Scottish Council on Human Bioethics

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House of Commons Science and Technology Committee report entitled 'Human Reproductive Technologies and the Law'

Response on behalf of the Scottish Council on Human Bioethics:

The **Scottish Council on Human Bioethics** (SCHB) is very grateful to the UK Department of Health for this opportunity to respond to the published report from the House of Commons Science and Technology Committee on Human Reproductive Technologies and the Law.

However, because of the limited amount of time given by the Department of Health (24th of April 2005) for organisations to respond, the SCHB will not be able to address all the issues presented in the report nor go into them at any depth.
In addition, because of the deep split between the Science and Technology Committee members concerning the contents of the report, the Council was unsure about the weight and authority to be given to this controversial document.

In addressing the consultation, the SCHB has formulated the following responses:

1. The balance between states legislation and regulations with reproductive freedom

In the normal process of human reproduction, persons will generally decide for themselves the context in which they choose to have a child. They will thus choose their partners, the specific point in time when they want a child etc. However, as soon as a person or couple is prevented from having a child in a 'private' manner because of natural limitations and seek assistance from the state to overcome these limitations, a discussion is then initiated concerning the conditions set by the public domain with respect to assisted reproduction.

For example, the House of Commons Science and Technology Committee indicated in its report entitled '***Human Reproductive Technologies and the Law***' that:

"*it might be argued that the mere fact of third party involvement is enough to render the behaviour in question public rather than private*."[1]

But the committee then went on to conclude that any prior conditions concerning the creation of a child set by regulations in assisted reproduction are arguably leading to inconsistency and discrimination against certain groups or individuals based on the cause of their infertility rather than on any other ethical basis[2].

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[1] House of Commons Science and Technology Committee, Human Reproductive Technologies and the Law, Volume 1, 2005, The Stationery Office Ltd, paragraph 35, http://www.publications.parliament.uk/pa/cm200405/cmselect/cmsctech/7/702.htm

[2] House of Commons Science and Technology Committee, Human Reproductive Technologies and the Law, Volume 1, 2005, The Stationery Office Ltd, paragraph 35, http://www.publications.parliament.uk/pa/cm200405/cmselect/cmsctech/7/702.htm

The report fails however, to understand that society has always had a moral role in the provision of regulations when help is sought from the public domain. Legislation is indeed generally drafted from ethical principles which are themselves always the reflection of moral beliefs. And in the context of human reproduction, society has accepted that the ethical creation of children should also be based on the welfare of the prospective children and not only to fulfil the wishes of parents.
Thus when society is asked (through its health care professionals) to assist a person or couple to create a child it then also has an inherent responsibility to make sure that the welfare of the child is taken into account through providing conditions which will protect the child from certain risks or harm.

This is similar to the legislation relating to adoption in the UK in which society has been given the responsibility of children and therefore seeks to provide the best outcome for these children in the consideration of their welfare.

In the ***Informal Summary of the House of Commons Science and Technology Committee Report*** it is also indicated that "[*r]eproductive freedoms must be balanced against the interests of society but alleged or potential harms to society or to patients need to be demonstrated with evidence before technological developments are prohibited*" it then goes on to state that "*the HFEA's use of evidence falls short of these ideals"* and that the HFEA *"has employed an excessive use of the precautionary principle*". But the MPs seem to have overlooked the proportionality principle when considering the precautionary principle. The proportionality principle indicates that, in any ethical analysis, the advantages should be examined against the risks (even when only limited evidence for these risks exist). In association with the precautionary principle this means that if any serious risks for the welfare of the future child exist resulting from a procedure in assisted procreation then this procedure should not take place.

In the House Commons report Professor John Harris from Manchester University indicates that *"[t]here are many arguments from many sides, which purport to give reasons for limiting access to reproductive technologies ... There is one reason to reject them all, and that is that they do not point to dangers or harms of sufficient seriousness or sufficient probability or proximity to justify the limitation on human freedom that they require.*"[3]

The SCHB, however, disagrees with this view and notes that there are indeed dangers or harms of sufficient seriousness or sufficient probability or proximity with respect to reproductive procedures which justify the limitation on human freedom. Thus it agrees with Professor Alastair Campbell who argues that when the state and the professions are involved in parenting decisions there is an obligation to avoid harm wherever possible[4]. In other words as soon as the Public Domain is involved in the creation of the child, the state becomes responsible with the parents for the welfare of the prospective child. This is the important difference with respect to couples who conceive naturally in which case the state does not interfere.

2. The role of Parliament in the area of human reproductive technologies

2.1. The SCHB considers that the UK Parliament should ensure that it drafts all-encompassing legislation when preparing laws in the area of human reproduction. This would minimise the issues that would have to be regulated *ad hoc* by other bodies which may be less representative of society.

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[3] House of Commons Science and Technology Committee, Human Reproductive Technologies and the Law, Volume 1, 2005, The Stationery Office Ltd, paragraph 31,
http://www.publications.parliament.uk/pa/cm200405/cmselect/cmsctech/7/702.htm

[4] House of Commons Science and Technology Committee, Human Reproductive Technologies and the Law, Volume 1, 2005, The Stationery Office Ltd, paragraph 36,
http://www.publications.parliament.uk/pa/cm200405/cmselect/cmsctech/7/702.htm

2.2. The SCHB notes that the question relating to whether or not the area of human reproductive technologies becomes a devolved matter for the Scottish Parliament and the Northern Ireland Legislative Assembly should be considered.

3. The appropriateness of the ethical framework for legislation on reproductive technologies.

3.1. The SCHB is concerned that the current ethical framework underlying UK legislation is often little more than situation and utilitarian ethics. Instead, an acknowledgement of human identity and personhood with, as a consequence, the protection of human dignity should be the underlying basis on which to draft new legislation.

3.2. The SCHB also recognises a need to determine whether or not animal-human hybrid embryos could be acknowledged as having a human identity and personhood and whether or not they should be addressed under 'human' legislation. The Council notes that public debate is urgently required in this regard.

4. Definition of the Embryo

4.1. The SCHB does not agree that in establishing an ethical basis for the regulation and legislation of Human Reproductive Technologies, the Warnock Committee's gradualist approach to the status of the embryo is an ethically sound approach.

4.2. The SCHB concurs that the precautionary principal should be applied concerning the status of the human embryo. In other words, until explicit scientific proof of the contrary can be provided, a human embryo, as soon as it is created, should be considered as having the same moral status as an adult human person.
The Council also notes that it would be inappropriate not to address the debate relating to the moral status of the human embryo in any new enquiry. This is because the debate is crucial to the manner in which many consider the different biomedical procedures. In other words, it is not sufficient to dogmatically maintain that a conclusive and final decision has already been taken concerning this issue. It is because human personhood and dignity are not decided through majority votes that a considerable debate remains concerning the status of the early embryo!

4.3. For the same precautionary reasons, the SCHB believes that a definition of an embryo should be given. An example could be:
"The early biological stages in time of a person".
It also supports the definition of an embryo given in German legislation which indicates that any totipotent cell which may divide and develop into an individual human being once the necessary further conditions are provided[5], is also an embryo.
It would then be up to scientists and society to give evidence that an entity cannot be regarded as an embryo.

4.4. The Council notes in this regard that the process of human development is a continuous one in which any demarcation would be arbitrary and merely conventional as exemplified by the different upper time limits for abortions and embryological destructive research across Europe. Within the development process it is indeed impossible to indicate a non-arbitrary point of transition from human non-person to human person.

4.5. The SCHB agrees that the attempt to define an embryo in the HFE Act has proved counter-productive, but does not accept that any future legislation should resist the temptation to redefine it.

[5] Section 8 of the German Embryo Protection Act of 13 December 1990.

5. New Legislation and the HFE Act

5.1. The SCHB considers that the Human Fertilisation and Embryology Act 1990 is no longer capable of addressing new developments in embryology. This is reflected by the possibility for research to be permitted by omission and the ever-increasing number of court cases being initiated to provide additional clarifications to the Act.

5.2. Where regulations and/or legislation are being considered they should, in so far as possible, anticipate future biologically possibilities, even though it may be difficult to determine these developments.

5.3. The SCHB notes that in order to address the problem of possible new developments, legal provisions should state only what is specifically acceptable, thereby prohibiting all other procedures. This will then avoid an enumeration of prohibitions which may, with time, become obsolete, unclear and vague.
For example, new UK legislation with respect to reproductive cloning eventually enacted a provision indicating what was acceptable by stating that "A person who places in a woman a human embryo which has been created otherwise than by fertilisation is guilty of an offence" (Section 1 of the Human Reproductive Cloning Act 2001).
This was done in order to address misunderstandings resulting from only having prohibitions in existing legislation which did not specifically apply to human cloning.

5.4. Moreover, in a similar manner to Article 4 of the ***UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography***, the SCHB agrees that UK legislators should consider the possibility of drafting bioethical extra-territorial provisions making it an offence for UK nationals and habitual residents going abroad to undertake procedures which are prohibited in the UK.

5.5. The SCHB notes that UK legislation concerning embryo research is generally a lot more liberal than elsewhere in the world and that it would be highly desirable for UK legislation to encompass relevant international declarations and conventions.
In this regard, the SCHB is of the opinion that possible new legislation in the UK relating to Human Fertilisation and Embryology should be amended so that it becomes compliant with the following provisions of international declarations, legislation and regulation:

United Nations

- United Nations Declaration on Human Cloning

United Nations Educational, Scientific and Cultural Organization:

- The draft Universal Declaration on Bioethics (currently being prepared by UNESCO)

- The Universal Declaration on the Human Genome and Human Rights[6]

- The International Declaration on Human Genetic Data[7]

Council of Europe

- Convention on Human Rights and Biomedicine (European Treaty Series - No. 164)[8]:

[6] http://portal.unesco.org/en/ev.php@URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201.html

[7] http://portal.unesco.org/shs/en/file_download.php/6016a4bea4c293a23e913de638045ea9Declaration_en.pdf

[8] Signed by 31 of the 45 Council of Europe Members States, http://conventions.coe.int/Treaty/en/Treaties/Word/164.doc

Article 14 (Non-selection of sex):

The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided.

Article 18 (Research on embryos in vitro):

(1) Where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo.
(2) The creation of human embryos for research purposes is prohibited."

- Additional Protocol on the Prohibition of Cloning Human Beings (European Treaty Series - No. 168)[9]: Article 1 which states that :

(1) Any intervention seeking to create a human being genetically identical to another human being, whether living or dead, is prohibited.

(2) For the purpose of this article, the term human being "genetically identical" to another human being means a human being sharing with another the same nuclear gene set.

European Union

- Charter of Fundamental Rights of the European Union: Article 3 (Right to the integrity of the person)

1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:

- the free and informed consent of the person concerned, according to the procedures laid down by law,
- the prohibition of eugenic practices, in particular those aiming at the selection of persons,
- the prohibition on making the human body and its parts as such a source of financial gain,
- the prohibition of the reproductive cloning of human beings.

- Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells

6. The HFEA

6.1. The SCHB is of the opinion that the current HFEA does not adequately regulate new developments and seems to excessively support scientific research, without adequate weight being given to other views and considerations.
In this respect, the SCHB notes that the absence of any minority reports often indicates a unanimous decision. This suggests that the composition of the HFEA does not adequately reflect the wide spectrum of views within society. Indeed, many believe that the members of the HFEA are selectively appointed to only represent certain views.

[9] Signed by 29 of the 45 Council of Europe Members States, http://conventions.coe.int/Treaty/en/Treaties/Word/168.doc

6.2.In addition there are conflicts between the HFEA's role as an enforcer of legislation and its duty, as an adviser, to identify flaws in the legislative framework. Thus the regulatory and advisory functions of the HFEA should be separated.

6.3. The SCHB agrees that decisions made by the regulator on assisted reproduction and embryo research should be evidence driven. As stated above, however, the SCHB does not agree that the HFEA has employed an excessive use of the precautionary principle. On the contrary it believes that certain HFEA decisions could be considered as reckless and irresponsible in the light of the proportionality principle.

6.4. The Council is of the opinion that the current regulatory model, which provides the HFEA with a large amount of policy-making flexibility, should be replaced with a system which devolves clinical decision-making and technical standards down to patients and professionals while, at the same time, strengthening Parliamentary and ethical oversight.

6.5. The SCHB agrees that a Joint Parliamentary Bioethics Committee drawn from both Houses to consider legislation placed before Parliament and to identify inadequacies in existing legislation should be established. The relevant ethical debates will then be undertaken in parliament through a democratic process.

6.6. The SCHB concurs that specialist advisory committees could be set up to advise and inform legislators and society. In this regard, the remit of the Human Genetics Commission could be extended to embrace the advisory remit of the HFEA but parliament should continue to develop its consultation process in order to receive advice and information from as many relevant bodies and individuals as possible.