

# Assisted Reproductive Treatment Bill 2008

## Introduction Print

### EXPLANATORY MEMORANDUM

#### General

The Assisted Reproductive Treatment Bill 2008 repeals the **Infertility Treatment Act 1995** and replaces it with the **Assisted Reproductive Treatment Act 2008**. This Bill also includes amendments to the **Status of Children Act 1974** and the **Births Deaths and Marriages Act 1996**.

#### Background

On 11 October 2002, the Attorney-General made a joint reference with the then Minister for Health, the Hon John Thwaites, to the Victorian Law Reform Commission (VLRC) to inquire into various aspects of Victoria's laws concerning access to assisted reproductive treatment and adoption, surrogacy and parentage.

The VLRC engaged in extensive public consultation and research. Its final report was tabled in the Victorian Parliament on 7 June 2007.

The VLRC found that Victoria's regulation of assisted reproductive treatment had failed to keep pace with the emergence of new families and was out of step with other States. The VLRC identified the best interests of the child as the paramount consideration and made 130 recommendations for reform of Victoria's laws in this area.

On 14 December 2007, the Government announced that it would update its laws on assisted reproductive treatment and surrogacy based on the VLRC's recommendations, subject to working through practical implementation issues.

The Assisted Reproductive Treatment Bill 2008 incorporates amendments to reflect the Government's 14 December 2007 announcement that it would update Victoria's laws on assisted reproductive treatment and surrogacy based on the VLRC's recommendations. The **Infertility Treatment Act 1995** is to be repealed by the Assisted Reproductive Treatment Bill 2008. Part 2A and Part 4A of the **Infertility Treatment Act 1995** will be reproduced in the **Research Involving Human Embryos Act 2008** and the

**Prohibition of Human Cloning for Reproduction Act 2008** at the same time that the **Infertility Treatment Act 1995** is repealed.

### **PART 1—PRELIMINARY**

- Clause 1 sets out the main purposes of the Act.
- Clause 2 is the commencement provision.  
The substantive provisions will come into effect on a day or days to be proclaimed, or on 1 January 2010 if not proclaimed beforehand.
- Clause 3 is the definition section.
- Clause 4 sets out how certain references to procedures and treatment in the Act are to be interpreted.
- Clause 5 sets out the guiding principles which must be given effect in administering the Act, carrying out functions under the Act and the carrying out of activities regulated under the Act. The guiding principles are as follows—
- 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 purposes of exploiting 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 origins;
  - The health and wellbeing of persons undergoing treatment procedures must be protected at all times;
  - Persons seeking to undergo treatment procedures must not be discriminated against on the basis of their sexual orientation, marital status or religion.
- Clause 6 provides that the Act will bind the Crown in right of the State of Victoria and, so far as the legislative power of Parliament permits, in all other capacities. This section also provides that nothing in this Act renders the Crown liable to be prosecuted for an offence.

## PART 2—TREATMENT PROCEDURES

### Division 1—General

Clause 7 makes it offence for a person to carry out assisted reproductive treatment unless the person is (or are under the supervision and direction of) a doctor carrying out treatment on behalf of a registered ART provider, and the person is satisfied that the requirements of Division 2, 3 and 4 are met.

The Bill defines *assisted reproductive treatment* as medical treatment or a procedure that procures or attempts to procure, pregnancy in a woman by means other than sexual intercourse or artificial insemination and includes—

- in vitro fertilisation;
- gamete intrafallopian transfer; and
- any related treatment or procedure prescribed by the regulations.

The requirements of Division 2, 3 and 4 that a person must be satisfied of before carrying out assisted reproductive treatment include—

- the requirement that in the woman's circumstances, she is unlikely to become pregnant or unlikely to carry a pregnancy or give birth, other than by a treatment procedure, or she is at risk of transferring a genetic abnormality or a genetic disease to her child unless she undergoes a treatment procedure;
- the requirement that a presumption against treatment does not apply to the woman;
- the requirements as to consent;
- the requirement that permission be given for a child protection order check to be undertaken; and
- the requirement to undergo counselling.

This clause carries a penalty of 480 penalty units or four years imprisonment or both. This is also an indictable offence by virtue of clause 123. In Victoria, an indictable offence is one that is ordinarily prosecuted upon indictment or presentment before a judge and jury.

Clause 8 makes it an offence for a person to carry out artificial insemination of a woman unless the person is a doctor and the person is satisfied that the requirements of Division 2, 3 and 4 have been met.

*Artificial insemination* is defined in clause 3 as a procedure of transferring sperm without also transferring an oocyte into the vagina, cervical canal or uterus of a woman.

This clause allows doctors who are not providing services on behalf of a registered ART provider to carry out artificial insemination as part of their general practice.

This clause carries a penalty of 480 penalty units or four years imprisonment or both. This is also an indictable offence by virtue of clause 123.

Clause 9 is an exception to the prohibition in clause 8. This clause stipulates that the requirement that only a doctor may carry out artificial insemination does not apply to a woman carrying out self-insemination, or the woman's partner, friend or relative assisting her to self-inseminate. Consequently, there is no requirement for the provisions of Divisions 2, 3 and 4 to be met.

This means that, for example, a woman who chooses to undertake artificial insemination, and who is assisted by her female partner at her private premises to carry out the self-insemination without a doctor present, will not be committing an offence under clause 8.

### **Division 2—General requirements for treatment procedures**

Clause 10 sets out the eligibility criteria for persons wishing to undergo treatment procedures.

Clause 10 stipulates that a woman may undergo a treatment procedure only if the woman and her partner (if any) have consented to the carrying out of that particular procedure and either the criteria in subsection (2) apply, or the Patient Review Panel has decided under section 15(2) that there is no barrier to the woman undergoing the treatment procedure.

The criteria in subsection (2) are—

- a doctor is satisfied on reasonable grounds that in the woman's circumstances she is unlikely to become pregnant other than by a treatment procedure; or

- a doctor is satisfied on reasonable grounds that the woman is unlikely to be able to carry a pregnancy or give birth to a child without a treatment procedure; or
- a doctor is satisfied on reasonable grounds that the woman is at risk of transmitting a genetic abnormality or genetic disease to a child born as a result of a pregnancy, either from herself or from her partner as a carrier, unless the pregnancy is conceived by means of a treatment procedure.

For a doctor to be satisfied on reasonable grounds that a woman is at risk of transmitting a genetic abnormality or genetic disease to a child born as a result of a pregnancy, the doctor must obtain advice to that effect from another doctor or a geneticist, and the other doctor must have specialist qualifications in human genetics.

In addition to the above criteria, the woman must also not be subject to a presumption against treatment. The way in which a woman can be subject to a presumption against treatment is explained in clause 14.

Clause 11 sets out the requirements for a valid consent to be given by a person wanting to undergo a treatment procedure under clause 10. The consent—

- must be in the prescribed form; and
- must specify that the woman and her partner (if any) have consented to undergo the specific kind of treatment procedure in the consent form; and
- must not have been withdrawn or have lapsed when the procedure takes place; and
- must be accompanied by a statement from a counsellor that a criminal records check in relation to both the woman and her partner (if any) has been sighted and considered by a counsellor providing services on behalf of the registered ART provider; and
- must be accompanied by permission from the woman and her partner (if any) for a child protection check to be conducted.

The person who is giving the consent must give the consent, or cause the consent to be given, to a designated officer of the registered ART provider who is to carry out the procedure. If the procedure is being carried out by a doctor who is not providing services on behalf of a registered ART provider the consent must be given to the doctor in charge of the woman's treatment.

Clause 12 applies if a registered ART provider has been given permission under section 11(1)(e) to conduct a child protection order check.

For the purposes of this Bill, a relevant *child protection order* is defined as any of the following under the **Children, Youth and Families Act 2005**—

- a custody to the Secretary order;
- a custody to third party order;
- a guardianship to Secretary order.

Before providing treatment to a woman, and after permission has been given in accordance with section 11(1)(e), a registered ART provider must ask the Secretary to the Department responsible for providing child protection services to prepare a statement.

That statement, which the Secretary must provide, is to include—

- details of whether a child protection order has been made which removed custody or guardianship over any child from the woman or her partner (if any); and
- if such a child protection order has been made, details of that order, including when it was made and for how long.

Clause 13 provides that before a woman consents to undergo a treatment procedure, the woman and her partner, if any, must have received counselling from a counsellor who provides services on behalf of a registered ART provider. This includes counselling in relation to the prescribed matters.

Clause 14 stipulates that if a presumption against treatment applies against a woman, a registered ART provider must not provide a treatment procedure to that woman.

A presumption against treatment applies against a woman if a criminal record check in relation to a woman or her partner (if any) shown to a counsellor providing services on behalf of a registered ART provider specifies that—

- charges have been proven against the woman or her partner (if any) for a sexual offence referred to in clause 1 of Schedule 1 to the **Sentencing Act 1991**; or
- the woman and her partner (if any) has been convicted of a violent offence referred to in clause 2 of Schedule 1 to the **Sentencing Act 1991**.

Clause 1 of Schedule 1 includes offences such as rape, indecent assault, indecent acts with a child and possession of child pornography.

Clause 2 of Schedule 1 includes offences such as murder, manslaughter, intentionally causing grievous bodily harm and kidnapping.

A presumption against treatment against a woman will also apply if a child protection order check as referred to in clause 12 specifies that a child protection order, as defined under this Act, has been made which removed custody or guardianship over any child from the woman or her partner (if any).

A presumption against treatment will only apply to a woman who is to undergo a treatment procedure. Her partner (if any) may trigger the presumption, but the presumption will not apply to the partner unless the partner is also undergoing a treatment procedure.

Clause 15 provides that a person can apply to the Patient Review Panel for review in the following circumstances—

- if a presumption against treatment applies to a woman under section 14;
- if a woman does not meet the treatment eligibility criteria as set out in section 10(1);
- if a registered ART provider or a doctor has refused to carry out a treatment procedure on a woman because the provider or doctor believes that a child that may be born as a result of the treatment procedure would be at risk of abuse or neglect.

After considering an application for review made under this section, the Patient Review Panel may decide that there is no barrier to the person undergoing treatment in general, or may decide that there is no barrier to a person undergoing a treatment subject to particular conditions being met.

In deciding an application for review under this section, the Patient Review Panel must have regard to the following—

- the guiding principles referred to in section 5 of the Bill;
- whether or not undergoing the treatment is for a therapeutic goal and is consistent with the best interests of a child who could be born as a result of the treatment.

Decisions made by the Patient Review Panel under this section are able to be reviewed by VCAT.

### **Division 3—Requirements for donors**

Clause 16 provides that gametes may only be used in a treatment procedure if the person who donated the gametes has consented to the use of the gametes in a treatment procedure of that kind.

Similarly, clause 16(2) requires that embryos may only be used in treatment procedures if each of the persons who donated gametes that were used to create the embryo consent to the use of the embryo in a treatment procedure of that kind.

Clause 17 sets out the requirements for a valid consent to be given by a person donating embryos or gametes under clause 16. The consent—

- must be in the prescribed form; and
- must specify the number of women on whom treatment procedures using the donor's oocyte, sperm or embryo may be carried out; and
- must specify the kind of treatment procedures for which the donor has consented to the oocyte, sperm or embryo being used; and
- must not have been withdrawn or have lapsed when the procedure takes place.

Note that, as a result of section 29, a person may only consent to their gametes being used in a number of treatment procedures that result in a maximum of 10 women having children who are genetic siblings.

The person who is giving the consent must give the consent or cause the consent to be given to a designated officer of the registered ART provider that is to carry out the procedure. If the procedure is being carried out by a doctor who is not providing services on behalf of a registered ART provider the consent must be given to the doctor in charge of the woman's treatment.

Clause 18 stipulates that before a donor can give consent under section 16 the donor must have received counselling from a counsellor who provides services on behalf of a registered ART provider. This includes counselling in relation to the prescribed matters.

Clause 19 sets out the requirements regarding information to be given by donors, and to be given to donors, when donors give their consent under section 16 to their gametes or embryos being used in a treatment procedure.

Donors must provide to the registered ART provider or the doctor to whom the donation is being made the prescribed information required to be recorded in the register under sections 49 and 50 in relation to donors of gametes or embryos which are to be used in a treatment procedure.

Donors must be advised, in writing, by the registered ART provider or the doctor to whom the donation is being made of the following—

- the rights of any person born as result of a donor treatment procedure, the parents of that person and any other persons to information under Divisions 2 and 3 of Part 6, including identifying information about the donor themselves;
- the nature of the information about the donor recorded in the Central Register;
- the donor's rights to obtain information under Division 3 of Part 6, including information about persons born of a treatment procedure using gametes or embryos donated by them;
- the existence and function of the Voluntary Register under Part 7.

#### **Division 4—Provisions about consent**

- Clause 20 provides that consent given under section 10 (by a person wishing to access treatment) or under section 16 (by a donor) may be withdrawn by the person who gave the consent at any time before the procedure or action consented to is carried out.
- A withdrawal under this section must be in writing and it must be given or caused to be given by the person withdrawing the consent as soon as practicable either at the place where the consent was lodged, or at the place where the gametes or embryos to which the consent relates are stored or where they are to be used. Withdrawal of consent can also be lodged in accordance with the regulations.
- Clause 21 provides the time spans after which consent given by donors in relation to donations made by them lapse. This means that if the gametes or embryos donated have not been used before this time, the consent is no longer valid and the gametes or embryos can not be used.
- In the case of gametes, the consent of the donor lapses and is no longer valid 10 years after it given.
- In the case of an embryo, the consent of each donor who donated gametes that were used to create the embryo donor also lapses 10 years after it was given.
- In the case of either gametes or embryos, a period less than 10 years may be specified at the time that the consent is given by the person giving the consent. If a lesser period is specified, that is the time that the consent lapses.
- Clause 22 requires a designated officer of a registered ART provider to obtain and keep the original of each consent and withdrawal of consent lodged under this Part. A designated officer must also ensure that a certified copy of each consent or withdrawal of consent is given to the person who gave the consent or withdrawal.
- Clause 23 places an obligation on registered ART providers to ensure that, if gametes or embryos are transferred to another registered ART provider, any consents or withdrawals of consent relating to them are transferred with the gametes and embryos.
- Clause 24 provides that, if a registered ART provider transfers a donor's gametes or an embryo formed from the gametes, to another registered ART provider, a designated officer of the registered ART provider who is transferring the gametes or embryos must make all reasonable efforts to give the donor written notice of the

name of the registered ART provider to whom their gametes or embryos have been transferred.

### **Division 5—Requirements for donor treatment procedures**

Clause 25 requires a registered ART provider to provide certain written information to a woman and her partner (if any) before the woman undergoes a treatment procedure. The information and advice required to be given is about—

- the rights of any person born as result of the procedure and other persons to information under Division 3 of Part 6, including identifying information about the donor; and
- the nature of the information about the woman and her partner (if she has a partner) recorded in the Central Register; and
- the rights of the woman and her partner (if she has a partner) to obtain information under Divisions 2 and 3 of Part 6; and
- the existence and function of the Voluntary Register under Part 7.

## **PART 3—OFFENCES RELATING TO USE AND STORAGE OF GAMETES AND EMBRYOS AND OTHER MATTERS**

### **Division 1—Prohibited procedures**

Clause 26 prohibits the use of a gamete produced by a child or an embryo formed from gametes produced by a child in a treatment procedure.

A *child* is defined in section 3 as a person under the age of 18 years.

This clause carries a penalty of 240 penalty units or 2 years imprisonment or both.

Subsection 26(2) provides an exception to the prohibition on the use of gametes produced by a child in a treatment procedure. Gametes may be taken from a child for use in a future procedure if a doctor has certified that there is a reasonable risk of the child becoming infertile before the child reaches adulthood, and gametes are obtained from the child for the purpose of storing the gametes for the child's future benefit.

Gametes taken from a child in accordance with the exception outlined in 26(2) must not be used in the treatment of another person, including any relatives of the child. They also must not be used for research purposes or after the death of the person who produced the gametes when they were a child.

Clause 27 prohibits treatment procedures being carried out that use sperm produced by more than one person or oocytes produced by more than one person. Similarly, treatment procedures which use more than one embryo are prohibited if the gametes from which each embryo is formed are not produced by the same two people.

This clause carries a penalty of 240 penalty units or 2 years imprisonment or both.

Clause 28 prohibits sex selection.

This clause prohibits the use of gametes or embryos in a treatment procedure with the purpose or a purpose of producing or attempting to produce a child of a particular sex.

Similarly, the treatment procedure must not be performed in a particular manner with the purpose or a purpose of producing or attempting to produce a child of a particular sex.

This clause carries a penalty of 240 penalty units or 2 years imprisonment or both.

Subsection 28(2) provides an exception to the prohibition in clause 28(1). If it is necessary for a child to be a particular sex to avoid the risk of transmission of a genetic abnormality or a genetic disease to the child, gametes or embryos may be specifically used, or a treatment procedure may be performed in a particular manner, with the purpose or a purpose of producing or attempting to produce a child of a particular sex. Sex linked genetic diseases include muscular dystrophy and hemophilia.

Finally, the Patient Review Panel may also approve a treatment procedure in which gametes or embryos may be specifically used, or a treatment procedure that may be performed in a particular manner, with the purpose or a purpose of producing or attempting to produce a child of a particular sex.

Clause 29 prohibits the use of donated gametes in a treatment procedure that will result in the creation of more than ten families.

Under this clause, a person is prohibited from carrying out a treatment procedure using a gamete or an embryo formed from a gamete produced by a donor if the treatment may result in ten or more women having children who are genetic siblings.

The ten families that may be created using the donor's sperm includes the family or families of the donor created with any current or former partner of the donor, whether or not by a treatment procedure.

This clause does not prevent a registered ART provider from carrying out treatment procedures that will result in genetic siblings being added to an already existing family.

This clause carries a penalty of 240 penalty units or 2 years imprisonment or both.

Clause 30 prohibits destructive research on embryos that have been created for treatment purposes.

Under this clause, a person must not carry out research outside the body of a woman that involves the use of an embryo that has been created for use in a treatment procedure in the following cases—

- if the embryo is unfit for transfer to a woman;
- in the case of an embryo which is fit for transfer into a woman, if the research would harm the embryo, make it unfit for transfer or would reduce the likelihood of a pregnancy resulting from the transfer.

Research can only be conducted on embryos that have been declared to be an *excess ART embryo* in accordance with the **Research Involving Human Embryos Act 2008** and such research is strictly regulated by that Act and can only be performed under licence.

Clause 30 carries a penalty of 480 penalty units or 4 years imprisonment or both.

### **Division 2—Storage**

Clause 31 establishes how long gametes are allowed to remain in storage.

A person must not cause or permit gametes to remain in storage if the person knows that the person who produced the gametes has asked for the gametes to be removed from storage.

If a person has not asked for their gametes to be removed from storage, the gametes must not be stored for any longer than 10 years or, if the person who produced the gametes has given written approval for a specified longer storage period and the Patient Review Panel has approved the longer period, for that longer approved period.

The Patient Review Panel may only approve in writing a longer period of storage than 10 years if it considers that there are reasonable grounds to do so in the particular case. The Patient Review Panel may also place conditions on the approval of the longer storage period.

This clause carries a penalty of 240 penalty units or 2 years imprisonment or both.

Clause 32 establishes how and by whom and for how long embryos may be stored.

Clause 32(1) states that a person must not cause or permit an embryo to be placed in storage. This is an offence that carries a penalty of 240 penalty units or 2 years imprisonment or both.

Clause 32(2) sets out the exceptions to the offence established in clause 32(1). A person may cause or permit an embryo to be stored if—

- the person is a registered ART provider; and
- it is intended to transfer the embryos stored into the body of a woman in a treatment procedure in accordance with this Act; and
- the persons who have produced the gametes from which the embryo has been formed have consented to its storage for the purpose of transfer at a later time.

Clause 32(3) stipulates that a consent given under subsection (2)(c) must be in writing and must be given, as soon as practicable after the consent has been given, to the registered ART provider who is storing the embryo.

Clause 33 applies to embryos that have been stored for later transfer as contemplated in clause 32(2)(c).

This clause prohibits a registered ART provider from causing or permitting an embryo to which subsection 32(2)(c) applies to remain in storage for more than 5 years. However, if one of the persons who produced the gametes used to form the embryo has specified a period less than 5 years, that is the maximum period of storage allowed for that embryo. Similarly, if both of the persons who produced the gametes used to form the embryo have specified a period of not more than 5 years in addition to the 5 years usually allowed under this section, then that is the maximum period of storage allowed for that embryo.

For example, if Person A and Person B both produced gametes used to create an embryo and neither Person A nor Person B consent to a specified storage period, the embryo may only be stored for 5 years.

If Person A or Person B consented to the embryo only being stored for 2 years, then the embryo may only be stored for 2 years.

If Person A consented to the embryo being stored for 4 years and Person B consented to the embryo being stored for 2 years, then the embryo may only be stored for the least time consented to, being 2 years.

If both Person A and Person B consented to the embryo being stored for a further 5 year period after the period of 5 years which the Act already allows, the embryo may be stored for 10 years.

The Patient Review Panel may approve in writing a longer period for storage of an embryo if it considers that there are reasonable grounds to do so in the particular case. The Patient Review Panel may also place conditions on the approval of the longer storage period.

Clause 34 sets out when embryos may be removed from storage.

A registered ART provider must not remove an embryo from storage or cause or permit an embryo to be removed from storage unless—

- it is to be used in accordance with this Act in a treatment procedure; or
- written consent to its removal has been given to a designated officer of a registered ART provider by both of the persons who produced the gametes from which the embryo is formed; or
- the persons who produced the gametes from which the embryo is formed are unable to agree on the period for which the embryo is to be stored and the Patient Review Panel has directed that the embryo be removed;
- it is required to be removed because the relevant storage period in accordance with section 52 has expired.

Contravention of clause 34(1) is an offence that carries a penalty of 480 penalty units or 4 years imprisonment or both. This is an indictable offence by virtue of clause 123. In Victoria, an indictable offence is one which is ordinarily prosecuted upon indictment or presentment before a judge and jury.

Clause 34(2) further specifies that if an embryo is removed from storage for a purpose or reason permitted by this clause, and is not to be used for a treatment procedure, the person who removes the embryo must ensure that—

- the embryo is not removed from its container (except for the sole purpose of observing the embryo); and
- the embryo is disposed of in accordance with the regulations.

Contravention of clause 34(2) is also an offence and carries a penalty of 240 penalty units or 2 years imprisonment or both.

### **Division 3—General offences in relation to gametes or embryos**

Clause 35 prohibits a person from knowingly or recklessly forming or attempting to form an embryo outside the body of a woman unless the person is a doctor or a scientist who provides services for a registered ART provider, and the person forms the embryo in the course of providing services for the registered ART provider.

Contravention of this clause is an offence that carries a penalty of 480 penalty units or 4 years imprisonment or both. This is also an indictable offence by virtue of clause 123.

Clause 36 prohibits the bringing into, or taking out of, Victoria of donated gametes and embryos.

A person must not bring a gamete produced by a donor or an embryo produced from gametes produced by donors into Victoria. Similarly, a person must not take a gamete produced by a donor or an embryo produced from gametes produced by donors out of Victoria.

This is an offence that carries a penalty of 240 penalty units or 2 years imprisonment or both.

Clause 36(2) provides an exception to the offence in clause 36(1). A gamete or embryo may be brought into or taken out of Victoria in accordance with the written approval of the Authority.

In deciding whether or not to grant approval for a person to take a gamete or embryo out of Victoria, the Authority must have regard to whether the purpose for which the gamete or embryo will be used outside of Victoria and the way in which it will be used, is consistent with a purpose and use that would be allowed in Victoria under this Act.

The Authority's approval may apply to a particular case or to a class of cases and may also be subject to conditions imposed by the Authority.

A person granted an approval under this section must comply with any condition imposed by the Authority on the approval, and failure to comply may attract a penalty of 240 penalty units or 2 years imprisonment or both.

Clause 37 enables the Authority to exempt certain persons from compliance with certain provisions of the Act.

If the Authority has granted approval to a person to bring a gamete or an embryo into Victoria under section 36(2), the Authority may exempt that person from the following provisions in this Act in relation to the gamete or embryo, or donor of the gamete or embryo—

- section 17 (donor must consent in certain form and lodge consent);
- section 18 (donor must be counselled);
- section 19 (information which donor must give and which donor must be given);
- section 20 (withdrawal of consent to be lodged);
- section 32 (storage of embryos);
- Division 1 of Part 6 (information to be kept on the register held by the registered ART provider); and
- any other prescribed provision of the Act or the regulations.

The Authority may only exempt a person from any of these provisions in the Act if the Authority is satisfied that—

- similar procedures have taken place outside of Victoria; and
- there are special circumstances which warrant the exemption.

Clause 36(3) states that, if the Authority has granted approval to a person to take a gamete or an embryo out of Victoria under section 36(2), the Authority may exempt that person from compliance with the following provisions in this Act in relation to the gamete or embryo—

- section 32 (storage of embryos);
- section 33 (removal of embryos from storage); and
- any other prescribed provision of the Act or the regulations.

The Authority may only exempt a person under subsection (3) if the Authority is satisfied that—

- the gamete or embryo will be used in a manner which is consistent with this Act; and
- there are special circumstances which warrant the exemption.

An exemption granted under section 37 must be made in writing and may relate to the whole or a part of a provision and may be subject to conditions.

It is an offence to not comply with a condition imposed on an exemption granted by the Authority under this section which may attract a penalty of 240 penalty units or 2 years imprisonment or both.

#### **Division 4—Offence in relation to giving information**

Clause 38 makes it an offence for a person to knowingly or recklessly give false or misleading information or omit to give material information in an application, consent or request under this Act, or with respect to the giving of information which is required to be given under this Act or included in a register, record or notice under this Act.

This is an offence which carries a penalty of 50 penalty units.

#### **PART 4—SURROGACY**

Clause 39 requires that treatment procedures carried out by registered ART providers may only be carried out as part of a surrogacy arrangement if the surrogacy arrangement has been approved by the Patient Review Panel.

The Act defines a *surrogacy arrangement* as an arrangement, agreement or understanding, whether formal or informal under which a woman agrees with another person to become or try to become pregnant, with the intention—

- that a child born as a result of the pregnancy is to be treated as the child, not of her, but of another person or persons (whether by adoption, agreement or otherwise); or
- of transferring custody or guardianship in a child born as a result of the pregnancy to another person or persons; or
- that the right to care for a child born as a result of the pregnancy be permanently surrendered to another persons or persons.

Clause 40 sets out the matters to be considered by the Patient Review Panel when deciding whether to approve a surrogacy arrangement to be carried out with the assistance of a registered ART provider.

The Patient Review Panel may approve a surrogacy arrangement if satisfied of the following—

- that a doctor has formed the opinion that, in the circumstances, the person is unlikely to become pregnant, be able to carry a pregnancy or give birth; or if the person 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;
- that the surrogate mother is at least 25 years of age;
- that the commissioning parents, the surrogate mother and the surrogate mother's partner (if any) have received counselling and legal advice as required under section 41;
- that the parties to the surrogacy arrangement are aware of and understand the personal and legal consequences of the arrangement;
- that the parties to the surrogacy arrangement are prepared for the consequences if the arrangement does not proceed in accordance with the parties' intentions;

- that the parties to the surrogacy arrangement are able to make informed decisions about proceeding with the arrangement.

Clause 40(2) requires the Patient Review Panel in making a decision under section 40(1) to have regard to the following—

- a report from a counsellor who provided counselling under section 43 to the parties;
- an acknowledgement by the parties to the surrogacy arrangement that the parties have undergone counselling and obtained information about the legal consequences of entering into the arrangement as required by section 43.

A decision under clause 40 by the Patient Review Panel to not approve a surrogacy arrangement is a decision that may be reviewed by VCAT.

Clause 41 enables the Patient Review Panel to approve non-complying surrogacy arrangements even when not satisfied of all the matters in clause 40(1) if the Patient Review Panel believes that—

- the circumstances of the proposed surrogacy arrangement are exceptional; and
- it is reasonable to approve the arrangement in the circumstances.

Clause 42 makes it clear that the general requirements for treatment under Division 2 of Part 2 are also applicable to surrogacy arrangements.

The requirement to ensure that a criminal records check has been shown to a counsellor providing services on behalf of the registered ART provider applies to all parties to a surrogacy arrangement—the surrogate mother, her partner (if any) and the commissioning parent or parents. The requirement to give permission for a child protection order check to be conducted also applies to all parties to a surrogacy arrangement.

If any of the criminal records checks or child protection order checks trigger a presumption against treatment, this must also be considered by the Patient Review Panel.

However, the requirement in section 10(2)(a) that a doctor must be satisfied, on reasonable grounds, that in the woman's circumstances, the woman is unlikely to become pregnant other than by a treatment procedure does not apply to the surrogate mother.

Clause 43 outlines the requirements for counselling and obtaining information about the legal consequences of entering into the arrangement.

Before a surrogacy arrangement is entered into, all parties must do the following—

- undergo counselling by a counsellor providing services on behalf of a registered ART provider about the social and psychological implications of entering into the arrangement, including counselling about the prescribed matters;
- if the surrogate mother's oocyte is to be used in the conception of the child, undergo counselling about the implications of relinquishment of a the child (who will be genetically related to the surrogate mother) and the relationship between the surrogate mother and the child once it is born;
- obtain information about the legal consequences of entering into the arrangement.

Clause 44 prevents a surrogate mother from receiving any material benefit or advantage as a result of a surrogacy arrangement. Surrogacy arrangements under this Act may only be altruistic and can never be commercial arrangements.

This does not, however, prevent a surrogate mother from being reimbursed for costs actually incurred by her as part of the surrogacy arrangement. Costs actually incurred may include medical expenses or lost earnings not otherwise reimbursed by leave entitlement.

This clause makes it clear that, to the extent that a surrogacy arrangement may provide for a matter other than the reimbursement of costs actually incurred by a surrogate mother, the arrangement is void and unenforceable.

Clause 45 prohibits certain things being published in relation to surrogacy arrangements.

**Publish** means publish in a newspaper or by means of television, radio or the internet or otherwise disseminate to the public.

In keeping with the need to ensure that surrogacy arrangements are not commercialised and are altruistic, a person must not publish or cause to be published a statement, advertisement, notice or document—

- to the effect that a person is or may be willing to enter into a surrogacy arrangement; or
- to the effect that a person is seeking another person who is or may be willing to enter into a surrogacy arrangement or to act as a surrogate mother or to arrange a surrogacy arrangement; or
- to the effect that the person is or may be willing to arrange a surrogacy arrangement; or
- to the effect that a person is or may be willing to accept any benefit under a surrogacy arrangement, whether for himself or herself or for any other person; or
- that is intended or likely to counsel or procure a person to agree to act as a surrogate mother; or
- to the effect that a person is or may be willing to act as a surrogate mother.

This clause is an offence which carries a penalty of 240 penalty units or 2 years imprisonment or both.

## **PART 5—POSTHUMOUS USE OF GAMETES**

Clause 46 sets out the requirements for the posthumous use of gametes or embryos in treatment procedures provided by a registered ART provider.

A registered ART provider may use a person's gametes or an embryo formed from the person's gametes, in a treatment procedure after that person has died only if all of the following criteria are met—

- the treatment procedure is carried out on the deceased person's partner. However, if the deceased person's partner is a man, the treatment procedure may be carried

out on a surrogate mother as part of a surrogacy arrangement in accordance with Part 4;

- the deceased person provided specific written consent for their gametes or an embryo created using their gametes to be used after their death in a treatment procedure of that kind. This means that, in the case of a deceased woman with a male partner, she must have consented to her male partner commissioning a surrogacy arrangement for him to be able to use the gametes or embryo;
- the Patient Review Panel has approved the use of the gametes or embryo;
- the person who is to undergo the treatment procedure has received specific counselling under section 48.

Clause 47 sets out the matters to which the Patient Review Panel must have regard when deciding whether or not to grant approval for the posthumous use of gametes or an embryo in a treatment procedure.

The Patient Review Panel must have regard to the possible impact on the child to be born as result of the treatment procedure. In particular, the Patient Review Panel must have regard to any research on outcomes for children conceived after the death of one of the child's parents.

Clause 48 requires a woman to undergo counselling by a counsellor providing services on behalf of a registered ART provider in relation to the prescribed matters before undergoing a procedure which involves the use of gametes or an embryo formed from gametes of a person who has died.

## **PART 6—REGISTERS AND ACCESS TO INFORMATION**

### **Division 1—Register to be kept by registered ART provider**

Clause 49 requires a registered ART provider to keep a register.

Each registered ART provider must ensure that the prescribed information is entered in the register in relation to the matters listed in this clause. These matters include the names of donors, the names of woman who undergo treatment procedures, consents, the types of treatment procedures and the outcome of treatment procedures.

Failure to enter the prescribed information may result in a penalty of 50 penalty units being incurred by the registered ART provider.

Clause 50 requires a doctor who carries out artificial insemination other than on behalf of a registered ART provider to also keep a register, similar to the one required to be kept by registered ART providers in clause 49.

This means that doctors who carry out artificial inseminations as part of their day to day private practise, for example, will need to keep a separate register in accordance with this clause at their consulting rooms. That register must include the prescribed information in relation to the matters listed in clause 50(2). These matters include the names of donors, the names of woman who undergo artificial insemination, consents and the outcome of the artificial insemination, if known.

Clause 51 sets out the information that must be provided to the Registrar of Births, Deaths and Marriages no later than 1 July each year by registered ART providers.

This information includes certain details about every birth of a person born as a result of a treatment procedure carried out by the registered ART provider, every pregnancy which has occurred as a result of a treatment procedure carried out by the registered ART provider, and, in certain circumstances, every donor treatment procedure carried out by the registered ART provider in the preceding financial year.

Failure to provide this information to the Registrar may result in the registered ART provider incurring a penalty of 10 penalty units.

Clause 52 is similar to clause 49 as it sets out the information that must be provided to the Registrar of Births, Deaths and Marriages before 1 August in each year by doctors who have carried out artificial insemination other than on behalf of a registered ART provider.

This information includes certain details about every birth of a person born as a result of artificial insemination carried out by the doctor, every pregnancy which has occurred as a result of artificial insemination carried out by the doctor, and every artificial insemination carried out by the doctor in the preceding financial year.

Clause 53 requires the Registrar of Births, Deaths and Marriages to keep a Central Register containing the information provided to the Registrar by registered ART providers and doctors in accordance with Part 6 of the Act, as well as the prescribed information.

The Registrar may keep the Central Register in the way decided by the Registrar.

- Clause 54 enables requests to be made to the Registrar of Births, Deaths and Marriages for information in the Central Register to be corrected or amended if the information is inaccurate, incomplete, out of date or misleading.

There must be information on the Central Register which relates to the person making the application to the Registrar.

Clause 54 sets out the way in which such a request must be made and what the registrar must do when such a request is made.

### **Division 2—Information to be given by registered ART providers**

- Clause 55 sets out the information that is to be given by a registered ART provider from their register to a donor upon request by a donor.

A donor may ask a designated officer for any information that is required to be recorded on the register kept by the registered ART provider about the woman (and her partner, if any) upon whom a treatment procedure is proposed to be carried out using the gametes or an embryo formed from the gametes of the donor.

A designated officer must provide any information that is held on the register about the woman and her partner to the donor if the information does not identify the woman or her partner.

Identifying information about the woman and her partner (if any) must only be given to the donor if the woman and her partner (if any) have consented to the information being given to the donor.

This clause also sets out how information is to be provided.

Failure to comply with this clause is an offence which attracts a penalty of 50 penalty units.

### **Division 3—Disclosure of information on the Central Register**

- Clause 56 lists the persons who are able to apply to the Registrar of Births, Deaths and Marriages for information to be disclosed to them that is recorded on the Central Register.

Persons born as a result of a donor treatment procedure, the parents of persons born as a result of a donor treatment procedure and donors may make an application to the registrar for information that relates to themselves or to their children.

Clause 56 also sets out how such applications are to be made.

Clause 57 stipulates that information that does not identify another person must be disclosed by the Registrar when an application is made under section 56.

Consent does not need to be given by the person about whom the information relates before it is disclosed as only non-identifying information may be disclosed under this clause.

Clause 58 sets out how information may be disclosed to donors or parents of persons born as a result of donor treatment procedures.

If the Registrar receives an application under section 55 from a donor or a parent of a person born as a result of a donor treatment procedure, the Registrar must disclose to them information that they applied for, even if that information identifies or may identify another person if the person to whom the information relates consents to the disclosure of the information.

The disclosure must be made in accordance with the consent given, which means that if the consent has been given with conditions attached, those conditions must be met.

If the person to whom the information relates is a child, the Registrar must disclose the information if the child's parent or guardian has consented to the disclosure, the disclosure is in accordance with the consent, and the child has not indicated to the Registrar that they do not want the information about them to be disclosed.

Clause 58(2) gives the Registrar discretion to disclose information about a child born of a donor treatment procedure, even if the child's parent or guardian has consented to the disclosure, if the child has indicated that they do not want the information to be disclosed. The Registrar may only disclose the information in those circumstances if the Registrar considers it reasonable.

Clause 59 sets out how information may be disclosed to persons born as a result of donor treatment procedures.

If the Registrar receives an application under section 56 from a person born as a result of a donor treatment procedure after the person has turned 18, the Registrar must disclose to the person information that they applied for, even if that information identifies or may identify another person.

If the person born as a result of a donor treatment procedure is still a child, the person's parent or guardian must consent to them making the application under section 56 for disclosure of information.

Alternatively, if a counsellor provides counselling to the person about the possible consequences of the person's application and the information the person may receive, and the counsellor advises the Registrar in writing that the person is sufficiently mature to understand those consequences, then the consent of their parent or guardian is not required.

***Counsellor*** is defined in this section as a counsellor who provides counselling on behalf of a registered ART provider or who is an approved counsellor within the meaning of the **Adoption Act 1984**.

There are additional criteria to be met before information can be disclosed by the Registrar under this clause. If the person born as a result of a donor treatment procedure who is making an application was conceived using gametes donated after 31 December 1997, and the criteria stipulated in clause 57(1)(a) have been met, the Registrar must disclose identifying information about the donor held on the Central Register.

However, if the person born as a result of a donor treatment procedure who is making the application was conceived using gametes donated between 1 July 1988 and 31 December 1997 the Registrar may only disclose identifying information held on the Central Register about the donor if the donor has given consent to the disclosure.

This is because between 1 July 1988 and 31 December 1997, donors were able to indicate at the time that they donated their gametes whether they consented to identifying information about them being disclosed to persons born of treatment procedures using their gametes in the future. If a donor did not consent at the time the gametes were donated, that lack of consent cannot now be ignored.

Since 1 December 1997, all donors have been made aware at the time that they made their donation that identifying information about them may be disclosed in the future.

Before 1 July 1988, donations were made anonymously and so no information that may identify those donors is held on the Central Register.

The Central Register will include the dates upon which donations were made so the Registrar will be able to ascertain which category information falls into.

Clause 60 enables the Registrar to disclose to a person who is descended from a person born as a result of a treatment procedure information that they have applied for under section 56 that will or may identify the donor from whom they are descended.

Whether or not to disclose the information is a matter for the Registrar and may depend on whether the donor has given their consent.

Clause 61 requires the Registrar to ensure that persons who apply for information under section 56 are counselled or have been offered counselling, depending on the circumstances, before information is disclosed.

In the case of disclosure of non-identifying information, the Registrar must ensure that the person making the application has been offered counselling.

In the case of disclosure of identifying information, the Registrar must be satisfied that the person making the application has received counselling about the potential consequences of disclosure of information from the Central Register.

The counselling referred to in this section is to be provided by a counsellor as defined by the Act—a counsellor who provides counselling on behalf of a registered ART provider or who is an approved counsellor within the meaning of the **Adoption Act 1984**.

The counselling need not relate to the possible impact of disclosure of the specific information held on the Central Register in relation to the particular person making the application, but should relate to the potential consequences of disclosure of information of the sort held on the Central Register in general.

Clause 62 requires the Registrar to make reasonable efforts to notify people if the Registrar intends to release information about them that will or may identify them.

Clause 63 enables the Registrar to disclose information on the Central Register to the Authority for purposes relating to the Authority's functions.

#### **Division 4—General Provisions**

Clause 64 clarifies that any reference in this Act or the regulations to the giving of information which will or may identify a person means the giving, disclosing or publication of information from which a person will or may be identified, directly or indirectly.

Clause 65 enables registered ART providers and the Registrar to disclose information that may have been applied for under this Part to a medical practitioner if the registered ART provider or the Registrar considers that the disclosure of the information which is

of a medical or psychiatric nature to the applicant might be prejudicial to the physical or mental health or wellbeing of the applicant. The applicant may nominate the medical practitioner to whom they wish the information to be disclosed.

Clause 66 requires records to be kept of information given under Part 6 or the regulations, including records of the person to whom the information has been given and the information given.

Clause 67 provides clarification about who can give consent in certain circumstances under Part 6 or the regulations.

If a person who is required to give consent is dead, the consent may be given by the senior available next of kin of that person within the meaning of the **Human Tissue Act 1982**.

Section 3 of the **Human Tissue Act 1982** defines *senior available next of kin* as—

- in relation to a deceased child—
  - if available, a parent of the child; or
  - if a parent is not available—a brother or sister of the child who is an adult and available; or
  - if neither a parent nor a sibling is available—a person who was the guardian of the child immediately before the child died, who is available; and
- in relation to any other deceased person—
  - if the person had a partner directly before death—their partner; or
  - if the partner is not available, or if they did not have a partner immediately before they died—an adult son or daughter who is available; or
  - if neither the partner nor the son or daughter is available—a parent of the person who has died or
  - if none of the above people are available—an adult sibling of the person who has died.

Clause 63(2) states that if a person who is required to give consent is under the age of 18 years, the consent may be given by either of the person's parents or by the person's guardian.

Clause 63(3) further clarifies that information must not be given if consent is subsequently withdrawn in writing prior to the information being given.

Clause 68 declares certain documents to be an exempt document for the purposes of the **Freedom of Information Act 1982**, including the whole of the Central Register, and information about donors, persons who have undergone treatment and their partners and persons born of treatment procedures.

If a document is an exempt document for the purposes of the **Freedom of Information Act 1982** that means that the information in the document will not need to be released to an applicant who makes an FOI request for that information to be released.

#### **PART 7—VOLUNTARY REGISTER**

Clause 69 clarifies that Part 7 applies despite anything in Part 6 of this Act.

Clause 70 requires the Registrar to keep a Voluntary Register that contains information about donor treatment procedures. The Voluntary Register must be kept separately to the Central Register and is not to be considered part of the Central Register.

Clause 71 lists the information that may be entered in the Voluntary Register, such as names and addresses of persons born as a result of donor treatment procedures, names and addresses of donors and names and addresses of relatives of donors or persons born as a result of a donor treatment procedure.

The Voluntary Register should also contain information about the wishes of the persons whose names are in the register in relation to information about them being disclosed to persons already in the Voluntary Register or who may in the future put their name in the Voluntary Register.

Clause 72 enables the Registrar to only release information from the Voluntary Register in accordance with the wishes of the persons entered in the Voluntary Register.

Clause 73 requires the Registrar to ensure that before information is disclosed under section 72, the person to whom the information will be disclosed has been counselled or has been offered counselling, depending on the circumstances, before information is disclosed.

In the case of disclosure of non-identifying information, the Registrar must ensure that the person to whom the information will be disclosed has been offered counselling.

In the case of disclosure of identifying information, the Registrar must be satisfied that the person to whom the information will be disclosed has received counselling about the potential consequences of disclosure of information from the Voluntary Register.

The counselling referred to in this section is to be provided by a counsellor as defined by the Act—a counsellor who provides counselling on behalf of a registered ART provider or who is an approved counsellor within the meaning of the **Adoption Act 1984**.

The counselling need not relate to the possible impact of disclosure of the specific information held on the Voluntary Register in relation to the particular person making the application, but should relate to the potential consequences of disclosure of information of the sort held on the Voluntary Register in general.

## **PART 8—REGISTRATION AND DESIGNATED OFFICERS**

### **Division 1—Registration as an ART provider**

Clause 74 enables a person who holds RTAC accreditation to apply to the Authority for registration as a registered ART provider under this Act, and sets out how such applications are to be made.

**RTAC accreditation** is defined in section 3 as accreditation granted by the Reproductive Technology Accreditation Committee of the Fertility Society of Australia.

This clause makes it clear that if a registered ART provider ceases to hold RTAC accreditation the provider's registration under this Act also ceases.

Clause 75 enables the Authority to impose conditions on the registration of a registered ART provider if the Authority considers it necessary to do so in the public interest.

A condition imposed on the registration of a registered ART provider must not be inconsistent with conditions imposed on the RTAC accreditation of the registered ART provider. If there is an inconsistency, the condition imposed by the Authority will be valid.

As soon as practicable after imposing a condition on the registration of a registered ART provider under this section, the Authority must give the Minister written notice about the imposition of the condition including the reasons the condition has been imposed.

## **Division 2—General provisions about registration**

Clause 76 enables the Authority to suspend the registration of a provider if the Authority reasonably believes that a condition of registration has been contravened, or is otherwise satisfied that there are reasonable grounds to do so.

A written notice suspending a registered ART provider's registration must specify the grounds for the suspension, including any action the provider must take to rectify the matter that has led to the suspension.

If suspending registration under this clause, the Authority must allow the registered ART provider an opportunity to make written submissions to the Authority about the proposed suspension.

This clause also sets out how long such a suspension has effect.

Clause 77 enables the Authority to immediately suspend a registered ART provider's registration without allowing an opportunity to make submissions about the proposed suspension in certain circumstances.

The Authority may only immediately suspend a provider's registration if—

- the Authority reasonably believes there is an overriding public interest that requires the registration to be suspended immediately; and
- the Minister has consented to the immediate suspension of the provider's registration.

This clause also sets out how long such a suspension has effect, which must not be a period for any longer than is reasonably necessary to safeguard the public interest for which the suspension was imposed.

Clause 78 applies if a person who is a registered ART provider no longer holds RTAC accreditation.

If a person who is a registered ART provider no longer holds RTAC accreditation they must immediately notify the Authority in writing.

This clause notes again that if a registered ART provider no longer holds RTAC accreditation the provider's registration under this Act also ceases.

Failure to give notice in accordance with this clause is an offence which attracts a penalty of 240 penalty units or two years imprisonment or both.

Clause 79 requires the Authority to notify the Minister immediately if a registered ART provider no longer holds RTAC accreditation.

### **Division 3—Designated officers**

Clause 80 requires a registered ART provider to ensure that at all times a designated officer is appointed, employed or engaged by the provider.

### **Division 4—List of registered ART providers**

Clause 81 requires the Authority to keep a list of all registered ART providers.

Clause 81 sets out the particular details about registered ART providers which the Authority must record on the list, and must make available to the public.

## **PART 9—PATIENT REVIEW PANEL**

### **Division 1—Constitution and procedures of the Patient Review Panel**

Clause 82 establishes the Patient Review Panel.

Clause 83 sets out the how the Patient Review Panel is to be constituted each time the Patient Review Panel is required to conduct a hearing.

The Patient Review Panel will consist of 5 members, including—

- a chairperson appointed by the Governor in Council; and
- a deputy chairperson appointed by the Governor in Council; and
- 3 other members appointed by the chairperson and chosen from the list of approved names under section 78, at least one of whom must have expertise in child protection matters.

- Clause 84 enables the Governor in Council, on the recommendation of the Minister, to approve a list of names of persons suitable for appointment to one of the three positions able to be appointed by the chairperson to the Patient Review Panel under clause 83(2)(c).
- Clause 85 sets out the functions of the Patient Review Panel.
- Those functions are—
- to consider applications for surrogacy arrangements; and
  - to consider whether there is a barrier to treatment if a presumption against treatment applies; and
  - to consider applications for posthumous use of gametes and embryos; and
  - to consider applications for treatment in circumstances in which the registered ART provider is concerned about the health and wellbeing of a child that may be born as a result of the treatment; and
  - to consider applications for treatment in circumstances in which the applicant does not meet the criteria for treatment; and
  - to consider applications for extended storage periods of gametes or embryos; and
  - to monitor the practice of gamete donation and report on this to the Minister; and
  - any other functions given to the Panel by the Act or by the Minister.
- Clause 86 sets how the chairperson and deputy chairperson of the Patient Review Panel may be appointed, how they may resign and how they may be removed from office.
- Clause 87 sets out how a member of the approved list may resign or be removed from the approved list.
- Clause 88 sets out how members of the Patient Review Panel are to be paid.
- Clause 89 states that, on receiving an application, the chairperson of the Patient Review Panel must fix a time and place for the hearing of the application to be conducted and serve a notice of the hearing on the applicant.

This clause sets out the details that must be included in the notice of hearing, and also requires that the hearing be arranged and conducted as expeditiously as possible.

Clause 90 sets out how a hearing is to be conducted.

The Patient Review Panel must hear and determine the matter before it and—

- the proceedings must be conducted with as little formality and technicality as proper consideration of the application permits; and
- there is no legal right to representation unless the Panel grants leave; and
- the Panel must have regard to the guiding principles set out in section 5 of the Act and any other relevant criteria specified in this Act in determining the application (for example, if the application is regarding surrogacy and posthumous use, the criteria in Parts 2, 4 and 5 will all be relevant); and
- the applicant is entitled to be present and to make submissions and to be accompanied by another person; and
- the proceedings must not be open to the public; and
- the Panel is not bound by the rules of evidence and may inform itself in any way it thinks fit (for example, by calling witnesses to give expert evidence); and
- the Panel is bound by the rules of natural justice; and
- the procedure of the Panel is otherwise in the Panel's discretion.

Clause 91 lists the decisions which can be made by the Patient Review Panel.

This clause requires the Panel to make a decision within 14 days of hearing an application and enables the Panel to impose any conditions it considers necessary and reasonable in the circumstances of a decision that it makes.

Clause 92 requires the Patient Review Panel to give written reasons for the decision to the applicant.

This clause also requires the Panel to provide a copy of the reasons to the Authority if the Panel believes that a decision under section 91 may reasonably be expected to have a significant impact on the way in which treatment procedures are provided in Victoria.

Clause 93 provides that an act or decision of the Panel is not invalid only because—

- of a vacancy in its membership; or
- of a defect or irregularity in the appointment of any members.

Clause 94 grants immunity from personal liability to members of the Patient Review Panel in certain circumstances.

Clause 95 stipulates that in any proceedings under this Act, a copy of an order made or given under this Act by the Patient Review Panel and sealed and certified to be a true copy and to have been so made or given is evidence of the making or giving of the order.

### **Division 2—Review of Patient Review Panel's Decisions**

Clause 96 enables applications to be made to the Victorian Civil and Administrative Tribunal for a review of decisions made by the Patient Review Panel.

Reviews by VCAT will be applied for and conducted in accordance with the **Victorian Civil and Administrative Tribunal Act 1998** and the VCAT Rules 1998.

Clause 97 stipulates that an application for review under section 96 may only be made by a person whose interests are affected by a decision of the Panel or a failure of the Panel to act.

Clause 98 requires an application for review to be made within 28 days of a decision being made under section 91.

## **PART 10—VICTORIAN ASSISTED REPRODUCTIVE TREATMENT AUTHORITY**

### **Division 1—Constitution of the Authority**

Clause 99 establishes the Victorian Assisted Reproductive Treatment Authority as a body corporate.

Clause 100 sets out the powers and functions of the Authority, including—

- administration of the registration system under the Act; and
- undertaking community consultation about matters relevant to this Act; and
- monitoring certain programs and activities in relation to this Act, infertility and treatment procedures; and
- promoting research into the causes and prevention of infertility; and
- and approval of taking of gametes and embryos into and out of Victoria.

This clause requires the Authority to immediately notify the Minister without delay if any of the following matters come to its notice—

- a contravention of the Act or regulations;
- a contravention of a registered ART provider's registration;
- a development in research relating to infertility or treatment for infertility which the Authority considers of major importance or views with concern.

This clause also stipulates that the Authority has all the powers necessary to enable it to perform its functions but must have regard to the Minister's advice in carrying out its functions and exercising its powers.

Clause 101 sets out the membership of the Authority.

The Authority is to consist of not more than 7 members nominated by the Minister and appointed by the Governor in Council. In making nominations for appointment, the Minister must have regard to the need for diversity of expertise and experience.

Clause 102 stipulates that a member of the Authority holds office for the period, and on the terms and condition, specified in the member's instrument of appointment.

Clause 103 sets out how a member of the Authority may resign or be removed from office.

- Clause 104 sets out how the chairperson and deputy chairperson of the Authority are to be appointed by the Governor in Council, and how they may resign or be removed from office.
- Clause 105 describes the way in which an acting member may be appointed by the Governor in Council to act as a member of the Authority in the event that a member of the Authority is unable to perform their duties.
- Clause 106 sets out the manner by which members of the Authority are to be paid.
- Clause 107 sets out the procedures to be followed at meetings of the Authority.
- Clause 108 provides that an act or decision of the Authority is not invalid only because—
- of a vacancy in its membership; or
  - of a defect or irregularity in the appointment of any members; or
  - in the case of an acting member, the occasion for that member so acting had not arisen or had ceased.
- Clause 109 requires members of the Authority to disclose potential conflicts of interest and sets out the way in which such conflicts must be declared.
- Clause 110 grants immunity from personal liability to members of the Authority in certain circumstances.
- Clause 111 enables the Authority to employ or engage a chief executive officer and any other persons necessary for the purpose of the administration of the Authority and the carrying out of its powers and functions.
- Clause 112 enables the Authority, in writing, to delegate to a committee established under section 113 its powers and functions under this Act or the regulations. This delegation may only be made with the approval of the Minister and subject to any conditions or limitations imposed by the Minister.
- Clause 113 enables the Authority to appoint committees, to which powers and functions may be delegated in accordance with section 112.

## **Division 2—Reporting and financial provisions**

Clause 114 requires the Authority to report to the Minister by 30 September each year on the matters listed in this clause, including particulars of programs under which in the preceding year treatment procedures conducted and embryos and gametes were stored by each registered ART provider.

The Minister must cause the reports of the Authority to be laid before each House of Parliament before the expiration of the 14th sitting day of that House after the Minister receives the report.

Clause 115 requires the Authority to establish and keep the Victorian Assisted Reproductive Treatment Fund, and to pay monies into and out of the fund in accordance with this clause.

Clause 116 enables the Authority to invest money credited to the Fund, and that it does not immediately require, in the manner specified in this clause.

## **PART 11—GENERAL**

Clause 117 applies if a person has carried out a treatment procedure for which consent was required and before the treatment procedure was carried out the consent was withdrawn.

This clause states that no civil or criminal proceeding lies against the person who carried out the treatment if they did not know at the time and could not reasonably have been expected to know that the consent had been withdrawn.

Clause 118 enables the Authority to issue identity cards to members of the Authority.

Clause 119 enables a member of the Authority to exercise powers under this section only to the extent reasonably necessary to do so for the purpose of determining compliance with a registration under this Act.

Under this clause a member of the Authority may enter the premises of a registered ART provider at certain times and may—

- require the production for inspection of any records or other documents, including documents containing information required to be kept as a condition of a registration under this Act; and
- inspect any such documents; and

- take possession of any such documents in order to make copies (as long a receipt is made out and tendered).

The member of the Authority exercising the powers of entry under this clause must advise the occupier of the premises of the purpose of the member's visit and may not exercise any powers without producing an identity card on request.

Clause 120 makes it an offence to obstruct or hinder a member of the Authority in exercising the member's powers or duties under section 108.

This offence carries a penalty of 50 penalty units.

Clause 121 prohibits a person from destroying, removing or cancelling a document required to be kept under this Act or the regulations, unless authorised to do so.

This offence carries a penalty of 50 penalty units.

Clause 122 requires a registered ART provider that ceases to operate to make all reasonable efforts to transfer to another registered ART provider or a hospital within the meaning of the **Health Services Act 1988** any gamete or embryo stored by the registered ART provider and any record related to that gamete or embryo required to be kept by the registered ART provider.

Before the registered ART provider ceases to operate, it must also make a reasonable effort to notify all patients, including donors, that the registered ART provider intends to cease to operate. The registered ART provider might do this by placing an advertisement in a newspaper that is published in the local area in which the registered ART provider operates.

Clause 123 makes it clear that the following offences under this Act are indictable offences—

- section 7 (who can carry out assisted reproductive treatment);
- section 8 (who can carry out artificial insemination);
- section 33(1) (removal of embryos from storage);
- section 34 (formation of embryos).

## PART 12—REGULATIONS

Clause 124 enables the Governor in Council to make regulations for or with respect to a number of matters, including—

- forms for notices or other documents required under this Act; and
- the matters which counselling must address and the form it must take; and
- the giving of information and the keeping of records for the purposes of this Act; and
- the disposal of embryos removed from storage; and
- surrogacy arrangements; and
- the manner of keeping the Central Register and the Voluntary Register; and
- generally prescribing any matter or thing required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act.

Clause 125 sets out, amongst other things, how regulations made under section 124 may be applied.

## PART 13—REPEAL, SAVINGS AND TRANSITIONAL PROVISIONS

### Division 1—Repeal

Clause 126 repeals the **Infertility Treatment Act 1995**.

This Act replaces the **Infertility Treatment Act 1995**, except for Part 2A of the **Infertility Treatment Act 1995** which is replaced by the **Research Involving Human Embryos Act 2008**, and Part 4A of the **Infertility Treatment Act 1995** which is replaced by the **Prohibition of Human Cloning for Reproduction Act 2008**.

## Division 2—Transitional Provisions

- Clause 127 sets out the relevant definitions for this Division and states that the repealed Act means the **Infertility Treatment Act 1995**.
- Clause 128 stipulates that from the commencement of this section, references in other Acts or documents to certain matters relating to the repealed Act are to be taken to be references to matters in this Act.
- For example, a reference to a licensed centre under the repealed Act is to be taken to be a reference to a registered ART provider under this Act.
- Similarly, references to the Central Register kept under the repealed Act are to be taken to be references to the Central Register kept under this Act.
- Clause 129 provides that a valid consent given under the repealed Act, and which has not been withdrawn or lapsed immediately before the commencement of this section, is to be taken to be a valid consent given under this Act.
- Clause 130 provides that a register kept by a licensed provider under the repealed Act is to be taken to be a registered kept by a registered ART provider under this Act.
- Clause 131 provides that a person who was immediately before the commencement of this section a licence holder under the repealed Act is taken, from the commencement of this section, to be registered under this Act.
- Clause 132 provides that the Infertility Treatment Authority, established under the repealed Act, is to be taken upon commencement of this section to be the Victorian Assisted Reproductive Treatment Authority.
- A person who was a member of the Infertility Treatment Authority immediately before the commencement of this section continues from the commencement of this section as a member of the Victorian Assisted Reproductive Treatment Authority.
- Clause 133 applies if before the commencement of this section a person had applied to the Infertility Treatment Authority for access to information on a register kept under the repealed Act and immediately before the commencement of this section the application had not been dealt with.
- From commencement of this section, the application is taken to have been made to the Registrar under this Act.

Clause 134 enables the Governor in Council to make regulations containing provisions of a savings or transitional nature consequent on the enactment of this Act. The provisions may be retrospective in operation and will operate despite anything to the contrary in any Act (other than this Act and the Charter of Human Rights and Responsibilities).

This section expires on 1 January 2011.

### **Division 3—savings provision**

Clause 135 continues the operation of the Infertility Treatment Regulations 1997 until the **Infertility Treatment Act 1995** is repealed despite the fact that under section 5(4) of the **Subordinate Legislation Act 1994** those regulations should cease to operate in December 2008.

## **PART 14—AMENDMENTS TO THE STATUS OF CHILDREN ACT 1974**

### **General**

Part 14 of the Bill amends the **Status of Children Act 1974** in order to clarify the status of children born as a result of the use of assisted reproductive treatment and artificial insemination. In particular, Part 14 applies presumptions of parentage in relation to children born—

- to a woman who has undergone a treatment of artificial insemination or assisted reproductive treatment where she does not have a male partner;
- as a result of a surrogacy arrangement;
- through the posthumous use of gametes.

Part 14 clarifies that a donor of gametes used in assisted reproductive treatment or artificial insemination is presumed *not* to be a parent of a child born as a result of that procedure.

Part 14 also allows the Supreme Court and the County Court to make substitute parentage orders in relation to children born as a result of a surrogacy arrangement.

### **Clause Notes**

Clause 136 provides that references to the "Principal Act" mean references to the **Status of Children Act 1974**.

- Clause 137 inserts definitions into section 2 of the Principal Act, including new definitions of *partner* and *non-birth mother*. The definitions apply across the Principal Act. It is noted that new transitional section 43 (inserted by clause 147) ensures that the definitions inserted into the Principal Act by this clause include, for the purpose of Part II, those definitions contained in section 10A(3) of the Principal Act immediately before its repeal.
- Clause 138 amends section 8 of the Principal Act by inserting the new heading "Evidence of parentage" and replacing references in the section to "the father" with "a parent". The amended section 8 will provide that where the name of a parent of a child is entered in the register of births in the Register maintained under the **Births, Deaths and Marriages Registration Act 1996** in relation to the child, a certified copy of the register entry will be prima facie evidence that the person named as a parent is a parent of the child.
- Subclause (3) also inserts a new subsection (2A) in section 8 to allow a mother and non-birth mother of a child to execute a deed that will provide prima facie evidence that the non-birth mother is a parent of the child. This replicates for mothers and non-birth mothers subsection (2) in section 8, which allows such a deed to be made by the mother of a child and by any person acknowledging that he is the father of the child.
- Clause 139 amends section 9 of the Principal Act to make minor amendments to cross-references and terminology in the section. The amendments include replacing the reference to the Government Statist in the heading of the section with the Registrar of Births, Deaths and Marriages.
- Clause 140 amends section 10 of the Principal Act to provide for applications to the Supreme Court for declarations of parentage to be made, rather than merely declarations of paternity.
- Clause 141 amends the heading to Part II of the Principal Act to include the words "WOMEN WITH A MALE PARTNER" to reflect the specific kind of relationships dealt with in this Part. Part II provides that a married or heterosexual de facto couple who have a child through assisted reproductive treatment or artificial insemination are the legal parents of the child, even if the child was conceived with the use of donor semen or ovum.

- Clause 142 repeals section 10A(3) of the Principal Act and the note attached to that section. Section 10A(3) is no longer necessary as clause 137 inserts definitions that apply across the Principal Act. It is noted that new transitional section 43 (inserted by clause 147) ensures that the definitions inserted by clause 137 include, for the purposes of Part II those definitions contained in section 10A(3) of the Principal Act immediately before its repeal.
- Clause 143 amends section 10C(3)(b) of the Principal Act to refer to a conflicting declaration made under section 10, rather a conflicting presumption arising by virtue of section 10. This amendment more accurately reflects the effect of section 10, which provides for the Court to make a declaration of parentage.
- Clause 144 amends section 10D(3)(b) of the Principal Act to refer to a conflicting declaration made under section 10, rather a conflicting presumption arising by virtue of section 10. This amendment more accurately reflects the effect of section 10, which provides for the Court to make a declaration of parentage.
- Clause 145 amends section 10E(3)(b) of the Principal Act to refer to a conflicting declaration made under section 10, rather a conflicting presumption arising by virtue of section 10. This amendment more accurately reflects the effect of section 10, which provides for the Court to make a declaration of parentage.
- Clause 146 repeals section 10F of the Principal Act. Section 10F sets out the statutory presumptions in relation to the status of a child born to a woman who has undergone a treatment of artificial insemination where donor semen is used, and where the woman is unmarried or lacks the consent of her husband. These presumptions will be replaced by the presumptions set out in new Part III in the Principal Act (inserted by clause 147). The new Part III clarifies that a man who produces semen used by a woman without a male partner is presumed for all purposes not to be the father of any child born as a result of the pregnancy, whether or not the man is known to the woman or her female partner.
- It is noted that new transitional section 44 (inserted by clause 147) provides that section 10F continues to apply in respect of a child born before the section was repealed, where the child was born to a woman who underwent a treatment of artificial insemination where donor semen was used, and where the woman was unmarried or lacked the consent of her husband.

Clause 147 replaces Part III of the Principal Act with new Parts III, IV, V and VI as follows—

**PART III—STATUS OF CHILDREN—MEDICAL  
PROCEDURES—WOMEN WITH A FEMALE  
PARTNER OR WITHOUT A PARTNER**

New Part III allows for the application of presumptions as to the status of a child born to a woman with a female partner, or without a partner, who undergoes a procedure.

New section 11 provides that, for the purposes of Part III, the term "procedure" means, within the meaning of the **Assisted Reproductive Treatment Act 2008** artificial insemination or assisted reproductive treatment.

New section 12 provides that Part III applies in respect of a woman who undergoes artificial insemination or assisted reproductive treatment and who, at the time of the procedure, has a female partner or does not have a partner.

New section 13 outlines the statutory presumption in relation to the status of a child born to a woman with a female partner who has undergone a treatment of artificial insemination or assisted reproductive treatment where donor semen is used.

In this situation, the woman who underwent the treatment procedure is presumed for all purposes to be the mother of the child (the birth mother). The woman's female partner is presumed to be a legal parent if she was the woman's partner at the time the woman underwent the treatment procedure and she consented to that procedure (the non-birth mother). The man who produced the semen used in the treatment procedure is presumed *not* to be the father of the child (the donor).

These are irrebuttable presumptions that prevail over any conflicting presumption that arises under section 8 of the Principal Act, or any conflicting declaration of parentage under section 10 of the Act.

New section 14 outlines the statutory presumption in relation to the status of a child born to a woman with a female partner who has undergone a treatment of artificial insemination or assisted reproductive treatment where donor ovum is used.

In this situation, the birth mother is presumed for all purposes to be the mother of the child. The non-birth mother is presumed to be a legal parent if she was the birth mother's partner at the time the birth mother underwent the treatment procedure, and she consented to that procedure. The donor of the semen is presumed

*not* to be the father of the child and the donor of the ovum is presumed *not* to be the mother of the child.

These are irrebuttable presumptions that prevail over any conflicting presumption that arises under section 8 of the Principal Act, or any conflicting declaration of parentage under section 10 of the Act.

New section 15 outlines the statutory presumption in relation to the status of a child born to a woman without a partner who has undergone a treatment of artificial insemination or assisted reproductive treatment where donor semen is used.

In this situation, the birth mother is presumed for all purposes to be the mother of the child and the donor of the semen is presumed *not* to be the father of the child.

These are irrebuttable presumptions that prevail over any conflicting presumption that arises under section 8 of the Principal Act, or any conflicting declaration of parentage under section 10 of the Act.

New section 16 outlines the statutory presumption in relation to the status of a child born to a woman without a partner who has undergone a treatment of artificial insemination or assisted reproductive treatment where donor ovum is used.

In this situation, the birth mother is presumed for all purposes to be the mother of the child, the donor of the semen is presumed *not* to be the father of the child and the donor of the ovum is presumed *not* to be the mother of the child.

These are irrebuttable presumptions that prevail over any conflicting presumption that arises under section 8 of the Principal Act, or any conflicting declaration of parentage under section 10 of the Act.

#### **PART IV—STATUS OF CHILDREN IN SURROGACY ARRANGEMENTS**

New Part IV allows for the application of presumptions as to the status of a child born as a result of a surrogacy arrangement, and provides for making substitute parentage orders.

##### **Division 1—Preliminary**

New section 17 provides for definitions relating to this Part.

Under this Part, a *surrogacy arrangement* has the same definition as under the **Assisted Reproductive Treatment Act 2008**, meaning an arrangement under which a woman agrees to become pregnant with the intention that a child born as a result of

the pregnancy is to be treated as a child of another person. The intention may be to permanently surrender the right to care for the child or to transfer custody or guardianship of the child. The person or persons who commission a surrogacy arrangement are the "commissioning parents" and the woman who gives birth to a child under a surrogacy arrangement is the "surrogate mother".

New section 17(2) clarifies that a reference in this Part to the surrogate mother's partner is a reference to the person who was her partner when the surrogacy arrangement was entered into.

New section 18 follows section 6 of the **Adoption Act 1984**, conferring jurisdiction to make substitute parentage orders on both the Supreme Court and, at the applicant's option, the County Court. It allows the County Court to transfer applications to the Supreme Court where necessary.

New section 19 provides that the presumptions of parentage that arise under Part II, III or V of the Principal Act apply in relation to a child born of a surrogacy arrangement, but do not prevail over a substitute parentage order. For example, this means that the surrogate mother will be presumed to be the mother of the child unless or until a substitute parentage order is made in favour of the commissioning parents. If a substitute parentage order is subsequently discharged, the presumptions of parentage in favour of the surrogate mother will revive.

## **Division 2—Substitute parentage orders**

### **Subdivision 1—Making substitute parentage orders**

New section 20 allows a commissioning parent or the commissioning parents of a child born as a result of a surrogacy arrangement to apply to the County or Supreme Court for a substitute parentage order if the child was conceived as a result of a procedure carried out in Victoria and the commissioning parent or parents live in Victoria when the application for the order is made. The application must be made not less than 28 days and not more than six months after the child is born, otherwise leave of the Court is required.

It is noted that new transitional section 46 (inserted by clause 147) provides that new Part IV applies in respect of any child born under a surrogacy arrangement before the commencement of Part IV, where the commissioning parents were ordinarily resident in Victoria at the time the child was conceived but whether or not the child was conceived in Victoria.

New section 21 provides that it will be presumed that a substitute parentage order in relation to a child born as a result of a surrogacy arrangement will name both (if there are two) commissioning parents as the child's legal parents, unless a person named as a commissioning parent can show that he or she did not consent to the surrogacy arrangement.

New section 22 sets out the matters about which the County or Supreme Court must be satisfied before making a substitute parentage order in favour of a commissioning parent or parents. These matters include—

- the making of the order is in the best interests of the child;
- the child is living with the commissioning parent or parents at the time the application for the substitute parentage order is made;
- the surrogate mother has not received any material benefit or advantage from the surrogacy arrangement (other than the reimbursement of costs as permitted under section 44 of the **Assisted Reproductive Treatment Act 2008**);
- the surrogate mother freely consents to the order.

Where the surrogacy arrangement was commissioned with the assistance of an ART provider registered under the **Assisted Reproductive Treatment Act 2008**, the Court must also be satisfied that the Patient Review Panel approved the surrogacy arrangement.

Where the surrogate mother's partner was a party to the surrogacy arrangement, the Court must also consider whether the partner consents to the making of the substitute parentage order.

New section 23 sets out the additional matters about which the County or Supreme Court must be satisfied before making a substitute parentage order where the surrogacy arrangement was commissioned without the assistance of a registered ART provider. In addition to the matters set out under new section 22, the Court must be satisfied that—

- the surrogate mother was at least 25 years old before entering the surrogacy arrangement;

- the parties to the surrogacy arrangement have received counselling from a counsellor who provides counselling on behalf of a registered ART provider or who is an approved counsellor within the meaning of the **Adoption Act 1984**;
- the parties to the surrogacy arrangement have obtained advice about the legal consequences of the arrangement.

New section 24 allows the County or Supreme Court to dispense with the need to establish that the surrogate mother consents to the making of the substitute parentage order if satisfied that she cannot be found following reasonable inquiries, is deceased or is in such mental or physical condition as to be incapable of considering whether to give consent.

Where the surrogate mother's partner was a party to the surrogacy arrangement, the Court may also dispense with the need to establish that the surrogate mother's partner consents to the making of the substitute parentage order if satisfied that the partner cannot be found following reasonable inquiries, is deceased or is in such mental or physical condition as to be incapable of considering whether to give consent.

New section 25 allows the County or Supreme Court to make further orders in relation to a substitute parentage order, where these orders are in the interests of justice or are for the welfare and in the best interests of the child in respect of whom the order is made.

New section 26 provides that if the County or Supreme Court makes a substitute parentage order, sections 53 (other than sections 53(1)(d) and (e)) to 58 of the **Adoption Act 1984** apply in relation to the order as if that order were an adoption order and as if the child was an adopted child. This means that a reference in those applied provisions of the **Adoption Act 1984** to an adopted child is as if the reference was to a child who is the subject of a substitute parentage order, and a reference to an adoptive parent is as if the reference were to the commissioning parents in whose favour the substitute parentage order was made. However, a substitute parentage order is not an adoption order and a child who is the subject of a substitute parentage order is not an adopted child.

### **Subdivision 2—Discharge of substitute parentage order**

New section 27 allows the following people to apply to the County or Supreme Court for an order to discharge a substitute parentage order—

- the Attorney-General;
- the Secretary of the department administering the **Status of Children Act 1974**;
- a child who was the subject of a substitute parentage order and who is now 18 years old or over.

Section 27 also allows any person to apply for leave from the Court to intervene in an application for a discharge order. Where an order by the Court entitles a person to intervene, he or she is to be treated as a party to the application.

New section 28 sets out the limited circumstances in which the County or Supreme Court may make an order discharging a substitute parentage order. The Court may make a discharge order if satisfied that the substitute parentage order, or a consent upon which the substitute parentage order was based, was obtained by fraud, duress or other improper means. The Court may also make a discharge order if satisfied that there is some exceptional reason the substitute parentage order should be discharged.

However, the Court must not make a discharge order unless the order is in the best interests of the child whose parentage would be affected, and it is satisfied that reasonable efforts have been made to give notice to all the parties to the surrogacy arrangement.

The Court is able to make further orders in relation to a discharge order, where these orders are in the interests of justice or in the best interests of the child whose parentage would be affected. Such orders include orders relating to the ownership or possession of property and the domicile of the child.

New section 29 provides that where a discharge order is made, persons will be returned to the position they were in before the substitute parentage order was made. This does not affect anything lawfully done or the consequences of anything done while the substitute parentage order was in force, including any proprietary right or interest that became vested in any person.

### **Subdivision 3—Appeals**

New section 30 allows a party to a proceeding for a substitute parentage order, or for an order to discharge a substitute parentage order, to appeal a decision of the County or Supreme Court to the Court of Appeal.

### **Division 3—Proceedings under this Part**

New section 31 requires the County or Supreme Court to serve a sealed copy of a substitute parentage order, or an order to discharge a substitute parentage order, on the Registrar of Births, Deaths and Marriages.

New section 32 ensures that proceedings under Part IV are to be heard in closed court. Unless the Court directs otherwise, only parties to the proceeding and their legal representatives, if any, may be present.

New section 33 prohibits a person from publishing a report of a proceeding under Part IV, or about any order made under Part IV, that contains any particulars capable of leading to the identification of a party to a surrogacy arrangement, or a child who is the subject of a surrogacy arrangement.

New section 34 restricts access to court records relating to proceedings taken under Part IV to the parties who were involved in the surrogacy arrangement or the child to whom the proceeding relates or the parties to the proceedings, but only with leave of the Court.

New section 35 provides for access to court records relating to proceedings taken under Part IV where a person is deceased or cannot be found. If a person who would otherwise be eligible to apply to access court records is deceased, an application may be made by the person's parent or grandparent, child or grandchild, or sibling, as long as they are an adult. If the child to whom the proceeding related is now an adult and cannot be found, an application may be made by the child's parent or grandparent, child or grandchild, or sibling, as long as they are an adult.

### **PART V—POSTHUMOUS USE OF GAMETES**

New section 36 provides that, for the purposes of Part V, the term *treatment procedure* means a treatment procedure within the **Assisted Reproductive Treatment Act 2008**. The **Assisted Reproductive Treatment Act 2008** defines *treatment procedure* to mean artificial insemination (other than self-insemination) or assisted reproductive treatment.

New section 37 outlines the statutory presumption in relation to the status of a child born to a woman who has undergone a treatment procedure using the gametes of her deceased male partner or an embryo created before her male partner died using his gametes. Such a treatment procedure is regulated by Part 5 of the **Assisted Reproductive Treatment Act 2008** and requires the deceased male partner to have provided written consent for his gametes to be used in this way.

In this situation, the woman who underwent the treatment procedure is presumed for all purposes to be the mother of the child. The woman's deceased male partner is presumed to be the father of the child but only for the purpose of registering his particulars on the birth certificate. If a donor ovum was also used in the treatment procedure, the woman who produced the ovum is presumed *not* to be the mother of the child.

New section 38 outlines the statutory presumption in relation to the status of a child born to a woman who has undergone a treatment procedure using the gametes of her deceased female partner or an embryo created before her female partner died using her gametes. Such a treatment procedure is regulated by Part 5 of the **Assisted Reproductive Treatment Act 2008** and requires the deceased female partner to have provided written consent for her gametes to be used in this way.

In this situation, the woman who underwent the treatment procedure is presumed for all purposes to be the mother of the child. The woman's deceased female partner is presumed to be a legal parent of the child but only for the purpose of registering her particulars on the birth certificate. The man who produced the semen used in the treatment procedure is presumed *not* to be the father of the child.

New section 39 outlines the statutory presumption in relation to the status of a child born as a result of a surrogacy arrangement commissioned by a man where the gametes of the man's deceased female partner, or an embryo created before his female partner died using her gametes, are used, and where the man applies to the County or Supreme Court for a substitute parentage order. If a substitute parentage order is made, the man's deceased female partner is presumed to be a legal parent of the child but only for the purpose of registering her particulars on the birth certificate.

New section 40 confirms that a deceased person whose gametes are posthumously used in a treatment procedure will be treated in law as a parent of any child born as a result of that procedure but only for the purpose of being registered on the child's birth certificate. This presumption does not, however, preclude a

person from making specific provision in a will for any child conceived posthumously.

#### **PART VI—GENERAL**

New section 41 provides for the making of regulations for the purposes of the Principal Act.

#### **PART VII—TRANSITIONAL PROVISIONS— ASSISTED REPRODUCTIVE TREATMENT ACT 2008**

New section 42 provides that references in Part VII of the Principal Act to "2008 Act" mean the **Assisted Reproductive Treatment Act 2008**.

New section 43 preserves the definitions contained in section 10A(3) of the Principal Act for the purposes of Part II.

New section 44 is a transitional provision dealing with the repeal of section 10F of the Principal Act. Section 10F sets out the statutory presumptions in relation to the status of a child born to a woman who has undergone a treatment of artificial insemination where donor semen is used, and where the woman is unmarried or lacks the consent of her husband. These presumptions will be replaced by the presumptions set out in new Part III in the Principal Act (inserted by clause 147). The new Part III clarifies that a man who produces semen used by a woman without a male partner is presumed for all purposes not to be the father of any child born as a result of the pregnancy, whether or not the man is known to the woman or her female partner.

New section 44 provides that section 10F continues to apply in respect of a child conceived before the section was repealed, where the woman became pregnant by artificial insemination where donor semen was used, and where the woman was unmarried or lacked the consent of her husband.

New section 45 provides that the provisions of new Part III of the Principal Act apply in respect of a pregnancy occurring, or a child born, before or after the commencement of Part 14 of the 2008 Act and whether or not as a consequence of a treatment procedure carried out in Victoria. This application does not affect the vesting in possession or in interest of any property occurring before the commencement of Part 14 of the 2008 Act.

New section 46 provides that new Part IV of the Principal Act applies in respect of any child born under a surrogacy arrangement before or within 10 months of the commencement of Part 14 of the 2008 Act where the commissioning parent or parents were ordinarily resident in Victoria at the time the child was conceived. However, Part IV applies whether or not the child was conceived in Victoria. This application does not affect the vesting in possession or in interest of any property occurring before the commencement of the 2008 Act.

New section 47 provides that new Part V of the Principal Act will only apply in respect of a pregnancy which resulted from the posthumous use of gametes after commencement of the 2008 Act. This application does not affect the vesting in possession or in interest of any property occurring before the commencement of the 2008 Act.

Clause 148 provides for the automatic repeal of Part 14 on the first anniversary of its commencement. As suggested by the Scrutiny of Acts and Regulations Committee, all amending Acts now contain an automatic repeal provision, which will save the time and expense of having to repeal amending Acts in statute law revision Bills. The repeal of this Part does not affect in any way the operation of the amendments made by this Act (see section 15(1) of the **Interpretation of Legislation Act 1984**).

#### **PART 15—AMENDMENTS TO THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT 1996**

Clause 149 inserts a new sub-section after section 3(c) of the **Births, Deaths and Marriages Registration Act 1996** to include as an object of the Act, the keeping of information relating to donors and surrogacy arrangements under the **Assisted Reproductive Treatment Act 2008**.

Clause 150 inserts new definitions in section 4(1) of the **Births, Deaths and Marriages Registration Act 1996** to reflect provisions of the **Assisted Reproductive Treatment Act 2008**. This includes definitions such as *partner* and *surrogacy arrangement* and defines *parent* to mean a person who is presumed to be a parent of a child under the **Status of Children Act 1974**. Additionally the definition of a *registrable event* is expanded to include surrogacy arrangements.

Clause 151 amends section 6 of the **Births, Deaths and Marriages Registration Act 1996** to expand the Registrar's functions to include functions given to the Registrar under the **Assisted Reproductive Treatment Act 2008**.

Clause 152 amends section 16(1)(a) of the **Births, Deaths and Marriages Registration Act 1996** to replace the reference to "father and mother" with "parents". Section 16(1)(a) will therefore provide that the parents of the child make a joint application for the inclusion of information regarding themselves on their child's birth record.

Clause 153 inserts a new section 17A into the **Births, Deaths and Marriages Registration Act 1996** to provide for the inclusion of a woman's female partner on a child's birth record where the female partner is presumed to be a parent of the child under Part III of the **Status of Children Act 1974** (the non-birth mother) and where the child's birth was registered before the commencement of the **Assisted Reproductive Treatment Act 2008**.

The mother and her female partner may apply for the mother's female partner to be included on the birth record as the child's parent where the original birth entry lists only the mother of the child. However, if the birth entry lists the mother and a father, an amendment to the birth record may only be made upon production of a court order to that effect.

Clause 154 inserts a new section 19A into the **Births, Deaths and Marriages Registration Act 1996** to enable the registration of surrogate births. Upon receipt of a sealed substitute parentage order issued by the County or Supreme Court under the **Status of Children Act 1974**, the Registrar must register the surrogacy in the Surrogate Birth Register and mark the original birth entry with the words "closed—surrogate".

In the event that the Court makes an order for the discharge of the substitute parentage order under the **Status of Children Act 1974**, the Registrar must cancel the relevant entry in the Surrogate Birth Register and remove the words "closed—surrogate" from the original birth entry in the Register.

It is noted that new section 31 of the **Status of Children Act 1974** (inserted by clause 147) requires the County or Supreme Court to serve a sealed copy of a substitute parentage order, or an order to discharge a substitute parentage order, on the Registrar of Births, Deaths and Marriages.

## **PART 16—CONSEQUENTIAL AMENDMENTS OF OTHER ACTS**

### **Division 1—Amendment of Freedom of Information Act 1982**

Clause 155 consequentially amends section 34(8) of the **Freedom of Information Act 1982** by replacing the current reference to the **Infertility Treatment Act 1995** with a reference to the **Assisted Reproductive Treatment Act 2008**.

### **Division 2—Amendment of Magistrates' Court Act 1989**

Clause 156 replaces Part 62 of Schedule 4 to the **Magistrates' Court Act 1989**, which provides that indictable offences under the **Infertility Treatment Act 1995** may be heard and determined summarily, with a new Part 62 that provides that indictable offences under the **Assisted Reproductive Treatment Act 2008** may be heard and determined summarily.

### **Division 3—Amendment of Public Health and Wellbeing Act 2008**

Clause 157 consequentially amends section 152(1)(b)(i) of the **Public Health and Wellbeing Act 2008** to replace the reference to a fertilisation procedure within the meaning of the **Infertility Treatment Act 1995** with a reference to a treatment procedure within the meaning of the **Assisted Reproductive Treatment Act 2008**.

Clause 158 repeals section 278 of the **Public Health and Wellbeing Act 2008**.

### **Division 4—Amendment of Victorian Civil and Administrative Tribunal Act 1998**

Clause 159 inserts a new Part 2A after Part 2 of Schedule 1 to the **Victorian Civil and Administrative Tribunal Act 1998**. Schedule 1 provides for variations from Parts 3 and 4 of the **Victorian Civil and Administrative Tribunal Act 1998** for various proceedings and new Part 2A provides for variations for proceedings under the **Assisted Reproductive Treatment Act 2008**. In particular, new Part 2A provides that—

- no fee is payable in respect of an application under the **Assisted Reproductive Treatment Act 2008**;

- in relation to the review of a decision by the Patient Review Panel under Division 2 of Part 9 of the **Assisted Reproductive Treatment Act 2008**, the Tribunal must be constituted by three members at least one of whom is a woman.