SUBMISSION BY THE
NSW COMMISSION FOR CHILDREN AND YOUNG PEOPLE
TO THE NSW DEPARTMENT OF HEALTH
ON THE ASSISTED REPRODUCTIVE TECHNOLOGY BILL 2003
APRIL 2004

1. The Commission for Children and Young People

1.1 The NSW Commission for Children and Young People (‘the Commission’) promotes the safety, welfare and well-being of children and young people in NSW.

1.2 The Commission was established by the Commission for Children and Young People Act 1998 (‘the Act’). Section 10 of the Act lays down three statutory principles which govern the work of the Commission:

(a) the safety, welfare and well-being of children are the paramount considerations;
(b) the views of children are to be given serious consideration and taken into account; and
(c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children.

1.3 Section 12 of the Act requires the Commission to give priority to the interests and needs of vulnerable children. Children are defined in the Act as all people under the age of 18 years.

1.4 Section 11(d) of the Act provides that one of the principal functions of the Commission is to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children.

2. General Comments

2.1 The Commissioner is pleased to make a submission to the NSW Department of Health (‘the Department’) on the Assisted Reproductive Technology Bill 2003 (‘the Bill’).

2.2 In preparing this submission, the Commission has sought the views of children and young people.

2.3 The central view of this submission is that formulation of the law around assisted reproductive technology (‘ART’), and the policies and
practices surrounding it, should focus on the best interests of children and young people.

2.4 The best approach to enacting ART legislation requires consideration of what is in the best interests of children and young people as donor offspring and as possible donors.

2.5 The children and young people the Commission consulted on the Bill considered that the law on ART should be similar to that governing adoption. This was particularly so in relation to accessing information about donor parents. The children and young people considered that donor offspring should have the same rights to access information about their donor parents as adoptive children have to access information about their adoptive parents.

2.6 Where possible, the Commission has addressed its comments to particular sections of the Bill. The Commission has provided more general comment on issues where it has not been possible to attach comment to individual sections. In all cases, the views of the children and young people consulted have been incorporated within these comments.

3. Specific Comments

Section 4: Definition of ‘child’

3.1 Section 4 provides that a “child” means a person who has not attained the age of 18 years and who is not married. The Commission for Children and Young People Act 1998 defines a child as anyone under the age of 18. The UN Convention on the Rights of the Child also defines child as a person under the age of 18. Neither include any reference to the marital status of the child. The Commission queries the need for the definition in the Bill to differentiate between whether a person under the age of eighteen is married or not.

Section 17: Consent of gamete provider

3.2 The Commission agrees that while views of partners and spouses are important in assessing access to ART treatment, the law should not enable spouses to lawfully interfere with the rights of their partner to participate in ART treatment. This right rightfully rests with the individual.

Section 18: Modifying and revoking consent

3.3 The Commission supports the proposed section 18, which provides that consent previously given may be modified or revoked by the gamete provider up until the time any resulting resulting embryo is actually used in treatment procedure. This position is consistent with the Commission’s view that the best interests of any resulting child
should prevail over those of the persons involved in the ART treatment. As the Information Guide notes, it would not be in the best interests of a child to allow a birth knowing that one genetic parent was opposed to that birth.

Section 19: Collection of gametes from a child

3.4 The Commission supports the proposed section 19 which will prohibit the taking of gametes from a child unless a medical practitioner has certified that there is a reasonable risk of the child becoming infertile and the gamete is taken for the future benefit of the child. The proposed subsection (3) is vital to ensure that the gametes may be kept long enough so as to be of future benefit to the child. Arbitrary restrictions on periods for which the gametes may be stored in these situations are not appropriate, especially in light of the increasing age at which women are choosing to have children.

Section 28: Storage of gametes or embryos

3.5 The Consultation Draft Information Guide provides that the Draft Bill will ensure that gametes may be stored only for the period of time specified in writing by the gamete provider. However, the proposed section 28(3)(a) states that the gametes may only be stored for the period the ART provider has given in written notice to the gamete provider (where that period is the shorter of the possible storage periods). It is unclear why this provision has been included in the Bill.

Section 29: Donated gametes or embryos – time limit on use

3.6 The Commission recognises that there will be numerous circumstances in which it would be inappropriate to enforce a ten year limit on the use of donor material. Accordingly, the Commission supports the proposed section 29(1) & (2) which will allow the Director General to authorise use of the donor material where the Director General is satisfied that there are reasonable grounds for giving such an authorisation, having regard to any relevant guidelines.

3.7 However, the Commission suggests that it might be appropriate in these situations to distinguish between persons who are donating for their own future purposes (for instance a child undergoing chemotherapy) and persons who do not intend to use the donated material for their own future benefit. It is suggested that where a donor donates material for their own future purposes, there should be no need to seek authorisation from the Director General for its use where ten years has lapsed since the time of donating. If such an exemption is not possible, then any guidelines that the Director General may issues on this matter should provide that favourable consideration should be given to granting approval for use of the material where it was donated by a person who was seeking to use it for their future benefit.
Section 30: Maximum number of families and offspring

3.8 The Commission supports the proposal in the Bill to impose a limit of five women who may bear offspring from a particular donor and a maximum number of ten offspring from that donor. Such limits are necessary to reduce the risk on unknowingly entering a relationship with a blood relative later in live.

Part 3: Central ART donor register

3.9 The Commission supports the establishment of a central ART donor register. As noted above, the children and young people the Commission has consulted considered that donor offspring should have access to certain identifying and non-identifying information about their donor parents and offspring. A central ART donor register is an effective means by which these children and young people can have access to this information.

3.10 The Bill includes effective consent provisions which protect the interests of other offspring that do not wish to be identified, while at the same time providing important non-identifying information to the donor offspring.

3.11 As the Bill does not allow children to access donor information directly, the Commission considers the retention of the proposed clause 39(2) essential to address situations where parents or guardians are unwilling to or unable to seek the information on a child’s behalf.

Eligibility for ART treatment

3.12 The Commission agrees that it is not the role of legislation to screen out good prospective parents from bad prospective parents. It also agrees that it is possible to distinguish eligibility procedures for adoption on the basis that the child has already been born and his or her welfare been placed in a position of potential compromise. The Commission does not consider that it would be appropriate for the Bill to specify eligibility criteria for ART treatment.