

ABA conference, Adelaide, 2002

USE OF THE EXTERNAL AFFAIRS POWER IN TREATY IMPLEMENTATION: IMPLICATIONS FOR ETHICISTS

Loane Skene*

Ethical principles in relation to new scientific developments are often formulated in international instruments like the International Declaration on the Human Genome. These instruments have the advantage of a global perspective, especially in an area where it is desirable to have laws that apply across territorial boundaries. They also reflect the wisdom of wide collaboration from many perspectives in a non-political context. However, it may be difficult for the federal government constitutionally to implement these treaty obligations. Under the Australian Constitution, most of the powers to legislate in relation to health matters fall within the jurisdiction of the states. If a law is to be made that applies throughout Australia, that must sometimes be achieved by the states transferring their legislative power to the Commonwealth, or by all states enacting the same legislation. This occurred, for example, with the Uniform Companies Code. However, in a non-business area, where there are fewer perceived advantages in a common approach, it is much harder to achieve Australia-wide legislation. This is illustrated by the delays and difficulty in passing the Gene Technology Act 2000 (Cth). This paper will explore the possibility of the Commonwealth making greater use of the foreign affairs power under the Constitution to legislate directly to implement treaty obligations. This has important obligations for ethicists as international agreements often precede local laws on difficult ethical issues on which it may be hard to reach agreement and the political will to legislate may be limited. Particular reference will be made to the development of laws on human cloning and the use of embryonic stem cells in research.

- * Professor of Law, Faculty of Law and Faculty of Medicine, Dentistry and Health Sciences, University of Melbourne; Program Director, Centre for Applied Philosophy and Public Ethics, University of Melbourne; Chair, Australian Institute of Health, Law and Ethics; Deputy Director, Law Gene Centre, University of Tasmania and University of Melbourne

Thanks to my Assistant, Brenda Masters, for research associated with the paper.

1. WORLD-WIDE CONCERNS ABOUT HUMAN REPRODUCTIVE CLONING AND EMBRYONIC STEM CELL RESEARCH

Ethical issues in relation to human cloning and the use of human embryonic stem cells have been debated around the world. The types of concern that have been expressed are fully discussed in the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs: *Human Cloning: Scientific, Ethical and Regulatory Aspects of Human Cloning and Stem Cell Research*, September 2001 (the Andrews Report).¹

2. INTERNATIONAL RESPONSES TO CONCERNS ABOUT HUMAN CLONING

These ethical concerns have led to the preparation and adoption of several international instruments but these have no direct effect in Australian law.

2.1 The *Universal Declaration on the Human Genome & Human Rights* was developed by UNESCO and was adopted unanimously by member states in November 1997. It was endorsed by the UN General Assembly in March 1999.

Article 11 of the Universal Declaration states that:

Practices which are *contrary to human dignity*, such as *reproductive cloning of human beings*, shall not be permitted. States and competent international organizations are invited to co-operate in identifying such practices and in taking, at national or international level, the measures necessary to ensure that the principles set out in this Declaration are respected (emphasis added).

Although this Declaration purports to ban human cloning and might be construed to extend to other forms of research such as human embryonic stem cell research if that is considered "contrary to human dignity", the Declaration is not binding in international law. It is merely a guide to member states, which include Australia, that may be used in developing legislation in each country.

2.2 The *European Convention for the Protection of Human Rights and Dignity with regard to the Application of Biology and Medicine* was approved by the Council of Europe in 1996. A later addition to the Convention was approved in December 2000.

The Addition to the Convention refers specifically to cloning (para (1)), both in the title and in the text. It is called "*Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings*" (emphasis added). Article 1 of the Addition states:

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

Again, this instrument purports to prohibit human cloning but Australia is not a member of the Council of Europe and has not signed the Convention. Thus, it is not legally bound by Convention. It is possible that Australia may sign the Convention in future, especially as Australia participated in the elaboration of the Convention. But even if that occurred, it would not become legally effective in Australia without legislation in this country.

¹ See especially pages 77-90.

3. IMPLEMENTING TREATY OBLIGATIONS IN AUSTRALIA - COMMONWEALTH GOVERNMENT'S CONSTITUTIONAL POWERS

This brings us to consider how legislation might be passed in Australia to ban human cloning - or to ban human embryonic stem cell research. Could the federal Parliament pass such legislation?

The legislative powers of the Commonwealth of Australia are set out in section 51 of the Constitution Act 1900 (Imp):

The (Cth) Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (i) trade and commerce with other countries, and among the States; ...
- (xi) census and statistics; ...
- (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth; ...
- (xxix) *external affairs*; ... (emphasis added; the first three powers have been quoted because they appear in the Gene Technology Act 2000 (Cth) s 1. The external affairs power is not listed in the Act).

These provisions seem to confer constitutional power on the federal parliament to legislate on cloning and embryonic stem cell research in at least some aspects of that research. If research is undertaken by a corporation, for example, or if there is a transfer of genetic material from one state to another, or material is imported into the country, that could be governed by federal legislation. But, with the possible exception of the external affairs power, where is the authority to legislate in general terms to ban cloning or embryonic stem cell research that is undertaken by an individual within one state?

The constitutional problem is illustrated by the Gene Technology Act 2000 (Cth) and complementary legislation that is being enacted in various states. The Commonwealth Act lists specifically the heads of Commonwealth power on which it is based (section 13 (1)):

This Act applies as follows:

- (a) to things done, or omitted to be done, by constitutional corporations;
- (b) to things done, or omitted to be done, in the course of constitutional trade or commerce;
- (c) to things done, or omitted to be done, by a person that may cause the spread of disease or pests;
- (d) for purposes relating to the collection, compilation, analysis and dissemination of statistics;
- (e) to the Commonwealth & Commonwealth authorities;
- (f) to things authorised by the legislative power of Commonwealth under paragraph 51 (xxxix) of the Constitution, so far as it relates to the matters mentioned in paragraphs (a) to (e) of this subsection

It does not mention external affairs!

Section 192B of the Act purports to prohibit cloning:

(1) A person is guilty of an offence if:

- (a) the person engages in conduct; and
- (b) the person knows that, or is reckless as to whether, the conduct will *result in the cloning of a whole human being* (emphasis added).

Maximum penalty: 2,000 penalty units or imprisonment for 10 years.

It is difficult to see how this broad prohibition falls within the constitutional power of the Commonwealth. No doubt this is the reason for the enactment of legislation in equivalent terms to the Commonwealth Act being enacted in the states (see below).

4. STATES AND TERRITORIES

The States do have constitutional power to legislate on cloning, or on human embryonic stem cell research. This comes from section 107 of the Commonwealth of Australia Constitution Act 1900 (Imp):

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

Some states have legislated specifically to ban cloning in broad legislation on reproductive technology. In Victoria, section 47 of the Infertility Treatment Act 1995 (Vic) states:

A person must not carry out or attempt to carry out *cloning*.
Penalty: 480 penalty units or 4 years imprisonment or both.
s 3(1) "*clone*" means to form, outside the human body, a human embryo that is genetically identical² to another human embryo or person (emphasis added).

There are also provisions that prohibit research on embryos so that they would prohibit stem cell research involving embryonic stem cells, whether the embryo is created specifically for the research, or "spare" one from IVF programs. Section 39(2) states that:

A person must not alter the genetic, pro-nuclear or nuclear constitution of a zygote or an embryo except to alter the somatic cells for therapeutic purposes.
Penalty: 480 penalty units or 4 years imprisonment or both.

In South Australia, section 6 of the Reproductive Technology (Code of Ethical Research Practice) Regulations 1995 (SA) states:

A licensee must not carry out, or cause, suffer or permit to be carried out, the procedure of *cloning*.
"*Cloning*" means any procedure directed at producing two or more genetically identical² embryos from the division of one embryo (emphasis added).

In Western Australia, s 7(1)(d)(i) of the Human Reproductive Technology Act 1991 (WA) states:

A person ... who causes or permits any procedure to be carried out directed at *human cloning* commits an offence.
Penalty: \$10 000 or 2 years imprisonment.
Cloning: the use of reproductive technology for the purpose of producing, from one original, a duplicate or descendant that is, or duplicates or descendants that are, genetically identical,² live born and viable (emphasis added).

More recently, Victoria and South Australia (and also Queensland and Tasmania²) have passed Gene Technology Acts in the same terms as the Gene Technology Act 2000 (Cth). The Victorian Act³ has only the heading of s192B of the Commonwealth Act, no text and a note:⁴

² The Gene Technology Act 2001 (Tas) has yet to come into effect.

³ The Gene Technology Act 2001 (Vic).

192B. Cloning of human beings is prohibited

Note 1: Section 192B of the Commonwealth Act prohibits the cloning of whole human beings.

Note 2: Section 47 of the Infertility Treatment Act 1995 prohibits cloning.

In South Australia, the Gene Technology Act 2001 (SA) does not maintain the headings of the Commonwealth Act, therefore s192B has been completely omitted (see below). The sub-sections in section 192 of the South Australian Act are as follows:

92. False or misleading information or document

192A. Interference with dealings with GMOs

192E. Attempts to commit offences against Act

193. Regulations

The omission of a heading for section 192B seems odd in view of the provision in section 8A of the South Australian Act that the numbering in the Act should be the same as the Victorian Act!⁵

However, the fact that the Commonwealth prohibition on cloning does not appear in the Victorian and South Australian Gene Technology Acts is no doubt due to the fact that these states have specific legislation banning cloning and, in Victoria, also embryo research. The effect of the provisions in the Queensland and Tasmanian Gene Technology Acts that reproduce section 192B of the Commonwealth Act would appear to enact the same prohibition in state law in those states as in the Commonwealth, thus avoiding a constitutional challenge concerning the extent of Commonwealth power to enact the federal Act.

New South Wales, Queensland, Tasmania, the ACT, and the Northern Territory have not enacted legislation on assisted reproductive technology. Instead, they have relied on procedures recommended by the National Health and Medical Research Council (NHMRC). Statement Supplementary Note 5 to the NHMRC's *Statement on Human Experimentation and Supplementary Notes* (now replaced by the *National Statement on Ethical Conduct in Research Involving Humans*) refers to research on a fetus or fetal tissue. It does not prohibit cloning or embryonic stem cell research.⁶ As noted earlier, Queensland and Tasmania have now enacted Gene Technology Acts incorporating the Commonwealth provision banning cloning.

From a constitutional perspective, therefore, it would seem that the Commonwealth Act and the complementary state legislation cover the field in relation to the prohibition of human cloning in the states that have followed the Commonwealth lead or have enacted specific legislation of their own. To date, this leaves out only the ACT and the NT. However, the Gene Technology Acts cover only cloning; they do not cover stem cell research, except so far as it falls within the definition of cloning. And there are some differences in the law in the various jurisdictions.

⁴ The Queensland Act is similar.

⁵ Section 8A(1)(a) of the South Australian Act reads: "In order to maintain consistent numbering between this Act and the Gene Technology Act 2000 of the Commonwealth- if the Commonwealth Act contains a section that is not required in this Act, the *provision number and heading to the section* appearing in the Commonwealth Act are included in this Act despite the omission of the body of the section" (emphasis added).

⁶ It envisages that research on embryos and fetuses may be conducted in institutions that have a properly constituted ethics committee, according to written protocols approved in writing by the committee. The mother's consent is usually required and also the father's consent if practicable. Proper records must be kept of the research and its outcomes: paras 2, 8-11. If fetal cells are to be stored or propagated in tissue culture, consent for this should be obtained specifically (para 9).

5. ADVANTAGES OF COMMONWEALTH LEGISLATION

These omissions could be filled by enacting legislation at Commonwealth level, assuming that there is the political will to do so and it is constitutionally possible. The law would then be Australia wide and uniform throughout Australia. Amendment would be relatively easy, with only one Act to amend, instead of separate Acts in each jurisdiction. But it may be difficult to find a constitutional head of power on which to base the legislation.

In relation to cloning, the section banning human cloning in the Commonwealth Gene Technology Act was a late amendment to a bill dealing with health and environmental issues relating to *agricultural biotechnology*.⁷ The amendment was presumably a concession in the parliamentary process to ensure passage of the proposed legislation. The fact that state legislation has also been passed indicates that there are doubts about the extent of Commonwealth constitutional power.

Could the external affairs power be used as an alternative source of power? Consider the section in the International Declaration on the Human Genome quoted earlier -

Practices which are *contrary to human dignity, such as reproductive cloning of human beings*, shall not be permitted.

By signing this Declaration, Australia has committed itself to trying to implement this principle in its own laws. This might justify the use of the external affairs power by the Commonwealth to legislate, not only on cloning but also on other "practices ... contrary to human dignity". Relying on this power to legislate would have some advantages. Australia would be seen to be implementing its international treaty obligations. It would promote international uniformity. And the Australian government could pass legislation for which there might not otherwise be the political will. On the other hand, the electorate would be deprived of an opportunity to fully participate in the parliamentary process. Accession to treaties falls within the responsibility of the executive and there is a limited role for community consultation and debate. Also, views may differ from one state to another and people in some states may have their views overridden by federal legislation in which they have had no part.

In a wider context, however, the possibility of the Commonwealth using the external affairs power to legislate on sensitive issues has obvious implications for ethicists. International instruments are commonly prepared to cover new developments in medicine and science - including ethical aspects. Law makers can draw on wide expertise in other countries. For those who favour legal regulation, the external affairs power may seem attractive.

On the other hand, local debate may be stifled. International instruments are often expressed in broad or vague terms, such as "human dignity". There may be compromises to gain approval of members from very different backgrounds. And the legislation that is enacted may be hard to change.

Conclusion

The external affairs power seems to provide a new track for the Commonwealth to legislate on sensitive issues like human cloning and embryonic stem cell research. However, laws based on this power may be open to constitutional challenge, especially if they rely on terms like "practices contrary to human dignity". Traditional methods of promoting uniformity in laws across the country, such as ministerial consultation and complementary state legislation, are to be preferred

⁷ Senate Hansard, Gene Technology Bill 2000, Gene Technology (Consequential Amendments) Bill 2000, Gene Technology (Licence Charges) Bill 2000.

in providing more scope for local debate and the reflection of community views in the ultimate legislation. This has been the method adopted to date in Australia, as explained in this paper. However, the downside is that the law is different in some jurisdictions and constitutional issues still remain.