

Ad Hoc Interfaith Committee

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Tuesday 28th October 2008

Mr Carlo Carli MP
Chairperson,
Scrutiny of Acts and Regulations Committee
Inquiry into Assisted Reproductive Treatment
Parliament House
Melbourne VIC 3000

**Re: Assisted Reproductive Treatment Bill 2008
Research Involving Human Embryos Bill 2008
Prohibition of Human Reproductive Cloning Bill 2008**

We, the undersigned share common concerns about the Government's plans to make substantial changes to the current law governing reproductive technology.

The Bill proposes to broaden the range of persons eligible for assisted reproductive treatment, to provide for surrogacy arrangements, substitute parent orders and changes to birth certificates and other records of parentage, and to modify procedures and regulation.

The proposals would change the main aim of the current law from protecting the **best interests of the child** born or to be born, towards treating the technology as a mere service rather than as a means of family formation within which children have rights.

The main effect of that shift is that the biological and relational basis of family formation which currently establish the roles, duties and presumptions of motherhood and fatherhood and protect the rights of children become merely optional. The changes to the law strike out the role and therefore the duties of a father and replace it with a notion of genderless parenthood. Parenthood under the new law would happen by nomination rather than through the biological and social reality of a child being born to a woman and conceived within a relationship to the child's father.

The current law seeks to deal with the new possibilities by recognizing the social and biological reality of natural parenthood and using both natural parenthood and having both a mother and a father as the paradigm for the courts in making parenthood decisions in the best interests of the child. The proposed changes to the law, especially the changes to the Status of Children Act, are not based on a child's right to have a relationship to both a mother and a father, nor on the duties and responsibilities that arise through natural parenthood.

By treating ART as a mere service which the Bill requires, children will have become mere commodities in the many matrixes of family formation that the technology makes

possible. Infertility is no longer the key criterion for eligibility for treatment. The new test would be whether in the woman's circumstances without a treatment procedure she is unlikely to become pregnant or give birth, or is at risk of transmitting a genetic abnormality or disease. Thus the legislation's title refers to "Assisted Reproductive Treatment" rather than "Infertility Treatment".

The Bill is specifically designed to bypass the limitations of gender and biology that currently and traditionally define the roles of mother and father. This is done so that two men, two women, or a single man or woman might become a parent through the use of the technology and surrogacy or gamete donation arrangements.

In several ways the Bill breaches the UN Convention on the Rights of the Child which Australia has ratified. The Convention recognizes the right of a child to an identity and family relations (Art. 8), and the right to know and be cared for by his or her parents (Art. 7) and to maintain personal relations and direct contact with both parents on a regular basis (Art. 9).

Australia has also ratified the International Covenant on Civil and Political Rights which does not recognize a right to a child, but does recognize the right of men and women of marriageable age to marry and to found a family (Art. 23), in which marriage means a contract entered into between a man and a woman for life. That article also holds that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

These proposed changes to the law are profound and the complexities warrant very careful analysis by the Parliament.

We are concerned that debate is to begin on these bills in such a short space of time without proper time for due consideration and at a time when much attention is focused on the upper house debate on the Abortion Law Reform Bill. It appears as though the timing was contrived to minimise the debate in the community and in the parliament. We ask you to reject these proposed changes and to vote against this legislation. There has not been sufficient time for the community to consider the implications of what is a complete rewriting of the Infertility Treatment Act 1995 and the Status of Children Act.

Attached is a summary of detailed concerns about the Bill and the many ways in which it departs from the protection of children born or to be born through the technology.

Yours sincerely,

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Ends

**Summary of Concerns
about the
Assisted Reproductive Treatment Bill 2008**

1. Interests of the Child/Children born or to be born no longer a Priority

Currently the Infertility Treatment Act 1995 states that the following principles must be applied in descending order of importance;

1. The welfare and interests of any person born or to be born as a result of a treatment procedure are paramount.
2. Human life should be preserved and protected.
3. The interests of the family should be considered.
4. Infertile couples should be assisted in fulfilling their desire to have children.

The proposed Bill has removed the descending order of the principles and places the protection of the rights of children on a par with other principles such as that persons seeking to undergo treatment procedures must not be discriminated against on the basis of their sexual orientation or marital status. Thus for instance a court in making a parenthood decision in the best interests of a child could not have regard to the fact that one alternative offered a child both a mother and a father compared to other alternatives involving single parenthood or parenthood by two men or two women.

The interests of children are paramount in the provision of services which aim to achieve pregnancy, and the interests of children are best safeguarded in the context of a family formed upon the security and commitment of a marriage between a man and a woman.

Children need relationships with both a mother and a father, and the example of male and female identity in the love between their parents, and between each parent and the children. Sometimes it happens that this ideal becomes fragmented by death, illness or choice, or the individuals are less than ideal in fulfilling their responsibilities to each other and their children, but the ideal remains.

The protection of the interests of children is a *parens patriae* responsibility of the State and the law should promote those circumstances that are most likely to achieve that protection. It should be noted that, notwithstanding the recent exclusive focus on the issue of discrimination on the basis of marital status, Australia has ratified the UN Convention on the Rights of the Child which recognizes the right of a child to an identity and family relations (Art. 8), and the right to know and be cared for by his or her parents (Art. 7) and to maintain personal relations and direct contact with both parents on a regular basis (Art. 9).

Australia has also ratified the International Covenant on Civil and Political Rights which does not recognize a right to a child, but does recognize the right of men and women of marriageable age to marry and to found a family (Art. 23), in which marriage means a contract entered into between a man and a woman for life. That article also holds that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The Bill would, in effect, give single women a right to the technology to achieve pregnancy without regard to the rights of children to know, to be cared for and to have access to their fathers as well as their mothers.

We strongly oppose the proposed treatment of children as though they are a commodity to which a person can have a right. The proper relationship to children is one of responsibility, a responsibility of both his or her mother and father. No-one has a right to a child.

2. Respect for Human Life no longer required

The proposed legislation has removed the requirement that human life should always be preserved and protected as a guiding principle. This removes altogether the relevance of the status of a human embryo.

By contrast the NHMRC recently adopted a much more balanced view:

“While there are different views held in our community about the moral status of a human embryo, one very widely shared view is that embryos warrant very serious moral consideration. At all times, any embryos created must be dealt with according to these guidelines and accepted standards of clinical and laboratory practice.

“In the course of clinical practice, clinicians must limit the number of embryos created to those likely to be needed by the participants in the course of their treatment.

“To limit the number of embryos created, clinicians should:

- minimise ovarian stimulation;
- limit the number of ova fertilised and embryos stored; and
- not start new treatment cycles for patients when clinically suitable embryos are in storage.”¹

The new approach to the law no longer upholds any sense of balance on this issue and simply dismisses out of hand the concerns that the community and especially IVF patients themselves have in relation to the preciousness of each human embryo formed. Under the proposed law, IVF practitioners and the new Authority members would not be required to respect the moral status of nascent human life.

3 Access to Single and Homosexual Persons

Not only does the proposed bill allow single persons and homosexual persons access to ART, it specifically rules out taking into account that those seeking to be recognized as parents cannot offer a child both a mother and a father. The law needs to and does recognise natural parenthood when it happens, whatever the circumstances, and the social and biological reality of conceiving and giving birth to a child provide a basis for that. Natural parents have recognised duties, obligations and presumptions through that social and biological connectedness. In the interests of the child, those obligations apply even if spousal connectedness fails. But the new law would no longer take those relationships as the basis for recognizing parenthood and instead provides

¹ National Health and Medical Research Council *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* Australian Government (2007), n. 5.2 page 21.

for substitution of parents on the basis of desire and nomination rather than in the interests of the child.

Our view is that in the best interest of the child motherhood and fatherhood should remain the paradigm for parenthood decisions. In the interests of children we reject the striking out of fatherhood and the demeaning of motherhood which are the direct effect of the Bill.

A major overall concern is that the changes in the bill represent a significant attempt to move the Victorian community away from the biblical and traditional paradigm of the family founded upon the marital relationship of a man and a woman. This has never been the only way that families exist, but it has been the paradigm that provided a model of what is best for the nurturing of children by both a mother and a father and secured by the parents' loving commitment to each other and thus to the child.

4. Surrogacy to be approved by panel.

The bill would move Victorian law from a position of discouraging surrogacy arrangements to enabling them to occur subject to the approval of a Review panel. Surrogacy arrangements are not in the best interests of the child and should be discouraged because they fragment parenthood into commissioning parents, birth mother and gamete donors. In that fragmentation the natural obligations of parenthood are lost to the child. Surrogacy also demeans women by opting to treat the birth mother as a mere incubator and placing her at great emotional risk. Pregnancy is a relationship to a child not an occupation or a service.

5. Posthumous use of Gametes

The bill allows for the creation of and birth of a child from gametes belonging to a deceased person. The best interests of a child require that both parents be living.

6. Child Abuse

The provision that those seeking access to treatment undergo a police check to exclude those who have a history of child abuse or neglect is welcomed. It would appear that in this respect at least the best interested of the child have been considered. However, it is disturbing that a review panel may still approve treatment for such persons.

7. Counselling

While the bill requires those planning to undergo assisted reproductive treatment to see a counsellor, there is no requirement that the counsellors be qualified, or independent of the provider. The doctor providing the treatment could also be the counsellor. This displaces the current regulatory framework which requires ART counsellors to be qualified and approved by the Authority.

8. Record Keeping

The bill no longer requires information to be kept on the numbers of embryos used and the number of women treated. This will make it much harder for those seeking treatment to make an informed decision based on accurate information about success rates and embryo loss rates. This is a backward step in an age when patients expect that information to be available. It is a failure to uphold the obligation to provide information in the consent process. The current law in Victoria in this respect should be retained.

9. Providers of Assisted Reproductive Technology must not discriminate on grounds of sexual orientation or marital status.

While the bill will require practitioners and institutions to provide treatment or assistance to achieve pregnancy for single women, or on behalf of a homosexual couple, or for the latter via surrogacy there is no conscientious objection clause or a no disadvantage clause to protect those who do not wish for ethical reasons to be involved in such practices. The NH&MRC *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* contain such a clause:

“Conscientious objectors are not obliged to be involved in the procedures or programs to which they object. If any member of staff or student expresses a conscientious objection to the treatment of any individual patient or to any ART procedures conducted by the clinic, the clinic must allow him or her to withdraw from involvement in the procedure or program to which he or she objects. Clinics must also ensure that staff and students are not disadvantaged because of a conscientious objection.”²

10. Status of the Children

The Assisted Reproductive Treatment Bill 2008 requires major changes to the Status of the Children Act to accommodate single and homosexual parenthood and surrogacy.

The word “father” is to be replaced in the Act by the word “a parent”.

The woman who is the mother of a child can request that any other person who she claims has a relationship of parent to her child may be declared by the Supreme Court to be a parent of her child. There is no limit of the number of such persons who may be recognised as a parent of her child. The principle of the best interest of the child will no longer be applied by the Court in such matters.

The female partner of the woman who gives birth (using her ovum or another woman’s) is automatically presumed to be the parent of her child. The man who provided the sperm is deemed not to be the father of the child.

In surrogacy arrangements, a substitute parentage order can be made by the Court provided that it is in the best interests of the child, the Patient Review Panel had approved it if it was done by a registered ART provider, the child was living with them, there was no trade and the surrogate mother consents. There is no time period specified and no cooling off period and the decision of the court is not reversible.

In 1984, the Victorian *Infertility (Medical Procedures) Act* retained the notion that the technology should only be used to create families within the marital context, but broke away from the marital paradigm by endorsing the use of sperm and eggs from outside the marital union. In 1995, the need for security of the relationship was lost in the inclusion of couples who were not committed to each other by marriage.

The Federal Court decision about that legislation in the *McBain* case further eroded the principle by allowing access by single infertile women, though the Court considered this only as an individual’s right of access to a medical service, and did not consider the implications that this had for the rights of a child to know, to have access to, and to be nurtured by his or her parents, and the particular significance of family creation.

² National Health and Medical Research Council *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* Australian Government (2007), n. 5.9 page 23.

The bill represents a huge further step away from the biblical and traditional paradigm of family relations by completely privatizing who may be considered a parent and by totally separating the notion of parenthood from the biological and psychosocial reality of a relationship between a man and a woman as mother and father to a child. The new notion of parenthood becomes a voluntary engagement to be a member of a committee of parents, without regard to the realities of natural connectedness through genetic and gestational parenthood, and the coming to be of a child through a relationship between the parents.

11. Definition of the Embryo

The definition of an embryo creates a 16 hour gap between when gametes fuse to form one cell and cease to be gametes and the stage at which that first cell divides for the first time. This means there is a period in time where the law does not apply to the entity that has been formed and creates a legal lacuna. The NH&MRC guidelines cover this gap by asserting that the entity is to be treated as an embryo during that time.

12. Research involving Human Embryos Bill 2008

Research involving human embryos has been separated from the **Assisted Reproductive Treatment Bill** and covered in this separate bill. This bill would allow destructive research on so-called “excess ART embryos” and the creation and use of embryos by cloning. Human life should not be treated as mere biological matter for research.

The introduction of this issue as a separate Bill is an opportunity for the Parliament to consider this issue in isolation and to reject destructive experimentation on human embryos.

13. Prohibition of Reproductive Cloning Bill 2008

Research aimed at human cloning has again been separated from the Assisted Reproductive Treatment Bill and appears to be designed to fall into line with the Commonwealth legislation which allows Human Cloning for research.

However, since the vote in Federal Parliament, the Western Australian Parliament in May this year rejected legislation which would have legalised Human Cloning in that State. WA parliamentarians recognised that the new developments in the area of pluripotent stem cells are more promising than human cloning which is not turning out to be the scientific panacea that some have claimed. The plans by COAG and the Federal Government to have uniform national legislation allowing human cloning need to be rethought in that light. Human embryos, created by human cloning should not be exploited and treated as though they were just a biological commodity.

This is an opportunity for the Parliament to revisit that issue in the light of new developments and to seek to prohibit cloning human embryos for the purposes of human research.