

# Research impact: making a difference

## Reforming the intrusive application process for treating infertility

People seeking treatment for infertility are now spared an intrusive and discriminatory assessment previously required by law

### What was the problem?

Decisions about whether, when and with whom to have children are critically important to a person's life plan. When people need help in conceiving, the state has more opportunity to intervene in their decisions, but whether it should do so, and on what grounds, is open to question.

The Human Fertilisation and Embryology Act 1990 requires clinicians at fertility clinics to assess the welfare of any child that might result – the so-called 'pre-conception welfare principle', outlined in Section 13(5).

Until 2005, the Human Fertilisation and Embryology Authority (HFEA) required clinicians to take into account factors such as the commitment of prospective parents to having and bringing up a child, their ability to provide a stable and supportive environment and their future ability to provide for a child's need.

At issue was the state's right to intervene in such personal decisions and, in effect, to discriminate against infertile people.

### What did we do?

LSE Professor Emily Jackson developed her thinking on reproductive autonomy and why it matters in *Regulating Reproduction: law, technology and autonomy* (2001), which she amplified the following year in an article for *Modern Law Review* titled "Conception and the Irrelevance of the Welfare Principle".

Jackson argued that the state needs a greater justification for intervening in personal decisions than the fact that it can do so easily. Assessments of child welfare carried out under the Act were often intrusive, unfair and ineffectual given that clinicians in fertility clinics had neither the training nor the resources to scrutinise prospective parents' domestic arrangements or their parental fitness in a way that was routine in cases of adoption.

She further criticised section 13(5) for its inconsistency with legal principle and for its random application. In legal actions for 'wrongful life', when a severely disabled child sues someone for failing to prevent his or her birth, the judiciary has maintained that life must always be preferred to non-existence.

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It would be unthinkable to address parental fitness in other circumstances of infertility — deciding whether to carry out surgery on a woman's fallopian tubes, for instance, or supplying her with an ovulation-predictor kit. Why, then, should clinicians be required to assess parental fitness before taking steps to help people conceive?

## What happened?

Largely on the strength of her published research, Professor Jackson was appointed to the Human Fertilisation and Embryology Authority (HFEA) in 2001, becoming its Deputy Chair from 2008 to 2012.

Policy changes since 2003 have brought the welfare principle more into line with the position advocated by Jackson. In 2005, the Human Fertilisation and Embryology Authority transformed its required assessments of child welfare into assessments of child risk. These now impose on clinics a duty to consider whether any resulting child would be at risk of serious harm, rather than asking them to assess the parenting skills of would-be parents.

The Human Fertilisation and Embryology Act was subsequently amended in 2008. Now, instead of requiring clinics to take into account the child's 'need for a father' before offering treatment, the Act stipulates that they must take into account the child's 'need for supportive parenting'.

The following year, in its eighth Code of Practice, the Human Fertilisation and Embryology Authority clarified its position on supportive parenting. The Code now presumes "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".

Clinicians can no longer refuse treatment unless they believe that any child born would be at risk of significant harm or neglect, for instance because other children have already been taken into care. Clinicians are also no longer routinely required to approach General Practitioners to enquire about an individual's fitness to parent.

For people seeking fertility treatment, the process is now less discriminatory and intrusive and much less bureaucratic.

"The [Human Fertilisation and Embryology Authority]'s guidance has shifted significantly over the course of Emily Jackson's membership of the Authority from a fairly restrictive model towards one in which all patients are presumed to be supportive parents, in the absence of evidence to the contrary."

**Professor Lisa Jardine CBE,  
Chair of the Human Fertilisation  
and Embryology Authority  
2008–14**

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A recent empirical research study looking at the way fertility clinics assess child welfare attributed public debate over the assessment process in part to Professor Jackson's work. Other jurisdictions have also cited Professor Jackson's arguments, notably Victoria, Australia, where a similar change in the law has taken place.

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**Professor Emily Jackson** first joined the LSE in 1998. After graduating from Oxford University, she worked as a research officer at the Centre for Socio-Legal Studies in Oxford. Her first teaching position was at St Catharine's College, Cambridge, and she has also taught at Birkbeck College and Queen Mary, University of London. Emily's research interests are in the field of medical law. She is Deputy Chair of the Human Fertilisation and Embryology Authority, and a member of the British Medical Association Medical Ethics Committee.

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