

SUBMISSION TO THE SCRUTINY OF ACTS AND REGULATIONS COMMITTEE
RE THE ASSISTED REPRODUCTIVE TREATMENT BILL 2008

The **Victorian Charter of Human Rights and Responsibilities Act 2006** recognises that "*all people are born free and equal in dignity and rights*", yet Victoria is in the process of implementing an **Assisted Reproductive Treatment Bill 2008** by which the people conceived through the use of donor gametes and surrogacy will effectively be afforded less human dignity, equality and freedom than their conventionally conceived peers. Much consideration has been given to the reproductive desires of the adults, in whose interests this Bill is intended, but there is clearly little understanding of the consequences of donor assisted conception on the people deliberately created through reproductive technologies, or how those consequences might negatively impact on their well-being by impeding their development as autonomous people. In attempting to end a perceived discrimination against single women and non-heterosexual couples, this Bill will cause actual discrimination for the individuals resulting from the use of donor gametes. Their mode of State endorsed conception will result in breaches of their human rights, for which the Charter of Human Rights and Responsibilities Act was enacted to prevent.

Section 17 of the **Victorian Charter of Human Rights and Responsibilities Act 2006** states:

17 Protection of families and children

1. Families are the fundamental group unit of society and are entitled to be protected by society and the State.
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.

The **International Covenant on Civil and Political Rights (ICCPR)** upon which the **Victorian Charter of Human Rights and Responsibilities Act 2006 (VCHRR)** is based, explores the protection of families and children more fully and states:

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

It is evident that under **ICCPR**, States Parties clearly have a duty to protect the family, once formed and in existence, and that States Parties have no right to interfere in consenting adult relationships which can, by their nature, lead to the “founding” of a family. **ICCPR** does not imply that States Parties have a mandatory or statutory duty under the banner of Human Rights to artificially assist in the founding of families, or to provide or endorse facilities which lead to the deliberate creation of human beings, particularly if that created person is to suffer discrimination as a direct result of their mode of conception. While there has long been an almost universal awareness of, and empathy for, the heartache caused to heterosexual couples as a result of their inability to conceive, leading to a belief that clinical infertility is worthy of a cure, the pain of involuntary childlessness amongst those who are deemed “socially infertile” as a result of personal lifestyle choices, is currently being promoted as equally deserving of redress. Marriage is clearly indicated in **Article 23** of **ICCPR** as a central tenant and underpinning factor for the recognition of “the family” but the **Assisted Reproductive Treatment Bill 2008** seeks to “*recognise the realities of Victorian families and reflect new technologies*” by endorsing the movement amongst some elements of society, to deconstruct the traditional view of “family”, in order that it should include redefined concepts of gender, infertility and parenting. To this end it seeks to remove the current statutory requirement that women be married or be in a de facto relationship with a male, in order to access ART treatment in Victoria, despite marriage, (or at least a sexual union) between a man and a woman, being more generally, even universally, perceived as the foundation of a family. Indeed, in the High Court of Australia, in *Cattanach v Melchior* (2003) 215 CLR 1 'Wrongful Birth' Case, Justice Heydon ruled on the fundamental assumptions of the law relating to parents and children,

"It is a fundamental assumption underlying many rules of the common law and many statutory provisions that, in general, where the interests of children collide with other interests, the interests of the children prevail. That parents have a duty of the highest order to advance the interests of the children; that those interests are best advanced by nurture in stable marriages..."

Biologically speaking, regardless of current day assertions that the family is merely a social construct, a child cannot be created without genetic input from a man and a woman. By tradition, in almost every culture the man who contributes his genes in the conception of a child is accorded the title of “father” and the woman who similarly contributes her genes is accorded the title of “mother” and these two people are jointly known as the child’s “parents”. Every child who is born has the expectation of having two such people as the basis for their existence. To deny, or diminish the existence of these two primary people in the life of any child would be a breach of that child’s human rights.

Article 23 of **ICCPR** makes it clear that the children of a “family” are directly linked to the adults who “found” the family and that human reproduction, rather than the medically arranged application of unrelated gametes, or the legal assignment of parenthood, forms a unique bond between people which is an inherent right to be afforded protection by States Parties. It is a fact of life that other family arrangements, incorporating numerous variations of biologically and non-biologically related people living together, exist and require protection in order for the individuals involved to enjoy the same rights and freedoms as others. However, there is no onus on States Parties to medically contrive families by providing adults with the artificial means to produce children who are not the biological result of a pair bond between them and in particular there is no onus to create families which deviate from the universally accepted norm on which human rights have been founded.

The **United Nation Convention on the Rights of the Child (CRC)** is intended to apply to all children, without exception and the States Parties have both an obligation under **Article 2** to protect the child from all forms of discrimination and to take positive action to promote their rights. This is partly mirrored in

Section 17.2 of the **VCHRR**, which gives protection to children from discrimination but is less specific about the need for positive action to promote those rights. Under **Article 3.1 of CRC** it is asserted that “*the best interests of the child shall be a primary consideration*” while in **Article 3.2** it draws attention to the need for States Parties to provide adequate care for the child when parents, or others charged with that responsibility, fail to do so:

Article 3.2 CRC states:

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

The biological nature of parentage is implicit in this regulation, as the specific mention of “*legal guardians, or other individuals*” being secondary in position, is an indication that those with a legal or social relationship to the child are appointed to that position, or have it bestowed on them by the State, rather than arriving at that status through the process of natural human reproduction.

Article 7 of CRC sets out the rights pertaining to a child from their moment of birth onwards:

1. The child shall be registered immediately after birth and shall have the right 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.

Given that the “parents” of a child are the male and female people whose distinct DNA has been combined through the process of conception, leading to the birth, any donor assisted reproductive procedure approved by States Parties, which automatically reassigns a child from the care of one or both of these people, would be in breach of that child’s human rights. To provide a child with a birth certificate which deliberately eliminated the existence of one or both of its biological parents, would set that child apart from its peers and be discriminatory, particularly as the child might not be made aware of the discrepancy. Whilst the donor conceived children of single women and non-heterosexual couples have reason to be aware that one of their biological parents is missing from their lives, and will almost certainly be given some awareness of their donor conceived status, it is known from published studies, that up to 90% of the children born to married or cohabiting heterosexual couples will not be told of their donor status. Such deception can lead to devastating consequences for their psychological well-being and personal development.

Article 8 of CRC makes the preservation of a child’s identity a State obligation:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

Providing a register of gamete donors to which a donor conceived child may apply on reaching adulthood, (or even, as proposed, at a time of sufficient maturity agreed by the authorities) in order to enable him or her to better understand their origins and personal identity and to make contact, if wished, with their

biological parent/s and wider “*family relations*” is not consistent with the proscribed need for “*speedily re-establishing his or her identity*” which is mandated by the Charter. Furthermore, the withholding of this information can be seen to be in the best interests of the adults who commissioned the donor conceived person, rather than fulfilling the “*primary consideration*” of the best interests of the child as asserted in **Article 3.1**.

In attempting to “*remove existing anomalies and inconsistencies*” in the **Assisted Reproductive Treatment Bill 2008** for the commissioning adults who are seeking to establish a pregnancy, the proposals do nothing to ameliorate the anomalies and inconsistencies which already exist for the children who are created through these procedures. There is a clear disparity in personal circumstances between donor conceived children born to single women and same-sex-couples, and those born to heterosexual couples, who at least have the benefit of both a visible father and a mother, even if either the father or mother (or both, in the event of the use of donor embryos) is not genetically related to them. The second group of children are able to experience what may be seen as the human rights norm, rather than being born into a family situation with only one parent, or two parents of the same sex, which regardless of the quality of the parenting care that such arrangements can provide, is still not consistent with the premise that all children have “*as far as possible, the right to know and be cared for by his or her parents.*”

Article 9 of CRC deals with the separation of children from their parents and specifies that children have a right to live with their parents unless this is deemed to be incompatible with the child’s best interests. Furthermore, once it has been established that separation is in the best interests of the child it is incumbent upon States Parties to ensure that the child may continue to have parental contact. **Article 9.3** states:

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain contact with both parents on a regular basis, except if it is contrary to the child’s best interests.

It is difficult to see how the aims of this article can be honored in respect of donor conceived people who are deliberately separated, before conception and birth, from one or both of their biological parents. The specific reference to “*contact*” cannot be met by providing donor conceived people with small quantities of non-identifying information about the person their legal parents regard as merely a gamete donor, but who is in reality a living, breathing, biologically related family member to the donor conceived person. Furthermore, proposals in the **Assisted Reproductive Treatment Bill 2008** to allow posthumous use of donor gametes cannot possibly meet the demands of **Article 9.3**, if one of the biological parents is already dead at the time of conception. When a parent-to-be dies post conception but prior to the birth of his or her child, it is considered by society to be a life long tragedy for the child, but when an adult requests to use the gametes of a dead partner to enable a posthumous conception this is to be granted State endorsed support in Victoria in order to “*recognise the realities of Victorian families and reflect new technologies*”. It seems that “*reality*” has little to do with the human rights of children and more to do with experimental social engineering and progressive ideologies.

Article 26 of ICCPR sets out a framework for equality in human rights:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal

and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This is echoed in the **Victorian Charter of Human Rights and Responsibilities Act 2006**, which set out to recognize that "*all people are born free and equal in dignity and rights*". It is unfortunate that those who are born as a direct result of State's Parties endorsement in donor assisted reproduction do not start their lives on an even platform with others and continue to be disadvantaged throughout their lifetime.

In terms of "dignity", people conceived through donor gametes enjoy less human dignity than their peers. The act of deliberate creation by commissioning adults, to assuage their personal need (or as they might describe it, a "reproductive human right") sets the donor conceived person apart:

"...we do not determine what our offspring are; we receive them as a gift, as beings who are equal with us at a fundamental level by contrast, that which we make is different from us. It is an artifact, alien from our humanity and is fundamentally at our disposal, a product of our will rather than our being." [David Jones et al., submitted to UK House of Lords Select Committee on Stem Cell Research, 2001]

There can be no dignity in growing up not knowing your father's name, or anything substantial about him except that he once masturbated at a clinic and collected the ejaculate in a pot. Nobody seeks to view their ancestral home as a specimen jar.

In terms of "equality", people conceived through donor gametes do not enjoy the same rights under **CRC** as their peers. They are systematically deprived of knowing and being cared for by both of their biological parents (**Article 7**) and prevented from making contact with their biological donor (**Article 9**) or of enjoying the nurturing company of their wider family members (**Article 8**). Donor conceived people do not even have parity with adopted people, whose interests are specifically defined as paramount (**Article 21**) and are only separated from their biological parents and families as a last resort. Adoptees are at least afforded the right to an original birth certificate recording the names of their biological parents, unlike the donor conceived who are deliberately deprived of some elements of their identity (**Article 8**) through the omission of details of their full biological parentage on their birth certificates. The donor gamete recruitment, selection and registration process prior to their medically assisted creation pays scant respect to enabling donor conceived people to experience the same religion, politics, political or other opinion, social origin, property, status, cultural and ancestral values as their donor parent and his associated kinfolk. They are not actively protected from all forms of discrimination (**Article 2**) and far from having their best interests served (**Article 3**), their needs and rights are routinely treated as being of secondary importance to those of the adults who commission them, however well meaning those adults might be in their intentions to provide a loving and supportive upbringing. When commissioning parents know little about the gamete donor and his or her extended family, they are in no position to exercise their responsibility to give appropriate direction and guidance to the donor conceived person (**Article 5**) and even efforts by licensed clinics to ensure that a gamete donor is in good health prior to the use of his or her genetic material, is of little value (**Article 24**) if medical information about the donor and his other family members is not regularly updated. It is difficult to see how States Parties can endorse donor assisted reproduction for any adults, of any sexual orientation, whether married, single or living together in any recognizably sustainable manner, whilst upholding and implementing the rights contained in the **CRC (Article 4)**.

In terms of "freedom", a donor conceived person does not choose to be conceived by assisted reproductive technology but as a direct result of the freedom of choice of the adults who commissioned them they are

unable to enjoy all the uncomplicated nurturing structures and relationships that flow from being part of a traditional, biologically created family. The decades of secrecy which have prevailed in relation to donor conception practice has meant that little research has been conducted to establish how such medically constructed families, and most importantly the created individuals, have been affected. Amongst the donor conceived adults who grew up with heterosexual parents it has been reported that many experienced varying levels of family dysfunction, with miss-matched temperaments and unequal relationships causing tensions. For those who were not made aware of their donor status during childhood, identity confusion, genealogical bewilderment and a general sense of sense of unease, or not “fitting in” with other family members has been common place. Those who were informed of their donor status at an early age were less affected by the complications of living with undisclosed secrets but were left to ponder on the identity of their donor parent and to concern themselves with questions about his motivation, his wider family, his inheritable illnesses and the potential impossibility of ever establishing a meaningful relationship with him. Particular interest has been shown in the number of legitimate and donor half siblings that a donor conceived person might have, perhaps even living in their near vicinity. This has led to some young adult donor offspring having to consider the implications of unwitting incest.

It is to be hoped that when the **Assisted Reproductive Treatment Bill 2008** is scrutinized for it’s compliance with other acts and regulations, the Committee will bear in mind that they have a fundamental responsibility to the people who will be created as a result of the Bill. Reproductive rights must respect others, even those who are not yet born and especially if the rights of one generation are likely to impinge on those of another. Assisted conception procedures like IVF and ICSI which enable heterosexual couples to overcome clinical infertility and create a child from their own gametes *is* in compliance with human rights, provided that the resulting child is not at greater risk of long term health implications as a result of it’s mode of conception. Donor assisted conception, however, brings no benefits to the people it creates. It creates them in a manner which breaches their human rights. Its long term consequences have brought emotional pain to thousands of people the world over, yet their voices are rarely heard above the clamor of those who desire to have children by assisted means.

For reasons which I have set out above the **Assisted Reproductive Treatment Bill 2008 is inconsistent with the human rights set out in the Victorian Charter of Human Rights and Responsibilities Act 2006, the International Covenant on Civil and Political Rights and the United Nation Convention on the Rights of the Child.**

Christine Whipp

24th October 2008