

## Article

# Considering the need for a father: the role of clinicians in safeguarding family values in UK fertility treatment

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Natalie was an active voice in the debate on the 'need for a father', interviewed on the Radio 4 *Today* Programme and a speaker at the Progress Educational Trust debate on the issue in the Houses of Parliament. Natalie is a leading fertility law expert who advises patients and clinicians, particularly on legal parenthood for parents conceiving through donor conception and surrogacy.

### Abstract

One of the most hotly debated issues in the UK's new Human Fertilisation and Embryology Act 2008 has been the abolition of the requirement for clinicians to consider a prospective child's 'need for a father' before offering treatment. Leading fertility law specialist and solicitor Natalie Gamble reviews the history of the 'need for a father' provision and assesses the practical impact of the new legal requirement of clinicians to consider the child's need for 'supportive parenting'.

**Keywords:** *child welfare, family, HFEA, IVF treatment, legal, same-sex couples*

### Introduction

When first reading through the government's draft proposals for updating the Human Fertilisation and Embryology Act 1990, I remember skipping over the mention that the welfare of the child assessment would be updated to remove specific reference to the need for a father. It was an issue which I barely dwelled upon; merely a logical change to bring the law into line with the reality of modern practice.

How naïve I was. In fact, this clause proved one of the most controversial of the whole Bill, provoking public vitriol from religious leaders and a conscience vote in a specially convened committee of the whole House of Commons.

So what was the fuss all about, and what does this tiny piece of law actually mean for patients and clinicians?

### The origins of the 'need for a father' requirement

The Human Fertilisation and Embryology Act 1990 introduced the legal requirement that: '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) ...'.

The duty to consider the need for a father was added to original requirement to consider the welfare of the child following

a bitter 1990 debate about who should be allowed access to fertility treatment. This 1990 discussion was started in the House of Lords, where Lady Saltoun proposed restricting donor conception to married couples only. She argued: 'The object of the amendment is to prohibit the provision of AID to unmarried women, lesbian couples or unmarried couples ... Most doctors who provide these services are very careful and responsible as to whom they will treat with what is, at present, a scarce and expensive form of treatment. But there have been cases where IVF treatment has been given to unmarried women, or unmarried couples. Surely, therefore, some prohibition of this should appear on the face of the Bill.'

Her views, which seem remarkable – even unthinkable – today, were widely supported two decades ago. Though others argued equally fiercely on the other side (Lord Houghton, for example, saying that 'the whole idea is Victorian'), Lady Saltoun's amendment was widely supported and was rejected by the House of Lords by just one vote.

The debate about access to treatment continued when the 1990 Bill reached the House of Commons, with bitter opinion on both sides. Various new amendments were tabled, but the one which ultimately found favour was a compromise: an amendment which tacked on to the Bill's general requirement that clinicians consider the welfare of the child as a specific additional obligation to consider, in particular 'the need of that child for a father'. Mr Wilshire, who tabled the 'need

for a father' amendment, stated: 'My amendment would not automatically bar anyone from seeking treatment ... When speaking of the family in this context, we are seeking to speak up for the traditional values and standards of society that have stood us in good stead for a long time. It is clear to me that the traditional social family unit in this country is, for better or worse, a unit of a mother and a father in a stable long term relationship ... It is a tried and tested way of giving a child the best possible start in his or her life. We tinker with that social unit at our peril.'

The requirement for clinicians to consider the need for a father was in 1990 therefore very clearly a political compromise, the product of an unresolved discussion about whether fertility treatment should be available freely to all or only to heterosexual married couples. For the next 18 years, clinicians, before offering fertility treatment, would be legally required to take account 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)'

## The intervening years

The reality is that the duty to 'take account of' a child's need for a father has always been impossibly vague. The clinician, faced with an individual patient who is single or in a lesbian relationship, must decide whether to not treat her and must be mindful of his obligations under the law. However, though there may be investigations and counselling hoops to jump through to show that the need for a father has been taken account of, ultimately there is no middle ground in terms of patient outcome: either treatment is provided, or it is not.

Between 1991 and 2008, clinical practice shifted on this very basic question. In the early 1990s, it was almost impossible to find a clinic that would treat single or lesbian women, but gradually clinics began to broaden their eligibility criteria (following the example of pioneers like the London Women's Clinic) and, by 2008, it was almost impossible to find a clinic that would not treat single and lesbian women.

The Human Fertilisation and Embryology Authority (HFEA) guidance on how the law should be interpreted has also evolved over the years. Between 1991 and 2003, the HFEA Code of Practice stated that: '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'. In 2003, this was updated to: 'Where the child will have no legal father the treatment centre is expected to assess the prospective mother's ability to meet the child's needs'. The 2003 shift in wording was subtle, but suggested acceptance that, in practice, single women and lesbian couples were actually being treated.

By time the seventh (current) Code of Practice was published in 2007, the legal and social context had changed entirely. Regulations under the Equality Act 2005 had come into force in April 2007, making it unlawful for anyone providing services to discriminate on the grounds of sexual orientation. The Civil Partnership Act 2004 had also made it clear that same-sex couples should have equal legal status to their married counterparts, and in 2006 the Adoption and Children Act 2002 had come into force, enabling same-sex partners to be treated as equal legal parents.

Though the legal obligation for clinicians to consider the need for a father remained, it now had to be applied in this wider context. The seventh Code of Practice's new risk-based approach to the welfare of the child assessment (with a presumption in favour of treatment) was supplemented by clear guidance that clinics should not discriminate against lesbian couples. During 2007, the HFEA also issued written guidance to all fertility doctors highlighting that: 'It is unlawful for a person or organisation to refuse to supply goods, services or facilities to a person on the grounds of their sexual orientation.'

The duty to consider the need for a father increasingly looked like an anomaly. On the one hand, clinicians were told not to deny treatment to lesbian couples; on the other, they were told to consider the need of the child for a father. In practice, the non-discrimination laws were the more prescriptive and more recent, and this eroded the application of the 'need for a father' consideration to near meaninglessness in practice.

## The Human Fertilisation and Embryology Bill 2008

When the government introduced the Human Fertilisation and Embryology Bill 2008 to Parliament, it was therefore no surprise that it contained a proposal to delete specific reference to the need for a father. The government's view was that this represented simply an updating of the wording of the law to bring it into line with current clinical practice, and to reconcile the Human Fertilisation and Embryology Act with wider legal developments. In evidence to the prelegislative scrutiny committee, the government said that the need for a father consideration 'does not actually seem to achieve anything. It does not prevent treatment from being provided to single women or same sex couples, and also does not seem to fit too comfortably with the Government's wider civil partnerships policy.'

However, from the Bill's first debate in the House of Lords, it was clear that the government's position would become controversial. Baroness Ruth Deech, former HFEA Chair, argued that the proposed change undermined the importance of fathers: 'To remove the requirement that a child needs a father is to make a fresh statement to the effect that a child does not need a father. It sends a message to men, at a time when many of them feel undermined as providers and parents.'

Had she never publicized the change, one wonders whether it really would have sent any kind of message to undermine fathers. Would men have truly been discouraged in fatherhood as a result of something buried in the Human Fertilisation and Embryology Act, only read by HFEA licence-holders and only relevant in practice to women presenting for treatment without men?

However, the 'anti-father' mantra was in the public domain and controversy inevitably followed, with Iain Duncan Smith condemning the proposal as a 'the last nail in the coffin of the traditional family' and Cardinal Cormac Murphy O'Connor saying that the proposals were 'profoundly wrong'.

In response to the controversy, the government suggested a compromise. The requirement to consider the need for a father would not simply be removed; it would be replaced

with a requirement to consider a child's need for 'supportive parenting'. The new wording would be more neutral, and remove reference to particular family forms.

Ultimately, following debate in the House of Lords, the 'need for supportive parenting' wording was approved, and the Bill then passed to the House of Commons, where the provision became the subject of a highly publicized conscience vote.

Iain Duncan Smith led the opposition to the government's proposals in the House of Commons, citing evidence of the detrimental effect of absent fathers on children: 'There has been a huge amount of research on the effect of absent fathers, demonstrating an increasing understanding of the importance of the role that fathers play in the home.'

The 'need for a father' provision did not and should not, he said, prevent access to treatment for single and lesbian women, but the status quo should be preserved so that the importance of fathers was acknowledged. Like Baroness Deech, his argument was based on the concept that the existing law represented a statement of principle about the importance of fatherhood.

Others disagreed, Desmond Turner emphasizing the need to combat discrimination: 'This is an equalities issue, whether or not anyone tries to deny that, because the provision bites only on lesbian couples. This House has established over recent years a very good and honourable record of ending discrimination on the grounds of sexuality or anything else. If the amendments are to be voted through, the House would be taking a step backwards.'

Minister of Health Dawn Primarolo agreed, saying that the current law created real discrimination, and that a positive endorsement of a law which was currently being interpreted flexibly could lead to a backwards step: 'We have heard of same sex couples who have been refused treatment on the grounds of their sexuality. If the Committee were to reaffirm that today, we could realistically expect that position to continue and, most likely, worsen if it became the current endorsed view of Parliament ... It is one thing for the HFEA and clinics to interpret a provision that was passed almost 20 years ago in a way that allows same sex couples and single women to access treatment, but it is quite another thing for such an interpretation to continue if the position is reaffirmed by this House in 2008.'

The House ultimately agreed with the government, and voted 292 to 217 in favour of replacing the 'need for a father' provision with 'supportive parenting'. When the Act comes into force (expected to be in October 2009), this means that clinicians will have to consider the 'welfare of any child who may be born as a result of treatment (including the need of that child for supportive parenting)' before offering treatment.

## Understanding the debates

As we have seen, the recent opposition to the abolition of the 'need for a father' provision was very much driven by a desire to protect the traditional concept of the family and particularly the father. A great deal was said in the debate in both Houses of Parliament about the importance of fathers and the valuable role they play in the upbringing of children. The arguments put

were certainly heartfelt and compelling, and echoed the fears of many about family breakdown and the exclusion of fathers from family life.

But these arguments misunderstood this particular piece of law and dragged an issue of clinical practice into wider debates about absent fathers and social breakdown which it had little to do with. This piece of law is not – and never was – a statement of principle about how important fathers are. Neither did it ever have the power to make absent fathers present for their children or to encourage men in fatherhood. As we have seen, this piece of law has always been about restricting the creation of fatherless families or, in other words, discouraging the provision of donor insemination treatment to single and lesbian women.

In the recent Parliamentary debates, Baroness Deech and Iain Duncan Smith argued that the existing law (including the duty to consider the need for a father) put the welfare of the children first and was not discriminatory; that it applied equally to same-sex and opposite-sex couples. But this is quite clearly ludicrous. The duty to consider the need for a father singles out single and lesbian patients for special consideration, and such differentiation is the very essence of discrimination.

Even without understanding the history or looking at the 1990 debates, the discriminatory intent of the existing law is obvious from its wording. If the child's welfare is the paramount objective, why single out only this particular factor for special additional consideration? Why not also impose a duty to consider whether the parents can offer good educational prospects or a stable family income (either of which, the research evidence shows, has a far greater impact on the child's welfare than the gender or marital status of the parents)? The duty to consider the need for a father was always quite clearly (and in 1990 quite openly) targeted at excluding single and lesbian women.

And far from being a carefully worked-out provision that has stood the test of time (as Baroness Deech claimed in the House of Lords), the 'need for a father' provision has always been an impossibly difficult piece of law for clinicians to apply in practice. What does it mean? Does it mean that a woman should not be treated if there is no father involved? Or that she can be treated if she can demonstrate a suitable variety of non-father male influences for her child or if she brings a male role model along with her? Or that she merely has to reflect on the position through counselling before deciding she can manage without a father? The law is vague to the point of meaninglessness.

Since the 1980s our society has changed radically, and as part of the process of these wider changes, the interpretation of the duty to consider the need for a father has shifted, from a virtual ban in 1990 to virtually universal access in 2008. Does this demonstrate that the law is flexible and responsive to changing social contexts? It seems more likely that it demonstrates how ineffective it has always been in achieving anything in practice at all.

## So what does it mean for the future?

Not a whole lot. Clinicians will, on the whole, continue as before and patients who are single or in lesbian relationships will continue to access treatment services. The controversy

over this piece of law was ultimately on a point of principle, which would have had little impact on anyone whatever was ultimately decided.

What is such a shame about this is that it detracted from a potentially much more important debate about whether clinicians should be responsible for assessing the welfare of the child at all. In a modern liberal society, intelligent consideration should have been given to how we reconcile the need to maintain public confidence in assisted reproduction (which may favour retaining a moral arbiter at the front line of patient care) with basic principles of liberty (which should allow the patients

themselves to decide whether or not they become parents, just as fertile couples are able to do). This was always a much more significant issue, but unfortunately it got lost in the debates about the need for a father. Roll on the next Human Fertilisation and Embryology Bill.

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