Current Issues Brief No. 5, 2008

Assisted Reproductive Treatment Bill 2008


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Research Officer
December 2008

This research paper is part of a series of papers produced by the Library’s Research Service. D-Briefs are intended to provide an overview of upcoming bills and topics of interest to Members of Parliament.
NB: Readers should be aware that this paper was prepared prior to the passage of the Assisted Reproductive Treatment Bill 2008 through the Victorian Parliament. It was passed by the Legislative Council on 4 December 2008 with amendments, which were considered and passed by the Legislative Assembly that same day. The Act was assented to on 11 December 2008 (Act no. 76/00). Readers interested in the Act as passed should visit the Victorian Legislation and Parliamentary Documents website at http://www.dms.dpc.vic.gov.au.

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**Glossary of Key Terms**

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<tr>
<td>Assisted Reproductive Treatment</td>
<td>The Victorian Law Reform Commission defines assisted reproductive treatment as procedures that are used to help a person conceive a child when conception through heterosexual intercourse is impossible or difficult, or carries a risk that a disease or genetic abnormality may be transferred to the child. In other literature and legislation, the term ‘treatment’ may be supplanted by the term ‘technology’. It is important to note that the Victorian Bill does not include artificial insemination in the definition of assisted reproductive treatment.</td>
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<td>Artificial Insemination</td>
<td>Where sperm from a woman’s partner or a donor is injected into the woman’s uterus</td>
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<tr>
<td>Gamete</td>
<td>A sperm or an oocyte</td>
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<tr>
<td>Infertility</td>
<td>An inability to conceive after 12 months of regular intercourse without contraception</td>
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<tr>
<td>In-vitro Fertilisation</td>
<td>Fertilisation of an egg in a test tube (in-vitro)</td>
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<tr>
<td>Oocyte</td>
<td>An egg cell</td>
</tr>
<tr>
<td>Donor</td>
<td>The person who donates gametes (sperm or eggs)</td>
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<td>Surrogacy</td>
<td>A woman who is, or is to become, pregnant agrees to permanently surrender the child to another person or couple who will be the child’s parent or parents.</td>
</tr>
<tr>
<td>Altruistic Surrogacy</td>
<td>Unpaid; currently the only kind of surrogacy permitted in some Australian jurisdictions. Reimbursement of the surrogate’s costs may be allowed in some jurisdictions.</td>
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<tr>
<td>Commercial Surrogacy</td>
<td>Paid; a commercial surrogacy contract can involve legal, medical and administrative intermediaries, and can cost tens of thousands of dollars</td>
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<tr>
<td>Gestational Surrogacy</td>
<td>Embryo from couple is implanted into a surrogate mother; otherwise known as ‘full’ surrogacy</td>
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2 ibid., p. 160.
<table>
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<tr>
<td>Traditional Surrogacy</td>
<td>Artificial insemination of surrogate with sperm from the male partner in commissioning couple. Also known as ‘partial surrogacy’; because the woman is also ‘partially’ the mother(^3)</td>
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<tr>
<td>Birth parent</td>
<td>The person who conceived the child and saw the pregnancy through to birth(^4)</td>
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<tr>
<td>Non-birth mother</td>
<td>The female partner of a woman who bore the child. The non-birth mother is a social parent(^5)</td>
</tr>
<tr>
<td>Social parent</td>
<td>Not biologically related; may include step-parents, foster parents or same sex partners of a biological parent</td>
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<tr>
<td>Pre-Implantation Genetic Diagnosis</td>
<td>Involves the testing of an embryo for genetic diseases or, in some cases, gender</td>
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\(^5\) ibid., p. vii.
Introduction

In September 2008, the Victorian Government introduced into Parliament a Bill for the regulation of assisted reproductive treatment (ART), artificial insemination and surrogacy arrangements. The Assisted Reproductive Treatment Bill 2008 (‘the Bill’) repeals the Infertility Treatment Act 1995, and makes consequential amendments to the Status of Children Act 1974 with regard to legal parentage, as well as other relevant Victorian legislation.

The Bill is based on recommendations made by the Victorian Law Reform Commission (‘the Commission’) in its 2007 report, Assisted Reproductive Technology and Adoption. The Commission was tasked with examining the feasibility and desirability of changes to the Infertility Treatment Act and the Adoption Act 1984, and other relevant Victorian legislation, with regard to the eligibility criteria for ART and adoption, the regulation of surrogacy and issues surrounding parental recognition. The Commission’s final report was tabled in Parliament in June 2007, and many of the recommendations are reflected in this Bill.

The Bill defines ART as a ‘medical treatment or procedure that procures, or attempts to procure, pregnancy in a woman by means other than sexual intercourse or artificial insemination’. It is important to note, however, that the broader term ‘treatment procedure’ is used in the Bill to refer to both ART and artificial insemination. This term shall therefore be used in Section 1 of this paper.

Elsewhere in this paper, the term ART shall be used to refer to all forms of reproductive treatment and technology, in accordance with the definition contained in the Commission’s report and wider literature on the subject.6

1. The Bill

The Attorney-General Rob Hulls introduced the Bill to the House on 9 September 2008. The Government announced that it would allow a conscience vote on the Bill.7

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1.1 Second reading speech

In the second reading speech of 10 September 2008, the Attorney-General Rob Hulls outlined the history of reproductive treatment legislation in Victoria. He stated that current Victorian law has ‘not kept pace with rapid developments in reproductive technology’.\(^8\) Advances in treatment procedures and a more pluralistic society have created new challenges and ‘a new stage in the development of legislation’; he specifically noted the inconsistency of Victorian law with the *Sex Discrimination Act 1984* (Cth), as found by the Federal Court in 2001.\(^9\)

The Attorney-General detailed the Government’s reference to the Commission in 2002, and discussed the limitations of current Victorian legislation as identified in the Commission’s final report. He noted that some Victorians can only access reproductive technology interstate or overseas, and those who choose to self-inseminate go without the benefits of clinical checks and counselling. The legal status of donors is in some cases unclear, and the current laws ‘fail to recognise as parents all people who have children in their care’, including commissioning parents and same sex social parents.\(^10\)

The Attorney-General told the House that the Bill seeks to ‘create a legislative framework that provides access and security’ for Victorians who require treatment procedures to create a family.\(^11\) He argued that allowing equal access to treatment procedures and legally recognising social parenting arrangements will ‘strengthen families and provide equal protections for all Victorian children’, and made note of the Commission’s findings:

> … parents’ sexuality or marital status are not key determinants of children’s best interests. Rather, it is the quality of relationships and processes within families that determine outcomes for children.\(^12\)

The Attorney-General told the House that the title of the Bill reflects ‘the change in focus from treatment of infertility to a broader purpose of regulating assisted human fertilisation procedures’.\(^13\)

1.2 Purpose and Guiding Principles

The Bill is intended to regulate ART and artificial insemination, to make provisions in regards to surrogacy arrangements, and to make consequential amendments to relevant legislation. Part 1, Section 1 of the Bill outlines eight specific purposes:

- To regulate the use of assisted reproductive treatment and artificial insemination procedures (other than self-insemination);
- To regulate access to information about treatment procedures;
- To promote research into the incidence, causes and prevention of infertility;

\(^8\) Victoria, Legislative Assembly (2008) *Debates*, Bk. 12, p. 3441.  
\(^9\) ibid.  
\(^10\) ibid., p. 3442.  
\(^11\) ibid.  
\(^12\) ibid., pp. 3458, 3441.  
\(^13\) ibid., p. 3442.
To make provision with respect to surrogacy arrangements;
To establish the Victorian Assisted Reproductive Treatment Authority (VARTA);
To provide for the keeping of the Central Register and the Voluntary Register by the Registrar of Births, Deaths and Marriages;
To repeal the Infertility Treatment Act 1995; and

In keeping with the Commission’s recommendations, which are detailed in Section 2 of this paper, the Bill sets out guiding principles for the administration of the Act and the activities it regulates. They essentially promote non-discrimination and the welfare of those involved in treatment procedures, and are outlined in Part 1, Section 5:

- The welfare and interests of persons born or to be born as a result of treatment procedures are paramount;
- At no time should the use of treatment procedures be for the purpose of exploiting, in trade or otherwise, the reproductive capabilities of men and women, or children born as a result of treatment procedures;
- Children born as a result of the use of donated gametes have a right to information about their genetic parents;
- The health and wellbeing of persons undergoing treatment procedures must be protected at all times; and
- Persons seeking to undergo treatment procedures must not be discriminated against on the basis of their sexual orientation, marital status, race or religion.

1.3 Key Definitions

Definitions are contained in Section 3. Most notable are the distinctions between ‘assisted reproductive treatment’, ‘artificial insemination’ and ‘self-insemination’, which are essentially based upon the particular gametes being used and who is performing the procedure.

- Assisted reproductive treatment is defined as a medical procedure or treatment that ‘procures or attempts to procure pregnancy in a woman by means other than sexual intercourse or artificial insemination’.
- Artificial insemination is a procedure performed by a doctor, and involves the transfer of sperm into a woman.\(^\text{14}\)
- Self-insemination is ‘artificial insemination not carried out by a doctor’.

1.4 Administrative Bodies

The Bill makes a number of changes to the administration and regulation of treatment procedures and information registers.

**Victorian Assisted Reproductive Treatment Authority**

Under Part 10 of the Bill, the Infertility Treatment Authority (ITA) is renamed the Victorian Assisted Reproductive Treatment Authority (VARTA). According to the

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\(^\text{14}\) See further: Assisted Reproductive Treatment Bill 2008, Section 8.
Attorney-General, the new body ‘will take on a more focused role that expands its responsibility for community consultation and community education on matters relevant to assisted reproductive treatments’. VARTA will continue the role of the ITA to regulate the import or export of donated gametes, or embryos formed from donated gametes. VARTA will also promote research into infertility, and develop resources that support parents of donor conceived children to tell their offspring about their genetic origins.

**Patient Review Panel**
Part 9 of the Bill also provides for the establishment of a Patient Review Panel, which will be a state wide panel consisting of five members appointed by the Minister for Health. At least one member will have expertise in the area of child protection. The Panel will examine:

- Applications for surrogacy arrangements;
- Applications for posthumous use of gametes;
- Presumptions against treatment;
- Periods of gamete or embryo storage when the time limit is expired or disputed; and
- ART procedures that fall outside standard eligibility requirements (such as the desire to conceive a ‘saviour sibling’ in order ‘to create compatible tissue for an existing child or relative who is seriously ill’).

The Panel’s decisions will be justified in writing within 14 days, and are reviewable by the Victorian Civil and Administrative Tribunal (VCAT).

**Registered ART providers**
The Bill also reforms the administration and regulation of registered ART providers. The Attorney-General stated in the second reading speech that ART in Victoria is ‘highly regulated’ and the government wishes to reduce ‘regulatory duplication’.

Under Part 8 of the Bill, ART providers are required to be accredited by the Reproductive Technology Accreditation Committee of the Fertility Society of Australia (RTAC). They are then required to submit evidence of this accreditation to VARTA to attain ‘deemed registration’. Should the ART provider lose RTAC accreditation, then their deemed registration will cease. The Attorney-General stated that this type of registration exists in New South Wales legislation, and is consistent with other Australian jurisdictions. He also stated that VARTA will have the power to impose conditions upon a provider’s registration or suspend the provider’s operation ‘where it is of the opinion that there is an overriding public interest to do so’.

**Records, registers and access to information**
In the second reading speech, the Attorney-General detailed the history of reproductive treatment records management in Victoria, including the central and voluntary registers that have stored information for donors, recipients and their offspring since the 1980s. Part 6 and Part 15 of the Bill reform the way this information is managed and accessed.

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16 ibid., p. 3454.
17 ibid.
Part 15 transfers the management of central and voluntary registers to the Registrar of Births, Deaths and Marriages by inserting relevant provisions into the Births, Deaths and Marriages Registration Act. Part 6 ensures that registered ART providers and doctors performing artificial insemination must keep registers of prescribed information, as detailed under Section 49, and submit this to the Registrar annually. Part 6, Section 59 also allows donor-conceived children to access information about the donor before the age of 18, provided they have received counselling and their parent or guardian has given consent.

1.5 Regulation of Treatment Procedures

Part 2 of the Bill contains the provisions for treatment procedures, as outlined below.

Self-insemination
Self-insemination of a woman, whether performed by herself or with assistance from her partner, a friend or relative, is not subject to legal penalty under Section 9.18

Eligibility for treatment
Section 10(2) of the Bill provides that a woman’s inability to get pregnant ‘other than by a treatment procedure’ may be due to her ‘circumstances’. Her eligibility for treatment is not dependent upon her relationship status. The woman must not however, be subject to a ‘presumption against treatment’ (this concept shall be discussed later in this section). The remaining eligibility criteria remain similar to those in the Infertility Treatment Act, and include the woman's inability to carry a pregnancy or give birth without a treatment procedure, or that the woman is at risk of transferring a genetic abnormality or genetic disease to a child conceived without the use of a treatment procedure. This includes a genetic abnormality or genetic disease carried by the woman’s partner. Under Section 10(3), the treating doctor must confirm this risk with a geneticist or a second doctor with specialist qualifications in human genetics.

Sections 11 to 14 of the Bill provide for a number of pre-requisite assessments of people seeking treatment procedures. These measures are in accord with the Bill’s guiding principles, as contained in Section 5, which aim to protect the welfare of treatment recipients and their unborn children. Firstly, Section 11 of the Bill makes provisions for the woman and her partner (if any) to provide consent to undergo a particular treatment procedure, and to undergo a child protection order check. Section 12 provides for this check, which involves finding out whether a child protection order has ever been made to remove a child from the custody of the woman and her partner (if any) and, if so, the details of that order. Section 13 provides that before a woman may undergo a treatment procedure, she and her partner (if any) must receive counselling from a counsellor ‘who provides services on behalf of a registered ART provider’.

18 Under Section 7 of the current legislation, artificial insemination by a person other than a doctor (who is approved to carry out donor insemination) attracts a criminal penalty. The Commission noted that while this does not indicate that those who self-inseminate will attract the penalty, ‘the qualification is not beyond doubt’. In addition, the Commission stated that ‘on a strict interpretation of Section 7 the partner of a woman who assists her to inseminate is guilty of a criminal offence’. See further: Victorian Law Reform Commission (2007) op. cit., p. 77.
Finally, Section 14 provides for a ‘presumption against treatment’. This may eventuate through the findings of either the child protection order check, or through a criminal record check, which the woman and her partner (if any) are also required to undergo. If the criminal record check finds that charges have been proven against either of them for a sexual offence, or that either of them has been convicted of a violent offence, then a presumption against treatment will apply to the woman. While her partner (if any) may be the source of the presumption, it applies to the woman (unless the partner is also undergoing a treatment procedure).

Under Section 15, a person can apply to the Patient Review Panel for a review of the presumption against treatment. They may also apply if they are considered ineligible for treatment under the criteria outlined in Section 10(2). The Patient Review Panel must have regard to the guiding principles of the Bill, and whether the treatment procedure is ‘for a therapeutic goal [and] is consistent with the best interests of a child who would be born as a result’.

**Donor requirements**

Divisions 3 and 4 outline a number of requirements for gamete donors, including that they undertake counselling and provide consent to the use of their gametes in specified procedures. Most notably, gamete donors are now required to specify the number of women on whom treatment procedures using their gametes (or embryos created from their gametes) may be carried out. Under Section 29, it is an offence for an ART provider to carry out a treatment procedure using a donor’s gametes or an embryo created by their gametes if that provider is aware that the procedure will result in more than ten women having children by that donor. As the Attorney-General told the House, this includes the donor and any current or former partner of the donor, and the provision ‘aims to limit the pool of people who are closely related to each other’ thereby aiming to protect the wellbeing of donor-conceived persons.19

Under Section 19, donors must also provide prescribed information to be recorded in the clinic’s register and the Central Register, and must be advised as to the rights of any child born as a result of the donation. These provisions are in keeping with the Bill’s guiding principles: specifically, the emphasis on the wellbeing of persons involved in treatment procedures and any resultant children, and the rights of donor-conceived children to access information about their genetic origins.

**Use and storage of gametes**

Part 3 of the Bill outlines offences relating to the use and storage of gametes, embryos and other matters. Most notable are the provisions regarding gametes produced by children. As the Attorney-General stated in the second reading speech, the Bill provides that gametes may be obtained from a child if a doctor certifies that that child may become infertile before reaching adulthood.20 These gametes must not be used in any treatment procedure other than one involving the child themselves when they become an adult.

Section 33 provides that a registered ART provider cannot store an embryo for more than five years, unless both gamete donors consent to an extension of that period (not

19 Victoria, Legislative Assembly (2008) op. cit., p. 3452.
20 ibid.
more than a further five years). The Patient Review Panel may approve an additional extension past this date.

1.6 Regulation of Surrogacy

Part 4 of the Bill provides for the regulation of altruistic surrogacy, a practice which has limited status and interpretation under the Infertility Treatment Act.

Eligibility

Under current Victorian legislation surrogates must be unlikely to become pregnant. The Bill transfers this requirement onto the commissioning parent or couple. Under Section 40, a doctor must be satisfied that:

- ‘in the circumstances, the commissioning parent is unlikely to become pregnant, carry a pregnancy or give birth; or
- if the commissioning parent is a woman, the woman is likely to place her life or health, or that of the baby, at risk if she becomes pregnant, carries a pregnancy or gives birth’.

As the Attorney-General stated in the second reading speech, surrogacy ‘will be available regardless of a person’s marital or relationship status or sexual orientation’.21

Surrogacy applications will be decided upon by the Patient Review Panel. Under Section 39, the Panel’s approval is required before a registered ART provider may carry out a treatment procedure on a woman in relation to a surrogacy arrangement.

The Bill also outlines eligibility criteria for the surrogate herself. Under Section 40(1)(b), the surrogate mother must be at least 25 years old. As the Attorney-General told the House, this minimum age restriction has been included ‘to remove the capacity for very young women to be approached to participate in such an arrangement and to reduce the risk of coercion’.22

All parties to the surrogacy arrangement must also undergo a criminal records check and a child protection order check under Section 42.

Counselling and legal advice

Under Section 40, the surrogate, her partner (if any), and the commissioning parent must also undergo counselling and receive relevant legal advice to ensure:

- That the parties understand the personal and legal consequences of the surrogacy arrangement;
- That the parties are prepared for the consequences if the arrangement does not proceed in accordance with the parties’ intentions; and
- That the parties are able to make informed decisions about proceeding with the arrangement.

21 ibid., p. 3453.
22 ibid.
The counsellor must provide services on behalf of a registered ART provider. Section 43 specifies the particular issues that the counselling and legal advice should address, and under Section 40(2), the counsellor must provide a report to the Patient Review Panel.

**Surrogacy costs**

While the Bill maintains the current prohibition of commercial surrogacy arrangements, Section 44 does provide for the reimbursement of a surrogate mother for the costs incurred ‘as a direct consequence of entering into the surrogacy arrangement’. As the Explanatory Memorandum states, this may include medical expenses or ‘lost earnings not otherwise reimbursed by leave entitlement’. The Attorney-General told the House that these costs will be prescribed in regulations.23 Under Section 44(3), should the surrogacy arrangement provide for ‘a matter other than the reimbursement of costs actually incurred’ the arrangement will become void and unenforceable.

### 1.7 Posthumous Use of Gametes

As the Attorney-General noted in the second reading speech, current Victorian law is inconsistent in relation to the posthumous use of gametes. The Bill seeks to clarify this use under Part 5, Sections 46 to 48. A registered ART provider may use a deceased person’s gametes, or an embryo created from such, in a treatment procedure if:

- The treatment procedure is carried out on the deceased person’s partner, or (if the deceased is a woman), in a commissioned surrogacy arrangement;
- The deceased person provided written consent prior to their death agreeing to the use of their gametes, or the use of an embryo created from their gametes in a specified treatment procedure;
- The Patient Review Panel has approved the use of the gametes or embryo; and
- The person who is undergoing the treatment has received counselling, as provided for in Section 48.

### 1.8 Amendments to the Status of Children Act 1974

Part 14 of the Bill aims to clarify the status of donor-conceived children by amending the Status of Children Act.

**New definitions**

Part 14, Section 137 inserts new definitions into the Status of Children Act, including the term ‘non-birth mother’.

**Presumption of parentage**

Part 14 applies presumption of parentage to situations in which a child has been born using assisted reproductive treatment or artificial insemination. These may include: a woman who has conceived through a treatment procedure but does not have a male partner; a surrogacy arrangement; and the posthumous use of gametes. Sections 138 to 140 of the Bill amend the relevant sections of the Status of Children Act to

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23 ibid.
substitute ‘a parent’ for ‘a father’, and ‘parentage’ for ‘paternity’. Section 138(3) inserts a new Section 2A into the Status of Children Act which provides that where the name of a parent is entered into the register of births, as maintained under the Births, Deaths and Marriages Registration Act, then a certified copy of that entry will constitute prima facie evidence that that person is a parent of the child.

Repeal of Section 10F and insertion of new Part III

Section 146 of the Bill repeals Section 10F of the Status of Children Act, which set out the statutory presumptions for the status of a child born using donor sperm to a woman without a male partner or without the consent of her husband. Section 10F stated that the sperm donor does not incur any rights or liabilities in respect of the child, however as the Attorney-General noted in the second reading speech, it is ‘silent as to whether he is the child’s father’.

Section 147 of the Bill inserts a new Part III into the Status of Children Act. Under this new Part III, a man whose donated semen was used by a woman without a male partner to conceive a child is presumed for all purposes not to be the father of the child. Under Section 13 of Part III, the woman’s female partner (if any) is presumed for all purposes to be the parent of the child if she lived with the woman as a couple when the woman underwent the procedure, and if she gave consent to the procedure (this consent is presumed but rebuttable). This is regardless of whether the sperm donor is known to the woman or her female partner (if any). The Attorney-General told the House that this presumption of parentage will apply ‘whether or not the woman conceived the child with the assistance of an ART clinic’. While clinic assistance ensures that the woman’s partner signs a consent form, thereby supporting the presumption of parentage, her registration as a parent of the child on the register of births can also be used as evidence of consent.

The Attorney-General told the House that these new provisions ensure that female partners ‘are treated no differently to the male partners of women who give birth using ART for the purpose of Victorian law’. He clarified however, that the presumption of parentage in favour of female partners will not be directly recognised under federal law, particularly the Child Support (Assessment) Act 1989, but that the Standing Committee of Attorneys-General has requested that the Commonwealth consider making a consequential amendment to the Family Law Act 1975 for this purpose. He added that amendments shall be made to other Victorian legislation in subsequent Bills ‘to recognise that children may have two parents of the same sex’.

Surrogacy

The Bill inserts a new Part IV into the Status of Children Act to provide for the status of children born through surrogacy arrangements. It allows for applications to the County or Supreme Court for substitute parentage orders, which will transfer legal parentage from the surrogate mother and her partner (if any) to the commissioning parent(s).

References:
24 ibid., p. 3456.
25 ibid., p. 3455.
26 ibid., p. 3456.
Under Section 22 of Part IV, the court may only make a substitute parentage order if it is satisfied that:

- The order is in the child’s best interests;
- The surrogacy arrangement was commissioned with the assistance of a registered ART provider and approved by the Patient Review Panel;
- That the child was living with the commissioning parents at the time of the application;
- That the surrogate mother and her partner (if any) have not received any material benefit or advantage from the arrangement;
- That the surrogate mother freely consents to the order; and
- Whether the surrogate mother’s partner consents to the order (if they were a party to the arrangement).

Circumstances in which the surrogate mother’s consent, or that of her partner (if any), is not required are detailed under Section 24 of Part IV.

These provisions will apply retrospectively to children born through surrogacy arrangements before the commencement of Part IV. A new birth certificate will be issued to the commissioning parents once the substitute parentage order has been made.

**Status of children born through posthumous use of gametes**

The Bill inserts a new Part V into the Status of Children Act to provide for children born through the posthumous use of gametes. Under Sections 37, 38 and 39 of Part V, a child born as a result of a treatment procedure in which a deceased person’s gametes are used, the deceased person is taken to be the parent only for the purpose of entering their particulars in the register of births. They are not regarded as a parent for any other purpose under Victorian law, including the laws of succession.

Under Section 40 of Part V, a person may make provision for a posthumously conceived child in their will; as the Attorney-General stated in the second reading speech, ‘if no such disposition is made, the child should have no claim to the deceased’s estate’. 27

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27 ibid., p. 3457.

In 2002 the Attorney-General asked the Commission to inquire into the feasibility and desirability of changes to the Infertility Treatment Act and the Adoption Act, as well as other relevant Victorian legislation, to expand eligibility criteria in regards to reproductive treatment. After releasing several papers during the following five years, the Commission’s final report was tabled in Parliament on 7 June 2007.

The Commission made 130 recommendations, based on a number of principles relevant to areas of ART, surrogacy and adoption. These are outlined below, and have been guided by one overarching principle: that the best interests of the child should be paramount.

2.1 ART

The Commission’s principles on ART include:

- The interests of the prospective child are paramount (this includes a child’s right to know their genetic heritage);
- The health and wellbeing of patients must be protected at all times;
- ART should not be used to exploit (commercially or otherwise) the reproductive capacities of men or women, or the resultant child; and
- People seeking treatment cannot be discriminated against on grounds of race, religion, marital status or sexual orientation.

In essence these principles make ethical considerations the chief priority, for the patients and the prospective child. The Commission recommended that these principles be used to guide the administration of the Infertility Treatment Act.

The Commission’s recommendations are concerned with initiatives that put these principles into effect. Key recommendations on several different areas of ART practice are outlined below.

Persons Seeking Treatment

The Commission recommended that ART clinics should establish Clinical Ethics Committees, which could review cases in which there is concern about the welfare of the prospective child. The committee would consist of various health professionals, including someone with experience in child development or psychology, and have the power to refuse treatment to a person or couple. Persons denied treatment would have recourse to appeal through the ITA review panel.28

The Commission also recommended that persons seeking treatment make a statutory declaration regarding their criminal histories (particularly in relation to children and violent offences). The aim here is to ensure that prospective children are not at risk of abuse or neglect. If the declaration contains evidence that gives rise to a presumption against treatment, the clinic must not treat that person or couple without the approval of the ITA review panel.29

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29 ibid., p. 10.
Persons seeking treatment should receive access to counselling and related resources; in particular, this includes sperm and egg donors, women seeking to self-inseminate, and those persons who are wishing to use their deceased partner’s gametes. The Commission recommended counselling as a means of ensuring that patients are fully informed of the future psychological and emotional consequences of their decision, both for themselves and the prospective child.\textsuperscript{30}

**Eligibility for treatment**

In existing Victorian legislation women may only access IVF if they are infertile, including women who are single or in a same sex relationship. The Commission recommended that a woman should not be refused treatment on the grounds that she has ‘no partner or a partner of the same sex’.\textsuperscript{31}

The Commission recommended that a woman who is single or in a same sex relationship should be able to access IVF treatment if she cannot get pregnant “through the circumstances in which she finds herself”. This would be in addition to the existing provisions that make women who are ‘unable to carry a child’ or ‘at risk of transmitting a genetic abnormality’ eligible for IVF.\textsuperscript{32} The concept of ‘marital status’ should therefore be removed from the current Act, and the Act should be amended to recognise that people seeking treatment will be same-sex couples, married, de facto or single.\textsuperscript{33}

**Donation of Gametes**

The Commission made several recommendations regarding the rights of donors and their resultant offspring. Firstly, donors should only be required to provide information relating to medical matters – ‘identifiable risk factors’ – and should understand how that information will be used.\textsuperscript{34} Donors should not be able to specify the ‘qualities or characteristics’ of the recipients of their donation.\textsuperscript{35}

The Commission recommended that the ITA regulate the quarantine period for donated sperm, and that this be reviewed periodically.\textsuperscript{36} The Commission also recommended that neither sperm nor egg donors are to be considered the parents of a resultant child.\textsuperscript{37}

**Export**

If gametes or embryos are to be exported, the ITA must determine whether they will be used in a manner consistent with Victorian legislation.

**Posthumous Gametes**

The Commission recommended guidelines for the use of posthumous gametes. Currently the Infertility Treatment Act legislates on some aspects of posthumous use

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\textsuperscript{30}ibid., p. 8.  
\textsuperscript{31}ibid., p. 67.  
\textsuperscript{32}ibid., p. 10.  
\textsuperscript{33}ibid.  
\textsuperscript{34}ibid., p. 11.  
\textsuperscript{35}ibid.  
\textsuperscript{36}ibid.  
\textsuperscript{37}ibid., p. 13.
but not others. The Commission’s recommendations aim to amend these inconsistencies by addressing various scenarios and practices.

The Commission advised that a person should have expressly consented to the posthumous use of their gametes or embryo(s) in the event of their death. Clinics should record the wishes of clients regarding the posthumous use of their gametes, and should not be allowed to use material from a person they know has died.\(^{38}\)

Prior written consent is required to retrieve gametes from a person posthumously. The proposed Clinical Ethics Committees should consider the consequences for the prospective child each time that a deceased person’s gametes or embryos are being used.\(^{39}\) The surviving partner should receive substantial counselling about the treatment process.\(^{40}\)

A child born using gametes of a deceased person should have that person registered as their parent on the birth certificate, however they are not regarded as the child’s parents for any other purpose under Victorian law, including the laws of succession. Couples considering posthumous use should be counselled as to whether they include the prospective child in their will.\(^{41}\)

### 2.2 Surrogacy

The Commission made several recommendations on surrogacy, which are consistent with the recommendations made regarding ART.

Firstly, a doctor must confirm that a person or couple seeking to commission a surrogacy are, ‘in the circumstances in which they find themselves, unlikely to become pregnant, be able to carry a pregnancy, or give birth’. A commissioning woman may also be ‘likely to place her life or health, or that of the baby, at risk if she becomes pregnant, carries a pregnancy or gives birth’.\(^{42}\) Persons arranging a surrogacy should not be discriminated against on the grounds of marital status or sexual orientation.\(^{43}\)

Practitioners and their associated Clinical Ethics Committees must consider whether a child born through a potential surrogacy arrangement is at risk of abuse or neglect, and can refuse treatment if so. The commissioning parents and surrogate should have recourse for review through the ITA review panel.\(^{44}\) The Commission recommended that ITA approval be required to treat persons with criminal histories of violence or offences against children.\(^{45}\)

Finally, the Commission recommended that a surrogate mother should not be compelled to hand over the child ‘if she cannot bring herself to do so’.\(^{46}\)

\(^{38}\) ibid., p. 11.
\(^{39}\) ibid., p. 12.
\(^{40}\) ibid.
\(^{41}\) ibid.
\(^{42}\) ibid., p. 14.
\(^{43}\) ibid.
\(^{44}\) ibid.
\(^{45}\) ibid.
\(^{46}\) ibid., p. 189.
2.3 Legal Parentage

The Commission’s recommendations on legal parentage concern various aspects of ART, including the status of gamete donors, as well as surrogacy arrangements and adoption.

The Commission made several recommendations regarding the rights of same sex social parents, in the interests of children and eliminating discrimination. These are based on the belief that it is in the interests of children for their families to be recognised under the law. The Commission was informed by 2001 census data which shows that nearly seventeen per cent of lesbian couples and nearly four per cent of gay male couples have a child living with them.47

These recommendations include that female domestic partners of a birth mother be able to register as a co-parent on the child’s birth certificate, and should be presumed for all purposes to be the child’s parent.48 The Registry of Births, Deaths and Marriages should offer a choice between the terms ‘mother’, ‘father’ and ‘parent’ on certificates.49 Amendments should be made to the Births, Deaths and Marriages Registration Act and to other relevant legislation to recognise that some children may have same-sex parents.50

The Commission recommended that the Attorney-General work with the Standing Committee of Attorneys-General and the Family Law Council to seek reforms to the Family Law Act that would recognise non-birth mothers under that Act and under the Child Support (Assessment) Act.51

The Commission recommended that gamete donors should be presumed for all purposes not to be a parent of any child born as a result of their donation. This includes those pregnancies resulting from self-insemination; women who self-inseminate outside the clinic system should be encouraged to enter the known donor’s details on donor registers.52

In regards to surrogacy arrangements, the Commission recommended that the Status of Children Act be amended to allow commissioning parents to apply for substitute parentage orders from the County Court. The Commission detailed various pre-requisites for the making of this order. It also recommended that substitute parentage orders be available to people who have already had a child through a surrogacy arrangement, and a new birth certificate be issued.53

Finally, the Commission recommended that same-sex couples be eligible to adopt children.54 Under section 11 of the Adoption Act, only a man and woman married for more than two years or living together as a de facto couple for two years may adopt a

47 ibid., p. 25.
49 ibid., p. 13.
50 ibid.
51 ibid.
52 ibid.
53 ibid., p. 16.
54 ibid., p. 12.
child.\textsuperscript{55} Given that same sex couples are able to act as short-term and permanent foster carers in Victoria, the Commission concluded that their parallel inability to adopt children in need ‘makes no sense’.\textsuperscript{56}

\textsuperscript{55} Section 11(b) of the Act also makes allowance for couples whose relationship ‘is recognised as a traditional marriage by an Aboriginal community or an Aboriginal group to which they belong’.

3. Victorian Legislation

3.1 ART: Currently

Under the Infertility Treatment Act (‘the Act’), access to ART is only available to women who are medically infertile or at risk of passing on a genetic disease. Originally, these women were also required to be married or in a de facto relationship. As a result of John McBain v State of Victoria & Ors [2000], which shall be detailed later in this section, women are no longer excluded on the basis of marital status; however, women who are single or in a same sex relationship must still be classed as medically infertile to access ART.57

Practitioners are licensed by the ITA, which has produced guidelines on various aspects of ART. The ITA also maintains Central Registers of identifying information for donor offspring, as provided for under the Infertility (Medical Procedures) Act 1984 and the Infertility Treatment Act. In addition, the Infertility Treatment (Amendment) Act 2001 established a Voluntary Register for donors, recipient families, donor offspring and their descendents to ‘share and exchange information’.58

Embryos may be stored for a maximum of five years, while gametes may be stored for up to ten years. In both cases, extensions of storage time may be granted. The Act regulates the import and export of gametes and embryos within Australia; Section 56 makes it an offence to transport gametes or embryos interstate without the written approval of the ITA.59

As discussed earlier, there are inconsistencies within the legislation in relation to the posthumous use of gametes. Section 43 of the Act prohibits the insemination of a woman using gametes of a deceased person. A provision prohibiting the implantation of an embryo created in vitro using a deceased person’s gametes was repealed by amending legislation in 2001.60 Instead, the ITA has guidelines on this practice which involve extensive counselling of the surviving partner.

Notably, the Human Tissue Act 1982 (Vic) allows the retrieval of gametes from a dead person for therapeutic, medical or scientific purposes, if they gave prior consent or if the ‘senior available next of kin’ consents on their behalf (this can include a spouse or domestic partner).61

3.2 ART: Background

In 1982 the Victorian Government established the Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation (‘the Committee’), chaired by Professor Louis Waller of Monash University. The move was prompted by considerable advances in ART technology in Australia, particularly at Monash; indeed, twelve of the first fifteen IVF babies born in the world were from Monash.

58 Victoria, Legislative Assembly (2001) Debates, Bk. 4, p. 761.
60 See further: Infertility Treatment (Amendment) Act 2001 (Vic).
61 Human Tissue Act 1982 (Vic), Section 26(d).
When the Committee was formed in 1982, donor insemination, egg retrieval and experimental in-vitro fertilisation had been practised in Victoria for over a decade, beginning at the Royal Women’s Hospital and the Queen Victoria Medical Centre in the early 1970s.\(^\text{63}\)

The Committee concluded that donor insemination (or Artificial Insemination by Donor – AID) had gained acceptance in the Victorian community. It was not, however, a treatment for infertility per se, but a practice through which ‘infertility is circumvented’. This distinction was essential, because the practice thereby had ‘important social, ethical and legal problems associated with it’.\(^\text{64}\)

In particular, the Committee had a number of recommendations relating to the identity of donors. A child’s ability to know their full biological identity was in the interests of family openness and avoiding incestuous relationships during adulthood; this could be facilitated through a registry maintained by the Health Commission. Further to this, the Committee believed that community awareness programs and an understanding of the causes of infertility would make donor conception more socially acceptable, thereby encouraging parents to tell their children about their genetic origins.\(^\text{65}\)

The Committee also made consequential recommendations concerning access to IVF treatment. While the Committee’s Interim Report of September 1982 expressed the opinion that only married couples should be eligible for IVF, later reports conceded that there was a need to provide for de facto couples under Victorian law.\(^\text{66}\) The concept of women who are single or in a same sex relationship receiving IVF treatment was not discussed.

The Victorian Parliament gave effect to these recommendations in 1984; the *Status of Children (Amendment) Act 1984* gave presumed parental status to the consenting male or female partner in a de facto relationship or marriage in which a child is conceived using ART. The Hon. Joan Kirner, then MLC for Melbourne West Province, told the House that this was ‘the first legislation in the world to recognise the social, as opposed to the genetic mother, as a legal guardian to the child’.\(^\text{67}\)

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\(^{64}\) ‘Report on Donor Gametes in IVF’ (1983) op. cit., p. 10.

\(^{65}\) ibid., pp. 26–29.


The Infertility (Medical Procedures) Act was passed later that year, and was ‘the first attempt in the common law world to regulate the IVF program’. It was repealed by the Infertility Treatment Act, which was fully proclaimed in 1998. The legislation maintained that IVF was to be available for married couples or ‘a woman living with a man in a de facto relationship’.  

This exclusion was nullified in July 2000, when Leesa Meldrum and Dr. John McBain won the right to fertility treatment for single women in the Federal Court. In *John McBain v State of Victoria & Ors*, Justice Sundberg ruled that the Victorian Infertility Treatment Act contradicted Section 22 of the *Sex Discrimination Act 1984* (Cth) by discriminating against women on the grounds of marital status. Thereafter, the Victorian Infertility Treatment Authority gave single women and lesbian couples access to IVF, but – as with women in heterosexual relationships – only if they were clinically infertile. When announcing the latest legislative reforms on 14 December 2007, the Attorney-General made reference to the *McBain* case, stating that Victorian laws ‘are out of date and have been found to breach Federal discrimination laws’.  

The Sundberg ruling elicited a variety of responses. Just four days later the Howard Government announced it would attempt to introduce amendments to the *Sex Discrimination Act 1984* (Cth) which would allow states to specify who could receive ART treatment on the basis of marital status, and therefore circumvent Section 22 of the Act and nullify Justice Sundberg’s ruling. The then Prime Minister John Howard said it was the right of a child to have ‘the reasonable expectation… of the affection and care of both a mother and a father’. Democrats Senator Meg Lees told the 7.30 *Report* that for the Prime Minister to only conceptualise one model of a family was to ‘take us back into the mid-1900s’. Both the Sex Discrimination Amendment Bill (no. 1) 2000 and its 2002 successor ultimately lapsed.  

At the same time, the Australian Catholic Bishops Conference challenged Justice Sundberg’s ruling in the High Court, with the support of various other Christian organisations and the Commonwealth Attorney-General’s Office. The decision was ultimately upheld in April 2002, having been defended by the Human Rights and Equal Opportunity Commission and the Women’s Electoral Lobby.

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74 ibid.  
In Victoria, the then leader of the Opposition, Denis Napthine, responded to Justice Sundberg’s ruling by calling for the Bracks Government to challenge the decision.\(^{76}\) The then Premier told the media that ‘it’s not a matter of my personal opinion’ and that his government would ‘examine the judgment and… take the proper public policy position’.\(^{77}\) Dr George Pell, then Archbishop of Melbourne, called Justice Sundberg’s ruling ‘one more example of the trend… to treat children as commodities’.\(^{78}\) Leesa Meldrum, the single woman at the centre of the case, told the 7.30 Report that ‘I never thought it would be this hard… [T]hey don’t know what it’s like to want a child as much as I do’.\(^{79}\)

### 3.3 Surrogacy: Currently

Commercial surrogacy contracts are illegal under the Infertility Treatment Act, and any kind of surrogacy contract is void and unenforceable.\(^{80}\) The Act does not sanction any kind of reimbursement for a surrogate. Most importantly, Section 20(3)(a) retains the ban on fertile surrogates of the 1984 Act, stating that for a woman to be the recipient of a donor embryo (or a sperm and oocyte) she must be ‘unlikely to become pregnant’ using:

… both the sperm of her husband and an oocyte produced by her, or from an embryo formed from such sperm and such an oocyte.

Through the interpretation of Section 20(30), a woman can only be impregnated with donated gametes or a donated embryo (and therefore act as a surrogate) if she is unlikely to become pregnant otherwise. The Age newspaper has called this ‘a bizarre requirement’, and as the Commission’s report noted, the chance of finding a woman ‘who meets these criteria and who is also willing to act as a surrogate is extremely low’.\(^{81}\)

The same legislation established the ITA, which continues to administer the regulation of ART in Victoria. Those involved in an altruistic surrogacy arrangement are required to notify the ITA, using the ‘Surrogacy Notification Form’, and confirm that the requirements of the Infertility Treatment Act are met.\(^{82}\)

Victorian law does not provide for the realisation of surrogacy contracts and therefore the delivery of a surrogate-born child to commissioning parents, nor does the law allow private adoption, where birth parents directly arrange to place a child with adoptive parents.\(^{83}\) The commissioning parents usually seek custody through the courts. As mentioned earlier, Section 10 of the Status of Children Act states that

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\(^{78}\) ibid.

\(^{79}\) ibid.


where a married woman has undergone donor insemination with the consent of her husband or de facto partner, the gamete donor will be presumed not to be the parent of the resultant child.\(^{84}\) As the National Bioethics Consultative Committee noted in its report on surrogacy in 1990, this automatically works against the interests of commissioning parents.\(^{85}\)

### 3.4 Surrogacy: Background

In 1984 the Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation released its findings on surrogacy in Victoria. It declared that commercial surrogacy arrangements as part of IVF access were ‘completely unacceptable’, on the grounds that the buying and selling of children was ‘inhuman’.\(^{86}\) While the Committee acknowledged that altruistic surrogacy could be of great benefit to infertile couples, it had the potential for serious complications for the surrogate herself, the child, the commissioning parents, and – in the worst case scenario – government welfare services. Cases in Britain and New South Wales of surrogates choosing not to relinquish the child informed these judgements. Ultimately the Committee considered all forms of surrogacy to be the ‘deliberate manufacture of a child for others’, and therefore unable to be ‘in the best interests of the child whose birth is planned’.\(^{87}\)

In a 1983 report on the use of donor gametes in IVF, the Committee recommended that the use of donor embryos be allowed only for those couples who were unlikely to become pregnant by any other means or were at risk of transmitting a genetic disorder.\(^{88}\) This restriction subsequently appeared in the Infertility (Medical Procedures) Act and its successor, the Infertility Treatment Act, and is the reason why only infertile women are able to act as surrogates in Victoria.

Although the Victorian Parliament passed the Infertility (Medical Procedures) Act in October 1984, key sections relating to surrogacy – 11, 12 and 13 – did not come into effect until June 1988, after the first surrogate birth in Australia (see below). Most notably, Section 12(6) banned a female donor from receiving payment for her oocyte, other than for medical and travel expenses incurred. As mentioned earlier, Section 13(3)(d) declared that a woman must only be impregnated with a donated embryo or donated gametes (both sperm and egg) if she was unlikely to become pregnant via any other procedure, ensuring that a surrogate needed to be infertile. Section 30(2) and 30(3) of the Act banned commercial surrogacy and declared altruistic surrogacy arrangements void.\(^{89}\)

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\(^{84}\) *Status of Children Act 1974 (Vic)* Section 10.


\(^{86}\) Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation (1986) ‘Report on the Disposition of Embryos Produced by In Vitro Fertilisation’ in *Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation*, op. cit., p. 52.

\(^{87}\) ibid., pp. 52–54.

\(^{88}\) Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation (1986) ‘Report on Donor Gametes in IVF’ in *Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation*, op. cit., p. 41.

\(^{89}\) *Infertility (Medical Procedures) Act 1984* ( Vic); see also: Kennan (1986) ‘Introduction’ in *Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation*, op. cit., p. 5.
Surrogacy came to the Australian public’s attention in May 1988 with the birth of Alice Kirkman in Victoria. Kirkman was conceived using her mother’s egg and a donor’s sperm. As her mother had no uterus, Kirkman was carried by her aunt. This was the first case of surrogacy in Australia, closely followed in October 1988 by a Victorian woman who gave birth to her sister’s triplets in Perth. More recently, Victorian Labor Senator Stephen Conroy and his wife travelled to New South Wales to have a baby with an altruistic surrogate in 2006 using a donor egg. Senator Conroy’s wife Paula Benson had suffered ovarian cancer and was unable to bear children. According to *The Australian*, the so-called ‘double surrogacy’ (the use of a donor egg and a donor uterus) was most likely ‘an Australian first’.  

These cases are prime examples of the conflict between ART and Victorian legislation. Legally, neither the Kirkmans nor the Conroys could be named as parents on their children’s birth certificates. Therefore, Kirkman’s aunt and her husband were named as parents on the birth certificate, rather than Kirkman’s mother and her husband, Kirkman’s non-biological father. They were only granted parental recognition more than a year after Kirkman’s birth. Senator Conroy and his wife also had to seek parental recognition through the courts.

The news of Senator Conroy’s experience prompted calls from state and federal politicians and reproductive specialists for consistent national legislation. In particular, Senator Conroy urged the Victorian Government to amend its surrogacy laws. Then Premier Steve Bracks responded by pointing out that surrogacy was only possible in New South Wales because the government had not legislated on the issue; he also said that surrogacy was a technology that ‘couldn’t be anticipated when our IVF laws were first framed’. At the time, the Commission was examining the issue.

This state of affairs continues to affect the increasing number of Victorian children born through surrogacy arrangements interstate or in the United States. Gay couples in particular are taking advantage of the liberal ART laws in California, frustrated by Australia’s ‘advanced fertility treatments and extensive restrictions on surrogacy’. In speaking about his experience, Senator Conroy expressed his belief that children born to gay and lesbian couples through ART should also be given the legal protection available to other children.

### 3.5 Legal Parentage: Currently

As the Attorney-General noted in the second reading speech, current Victorian legislation ‘fails to recognise as parents all people who have children in their care’. The legal status of commissioning parents in a surrogacy arrangement has already been addressed in the previous two sections; this section shall outline the legal status...
of gamete donors and same sex partners, and discuss the difference between parenting orders and adoption.

If a woman without a male partner (either single or in a same-sex relationship) conceives a child using donor sperm, the donor’s parental status is not extinguished; as the Attorney-General told the House, the Status of Children Act ‘is silent’ on this issue. The sperm donor does not, however, have any rights or liabilities toward the child.

If a woman conceives a child using donor sperm and has a male partner, the presumption of parentage under the Status of Children Act grants him the right to be listed on the child’s birth certificate. This is contingent on his consent to the original treatment procedure and may therefore be refuted. As Millbank writes, it is ‘the fact of consent to the process leading to conception that triggers responsibility’.98

Non-birth mothers in a same sex relationship are not afforded this privilege under Victorian law. This means that in a same-sex relationship the non-biological parent, or ‘social parent’, is not able to be a legally recognised parent of the child. Social parents can apply for ‘parenting orders’ from the Family Court, as provided for under Sections 64 and 65 of the Family Law Act. Yet as the Commission noted, these orders ‘are generally for specific purposes and expire when the child is 18 years old’.99 More importantly, the Commission noted that parenting orders ‘do not carry all the powers and responsibilities imposed on legal parents by the common law and federal and state legislation’, what Millbank calls ‘the universal or durable status accorded by adoption’100. For example, parenting orders do not affect the concept of ‘parent’ in intestacy, superannuation or taxation law.101

In the case of adoption by a heterosexual partner or relative, the Adoption Act gives preference to the Family Court process for parenting orders; according to Millbank, it is a preference for a ‘more limited and flexible mechanism’ which will not impact upon the biological parent’s status. The court therefore requires evidence that a parenting order cannot adequately provide for the child’s interests before adoption may be granted. In addition, ‘exceptional circumstances’ must also be confirmed to justify the adoption.102 For same sex parents, the adoption process is even less accessible, as Seymour and Magri note:

> Since the birth mother’s partner is neither a spouse of the birth mother nor a relative of the child, these special provisions do not apply to her. Even if the law were changed to permit her to be recognised as a spouse for adoption purposes, she would still have to overcome the barrier created by the Act’s preference for proceedings to be taken under the Family Law Act.103

Millbank considers this preference to have little relevance to lesbian parents who have used assisted conception, as the non-birth mother is usually wholly involved in

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100 ibid; Millbank (2006) op. cit., p. 6.
102 For more detail see further: Seymour & Magri (2004) op. cit., p. 54.
103 ibid.
parenting from the outset; she should not be placed ‘in the same legal position as a new partner’.104

In terms of traditional adoption, under Section 11 of the Adoption Act only a man and a woman married for more than two years or living together as a de facto couple for two years may adopt a child.105 Single persons may adopt if a court recognises that there are ‘special circumstances’ which make adoption by one person ‘desirable’, but the Adoption Act does not recognise same sex relationships.106

3.6 Legal Parentage: Background

Victoria’s first adoption legislation was introduced in 1928, followed by the *Adoption of Children Act 1964* which was repealed by the current legislation.

In 2001 the *Statute Law Amendment (Relationships) Act* and the *Statute Law Further Amendment (Relationships) Act* introduced the non-gendered concept of domestic partner to a range of Victorian legislation. In doing so, same-sex couples received the same obligations and powers as legal parents in particular circumstances.107 As the Commission pointed out however, these amendments did not ‘go so far as to give full legal parental status to social parents’.

105 As stated earlier, Section 11(b) of the Act also makes allowance for couples whose relationship ‘is recognised as a traditional marriage by an Aboriginal community or an Aboriginal group to which they belong’.
108 ibid.
4. Other Jurisdictions

This section provides an overview of legislation in other Australian and overseas jurisdictions. For more detailed information, readers may wish to access the Commission’s 2004 Occasional Paper, entitled ART, Surrogacy and Legal Parentage: A Comparative Legislative Review, which is available on the Commission’s website.

4.1 ART in Australia

Currently about four per cent of all births in Australia – around 10,000 babies – are the product of IVF technology. Despite the popularity of ART, state and territory legislation varies considerably.

According to Seymour and Magri, the Commonwealth of Australia does not have the power to legislate on ART, making it a state responsibility. Victoria, Western Australia, South Australia and New South Wales have passed ART legislation and, according to Seymour and Magri, the remaining jurisdictions follow ethical guidelines outlined by bodies such as the National Health and Medical Research Council (NHMRC) and the Fertility Society of Australia.

New South Wales

The New South Wales Parliament passed the Assisted Reproductive Technology Act in November 2007 allowing gamete donors to specify the recipients of their sperm or egg with regard to marital status, sexual orientation, ethnic origin or religious belief.

Under the Assisted Reproductive Technology Act clinics must apply for registration to the Director-General of the Department of Health. The Director-General is tasked with maintaining a central donor register.

The objectives of the Act, as set out in Part 1, Section 3, are: ‘to prevent the commercialisation of human reproduction’; and to protect the interests of persons born as a result of treatment, gamete donors, and women undergoing treatment. The Act provides that non-compulsory counselling services be made available to those seeking treatment.

Under the Act, gametes of a deceased person or a person in a persistent vegetative state can be used, provided that their consent was obtained prior to their losing the ability to consent. Gametes may be obtained from a child if a medical practitioner certifies that there is a reasonable risk the child will become infertile before they reach adulthood.

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111 ibid.
Western Australia
The Human Reproductive Technology Act 1991 established the Reproductive Technology Council (RTC), which issues licenses to practitioners and oversees ART in the state. The legislation allows couples or individuals to access IVF treatment if they are infertile or risk passing on a genetic disease. Embryos may be stored for up to ten years.

South Australia
The Reproductive Technology (Clinical Practices) Act 1988 established the South Australian Council on Reproductive Technology (SACRT), which oversees the practice of ART in conjunction with the South Australian Department of Health.

SACRT places ultimate priority on the welfare of children born through ART practices. Sperm donors can choose to remain anonymous, although non-identifying details must be maintained in the interests of the resultant child. Before receiving IVF treatment patients are required to sign a Statutory Declaration concerning their criminal history (with particular regard to children) and that of their partner. They must also declare that they have never had a child removed from their guardianship.

The actual practice of ART is strictly regulated: no more than three embryos may be implanted in a woman at any one time. Embryos may only be stored for a maximum of ten years, and Pre-Implantation Genetic Diagnosis is not permitted for the purposes of gender selection. There are however, no age limits on IVF recipients. Following the birth of triplets to a 52 year old South Australian woman in 1998, SACRT established a Working Party to develop guidelines on the treatment of older women. ART is now not to be offered to women who have come to the natural end of their fertility (i.e. menopause), as opposed to premature infertility during normal child-bearing years.

The Reproductive Technology (Clinical Practices) Act restricted access to ART on the basis of marital status, and in 1996 the Supreme Court of South Australia ruled that this contravened the Sex Discrimination Act. Interpretations of the Reproductive Technology (Clinical Practices) Act are now required to take the Commonwealth legislation into account. Women who are single or in a same sex relationship are able to access ART in South Australia, but – as in Victoria – only if they are infertile. SACRT suggested in a related discussion paper that fertile lesbian women could organise their own artificial insemination in the privacy of their own home.

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114 The Act was originally called the Reproductive Technology Act 1988 (SA) but changed when two pieces of legislation on human cloning and embryo research were passed in 2003.
116 See further: Reproductive Technology (Clinical Practices) Act 1988 (SA) Section 13(3).
118 ibid.
Northern Territory
Reproductive treatment services in the Northern Territory are provided by South Australian practitioners, and the Northern Territory Department of Health requires clinics to follow South Australian law in most respects. The Territory’s Anti-Discrimination Act 1992 does not apply to artificial insemination, therefore single women and same sex couples cannot access treatment.

4.2 ART Overseas

Canada
In Canada, reproductive technologies are regulated by the Assisted Human Reproduction Act 2004, and overseen by the Assisted Human Reproduction Agency of Canada. The Agency issues licenses to practitioners, and aims to ‘foster the application of ethical principles’.

Under Section 2(a) of the Assisted Human Reproduction Act, the health and wellbeing of children born through ART is primary, while section 2(e) bans discrimination against ART recipients on the basis of their sexuality or marital status.

Gamete donors are rigorously screened for disease and, as in Australia, sperm donations are quarantined for six months before the donor is re-tested. Sperm donors can choose whether to reveal their identities. For their part, egg donors are subject to psychological testing as well as medical checks. Canada prohibits ‘the commercialisation’ of donation; prior to April 2004, sperm and egg donors were paid for their efforts. The passing of Bill C-6 (the Assisted Human Reproduction Act) in the Canadian parliament made reimbursement illegal, causing a significant downturn in gamete donations.

United States
ART suffers a lack of regulation in the United States, as the federal government neither registers nor licences IVF clinics or practitioners. According to Seymour and Magri, only 33 states in the US have legislated on aspects of ART, with only New Hampshire placing distinct restrictions on access to the technology. The ability of unmarried women to access ART varies between states.

Various American authors on the subject believe that the lack of consistent regulation has hampered communication between practitioners and government health agencies, which is ultimately disadvantageous to the patients involved. Unlike the other jurisdictions discussed in this section, there are no national restrictions on the number of embryos that can be implanted into a woman. This has ensured that the size and

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120 ibid., pp. 23–24.
121 ibid.
127 ibid., pp. 6–7.
number of multiple births is quite high, and resultant cases of developmental problems, disabilities and premature births are common.\textsuperscript{129}

**United Kingdom**

In the United Kingdom, the regulation of ART is similar to Australia. The *Human Fertilisation and Embryology Act 1990* established the Human Fertilisation and Embryology Authority (HFEA), which issues licenses and promotes section 13(5) of the Act, which places foremost importance on the welfare of children born through ART practices. While this includes the preference for a child to have a mother and a father, women who are single or in a same sex relationship are still able to access ART treatment; according to Seymour and Magri however, the legislation is ‘limited’ in the way it addresses single women or lesbian couples who access ART.\textsuperscript{130}

The Human Fertilisation and Embryology Bill 2007 is currently before the House of Commons, having passed the House of Lords in early 2008. The Bill seeks to amend the original Act by explicitly allowing women who are single or in a same sex relationship to access ART.

The HFEA only permits Pre-Implantation Genetic Diagnosis (PGD) for medical reasons, not for gender selection. The HFEA also limits the number of embryos that can be implanted, to ensure the health of the patient and her unborn children. A woman can only be implanted with a maximum of two embryos, although women over 40 are allowed three embryos if they are using their own eggs.\textsuperscript{131}

In 2007, the HFEA announced that women who donate eggs directly to research will be reimbursed for their travel and associated expenses, to a maximum of 250 GBP. Donors will have to prove that they are motivated by altruism: for example, having a family member with a disease that stem cell research is investigating. Those women who donate excess oocytes from their own fertility treatment will also receive a discount on their IVF. The decision is an attempt to combat a shortage of eggs for research purposes, and has ignited considerable debate within the academic community.\textsuperscript{132}

### 4.3 Surrogacy in Australia

Commercial surrogacy and the advertisement of surrogacy services are illegal in the states and territories that have legislated on the issue. Surrogacy contracts are also unenforceable.

\textsuperscript{129} Spar raises the converse idea that if ART in the United States was regulated more thoroughly then practices such as Pre-Implantation Genetic Diagnoses and Selective Reduction would be curtailed, and age limits may be placed upon IVF recipients. This could disempower older women and those who are carrying ‘multiples’ (several foetuses). See further: Spar (2006) op. cit., p. 223. Selective Reduction is a form of termination which occurs when a woman is pregnant with multiples, and her health and the health of the foetuses is in danger.


Given the restrictions upon surrogacy in Australia, commissioning couples have looked to the United States for their surrogacy services. There are many well-publicised stories of gay couples and infertile heterosexual couples who have exhausted other options achieving reproductive success in states such as California.133

The Federal Government has taken some action with regards to this trend. In response to the passing of the *Prohibition of Human Cloning Act 2003* (Cth) the Federal Government amended the Customs (Prohibited Export) Regulations 1958 (Cth), which banned the exportation of embryos for twelve months.134 As the then Justice and Customs Minister Chris Ellison later acknowledged, this had a negative impact ‘on people who could lawfully use the embryos in Australia but due to particular circumstances needed to do so overseas’.135

These people included Lisa and John Banfield, who in 2003 were in the midst of harvesting Ms Banfield’s eggs in Sydney and arranging for an American surrogate. Ms Banfield lobbied the Minister to grant them an exception; what became known as the ‘Banfield Clause’ – Customs (Prohibited Exports) Amendment Regulations 2003 (no. 2) – also helped other couples in similar predicaments.136 The Banfield’s Californian surrogate gave birth to twin boys in 2004.

**New South Wales**
As previously stated, the Assisted Reproductive Technology Act was passed in November 2007. As such, the New South Wales Government legislated against commercial surrogacy and declared all surrogacy arrangements void and unenforceable, whether altruistic or not. This includes agreements made before the commencement of the Act. The New South Wales surrogacy laws are currently being reviewed by the New South Wales Parliament.137

**Australian Capital Territory**
Under the *Parentage Act 2004* commercial surrogacy is defined as a ‘commercial substitute parent agreement’, and is illegal. Altruistic surrogacy contracts are unenforceable, and a surrogate can only be reimbursed for expenses incurred. The advertisement of surrogacy services is prohibited. The Parentage Act also bans the provision of technical or professional services in relation to a commercial surrogacy. Importantly, the Parentage Act has provisions for the commissioning parents to become the legal parents of a child born to a surrogate.

**Western Australia**
The Surrogacy Bill 2007 passed the Legislative Council in June 2008, but lapsed in August due to the prorogation of the Western Australian Parliament.

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134 Customs (Prohibited Export) Amendment Regulations 2003 (no. 1) no. 17 (Cth).
135 Customs (Prohibited Export) Amendment Regulations 2003 (no. 2) no. 44 (Cth), Explanatory Statement.
Tasmania
The Surrogacy Contracts Act 1993 makes commercial surrogacy illegal, and any surrogacy contract void. Importantly, the provision of technical or professional services in relation to a surrogacy arrangement is illegal.

Queensland
Both commercial and altruistic surrogacy are illegal under the Surrogate Parenthood Act 1988. As such, the advertising of surrogacy services is prohibited and entering into a contract is prohibited.

South Australia
The Family Relationships Act 1975 (Part IIB) makes commercial surrogacy illegal, and also bans altruistic surrogacy (but does not enforce a penalty). Section 10 gives presumption of parentage to a surrogate and her partner. Contracts concerning a surrogacy arrangement are illegal and unenforceable.

4.4 Surrogacy Overseas

Canada
In 1985 the Ontario Law Reform Commission released its Report on Human Assisted Reproduction and Related Matters, which decided that surrogacy should be regulated on the grounds that prohibition could result in the making of clandestine and potentially unsafe arrangements.\(^{138}\)

Commercial surrogacy is illegal in Canada, but otherwise intending parents are allowed to reimburse an altruistic surrogate for her expenses under the federal Assisted Human Reproduction Technology Act. The commissioning parents however, are not treated as the legal parents. The process retains a nebulous legal status, and is currently being reviewed by Health Canada; in the meantime, many parents choose to employ commercial surrogates over the border in the United States.\(^{139}\)

United States
Surrogacy in the United States is not regulated at a federal level; according to Spar, the marked reluctance of successive federal governments to legislate on surrogacy has afforded the practice a legal status that is ‘piecemeal and highly disparate’ across the country.\(^{140}\) Some states view surrogacy contracts as baby selling and therefore illegal, while other states view them as simply ‘service contracts’.\(^{141}\) Ultimately, Spar argues, the issue has been left to the mercy of the free market and local legislatures.\(^{142}\) In states such as California, surrogacy has developed a social and legal acceptance.\(^{143}\) Many prominent reproductive centres are based there and, according to Mundy, babies and related reproductive services are now one of the state’s biggest exports.\(^{144}\)

\(^{138}\) National BioEthics Consultative Committee (1990) op. cit., p. 70.
\(^{140}\) See further: Spar (2006) op. cit., p. 71; Seymour & Magri (2004) op. cit., p. 34.
\(^{141}\) Meyer (1997) op. cit., pp. 75–76.
\(^{144}\) Mundy (2007) op. cit., p. 134.
United Kingdom
In 1982 the British Government established the Warnock Committee to examine the social, ethical and legal issues surrounding surrogacy and ART. It recommended that surrogacy agencies, whether ‘profit making or non-profit making’, be made illegal.145

After the first commercial surrogate baby was born in Britain in 1985, the British Government passed the Surrogacy Arrangements Act 1985 which made the Warnock Committee recommendations law. Yet direct commercial arrangements between surrogates and commissioning parents are not illegal, and neither are altruistic arrangements. Surrogates can be reimbursed for their expenses.

4.5 Legal Parentage in Australia

New South Wales
The Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008 was passed by the New South Wales Parliament in mid 2008. It made consequential amendments to the Anti-Discrimination Act 1977 by inserting non-gendered definitions of ‘de facto’ and ‘domestic status’. The Miscellaneous Acts Amendment (Same Sex Relationships) Act also amended the Status of Children Act 1996, to provide for presumption of parentage for non-birth mothers in a same sex relationship, and to provide that a woman who conceives using a donated oocyte is considered to be the child’s mother. Relevant amendments were also made to the Births, Deaths and Marriages Registration Act 1995 to allow non-birth mothers to register as a child’s parent. The Miscellaneous Acts Amendment (Same Sex Relationships) Act did not amend the Adoption Act 2000 to allow same sex couples the adopt children. Under the Adoption Act only a heterosexual couple or individual may adopt a child.

Australian Capital Territory
Under the Parentage Act, the presumption of parentage applies to the birth mother and her partner (if the partner consented to the ART procedure). Gamete donors are afforded no parental status under the legislation. The non-gendered term ‘domestic partner’ within Australian Capital Territory statutes means that same sex partners of birth mothers are also considered parents of the child.146 The Adoption Act 1993 allows heterosexual couples and individuals who are not in a domestic partnership to adopt.147

Western Australia
The Artificial Conception Act 1985 recognises the parental status of people who undergo artificial fertilisation procedures. This includes the non-biological parent (social mother or father) provided they consented to the ART procedure. Same-sex couples are able to register both partners’ names with the Registry of Births, Deaths and Marriages. The Adoption Act 1994 allows married or de facto couples (regardless of sexual orientation) and individuals to adopt.

147 Adoption Act 1993 (ACT) Section 18.
Tasmania
Like Victorian law, the Tasmanian Status of Children Act 1974 states that a child born to a woman in a marriage or de facto relationship is presumed to be the child of her partner.148 Part 20 of the Tasmanian Adoption Act 1988 allows couples (regardless of sexual orientation) to adopt if they are married or registered under the Relationships Act 2003; however, if the couple is registered one partner must also be related to the child.

South Australia
Same sex partners are not entitled to a presumption of parentage under South Australian law. In regards to surrogacy arrangements, as previously stated Section 10 of the Family Relationships Act considers the surrogate mother and her partner to be the child’s parents.

4.6 Legal Parentage Overseas

Canada
While there is no federal directive on the issue of parentage, the right to equality under human rights legislation in various provinces has ensured that same sex couples should not be discriminated against when registering the birth of their child.149 Quebec rules that if both parents are women, then the normal rights of a father are awarded to the non-birth mother.150

Quebec, Newfoundland and the Yukon have specific legislation on the issue of legal parentage of children born through ART, including the directive that a sperm donor is not the child’s father if the woman’s male partner consented to the procedure.151 As stated earlier, commissioning parents in a surrogacy arrangement are not treated as the legal parents.

United States
While legislation varies slightly between states, according to Seymour and Magri a sperm donor in the US is not considered to be the father of the child conceived through ART; states such as Delaware and New Mexico enable the donor to consent to be treated as the father. Courts in California and Colorado have identified legislative ambiguity as to the parental rights of known donors, in relation to both self-insemination and artificial insemination.152 In terms of donated oocytes, in the absence of a surrogacy arrangement the birth mother and her partner (if any) are considered to be the child’s parents.153

No legislation addresses the status of the same sex partner of a woman who conceives through ART. As Seymour and Magri detail however, many states allow same sex

148 Status of Children Act 1974 (Tas), Section 2(5).
150 ibid., p. 14.
151 ibid.
couples or individuals to adopt, either through explicit anti-discrimination clauses or simply through provisions granting eligibility to ‘a person or adult’.154

**United Kingdom**
Under the Human Fertilisation and Embryology Act, the woman who has a child through ART is considered to be the legal mother, and her male partner (if she has one) is the father if he consented to the procedure. The Act does not address issues of parentage for same sex couples.155

As stated earlier, the Human Fertilisation and Embryology Bill 2007 is currently before the House of Commons. The Bill seeks to amend definitions of parenthood for cases involving reproductive treatment, thereby enabling non-birth mothers in same sex relationships to be recognised as parents.

Under the *Adoption and Children Act 2002*, same sex couples, unmarried couples and single people are eligible to adopt.

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154 ibid., pp. 56–57.
155 ibid., pp. 17–18.
5. Views of Stakeholders

The five year Commission inquiry and the resultant Bill have elicited strong responses from the community. Those in favour of law reform have viewed the Commission inquiry and the development of the Bill as a chance to fight for the right to ‘create our own loving and diverse kinds of families’.

Those opposing the Commission’s findings have branded the recommendations ‘social engineering’. Outlined below are some of the views expressed by both proponents and opponents of law reform.

In presenting its recommendations on legal parentage for same sex couples, the Commission noted that ‘children are already living in diverse families, and will continue to do so’. This observation is borne out by the increasing number of institutional and grassroots support networks which operate around Melbourne and regional Victoria. These groups include the A.R.T. Support Group, Rainbow Families, Maybe Baby, Prospective Lesbian Parents Victoria and Gay Dads Victoria. In 2003, the Royal Women’s Hospital launched a guide to same-sex parenting, ‘Pride and Joy’, to coincide with what it called a ‘baby boom’ amongst lesbian couples in Melbourne.

These families have garnered a great deal of publicity over the course of the inquiry. Much of the positive media coverage has focused on their personal stories; various same sex couples who have borne children through surrogacy arrangements and IVF treatment have spoken about being ‘warmly embraced’ by other parents at their mothers’ group or playgroup. Alice Kirkman has written about her birth in a variety of publications and made a submission to the Commission inquiry. Most recently SBS television ran two documentaries in January 2008 which traced the journey of two same sex couples to conceive and celebrate the families they ultimately created. Positive media coverage has both promoted the idea of law reform and attempted to normalise ‘modern’ concepts of family.

In turn, the anomalous nature of Victorian ART legislation and its impact upon families has been well-documented in local media. The Age has described the Victorian law as generating ‘an unjust and irrational system’ that leaves children ‘in legal limbo’.

Commissioning parents have discussed the difficulties of not being granted full parental rights for their surrogate-born children, including the basic administrative obstacles involved in admitting their children to hospital or applying...

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157 Victorian Law Reform Commission (2007) op. cit., p. 120.


for a passport.\textsuperscript{163} It is for these reasons that the Victorian Gay and Lesbian Rights Lobby (VGLRL) advocates the rights of families to self-definition and believes that children are ultimately better off if their families are recognised under the law.\textsuperscript{164} The Commission made a similar observation, presenting evidence that non-recognition of one or both parents can have a deep social and emotional impact on the family.\textsuperscript{165}

When the Attorney-General announced the reform of Victorian ART law in December 2007, Senator Conroy welcomed the news, telling the ABC that it is ‘fantastic to see that other couples and other families won’t have to go through what myself and my wife went through’.\textsuperscript{166}

Conservative commentators and religious groups have commonly expressed the view that the reform of Victorian ART law threatens the traditional nuclear family and is ‘not in the best interests of children’.\textsuperscript{167} The Christian group Salt Shakers has argued that same sex relationships are less stable and less monogamous than heterosexual couples, and that legitimising these relationships would undermine the institution of marriage.\textsuperscript{168} In December 2007 the \textit{Herald Sun} argued that the Commission’s findings are not representative of community values, and the reforms are ‘high-level social engineering based on the views of activists and the gay lobby’.\textsuperscript{169} Bill Muehlenberg of the Family Association of Victoria made a similar argument in the same newspaper earlier that month, claiming the reforms are part of a wider conspiratorial plan by ‘radical social engineers’, ‘the homosexual lobby’, the ‘biased’ Commission and the ‘leftist Labor Government’.\textsuperscript{170}

The ‘social engineering’ tag has been echoed by Saltshakers, the Australian Christian Lobby and an interfaith committee of Jewish, Christian and Muslim leaders.\textsuperscript{171} In January 2008 this interfaith committee released a detailed statement arguing that the Government’s endorsement of altruistic surrogacy arrangements has no regard for ‘the realities of natural connectedness through genetic and gestational parenthood’.\textsuperscript{172} Spokesman Rabbi Shimon Cowen told \textit{The Age} that the law reform was evidence that fundamental values had been ‘hijacked’ by secularism, and that traditional ‘ground rules’ have ‘disintegrated’.\textsuperscript{173} In a letter to all state MPs the interfaith committee argued that ‘the new notion of parenthood becomes a voluntary engagement’, which

\begin{itemize}
  \item \textsuperscript{165} Victorian Law Reform Commission (2007) op. cit., pp. 125–126.
  \item \textsuperscript{167} Australian Christian Lobby (2007) \textit{Reproductive Report Slammed for Going Against the Best Interests of Children}, media release, 7 June. In 2006 the Australian Family Association, in conjunction with pro-life group the Endeavour Forum, made a submission to the Commission that same-sex families had high incidences of violence and sexual abuse. The Commission’s Final Report refuted these claims and quoted a variety of international research which has found heterosexual men to be the most common perpetrators of family violence. See further: Victorian Law Reform Commission (2007) op. cit., p. 34.
  \item \textsuperscript{169} Editorial (2007) ‘A debate we didn’t have’, \textit{Herald Sun}, 18 December, p. 20.
  \item \textsuperscript{171} Australian Christian Lobby (2007) op. cit.
  \item \textsuperscript{173} Zwartz (2008)op. cit., p. 2.
\end{itemize}
‘divides the physical, psychological and moral elements that constitute families’. 174
The Australian Christian Lobby released a media statement prior to the Bill’s introduction to Parliament arguing that the legislation promoted ‘biological nonsense’ by defining children as products of same sex relationships. The Lobby instead proposed instituting a ‘dependency test’ to determine the rights and needs of children and parents in same sex relationships. 175

174 ibid.
175 Australian Christian Lobby (2008) Same Sex Reform Possible Without Social Engineering, media release, 4 September.
References


Australian Greens (2007) ALP votes with the Government against same-sex IVF and adoption rights, media release, 18 June.


Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation (1986), Melbourne, The Committee.


*Re McBain; ex parte the Australian Catholic Bishops Conference* [2002] *HCA 16*.


Legislation

Adoption Act 1988 (Tas)
Adoption Act 1993 (ACT)
Adoption Act 1984 (Vic)
Adoption Act 1994 (WA)
Adoption Act 2000 (NSW)
Adoption and Children Act 2002 (United Kingdom)
Anti-Discrimination Act 1977 (NSW)
Anti-Discrimination Act 1992 (NT)
Artificial Conception Act 1985 (WA)
Assisted Human Reproduction Act 2004 (Canada)
Assisted Reproductive Technology Act 2007 (NSW)
Births, Deaths and Marriages Registration Act 1995 (NSW)
Births, Deaths and Marriages Registration Act 1996 (Vic)
Customs (Prohibited Export) Amendment Regulations 2003 (no. 1) no. 17 (Cth)
Customs (Prohibited Export) Amendment Regulations 2003 (no. 2) no. 44 (Cth)
Family Law Act 1975 (Cth)
Family Relationships Act 1975 (SA)
Human Fertilisation and Embryology Act 1990 (United Kingdom)
Human Fertilisation and Embryology Bill 2007 (United Kingdom)
Human Reproductive Technology Act 1991 (WA)
Human Tissue Act 1982 (Vic)

Infertility Treatment Act 1995 (Vic)

Infertility Treatment (Amendment) Act 2001 (Vic)

Infertility (Medical Procedures) Act 1984 (Vic)

Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008 (NSW)

Parentage Act 2004 (ACT)

Reproductive Technology (Clinical Practices) Act 1988 (SA)

Sex Discrimination Amendment Bill (no. 1) 2000 (Cth)

Sex Discrimination Amendment Bill 2002 (Cth)

Status of Children Act 1974 (Tas)

Status of Children Act 1974 (Vic)

Status of Children (Amendment) Act 1984 (Vic)

Status of Children Act 1996 (NSW)

Statute Law Amendment (Relationships) Act 2001 (Vic)

Statute Law Further Amendment (Relationships) Act 2001 (Vic)

Surrogacy Arrangements Act 1985 (United Kingdom)

Surrogacy Contracts Act 1993 (Tas)

Surrogate Parenthood Act 1988 (QLD)