



# **Submission to the Victorian Parliament's Scrutiny of Acts and Regulations Committee on the Assisted Reproductive Treatment Bill 2008**

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PO Box 455, Flinders Lane  
Melbourne VIC 8009

Telephone: 03 9621 2663  
Facsimile: 03 9011 9731

Email: [rob.ward@acl.org.au](mailto:rob.ward@acl.org.au)  
[www.acl.org.au](http://www.acl.org.au)

ABN 4007 512 0517

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## ***Executive Summary***

ACL does not consider that the ART bill is in the best interests of children. For ease of reference, our position on this bill is summarised in the next section.

This submission focuses on whether the bill is compatible with rights guaranteed in the Charter of Human Rights and Responsibilities 2006. In summary, ACL argues that:

- The imposition of background checks on prospective ART parents is justified on the basis that the state's overriding concern must be the protection of the child to be created through ART;
- Human embryos are part of the human family and therefore should meet the definition of 'person' used in the Charter;
- Surrogacy fragments parenthood and can cause significant distress to both adults and children involved. Surrogacy should not be legalised and therefore advertising for services should be banned. Consequently, advertising one's availability to enter into a surrogacy arrangement should remain illegal. The law should be able to distinguish between the expression of personal views on surrogacy itself (which should be acceptable) and the promotion of one's availability to enter into a surrogacy arrangement (which is unacceptable);
- International human rights treaties ratified by Australia commit the government to acting in the best interests of the child and recognise that, as far as possible, the child has the right to know and be cared for by his or her parents. Nearly everything in this bill denies a child this right.

## ***A summary of ACL's position on the ART Bill 2008***

As noted in the attached copies of our Media Releases dated June 7<sup>th</sup> 2007 and December 12<sup>th</sup> 2007, ), the Australian Christian Lobby vigorously opposes many aspects of the Assisted Reproductive Treatment (ART) Bill 2008 and the Victorian Law Reform Commission report which formed the basis for much of the bill. We were also signatories along with other faith groups who are members of the Ad Hoc Interfaith Committee whose letter to all Parliament is also appended to this submission. This opposition is based on the fact that the bill:

- Elevates the desires of adults above the best interests of children;

- Deprives a child of its right to a mother and a father by making single people and members of same-sex couples eligible for fertility treatment and by allowing the gametes of dead people to be used to create children;
- Fractures parenthood by allowing for surrogacy in which up to six adults have a stake in the child;
- Weakens regulatory oversight by allowing the Assisted Reproductive Treatment Authority to devolve its powers to non-specialist agencies such as general practitioners.

ACL accepts that this submission is not the place to explore these concerns again in detail. Our comments will focus on the terms of reference established for this inquiry, namely whether the provisions in the bill:

- Unduly trespass on rights or freedom; or are
- Incompatible with the human rights set out in the Charter of Human Rights and Responsibilities Act 2006.

### ***Does the bill unduly trespass on rights or freedom?***

No-one has a right to a child, let alone a right to state assistance to conceive one - particularly if this 'infertility' is the result of choice or circumstance rather than due to a medical condition.

Children are not commodities produced to a certain standard for the enjoyment of adults. Rather children are vulnerable and dependent on their mother and father, whose proper role is one of sacrificial love which places the child's wellbeing above that of the parent.

The state has no role in the vast majority of conceptions, which occur naturally and privately. However, where the state does become involved in conception through the provision of ART services to those unable to conceive naturally, then the state is obligated to act in the best interests of the child at all times as stated in the UN Convention on the Rights of the Child, which the Australian Federal Government has ratified<sup>1</sup>.

Therefore any limitations that the state may impose on other recognised freedoms are valid if they serve the higher principles of protecting the best interests of the child: the most

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<sup>1</sup> *Convention on the Rights of the Child*, article 3(1), United Nations 1989

vulnerable person involved in ART and therefore the one most in need of the state's protection.

***Are the bill's provisions incompatible with the human rights set out in the Charter of Human Rights and Responsibilities Act 2006***

The Scrutiny of Acts and Regulations Committee (SARC) has already noted some possible concerns regarding the relationship between rights guaranteed by the Charter of Human Rights and Responsibilities 1996 and certain provisions in the ART Bill 2008. These were detailed in Alert Digest No 12 of 2008<sup>2</sup> and form the basis for ACL's comments below.

*Clauses 11(1) and 14*

Clause 11(1) requires that a woman seeking ART must supply a criminal records check for herself and her partner (if any) and also give her consent for the ART provider to conduct a child protection order check on herself and her partner (if any). Should these checks reveal violent or sexual offences, or removal orders, clause 14 states that ART is to be denied unless the Patient Review Panel decides that it may proceed despite the evidence against the potential parents.

As a result, according to the Alert Digest:

The Committee refers to Parliament for its consideration the questions of:

1. Whether or not clauses 11(1) and 14, by imposing procedures on people who use assisted reproductive technology that do not apply to people who conceive naturally, limits their Charter right to equal enjoyment of the rights to privacy and family without discrimination on the basis of impairment, marital status or sexual orientation?
2. If so, whether or not clauses 11(1) and 14, by seeking to protect children conceived using assisted reproductive technology, are reasonable limits according to the test set out in Charter s. 7(2)?

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<sup>2</sup> Accessed on 22<sup>nd</sup> October 2008 from

[http://www.parliament.vic.gov.au/sarc/Alert\\_Digests\\_08/08alt12body.htm#Assisted\\_Reproductive\\_Treatment\\_Bill\\_2008](http://www.parliament.vic.gov.au/sarc/Alert_Digests_08/08alt12body.htm#Assisted_Reproductive_Treatment_Bill_2008)

The comparison of people seeking ART with people who conceive naturally is a flawed one as these two groups of people are in utterly different circumstances and therefore warrant different treatment. The state plays no role in natural conception and therefore cannot impose any particular requirements on these parents. However, the state is greatly involved in ART through legislation and funding. The state must therefore exercise due diligence in screening prospective parents to ensure it is not placing children at risk by allowing unsuitable people (such as those with a history of violence, sexual offences or child neglect) to conceive a child through ART.

The Charter itself recognises that rights are not unlimited (see section 7.2). Requiring people seeking ART to undergo various suitability checks *does* place different requirements on them than on others who are not seeking ART. However, this is a reasonable limit of their right to privacy because it serves a higher purpose, which is also enshrined in the Charter and in the UN Convention on the Rights of the Child: that of protecting the child's best interests (section 17 of the Charter).

It should be noted that a record of violent or sexual offences or of child neglect does not automatically preclude someone from accessing ART. Such people are able to apply to the Patient Review Panel (PRP) and, on hearing the details of their case, the PRP may rule that they are eligible for treatment despite their past offences. If anything, rather than suggesting that the requirements for background checks are onerous and discriminatory, ACL would argue that there is too much lenience.

In the court of public opinion, the Government will find it much easier to defend itself against charges of invasive bureaucracy towards prospective ART parents than to defend itself against a charge that it allowed a person with a history of violence, sexual offences or child neglect to gain access to another child.

Clause 34(2)(b)

ART, as it is most commonly practiced, produces more embryos than are used in a single pregnancy. The bill limits an ART provider to storing embryos for up to five years under normal circumstances, though with the consent of both gamete donors, the embryos can be destroyed earlier than this or kept in storage for a further five years. Ultimately, there comes a time when the embryo is to be 'disposed of in accordance with the regulations' (clause 34.2.b). The Committee therefore:

... refers to parliament for its consideration the questions of:

1. Whether or not embryos have human rights under the Charter; and
2. If so, whether or not clause 34(2)(b), by requiring the destruction of stored embryos in some circumstances to prevent their indefinite storage, is compatible with any rights that stored embryos have to life.

This question goes to the heart of the concerns that many Christians feel about ART. ACL accepts the use of ART in certain limited circumstances, namely to help an infertile married couple try to conceive a child using their own genetic material and creating no more embryos than are to be implanted. Most couples, however, give consent to the creation of more embryos than they can possibly use, raising the vexed question of what to do with the embryos once the couple no longer wants any more children.

ACL has always affirmed that life begins at conception and that the right to life begins there too. According to the Charter, 'every person has the right to life and has the right not to be arbitrarily deprived of that life.' The Charter defines 'person' as 'a human being' (section 3).

Human beings experience many different stages of development. Some of us are elderly, some are mature adults, some are adolescents, some are children, some toddlers, some infants, some fetuses and some embryos. Yet we are all members of the human family. Put another way: if an embryonic human is not a human being then what else is it?

It is a matter of great regret that ART, as most commonly practised, results in the creation and destruction of so many embryonic humans. This is one case where the emotional drive to conceive a child, the technology to do so, and the difficulties of funding repeated attempts at IVF have all created momentum which has not been constrained by consideration of the ethical status of the excess embryos.

#### Clause 45

Clause 45 prohibits people advertising their willingness to enter into or facilitate a surrogacy arrangement in any public forum, including radio, television, the Internet and any other methods of dissemination to the public. The Government has stated that its intention in this clause is to prohibit commercial surrogacy but the SARC has raised concerns that the unintended consequence may be to prohibit the expression of personal views regarding

surrogacy (e.g. an offhand comment in an opinion piece that a woman would be willing to act as a surrogate in a hypothetical family situation, or comment on a blog site made by a couple seeking a surrogate and frustrated at the difficulties in finding one).

According to the Alert Digest:

The Committee will seek further information from the Minister as to whether clause 45 will apply to people who publicly mention their own willingness to enter into a surrogacy arrangement as part of public discussions on the issues associated with surrogacy. Pending the Minister's response, the Committee draws attention to clause 45.

This is a complex issue. There is widespread disapproval of commercial surrogacy as this is seen as 'buying a baby'. The bill rightly seeks to prohibit this practice. However, there can be a very blurred line between altruistic surrogacy and commercial surrogacy. The bill does allow payment of costs associated with surrogacy to the surrogate mother (clause 44) and creative individuals will easily find ways to justify a very broad interpretation of this.

In the same vein, it is hard to see how this clause could be constructed in a way that securely prevented any kind of surrogacy advertising without, at the same time, having some impact on a person's freedom of expression.

The bill seems to intend that altruistic surrogacy be a private arrangement between a commissioning couple and a woman who has agreed to act as a surrogate mother for them. Such a woman is likely to be found amongst the couple's own relatives or friends as the only alternative is to recruit a stranger through an agency or another organised network, e.g. a website listing people willing to be surrogates. If clause 45 is amended to clearly allow people to state their own willingness to enter into a surrogacy arrangement, then we are moving closer to the spirit of commercial surrogacy in which the parties are strangers to each other.

The law should allow people to express their personal views on the principles of surrogacy. However, it should prohibit people actively promoting their availability to enter into surrogacy arrangements as this is nothing short of advertising.

*The Charter does not limit other rights*

Clause 5 of the Charter notes that:

A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

With this in mind, ACL highlights the UN Convention on the Rights of the Child, which Australia has ratified, which states in article 7 that:

The child shall... [have] as far as possible, the right to know and be cared for by his or her parents.

The ART Bill 2008 deprives many children of that right:

- The bill allows children to be deliberately conceived using donated gametes and raised by people who are not their genetic parents (a situation very different from adoption in which an existing child who cannot be cared for by its natural parents is given into the care of another couple);
- The bill allows children to be conceived after one of their parents has died, removing forever the possibility of the child being known and cared for by that parent;
- The bill denies a child's right to a mother and father by making same-sex couples and single people eligible for ART;
- In its provision for surrogacy, the bill fractures parenthood into the genetic (two gamete donors), the gestational (the surrogate mother and her family) and the social (the commissioning couple who raise the child). Just who are the child's 'parents' in such an arrangement?

Nothing in the bill tries 'as far as possible' to ensure that children know and are cared for by their parents. If it did, it would require that only heterosexual couples using their own gametes could create a child using ART.

## ***Conclusion***

ACL maintains that this bill is not in the best interests of children as it deprives them of the ability to know and be cared for by their own parents. As such, it should be withdrawn or voted down.

However, according to the terms of reference for this inquiry, it is our view that the provisions in question to screen potential parents for relevant offences are justified, that human embryos should be considered 'persons', and that promoting one's availability to enter into a surrogacy arrangement should remain illegal.

**ACL Victoria**

**November 2008**

# MEDIA RELEASE

**For Release: 7 June 2007**

## **Reproductive Report Slammed for Going Against the Best Interests of Children**

The Australian Christian Lobby (ACL) has slammed recommendations in a Victorian report which would allow same-sex couples to adopt children and make IVF available to single and lesbian women.

ACL Victorian Chief of Staff Rob Ward today said the Victorian Law Reform Commission's recommendations in this area are an example of social engineering gone mad and are clearly not in the best interests of children.

"We urge the Victorian Government to reject recommendations in the Assisted Reproductive Technology Report which put the wishes of same-sex parents and single people above the interests of children," Mr Ward said.

"We believe that every child has the right to start out in life with a father and a mother. It is not in the best interests of children to change the law to pave the way for more same-sex couples and single people to become parents.

"In the case of same-sex adoption, the report itself admits that the adoption of babies is already very rare in Victoria. There is no shortage of loving heterosexual families wanting to adopt a child. Is it really fair that a child put up for adoption should end up in a same-sex family – missing out on either a mother or a father?

"In the case of providing IVF for single or lesbian women, or permitting surrogacy arrangements for same-sex couples, it means you are deliberately creating a less than ideal situation which is not in the best interests of a child. It treats a child as a commodity."

Mr Ward said an early reading of the report does show some good recommendations, such as a ban on people choosing a child's sex when using IVF, and the denial of access to Assisted Reproductive Technology for people convicted with sexual and serious violent offences.

"However a large part of the report goes against the interests of children and should be strongly discarded," Mr Ward said.

**Media Contact: Glynis Quinlan on 0408 875 979**



National Office  
Suite 9 Level 1  
National Press Club  
16 National Circuit  
BARTON ACT 2600

T 02 6259 0431  
F 02 6259 0462

E [natoffice@acl.org.au](mailto:natoffice@acl.org.au)  
W [acl.org.au](http://acl.org.au)

ABN 40 075 120 517

# MEDIA RELEASE

For Release: 14<sup>th</sup> December 2007

## CHILDREN'S RIGHTS ABANDONED IN LESBIAN IVF MOVE

A child's right to have every opportunity in life to have both a mother and a father has been dealt a blow by today's pre-Christmas announcement on gay access to IVF and surrogacy by Victorian Attorney General Rob Hulls.

Australian Christian Lobby Victorian State Director Rob Ward said that while not every child had a mother and a father for a range of reasons, to deliberately create a situation where this was the case from birth was not in the best interests of children.

"There are times when it is important to discriminate on behalf of the weak and vulnerable and place their rights above the wishes of adults," Mr Ward said.

"Abolishing the terms 'mother' and 'father' on some children's birth certificates is a recipe for confusion and heartbreak in the future," Mr Ward said.

"It is disappointing that this announcement was made barely a week before Christmas."

**For more information contact Rob Ward 0408 348 352.**

**Email: [viccos@acl.org.au](mailto:viccos@acl.org.au) Website: [www.acl.org.au](http://www.acl.org.au)**

