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"No Father Required"? The Welfare Assessment in the Human Fertilisation and Embryology Act 2008

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Abstract Of all the changes to the Human Fertilisation and Embryology Act 1990 that were introduced in 2008 by legislation of the same name, foremost to excite media attention and popular controversy was the amendment of the so-called welfare clause. This clause forms part of the licensing conditions which must be met by any clinic before offering those treatment services covered by the legislation. The 2008 Act deleted the statutory requirement that clinicians consider the need for a father of any potential child before offering a woman treatment, substituting for it a requirement that clinicians must henceforth consider the child's need for "supportive parenting". In this paper, we first briefly recall the history of the introduction of s 13(5) in the 1990 Act, before going on to track discussion of its amendment through the lengthy reform process that preceded the introduction of the 2008 Act. We then discuss the meaning of the phrase "supportive parenting" with reference to guidance regarding its interpretation offered by the Human Fertilisation and Embryology Authority. While the changes to s 13(5) have been represented as suggesting a major change in the law, we suggest that the reworded section does not represent a significant break from the previous law as it had been interpreted in practice. This raises the question of why it was that an amendment that is likely to make very little difference to clinical practice tended to excite such attention (and with such polarising force). To this end, we locate debates regarding s 13(5) within a broader context of popular anxieties regarding the use of reproductive technologies and, specifically, what they mean for the position of men within the family.

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Introduction

The passage of the Human Fertilisation and Embryology Act 2008 provoked considerable debate and sustained critical scrutiny.[1] While the 2008 Act introduced a number of controversial changes to the Human Fertilisation and Embryology Act 1990, foremost among the issues to excite media and popular attention was the amendment of the so-called welfare clause. This clause forms part of the licensing conditions which must be met by any clinic before offering those treatment services covered by the legislation. In the original text of the 1990 Act, this section had read:

> S 13(5) A woman shall not be provided with treatment services 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.

Controversially, the 2008 Act deleted the phrase "the need of that child for a father", substituting a requirement that clinicians must henceforth consider the child's need for "supportive parenting". The deletion of the "need for a father" was widely depicted in parts of the media as an attack on fatherhood, signalling that women have won the 'right' to have children without fathers, with frequent allusions to this as heralding the redundancy of men and traditional male roles in modern Britain (Laurence 2004; Donnelly 2007; Henderson et al. 2008). Likewise, when the reform of the parenthood provisions, which allow a "female parent" to be registered as a second parent on a birth certificate instead of a "father" came to the media's attention, they were reported in a similarly confrontational tone (MacRae 2009; see further McCandless and Sheldon 2010), while the potential reproductive use of 'artificial sperm' (created using stem cells taken from elsewhere in the body) was discussed in the media as a means of making possible reproduction without a man; despite the primary goal of such developments being the treatment of male infertility (Cook 2009).

In this paper, we first briefly recall the history of the introduction of s 13(5) in the 1990 Act, before going on to track discussion of its amendment through the lengthy reform process that preceded the introduction of the 2008 Act. In addition to the extensive textual documentation produced by this reform process, we further draw on a number of interviews that we conducted with key actors in the process.[2]

[1] The phrase 'No Father Required' is taken from the title of an article in the Daily Mail, see Wilson (2005).

[2] Interviewees were: key officials at the Department of Health (Edward Webb, Deputy Director for Human Tissue Transplantation, Embryology and Consent; Gwen Skinner, the policy manager responsible for the development of the legal parenthood provisions in the 2008 Act; and Katy Berry, who was responsible for the implementation of the 2008 Act); the Deputy Chair of the Human Fertilisation and Embryology Authority (Emily Jackson); the academic advisors to the two Parliamentary committees involved in the reform process (Derek Morgan, Advisor to the House of Commons Science and Technology Committee and Sheila McLean, Advisor to the House of Commons Science and Technology Committee and the Joint Committee); the Chair of the Joint Committee (Phil Willis MP) and a further

We then discuss the meaning of the phrase "supportive parenting" with reference to guidance regarding its interpretation offered by the Human Fertilisation and Embryology Authority. While the changes to s 13(5) have been represented as suggesting a major change in the law, we suggest that the reworded section does not represent a significant break from the previous law as it had been interpreted in practice. This raises the question of why it was that an amendment that is likely to make very little difference to clinical practice, tended to excite such attention (and with such polarising force). In response, we suggest that debates regarding s 13(5) must be understood within a broader context of popular anxieties regarding the use of reproductive technologies and, specifically, what they mean for the position of men within the family.

The 1990 Act and the 'Sexual Family'

The Human Fertilisation and Embryology Act 1990 established a regulatory regime, overseen by a new body, the Human Fertilisation and Embryology Authority (HFEA), for embryo research and infertility treatment services involving the *ex utero* creation of embryos or the use of any gametes other than those of the patient and her partner, as well as the storage (and post-storage use of) gametes.[3] The Act's origins lay in a report produced by a Committee of Inquiry, chaired by Mary (now Baroness) Warnock in 1984. Produced at a time of great anxiety regarding the possibilities opened up by assisted reproductive technologies and what they meant for the 'traditional' family, Warnock (1984, para 2.11) had cautioned that:

> many believe that the interests of the child dictate that it should be born into a home where there is a loving, stable, heterosexual relationship and that, therefore, the deliberate creation of a child for a woman who is not a partner in such a relationship is morally wrong … we believe that as a general rule it is better for children to be born into a two-parent family, with both father and mother, although we recognise that it is impossible to predict with any certainty how lasting such a relationship will be.

The text of the 1990 Act did not translate this stricture into a ban on treating anyone other than stable heterosexual couples, although an amendment seeking to criminalise the treatment of unmarried women only narrowly failed in the House of Lords.[4] However, s 13(5)'s requirement that clinicians must consider the need for a father clearly reflected such concerns.

Footnote 2 continued
member of the Joint Committee (Baroness Deech, who was previously the Chair of the Human Fertilisation and Embryology Authority). We are grateful to our interviewees for their time and to the Socio-Legal Studies Association for providing the resources to conduct these interviews.

[3] Ss 3, 4. Plans to disband the HFEA and redistribute its functions to other bodies have recently been announced (Raper 2010), however, it will be some time before such plans might have any possibility of being realised given the need for primary legislation to put them into effect (Harris 2010).

[4] Introduced by Lady Saltoun of Abernethy, HL Debs Vol 515, Col 787 (6 Feb 1990). See Lee and Morgan (2001, pp. 159–167) for a detailed consideration of the parliamentary debates regarding s 13(5) and its application in practice.

Section 13(5) almost certainly represents the most extensively studied subsection of the 1990 Act, having provoked both empirical studies charting the way in which it has been applied in practice and more theoretical work assessing what it says about our attitudes towards appropriate mothering and, to a lesser extent, fathering (Stanworth 1987; Cooper and Herman 1991; Douglas 1993; Millns 1995; Steinberg 1997; Plomer et al. 1999; Jackson 2002; Sheldon 2005; Jones 2007; Harding 2010). A reading of the contemporary parliamentary debates identifies three major grounds which underpinned the explicit entrenchment of the "need for a father" in law. First, with the 1990 Act passed at a time of widespread, media-fuelled concern about increasing social security expenditure on single parent families (Davis et al. 1998), the need to ensure financial provision for children was significant.[5] Secondly, while the importance of fathers as hands-on carers emerged as a far less dominant theme than we might anticipate today, there was mention of the need for a male parent, with fathers seen as important for the healthy psychological development of children of both sexes into the good husbands, wives, mothers and fathers of tomorrow.[6] Thirdly and most significantly, the debates reflected frequent assertions of the marital unit as the best possible forum in which to raise children. This was seen as the only sure start in life for children, with the decline of marriage credited with causing much that was wrong in society.[7] The importance of providing a 'stable' base for children was frequently asserted, with 'stability' standing as shorthand for heterosexual marital monogamy.[8] Further, many of those speakers who were reluctant to confine child bearing to the marital unit were often equally convinced that it should nevertheless remain the preserve of co-habiting heterosexual couples. For example, in an intervention rendered deeply poignant in the light of later events in his own personal life, David Blunkett MP argued:

> People have an absolute right to be themselves, to reject contact with men or to shun any physical contact with them. That is their choice. But that is not the same as accepting that there is some automatic or inalienable right to child bearing. Child bearing is not a right. It is part of the unfathomable life force.

[5] E.g. "To allow and encourage by state provision—it is at the taxpayers' expense ultimately—begetting of children into what are designed to be one-parent families does not make sense as regards serious sociological responsibility" per Lord Lauderdale, HL Debs Vol 516, Col 1103 (6 March 1990). See further Sheldon (2005) for reference to examples of numerous other similar statements.

[6] E.g. "Children learn primarily from example, by copying what they see. It is by example that a boy learns how to be a responsible husband and father and how to treat his own children in turn. It is by example that a girl learns how to be a wife, from seeing how her mother cares for her father. The father is enormously important, if only as a role model" per Lady Saltoun of Abernethy, HL Debs Vol 515, Col 788 (6 February 1990).

[7] See e.g. Lord Ashbourne, HL Debs, Vol 515, Col 767 (6 February 1990), David Wilshire, HC Debs Vol 174, Cols 1024–1025 (20 June 1990).

[8] As Douglas (1993, p. 53) notes, the proposers of amendments to the legislation in the House of Lords were overwhelmingly concerned with preventing women with dubious sexual attitudes from having children, yet seemingly indifferent to others who might be deemed unsuitable as parents (e.g. violent spouses, drug users and disabled people, noting that in practice it can be hard for paraplegic men to persuade clinics to treat their wives).

> That is why man and woman together must take responsibility for the well-being and love of the child.[9]

A close reading of the debates, then, might suggest that parliamentarians were less concerned with the need to ensure a financial provider or hands-on (male) carer than they were with the symbolic value of ensuring children were only born into (quasi) marital units.[10] As such, the original text of s 13(5) is best conceptualised in terms of a refusal of single motherhood and a desire to link women to men. In this way, the section could be usefully understood as offering an entrenchment of what Martha Fineman has described as the "sexual family", by which she meant "the traditional or nuclear family, a unit with a heterosexual, formally celebrated union at its core" (Fineman 1995; see also Smart 1984; Diduck and Kagagnas 2006).

How far did these Parliamentary concerns translate into practice in terms of how the law was to be applied? Guidance for clinics has been supplied by the HFEA in its regularly updated Code of Practice (Blyth and Cameron 1998). The First Edition of the Code, published in 1991 (HFEA 1991), advised that where the child would have no legal father:

> Centres are required to have regard to the child's need for a father and should pay particular attention to the prospective mother's ability to meet the child's needs throughout his or her childhood, and where appropriate whether there is anyone else within the prospective mother's family and social circle who is willing and able to share the responsibility for meeting those needs and for bringing up, maintaining and caring for the child. (para 3.16)[11]

At this time, clinics were obliged to satisfy themselves that the woman's GP knew of no reason why she should not be offered treatment (para 3.19). And while the GP should only be approached with her consent, a refusal would be taken into account in considering whether or not to offer treatment. The decision to treat would be made in the light of all available evidence, and treatment might be refused on clinical grounds, on the basis of child welfare, or where there was insufficient information to reach a proper conclusion (para 3.25). Finally, while it is noteworthy that the above advice did not require the production of an appropriate male 'role model' to satisfy the welfare assessment, some patients and clinics (whether directly or indirectly) interpreted it as imposing just such a requirement (Jones 2007, pp. 88–95; Harding 2010, pp. 130–134).

[9] HC Debs Vol 174, Col 1023 (20 June 1990). Following an affair with publisher Kimberly Quinn, Blunkett became involved in a well publicised struggle in which he sought to establish his paternity of her two young children, with a view to assuming an active role in their lives; see Hinsliff (2005).

[10] This fits with the tentative guidance given by the Warnock Report (1984). See further Sheldon (2005) for a detailed rebuttal of the possible argument that the importance accorded to marriage was not seen as important *per se*, but merely reflected parliamentarians' hope that this would ensure financial provision and a second carer who could bring specifically male attributes to bear.

[11] All editions of the Code of Practice are available on the HFEA website: www.hfea.gov.uk. Clinics were also advised that they must make "a fair and unprejudiced assessment of [the] situation and needs" of people seeking treatment, taking account of their commitment to bringing up a child, their ages and medical histories, the needs of prospective children and their ability to meet those needs, the risk of harm to the child and the effect of a new baby on existing children of the family (para 3.13).

Subsequent iterations of the Code of Practice have served to liberalise the guidance offered on s 13(5). For example, in 2003 the Sixth Edition (HFEA 2003) scaled down the specific guidance regarding the assessment of those cases where the child will have no legal father, with the removal of the phrase requiring shared responsibility "for bringing up, maintaining and caring for the child". Significant changes were introduced in 2007, following a HFEA consultation on the operation of the welfare clause (HFEA 2005). This Seventh Edition of the Code (HFEA 2007) retained the requirement that where the child would have no legal father, clinics should consider the prospective mother's ability to meet the child's needs and the ability of other persons willing to share responsibility for them (para G.3.3.3). However, this provision was no longer framed as part of a general assessment of the welfare of the future child but, rather, was included on a list of considerations forming part of a risk assessment of factors which should be checked for likelihood of "serious physical, psychological or medical harm" to the future child. This represents a subtle but crucial shift, which prefigures the explicit presumption in favour of patients' future parenting abilities that appears in the current Code (discussed below): a clinician who felt, other things being equal, it would be in a child's best interests to have a father figure might stop short of determining that the absence of the same would be liable to constitute a risk of serious harm.

Second, for the first time, clinics were explicitly directed that "[i]n particular, patients should not be unfairly discriminated against on grounds of gender, race, disability, sexual orientation, religious belief or age" (para G.3.2.2). This explicit reference to sexual orientation is significant as the Sixth Edition of the Code merely stated that those seeking treatment "are entitled to a fair assessment" which should be conducted "with skill and care" and due regard "to the wishes and sensitivities of all involved" (para 3.12).

Finally, clinics were henceforth to contact GPs only where the information gathered from patients gave grounds to suggest that there might be a risk of serious harm to the child, or where the information gathered was incomplete, inconsistent or deception was suspected (para G.3.4.4). Where a patient refused permission for a GP to be contacted, this should still be taken into account. However, for the first time the Seventh Edition of the Code provided that the refusal should not itself be grounds for refusing treatment (para G.3.4.4). Where further information was collected, treatment should be refused only if the centre concluded that the child to be born or any existing child of the family "is likely to experience serious physical, psychological or medical harm or where the treatment centre is unable to obtain sufficient further information to conclude that there is no significant risk" (para G.3.4.5). Combined, these changes represented a far more liberal reading of s 13(5) than that envisaged in the First Code of Practice and a subtle restacking of the decks in favour of the patient's rights to treatment.

How did clinics interpret s 13(5) and this accompanying guidance? It is clear that clinical judgment regarding whom to accept for treatment varied significantly, with some clinics far more liberal than others (Saffron 2002; Jones 2007).[12] However,

[12] Note also two prominent legal cases, one brought before 1990 by a woman who had been refused treatment on the grounds of moral unsuitability (a history of prostitution) and a second after 1990,

despite the clear potential for discriminatory practices offered by s 13(5), research has tended to suggest that generally clinics were reluctant to use s 13(5) as "a convenient, if thinly disguised, rationale for refusing to provide certain services or treat certain people" (Blyth 1995), with Gillian Douglas's early study of the operation of the section indicating that it made very little difference to clinicians' practice (1993). Indeed, by the mid 2000s, a greater toleration of the use of assisted reproductive technologies combined with increased acceptance of same-sex relationships, including those which involved co-parenting, had led to growing unease regarding the use of s 13(5) to exclude single women and lesbian couples from treatment. A statutory requirement that clinicians must consider a child's "need for a father" came to appear particularly anomalous in a context where same-sex couples were permitted jointly to adopt children.[13] As such, even before the coming into effect of the changes introduced by the 2008 Act, a more liberal reading of the legislation was widespread and s 13(5) was not formally operating as a significant legal bar to the treatment of lesbian couples.[14]

In the light of these changes, one might have assumed that the deletion of the "need for a father" from s 13(5) was a matter of nothing more than updating the legislation to bring it into line with clinical practice. However, this reform was to prove anything but uncontroversial, a fact that we suggest below is more readily explained by the challenge that this change posed to the symbolism of the 'sexual family' than by any likely practical impact of the reform. We now turn to a detailed discussion of the process by which the section came to be amended.

The Reform Process

Almost two decades after its introduction, reform was believed necessary to update the 1990 Act in the light of advancing scientific knowledge and to "future proof" it against developments yet to come (Department of Health 2005). It would further allow for the consolidation of various changes made to the legislation since its inception and for problems with its existing wording to be addressed. Finally and most significantly, for our purposes, the 2008 Act would provide an opportunity to update the legislation in the light of changing social and familial norms, most

Footnote 12 continued
concerning refusal on the basis of age; both saw the claimants fail: *R v Ethical Advisory Committee of St. Mary's Hospital ex p Harriott* [1988] 1 FLR 512; *R v Sheffield Health Authority, ex p Seale* (1994) 25 BMLR 1.

[13] Adoption and Children Act 2002. Note also the recognition of same sex relationships in the Civil Partnership Act 2004.

[14] In two recent cases, the NHS reversed its decision to refuse treatment to two lesbian couples in the face of a legal challenge. While these decisions regarded the refusal of funding, clearly the couples concerned could not have won if they were seen to be arguing for funding for treatment which was unlawful. See further Robertson (2009) and Templeton (2009). While the imminent introduction of the 2008 Act was clearly a factor in the outcome of these cases, also significant was the impact of the Human Rights Act 1998 and the Equality Act 2006 on the legality of a refusal to treat on the grounds of sexual orientation. This is not to deny, however, the fact that s 13(5) was *perceived* as operating a real bar by at least some people: see again Jones (2007) and Harding (2010).

notably with respect to the recognition of single and same-sex parents. In the words of the Department of Health, the legislation was "framed in terms of heterosexual couples" and should thus be changed better to "recognise the wider range of people who seek and receive assisted reproduction services in the 21st century" (Hinsliff 2004; see further House of Commons Science and Technology Committee 2005, Ev 195, para. 21). The then chair of the HFEA concurred, stating that "[it] is absolutely clear if you think about the changes in society and the different ways that families can be constituted that it is anachronistic for the law to include the statement about the child's need for a father" (Blackstock 2004; see further Jackson 2002). Others pointed out that, in any case, as we have noted above, this requirement was widely ignored by clinicians and thus achieved nothing in practice.[15] However, notwithstanding such sentiments in favour of reform, s 13(5) was to attract considerable attention at every stage of the Parliamentary reform process.

The first major step in concretising ideas for reform was undertaken in the House of Commons Science and Technology Committee (STC)'s Report (2005), which drew on the responses to an on-line public consultation exercise and evidence provided by a range of expert witnesses (Hansard Society 2004; House of Commons STC 2005, Vol II). This Report concluded that the "need for a father" requirement was akin to a "'fitness for parenting' requirement, historically used to prevent certain 'undesirable' groups from reproducing", and was discriminatory and unjustifiably offensive to many (Vol I, paras 93, 101).

> The requirement for a father does not square with the current view of what constitutes a family, and discriminates against single women who may have the financial and emotional facilities to cope with a child on their own or with other support systems, who may need to use donor insemination to conceive safely. (Vol I, para 99)

Having initially defended the idea that "as a general rule it is better for the children to be born into a two parent family with both mother and father" (Vol II, Qs 1314 and 1348), the Government chose eventually to fall into line with the views of the STC (Department of Health 2005, 2006), concluding that the retention of the "need for a father" requirement was no longer justified by evidence of harm, particularly when weighed against the potential risks that may arise as a consequence of encouraging "some women" (i.e. lesbians and single women) to use privately arranged treatment services (Department of Health 2006, paras 2.23, 2.26). The Government's support for change was thus justified primarily on the basis of patient safety (to bring all women within the protective regulatory framework offered by the legislation) and only indirectly as an equality measure.[16]

[15] See Tedd Webb, Joint Committee (2007, Vol I, para 243) commenting that the fact that s 13(5) "does not actually seem to achieve anything" was the Department of Health's starting point for its proposed reform.

[16] The Government's concern to emphasise patient safety as the basis for reform can also be seen, for example, in: Lord Darzi, HL Debs Vol 696, Col 869 (21 November 2007); Dawn Primarolo, HC Debs, Vol 475, Col 1159–1160 (12 May 2008). A number of other Parliamentarians also drew attention to the possible risks of unregulated sperm donation, to include health risks and questions over whether or not children would then be able to identify their genetic father: see Lord Carlile of Berriew, HL Debs, Vol

The resulting draft legislation therefore foresaw the retention of the welfare clause but simple deletion of the phrase "need for a father" from within it.[17] Before being considered by Parliament in full, the draft Bill was scrutinised by a Joint Committee of the House of Commons and House of Lords (JC), chaired by the Liberal Democrat MP, Phil Willis (JC 2007; see also HM Government 2007). The JC conducted its own on-line consultation exercise on a number of specific questions, as well as inviting both written and oral evidence on a broader range of issues (JC 2007, Vol II), with s 13(5) again attracting significant attention. In carefully worded conclusions which clearly reflected internal division on this point,[18] the JC eventually accepted the need for deletion of the "need for a father" but recommended that the phrase should be replaced with requiring consideration of the "need for a second parent" (JC 2007, Vol I, para 243), noting:

> [i]n making this recommendation, we do not seek to discriminate against single women seeking treatment and we recommend that in such circumstances … the requirement to consider the need of a child for a second parent should, as now, not be a barrier to treatment. (Vol I, para 243)

The question of how it is possible to prefer a two parent family while not thereby inherently failing to prefer other family forms (and whether giving formal sanction to such preference can fail to constitute discrimination) received no further attention. Of interest, however, is the JC's reassertion of the importance of the 'sexual family' form (Fineman 1995), albeit in modified form. Children should ideally be raised by two parents: what changes is the necessity that one of the two must be a father. As the JC chairman put it: "[i]t must be an ideal to bring a child into the world with two supporting parents. Mustn't it?"[19] A second JC member, Baroness Deech, concurred:

> We are trying to gloss over the fact that regrettably, often for reasons not of their choosing, not at all, women are having to bring up children single handed. I don't think one should thereby pretend that that is as good as – and even better – than having two parents.[20]

Footnote 16 continued
698, Col 65–66 (21 January 2008); Baroness Howarth of Breckland, HL Debs, Vol 698, Col 69–70 (21 January 2008); Lord Ali, HL Debs, Vol 698, Col 78 (21 January 2008); and Baroness Barker, HL Debs, Vol 698, Col 82–83 (21 January 2008)). This reasoning mirrors that of the Warnock Report (1984). Despite not necessitating the creation of *in vitro* embryos, Margaret Brazier has convincingly argued that donor insemination was included in the 1990 Act due to the Warnock Committee's recognition that unregulated practices could endanger patients (1999, p. 172).

[17] Human Tissues and Embryos (Draft) Bill 2007, s 21(2)(b). Following the dropping of provisions foreseeing the merging of the HFEA and Human Tissue Authority, the title of the Bill was changed to the Human Fertilisation and Embryology Bill.

[18] Our interview with Phil Willis, MP confirmed that this wording was a compromise between those who wanted to retain the 1990 Act wording of the welfare provisions and those who thought it was in need of reform (Phil Willis, MP, interviewed on 19 March 2009).

[19] Phil Willis, MP, *ibid*.

[20] Ruth Deech, interviewed by Julie McCandless on 22 February 2009.

The JC would appear to have been influenced by expert evidence regarding the welfare of children born to lesbian couples. This widely cited research, conducted by Susan Golombok and others, has demonstrated that such children do just as well (if not better) across a variety of indicators as children born to heterosexual parents (Brewaeys et al. 1997; Mooney-Somers and Golombok 2000; Golombok et al. 2002; Golombok et al. 2003; Stevens et al. 2003; Perry et al. 2004; MacCallum and Golombok 2004). Golombok was invited to present this work to the JC in detail, where she provided a compelling case against discriminating between same-sex and heterosexual couples (JC Vol II, Qs 877–917). In contrast, although debate continues to rage as to whether this reflects no more than the relative poverty of lone parent families or whether the absence of a father figure (and the specifically masculine attributes which would be brought to parenting) is an independent negative factor, there is substantial evidence to suggest that children raised in single parent households do less well across these same indicators (e.g. Lewis et al. 2002; O'Neill 2002; Barlow et al. 2005). But what the JC's recommendation ignores is that children conceived to single mothers via IVF form an unrepresentative sample, as given the limited NHS funding availability for such treatment services, typically such women will have needed to fund their own treatment and can therefore be safely assumed, in the vast majority of cases, not to be struggling to raise children in the levels of poverty faced by many single mothers. Ultimately, however, the Government did not follow the JC's recommendation, reasoning that it would add nothing to the statutory mandate requiring the welfare of the child to be taken into account before provision of treatment (Department of Health 2007, para 57).

The draft legislation was then subject to over 80 hours of parliamentary debate.[21] Suggested amendment of the welfare clause (relating almost exclusively to the deletion of "need for a father" and what might replace it) occupied a significant proportion of this time, while other amendments relating to parenthood received virtually no discussion.[22] The apparent simplicity of the question of whether the "need for a father" should be deleted proved to have a polarising appeal that other, more technically complex, parenthood provisions did not.

Significantly, discussion of s 13(5) occurred within—and served as a focus for—a broader range of popular anxieties regarding the use of reproductive technologies and, specifically, what they mean for the position of men within the family. In such a context, it is unsurprising that debate regarding the rewording of s 13(5) focused not just on the narrow issue of access to infertility treatment services but became a basis for pursuing debates about topics as wide-ranging as youth disaffection in society, teenage sexual practices and the significance of poor or absent fathering to

[21] For the text of the Bill, amendments tabled and links to all parliamentary debates, see: http://services.parliament.uk/bills/2007-08/humanfertilisationandembryology.html.

[22] Totalling up the series of brief mentions relating to the 'status provisions', which set out the determination of legal parenthood for those children conceived as a result of treatment services regulated by the Act, gives a total of around one hour of Parliamentary debate. In contrast, the welfare clause generated over eight hours of debate. This total would most likely have been greater had the time allocated to discussing the welfare clause in the House of Commons at Committee stage not been restricted to a three hour session.

these issues.[23] Importantly, those pursuing these lines of argument again conflated deliberately created fatherless families with the very different circumstances of other kinds of fatherless families.[24] To take just a very few examples from the debates:

> … to rule out the male responsibility seems to go in the face of nature, religion and good sensible politics on the part of a Government who are trying to stop overfilling the jails of the country.[25]

> Children flourish when nurtured in a family with two parents of the opposite sex who work together and complement each other. That is God's design and intention. We see from research that the pattern that God has laid down for fatherhood is necessary, because the lack of a father figure has a high cost indeed.[26]

> Since 1990 there has been a huge amount of research on the effect of absent fathers, demonstrating an increasing understanding of the role fathers play in the home. Research that [the Centre for Social Justice] published recently showed that the effect on those broken homes is remarkable – 75 per cent of the children are more likely to fail at school, 70 per cent are more likely to succumb to drug addiction, 50 per cent are more likely to have serious alcohol problems, and 35 per cent are more likely to experience some form of unemployment or welfare dependency.[27]

> Fathers bring something distinctive to the party. One can only handle research in relation to children responsibly by concluding that we must assume that the best interests of the child are, on average – although we know of wonderful examples that buck the trend – less likely to be met in the absence of a father … we have to conclude that it would be wrong of the state to facilitate the deliberate creation of children with the intention that they should be denied the chance of ever having a father for the duration of their childhood, yet that is what the clause does.[28]

Others simply appealed to the 'facts of life' or the assumed 'naturalness' of the two-parent heterosexual family unit as a justification for retaining the "need for a father" provision:

[23] See particularly Iain Duncan Smith, HC Debs, Vol 476, Col 166–170 (20 May 2008).

[24] The extent of this conflation resulted in the following plea from Baroness Findlay of Llandaff: "I would also caution your Lordships that it is not honest to transpose the research from broken families and the outcomes for their children on to the outcomes for children who are conceived through an infertility clinic after incredibly careful consideration by people who are desperate to give the very best upbringing possible to those children. … That is completely different from unplanned pregnancies and broken relationships" (HL Debs, Vol 698, Col 84, 21 January 2008). A number of MPs also pointed to the significance of the different context: see for example, Dr Evan Harris, HC Debs, Vol 476, Col 168 (20 May 2008) and Dari Taylor, HC Debs, Vol 476, Col 194 (20 May 2008).

[25] Lord Elton, HL Debs, Vol 696, Col 843 (21 November 2007).

[26] Iris Robinson, HC Debs, Vol 475, Col 1125 (12 May 2008).

[27] Iain Duncan Smith, HC Debs, Vol 476, Col 167 (20 May 2008).

[28] Gary Streeter, HC Debs, Vol 476, Col 227 (3 June 2008).

> The law as it stands provides an important safeguard for the unborn child, [by] recognising and promoting the generally accepted notion of the ideal family unit – the one designed by nature, that of a mother, father and child.[29]

> What we are talking about is the natural order of things, and I make no apology for standing up for what I believe to be the natural order of things. *[Interruption]* …it is a natural thing for a family to consist of a man and a woman who have children, and give those children a proper home.[30]

> [T]here is a difference between the issue of same-sex couples being suitable to foster a child at a particular point in a child's life in the interests of the child … and the creation of a child … in circumstances outwith the normality of how we would proceed were we not able to implement IVF. [This debate] is not about equality or rights … it is about the nature of procreation and the way in which we proceed in respect of a policy in the nation, rather than an individual right for a human being.[31]

During the passage of these debates, sustained interest in the welfare clause resulted in each House of Parliament having the opportunity to debate, and vote on, its precise rewording. First, the House of Lords considered a "veritable banquet of options"[32] which might be substituted for the "need for a father" including a child's need for "supportive parenting";[33] "support by a father and a mother";[34] "supportive parenting and family life";[35] "supportive parenting and the advantages of having a father and a mother";[36] and "the advantages of having a father and a mother".[37] The Government's proposal that "the need for a father" be replaced by "the need for supportive parenting" was finally agreed.[38] In the House of Commons, efforts to further amend this clause continued with a range of options attempting in some way to reinsert an explicit mention of a father. Suggestions included the "need for a father and a mother"[39] and the "need for supportive

[29] Geraldine Smith, HC Debs, Vol 475, Col 1097 (12 May 2008).

[30] Sir Patrick Cormack, HC Debs, Vol 476, Col 206–207 (20 May 2008).

[31] David Blunkett, HC Debs, Vol 476, Col 209 (20 May 2008).

[32] Per Lord Warner, HL Debs, Vol 698, Col 71 (21 January 2008). Note that, unusually, the Bill had begun its life in the House of Lords and thus the issue was first debated there.

[33] Amendment 108, tabled by Lord Darzi on behalf of the Government.

[34] Amendment 108A, tabled by Baronesses Deech and O'Caithan and Lord Lloyd of Berwick.

[35] Amendment 108B, tabled by Lord Northbourne, Baroness Butler-Sloss and the Earl of Listowel.

[36] Amendment 108C, also tabled by Lord Northbourne, Baroness Butler-Sloss and the Earl of Listowel.

[37] Amendment 101A, tabled by Baroness Deech and Baroness Butler-Sloss. A further proposed amendment was "the child's need for a father, including whether that child would be disadvantaged by the lack of either a father or a mother" (Amendment 110, proposed by Baronesses Butler-Sloss, Williams of Crosby and Warnock).

[38] The Government's formulation was passed when the House voted against amendment 108A by 71 votes.

[39] Amendment 56, tabled by Iain Duncan Smith, David Taylor, Claire Curtis-Thomas, Johan Gummer, Michael Ancram and Geraldine Smith.

parenting and a father or male role model".[40] In the end, however, these further amendments were all defeated and the need for "supportive parenting" has survived into the final text of the legislation.[41]

The explicit inclusion of "and a mother" in some of these amendments is of interest. This could be read as attempting to regulate gay male couples' access to surrogacy, raising a potential question mark regarding child welfare for clinicians who know that a child will be given up by the birth mother to be raised by two men.[42] In fact, as we have suggested elsewhere with regard to the 'status provisions', which determine the legal parenthood of children conceived under the 2008 Act (McCandless and Sheldon 2010), there was virtually no discussion of the implications of these reforms for gay male couples. As such, while this explanation may be plausible, in our view it is more likely that the suggested inclusion of a reference to mothers represented a gesture towards formal equality on the face of the Act: if we are prescribing the need for a mother, who could then object to similarly prescribing the need for a father? And as one of us has suggested elsewhere, the idea of formal equality has often served as a powerful tool for advancing fathers' rights agendas and entrenching conservative understandings of the family (Collier and Sheldon 2007, 2008).

Why should a reform which looks set to have such limited practical significance excite so much attention, particularly when many of the suggested wordings reflected only subtle differences? We would suggest that the answer lies, as we argued above, in the role this narrow issue played as a focus for far broader disagreements regarding the shape of the family and the role of men within it. We would further suggest that, as in 1990, Parliament was highly concerned with the symbolic message which would be sent out by this reform. For example, Baroness Warnock argued for the retention of the provision precisely because it was ineffective, "wishy washy" and did no harm, whereas the message sent out by its deletion would be profoundly negative:

> [Removal of the "need for a father"] has been taken to be a statement that the old forms of family are no longer necessary and, particularly, that men have no use in the procreation of children. That does not seem the intention of the Government, but if that is how it is widely interpreted it ought to stay in the Bill, partly because it has always been a pretty ineffective bit of legislation.[43]

Other peers and MPs repeatedly expressed similar concerns, at times mistakenly conflating the removal of this phrase with the question of whether children should have a right to know the identity of their biological fathers, which was covered

[40] Amendment 58, tabled by Mark Simmonds and Andrew Lansley.

[41] This is perhaps not surprising given that the Government placed a whip on this issue in the House of Commons. However, it is questionable whether the Government actually needed to do this to ensure the passing of the words "supportive parenting". A recent analysis of the voting patterns throughout the passage of this Bill suggests a general trend of party-line voting, whether or not a whip was in place: see Philip Cowley, 'Democracy in Practice' presentation at ESRC Genomics Forum workshop, *The Human Fertilisation and Embryology Act: A Retrospective* (12 March 2009).

[42] We are grateful to one of the anonymous referees for making this point to us.

[43] Baroness Warnock, HL Debs, Vol 696, Col 720 (19 November 2007).

elsewhere in the Bill.[44] It was stated that the reform would "make a fresh statement to the effect that a child does not need a father … at a time when many [men] feel undermined as providers and parents";[45] leading "to the deconstruction… and to the incipient devaluation … of the very idea of fatherhood",[46] with the message that fathers "do not matter"[47] being in direct contradiction to Government policy[48] and the wider societal desire for responsible fatherhood.[49] Lord Alton was thus voicing concerns expressed by many when he claimed:

> The Government's decision to remove the reference to the "need for a father" from law and social policy is a huge error. Women should not be interrogated at IVF clinics about their sexual orientation or their marital status and many single women are loving and exceptionally good mothers, but the need for a father, and the right to know who he is, are the issues.[50]

Intriguingly, given the Government's clear insistence that the statutory welfare requirement was to remain, concerns were also expressed that removal of the "need for a father" was tantamount to removal of the welfare requirement altogether.[51] The idea that, without explicit reference to a father, a concern with child welfare becomes meaningless might be seen as reflecting the extent to which a concern for child welfare has become conflated with a concern for ensuring the presence of a father (Wallbank 2004; Collier 2006; McCandless 2009, ch. 5; Sheldon 2009).

The arguments made in favour of retaining the "need for a father" in 2008 clearly echo similar arguments made in the 1980s, which we briefly discussed above. The 2008 debates are distinguished, however, by a far more prominent concern not to discriminate against lesbian couples or single parents. Advocates for retaining the "need for a father" provision thus frequently prefaced their comments

[44] See, e.g. Lord Mackay of Clashfern, HL Debs, Vol 696, Col 669–670 (19 November 2007); Baroness Deech, HL Debs, Vol 696, Col 672–673 (19 November 2007); Lord Alton, HL Debs, Vol 696, Col 682–683 (19 November 2007); Lord Northbourne, HL Debs, Vol 696, Col 849 (21 November 2007); Baroness Deech, HL Debs, Vol 698, Col 58–61 (21 January 2008); The Archbishop of York, HL Debs, Vol 698, Col 62–63 (21 January 2008); Geraldine Smith, HC Debs, Vol 475, Col 1097 (12 May 2008); David Burrowes, HC Debs, Vol 475, Col 1131 (12 May 2008); Sir Patrick Cormack, HC Debs, Vol 476, Col 206–207 (20 May 2008); Gary Streeter, HC Debs, Vol 476, Col 225–230 (3 June 2008).

[45] Baroness Deech, HL Debs Vol 696, Col 674 (19 November 2007).

[46] Lord Patten, HL Debs, Vol 697, Col 30 (10 December 2007).

[47] Baroness Butler-Sloss, HL Debs, Vol 697, Col 34 (10 December 2007).

[48] Sammy Wilson, HC Debs, Vol 476, Col 198 (20 May 2008).

[49] Gary Streeter, HC Debs, Vol 475, Col 1109 (12 May 2008).

[50] Lord Alton, HL Debs, Vol 696, Col 681–682 (19 November 2007). For further examples not otherwise referred to see: Baroness Williams of Crosby, HL Debs, Vol 696, Col 687–688 (19 November 2007); Baroness Butler-Sloss, HL Debs, Vol 607, Col 34 (10 December 2007); Baroness O'Cathain, HL Debs, Vol 698, Col 64 (21 January 2008); Baroness Butler-Sloss, HL Debs, Vol 698, Col 67 (21 January 2008) (specifically on the message being sent to fathers' rights groups); Lord Patten, HL Debs, Vol 698, Col 83–84 (21 January 2008); Iain Duncan Smith, HC Debs, Vol 475, Col 1079 (12 May 2008); Gary Streeter, HC Debs, Vol 475, Col 1109 (12 May 2008); Mark Simonds, HC Debs, Vol 476, Col 188 (20 May 2008).

[51] For a very explicit statement to this effect, see Lord Warner, HL Debs, Vol 697, Col 33 (10 December 2007): "By deleting the wording of the 1990 Act, I believe that we are giving an ambiguous signal to license holders that they do not have to take as seriously the welfare of the child requirements in the 1990 Act. It is a diluted version of the 1990 Act wording".

with the caveat that they were not against lesbian or single women accessing assisted reproduction services and that such women should be treated fairly.[52] However, as with the JC's recommendation, it is hard to see how it could be possible not to discriminate against a family form that falls outside a legislatively prescribed ideal of a family with a mother and a father. Moreover, slippage between requiring mere consideration of a father and something more prescriptive can be seen in a number of interventions, including that of Baroness Deech, who begins by suggesting that we should retain "the need for a father and mother to be *considered*—not actually present" but moves in the space of a few lines to suggest that "I feel fairly confident that we are not breaching human rights by *requiring* a father and a mother".[53] Other MPs were at pains to defend the "need for a father" in such a way that avoided accusations of heterosexist bias. For example, Iain Duncan Smith advocated the "simplicity" of the phrase,[54] ignoring the empirical evidence from clinicians and organisations such as the Royal College of Obstetricians and Gynaecologists that this statutory requirement was far from clear (JC 2007, Vol II, Ev 09, paras 5.12–5.13).

Those who sought to defend the retention of the "need for a father" provision did not have a monopoly on concern with the symbolic message sent out by the phrase. Others argued strongly against the message sent out by retaining the clause in its current form.

> The signal that would be received by the … one child in four currently in a family without a father, is that we believe those families are inferior and those children are second-class children. As a result, we would be stigmatising them in the name of some family form that we wish them to have, but that they do not have, and cannot, as children, choose to have it. Is that what we want to do? To stigmatise children with an amendment that will have no practical effect on any presenting client, but will impact on the children that may result?[55]

[52] See, e.g. Lord Alton, HL Debs, Vol 696, Col 681–682 (19 November 2007); The Bishop of St Albans, HL Debs, Vol 698, Col 70 (21 January 2008); Geraldine Smith, HC Debs, Vol 476, Col 173 (20 May 2008). As one of us has noted elsewhere, similar caveats were frequently entered in 1990 regarding the exemplary parenting provided by many widows: Sheldon (2005).

[53] Baroness Deech, HL Debs, Vol 698, Col 61 (21 January 2008) (our emphasis). The Archbishop of York appears to be searching for just such a requirement in his criticism of the phrase "supportive parenting": "I am one of these who are totally committed to equality, fairness and justice, but I cannot be persuaded that phrases such as 'supportive parenting' equals a mother and a father. It is such a vague phrase. We need to define it to know what it is": HL Debs, Vol 698, Col 62 (21 January 2008).

[54] Iain Duncan Smith, HC Debs, Vol 476, Col 192 (20 May 2008). Baroness Deech made the same claim in the House of Lords and further criticised the idea of "supportive parenting" as a *retrospective* standard in the context of a *prospective* process. While this is true, a similar criticism can be levelled against "the need for a father" requirement, which is nowhere defined and which provides no guarantee that a man present at the time of treatment will remain involved in the child's life. Baroness Deech, HL Debs, Vol 698, Col 59 (21 January 2008).

[55] Baroness Hollis of Heigham, HL Debs, Vol 696, Col 81 (21 January 2008). For other examples see: Baroness Hollis of Heigham, HL Debs, Vol 696, Col 857 (21 November 2007); Baroness Barker, HL Debs, Vol 696, Col 861 (21 November 2007); Lord Darzi, HL Debs, Vol 696, Col 868 (21 November 2007); Baroness Howarth of Breckland, HL Debs, Vol 698, Col 68–70 (21 January 2008); Baroness Finlay of Llandaff, HL Debs, Vol 696, Col 84 (21 January 2008).

Others were keen to emphasise that the requirement for "supportive parenting" in no way undermined the importance played by men in the family.

> It is claimed that if … we replaced "the need for a father" with a need for "supportive parenting" it would fundamentally undermine fatherhood. "Supportive parenting" and "fatherhood" are hardly mutually exclusive.[56]

What was accepted on both sides of the debate is that while this legislation would only ever affect a very small percentage of births, this small phrase was an issue of enormous symbolic significance. A concern with the message sent out by (amendment of) s 13(5) was not limited to the question of equality for same-sex couples in the context of parenthood or access to licensed assisted reproduction services for lesbians and single women. Debate about s 13(5) rather became a debate about the 'sexual family' in law and policy, thus reflecting deeper divisions regarding firmly entrenched values concerning parenting, families and child welfare. Given this concern with symbolism and the deep divide regarding the appropriate message to be sent out, it is perhaps unsurprising that the eventual term adopted in the legislation represents a compromise expressed in vague terms.

Moreover, it is clear from the debates that there was a significant gulf in how Parliamentarians interpreted the term "supportive parenting" and this was clearly illustrated in two interviews which we conducted with parliamentarians who had been at the heart of the reform process. While Phil Willis, MP, noted that he thought most MPs understood this phrase as a "modern way of talking about the traditional family",[57] when it was suggested to Baroness Deech that this term might be taken as a euphemism for the two parent family, she took a strongly contrary view:

> Absolutely not. It certainly wasn't … that whole issue is very thoroughly explored and the [word] "supportive" was an indication that you were no longer going to need two parents let alone a father and a mother … "Supportive parenting" is absolutely rubbish … what does it mean?[58]

Others saw the fluidity and lack of prescription in "supportive parenting" as a significant advantage. As Lord Lester observed, the term "does not prejudge or seek to impose a standardised view of what the family ought properly to be".[59]

[56] Emily Thornberry, HC Debs, Vol 475, Col 1123 (12 May 2008). Thonberry here echoes a point made earlier by the Archbishop of York, while deploying it to very different effect: "The Government's proposal to remove the need-for-a-father provision … creates a false dichotomy at the heart of the Bill which places the welfare and needs of the child against their need for a father. Since when did they become competing requirements?" HL Debs, Vol 696, Col 705 (19 November 2007).

[57] Phil Willis, MP, interviewed on 19 March 2009. See further, Dr Turner, HC Debs, Vol 476, Col 183 (20 May 2008): "If we follow the provisions of the Bill, we stand to guarantee supportive parenting. We are almost assured that that child will have two parents. Not only that, but should anything happen to one of those parents, there will be a clearly identified parent with parental rights to look after the child".

[58] Ruth Deech, interviewed by Julie McCandless on 22 February 2009. See further, Lord Northbourne: "How can we ensure, as far as possible, that children born through IVF get the parenting and family life that they need? The Government have made a good job of it by adding the words 'supportive parenting' … but it does not go far enough. … I believe in the importance of both a father figure and a mother figure in a child's life": HL Debs, Vol 698, Col 79–80 (21 January 2008).

[59] Lord Lester of Herne Hill, HL Debs, Vol 698, Col 68 (21 January 2008).

This diversity of views highlights once more the extent to which the "supportive parenting" provision operates as a compromise measure, designed to respond to continued anxieties surrounding assisted reproductive technologies and those who seek to avail of them, most significantly in relation to the role of men and fatherhood.[60] Indeed, the fact that the welfare clause continues to exist at all might be seen as reflecting these same concerns.

"Supportive Parenting" in the New HFEA Code of Practice

As is clear from the above analysis, the phrase "supportive parenting" originated as a compromise measure, designed to assuage some of the concerns expressed regarding the simple deletion of the phrase, "need for a father", with nothing to replace it.[61] But what does this phrase mean? Introducing the new wording in the House of Lords, Lord Darzi had stated that:

> We consider that a supportive parent would be willing and able, first, to make a long-term commitment to safeguard and promote the child's health, development and welfare and, secondly, to provide direction and guidance in a manner appropriate to the age and development of the child.[62]

This definition had originated in an amendment, tabled by a number of peers who had wanted to see "supportive parenting" defined in the legislation itself,[63] but eventually withdrawn upon the assurance that a similar definition would instead be included in the HFEA Code of Practice.[64] When the definition was discussed in the House of Lords, Lord Darzi explained that those presenting for assisted reproduction would be presumed to be supportive parents and that it would only be in rare situations, when a fertility clinician is aware of contrary evidence or indicators, that this presumption would be challenged.[65] On being questioned regarding what "long term commitment" was to mean, he responded that "logic tells me that it would be throughout the child's development, until the child becomes an adult".[66] However, the reference to a "long term" commitment was removed by the time the Bill reached the House of Commons, with the following definition offered there:

> It is the view of the Government that all parents assessed for treatment would be assumed to be supportive parents unless there was evidence to the contrary… A supportive parent would be willing and able to make a commitment to safeguard and promote the child's health, development and

[60] As can be seen in the suggestion from one MP that the definition of "supportive parenting" should preclude someone who denies the role of fathers or male role models, Bernard Jenkin, HC Debs, Vol 476, Col 193 (20 May 2008).

[61] Ted Webb, interviewed on 26 January 2009.

[62] Lord Darzi of Denham, HL Debs, Vol 698, Col 55 (21 January 2008).

[63] Amendment 111A, tabled by Lord Northbourne, Baroness Finlay of Llandaff and Lord Listowel.

[64] See Baroness Finlay of Llandaff, HL Debs, Vol 698, Col 448 (28 January 2008).

[65] Lord Darzi of Denham, HL Debs, Vol 698, Col 449–450 (28 January 2008).

[66] *Ibid*, Col 450.

> welfare and to provide direction and guidance in a manner appropriate to the age and development of the child.[67]

The recently published Eighth Code of Practice (HFEA 2009a), which takes account of the changes introduced in the 2008 Act, serves to build on and extends the liberal reading given to the welfare clause in the Seventh Edition (para 8.3). The Code's definition of "supportive parenting" differs slightly from that offered to Parliament:

> Supportive parenting is a commitment to the health, well being and development of the child. It is presumed that all prospective parents will be supportive parents, in the absence of any reasonable cause for concern that any child who may be born, or any other child, may be at risk of significant harm or neglect. Where centres have concern as to whether this commitment exists, they may wish to take account of wider family and social networks within which the child will be raised. (para 8.11)

It is noteworthy that, contrary to that provided by Lord Darzi, this definition omits any reference to "direction and guidance" (which might have been taken to hint at the traditional role played by a father) and replaces the word "welfare" with "well being" (possibly suggesting an attempt to distance "supportive parenting" from the previous "need for a father" requirement). Significantly, the guidance given explicitly places the burden of proof on those who would seek to refuse a woman access to treatment: those seeking to make use of assisted reproduction are presumed to be suitable parents unless, following a risk assessment, there are grounds for suspecting that the child to be born will be at risk of significant harm or neglect (para 8.3).

The Eighth Code was put out for consultation in draft form and two significant changes were made to the originally proposed guidance on "supportive parenting" as a result of that exercise. First, the draft text had originally defined "supportive parenting" as a "sustained commitment to the health, well being and development of the child". The word "sustained" (which mirrors Lord Darzi's recommendation that that the commitment should be "long-term") was deleted lest it be read as mandating the exclusion of patients who had "a serious medical condition or terminal illness" (HFEA 2009b, para 3.8). Second, the possibility of taking account of wider family and social networks within which the child will be raised was deleted from the list of factors for routine consideration as part of the risk assessment conducted for each patient, and moved to the list of factors which should only be considered in cases where there is cause for concern. This was because it risked discriminating against "lesbian couples, single women, orphans and recent immigrants, who may not have a wider family or social network'" (HFEA 2009b, para 3.9).

The HFEA has stressed that its interpretation of "supportive parenting" is "in line with parliamentary debates" (HFEA 2009b, para 3.7). While this is true in the sense that the HFEA interpretation echoes the definition offered to Parliament by the

[67] Dawn Primarolo, HC Debs, Vol 476, Col 192–193 (20 May 2008).

Government, it is clear from our own analysis that any suggestion of a more general Parliamentary consensus which might be mirrored in the HFEA guidance on the meaning of the phrase is profoundly misleading. It also seems clear that the HFEA was far more strongly influenced by fears of discrimination than was Parliament and far less concerned with asserting the importance of fathers. This might reflect the fact that the HFEA is likely to be more focused on the narrow issue at hand than was Parliament and less concerned with the symbolic message regarding the 'sexual family' that might be sent out by any change to this provision.

Conclusion

In many ways, the changes introduced by the 2008 Act can be seen as a consolidation of the shifts in clinical practice that had occurred over the life of the 1990 Act, representing a natural culmination of the increasingly permissive interpretation which had been given to s 13(5) both in the official guidance of the HFEA and in the exercise of clinical discretion. Read in the way suggested by the current Code of Practice, the new test represents a very minimal scrutiny of the quality of parenting likely to be provided by those achieving parenthood through the licensed technologies, essentially requiring clinics to conduct a risk analysis on the basis of information provided by the patients themselves. We would suggest, however, that this more liberal guidance will make very little difference in practice: the permissive interpretation given to the previous wording of s 13(5) already meant that it was unlikely to lead to the exclusion of many patients on child welfare grounds. Indeed, a very early survey of the impact of the then newly introduced s 13(5) had suggested that even in the years immediately following its introduction, s 13(5) had had very little impact on clinics' practice:

> [s 13(5)] has not forced (or even encouraged) clinics to alter their approach to whom they will treat. It permits clinicians to decline to take on those people to whom an objection is taken, without requiring them to investigate further, or to justify their conclusion – if asked, they can simply say that, in their view, the welfare of the child would not be promoted. Clinicians prepared to take a different view can equally feel comfortable with their position; in *their* opinion, welfare would not be endangered if treatment were given. (Douglas 1992, p. 27, emphasis in original)

This is not to deny, however, the point which we made above: that regardless of its actual application in practice, popular understandings of the functioning of s 13(5) may have deterred some single and lesbian women from seeking treatment at licensed clinics (Jones 2007; Harding 2010). The extent to which reports of the law's liberalisation will have an effect on such popular understandings is, as yet, unknown.

However, while the revised legislation and associated Code of Practice have each advanced a more inclusive definition of appropriate family forms, boundaries to the idea of acceptable parenthood still remain and will operate both at the point of the availability of funding for treatment and, to a lesser extent, when the patient is

assessed at the clinic.[68] For the future, we would suggest that questions of whether certain categories of patient—for example older women and transgender patients—should be accepted for treatment are likely to continue to provoke lively debates (Cutas 2007; McGuinness and Alghrani 2008). Furthermore, given current frequent assertions regarding a child's right to information regarding his or her genetic origins, we might also speculate whether a given patient's expressed unwillingness to share information regarding the circumstances of conception with a future child might raise concerns regarding future psychological harm to that child and, thus, the patient's capacity to offer "supportive parenting".

It is also likely that clinics have not yet fully understood that the 2008 Act imposes no requirement that people seeking treatment together should be in a traditional 'couple' relationship and it is possible that if two friends seek treatment together, aiming both to be recognised as legal parents, that this non-traditional family form might raise welfare concerns in the minds of some clinicians (McCandless and Sheldon 2010). On this point it is noteworthy that the Eighth Code of Practice uses the term "partner" throughout to refer to the person who is seeking treatment together with the future mother and who will be recognised as the future child's father or female parent, even though there is no legal requirement that the two be 'partners' in the sense of being in a romantic/sexually intimate relationship. Beyond this focus on the likely future quality of parenting, s 13(5) will continue to play a role when clinicians decide which treatments to offer, with procedures such as surrogacy and intra-familial gamete donation amongst those which may raise child welfare concerns.

Given the limited impact of the amendment of s 13(5), the extent of the battles regarding its precise rewording might appear puzzling. However, we have suggested above that two factors were relevant in focussing attention on this provision. First, we have suggested that the simplicity of the choice of whether simply to delete "the need for a father" gave the reform of s 13(5) a significant, galvanising and polarising appeal, which was lacking in discussion of other aspects of the reform process. Here we might draw a comparison with the reform of the 'status provisions'. Under the 2008 Act's provisions, two women can be recognised on a child's birth certificate from the moment of birth. Practically, this change will have real effect and, symbolically, might appear to pose just as great a challenge to the role of men in reproduction as the amendment of s 13(5). Indeed, it was in defending the legal parenthood provisions that the Government placed more specific emphasis on the need to reform the 1990 Act in order to "better recognise" the wider range of people who "seek and receive assisted reproduction services in the 21st Century", considering their extension necessary to create parity between opposite and same-sex couples (Department of Health 2006, para 2.69). The crucial

[68] Access to state funding depends not exclusively on clinical factors but also on a range of other considerations, which may have no or only indirect clinical bearing (including e.g. where the patient lives, age of each potential parent, obesity, smoking, and existing children in the family). See Department of Health (2009) for an overview of the practices adopted by individual Primary Care Trusts in determining who should receive access to funded treatment; and Kennedy et al. (2006) for a detailed evaluation of the kinds of criteria adopted for acceptance on an NHS programme, suggesting that the criteria adopted are often arbitrary.

difference is, however, that the reforms to the status provisions are lengthy, highly complex and embedded in very technical language. When eventually reported in the popular media these changes were likewise cast as "[a]nother blow to fatherhood" (MacRae 2009) yet, unlike the welfare clause changes, they were to pass largely under the radar of the popular media until some months after the legislation was passed (McCandless and Sheldon 2010).

More generally, we have suggested that debates regarding s 13(5) cannot be understood merely as a disagreement about the (narrow) issue of who should access infertility treatment services. Rather, such discussions served as a way of focussing wide-ranging concerns regarding the role of men in the family: this was seen above most clearly with regard to the debates regarding s 13(5) in Parliament. This is nothing new: assisted reproductive technologies' ability to complicate—and limit—paternal ties and, more specifically, to facilitate procreation outwith heterosexual relationships has long served as a significant, and well documented, flashpoint in the articulation of cultural anxieties regarding fatherhood and the so-called 'crisis in masculinity' (Collier and Sheldon 2008, pp. 69–100).

It was noteworthy in the debates that practices that have long been in place—such as the naming of someone other than the genetic father on the birth certificate, state-sanctioned fatherlessness and, more recently, posthumous birth registration—were problematised almost exclusively with reference to lesbian parenthood. For example, the Government were accused of "airbrush[ing] out the existence of the biological fathers of children of lesbian couples",[69] with no mention of the far greater number of heterosexual couples for whom this is also the case. And as we have noted elsewhere, given that the 2008 Act does not statutorily require legal parents to disclose to their children that they were born through the use of donated gametes, it is actually in the context of heterosexual parenthood that the genetic father—and indeed the genetic mother—can be more effectively "airbrushed out": children of same-sex parents will soon come to realise that at least one of their legal parents is not also their genetic parent (McCandless and Sheldon 2010). Indeed, there is some empirical evidence to suggest that lesbian co-parents are more willing to facilitate a child's relationship with a genetic father than are heterosexual co-parents who use donor insemination or heterosexual single mothers (Smith 2006). It would seem that in 2008, as in 1990, the anxieties of Parliamentarians regarding a child not having a biologically related father might be assuaged by the existence of a man who would act as a social father. Many such Parliamentarians distinguished same-sex couple adoption on the basis that adopted children would at least have had a chance at having a father, and may indeed have had one for a period of time.[70] Notwithstanding the liberalisation of this area of law, therefore, the grasp of the 'sexual family' form upon it nonetheless remains clear.

In conclusion, then, while the 2008 Act and the HFEA Eighth Code of Practice which accompanies it, might appear on first blush to offer a significant liberalisation

[69] Geraldine Smith, HC Debs, Vol 475, Col 1097 (12 May 2008) (emphasis added). Another example is the amendment tabled in the House of Lords (number 68), which sought to prevent the posthumous registration of female parents, despite this being possible for fathers who were not also the genetic father of the child, since the Human Fertilisation and Embryology (Deceased Fathers) Act 2003.

[70] See, e.g., Iris Robinson, HC Debs, Vol 475, Col 1125 (12 May 2008).

of the previous law, we would suggest that the rewording of s 13(5) is better viewed as marking another moment in a gradual ongoing renegotiation of the family and of fatherhood. Rather than representing any significant rupture with the past, the new s 13(5) represents the same kind of uneasy compromise as the wording which it replaced and, notably, reflects the same kinds of anxieties about the shape of the family and the role of men within it as were in evidence in the late 1980s. A sustained focus on the message that the removal of the "need for a father" provision would send to men and the corresponding supposition that the new legislation should be used as a tool to "affirm … the position of fathers in parenting, families and society in general"[71] meant that discussion of s 13(5) was inevitably simultaneously a discussion about the appropriate shape of the modern family. We end with the words of Baroness Deech, who offered just such an explanation of why the amendment attracted so much interest, citing its function as a cipher for broader concerns regarding the role of fathers:

> There is nowhere else in life … when you can stand back and say, "you need two parents", except at the moment of birth and possibly divorce. It's only in those two contexts that you can really talk about that. And, in divorce, one person is going to push off anyway. You can't stop that. The judges have striven to maintain contact and they are quite tough sometimes on mothers who say they don't want the child to have contact with the father … I just don't see how you can write off as unimportant the contribution made by half of the human race, that's men, to the upbringing of the next generation.[72]

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[71] Gary Streeter, HC Debs, Vol 475, Col 1109 (12 May 2008).

[72] Ruth Deech, interviewed by Julie McCandless on 22 February 2009.

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