

Submission

on the

Assisted Reproductive Treatment Bill 2008

Prohibition of Human Cloning for Reproduction Bill 2008

Research Involving Human Embryos Bill 2008

to the

Scrutiny of Acts and Regulations Committee

Parliament House

Melbourne VIC 3000

Phone: 03 8682 2891

Email: andrew.homer@parliament.vic.gov.au

Website: www.parliament.vic.gov.au/sarc

by

FamilyVoice Australia

GPO Box 9894, Melbourne VIC 3001

Phone: 1300 365 965

Fax: 08 8223 5850

Email: office@fava.org.au

Website: www.fava.org.au

1 November 2008

TABLE OF CONTENTS

1. Introduction.....	1
2. Protecting the rights of children.....	1
2.1 The child’s need for a mother.....	2
2.2 The child’s need for a father.....	3
2.3 Same-sex couples as parents?	3
2.4 Surrogacy	4
3. Human embryo research and human embryo cloning.....	6
4. Recommendations	8
5. Endnotes.....	9

1. Introduction

The *Assisted Reproductive Treatment Bill 2008*, the *Prohibition of Human Cloning for Reproduction Bill 2008* and the *Research Involving Human Embryos Bill 2008* were introduced into the Victorian Legislative Assembly on 9 September 2008.

The Assisted Reproductive Technology Bill 2008 would if passed:

- change the law on access to assisted reproductive technology to allow single women and women in a lesbian relationship to use this technology to have a child even if they are not medically infertile. The Bill would do this by the device of allowing a doctor to give treatment to any woman who “in the woman's circumstances, is unlikely to become pregnant other than by a treatment procedure”. In other words, simply not having a current male partner, for any reason including a choice to live in a lesbian relationship, would qualify a woman for access to reproductive technology;
- remove any obligation to consider the child's need for a father;
- allow birth certificates to record two women as the child's only parents;
- allow surrogacy arrangements where one woman carries and gives birth to a child with the intention of handing it over to someone else to raise. Single men and male homosexual couples would be able to use surrogacy to acquire a child.
- allow birth certificates to record the single man or two homosexual men who commission a child through surrogacy to be recorded as the child's only parent(s).

The Bill would also repeal the existing Infertility Treatment Act 1995.

The Prohibition of Human Cloning for Reproduction Bill 2008 and the Research Involving Human Embryos Bill 2008 would re-enact in separate statutes the provisions dealing with these matters that are currently contained in the Infertility Treatment Act 1995.

The Bills each passed a third reading unamended in the Legislative Assembly on 9 October 2008. Second reading debate has commenced in the Legislative Council and is expected to continue when the Council resumes on 11 November 2008.

On 7 October 2008 the Scrutiny of Acts and Regulations Committee tabled its initial report on the Bills in its Alert Digest No. 12 of 2008. The Committee indicated that it may make a further report on the Bills and has called for public submissions which are due by 3 November 2008.

The Committee's inquiry concerns whether the provisions in these Bills 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.

2. Protecting the rights of children

Section 17 (2) of the *Charter of Human Rights and Responsibilities Act 2006* provides that “Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.”

Section 5 of the Charter provides 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.”

Article 7 (1) of the *Convention on the Rights of the Child* provides that:

“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”¹

Principle 6 of the *Declaration on the Rights of the Child* states that:

“The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother.”²

Several provisions of the *Assisted Reproductive Technology Bill 2008*, if passed, would be incompatible with the rights of the child as expressed in the Charter and in international law.

2.1 The child’s need for a mother

Provisions permitting single men or male homosexual couples to procure a child through a surrogacy arrangement would deprive a child not just of his or her birth mother but of having a mother at all.

These provisions fail to give “such protection as in the child’s best interest” as required by Section 17 of the Charter.

Mothers alone have the capacity to breastfeed. According to a 2005 NSW Public Health Bulletin “Breastfeeding has been consistently shown to be protective against a large range of immediate and longer term health outcomes that are a significant burden on individuals, the health system and society.”³

There is convincing evidence that breastfeeding is protective for children in developed countries from gastrointestinal illnesses, otitis media, respiratory tract infections and neonatal necrotising enterocolitis. There is probable evidence that it is protective for asthma and allergy, cognitive ability/intelligence, some childhood leukaemias, urinary tract infection, inflammatory bowel disease, coeliac disease, sudden infant death syndrome and obesity.⁴

Handing a baby to a single man or to two homosexual men to raise puts it at risk of missing out on these protective benefits.

Mothers have a distinctive ability to understand infants and children. “Mothers are better able than fathers to read their children’s words, deeds, and appearance to determine their emotional and physical state.”⁵

“The hormone peptide oxytocin, which is released in women during pregnancy and breastfeeding, makes mothers more interested in bonding with children and engaging in nurturing behavior than fathers ... when children look for comfort and consolation, no one compares with mom.”⁶

Recommendation 1:

That the Committee declare the provisions of the Assisted Reproductive Technology Bill 2008 authorising surrogacy for single men and male same-sex couples to be incompatible with the human rights of the child.

2.2 The child's need for a father

The provisions of the *Assisted Reproductive Technology Bill 2008* which permit a child's birth registration to record two women as parents and to fail to record the father of the child are not compatible with the human rights of the child.

The Convention on the Rights of the Child states that a child "to know and be cared for by his or her parents". This provision does not envision an arbitrary determination of who may, by a legal pretence, be named as the alleged "parents" of a child. A child has the right "as far as possible" to know both of his natural parents.

Further, provisions of the *Assisted Reproductive Technology Bill 2008* which would deprive a child of a father are not compatible with the Charter obligation to give the child "such protection as in the child's best interest".

"Fathers excel when it comes to discipline, play, and challenging their children to embrace life's challenges... Typically, fathers engender more fear than mothers in their children because their comparatively greater physical strength and size, along with the pitch and inflection of their voice, telegraph toughness to their children... Engaging in rough physical play with dad teaches children how to deal with aggressive impulses and physical contact without losing control of their emotions... Compared to mothers, fathers are more likely to encourage their children to take up difficult tasks, to seek out novel experiences, and to endure pain and hardship without yielding. Fathers are more likely than mothers to encourage toddlers to engage in novel activities, to interact with strangers, and to be independent; and as children enter adolescence, fathers are more likely to introduce children to the worlds of work, sport, and civil society."⁷

Girls whose fathers left the family early (before age 5) were five times more likely in the US and three times more likely in New Zealand to become pregnant as a teenager compared to girls from traditional families.⁸

Male adolescents in all types of families without a biological father (mother only, mother and step-father, and other) were more likely to be incarcerated than teens from two-parent homes, even when demographic information was included in analyses. Youths who had never lived with their father had the highest odds of being arrested.⁹

Recommendation 2:

That the Committee declare the provisions of the Assisted Reproductive Technology Bill 2008 authorising access to assisted reproductive technology for single women or women in a same-sex relationship to be incompatible with the human rights of the child.

2.3 Same-sex couples as parents?

In addition to depriving a child of either a father or a mother, those provisions of the *Assisted Reproductive Technology Bill 2008* which would facilitate same-sex couples acquiring a child would not be in the best interests of the child. These provisions would consequently be incompatible with Section 17 (2) of the Charter.

A key Australian study has shown significant detrimental outcomes from homosexual parenting. Dr Sotirios Sarantakos, when former Associate Professor of Sociology at Charles Sturt University, undertook several studies on heterosexual and homosexual couples. In 1996 he published a paper, *Children in three contexts*, where he explored the relationship between family environment and behaviour of primary school children living in three family contexts - married heterosexual couples, cohabiting heterosexual couples and homosexual partners.¹⁰

The major finding of the study was that family type did make a significant difference to the children's school achievements. Children in families where their biological parents were married to each other scored best of the three groups in language ability (7.7), mathematics (7.9) and sport (8.9). Children of cohabiting heterosexual couple families generally did next best in these areas (6.8, 7.0 and 8.3), while children of homosexual partners scored lowest (5.5, 5.5, 5.9). In class behaviour more children of homosexual partners were reported to be timid and reserved, unwilling to work in a team or talk about family life and holidays. In general they felt "uncomfortable when having to work with students of a sex different from the parent they lived with". Sex identity was reported by teachers to be a problem area for some children of homosexual families. Sarantakos cautiously concludes that "married couples seem to offer the best environment for a child's social and educational development".

Advocates of parenting by homosexual partners frequently claim that about 50 studies have been done "proving" no difference in outcome between children raised by married couples or by homosexual partners. Any social science study depends for its validity on following rigorous statistical and research procedures. Dr Robert Lerner and Dr Althea Nagai, experts in quantitative analysis, after dissecting each of 49 of such studies found at least one fatal research flaw in each study.¹¹ These studies are therefore no basis for good science or good public policy.

Professor Lynn D Wardle shows even from those studies which conclude in favour of homosexual parenting that there is data showing that homosexual parenting may be harmful.¹² There is a greater incidence of homosexual orientation in the children raised by homosexual partners with resulting problems including suicidal behaviour, promiscuity, etc. There is also a greater incidence of anxiety, sadness, hostility, defensiveness and inhibitions (some of these especially among boys of lesbian mothers).

Recommendation 3:

That the Committee declare the provisions of the Assisted Reproductive Technology Bill 2008 which would facilitate same-sex couples acquiring children by any means to be incompatible with the human rights of the child.

2.4 Surrogacy

The provisions in the *Assisted Reproductive Technology Bill 2008*, which would permit surrogacy, would authorise the separation of "a child of tender years ... from his mother" in contravention of the *Declaration on the Rights of the Child*.

Surrogacy involves an arrangement made, before the conception of a child, in which a woman who intends to carry a child during pregnancy agrees that she will hand over the child after his or her birth to be raised by the person or persons who commission her to carry the child.

Surrogacy is to be clearly distinguished from adoption. Adoption is an arrangement made after the birth (or at least after the conception) of a child - in the best interests of the child. The process of adoption allows birth parents (particularly the mother), who feel unable to support or rear the child, to decide freely to give up their position as the legal parents of a child and allow other persons to become the legal parents of the child.

Adoption primarily serves the needs of an existing child for parents who can raise him or her. Adoption may also serve the needs of relinquishing parents who freely decide that they are not able to raise a child, and the needs of well balanced, healthy and committed childless couples who wish to raise a child. However the needs of the relinquishing parents and adopting parents are secondary. The primary concern in adoption is the best interests of an existing child.

Surrogacy reverses these concerns. Surrogacy primarily serves the wishes of the commissioning parents (or parent) to procure a child by any means. In surrogacy, the child who does not yet exist becomes a commodity - the object of a legal contract. Surrogacy undermines the natural right of birth parents – especially the woman who carries a child, but also her husband – to be the legal parents of any child born to them unless they freely decide to relinquish the child. It subordinates, to the interests of the commissioning couple, the best interest of the child by ignoring the natural bonding of a child to the birth mother during pregnancy and potentially, his or her sense of identity, family and belonging.

A law permitting surrogacy does this by giving validity to a contract made before the conception of a child to put into effect a plan that intentionally fractures the child's life by separating the gestational mothering of the child from its subsequent upbringing.

Surrogacy may result in harm to the child whom the surrogate mother relinquishes, breaching a natural bond and potentially leading to identity problems in the child.

Children born as a result of a surrogacy contract are likely to share the “identity bewilderment” experienced by children born as a result of donor insemination. Recent accounts written by adults who were conceived as a result of donor insemination describe the profound problems of identity and belonging they experienced both as children and as adults.¹³ Some of these problems were related to secrecy - not being told the truth about their origins but intuiting that they were different. However, problems also persisted after the truth was revealed or discovered, including a longing to know the absent genetic parent.

Issues of identity, belonging and wantedness are likely to be important for children conceived as a result of a surrogacy contract. They may yearn to know, “Who am I? How could my mother give me away?”

It must be kept in mind that these issues are imposed on the child as a result of an intentional plan formed before the conception of the child, not unavoidably encountered through the exigencies of dealing, after the fact, with a crisis pregnancy.

Other harms to the child include the possible risk of rejection by one or both parties due to disability or other unwanted characteristics. The very fact of “commissioning” a child tends to reduce the child to an object rather than a person in his or her own right. Surrogacy contracts may include a commitment by the gestational mother to abort the pregnancy in the event of a prenatal diagnosis of disability or imperfection or the non-preferred sex. A child born with a disability may be rejected by both the commissioning parents and by the birth mother, with no-one willing to take parental responsibility for the child.¹⁴

Harm may arise if more than one baby is conceived when only one baby was desired. In 2001 a UK surrogate mother carrying twins sued a Californian couple who disavowed the contract when she refused to abort one of her unborn babies.¹⁵ Then again, the surrogate mother might take action to end the life of her unborn baby against the wishes of the commissioning parents.

The child may become the object of a legal dispute over custody. Notwithstanding a surrogacy contract a birth parent, especially the mother, may find she has bonded with the child and wishes to assert a legal claim to parenthood. In *Re Evelyn*¹⁶ the experience of the birth mother, Mrs S is reported as follows:

“It emerges from the material of Mrs S that she was struggling with the task of coming to grips with her decision to hand the child to the Qs. She attended grief counselling and had contact with a Relinquishing Mothers' Group. She says she came to the realisation that she could no longer abide by the arrangements. She says she was suffering emotionally as a result of the separation from her daughter and that, after much agonising, she concluded that it was better for herself, the child Evelyn and for her other children for Evelyn to be returned to her.”

Decisions may be made by courts at various level of the judicial hierarchy which result in the child being alternately placed in the custody of each of the contending parties, seriously disrupting the normal processes of bonding and attachment with the likely consequences of ongoing psychological harm to the child.

A persuasive case against permitting surrogacy was recently published in the progressive French journal *Liberation* by Myriam Szejer, a child psychiatrist and Jean-Pierre Winter, a psychoanalyst.¹⁷

Szejer and Winter write that “For the defenders of surrogacy, parental love will prevent the child from suffering from the after-effects of this mode of conception. It is forgotten that the prescription of in-vitro fertilisation (IVF) necessary for surrogacy is the equivalent of ‘an order to abandon one’s child’.

“The importance of epigenetics on the physical and psychological development of the fetus is known, as well as the emotional bond between the pregnant woman and the child she is carrying and the deleterious effects of the separation mother and baby at birth. In order not to cut this link, doctors place the newborn on the mother's womb after delivery, so as to restore its antenatal benchmarks which are stored and recorded for him as identity. They invented kangaroo care, the "skin to skin" contact of mother and baby while in hospital, because it is in the early postpartum period that the foundations of self-image are built. Pediatricians and midwives have seen how these practices improved the prognosis of survival, length of hospitalization, and the success of breastfeeding. How could doctors now prescribe abandonment of the newborn child? It is not gametes that the newborn recognizes as mother, but the woman who bore him. We know that the wounds of abandonment function as a bilateral amputation of Self. The most successful adoptions fail to erase the traces conscious and unconscious of this abandonment, both for the psyche of the child and for the mother who give up part of herself.

“In the case of surrogacy this separation is legally programmed and not the result of a tragedy of life, as in adoption.

“We should oppose a practice of which the child is the victim and which opposes the interest of the mother against that of the child, and even of other players. We need to be concerned about the future of all the players in surrogacy: the mother, the baby, but also the husband of the surrogate mother or her own children. The whole family is affected by this act, as would society be as a result of the transformation of the laws on filiation that would derive from it. When it ratifies this theory that separates mind from body, the social structure is responsible for doing so.”

Recommendation 4:

That the Committee declare the provisions of the Assisted Reproductive Technology Bill 2008 which would authorise surrogacy to be incompatible with the human rights of the child.

3. Human embryo research and human embryo cloning

The Committee has already noted in its initial report on the Bills that the provisions of the Bills authorising the disposal of human embryos, research on human embryos and the creation of human

embryo clones for the purpose of research each raise the fundamental question of whether the human embryo is a “human being” whose rights are protected by the Charter.

The Committee has referred this matter to parliament for its consideration.¹⁸

The Preamble to the Charter states that:

“On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.”

This statement presupposes that “dignity and rights” are inherent rather than a mere legal construct. That is to say the Parliament in enacting the Charter is “recognising” the universal possession by “all people” of “dignity and rights”. It is definitively not purporting to be creating or bestowing such “dignity and rights” by the legal act of enacting the Charter.

This means that the suggestion that the “question of defining a human being for the purpose of determining the existence of legal rights is a legal (rather than metaphysical or scientific) one” is not pertinent to the interpretation of the Charter.

If, as the Charter recognises “all people” are “born free and equal in dignity and rights” then they must be “born” inherently possessing such dignity and rights. There is nothing evident in the process of being born that could conceivably bestow such “dignity and rights” on a human being.

The obvious conclusion is that “all people” are “born free and equal in dignity and rights” because they already possess such “dignity and rights” by virtue of being a human being.

There is no doubt that human embryos, howsoever they come into existence, are human beings. They therefore possess the human rights enumerated in the Charter, including “the right to life and has the right not to be arbitrarily deprived of life” (Section 9) and the right not to be “subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.”

This conclusion is strengthened by the existence of Section 48 of the Charter which provides that: “Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.”

The Parliament was evidently conscience that provisions of any law permitting abortion or child destruction would be likely to be incompatible with the “right to life” provision of the Charter. However, no equivalent “savings provision” is included in the Charter in relation to any law applicable to human embryo research, notwithstanding that such a law already existed when the Charter was enacted.

Recommendation 5:

That the Committee declare the provisions of the Research Involving Human Embryos Bill 2008 authorising destructive research on human embryos, including human embryo clones, to be incompatible with human rights.

4. Recommendations

Recommendation 1: That the Committee declare the provisions of the Assisted Reproductive Technology Bill 2008 authorising surrogacy for single men and male same-sex couples to be incompatible with the human rights of the child.

Recommendation 2: That the Committee declare the provisions of the Assisted Reproductive Technology Bill 2008 authorising access to assisted reproductive technology for single women or women in a same-sex relationship to be incompatible with the human rights of the child.

Recommendation 3: That the Committee declare the provisions of the Assisted Reproductive Technology Bill 2008 which would facilitate same-sex couples acquiring children by any means to be incompatible with the human rights of the child.

Recommendation 4: That the Committee declare the provisions of the Assisted Reproductive Technology Bill 2008 which would authorise surrogacy to be incompatible with the human rights of the child.

Recommendation 5: That the Committee declare the provisions of the Research Involving Human Embryos Bill 2008 authorising destructive research on human embryos, including human embryo clones, to be incompatible with human rights.

5. Endnotes

1. <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.
2. <http://www.unhchr.ch/html/menu3/b/25.htm>.
3. Allan, J. and Hector, D “Benefits of breastfeeding”, *NSW Public Health Bulletin*, Vol. 16(3-4), 2005, p 44; http://www.publish.csiro.au/?act=view_file&file_id=NB05011.pdf.
4. *Ibid.*, Table 1, p 43.
5. W. Bradford Wilcox, “Reconcilable Differences: What Social Sciences Show About the Complementarity of the Sexes & Parenting”; <http://www.family-men.com/The%20necessity%20of%20both%20sexes%20in%20parenting.htm>
6. *Ibid.*; Palmer, Linda F. “Bonding Matters ... The Chemistry of Attachment” in Attachment Parenting International News, Vol 5, No 2, 2002, <http://www.babyreference.com/BondingMatters.htm>.
7. W. Bradford Wilcox, “Reconcilable Differences: What Social Sciences Show About the Complementarity of the Sexes & Parenting”; <http://www.family-men.com/The%20necessity%20of%20both%20sexes%20in%20parenting.htm>.
8. Ellis, B., Bates, J., Dodge, K, Fergusson, D., Horwood, L.J., Pettit, G. & Woodward, L. “Does father absence place daughters at special risk for early sexual activity and teenage pregnancy?” *Child Development*, 2003, Vol 74, 801-821.
9. Harper, C., & McLanahan, S., *Father absence and youth incarceration*, 2003, Center for Research on Child Wellbeing, Working Paper 99-03.
10. Sarantakos, S, “Children in three contexts”, *Children Australia*, 1996, Vol 21, No 3.
11. Lerner, Robert and Nagai, Althea, 2001, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting*, Marriage Law Project, Ethics and Public Policy Center, Washington, DC, 2003.
12. Wardle, Lynn D, 1997, “The Potential Impact of Homosexual Parenting on Children”, *University of Illinois Law Review*, Vol 1997, Issue 3, p 833.
13. “*Who Am I? Experiences of Donor Conception*” Idreos Education Trust, 2006.
14. “Spurned baby sparks action on surrogate births”, *The Australian*, 27/1/1983.
15. “Surrogate mother sues California couple”, 14/8/2001; <http://archives.cnn.com/2001/LAW/08/13/surrogate.dispute/index.html>.
16. *Re Evelyn* [1998] FamCA 55 (15 May 1998).
17. <http://www.liberation.fr/rebonds/340657.FR.php>.
18. http://www.parliament.vic.gov.au/sarc/Alert_Digests_08/08alt12.htm.