



Victorian
Law Reform
Commission



PRODUCTIVE
& ADOPTION

ASSISTED REPRODUCTIVE TECHNOLOGY & ADOPTION

Final Report Summary

This is a summary of the Victorian Law Reform Commission's *Assisted Reproductive Technology • Adoption: Final Report*. The full report is on our website <www.lawreform.vic.gov.au> and printed copies are available from the commission.

The commission was asked by the Attorney-General to conduct an inquiry into the laws that determine who should be able to access reproductive services provided by clinics in Victoria, such as IVF and donor insemination, how the law should recognise parents in different types of families and how surrogacy arrangements should be regulated.

The commission makes 130 recommendations for a more inclusive approach to the regulation of assisted reproductive treatments and the protection of the best interests of children born as a result of these treatments. The package of reforms we have proposed provides a comprehensive approach to the regulation of reproductive technology in Victoria.

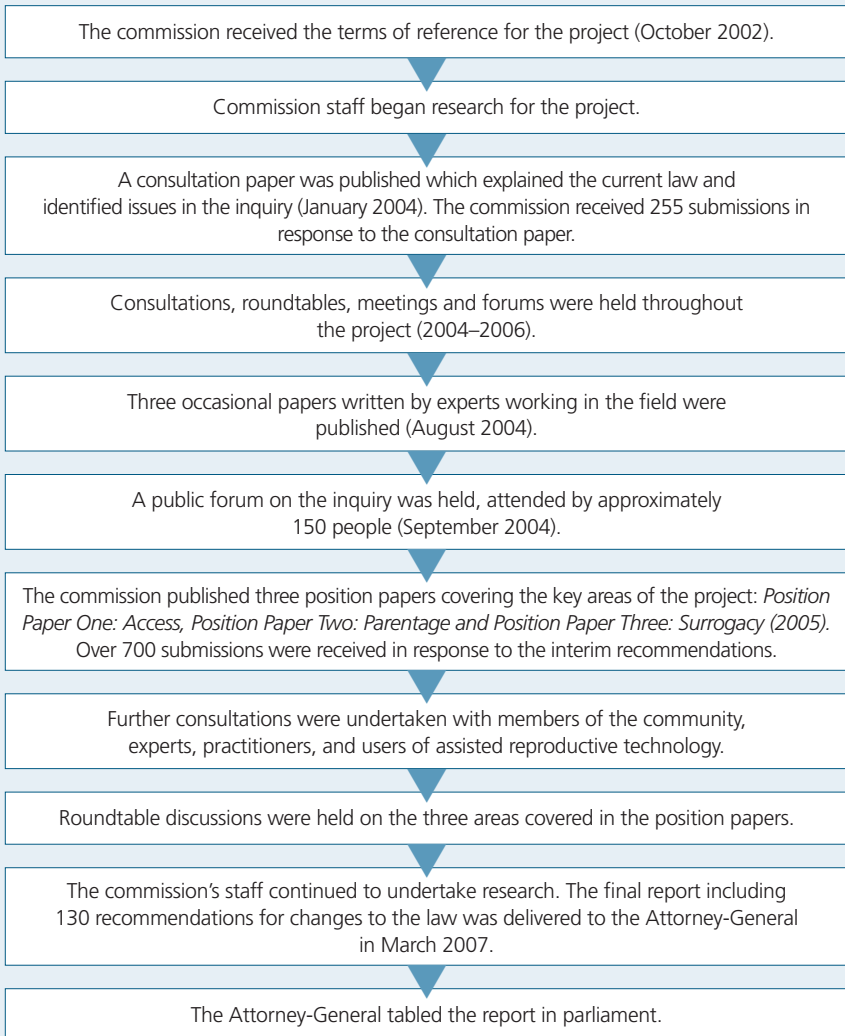
The commission has delivered the report to the Attorney-General. Now that the report has been released, it is up to the government to respond to the recommendations and pass legislation to change the law.

We have summarised the report's main recommendations in this brochure, but you will need to read the full report for the details.

Copies of the *Assisted Reproductive Technology • Adoption: Final Report* are available from the website <www.lawreform.vic.gov.au>, or you can request a hard copy by email <law.reform@lawreform.vic.gov.au> or phone 03 8619 8619.

Our Process

The Victorian Law Reform Commission was established by the government to look at ways to improve Victoria's laws. We receive our projects from the Attorney-General but otherwise operate independently of government. Eight people sit on the commission, including judges, academics and lawyers.



Summary

SOCIAL CONTEXT FOR REFORM

Over the past three decades there have been substantial changes in the structure of Australian families. Changes include a growth in the proportion of single parent families and blended families, and increases in the number of people living in same-sex relationships. In addition, the number of people who use IVF or other forms of assisted reproductive technology (ART) has steadily increased over the past decade.

Victoria's regulation of ART has failed to keep pace with the emergence of new families and developments in reproductive technology.

Currently in Victoria the law neglects several family types, either by excluding certain categories of people from accessing ART services to enable them to have children or by failing to recognise relationships existing within certain families.

In the report the commission makes a series of recommendations 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.

A NEW APPROACH TO REGULATION

Infertility treatment legislation was first passed in Victoria in 1984 and has undergone many changes since then. This has resulted in legislation which covers many situations but lacks the flexibility to respond to the diversity of relationships and family arrangements which currently exist. In the report, the commission recommends an approach that uses a new set of principles to guide users of the Act and to improve the law's ability to cover unexpected issues.

The guiding principles are:

- The welfare and interests of children to be born as a result of the use of reproductive technology are paramount.
- At no time should the use of reproductive technology be for the purpose of exploiting the reproductive capabilities of men and women or any child born.
- All 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 people undergoing assisted reproductive treatment procedures must be protected at all times.
- People seeking to undergo assisted reproductive treatment procedures must not be discriminated against on the basis of their sexual orientation, marital status, race or religion.

ACCESSING CLINICS

INCLUSIVE ACCESS TO TREATMENT

The legislation in Victoria says that a woman must be unlikely to become pregnant to have treatment in a clinic.

She must also be married or in a de facto relationship with a man. In 2000, a court decided that this requirement was inconsistent with the federal anti-discrimination law and was therefore invalid. Since then, clinics have been able to treat women who are not married or in relationships with men, as long as they are clinically infertile. These women are able to be treated with donor sperm. Single women or women in same-sex relationships who wish to use donor sperm from a clinic because they do not have male partners but who are not clinically infertile cannot access treatment.

The restrictions in the current law have a substantial impact on women wishing to have children. Single or lesbian women may need to travel interstate to access clinical services or they may attempt to become pregnant by self-inseminating using donor sperm at home. The protections offered by Victorian clinics, such as the legal right to access

information about donors, counselling, and the screening of sperm for disease are not always available to these women.

There is confusion over who can use clinics in Victoria and for what reasons. This means the legislation needs to be clarified.

The commission believes that the requirement that women must be married or in relationships with men to access clinical services needs to be removed from the legislation. It is no longer legally valid because it has been found to be discriminatory.

The commission also believes that the definition of 'unlikely to become pregnant' in the current Act should be expanded to include reasons other than clinical infertility. An appropriate test is whether a woman is 'in the circumstances in which she finds herself, unlikely to become pregnant other than by a treatment procedure'. This would mean that women who do not have male partners would be entitled to seek treatment in clinics.

Clinical infertility is the term used to describe the medical reasons which prevent a woman from becoming pregnant.

Summary

ACCESSING CLINICS PROTECTING CHILDREN

The current restrictions limit access to reproductive treatment on the basis of whether people are married or in de facto relationships, and whether they are clinically infertile. These restrictions are not based on identified risks to children. Research shows that having single, lesbian or gay parents does not pose a risk to children's wellbeing. However, people with histories of violence, sexual abuse or neglect of children do pose a risk.

To protect children who are born as a result of ART, the commission recommends that clinics play a more active role in screening people who want treatment and dealing with other issues which may affect children.

The commission's recommendations to protect children include:

- a presumption that people with convictions for sexual and serious violent offences or who have had child protection orders made against them should not have access to treatment
- doctors and counsellors who believe that any child born as a result of reproductive treatment would be at risk of abuse or neglect should ask a clinical ethics committee to decide if treatment should be permitted
- if a person seeking treatment disagrees with the decision made by the committee, they can ask a review panel of the Infertility Treatment Authority to review the decision.

The review panel and ethics committees would include experts in child development and protection.

ADOPTION

Adoption of babies is now rare. Same-sex couples are currently unable to adopt children in Victoria.

The commission believes that it is important that the widest possible pool of people is available to help these children. Research shows that a parent's sexuality is not a predictor of harm to children.

The commission recommends that same-sex couples should be allowed to apply to adopt children. All applicants for adoption should continue to be subject to the full range of assessment criteria, including the need to be approved as fit and proper people to adopt a child.

RECOGNISING PARENTS

NON-BIRTH MOTHERS

In Victoria the law establishes many powers and responsibilities parents have in respect of their children.

When children are born to same-sex couples, they are disadvantaged because one of the people caring for them is not legally recognised as their parent. The woman who gives birth to the child has legal responsibilities for the child. However, the non-birth mother's relationship with the child is not legally recognised, even though she acts in every way as the child's parent. This can cause problems when dealing with schools, doctors and government departments.

A child is not entitled to child support from their non-birth mother if a couple breaks up. Nor does a child have an automatic right to claim on the estate of their non-birth mother if she dies.

To remedy these problems, the commission recommends that Victorian law should recognise the female partner of a birth mother as a parent of the child. The mechanism for recognising parents in same-sex relationships should be the same as it is for heterosexual relationships. That is, the law should presume that a birth mother's partner is a child's parent when she has consented to the birth mother becoming pregnant. This law should apply both to non-birth mothers of children born in the future and also of children who have already been born.

The Victorian Government should also work towards national reform to ensure that the non-birth mother is considered

a parent under the federal *Family Law Act 1975* and *Child Support (Assessment) Act 1989*.

DONORS

The current law says that donors of sperm, eggs or embryos are not the parents of any child born to a heterosexual couple. When a man donates sperm to a single woman or to a woman in a same-sex relationship, his status is unclear. There have been some complex court cases about the status of donors in these situations.

The law should make it clear that all sperm and egg donors are not considered the parents of children born from their donations, regardless of the marital or relationship status of the child's parents.

This does not mean that donors cannot or should not be part of the child's life. As with all relationships, this is a matter to be negotiated, planned and discussed in each family before children are born and as they grow up. Arrangements providing for a parental role for donors can be formalised with parenting orders from the Family Court, which are flexible enough to reflect the needs of individual families.

BIRTH REGISTRATION

Birth certificates should list the people who are the legal parents of a child, including non-birth mothers. The commission recommends that as well as using the terms 'mother' and 'father', birth certificates include the option of being listed as a 'parent'. Some families may wish to update their children's birth certificates to reflect the changes to the law.

Summary

NEW DEVELOPMENTS IN TREATMENT

The current Victorian legislation covering ART is over ten years old. Since that time there have been many new developments which were not anticipated. One of the areas the commission was asked to make recommendations about is how to ensure that the legislation can keep up with rapidly changing technology.

The commission believes that the structure of the legislation should be more flexible so that it can keep pace with technological change. The system of regulation which the commission recommends includes:

- The legislation should set down guiding principles which reflect broad community expectations and should establish processes to facilitate access to ART.
- An Infertility Treatment Authority ethics committee should consider what impact new treatments or medical techniques might have on children and adults involved in treatment.
- The ethics committee should decide whether clinics are allowed use the new treatments. If a woman or couple wishes to use ART to have a child for reasons other than an inability to become pregnant or the desire to avoid the transmission of a genetic condition, they should be able to apply to the review panel for permission.

One example of a new development is the use of ART to conceive a child with particular genetic traits so that this child can donate cord blood or other tissue to an existing ill sibling.

This is a difficult ethical question and the commission believes that a case such as this one should be handled by an expert review panel rather than through legislation. The commission recommends the review panel should make decisions on a case-by-case basis, and according to the principle that the welfare and interests of the child are paramount.

An embryo is the fertilised egg in the first seven weeks of its development.

SEX SELECTION

The commission believes that the ban on people choosing a child's sex when using IVF should remain. The only time it should be possible for embryos of a particular sex to be selected is when it is necessary to avoid passing on a genetic condition to a child.

WHEN PEOPLE DIE

There have been a few cases in Victoria where people have died and their partners have subsequently wanted to use their sperm or an existing embryo to have a child.

The legislation currently allows a woman to use an embryo which was created with her husband's sperm before he died. It is also possible to use the sperm or eggs of a dead person to create an embryo in a laboratory and to transfer the embryo into a woman's uterus. However, it is illegal to transfer the sperm or eggs of a dead person directly into a woman's uterus, for example by assisted insemination.

The commission recommends that sperm and eggs can only be used after a person dies if they have left written consent. It should be a standard procedure

for clinics to ask people whether they consent to this use.

The commission also recommends that sperm or eggs can only be retrieved from the body of a dead person if they had provided written consent to such a procedure.

The commission believes that a dead person's sperm, eggs or embryos should only be used by his or her surviving partner. A clinical ethics committee should decide whether treatment in each case should proceed and must consider the possible impact of the birth of a child.

The commission recommends that if a person who has donated sperm, eggs or embryos to a clinic dies, the clinic should not be able to continue to make the donation available.

SELF-INSEMINATION

Self-insemination is where a woman who wants to get pregnant attempts to do so at home using donated sperm. Currently, women may not be able to ensure that the sperm is free from disease or check its quality. The legislation is also unclear about whether it is a criminal offence for a partner or friend of the woman to help her insert the sperm.

The commission does not think it is in the best interests of children for their mothers to risk using unscreened sperm. Women who want to use healthy sperm should be able to have it screened by a clinic.

It also does not make sense to punish a friend or partner of the woman for helping her use donated sperm, and it should not be an offence to do so.

Summary

DONOR SPERM, EGGS AND EMBRYOS

Some ART treatments use donated sperm, eggs or embryos to help a woman or couple to have a child. The current law makes all donors receive counselling and have medical checks before they donate. The commission believes the processes that apply to the screening of donors and donations, such as lifestyle questionnaires and quarantine periods, need to be updated to reflect current medical knowledge.

The commission has also considered whether a person should be able to say who can benefit from their donated sperm, eggs or embryos. For example, a person may want their sperm only to be used by a person of a particular race or a particular kind of family. The commission believes that donors should not be able to specify what type of people can receive their donations. However, donors should still be able to donate to people who they already know.

INFORMATION ABOUT DONORS

The way we treat information about people who donate sperm has changed since the first IVF baby was born. It used to be the case that all donors were anonymous. However, we now know that it is important for children to know the identity of their donors.

Currently in Victoria, people born after 1998 can find out who their donor was when they turn 18. However, people born before this date can only find out the donor's identity if the donor consents. No central records were kept about donations made before 1988 and people born during this period are often angry and frustrated that they cannot find out who their donor was. The commission recommends that the Infertility Treatment Authority (ITA) assist clinics to contact their pre-1998 donors to explain their options for providing information about themselves to people conceived using their sperm.

Donors can apply to the ITA for information about children conceived

with their sperm or eggs. When the ITA receives an application it must seek the donor-conceived person's consent to release their identity to the donor. For many donor-conceived people, this may be the first time they discover how they were conceived.

The commission believes the best people to tell children about their conception are their parents, and therefore recommends that donors no longer be able to apply to find out the identities of people born using their sperm or eggs.

It is important that people are told about their genetic origins. The commission thinks parents of children born from donated sperm and eggs should receive ongoing counselling and support to help them tell their children how they were conceived.

The ITA manages information registers about donors and people born from donated sperm and eggs, but the commission thinks a separate agency, similar to the agency that handles adoption information, should be responsible for managing the donor registers.

SURROGACY

Surrogacy arrangements that do not involve any payment are legal in Victoria. However, the law makes it almost impossible for a surrogate mother to have treatment in a reproductive clinic. She must be 'unlikely to become pregnant' to receive treatment. If the people arranging the surrogacy want to use their own embryo, the surrogate's husband must also be infertile.

The restrictions in Victoria have meant that people wanting to use surrogacy to have a child have travelled interstate or overseas to do so. When this happens, the child born may lack the full protection of Victorian law.

If the law allows surrogacy, it is important that arrangements are undertaken with care. Surrogacy arrangements are more complex than other forms of ART because a woman will surrender a child who she has given birth to.

The commission believes that it should be possible to use reproductive clinics for surrogacy arrangements. We recommend that the 'unlikely to become pregnant' requirement apply to the people arranging the surrogacy rather than the surrogate mother or her partner.

All the parties in a surrogacy arrangement should receive counselling and legal advice. A clinical ethics committee should then decide if the surrogacy arrangement can go ahead.

There is always the possibility that a surrogate mother will not want to give up a child once it is born. This highlights the importance of counselling before, during and after the pregnancy.

Surrogate mothers who use their own eggs in a pregnancy should receive specific counselling. The commission also recommends that a woman acting as a surrogate be aged 25 years or older. This is intended to help ensure that she will be mature enough to understand the consequences of her decision.

The law does not currently recognise the people who arrange to have a child through surrogacy as the parents, even if they are the genetic parents of the child. Under the current law, the surrogate is considered the mother and if she has a partner he is considered the father.

The commission recommends that the people who arrange the surrogacy should be recognised as the child's parents as long as the surrogate mother agrees and a court agrees it is in the best interests of the child. When a court decides that the parents should be recognised, they should be able to put their names on the child's birth certificate.

The commission believes that this court process should also be available to recognise surrogacy agreements completed in the past to allow existing families to change birth certificates and be legally recognised as the parents of their children.

Surrogacy is an arrangement where a woman agrees to carry a baby for another person or couple.



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