man is ill for a long period, sperm production may diminish, making it less likely to extract viable sperm: Access roundtable, 9 February 2006, email from Professor Gordon Baker, Melbourne IVF 5 April 2005.
- 37 Access roundtable (9 February 2006).
- 38 Submissions CP 90 (Diane Blood), CP 192 (ACCESS).
- 39 Submission CP 90 (Diane Blood).
- 40 Access roundtable, 9 February 2006.
- 41 Submissions CP 90 (Diane Blood), CP 183 (Jacinta Weston), CP 192 (ACCESS).
- 42 *R v Human Fertilisation and Embryology Authority; Ex parte Blood* [1996] 3 WLR 1776, 1181 (Sir Stephen Brown P).
- 43 *Blood* [1997] All ER 687. Diane Blood has published her account of the case: Diane Blood, *Flesh and Blood: The Human Story Behind the Headlines* (2004).
- 44 Submission PP1 117 (Julia Mangan).
- 45 Submission PP1 66 (Dr Estela Papier).
- 46 Submission CP 192 (ACCESS). For example, a woman could be encouraged to postpone treatment until she has worked through issues related to grieving.
- 47 There are some published individual accounts of posthumous conception, eg Diane Blood, *Flesh and Blood: The Human Story Behind the Headlines* (2004).
- 48 ESHRE Task Force on Ethics and Law, 'ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction' (2006) 21 (12) *Human Reproduction* 3050, 3051.
- 49 Joi Ellis, 'Four Fathers and Four Families: A follow up report of the use of posthumous sperm' (2006) *ANZICA Newsletter* (November 2006) 9, 12.

RECOMMENDATIONS

52. If, and only if, a person has expressly consented to the posthumous use of their gametes (or embryos formed with the gametes) by their partner, should a clinic be able to use those gametes or embryos in a treatment procedure in accordance with any conditions stipulated by the deceased (unless those conditions are contrary to law).
53. It should not be possible to use donated gametes in a treatment procedure if a clinic is aware that the donor has died.
54. Each application to use the gametes or embryos of a deceased person should be considered by the clinical ethics committee to assess the possible impact on any child to be born, with particular regard to any research findings on outcomes for children conceived after the death of one parent. The assessment process should take account of the sensitive nature of the application.
55. If a person intends to use the gametes or embryos of his or her deceased partner in a treatment procedure, the person must receive appropriate counselling before the treatment procedure is carried out. Counselling must address the grieving process and its impact on conception, and in particular the appropriate period of time which should elapse between the deceased's death and attempts at conception.
56. Where a person is seeking treatment using the gametes or embryos of a person who has died, the counselling and information provisions in the Act should not apply in respect of the deceased person.
57. The Infertility Treatment Authority should monitor any available research on the effects on children born as a result of posthumous use of gametes and embryos.

WELLBEING OF THE CHILD

In Chapter 5 we argued that the health and wellbeing of children born as the result of assisted reproductive technology should be paramount in decisions about ART procedures. It follows that this principle must be taken into account in policies relating to posthumous use of gametes and embryos.

Some submissions raised concerns about the consequences of posthumous conception for the child. Some have suggested that where a couple was involved in a treatment program before the man died, the woman's grief at the death of her partner may affect her parenting capacity.⁴⁴ Others suggested that conception could interfere with grieving processes or that a child would be seen as 'a replacement of the dead person'.⁴⁵ During our consultations, some people expressly rejected this argument and submitted that the desire to have a child is distinct from a grief reaction. Rather, they argued that a person's relationships and circumstances before the death of a partner are likely to influence their readiness to have children. The nature and timing of the death will also be a factor. One submission commented that the impact of grief could be addressed in counselling prior to treatment.⁴⁶

Another concern raised during consultations is that children conceived from posthumous use of gametes may suffer psychological harm because they will never meet or know their biological father. However, this situation is not limited to the case of children conceived posthumously but could also occur if a gamete donor who was alive at the date of conception dies before the child is old enough to seek them out, or if a parent dies during pregnancy or early childhood.

There is little research on whether the health and welfare of a child is adversely affected as a result of being conceived after the death of one biological parent.⁴⁷ The European Society of Human Reproduction and Embryology recently reported that '[b]ecause the applications of posthumous reproduction are of recent date, no research has been conducted to study the consequences for the child'.⁴⁸

Joi Ellis, a New Zealand fertility counsellor, has conducted research into the outcomes of cases involving posthumous use of gametes in New Zealand. Four women who conceived a child (or children) with sperm that had been stored at a fertility clinic prior to their partner's death were interviewed. The women who sought treatment were between 28 and 36 years old and made inquiries to the clinic between one month and one year after their partner's death. Five children have been born to the women using either assisted insemination or IVF.

Ellis' research indicates that initial outcomes for the children born (aged 3 to 6 years old) are positive. The women reported that they had no regrets about becoming parents. Further, Ellis states that 'all the mothers are committed to their children being made aware of the particular circumstances of conception'.⁴⁹ When asked about any difficulties they experienced, the women linked their concerns to parenting issues, rather than the specific experience of posthumous conception.

The commission is encouraged by these early findings about outcomes for children conceived by posthumous use of gametes. However, we believe that without further evidence, a cautious approach in this area is warranted. As with all decisions about treatment under the Infertility Treatment Act, the welfare and interests of children to be born as a result of the use of assisted reproductive technology should be paramount.

RECOMMENDATIONS

The commission has found the issue of posthumous use of gametes and embryos a particularly difficult area on which to make recommendations. Submissions that dealt with the substantive issues raised by the question of whether or not to allow posthumous use were generally in favour of allowing such use.⁵⁰ On the other hand, there are legitimate concerns about the potential consequences for children of a practice about which we know very little. The commission also agrees with the premise expressed in one submission that '[t]he law in this area needs to be principle-based, coherent and flexible enough to deal with future technological advances'.⁵¹

The commission recommends that posthumous use be permitted in certain circumstances. We recommend a rigorous process that deals with the following key issues:

- consent of the deceased
- existence of a relationship with the deceased
- approval for treatment
- counselling
- retrieval of gametes
- notification of wishes
- export of gametes and embryos
- status of the deceased and any children born.

CONSENT

In *Position Paper One: Access* the commission recommended that posthumous use and retrieval of gametes only be permitted if the deceased had expressly consented in writing to such procedures. As discussed above, some people argued that the requirement for express written consent was too onerous and might result in unfairness. They argued for a process where implied consent was sufficient to permit posthumous use or retrieval.

The commission believes that the requirement of express written consent is an important safeguard for posthumous use of gametes and embryos. It ensures that the wishes of the deceased are respected and may also be helpful to any child born. The commission recommends that the deceased's written consent must specifically contemplate *posthumous* use of gametes or embryos, not just use in a treatment procedure.

EXISTENCE OF A RELATIONSHIP

The commission believes that in the absence of research findings on outcomes for children born as a result of posthumous use of gametes, a cautious approach in this area is warranted. For this reason, we recommend that posthumous use of gametes only be permitted when there was a pre-existing relationship. Although research to date does not provide information about the possible impact of posthumous use of gametes on any children born, the fact that surviving partners are able to tell children about their deceased parents addresses some of the major concerns the commission holds.

The commission recommends that the couple need not have been involved in a treatment program prior to the deceased's death.

If the deceased has stipulated conditions about the use of his or her gametes after death, these should be followed, unless they are contrary to law. If the deceased's surviving partner has re-partnered, it may be possible for him or her to use the gametes or embryos with a new partner if they meet the eligibility requirements for treatment under the Infertility Treatment Act, and if the deceased's consent envisaged such use.

50 Submissions CP 19 (Anita Stuhmcke), CP 90 (Diane Blood).

51 Submission PP1 203 (Professor Marian Pitts and Associate Professor Kerry Petersen).

52 National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2004).

53 Joi Ellis, 'Four Fathers and Four Families: A follow up report of the use of posthumous sperm' (2006) *ANZICA Newsletter* (November 2006) 9, 10.

54 This recommendation aligns with the National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2004).

RECOMMENDATIONS

58. A medical practitioner should be able to remove gametes from a living person where that person has expressly consented to such removal, but not in any other circumstances.
59. A medical practitioner should be able to remove gametes from a person who is dead if the deceased person expressly consented to posthumous retrieval and to their use by the surviving partner to create a child.
60. Where express consent to retrieval of gametes after death exists but cannot be located, the spouse or next-of-kin should be required to make a statutory declaration that written consent exists before a medical practitioner can retrieve the gametes. The written document must be produced before the gametes can be used in a treatment procedure.
61. Clinics should ensure that people's wishes about posthumous use of their gametes and embryos are recorded.
62. Clinics should contact all people whose gametes or embryos are already in storage to ascertain their wishes with respect to posthumous use.
63. Donors should be counselled about the limits on posthumous use of gametes and must be advised to make arrangements for the clinic to be notified if they die.
64. In making decisions about whether approval should be given to export gametes or embryos outside of Victoria, the Infertility Treatment Authority should be required to take into account whether the gametes or embryos will be used in a manner which is consistent with Victorian law.

Donors

The commission has concerns about posthumous use where there is no pre-existing relationship between the deceased and the recipient. We believe that these circumstances are sufficiently different from posthumous use in the context of a pre-existing relationship to warrant a different approach. Permitting posthumous use of donor gametes or embryos will mean that some donor-conceived people will never have the opportunity to make contact with or meet their donors. The commission has heard from a number of people who will never be able to identify their donors because of past law, policy and practices (such as destroying hospital records). This fact can cause significant distress to donor-conceived children and adults.

For these reasons, the commission believes that it should not be possible to use donated gametes or embryos if a clinic is aware that a donor has died.

APPLICATIONS FOR POSTHUMOUS USE

Process

Treatment using posthumous use of gametes or embryos involves serious ethical issues. This fact is acknowledged in the NHMRC guidelines.⁵² The commission believes that approval from a clinical ethics committee is appropriate before a person may undergo treatment using gametes or embryos from a deceased person.

In New Zealand, ethics committee approval is a requirement for posthumous use. The New Zealand study discussed above reported that women found the process of mandatory approval by an ethics committee unnecessary and intrusive. All participants had been planning to conceive a child before the death of their partners. The women said their decision to conceive using their deceased partner's sperm was not a snap decision in response to bereavement. They 'objected to a group of people who did not know them judging their future, their choices and having control over them'.⁵³ Ethics approval and counselling requirements took many months. Nevertheless, the women who participated in the study also found that counselling and expressing their wishes to the ethics committee was empowering.

Despite these concerns, the commission has decided that posthumous use of gametes and embryos should only be permitted when each application is considered by a clinical ethics committee. The committee should assess possible impacts on any child to be born, with particular regard to any research findings on outcomes for children conceived after the death of one parent. The assessment process should take account of the sensitive nature of the application.

Counselling

The Infertility Treatment Act requires the partners of women undergoing treatment and donors to receive counselling and information and to provide relevant consent.

The commission recommends that the applicant receive counselling which addresses the grieving process and its impact on conception, and in particular the appropriate period of time which should elapse between the deceased's death and attempts at conception.⁵⁴

If the commission's recommendations are implemented, the deceased must have consented to use of his or her gametes but is unlikely to have undergone counselling or to have received relevant information, particularly if gametes were retrieved after death. The commission recommends that where a person is seeking treatment using the gametes of a person who has died, the counselling and information provisions in the Act should not apply in respect of the deceased person, as compliance with those requirements is clearly not possible.

It is likely that only a small number of children will be conceived through the use of posthumous donations of gametes. In accordance with the commission's cautious approach, we believe that the wellbeing of children born as a result of posthumous use should be monitored. As we discussed above, there is limited information available about the effects of posthumous use; future policy decisions would be assisted by knowledge of the psychological and developmental impacts of the practice on children. Any research in this area could only be conducted with the consent of the children's parents, and where appropriate, of the children themselves.

Time Limits

During the course of our consultations, the commission asked whether there should be a specified period of time within which gametes must be used.⁵⁵ We also considered whether a prescribed period of time should elapse after death before gametes or embryos can be used.

A small number of submissions said that gametes should be used within five years of the provider's death.⁵⁶ However, the majority of submissions on this issue said that imposing a time limit on the use of gametes was unnecessary and unfair. Time limits could coerce women to commence treatment before they are ready⁵⁷ and may impact on decisions about family spacing or constrain the possibility of having more than one child. The ITA submitted that:

highly prescriptive legislation can create significant impediments to good regulation by imbedding inflexible processes that may result in inconsistent and unjust outcomes. A statutory time limit for the posthumous use of gametes has the potential to operate in precisely this way ... Inconsistency would occur when two women in apparently similar circumstances—wishing to use the sperm of their deceased partner with his express consent—are distinguished on the basis of a non-essential factor, namely, the time elapsed since the death of their partner.⁵⁸

Time periods for storage of gametes and embryos already exist under the Infertility Treatment Act.⁵⁹ The NHMRC guidelines do not impose a time period before conception may be attempted; they merely require that clinics 'allow an appropriate period of time before attempting conception'.⁶⁰

The commission agrees that imposing time limits on the posthumous use of gametes or embryos would be overly prescriptive. We recommend that no additional time periods should apply to the posthumous use of gametes and embryos. As discussed above, counselling should address the appropriate period of time that should elapse between the deceased's death and attempts at conception. If there are special circumstances that warrant an extension of storage time, a person may apply to the ITA. If the deceased leaves instructions about time limits when they consent to the use of their gametes or embryos,

these time limits should be observed.

POSTHUMOUS RETRIEVAL OF GAMETES

Posthumous retrieval is a particularly contentious aspect of posthumous use of gametes. As discussed above, the Supreme Court has permitted retrieval of gametes where the deceased has not given consent. Posthumous retrieval often occurs at a time of distress to the deceased's family members, and the need to obtain a court order can add to concerns at this time. We received submissions about posthumous retrieval which expressed a range of views: total disagreement with the concept, acceptance of retrieval if express consent is provided, and support for retrieval in accordance with current provisions of the Human Tissue Act.

The commission has decided that the requirement of express consent is as important for the retrieval of gametes as it is for the use of gametes. We believe that the public benefits of express consent outweigh individual concerns about the limitations and possible unfairness that might arise if a person has not provided consent for posthumous use. Express consent provides certainty and practicality to all parties. This is particularly important in light of the invasive nature of retrieval, and because members of the deceased's family may hold different views about whether gametes should be removed. The commission believes the purpose of gamete retrieval sets it apart from other tissue donations covered in the Human Tissue Act that are permitted with the consent of the deceased's next-of-kin.

The commission acknowledges that it may be difficult to locate the relevant documentation in situations where a small window of time exists for retrieval of gametes.⁶¹ In an emergency situation, where express consent exists but cannot be located, the commission recommends the deceased's spouse or next-of-kin should be required to make a statutory declaration that written consent exists. This procedure would permit a doctor to retrieve gametes on the basis of this assurance. The written document expressing consent would need to be produced before the gametes could be used in a treatment procedure.

55 Victorian Law Reform Commission, *Position Paper One: Access (2005)*, Question 8.

56 Submissions PP1 227 (Anonymous), PP1 339 (Women's Electoral Lobby).

57 Submission PP1 172 (Diane Blood).

58 Submission PP1 337 (Infertility Treatment Authority).

59 Gametes may be stored for ten years, embryos may be stored for five years: *Infertility Treatment Act 1995* ss 51(1)(b), 52(4).

60 National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2004), 6.16.

61 Submission PP1 172 (Diane Blood).

62 *YZ v Infertility Treatment Authority* [2005] VCAT 2655 (Unreported, Morris P, 20 December 2005) [68].

63 For example, *Human Fertilisation and Embryology (Deceased Fathers) Act 2003* (UK).

RECOMMENDATIONS

65. Where a woman gives birth to a child conceived with gametes contributed by her deceased partner, the child should be regarded as the child of the deceased for the purpose of birth registration, but not for any other purpose under Victorian law (in particular the laws of succession).
66. Where a couple in a treatment program is contemplating posthumous use of gametes or embryos, they should be counselled to seek legal advice about making provision for any posthumously conceived child in their wills.

NOTIFICATION OF WISHES

The requirement that the deceased expressly consent to the posthumous use of their gametes or embryos is fundamental to the commission's recommendations in this area. However, the commission acknowledges that even where people do state their wishes in writing, they may subsequently change their mind or their circumstances may change.

The ITA's 'Advance Directive Consenting to Posthumous Use of Stored Gametes by a Partner: Interim Form' is an important mechanism to ascertain the wishes of people undergoing treatment about potential use of their gametes after death. Efforts should also be made to determine the wishes of donors of gametes or embryos.

The commission recommends that clinics should ensure that people's wishes about posthumous use of their gametes and embryos are recorded. In particular, clinics should contact all people whose gametes and embryos are already in storage to ascertain their wishes with respect to posthumous use. If a person who has gametes or embryos in storage does not respond to requests for instructions about posthumous use, it should not be possible to use those gametes or embryos to conceive a child. (This would not necessarily preclude use for research purposes, assuming the law allowed such research).

The commission agrees with the principle that it should always be possible to revoke consent. Accordingly, a subsequent document would override an advance directive form held by a clinic. The commission acknowledges that decisions, or changes to decisions, about posthumous use can occur without the mandatory counselling provided when people are formally seeking treatment. However, the decision about posthumous use is a matter for individual autonomy. Accordingly, the commission recommends that a person can only modify their consent to posthumous use of their gametes or embryos if it is in writing.

Transitional Provisions

The commission considered whether any provision should be made for situations where gametes are already in storage but the deceased did not have an opportunity to express his or her wishes about posthumous use of those gametes.

The commission decided that the requirement for express consent should not be dispensed with in such situations. To do otherwise would be to afford those people wanting to use gametes or embryos already in storage rights that are additional to the rights people may enjoy in the

64 See Chapter 19.