

# **CLONING OF HUMANS (PROHIBITION) BILL 2001**

## **EXPLANATORY NOTES**

### **GENERAL OUTLINE**

#### **Policy Objectives of the Bill**

The policy objective of the Bill is to prohibit the creation or attempted creation of cloned humans, or ‘human reproductive cloning’, and to prohibit the gestation of human embryo clones. The Bill is not intended to prohibit other research into the use of human cells or human tissue which uses cloning technologies.

#### **Means of Achieving Objectives**

The objectives of the Bill will be achieved by the prohibition of two practices: the creation or attempted creation of a human clone by a technological or other artificial process; and the placing of a human embryo clone in the body of a human or animal for any period of gestation.

#### *Background*

Human reproductive cloning is widely considered, at international, national and state levels, to be unacceptable and contrary to human dignity. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the World Health Organisation have condemned the use of cloning for replication of humans as unacceptable. In Australia, the National Health and Medical Research Council’s *Ethical Guidelines on Assisted Reproductive Technology* describe reproductive cloning as a prohibited and unacceptable practice. The Fertility Society of Australia and the Australian Academy of Science, regard human reproductive cloning as unacceptable. The *Code of Ethical Conduct for Biotechnology in Queensland*, commits government biotechnology organisations and organisations which subscribe to the Code to not undertake human reproductive cloning.

Australian Health Ministers have agreed that States and Territories should pursue a ban on human reproductive cloning in each jurisdiction. In addition, the Council of Australian Governments made a commitment in June 2001 to achieve nationally consistent provisions in legislation to prohibit human cloning. This Bill implements those agreements in Queensland.

Advances in cloning technologies mean that the possibility of cloning human beings is no longer scientifically remote. Reproductive cloning has been demonstrated in several different mammal species in recent years.

The Bill ensures that there is an enforceable prohibition of human reproductive cloning. This legislative approach is considered to be necessary and appropriate because it applies a prohibition on cloning of humans to all individuals and corporations, rather than relying on voluntary compliance with guidelines and codes.

#### *Scope of the prohibition*

The Bill does not prohibit a specific cloning technology, but is framed so as to prohibit creation of a human clone by any technological or artificial process. Human reproductive cloning that is achieved by, for example, somatic cell nuclear transfer or parthenogenesis will therefore be prohibited. However, the Bill does not prohibit, for example, natural 'twinning' (the development of identical twins by way of natural splitting of the embryo) which may occur in the course of an assisted reproductive technology (ART) treatment procedure. In the event that identical embryos develop naturally during ART treatment and are transferred to a woman for gestation, neither would be a 'human clone' as defined in the Bill.

A 'clone' is generally regarded as an identical genetic copy. However a human clone or human embryo clone created by somatic cell nuclear transfer would contain some genetic material in the mitochondria (organelles in the cell cytoplasm) which would be different to the genes in the nucleus of the cell from which the copy has been made. Also, a clone could be genetically modified so that it is not identical to the original from which it was copied. For these reasons, in a proceeding for an offence against the Act that a human or a human embryo is a genetic copy, it is sufficient to prove that the set of nuclear genes has been copied. It is not necessary to prove that the copy is an identical genetic copy.

If a human embryo clone has been created, then placing it in a human or animal body for any period of gestation is an offence. In circumstances where, for example, a human embryo clone had been created elsewhere and

imported into Queensland, placing the human embryo clone in a human or animal body for gestation is also an offence. Should it become technically possible in future for an embryo to gestate in the human male body, the prohibition on placement of a human embryo clone in the human body for any period of gestation makes placement in the human male body an offence.

The prohibition on cloning a human in this Bill does not extend to the use of cloning technologies in medical research and treatment which do not involve human reproductive cloning. Cloning technologies are used to replicate DNA or individual cells, and in medical research into potential treatments for a range of diseases.

As already noted, the Council of Australian Governments has committed itself to achieving nationally consistent provisions in legislation to ban human cloning in each jurisdiction. To implement that commitment to national consistency in Queensland, it is not considered that there is any practical alternative to a legislative prohibition on human reproductive cloning. The state has no legislation that prohibits creation of a human clone. Voluntary compliance with guidelines and codes may not in future be sufficient to prevent an attempt at human reproductive cloning.

Currently, Commonwealth legislation prohibits cloning of a whole human being. However, this legislation relies on the Commonwealth corporations power, and does therefore not apply to individuals. The Commonwealth has indicated its intention to wind back or repeal the relevant legislative provision when States and Territories have enacted legislation to prohibit human reproductive cloning.

### **Estimated Costs of Government Implementation**

There are no significant costs associated with implementation of the Bill.

### **Consistency with Fundamental Legislative Principles**

Two provisions of the Bill raise possible fundamental legislative principle issues.

Clause 8 effectively provides that an act or omission of a person's representative in relation to an offence against the Act is taken to have been done by the person, if the representative was acting within the scope of the representative's authority. The person will therefore be taken to have committed the relevant offence unless the person can prove that they could

not, by the exercise of reasonable diligence, have prevented the act or omission.

Clause 9 provides that, if a corporation is convicted of an offence, each executive officer of the corporation is taken to have committed the offence of failing to ensure that the corporation complies with the relevant provision. This clause therefore presumes an executive officer of the corporation to be guilty until the officer can prove that the officer took all reasonable steps to ensure the corporation complied with the provision, or that the officer was not in a position to influence the conduct of the corporation in relation to the offence.

These provisions effectively provide for the reversal of the onus of proof. However, given the seriousness of the subject matter of the offences, it is appropriate that:

- persons be required to oversee the conduct of their representatives and, in doing so, make reasonable efforts to ensure that their employees and agents comply with the requirements of the legislation;
- an executive officer, who is responsible for a contravention of the legislation, be accountable for his or her actions and not able to 'hide' behind the corporation.

## **Consultation**

### *National*

Following the commitment made by the Council of Australian Governments on 8 June 2001 to achieve nationally consistent provisions in legislation to prohibit human cloning, officials from all jurisdictions have worked on the development of a consistent approach to legislative provisions to prohibit human reproductive cloning. During national discussions, the Australian Health Ethics Committee (a committee of the National Health and Medical Research Council), medical researchers, practitioners specialising in fertility treatment and health ethicists were consulted about an approach to legislative provisions to prohibit human reproductive cloning.

### *Government*

The Departments of Premier and Cabinet, Innovation and Information Economy and Justice and Attorney General have been consulted in relation to the preparation of the Bill.

### *Researchers and ethicists*

A confidential consultation draft of the Bill was provided to a small number of medical researchers, ethicists and lawyers for comment to ensure that the Bill achieves its objective, without impinging on legitimate areas of medical research which use cloning technologies, but do not involve human reproductive cloning.

### *Results of Consultation*

The provisions in this Bill are consistent with the approach developed nationally for consistent legislative provisions to prohibit cloning of humans. There is general support from government agencies, researchers and ethicists for this legislative approach to prohibiting human reproductive cloning.

## **NOTES ON PROVISIONS**

*Clause 1* sets out the short title of the Act.

*Clause 2* specifies that the dictionary, contained in the schedule, defines particular words used in the Act.

*Clause 3* prohibits the creation of a human clone, or an attempt to create a human clone by a technological or other artificial process. The penalty for an offence against this provision is set at 4 000 penalty units or 10 years imprisonment. In accordance with section 181C of the *Penalties and Sentences Act 1992*, for an offence committed by a corporation, a court may impose a penalty of five times the maximum penalty specified for an individual.

*Clause 4* prohibits the placing of a human embryo clone anywhere in the body of a human or animal for any period of gestation. A penalty of 4 000

penalty units or 10 years imprisonment applies for an offence against this provision.

*Clause 5* provides that, for proving in a proceeding for an offence against the Act that a human or a human embryo is a genetic copy, it is enough to prove that the set of genes in the nucleus of the human cell has been copied, and it is not necessary to prove that the copy is an identical genetic copy. A *human clone* is defined to mean a human that is a genetic copy of another living or dead human. Proof that a human or a human embryo is a human clone will be demonstrated by proof that the nuclear genes have been copied.

*Clause 6* provides that in proceedings brought under the Act, it is not material whether the human clone or human embryo clone did not or could not survive.

*Clause 7* provides that an offence against the Act is a crime, and the offender cannot be arrested without warrant.

*Clause 8* specifies that an action or omission of a person's representative, in relation to an offence against the Act, is taken to have been done by the person, if the representative was acting within the scope of the representative's authority. However, the person can utilise the defence provided for under this provision and prove that they could not, by the exercise of reasonable diligence, have prevented the act or omission.

*Clause 9* places an obligation on the executive officers of a corporation to ensure that the corporation complies with the legislation. As such, this provision creates an offence on the part of each executive officer in situations where the corporation has committed an offence against the Act. However, it is a defence for an executive officer to prove that he or she exercised reasonable diligence to ensure the corporation complied with the provision; or was not in a position to influence the conduct of the corporation in relation to the offence.

## **SCHEDULE—DICTIONARY**

The *Schedule* defines particular words used in the Act.