The bill excises part 4A of the Infertility Treatment Act 1995 — prohibited practices including prohibition on human cloning for reproduction — and re-enacts these provisions into a stand-alone piece of legislation.

The bill also corrects the erroneous part of a note currently in section 38OD of the Infertility Treatment Act 1995, clarifying that research involving hybrid embryos is prohibited.

Consistent with the Commonwealth Regulation of Human Embryo Research Act 2002, the bill provides for the continued prohibition of human cloning for reproduction and other unacceptable practices associated with reproductive technology, and for related purposes. It also identifies practices that are prohibited unless authorised by a licence issued by the National Health and Medical Research Council.

The passage of this bill is essential, as it continues to prohibit practices that are aberrant to the overwhelming majority of Australians and it allows research activities to proceed, under licence, in a narrow range of areas for the purposes of improving the effectiveness of assisted reproductive treatments.

I commend the bill to the house.

Debate adjourned on motion of Mr DELAHUNTY (Lowan).

Debate adjourned until Wednesday, 24 September.

ASSISTED REPRODUCTIVE TREATMENT BILL

Statement of compatibility

Mr HULLS (Attorney-General) tabled following statement in accordance with Charter of Human Rights and Responsibilities Act:

In accordance with section 28 of the charter of Human Rights and Responsibilities (the charter), I make this statement of compatibility with respect to the Assisted Reproductive Treatment Bill 2008.

In my opinion, the Assisted Reproductive Treatment (ART) Bill 2008 (bill) as introduced to the Legislative Assembly, is compatible with the human rights protected by the charter. I base my opinion on the reasons outlined in this statement.

Overview of bill

The bill will:

(a) update Victoria's laws on ART and surrogacy to clarify and remove existing anomalies and inconsistencies, to recognise the realities of Victorian families and reflect new technologies;

(b) remove the current statutory requirement that women be married or in a de facto relationship with a male to access ART treatment in Victoria;

(c) strengthen the protections for children born through ART by implementing enhanced screening for treatment, expanding donor-conceived children's access to information about their genetic history and clarifying parentage laws;

(d) provide that complex treatment decisions are made by an independent expert Patient Review Panel, with provision for review of decisions by the Victorian Civil and Administrative Tribunal;

(e) expand the opportunity for altruistic surrogacy and posthumous use of gametes in treatment procedures, in the context of rigorously assessed applications;

(f) provide that prescribed ART records are held by the Registry of Births, Deaths and Marriages; and

(g) reduce the regulatory burden on ART providers by introducing a deemed registration system.


The principles underpinning the charter of respect, equality, freedom and dignity are closely to the objectives of the bill. These principles include human rights that:

are essential in a democratic and inclusive society that respects the rule of law, human dignity and equality and freedom;

belong to all people without discrimination, and the diversity of the people of Victoria enhances our community.

Human rights issues

The provision and regulation of ART involves a balancing of a number of rights and interests, including those of donor-conceived children, potential parents, donors of gametes, as well as the broader interests of society.

The bill aims to enhance rights protection and achieve an appropriate balance between those interests.

Section 8: recognition and equality before the law

Section 8 of the charter establishes a series of equality rights. The right to recognition as a person before the law means that the law must recognise that all people have legal rights. The right of every person to equality before the law and to the equal protection of the law without discrimination means that the government ought not discriminate against any person, and the content of all legislation ought not be discriminatory.

Guiding principle of non-discrimination

Clause 5 of the bill sets out the guiding principles, including that persons seeking to undergo reproductive treatment must not be discriminated against on the basis of their sexual orientation, marital status, race or religion. The right in
section 8 of the charter therefore underpins the objectives of the bill in promoting equality and non-discrimination.

**Discrimination on the grounds of age**

Numerous clauses of the bill make provision for differential treatment of persons on the basis of age. These provisions amount to discrimination and constitute reasonable limitations on section 8 of the charter, for the reasons set out below. The provisions which discriminate on the basis of age are:

- gametes or embryos produced from a child cannot be used in treatment other than for the treatment of the child (clause 26);
- where a donor or a parent of a person born as a result of a donor treatment procedure applies for information on the central register which relates to a child, the registrar must only disclose the information if the child’s parent or guardian has consented and the registrar must also take into account whether or not the child has indicated that it does not want the information disclosed (clause 58);
- where a child born as a result of a donor treatment procedure applies for information on the central register, the registrar must only disclose information if the child’s parent or guardian has consented to the making of the application and a counsellor has provided advice that the child is sufficiently mature to understand the consequences of the disclosure (clause 59); and
- a person may enter into a surrogacy arrangement for a woman only if the surrogate mother is at least 25 years of age (clause 40).

(a) the nature of the right being limited

The prohibition of discrimination is one of the cornerstones of human rights instruments and this is reflected in the preamble to the charter. However, the right is not absolute and can be subject to reasonable limitations in section 7 of the charter.

(b) the importance of the purpose of the limitation

The purpose of the differential treatment of children in clause 26 is to protect the child from undergoing treatment procedures except where the procedure is for the child’s future benefit. This protects the child from inappropriate or unnecessary procedures.

The purpose of the differential treatment of children in clause 59 is to ensure that children may only access information on a Register under the supervision and guidance of a parent or guardian, or where the child is assessed by a counsellor as being sufficiently mature to understand the consequences of the disclosure. The purpose of the differential treatment of children in clause 58 is to ensure that the disclosure of information is appropriate, in the best interests of the child and that whether the child has indicated that he or she does not want the information disclosed is taken into account by the registrar.

In each case, the differential treatment is for the important purpose of protecting the child’s best interest, consistent with section 17 of the charter (protection of families and children).

The purpose of clause 40 is an important one: to protect the surrogate mother from possible coercion, exploitation and psychosocial difficulties potentially arising from entering into a surrogacy arrangement.

(c) the nature and extent of the limitation

Clause 26 provides a prohibition on procedures involving gametes produced by children except in limited circumstances where the procedure is for the child’s future benefit.

Clause 58 provides that the registrar must only disclose the information about a donor-conceived child if the child’s parent or guardian has consented and the registrar must take into account the child’s wishes.

Clause 59 provides that the registrar must only disclose information if a counsellor has provided advice that the child is sufficiently mature to understand the consequences of the disclosure.

Clause 40 precludes clinics providing treatment to a surrogate mother who is less than 25 years old. Part 14 of the bill inserts a new part IV into the Status of Children Act 1974, section 18 of which also precludes the County and Supreme courts in most cases making a substitute parentage order transferring parentage from a surrogate mother who is less than 25 years old to the commissioning parents. There is provision for the approval of non-complying surrogacy arrangements in clause 41, but this can only be approved in exceptional circumstances and only if it is reasonable to approve the arrangement in the circumstances.

In the case of the limitations imposed by clauses 58, 59 and 40 the restrictions are limited in time and last only until the child or young person reaches the prescribed age.

(d) the relationship between the limitation and its purpose

In relation to clauses 26, 58 and 59 there is a direct relationship between the age discrimination and the protection of the best interests of the child.

In relation to clause 40, the Victorian Law Reform Commission (VLRC) stated that “[A] woman acting as a surrogate requires a sufficient level of maturity to be able to understand the implications of entering into the arrangement. Becoming a surrogate should not be seen as the mere exercise of a legal right attained on turning 18, but rather a decision that requires a level of maturity that most people have not developed at that age. It is worth noting in this context that although people become legal adults at 18, the United Nations’ definition of youth extends to anyone under 25. Requiring the surrogate to be at least 25 years old may also act as an additional protection against any unequal bargaining power between her and the commissioning parents’ (VLRC, Assisted Reproductive Technology and Adoption: Final Report, March 2007, page 176). There is a direct and rational connection between protecting young women from exploitation and the age restriction imposed.

(e) any less restrictive means reasonably available to achieve its purpose

In relation to clause 26, 58 and 59 there is no less restrictive means available to achieve the purpose of the provisions.

In relation to clause 40, a less restrictive means would have been a broader test than the exceptional circumstances test in clause 41, one that enables assessment of the maturity of the
potential surrogate on a case-by-case basis. However, it was determined that this would not ensure sufficient protection of young women from possible coercion, exploitation and psychosocial difficulties potentially arising from entering into a surrogacy arrangement.

(f) any other relevant factors

Victorian courts may follow European courts in affording a ‘wide margin of appreciation’ when interpreting legislation of sensitive moral and ethical matters, as is certainly the case with this bill (see Evans v. UK, ECHR, application no 6339/05, 10 April 2007).

Section 10(c): right not to be subject to medical or scientific treatment without full, free and informed consent

Section 10(c) provides that a person has the right not to be subjected to medical or scientific treatment without full, free and informed consent.

Divisions 2 and 3 of part 2 set out the pre-treatment requirements for persons who may undergo treatment and persons who are contemplating gamete or embryo donation. Before consent to treatment is obtained these persons must undertake counselling on prescribed matters, which ensures they have all relevant information and fully understand the implications of the treatment. This is consistent with and gives effect to the requirements of section 10(c) of the charter.

Section 13: right to privacy

Section 13(a) of the charter recognises a person’s right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The right to privacy encompasses the right to information privacy and bodily privacy. The requirement that any interference with a person’s privacy must not be “unlawful” imports a requirement that the scope of any legislative provision that allows an interference with privacy must specify the precise circumstances in which interference may be permitted. The requirement that an interference with privacy must not be arbitrary requires that any interference with a person’s privacy must be reasonable in the circumstances and should be in accordance with the provisions, aims and objectives of the charter.

Presumption against treatment

Clause 14 of the bill provides that a clinic cannot treat a woman where the woman or her partner have had charges proven against them for a sexual offence, been convicted of a violent offence or had a child protection order made in respect of a child in their care unless the Patient Review Panel determines that there is no barrier to the person undergoing treatment.

In practice this will be brought to effect by a woman and her partner, if any, each producing a criminal record check for consideration by an ART clinic counsellor and providing consent for the counsellor to obtain a child protection order check from the Department of Human Services (pursuant to the regulations as to consent in clause 11). If either of the checks is positive, that is, there are relevant charges or offences or orders disclosed, the clinic will not be able to provide treatment and the woman and her partner may seek a decision from the Patient Review Panel to determine if there is a barrier to the clinic providing treatment.

The requirement to provide a criminal record check and consent to a child protection order check engange the right of the woman or her partner to information privacy. The child protection order check will only produce a statement indicating whether relevant orders have been made under the Children, Youth and Families Act 2005. The requirement to provide a full criminal history may disclose personal and sensitive information not relevant to the eligibility requirements for ART. However, a criminal record check is the only available objective mechanism to identify the existence of offences pertinent to determining potential risk of abuse or harm to the child to be born from ART. While the counsellor will sight the criminal record check(s) as part of the counselling process, he or she will only have regard to the relevant offences for the purposes of establishing whether a presumption against treatment applies. The bill seeks to limit the extent of the disclosure of the contents of the criminal record check by ensuring that it is available in the pre-treatment counselling only and that the consent to treatment records evidence that the check was considered by the counsellor. Further, the information disclosed in counselling is protected by professional confidentiality provisions. The requirements to provide a criminal records check and consent to a child protection order are reasonable given the important purpose of protecting the child to be born from ART. The interference with privacy is proportionate to the purpose, and is not arbitrary or unlawful.

The presumption against treatment also engages the right not to have one’s family unlawfully or arbitrarily interfered with, because it may bar certain persons from constituting or enlarging their family. However, the right in section 13 of the charter does not extend to requiring the state to permit unconditional access to ART. The presumption against treatment does not amount to discrimination under the Equal Opportunity Act 1995 (EO Act) and is therefore not discriminatory, arbitrary or unlawful. The purpose of the presumption is to protect children born through ART, which is a clear and reasonable purpose consistent with the principles of the charter, in particular, the best interests of the child protected in section 17 of the charter. The presumption against treatment therefore does not amount to an unlawful or arbitrary interference with the family.

Requirements to undergo counselling

The bill makes numerous provisions for persons to undergo counselling, such as:

- a person who wishes to undergo a treatment procedure and her partner, if any (clause 13);
- donors (clause 18);
- persons wishing to enter into a surrogacy arrangement and her partner, if any (clause 43);
- a woman wishing to undergo a treatment procedure involving posthumous use of gametes or embryos (clause 48);
- a donor-conceived child who wishes to access information on the central register which may identify another person (clause 59);
- all applicants to the central register (clause 61) or voluntary register (clause 73) prior to release of identifying information.
The requirements to undergo counselling are to ensure that the person understands the full implications of their decision, including the social, psychological and legal implications, so that full and informed consent may be provided. The requirement is therefore for an important purpose and is reasonable. Further, the requirement to undergo counselling occurs in a context where a person has volunteered for a particular procedure or applied to obtain certain information. All information disclosed in the counselling process is confidential. The counselling requirements therefore do not constitute an arbitrary or unlawful interference with a person’s privacy.

**Accessing information on ART provider registers and the central register**

The regulation of access to information on ART provider registers and the central register engages the right to privacy in a number of respects. It affects the interests of the donor-conceived person in obtaining information regarding their identity and genetic history, as well as their interests in not having their personal information disclosed. It also affects the interests of a donor in respect of accessing information regarding their genetic offspring and their interests in keeping personal information confidential.

The bill seeks to achieve an appropriate balance between those competing interests.

Part 6 of the bill makes provision for ART providers to maintain a register of prescribed information including information about donors and treatment procedures, and for the registrar of births, deaths and marriages to keep a central register of prescribed information. The central register is comprised of records from two distinct periods: 1 July 1988 to 31 December 1997 when identifying information was recorded about donors who donated gametes in this period and could specify whether their identity could be released; and 1 January 1998 to the current date where the donor consented to the donation of gametes knowing that their identity may be revealed to the donor-conceived child. Prior to 1 July 1988 donations were anonymous and records were not kept centrally. However, a voluntary register applies in respect of such donations.

Part 6 carefully regulates how information from the central register may be accessed and when information which discloses personal information about another person may be disclosed. Consent is required in relation to the disclosure of information to donors (clause 55 and clause 58). The circumstances in which disclosure of information will occur to persons born as a result of a donor treatment procedure are provided for in clause 59.

The different rules for disclosure of information depending upon the date of the donation, reflects the different conditions under which donations were given. While it is recognised that refusing access to donor information prior to 1 January 1998 may involve an interference with the right of a donor-conceived child to access information regarding their identity and genetic history, this reflects the fact that donations prior to this time could be or were made anonymously and to change those conditions would amount to an unreasonable interference with the donors’ rights to privacy.

To the extent that a donor’s personal information is disclosed, the disclosure of information is not arbitrary as it is for the purpose of giving effect to the right of the donor-conceived person to access information about their identity and will occur in accordance with the understanding of the donor at the time the donation was made.

The bill enhances the rights of children to obtain such information through enabling access either with parental or guardian consent or the advice of a counsel that the child is sufficiently mature to understand the consequences of the disclosure. To the extent that access is limited where a person is not certified as sufficiently mature, this is to ensure the best interests of the child are protected and does not amount to an unlawful or arbitrary interference.

Part 7 of the bill provides that the registrar of births, deaths and marriages must keep a voluntary register that contains information about donor treatment procedures. However, the information that is recorded on the Voluntary Register is prescribed and is given voluntarily. The registrar may only release information from the Voluntary Register in accordance with the wishes of the person entered in this Register therefore the disclosure of information is not arbitrary. There is therefore no interference with the right in section 13 of the charter.

**Right to be told**

The information in relation to donor conception will not be recorded on the birth certificate and there is no mandatory requirement on parents to tell donor-conceived children of the manner in which they were conceived. On the one hand, recording such information on the birth certificate would interfere with privacy rights because it would involve public disclosure of personal information. On the other hand, it may be argued to be a reasonable interference as it gives effect to a child’s right to access information about their identity-genetic information.

While there is no requirement to tell a child they are donor conceived, where the donation was made after 1 January 1998, once the child turns 18 it is possible for Victorian Assisted Reproductive Treatment Authority (VARTA) to write directly to the child at a donor’s request and advise that the donor wishes to make contact. This provides a strong incentive for parents to tell a donor-conceived child about the manner in which they were conceived. In addition, VARTA provides significant support and encouragement for parents to tell, through the ‘Time to tell’ campaign.

Placing such information in a public document such as a birth certificate is a significant interference with the right to privacy and does not have the same protections for ensuring that children have access to such information only when they are sufficiently mature to deal with it. In these circumstances, it is not considered that it is not appropriate to record such information on a birth certificate or mandate telling children of the manner of their conception. This is better achieved through non-legislative means.

**Surrogate must be 25 years old**

It is arguable that the right to privacy also encompasses a right to autonomy with regard to decisions made by a person about their own body. In *Pretty v. UK* (ECtHR, 29 March 2002), the court accepted that preventing a terminally ill woman from obtaining assistance from a third party to commit suicide — by refusing to guarantee immunity from prosecution for that third party — could constitute an
interference with her right to respect for private life, as protected by Article 8 of the European Convention on Human Rights. The court went on to consider whether the possible limitation of Article 8 rights was justified and decided this question in the affirmative on the basis that the limitation was “necessary in a democratic society”. Thus, the court undertook a balancing of competing interests similar to the one which arises with respect to this proposed bill.

It is arguable that clause 40, which imposes an age restraint of 25 years on surrogate mothers, could be construed as limiting a woman’s autonomy to decide when she is ready to participate in a surrogacy arrangement. However, any interference with the woman’s privacy on this basis is reasonable for the same reasons as set out above in relation to section 8 of the charter, namely, to protect the surrogate mother from possible coercion, exploitation and psychosocial difficulties potentially arising from entering into a surrogacy arrangement.

Withdrawal of consent

Clause 17 requires that embryos be used only if each of the persons who donated gametes has consented to their use. Pursuant to clause 20, such consent can be withdrawn at any time prior to the use of the embryos. This achieves an appropriate balance between the rights of each donor to privacy, including the ability to choose when to become and when not to become a parent. While withdrawal of consent can result in a person not being able use the embryos, this possibility is best dealt with through the counselling procedure, rather than any ability to override the consent requirement which would be a significant interference with the rights of non-consenting donors.

Section 17: protection of families and children

Section 17(1) of the charter provides that families are the fundamental unit of society and are entitled to be protected by society and the state. Section 17(2) provides that every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child. The promotion of these rights underpins the objectives of the bill to recognise the realities of Victorian families and to ensure that the best interests of children born through ART continue to be protected through measures including enhanced screening provisions and the clarification of parentage laws.

A number of provisions in the bill which engage the right in section 17 of the charter are discussed below.

Recognition of non-birth mothers

Clause 147 of the bill inserts a new part III into the Status of Children Act 1974 which provides that if a woman conceives following a procedure of assisted reproductive treatment or artificial insemination, the woman’s female partner is presumed for all purposes to be a legal parent of the child born if certain criteria are met. This affords to non-birth mothers the same status currently afforded to male partners of women who give birth following a treatment procedure for the purpose of Victorian laws. This amendment recognises the realities of Victorian families, ensures that the best interests of children born through ART are protected, and clarifies parentage laws and the status of donors. These provisions therefore promote the rights in section 17 of the charter.

Child conceived posthumously to be regarded as child of the deceased for the purpose of birth registration but not for any other purpose under Victorian law

Clause 147 of the bill inserts a new part V into the Status of Children Act 1974 which provides that any child conceived posthumously should be regarded as the child of the deceased for the purpose of birth registration, but not for any other purpose under Victorian law. This limits the right under section 17 of the charter of the posthumously conceived child because the child will not have all of the benefits which would normally flow from the identification of a parent on a birth registration.

(a) the nature of the right

The protection of families and children is an important right which may be subject only to reasonable limitations under section 7 of the charter.

(b) the importance of the purpose of the limitation

New part V of the Status of Children Act 1974 implements the recommendation of the VLRC that the deceased should be recorded as the child’s parent on his or her birth certificate, however, the legal consequences flowing from the deceased’s parental status should be limited in order to provide certainty for the administration of deceased estates. (VLRC, Assisted Reproductive Technology and Adoption: Final Report, March 2007, page 102). There is no time limitation on the posthumous storage of gametes, and it is important to ensure that the estate of the deceased can be finalised and that the estate can be administered according to the deceased’s intentions expressed prior to death. In a reasonable time after death.

(c) the nature and extent of the limitation

The effect of the new part V of the Status of Children Act 1974 is that the posthumously conceived child will only be regarded as the child of the deceased for the purpose of birth registration, but for no other purpose under Victorian law. However, a person would still be able to make provision for a posthumously conceived child in his or her will under the new part V.

(d) the relationship between the limitation and its purpose

The restriction on the purposes for which a child is to be regarded as the child of a deceased recognises the rights of the posthumously conceived child to the accurate recording of their biological identity and strikes an appropriate balance between the rights of the posthumously conceived child and the rights of other family members and other children to legal certainty in the administration of the estate.

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

There is no less restrictive means reasonably available to achieve the purpose of the limitation.

Section 24: right to a fair hearing

Section 24 guarantees the right to a fair and public hearing. The right to a fair hearing applies in both civil and criminal proceedings and in courts and tribunals.
Clause 147 of the bill inserts a new part IV into the Status of Children Act 1974, sections 30 and 32 of which provide that appeal proceedings in the Court of Appeal against an order of the Supreme Court or County Court must be heard in a closed court, and publication of such proceedings is to be restricted. Sections 24(2) and (3) of the charter enable a court or tribunal to exclude persons or the general public from a hearing if permitted to do so by a law other than the charter, and to prohibit the publication of judgements or decisions made by a court if that is in the best interests of a child or a law other than the charter permits it. Therefore, these provisions fall within a lawful restriction on the right to a public hearing in sections 24(2) and (3) of the charter and do not limit the right.

Conclusion

I consider that the bill is compatible with the charter because to the extent that some provisions may limit human rights those limitations are reasonable and justified in the circumstances.

The Hon. Rob Hulls, MP
Attorney-General

Second reading

Mr HULLS (Attorney-General)—I move:

That this bill be now read a second time.

In 1980 the first Australian IVF baby was born in Victoria. Victoria was the first Australian jurisdiction to provide legislative safeguards for the women undertaking these assisted reproductive treatments through the Infertility (Medical Procedures) Act 1984. This legislation was based on the recommendations and report of the Waller committee, established to investigate the social, ethical and legal implications of in-vitro fertilisation. The 1984 legislation was updated in 1995 to reflect the advances in IVF treatment procedures and the resulting Infertility Treatment Act 1995 was introduced into this house on 4 May 1995 by the Honourable Marie Tavan MP. The 1984 and the 1995 Acts were passed by both houses of Parliament with bipartisan support.

We are now facing a new stage in the development of legislation to match the needs and challenges presented by Victoria’s pluralistic society. In 2001 the Federal Court of Australia found that the requirement that a woman be married or in a heterosexual de facto relationship to access assisted reproductive treatment, or ART, in a Victorian clinic was invalid because it was inconsistent with the Commonwealth Sex Discrimination Act 1986. In addition, the current legislation has not kept pace with rapid developments in reproductive technology.

Victorian Law Reform Commission Review

In 2002, the government provided a reference to the Victorian Law Reform Commission (VLRC) to:

- inquire into the desirability and feasibility of changes to the Infertility Treatment Act 1995 and the Adoption Act 1984 to expand eligibility criteria in respect of all or any forms of ART and adoption;
- make recommendations for any consequential amendment to relevant Victorian legislation;
- consider whether amendments should be made to reflect rapidly changing technology in the area of assisted reproduction; and
- consider how certain provisions of the Infertility Treatment Act apply to the practice of altruistic surrogacy and make recommendations for clarification of the legal status of any child born of such an arrangement.

After an extensive process of consultation and research conducted over four and a half years, the VLRC report was tabled in the Victorian Parliament in June 2007. The VLRC made 130 recommendations for reform, designed to meet the needs of all children born through ART, and to provide a robust framework capable of accommodating future social and technological change.

Overview of the commission’s findings in relation to the limitations of the current law

Before outlining the provisions of this bill, it is worth reviewing the limitations of the current legislation as identified by VLRC.

Limitations of previous act

As previously stated the current law contains invalid eligibility requirements for access to treatment. The requirement that a woman be ‘unlikely to become pregnant’ is currently applied inconsistently. If a woman has a male partner, her inability to become pregnant may be the result of a number of factors, including her partner’s infertility or an unidentifiable cause. If she does not have a male partner, she must be clinically infertile to be eligible for treatment.

The VLRC reviewed relevant research and was satisfied that 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.

Restrictions in the legislation also prevent people from pursuing surrogacy arrangements in Victoria. Altruistic