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**Submission to the  
Scrutiny of Acts and Regulations Committee Inquiry  
into the Assisted Reproductive Treatment Bill 2008  
(the ART Bill)**

**1. Introduction**

The Victorian Council for Civil Liberties Inc—Liberty Victoria—is an independent non-government organization which traces its history back to Australia’s first civil liberties body, established in Melbourne in 1936. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia’s compliance with the rights and freedoms recognised by international law. Liberty’s contribution is well known to parliamentary committees, at both federal and state levels of government, and we have campaigned extensively in the past on issues concerning human rights and democratic processes and participation.

In accordance with the Universal Declaration of Human Rights, Liberty Victoria believes that all human beings are born free and equal in dignity and rights, without distinction of any kind, such as race, colour, sex or sexual orientation. The law should not discriminate between groups in respect of establishing a family and parenting based on outdated and irrational prejudice.

Liberty Victoria welcomes the ART Bill as a significant reform to enhance the human rights of children, families and parents. Liberty calls on the Parliament to pass this Bill as quickly as practicable.

**2. History and background**

It is now ten years since the then EOCV (now the Victorian Equal Opportunity and Human Rights Commission) presented its landmark report *Same Sex Relationships and the Law* (March 1998). This report identified areas where the Parliament’s intention to eliminate discrimination on the basis of sexual orientation, set out in the *Equal Opportunity Act 1995*, was in fact frustrated by discriminatory effects of older legislation, which therefore needed to be brought into line. All but one of the reforms the Commission proposed in that report have now reached the statute book, which is a credit to this government and the Parliament.<sup>1</sup> The remaining reform is the subject of this Bill.

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<sup>1</sup> See, for example, *Statute Law Amendment (Relationships) Act 2001*, *Statute Law Further Amendment (Relationships) Act 2001*, *Constitution Amendment (Judicial Pensions) Act 2008*, *Relationships Act 2008*

The 1998 report noted that the laws on access to reproductive technology and parenting were discriminatory on grounds of sex, marital status and sexual orientation and were in need for reform. Observing that this area had been the most contentious of all the issues raised in its 1997 Discussion Paper, the Commission recommended that “further consideration and community consultation is necessary.” Heeding this recommendation the Government referred the questions of access to ART and adoption to the Victorian Law Reform Commission, which conducted a lengthy and thorough inquiry, with very substantial community consultation, over four years. The VLRC’s report, delivered mid-2007, recommended the reforms that now come before the Parliament in this ART Bill.

Furthermore, the discriminatory provisions of the *Infertility Treatment Act* were rendered inoperative under the Australian Constitution by the decision of Sundberg J in the case of *McBain v the State of Victoria & Ors*, [2000] 99 FCR 116.

The present ART Bill both remedies the breaches of the *Sex Discrimination Act 1984* (Cth) and implements an effective regime to enable the broader implementation of the VLRC’s recommendations.

### **3. Recognizing Reality**

Children of same-sex couples exist, here and now.

The current laws concerning parenting disadvantage those children, violate their human rights in many ways, and must be reformed. This ART Bill does that.

Children in this situation are discriminated against on the basis of out-of-date prejudices against the sexual orientation and the relationship status of their parents. This is just the same as the discrimination against so-called illegitimate children of past eras. That shameful discrimination was outlawed, and removed from the statute book, in the early 1970s. The ART Bill removes this shameful discriminatory burden from the children of same-sex couples, and needs to be passed for their sake, right now.

Victoria’s *Charter of Human Rights and Responsibilities* expressly guarantees human rights to children: s17. Those rights are best explicated by reference to the *Convention on the Rights of the Child*, and indeed the Charter requires the express inclusion of the Convention to be considered at the Charter’s four year review in 2010. In the VLRC’s Occasional Paper *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* John Tobin writes (footnotes omitted):

In the Convention there are 40 substantive articles that provide rights to children covering matters ranging from juvenile justice and child labour to education and health... [with] several rights ... particularly relevant to children in the context of adoption and assisted reproductive technology, including:

- the right of a child to know and be cared for by his or her parents as far as possible;
- the right to an identity; and
- a collection of rights that set out the obligations and responsibilities of parents to protect their children from harm, provide them with a safe and secure living environment and ensure their children’s best interests remain their basic concern.

The current law violates these human rights of children in the here and now, let alone of those who are yet to be born. The ART Bill will remedy those violations, and must be passed. Those who oppose the ART Bill, whatever they may say, are actively opposing the human rights of children, now and in the future.

#### **4. Homophobia, or sexual prejudice**

There is a reason that these violations of the human rights of children, and of their parents and would-be parents, have gone unremedied for so long after the Commission drew attention to them in 1998. That reason is homophobia, or in the words of Gregory Herek, sexual prejudice.<sup>2</sup>

It is important to name the prejudices that sometimes impede social progress, and not to accept the obfuscating explanations with which the opponents of a measure such as this ART Bill like to cloak their actions.

In the absence of homophobia or sexual prejudice the clear evidence of psychological and social research about what matters in the upbringing of children would inform public policy and make the passage of this Bill a routine matter.<sup>3</sup> Liberty Victoria urges the Committee to reject the sexual prejudice that clouds this discussion in the public sphere, to review the research, and to urge the immediate passage of the bill.

#### **5. Human rights**

While the discussion of human rights in this state is still in its infancy, it is common for the unsophisticated to frame their mere wants as “rights”, or cast any assertion they may wish to advance as if there were a right involved. Mere framing of a belief as a right does not make it so, however.

In considering the ART Bill some have concocted a “right to a mother and a father” for this purpose. There is no such human right in international law, nor a legal right to this effect in Victorian law. Nor should there be.

What is clear, however, is that the human rights of children include the right to protection by their parents, and not to be discriminated against because of prejudice against those parents, and for society to protect their parents. The Charter, for example, says in section 17(2):

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.

In section 17(1) the Charter states: “Families are the fundamental group unit of society and are entitled to be protected by society and the State.”

These Charter rights must be interpreted in the light of international law. An important source of international human rights law concerning children is, of course, the *Convention on the Rights of the Child*, which provides in article 2 that:

2(1)—‘State parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind...’;

2(2)—‘State parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status...of the child’s parents, legal guardians or family members’.

The VLRC’s Occasional Paper by John Tobin, referred to above, analyses these issues in great detail. Its conclusion is inescapable. The best interests of the child, and the human rights of children, are best served by the reforms proposed by the VLRC and implemented in the present ART Bill.

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<sup>2</sup> For this terminology see, for example, Herek, G. (2004). Beyond “homophobia”: Thinking about sexual stigma and prejudice in the twenty-first century. *Sexuality Research and Social Policy*, 1(2), 6-24.

<sup>3</sup> A comprehensive, up-to-date summary of the research is presented by the Australian Psychological Society at [http://www.psychology.org.au/publications/statements/lgbt\\_families/](http://www.psychology.org.au/publications/statements/lgbt_families/)

Assertions to the contrary founded on a specious “right to a mother and a father” are mere special pleading and question-begging rhetorical devices intended to inhibit rational analysis. They should play no role in the serious assessment of the evidence justifying the ART Bill.

### **6. Evidence, and what “less restrictive means” are “reasonably available”**

An effect of the Charter not yet adequately noticed is the importance it attaches to evidence, and to its honest assessment.

In the analysis of legislation in the light of the Charter it is often the case that some provisions limit human rights. Such limitation is able to be justified, as the Charter makes clear, by reference to the standards elaborated in international human rights law, and codified in the Charter, section 7. Liberty knows that the Committee is well aware of this, as it must assess every bill by these standards, and must consider the statements of compatibility of every bill, wherein the member introducing the bill is supposed to explain their understanding of how the bill enhances or limits human rights, and why, in the case of limits, those limits are justified.

The language of section 7 requires limitations to be objectively identified, analysed and justified. The criteria are clear, even if broad. The use of the words “reasonable” and “demonstrably” colours the whole section. Only by the honest use of the best available research evidence can these requirements be satisfied.

This is why the work of a body like the VLRC is so important. It has researched the issues, in consultation with the public, and has collated the best available information from the research of others. It is a matter of grave concern to Liberty Victoria that much of the public discussion of this Bill has ignored the evidence, or has even wilfully misrepresented the findings of research by psychologists and social scientists, and that some contributions to the debate have expressed a disregard for the evidence bordering on contempt.

The current law imposes limitations on the human rights of children in same-sex couple headed families, and on the human rights of single women and of same sex couples, that cannot be justified “in a free and democratic society based on human dignity, equality and freedom” on any fair view of the evidence of research into the well-being of children. These impermissible limitations are endorsed by those who oppose this bill. This ART Bill, based on the evidence amassed by the VLRC, seeks to remove impermissible limitations on human rights, and should be enacted without further delay.

Liberty Victoria is not blind to the imperfections of the Bill. In the circumstances, however, it is more important to pass the Bill than to spend forever perfecting it. The fundamental good that it will do when passed, and the continuation of harm that would result from its deferral or failure, mean that passage now is the most important question. The flaws can be, and should be, dealt with in the usual way. Liberty will be happy to contribute to that process,<sup>4</sup> but sees no benefit in dwelling on what might have been included, or could have been done better, at this stage, for to do so would merely give succour to the bill’s opponents.

### **7. Conscience**

As this bill has been declared the subject of a conscience vote by the major parties it is appropriate to conclude this submission with some remarks on the proper role of conscience.

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<sup>4</sup> See the Appendix, which addresses, among other matters, some of the issues raised by the Scrutiny of Acts and Regulations Committee in the Alert Digest No 12 of 2008, Tuesday 6 October.

Liberty Victoria suggests that Members of Parliament should distinguish between two roles for conscience in their decision-making. These are the role of conscience in matters personal to the member, and the role of conscience in assessing what is in the public interest.

Only the latter should play a part in a member's decision on a bill.

Whether, for example, a member would consider engaging a surrogate mother to bear a baby for themselves, or would offer to be a surrogate for another, is an entirely different matter from whether the Parliament should prevent other persons from doing so, or impose unreasonable conditions on them. The former is personal to the member; the latter involves the conscientious assessment of the research evidence in the light of the Charter, with full weight given to the "human dignity, equality and freedom" of those for whom Parliament legislates.

## Appendix

This Appendix addresses two of the issues raised by the Scrutiny of Acts Committee in the Alert Digest No 12 of 2008, Tuesday 6 October. The first concerns clause 11 of the bill which requires those seeking assisted reproductive treatment to undergo a police check, and the second concerns whether embryos have human rights under the Charter. It also refers to two other problems in the Bill which will need to be fixed in the future.

### **1. Clause 11 – Police checks**

While Liberty Victoria acknowledges the concern for the protection of children that apparently lies behind the proposed requirement for police checks, we believe that this requirement is an arbitrary over-reaction to irrational concerns arising from a climate of risk panic, rather than from any evidence on which it is reasonable to rely. Such an approach fails to comply with the Charter requirement in s 7(2)(e) that any limits on human rights first test whether “less restrictive means” are “reasonably available”. Indeed it also fails the s7(2) requirement of a rational connexion between the limitation and its purpose.

Liberty does not oppose subjecting those with criminal records for sexual offences to very careful scrutiny or conditions before permitting their access to assisted reproductive treatment. However to require those with no criminal record or other reason for suspicion to undergo criminal record checks, solely on account of their sexual orientation or marital status, is objectionable. It is based on prejudiced assumptions, essentially that if a person is not in a heterosexual couple, or desires a child while unmarried, then their ordinary human desire for parenting is suspect. This requirement and assumption ignore what is obvious, namely that the lowest risk parents are those who, of necessity, must take considerable time and planning and effort to have children.

Assisted reproductive treatment involves expensive and often emotionally fraught procedures. People who undertake assisted reproductive treatment do not do so on a whim, but invest considerable time and effort into making their decision, in spite of these hurdles, to become a parent. It is not people who are a risk to children who will be burdened by this clause. Liberty believes the requirement of a police check without cause is not only a discriminatory and unjustified limitation on the right to privacy and reputation, but is a waste of resources based on nothing more than prejudiced assumptions about same-sex couples.

### **2. Embryos and human rights under the Charter**

Embryos do not have human rights as they are not persons. An embryo, like a fetus, is only a potential person, and unlike the mother and father (or the originators of the egg and sperm) cannot assert rights under any international or national human rights instruments.

This does not mean an embryo is devoid of legal protection. That legal protection is derived, however, from the wishes of those who contributed the gametes and created the embryo. An embryo should not be disposed of, for example, without considering the wishes of the donors. Disposal must be undertaken according to established legal requirements; this is not because the embryo has human rights but

because disposal must be done in a way that takes into account the human rights of the gamete donors.

### **3. Rights of children to information**

The VLRC report raised the issue of information about donors. There is a problem regarding the gap in information available to children between the years of 1988 and 1998. The current law limits the rights of children conceived by donor insemination in those years to information about their identity. In terms of section 7 it seems clear that the importance of the child's right to an identity<sup>5</sup> is such that only grave concerns could justify its limitation, and the expectation of anonymity does not suffice.

Liberty Victoria considers that a further amendment will be required to remove this unjustifiable limitation on the human rights of the affected children.

### **4. Acknowledging who is, in fact, a parent**

Liberty considers it unfortunate that the Bill does not respect the fact that in some cases a child may come into the world with more than two people who intend to fulfil the roles and responsibilities of parent, and indeed who do so. In such cases the child's birth certificate should record those who are, in fact, its parents, even though they are three or four.

This Bill is about recognizing and respecting the realities of different family structures, so it is particularly illogical to impose arbitrary limits on family structure in this context. This amounts to a limitation on the human rights of the people who wish to be, and will be, parents, and of the child, without any justification offered, and for which Liberty cannot discern any justification that could satisfy s7. It will therefore need to be revisited, and amended, in due course.

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<sup>5</sup> While not explicit in the Charter, this right derives from several charter rights, and the international jurisprudence. See the discussion in the previously mentioned VLRC Occasional Paper by John Tobin, pp 35 *et seq.*