Report 40

STANDING COMMITTEE ON LEGISLATION

*Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018*

Presented by
Hon Dr Sally Talbot MLC (Chair)

June 2019
Standing Committee on Legislation

Members as at the time of this inquiry:
Hon Dr Sally Talbot MLC (Chair)  Hon Nicholas Goiran MLC (Deputy Chair)
Hon Pierre Yang MLC  Hon Simon O’Brien MLC
Hon Colin de Grussa MLC

Staff as at the time of this inquiry:
Kimberley Ould (Advisory Officer)  Denise Wong (Advisory Officer (Legal))
Mark Warner (Committee Clerk)

Address:
Parliament House
4 Harvest Terrace, West Perth WA 6005
Telephone: 08 9222 7300
Email: lcco@parliament.wa.gov.au
Website: www.parliament.wa.gov.au

ISBN 978-1-925578-69-0
**Government response**

This report is subject to Standing Order 191(1):

> Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

The two-month period commences on the date of tabling.
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EXECUTIVE SUMMARY

1 The Legislative Council referred the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 (Bill) to the Standing Committee on Legislation (Committee) with the power to inquire into policy.

2 The stated policy of the Bill is to:
   • provide equitable access to surrogacy (through the use of assisted reproductive technology) for male same-sex couples and single men
   • enable licensed fertility clinics and practitioners to provide such services without discrimination on the basis of sex and sexual orientation, in compliance with Commonwealth (Sex Discrimination Act 1984) and State legislation (Equal Opportunity Act 1984).

3 To achieve this policy, the Bill proposes to amend the Human Reproductive Technology Act 1991 and Surrogacy Act 2008 to extend access to altruistic surrogacy arrangements (through in vitro fertilisation (IVF) procedures) to male couples and single men.

4 The Bill also:
   • clarifies that IVF procedures are available in circumstances of likely future infertility due to medical reasons
   • strengthens some of the advisory, investigation and search powers in relation to surrogacy regulation
   • makes minor corrections and consequential amendments to the Human Reproductive Technology Act 1991.

5 Advice provided to the Committee indicates that the current prohibition on male couples and single men accessing IVF procedures is inconsistent with the Sex Discrimination Act 1984 (Cth).

6 Conversely, while the Surrogacy Act 2008 is discriminatory against male couples and single men, the advice indicates that that discrimination is unlikely to be unlawful, and therefore, not strictly inconsistent with the Sex Discrimination Act 1984 (Cth). Nevertheless, the Committee considers that, if male couples and single men have access to IVF for the purposes of surrogacy, it is necessary also to address the discrimination present in the Surrogacy Act 2008.

7 The Committee’s inquiry has revealed numerous additional issues, including:
   • other issues arising from the current regulatory regime which are related to, but are not addressed by, the Bill—see Chapter 3
   • issues which arise from the amendments proposed by the Bill—see Chapters 4, 5, 6 and 7. In particular, the Bill’s proposed amendments will:
     o give rise to new areas of discrimination against women in relation to accessing IVF procedures (Chapter 5) and accessing surrogacy (Chapter 7)
     o diminish the existing rights of female couples seeking to access surrogacy and associated IVF procedures (Chapter 7).
   • other matters relevant to the Bill which, due to the inquiry’s constraints, the Committee has not considered in detail—see Chapters 8 and 9.
The Committee has made findings and recommendations to:

- clarify the operation of the current *Human Reproductive Technology Act 1991* and *Surrogacy Act 2008*
- improve the operation of the Bill, if passed.

**Findings and recommendations**

Findings and recommendations are grouped as they appear in the text at the page number indicated:

**FINDING 1**

A majority of the Committee, consisting of Hons Dr Sally Talbot, Pierre Yang and Colin de Grussa MLCs, finds that sections 23(1)(a) and 23(1)(c) of the *Human Reproductive Technology Act 1991* are inconsistent with section 22 of the *Sex Discrimination Act 1984* (Cth).

**FINDING 2**

A minority of the Committee, consisting of Hons Nick Goiran and Simon O’Brien MLCs, finds that the advice provided to the Committee is that sections 23(1)(a) and (c) of the *Human Reproductive Technology Act 1991* are inconsistent with section 22 of the *Sex Discrimination Act 1984* (Cth).

**FINDING 3**

Section 19 of the *Surrogacy Act 2008* is discriminatory, but not unlawfully so, and is therefore not strictly inconsistent with section 22 of the *Sex Discrimination Act 1984* (Cth).

**FINDING 4**

A majority of the Committee, consisting of Hons Dr Sally Talbot, Pierre Yang and Colin de Grussa MLCs, finds that, as a result of the repeal of regulation 5 of the *Sex Discrimination Regulations 1984* on 31 July 2017, discrimination against male couples under the *Human Reproductive Technology Act 1991* and/or *Surrogacy Act 2008* became unlawful under section 22 of the *Sex Discrimination Act 1984* (Cth). Discrimination against single men was already unlawful under section 22 of the *Sex Discrimination Act 1984* (Cth) and that situation was unchanged by the repeal of regulation 5.

**FINDING 5**

A minority of the Committee, consisting of Hons Nick Goiran and Simon O’Brien MLCs, finds that the advice provided to the Committee is that, as a result of the repeal of regulation 5 of the *Sex Discrimination Regulations 1984* on 31 July 2017, discrimination against male couples under the *Human Reproductive Technology Act 1991* and/or *Surrogacy Act 2008* became unlawful under section 22 of the *Sex Discrimination Act 1984* (Cth).
FINDING 6

FINDING 7
For the purposes of the Human Reproductive Technology Act 1991 and the Surrogacy Act 2008, a ‘surrogacy arrangement that is lawful’ is an altruistic surrogacy arrangement.

FINDING 8
There is confusion in the assisted reproductive technology industry over what constitutes a ‘lawful’ surrogacy arrangement. This is due to the combined effect of the following two factors:
   a) The lack of a statutory definition for ‘lawful’ surrogacy arrangements.
   b) The wording in direction 7 of the Surrogacy Directions 2009.

RECOMMENDATION 1
Amend the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 to insert a definition of a ‘surrogacy arrangement that is lawful’ into the Human Reproductive Technology Act 1991. This could be effected in the following way:

Clause 5
Page 3, after line 22 — To insert:
   lawful surrogacy arrangement means a surrogacy arrangement other than a surrogacy arrangement that is for reward;

Page 3, after line 24 — To insert:
   surrogacy arrangement that is for reward has the meaning given in the Surrogacy Act 2008 section 6;

RECOMMENDATION 2
Review and amend direction 7 of the Surrogacy Directions 2009 as necessary.

FINDING 9
Eligibility criteria for surrogacy arrangements are better placed at the time of approval of the arrangement rather than at the time of parentage orders.

RECOMMENDATION 3
The Government propose amendments to give effect to Finding 9.
FINDING 10

Section 23(1)(a)(iii) of the Human Reproductive Technology Act 1991 may be inconsistent with section 22 of the Sex Discrimination Act 1984 (Cth) in that it may require providers of in vitro fertilisation services to discriminate against transgender people and people of intersex status.

RECOMMENDATION 4


RECOMMENDATION 5

Amend the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 to ensure consistency between clause 4 of the Bill and section 23 of the Human Reproductive Technology Act 1991. This could be effected as follows:

Clause 4

Page 3, lines 8 to 13 — To delete the lines and insert:

(a) delete “persons who are unable to conceive children naturally due to medical reasons or” and insert:

certain persons (being persons who are likely to be unable to conceive or give birth to children naturally due to medical reasons, or

Page 3, lines 16 to 18 — To delete the lines and insert:

or who are parties to a lawful surrogacy arrangement for which there are medical or social reasons under the Surrogacy Act 2008)

RECOMMENDATION 6

Amend the Explanatory Memorandum for the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 to clarify that, under proposed sections 23(1)(a)(i), (ii) and (iii) of the Human Reproductive Technology Act 1991, the benefit likely to result from an IVF procedure does not always need to involve the pregnancy of a member of a couple who are, or the woman who is, likely to benefit.
RECOMMENDATION 7  
Amend clause 11(1)(a) of the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018, Human Reproductive Technology Act 1991 proposed new section 23(1)(a)(iv), to clarify that the procedures in proposed sections 23(1)(a)(i) to (iii) of the Human Reproductive Technology Act 1991 can be accessed without the requirement for an existing surrogacy arrangement. This could be effected as follows (in combination with Recommendation 10):  

Clause 11(1)(a)  
Page 5, lines 21 to 22 — To delete “a surrogacy arrangement that is lawful and” and insert: an existing lawful surrogacy arrangement

FINDING 11  
The amendments proposed by the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 resolve the issue of discrimination against single men under the Human Reproductive Technology Act 1991.

FINDING 12  
The amendments proposed by the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 resolve the issue of discrimination against male couples under the Human Reproductive Technology Act 1991.

FINDING 13  
The advice provided to the Committee is that the amendments proposed by the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 to section 23(1)(a) of the Human Reproductive Technology Act 1991 would be inconsistent with section 22 of the Sex Discrimination Act 1984 (Cth) because they would create discrimination against women not currently present.

FINDING 14  
If the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 is passed extending eligibility for surrogacy to single men and male couples for ‘social reasons’, this would likely result in unlawful discrimination against women as a result of the existing requirement for women to have ‘medical reasons’. This cannot be avoided other than by a fundamental change to the policy of the Bill, and to the existing policy of reproductive capability as the basis for the availability of in vitro fertilisation procedures.

FINDING 15  
As a result of the passing of the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018, proposed section 19(3) of the Surrogacy Act 2008 and section 23(1)(d) of the Human Reproductive Technology Act 1991 would create different effective age limits for men and women for access to in vitro fertilisation procedures and surrogacy.
The Department of Health provide clear and consistent communication regarding how the current age limits should be interpreted and applied. As noted in the report by Dr Sonia Allan, *The review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008*, prepared for the Minister for Health and dated January 2019, this may occur via the recommended new directions, conditions of registration and/or education of clinics and community.

RECOMMENDATION 9

The Government inform the House what amendments may be needed to ensure the *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008*, as amended by the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018, comply with the *Age Discrimination Act 2004* (Cth).

RECOMMENDATION 10

Amend clause 11(2) of the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 to clarify that the procedures in proposed sections 23(1)(a)(i) to (iii) of the *Human Reproductive Technology Act 1991* can be accessed without the requirement for an existing surrogacy arrangement. This could be effected as follows (in combination with Recommendation 7):

**Clause 11(2)**

Page 6, line 1 — To delete the line and insert:

(2) Delete section 23(2) and insert:

(2) Nothing in subsection (1) prevents the carrying out of a procedure referred to in paragraph (a) of the definition of *in vitro fertilisation procedure* under subsection (1)(a)(i), (ii) or (iii) in circumstances where —

(a) any human egg undergoing fertilisation, or human embryo, derived from the procedure may later be used for the purposes of a lawful surrogacy arrangement; but

(b) a lawful surrogacy arrangement does not yet exist.

(3) A procedure referred to in paragraph (b) of the definition of *in vitro fertilisation procedure* cannot be carried out for the purposes of a surrogacy arrangement unless subsection (1)(iv) applies, whether or not subsection (1)(a)(i), (ii) or (iii) also applies.
Amend section 54 of the Human Reproductive Technology Act 1991 to include a new requirement for the authorised officer, when relying upon section 54(1)(a), to record the reasonable cause(s) which led them to believe that any of the things prescribed in sections 54(1)(a)(i)-(v) have occurred, are occurring, or are likely to occur. As with records made and kept under section 54(6), these records should be made prior to exercising the powers and also be written, signed, witnessed and placed on the register kept by the Director General of the Department of Health. This amendment could be effected as follows:

New clause 14A
Page 6, after line 26 — To insert:

14A. Section 54 amended

After section 54(6) insert:

(6A) Before exercising a power under subsection (1)(a), an authorised officer must record in writing each reasonable cause that forms the basis of the authorised officer’s belief for the purposes of subsection (1)(a).

(6B) A record made under subsection (6A) must —

(a) be signed by the authorised officer in the presence of a witness; and
(b) be signed by the witness; and
(c) include the date and time that the record was signed by the authorised officer; and
(d) be placed, as soon as practicable, by the authorised officer on the register referred to in subsection (6).

FINDING 16
Page 54

If male couples and single men have access to in vitro fertilisation procedures for the purposes of surrogacy, it is necessary also to extend the right to apply for parentage orders to male couples and single men.

RECOMMENDATION 12
Page 56

Amend clause 18(1) of the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018, proposed new section 19(1)(b) of the Surrogacy Act 2008, to also allow applicants for parentage orders to have medical or social reasons after the time when the surrogacy arrangement was entered into but before the application is made. This could be effected as follows:

Clause 18(1)
Page 9, line 9 — To delete “into.” and insert:

into or after that time but before the application is made.
**FINDING 17**

Proposed section 19(1A)(b)(ii) of the *Surrogacy Act 2008* will lessen the effective availability of surrogacy for female couples because it will require both members of the couple to be unable to have children due to medical reasons. Under current section 19(1)(b)(ii), only one member of the female couple is required to meet that criterion.

**FINDING 18**

Neither the Second Reading Speech nor the Explanatory Memorandum for the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 identify a need for increasing the eligibility requirements for female couples seeking to apply for parentage orders.

**FINDING 19**

The shift in policy represented by proposed section 19(1A)(b)(ii) of the *Surrogacy Act 2008* (in clause 18(2) of the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018) could result in unfair outcomes for people who are affected by the transition from the current to the proposed regime.

**FINDING 20**

Proposed section 19(1A)(b)(ii) of the *Surrogacy Act 2008* (in clause 18(2) of the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018) gives rise to new discrimination against female couples but it is unlikely that this amounts to unlawful discrimination under the *Sex Discrimination Act 1984* (Cth).

**RECOMMENDATION 13**

The current eligibility requirements for female couples seeking to apply for parentage orders could be retained in the following way:

**Clause 18(2)**

Page 9, line 23 — To delete “2 eligible women; or” and insert:

2 women, 1 of whom is an eligible woman; or
CHAPTER 1
Introduction

Referral and procedure

1.1 On 10 April 2019, the Legislative Council referred the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 (Bill) to the Standing Committee on Legislation (Committee). The motion of referral provided:

(1) That the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 be discharged and referred to the Standing Committee on Legislation for consideration and report by no later than 27 June 2019; and

(2) the committee has the power to inquire into and report on the policy of the bill.¹

1.2 The Committee called for submissions from the stakeholders listed in Appendix 1 and advertised the inquiry in The West Australian and on Facebook, receiving 72 submissions (see Appendix 1 also). Media statements were also released for the inquiry and hearings.

1.3 Public hearings² were held with the following witnesses (see Appendix 1):

- officials from the Department of Health (Department)
- Dr Sonia Allan LLB(Hons) BA(Hons) MPH(Merit) LLM Global Health (Distinction) PhD, a legal academic and consultant³
- the Chair of the Reproductive Technology Council (RTC)
- the Commissioner for Children and Young People.

1.4 The Committee requested and obtained an independent legal opinion from Mr Greg McIntyre SC (see Appendix 2 for a copy of the opinion). The Committee initially requested an opinion from the State Solicitor and as a result of that request received an unsolicited opinion from the Solicitor-General (see Appendix 3 for a copy of the opinion).⁴

1.5 The Committee extends its appreciation to those who made submissions and appeared at hearings. The Committee acknowledges Dr Allan for her generous contribution to the inquiry and her comprehensive advice.

¹ Hon Nick Goiran MLC, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 10 April 2019, p 2362. The debate on the motion is captured at pp 2362–70.
² Broadcast live over the internet. Videos of each broadcast are available on the Committee’s webpage: <www.parliament.wa.gov.au/legq>.
³ Dr Allan has considerable experience and expertise in health law, in particular, assisted reproductive technology (ART), surrogacy and related matters. For example, Dr Allan has been examining the ethical, legal and social issues pertaining to assisted reproduction and surrogacy for more than 16 years. She has contributed to all government inquiries at state and federal level in Australia on ART and surrogacy that have been conducted over the past 15 years. She has also contributed to expert forums on cross-border ART and surrogacy in Australia, The Hague, and for the United Nations Population Fund, World Health Organization and Office of the High Commissioner on Human Rights. Most recently, in 2018, she led and conducted the review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008, which resulted in a 2019 report (see further, paragraphs 2.60-2.62).
⁴ The circumstances in which the Committee received this advice is discussed at paragraphs 2.46-2.49.
**Policy and purpose of the Bill**

**Policy of the Bill**

1.6 The stated policy of the Bill is to:

   firstly, provide equitable access to surrogacy through the use of assisted reproductive technology for male same-sex couples and single men; and, secondly, enable licensed fertility clinics and practitioners to provide such services without discrimination on the basis of sex and sexual orientation in compliance with commonwealth [Sex Discrimination Act 1984] and state legislation—the Western Australian Equal Opportunity Act 1984.5

**Purpose of the Bill**

1.7 The Bill proposes amendments to the Human Reproductive Technology Act 1991 (HRT Act) and Surrogacy Act 2008 (Surrogacy Act) to deal with two main matters:

   • the extension of surrogacy arrangements (through in vitro fertilisation (IVF) procedures) to male couples and single men
   • clarification that IVF procedures are available in circumstances of likely future infertility due to medical reasons.

1.8 The Explanatory Memorandum states that the Bill:

   provides for amendments to the Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 to enable male same-sex couples and single men access to surrogacy.

   The amendments will enable more equitable access to assisted reproductive technology (ART) services for such persons and enable compliance, by service providers, with the Sex Discrimination Act 1984 (Cth) the Equal Opportunity Act 1984 (WA) on the grounds of sex and sexual orientation.

   The amendments provide clarity that a woman is, or a married or de facto couple are, eligible for in vitro fertilisation (IVF) treatment if “likely to be” unable to conceive or give birth to a child as a result of disease, a medical condition or medical treatment.6

1.9 One expected benefit of the Bill, as discussed in the Second Reading Speech, is that:

   we may reduce the impetus of people to travel overseas to create a family. In many cases of overseas surrogacy, the children never know who their egg donor is or who gave birth to them. For the children and arranged parents, there are difficulties in establishing legal parentage, which impacts on the rights of these children.7

1.10 The Bill also proposes to:

   • strengthen some of the advisory, investigation and search powers in relation to surrogacy regulation

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5 Second Reading Speech: Hon Alanna Clohesy MLC, Parliamentary Secretary to the Minister for Health, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 10 October 2018, p 6771.


7 Hon Alanna Clohesy MLC, Parliamentary Secretary to the Minister for Health, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 10 October 2018, p 6771.
• make minor corrections and consequential amendments to the HRT Act which flow from the two main matters addressed by the Bill.

Committee approach

1.11 Given the inquiry’s time constraints and the nature of the debate on the referral motion, the Committee confined its considerations to whether:
• the stated policy of the Bill is justified from a technical, legal perspective
• the amendments to the HRT Act and the Surrogacy Act which are proposed by the Bill:
  o give proper effect to that policy
  o are effective
  o have any technical or legal consequences.
1.12 The majority of the submissions focused on the merits of extending access to surrogacy to male couples and single men. While the Committee has not considered this issue, some of the evidence received in this regard is outlined in Chapter 9.
1.13 As with previous inquiries, the Committee’s method for scrutinising the Bill included an assessment as to whether its provisions are consistent with Fundamental Legislative Principles (FLPs). Sixteen FLPs are set out in Appendix 4.
1.14 FLPs are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. They fall under two broad headings:
• Does the Bill have sufficient regard to the rights and liberties of individuals? (FLPs 1-11).
• Does the Bill have sufficient regard to the institution of Parliament? (FLPs 12-16).
1.15 Whilst consideration or application of FLPs is not mandatory in Western Australia, the Committee has used them as a framework for fair and effective scrutiny of legislation since 2004. For some bills, many FLPs do not apply. The question the Committee asks is not whether there is strict compliance with FLPs, but whether a bill has sufficient regard to them.
1.16 The Committee has reported on selected clauses of the Bill.

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8 Members who spoke in the debate were generally in agreement that—(1) the main impetus for the Bill is to address inconsistencies in Western Australia’s assisted reproductive technology legislation and the Sex Discrimination Act 1984 (Cth), and (2) the Committee should determine whether such inconsistencies in fact exist: see Hon Sue Ellery MLC, Minister for Education and Training, Hon Michael Mischin MLC, Hon Aaron Stonehouse MLC and Hon Martin Aldridge MLC, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 10 April 2019, pp 2363–4, 2366, 2367 and 2369, respectively. Some of the Members who spoke were also of the view that the Committee could not, and should not attempt to, reconcile the various opposing arguments about the appropriateness of allowing male couples and single men to access surrogacy: see Hon Sue Ellery MLC, Minister for Education and Training, Hon Alison Xamon MLC and Hon Martin Aldridge MLC, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 10 April 2019, pp 2362–3, 2364–5 and 2368.
9 The FLPs are based on principles set out in Queensland’s Legislative Standards Act 1992, though other Parliaments often rely on similar principles.
CHAPTER 2

Background of the Bill

Surrogacy and Reproductive Technology—terminology

2.1 As the Bill deals with matters in a specialised area of medicine, the Committee is mindful of its use of the terms and concepts which are commonly referred to in discussions about surrogacy and assisted reproductive technology (ART). To this end, the Committee refers the Parliament to the glossaries in a 2019 report on the review of the HRT Act and Surrogacy Act.10 Wherever possible, the Committee has used relevant terms and concepts consistently with their meanings as listed in those glossaries.

2.2 For ease of reference, the Committee has extracted the most relevant terms and concepts from the glossaries in the 2019 report and included them in this report’s glossary.

2.3 The Committee prefers the term ‘intended parents’ when referring to the people in a surrogacy arrangement who will be raising the child born through the arrangement. However, as the Surrogacy Act uses the term ‘arranged parents’, this report will also use that term for consistency and ease of reference.

Overview of current regulatory regime

2.4 The current regulatory regime is contained within two Acts, the HRT Act and the Surrogacy Act, their associated regulations and directions for licensees made under the HRT Act. This section of the report provides an overview of the aspects of the current regime which are relevant to the subject matter of the Bill.

Human Reproductive Technology Act 1991

2.5 The HRT Act regulates the provision of artificial fertilisation procedures, including IVF. In the HRT Act, an IVF procedure is defined as follows:

*in vitro fertilisation procedure* means a procedure,[¹] not being a storage procedure,[¹²] which —

(a) is consequent upon the removal of a human egg from the body of a woman, and carried out for one or more of the following purposes —

(i) the fertilisation[¹³] of that egg, within or outside her body; or

(ii) the keeping or use of that egg with intent to derive from it a human egg undergoing fertilisation or a human embryo; or

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11 ‘Procedure’ is defined as meaning ‘any treatment, course of treatment or cycle of treatment involving reproductive technology, but may also include any part of such treatment or any other service or process which is defined in and described by the Code [of Practice as defined in the Act] as constituting for the purposes of this Act a procedure of a specified kind’: Human Reproductive Technology Act 1991 (hereafter referred to as the HRT Act) s 3(1).

12 ‘Storage procedure’ is to be construed in relation to HRT Act s 3(4): HRT Act s 3(1).

13 ‘Fertilisation’ is defined as meaning ‘the process that commences at the moment of inclusion of a sperm head within the plasma membrane of an egg, and is completed when an embryo is formed’: HRT Act s 3(1).
(iii) the keeping or use of that human egg undergoing fertilisation or human embryo so derived;

or

(b) is directed at the introduction into the body of a woman of —

(i) a human egg;

(ii) a human egg undergoing fertilisation or a human embryo, whether or not fertilisation began outside the body into which it is introduced;

or

(c) is a procedure in relation to artificially assisted human conception which is prescribed[14] for the purposes of this definition;[15]

2.6 In broad terms, IVF, for the purposes of the HRT Act, encompasses the:

- artificial fertilisation of a human egg
- introduction of a human egg, a human egg undergoing fertilisation or a human embryo, into the body of a woman.

2.7 The Department advised the Committee that egg collection is not an IVF procedure covered by the HRT Act.[16] The Committee accepted that this interpretation is consistent with the wording in the definition of IVF (see paragraph 2.5).[17]

2.8 The circumstances in which IVF may be carried out are set out in section 23 (see Appendix 5).

In summary, an IVF procedure may be carried out, where the procedure is likely to benefit the following people:

- An opposite-sex married or de facto couple who are, together, unable to conceive a child due to medical reasons.[18]
- A woman, regardless of her marital status or sexual orientation, who is unable to conceive a child due to medical reasons.[19] For example, this could include a single woman or a woman who is a member of a female couple.
- An opposite-sex married or de facto couple whose child would otherwise be likely to be affected by a genetic abnormality or a disease.[20]

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14 No such procedure has been prescribed.
15 HRT Act s 3(1).
16 Jane Laurence, Director/General Counsel, Legal and Legislative Services, and Dr Maureen Harris, Manager, Reproductive Technology Unit, Department of Health, Transcript of evidence, 20 May 2019, pp 3–4.
17 However, the Department’s interpretation of ‘IVF procedure’ may not be consistent with the working interpretation to which the ART clinicians adhere: Dr Sonia Allan, Legal academic and consultant, Transcript of evidence, 20 May 2019, p 7.
18 HRT Act s 23(1)(a)(i), read with s 23(1)(c). Under the strict terms of the section 23(1)(c), since the December 2017 changes to the Marriage Act 1961 (Cth), people seeking to be regarded as a ‘married couple’ could now be either an opposite-sex or same-sex couple. However, a same-sex couple, regardless of their individual ability to conceive, is unlikely to qualify for an IVF procedure under medical reasons because, together, their biological reason for being unable to conceive is unlikely to amount to a ‘medical reason’. See the reasons set out in Joshua Thomson SC, Solicitor-General, Opinion, 9 May 2019, pp 2–3, paragraphs 16, 17 and 19.
19 HRT Act s 23(1)(a)(ia).
• A woman, regardless of her marital status or sexual orientation, whose child would otherwise be likely to be affected by a genetic abnormality or a disease.\(^{21}\)
• A woman, regardless of her marital status or sexual orientation, who is unable to give birth to a child due to medical reasons and is a party to a surrogacy arrangement (as defined in section 3 of the Surrogacy Act) that is lawful.\(^{22}\)

The requirement for women in this category to have an existing, lawful surrogacy arrangement in place before being eligible for IVF\(^{23}\) has caused practical difficulties—in some cases, effectively preventing these women from accessing IVF procedures (see paragraphs 5.9-5.29).

2.9 Overarching all of these eligibility criteria is the requirement that ‘age’ cannot be the reason for infertility.\(^{24}\) In practice, this requirement can result in ambiguity and inconsistency in the way IVF procedures are provided (see paragraphs 5.60-5.71). It does not feature in the equivalent legislation of other Australian jurisdictions.\(^{25}\)

**Human Reproductive Technology Regulations 1993**

2.10 These regulations prescribe the detail that complements the operation of the HRT Act. For example, they prescribe the:

• administrative requirements and the fees for obtaining an exemption relating to artificial insemination under section 28(1) of the HRT Act
• administrative requirements and fees for applying for a licence (storage or practice licence)
• information required to be recorded on a register of licensees
• form of warrants issued under section 55(1) of the HRT Act.

**Human Reproductive Technology Directions**

2.11 These directions set the standards of ART practice under the HRT Act. They were given by the then Commissioner of Health in November 2004, on advice from the RTC.

2.12 The HRT Act Directions, in effect, form part of the licence conditions of ART service providers. A failure to comply with the directions can result in disciplinary action.\(^{26}\)

**Surrogacy Act 2008**

2.13 The Surrogacy Act regulates:

• access to surrogacy arrangements preceding surrogate pregnancies
• the making of parentage orders following the birth of the child.

2.14 A ‘surrogacy arrangement’ is defined to mean:

an arrangement for a woman (the *birth mother*) to seek to become pregnant and give birth to a child and for a person or persons other than the birth mother (the *arranged parent* or *arranged parents*) to raise the child, but the term does not

\(^{21}\) HRT Act s 23(1)(a)(ii).

\(^{22}\) See paragraphs 3.1-3.10 in relation to what is required for a lawful surrogacy arrangement.

\(^{23}\) This requirement is reflected in *Surrogacy Directions 2009* (hereafter referred to as the Surrogacy Directions) direction 7.

\(^{24}\) HRT Act s 23(1)(d).

\(^{25}\) See Assisted Reproductive Technology Act 2007 and Surrogacy Act 2010 (NSW); Surrogacy Act 2010 (Qld); Family Relationships Act 1975 (SA); Surrogacy Act 2012 (Tas) and Assisted Reproductive Treatment Act 2008 (Vic).

\(^{26}\) HRT Act ss 31(4) and 34.
include an arrangement entered into after the birth mother becomes pregnant unless it is in variation of a surrogacy arrangement involving the same parties.27

2.15 The Surrogacy Act prohibits commercial surrogacy28 and regulates altruistic surrogacy only. Therefore, this report, when discussing access to surrogacy, deals with altruistic surrogacy arrangements only.

‘Approved’ surrogacy arrangements

2.16 Section 17 empowers the RTC to approve a surrogacy arrangement if certain requirements have been met.

2.17 In order for a surrogacy arrangement to be approved by the RTC, the parties must address the following requirements in section 17 of the Surrogacy Act:

- Age—the birth mother must have reached the age of 25 years.29
- Experience—the birth mother must have already given birth to a live child. The RTC can dispense with this requirement if it is satisfied that there are exceptional circumstances to do so.30
- Written agreement—the surrogacy arrangement must be set out in a written agreement signed by the arranged parents, the birth parents and any egg or sperm donor and their respective partners.31 This could amount to as many as eight parties.
- Implications counselling—at least three months before the RTC approval (if any), each of the parties must have undertaken counselling about the implications of the arrangement.32 Such counselling is governed by Surrogacy Regulations 2009 regulation 4 and must be provided by an RTC-approved counsellor.33
- Psychological assessment—at least three months before the RTC approval (if any), each of the parties must have been assessed, and confirmed in a written report to the RTC, to be psychologically suitable to be involved in the arrangement.34
- Independent legal advice—at least three months before the RTC approval (if any), each of the parties must have received independent legal advice about the effect of the arrangement.35
- Medical assessment to confirm medical suitability to be involved in a surrogacy arrangement—this confirmation must be obtained by each of the arranged parents, the birth mother and any donor at least three months before the RTC approval (if any). The assessment must be carried out by a medical practitioner and confirmed in a written report to the RTC.36

27 Surrogacy Act 2008 (hereafter referred to as the Surrogacy Act) s 3.
28 In the Surrogacy Act, a commercial surrogacy arrangement is known as a ‘surrogacy arrangement that is for reward’: Surrogacy Act Part 2, particularly, ss 6 and 8.
29 Surrogacy Act s 17(a)(i).
30 ibid., s 17(a)(ii).
31 ibid., s 17(b).
32 ibid., s 17(c)(i).
33 Surrogacy Regulations 2009 regs 4(1) and 3.
34 Surrogacy Act s 17(c)(ii).
35 ibid., s 17(c)(iii).
36 ibid., s 17(d).
• Future surrogate pregnancy—the birth mother must not yet be pregnant under the arrangement.\(^{37}\)

2.18 Section 17 of the Surrogacy Act does not prohibit male couples or single men from entering into surrogacy arrangements, nor does it prevent the RTC from approving such arrangements. In fact, the Act defines ‘surrogacy arrangement’, ‘birth parents’ and ‘arranged parents’ in gender neutral language\(^{38}\) and without reference to sex,\(^{39}\) marital status or sexual orientation.\(^{40}\) The Act also expressly acknowledges and provides for the possibility of single parents.\(^{41}\)

Parentage orders

2.19 Legal parentage of a child born from a surrogacy arrangement that involved an artificial fertilisation procedure is initially held by the birth parents,\(^{42}\) so arranged parents wishing to be the child’s legal parents must apply to the Family Court of Western Australia\(^{43}\) for a transfer of parentage, referred to in the Surrogacy Act as a ‘parentage order’.\(^{44}\)

2.20 Section 16 of the Surrogacy Act provides that a parentage order cannot be made unless a ‘surrogacy arrangement’ has been approved in writing by the RTC under section 17.

2.21 Section 19 of the Surrogacy Act (see Appendix 6) sets out the eligibility requirements for applications for parentage orders. Currently, arranged parents may only apply for a parentage order if:

- they both reside in Western Australia and at least one of them has reached the age of 25 years
- and
- the arranged parents are an ‘eligible couple’ or one of the arranged parents, or the one arranged parent, is an ‘eligible person’. The arranged parent(s) must meet the definitions of these terms either:
  - at the time when the surrogacy arrangement was entered into
  - or
  - after that time but before the application for the parentage order is made.\(^{45}\)

‘Eligible couple’

2.22 Section 19(2) defines an ‘eligible couple’ as an opposite-sex married or de facto couple who, as a couple:

(a) are unable to conceive a child due to medical reasons not excluded by subsection (3) [that is, age-related inability to conceive]; or

\(^{37}\) ibid., s 17(e).

\(^{38}\) Except, of course, in relation to the birth mother.

\(^{39}\) Except, of course, in relation to the birth mother.

\(^{40}\) Surrogacy Act ss 3 and 14.

\(^{41}\) ibid.

\(^{42}\) Dr Sonia Allan, Legal academic and consultant, Transcript of evidence, 20 May 2019, pp 20 and 21. See Artificial Conception Act 1985 ss 5-7, which determine legal parentage when artificial fertilisation procedures result in a pregnancy and/or birth of a child. Surrogacy Act ss 12, 14 rely on the legal parentage prescribed in the Artificial Conception Act 1985.

\(^{43}\) Surrogacy Act s 14.

\(^{44}\) See ibid., s 20.

\(^{45}\) ibid., s 19(1). However, see paragraphs 7.10-7.16 regarding the timing of medical and social reasons.
(b) although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or a disease;

2.23 This definition clearly excludes same-sex married or de facto couples.

‘Eligible person’

2.24 Section 19(2) defines ‘eligible person’ to mean a woman who:

(a) is unable to conceive a child due to medical reasons not excluded by subsection (3) [that is, age-related inability to conceive]; or

(b) although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or a disease; or

(c) although able to conceive a child, is unable for medical reasons to give birth to a child.

2.25 Under this definition, arranged parents who are single women and women who are members of a female couple are eligible to apply for parentage orders. Conversely, this definition, according to Dr Allan, clearly excludes men and, possibly, men who identify as females and people of intersex status.46

Surrogacy Regulations 2009

2.26 These regulations provide the detail to complement the Surrogacy Act. The regulations prescribe:

- who may be an ‘approved counsellor’
- the requirements for counselling about the implications of the surrogacy arrangement
- the administrative requirements for seeking approval of a surrogacy arrangement
- the requirements for counselling about the effect of a parentage order.

Surrogacy Directions 2009

2.27 The Surrogacy Directions 2009 (Surrogacy Directions) (see Appendix 7) ‘set the standards for the use of artificial fertilisation procedures in connection with surrogacy arrangements’.47 They were given by the Department’s Director General under section 31 of the HRT Act.

2.28 The Surrogacy Directions, in effect, form part of the licence conditions of ART service providers who perform these services in connection with surrogacy arrangements. A failure to comply with the directions can result in disciplinary action.48

The Reproductive Technology Council

2.29 The RTC was established under section 8 of the HRT Act and its statutory functions are prescribed in section 14. The RTC’s Chair described it as a ‘regulator’ in the field of ART:

Its principal functions are to oversee the licensing and the implementation of matters arising under that act [HRT Act]. The other function that it has is, when it is called upon to do so, to provide advice to the minister for other offices under the legislation in respect of matters regarding reproductive technology.49

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46 Allan Report (see paragraphs 2.60-2.62) Part 2, pp 55 and 60.
47 Surrogacy Directions direction 4.
48 HRT Act ss 31(4) and 34
49 Dr Brenda McGivern, Chair, Reproductive Technology Council, Transcript of evidence, 20 May 2019, p 2.
2.30 The main functions of the RTC are summarised on its website as follows:

Formulate and review a **Code of Practice** to govern the use of artificial fertilisation and storage procedures carried on by licensees;

**Advise the Commissioner of Health**[^50] on the suitability of applicants, and compliance of licensees with conditions of their licences;

Make sure that any **research** carried out by or on behalf of a licensee on eggs, sperm, or participants, has general or specific approval of Council;

**Advise the Minister for Health** on matters related to reproductive technology;

Encourage and facilitate research into the **causes and prevention** of all types of human **infertility** and on the social and public health implications of reproductive technology; and

To promote **informed public debate** and education on these issues.^[51]

2.31 The RTC also has the function of approving surrogacy arrangements in Western Australia, under section 17 of the Surrogacy Act.

### Is the current law inconsistent with the *Sex Discrimination Act 1984* (Cth) and *Equal Opportunity Act 1984* (WA)?

#### Background

2.32 As noted in paragraph 1.6, one of the stated policy reasons for the Bill is to address the potential inconsistency of the HRT Act and the Surrogacy Act with the *Sex Discrimination Act 1984* (Cth) (SDA).

2.33 In the course of its inquiry, the Committee considered:

- Whether there is an existing inconsistency between the HRT Act and/or the Surrogacy Act on the one hand, and the SDA and/or the *Equal Opportunity Act 1984* (WA) (EO Act) on the other hand.
- If there are any such inconsistencies, whether the amendments proposed by the Bill would resolve them.^[52]
- Whether the amendments proposed by the Bill would give rise to any other inconsistencies with the SDA and/or the EO Act, not present in the existing law.^[53]

2.34 This section of the Report deals with the first of these issues.

2.35 The second reading speech noted:

The main amendments to the current legislation within this Bill respond to the 2013 amendments to the *Sex Discrimination Act 1984* (Cth), which made discrimination on the grounds of sexual orientation, gender identity and intersex status, unlawful in all States and Territories.

Commonwealth regulations that were in place exempting the HRT Act and Surrogacy Act from application of the Sex Discrimination Act, expired on

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[^50]: Section 14 refers to the ‘CEO’, not the Commissioner of Health. ‘CEO’ is defined in section 3 by reference to the *Health Legislation Administration Act 1984* as meaning the chief executive officer of the Department of Health.


[^52]: Dealt with in paragraphs 5.30–5.40.

[^53]: Dealt with in paragraphs 5.41–5.49 and 5.60–5.71.
31 July 2017. Failure to respond to this, would be unwise due to an unacceptable risk of litigation and the prospect of provisions of the relevant State legislation (HRT Act) being held by a court to be invalid.

The amendments will –

... enable licensed fertility clinics and practitioners to provide such services without discrimination on the basis of sex and sexual orientation, in compliance with Commonwealth and State legislation (*Equal Opportunity Act 1984* (WA)).

2.36 The relevant parts of the SDA and EO Act are set out in Appendices 8 and 9, respectively.

2.37 In summary, the criteria for discrimination on the basis of sex, sexual orientation, gender identity and intersex status are set out in sections 5, 5A, 5B and 5C of the SDA, respectively.

2.38 Relevantly, section 22 of the SDA makes it unlawful for a person who provides goods, services or facilities to discriminate against another person on the ground of the other person’s sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:

- by refusing to provide the other person with those services
- in the terms or conditions on which the first-mentioned person provides the other person with those or
- in the manner in which the first-mentioned person provides the other person with those services.

2.39 The equivalent sections of the EO Act are sections 8 (sex discrimination), 9 (discrimination on the grounds of marital status) and 20 (discrimination prohibited in the provision of goods and services).

**Repeal in August 2017 of the exemption in regulation 5 of the *Sex Discrimination Regulations 1984* (Cth)**

2.40 ‘Commonwealth regulations’ in the second reading speech refers to regulation 5 of the *Sex Discrimination Regulations 1984* (Cth) which, until 1 August 2017, exempted both the HRT Act and the Surrogacy Act from the operation of section 22 of the SDA by reference to section 5A, 5B or 5C.

2.41 Regulation 5 was inserted in 2013, as follows:

5. **Exemption for things done in direct compliance with prescribed laws**

   (1) For subsection 40(2B) of the Act, all laws of the Commonwealth, the States and the Territories, as in force on 1 August 2013, are prescribed.

   Note: Subsection 40(2B) provides for an exemption from Divisions 1 and 2 of Part II (prohibition of discrimination) of the Act as applying by reference to section 5A (sexual orientation), 5B (gender identity) or 5C (intersex status) of the Act. The exemption applies to things done in direct compliance with a prescribed law of the Commonwealth, a State or a Territory.

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54 Hon Alanna Clohesy MLC, Parliamentary Secretary to the Minister for Health, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 10 October 2018, p 6770–1.

55 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Statutes) Regulation 2013* (Cth).
2.42 The purpose of regulation 5 was to allow time for states and territories to review their laws and assess compliance with the new protections (in 2013) against discrimination on the grounds of sexual orientation, gender identity and intersex status. The exemption was initially extended for all jurisdictions to 31 July 2016 and, from 1 August 2016, extended again in relation to Western Australia only. The new regulation 5 substituted in 2016 was as follows:

5. Exemption for things done in direct compliance with prescribed laws

(1) For the purposes of subsection 40(2B) of the Act, the following laws are prescribed:

(a) the Human Reproductive Technology Act 1991 (WA);
(b) the Surrogacy Act 2008 (WA).

Note: Subsection 40(2B) provides for an exemption, in relation to anything done by a person in direct compliance with a prescribed law, from Divisions 1 and 2 of Part II (prohibition of discrimination) of the Act, as applying by reference to:

(a) section 5A (sexual orientation); or
(b) section 5B (gender identity); or
(c) section 5C (intersex status).

(2) This regulation is repealed at the start of 1 August 2017.

2.43 The Committee notes that the exemption in regulation 5 only applied to discrimination on the basis of sexual orientation, gender identity or intersex status, and therefore did not apply to discrimination against single men under the HRT Act or the Surrogacy Act (unless the discrimination arose as a result of a man’s sexual orientation or gender identity).

2.44 The Committee raised this issue with the Department, Dr Sonia Allan and the Chair of the RTC, Dr Brenda McGivern. In summary, their responses were as follows:

- The Director/General Counsel, Legal and Legislative Services of the Department, Ms Jane Laurence, agreed that the exemption in regulation 5 only applied to discrimination on the basis of sexual orientation, gender identity or intersex status, and therefore did not apply to discrimination against single men under the HRT Act or the Surrogacy Act.57

- Dr Sonia Allan advised that under the current law:

Looking at the fact that single women, women in same-sex de facto relationships, married couples—same-sex male and female, arguably—and heterosexual couples may access ART in Western Australia, one may argue that excluding a single male, or for that matter a male in a same-sex de facto couple, gives rise to discrimination on the basis of their marital or relationship status, as they are being treated differently, especially to other men who may access treatment but have different marital or relationship status, and also to women who have the same or different marital or relationship status. To that end, I would argue that a single male should be able to access ART for the purposes of entering into a surrogacy arrangement because, otherwise, and in relation to couples, it is very arguable that if this were

56 Sex Discrimination Amendment (Exemptions) Regulation 2016 (Cth).
57 Jane Laurence, Director/General Counsel, Legal and Legislative Services, Department of Health, Transcript of evidence, 20 May 2019, p 5.
litigated, the legislation would be void to the extent of the inconsistency with the commonwealth act. The wording "are of opposite sex to each other" would be struck out in the case of same-sex couples and there is an argument that a single male now could bring a cause of action.58

- The RTC stated in its submission:

Since the eligibility criteria for IVF (and by extension, surrogacy) are currently directed to medical need, single men and same sex couples are not permitted access to IVF procedures (including for surrogacy purposes) under the HRT Act. Council understands those restrictions to be inconsistent with the Sex Discrimination Act 1984 (Cth). 59

**Advice to the Committee regarding inconsistency with *Sex Discrimination Act 1984* (Cth) section 22**

2.45 Dr Allan’s Report of her review of the HRT Act and the Surrogacy Act60 stated:

In effect, Western Australia had four years to amend its legislation prior to the expiration of such exemptions. However, this did not occur. It is now the case that the provisions that limit eligibility to ART and surrogacy to heterosexual couples or women, no longer being prescribed, contravene the *Sex Discrimination Act 1984* (Cth). That is, the Western Australian provisions discriminate against people on the basis of their relationship status, sex, sexual orientation, gender identity and/or intersex status in effect preventing people who are single males, in a same-sex relationship, transgender and/or intersex from access to ART or surrogacy. Such discrimination is unacceptable. Maintaining the status quo poses the risk of litigation and the prospect of the relevant provisions of the *HRT Act and Surrogacy Act* being held by a court to be invalid.61

2.46 At the Committee’s request, the Clerk of the Legislative Council sought advice from the State Solicitor regarding inconsistency of the HRT Act and the Surrogacy Act with the SDA by letter dated 17 April 2019.

2.47 By letter to the Clerk dated 3 May 2019, the State Solicitor declined to provide the requested advice and advised:

> It would not be appropriate for me or my Office to provide the advice sought by the Committee. However, I understand that the Solicitor General has been authorised to provide advice to the Committee.

Please note that any advice which the Solicitor General provides to the Committee will also be provided to the Hon Attorney General, who may distribute that advice as he considers appropriate.62

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59 Submission 68 from the Reproductive Technology Council, 3 May 2019, p 2. The Chair of the RTC clarified in her evidence that ‘Council did not submit [to the Committee] that it was inconsistent. The submission was that council understands that it is. That is an important distinction because council is not a legal advice-giving or forming body. It is a multidisciplinary body that acts on advice. So council have been advised that it is inconsistent, not that it holds that view independently of that advice’: Dr Brenda McGivern, Chair, Reproductive Technology Council, *Transcript of evidence*, 20 May 2019, p 5.

60 See paragraph 2.60.


2.48 Without any further communication from the Clerk or the Committee, the Solicitor-General provided a written opinion to the Clerk dated 9 May 2019, which indicated that a copy of the opinion had been provided to the Attorney-General and to the State Solicitor.

2.49 The Committee considers it undesirable for legal advice requested by a Committee to be provided to others without express authority from the Committee. The development of protocols for the request and provision of legal advice would be beneficial for future inquiries. The Committee will be drawing this matter to the attention of the President and the Clerk recommending administrative action.

2.50 In summary, the Solicitor-General advised that, in his opinion:

- Section 23 of the HRT Act, read with section 19 of the Surrogacy Act, impermissibly discriminates against a single male or a male in a same-sex married or de facto couple and is inconsistent with section 22 of the SDA.
- Regulation 5 of the Sex Discrimination Regulations provided an exemption to some of that discrimination. Since the repeal of regulation 5, that exemption no longer applies.

2.51 Subsequently, the Committee sought an opinion from Greg McIntyre SC. His advice on this issue was as follows:

Without the amendments, the denial of a person of an IVF procedure because of the operation of the HRT Act s 23(1)(c) unamended would be the denial of a service, being the IVF procedure, on the ground of the sex, gender identity or inter-sex status of the person, contrary to s 22 of the SDA and the [EO Act] s 20. The provision is thus inconsistent with SDA and [EO Act].

The process of surrogacy is a service. The prohibition on entering into a surrogacy arrangement would result in providers of that service acting in accordance with the Surrogacy Act refusing to provide that service and unlawfully discriminating on the grounds of sex and sexual orientation, contrary to the SDA s 22, the [EO Act] s 20 and the Age Discrimination Act as it is presently proposed to be enacted.

2.52 The Committee’s discussion of the extent to which the Bill addresses the inconsistencies identified in the advice is found in Chapters 4 and 6.

Committee conclusions regarding inconsistency with the Sex Discrimination Act 1984 (Cth) and/or Equal Opportunity Act 1984 (WA)

Human Reproductive Technology Act 1991 section 23

2.53 The Committee considers that IVF services under HRT Act s 23 are ‘services’ for the purposes of SDA s 22.

2.54 A majority of the Committee, consisting of Hons Dr Sally Talbot, Pierre Yang and Colin de Grussa MLCS, finds that sections 23(1)(a) and 23(1)(c) of the HRT Act are inconsistent with section 22 of the SDA as they require providers of IVF services to discriminate against single men and male couples, either on the basis of sex as defined in section 5, on the basis of

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63 Joshua Thomson SC, Solicitor-General, Opinion, 9 May 2019, pp 7-8, paragraph 46.
64 ibid., p 8, paragraph 49.
65 ibid., p 9, paragraph 54.
67 However, see paragraph 5.71.
sexual orientation as defined in section 5A, or on the basis of marital status as defined in section 6, depending on the particular circumstances.

2.55 A minority of the Committee, consisting of Hons Nick Goiran and Simon O’Brien MLCs, finds that the advice provided to the Committee is that sections 23(1)(a) and (c) of the HRT Act are inconsistent with section 22 of the SDA as they require providers of IVF services to discriminate against single men and male couples, either on the basis of sex as defined in section 5, on the basis of sexual orientation as defined in section 5A, or on the basis of marital status as defined in section 6, depending on the particular circumstances.

**FINDING 1**

A majority of the Committee, consisting of Hons Dr Sally Talbot, Pierre Yang and Colin de Grussa MLCs, finds that sections 23(1)(a) and 23(1)(c) of the Human Reproductive Technology Act 1991 are inconsistent with section 22 of the Sex Discrimination Act 1984 (Cth).

**Surrogacy Act 2008 section 19**

2.56 The Committee notes that there are differing opinions as to whether and to what extent any parts of the Surrogacy Act are inconsistent with the SDA. Mr McIntyre SC,70 the Chair of the RTC71 and the Department72 were all of the view that parentage orders are not ‘services’. Dr Allan thought it unlikely that they would be seen as ‘services’ but thought it would still be possible to mount an argument of discrimination if parentage orders were denied on the basis of an applicant’s sex, sexual orientation and/or marital status.73

2.57 The advice provided to the Committee is that due to the effective prohibition on male couples and single men from accessing surrogacy, section 19 of the Surrogacy Act is discriminatory, but not unlawfully so, and therefore, not strictly inconsistent with section 22 of the SDA.

**FINDING 3**

Section 19 of the Surrogacy Act 2008 is discriminatory, but not unlawfully so, and is therefore not strictly inconsistent with section 22 of the Sex Discrimination Act 1984 (Cth).

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71 Dr Brenda McGivern, Chair, Reproductive Technology Council, Transcript of evidence, 20 May 2019, p 5.
72 Jane Laurence, Director/General Counsel, Legal and Legislative Services, Department of Health, Transcript of evidence, 20 May 2019, p 5.
73 Dr Sonia Allan, Legal academic and consultant, Transcript of evidence, 20 May 2019, p 9.
Committee conclusions regarding the effect of the repeal of regulation 5 of the *Sex Discrimination Regulations 1984* (Cth)

2.58 The Committee finds that discrimination against male couples arising from the application of the HRT Act and/or the Surrogacy Act as identified in paragraphs 2.53–2.57, was exempt by regulation 5 from the application of section 22 of the SDA until its repeal on 1 August 2017.74

2.59 Contrary to the situation for male couples, for the reasons set out in paragraphs 2.43, the Committee finds that discrimination against single men on the basis of sex or marital status was not exempt under regulation 5.

**FINDING 4**

A majority of the Committee, consisting of Hons Dr Sally Talbot, Pierre Yang and Colin de Grussa MLCs, finds that, as a result of the repeal of regulation 5 of the *Sex Discrimination Regulations 1984* on 31 July 2017, discrimination against male couples under the *Human Reproductive Technology Act 1991* and/or *Surrogacy Act 2008* became unlawful under section 22 of the *Sex Discrimination Act 1984* (Cth). Discrimination against single men was already unlawful under section 22 of the *Sex Discrimination Act 1984* (Cth) and that situation was unchanged by the repeal of regulation 5.

**FINDING 5**

A minority of the Committee, consisting of Hons Nick Goiran and Simon O’Brien MLCs, finds that the advice provided to the Committee is that, as a result of the repeal of regulation 5 of the *Sex Discrimination Regulations 1984* on 31 July 2017, discrimination against male couples under the *Human Reproductive Technology Act 1991* and/or *Surrogacy Act 2008* became unlawful under section 22 of the *Sex Discrimination Act 1984* (Cth).

**Allan Report**

2.60 In January 2018, the Department appointed Dr Sonia Allan75 to lead a review of the HRT Act and the Surrogacy Act. The Report of the review (Allan Report) dated January 2019 and tabled in the Parliament on 21 March 2019,76 noted:

> the Terms of Reference of the review were extensive and covered a wide variety of issues related to regulation, governance and practices associated with ART, surrogacy and donor conception.77

2.61 The Allan Report made 67 recommendations regarding the HRT Act78 (including that the Act, Regulations and Directions be revised and/or repealed) and 55 recommendations regarding the Surrogacy Act.79

2.62 Of those 122 recommendations, several relate to the issues addressed in the Bill. The following four relate directly to the main two issues addressed in the Bill:

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74 The determination of whether any other exemptions under the SDA apply is a separate matter.
75 See footnote 3.
76 Tabled Papers No. 2507 and 2508, Legislative Council, 21 March 2019.
78 ibid., pp xxix to xxxvii.
79 Allan Report Part 2, pp xxix to xxxviii.
Recommendation 1 of Part 2:

Noting the recommendation in Part 1 of the report that the HRT Act be repealed and that a new Act be drafted, that the HRT Act 1991 (WA) and the Surrogacy Act 2008 (WA) and related directions and regulations should be amended to provide for access to IVF procedures in circumstances in which a patient faces the impending loss of, or significant impairment to, their fertility or the ability to carry or bear a child in addition to providing for such access by person(s) who are already infertile or unable to carry or bear a child.\(^\text{80}\)

Recommendation 2 of Part 2:

Noting the recommendation in Part 1 of the report that the HRT Act be repealed and that a new Act be drafted, that the HRT Act 1991 (WA), the Surrogacy Act 2008 (WA) and related directions and regulations be amended to remove any requirement that a person who needs to preserve their fertility for future treatment in which a surrogacy arrangement may be required, must already have a surrogacy agreement in place before being able to access ART. The HRT Act 1991 (WA), s23(1)(c)(iii) \([\text{sic}]\) and the Surrogacy Directions 2009, Direction 7 requirements for an RTC approved surrogacy arrangement prior to a person undergoing a fertilisation procedure, should be repealed.\(^\text{81}\)

Recommendation 3 of Part 2:

That discriminatory provisions within the HRT Act 1991 (WA) and the Surrogacy Act 2008 (WA) that prevent access to ART or surrogacy on the basis of sex, relationship status, gender identity, intersex status, or sexual orientation, be repealed and amended as a matter or priority.\(^\text{82}\)

Recommendation 4 of Part 2:

That the Minister of Health should progress interim measures as far as is possible to address issues raised in the review that require urgent attention, recognising further reform is required as a matter of priority.\(^\text{83}\)

**Timing of the Bill in relation to the Allan Report**

2.63 Although the inquiry into the HRT Act and the Surrogacy Act led and conducted by Dr Allan was still on foot, the Bill was introduced into the Legislative Assembly on 23 August 2018. This enabled Dr Allan to consider the Bill and reflect on its effect as part of her findings and recommendations in the Allan Report, which was provided to the Government in January 2019 and tabled in Parliament in March 2019.\(^\text{84}\)

2.64 Dr Allan noted:

Recognising that the [two issues addressed by the Bill] were of great importance and that the completion of this review may take some time, in August 2018 the McGowan government introduced the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 into Parliament. The Bill proposes amendments to the HRT Act 1991 (WA) and the Surrogacy Act 2008 (WA) in ways that would go some way to addressing the above discussed issues. The proposed

\(^{80}\) ibid., p 61.

\(^{81}\) ibid.

\(^{82}\) ibid., p 62.

\(^{83}\) ibid.

\(^{84}\) See further, Dr Sonia Allan, Legal academic and consultant, *Transcript of evidence*, 20 May 2019, p 4.
amendments if enacted would be an important step in realising long-awaited and necessary reforms of the ART and surrogacy legislation in Western Australia.\textsuperscript{85}

Regarding the above-mentioned discrimination on the basis of sex, relationship status, sexual orientation, gender identity and intersex status, the Bill only addresses access to surrogacy through use of ART for male same-sex couples and single men. This is an important first step in removing discrimination in Western Australia regarding relationship status, sex, and sexual orientation, but further reform will be necessary to ensure non-discrimination on the basis of gender identity or intersex status.\textsuperscript{[86]} ... In the meantime, the current Bill addresses pertinent issues that were reported by the Government to be seen as requiring immediate action.\textsuperscript{87}

**Overview of the Bill**

2.65 The amendments proposed by the Bill are primarily to section 23 of the HRT Act and section 19 of the Surrogacy Act.

2.66 As discussed at paragraph 2.4, these two sections are inter-connected. However, for the purposes of consideration of the Bill by the House, this report will deal with the proposed amendments separately in Chapters 4 to 7.

2.67 In summary, the proposed amendments are as follows.

**Proposed amendments to the Human Reproductive Technology Act 1991**

*Preamble*

2.68 Clause 4 of the Bill amends the Preamble to the Act.

*Section 14*

2.69 Clause 7 of the Bill proposes to amend section 14 of the HRT Act to clarify that the RTC’s functions extend to advising:

- the Minister for Health as to the administration and enforcement of the Surrogacy Act generally
- the Director General of the Department on the same matters, and particularly, disciplinary matters.

*Section 23*

2.70 In summary, the Bill proposes to amend section 23 of the HRT Act to extend availability of IVF procedures to couples and women likely to be unable to conceive or give birth to a child due to medical reasons. The current provision refers to couples and woman unable to conceive or give birth to a child due to medical reasons.

2.71 Under current s 23(1)(a), women ‘unable to conceive a child’ are dealt with in a separate provision from women ‘unable to give birth to a child’. Under the Bill amendments, the requirements in relation to those two groups of women are dealt with together in proposed s 23(1)(a)(ii).

2.72 The amendments would provide that an IVF procedure may only be carried out where the procedure:

\textsuperscript{85} Allan Report Part 2, p 58.
\textsuperscript{86} See paragraphs 3.18–3.25.
\textsuperscript{87} Allan Report Part 2, p 59.
would be likely to benefit a couple who are likely to be unable to conceive a child due to medical reasons—proposed s 23(1)(a)(i)

would be likely to benefit a woman who is likely to be unable to conceive or give birth to a child due to medical reasons (whether or not that woman is a member of a couple)—proposed s 23(1)(a)(ii)

would be likely to benefit a couple or woman whose child would otherwise be likely to be affected by a genetic abnormality or a disease—proposed s 23(1)(a)(iii)

or

is for the purposes of a lawful surrogacy arrangement for which there are ‘medical or social reasons’ under section 19(1A) of the Surrogacy Act—proposed s 23(1)(iv).

2.73 In addition, the Bill proposes:

- amendments to section 23(1)(c) to remove the requirement that a ‘couple’ for the purposes of section 23(1)(a) be of the opposite sex to each other
- the deletion of section 23(2) which currently provides:

Subsection (1) does not require that the benefit likely to result from the procedure involve the pregnancy of a member of the couple who are, or the woman who is, likely to benefit.

Section 55A

2.74 The Bill proposes to introduce a new section, section 55A, to extend to the Surrogacy Act the powers currently available under the HRT Act to:

- without a warrant, enter and inspect premises, search and seize records and other items including human gametes, eggs or embryos
- question people and limit their right to decline to answer
- arrest people.

2.75 These amendments raise potential FLP issues as discussed in Chapter 5.

Other proposed amendments

2.76 Other minor or consequential amendments are proposed to sections 3, 6, 18, 21, 22, 26, 33 and 53R.

Proposed amendments to Surrogacy Act 2008

2.77 The proposed amendments to section 19 of the Surrogacy Act introduce the concepts of:

- ‘eligible woman’ (replacing the current ‘eligible couple’ and ‘eligible person’)—proposed section 19(2)
- ‘medical and social reasons’—proposed section 19(1)(b) and 19(1A).

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88 Section 54.

89 See clauses 5, 6, 8, 9, 10, 12, 13 and 14 of the Bill.
2.78 Under proposed section 19(2), an ‘eligible woman’ means a woman who:

(a) is likely to be unable to conceive a child due to medical reasons not excluded by subsection (3); or

(b) although able to conceive a child, is likely to be unable to give birth to a child due to medical reasons; or

(c) although able to conceive a child, is likely to conceive a child affected by a genetic abnormality or a disease.

2.79 Under proposed section 19(1) an application could be made for a parentage order only if:

(a) the arranged parents reside in Western Australia and at least one arranged parent has reached 25 years of age; and

(b) there were medical or social reasons for the surrogacy arrangement when the surrogacy arrangement was entered into.

2.80 Under proposed section 19(1A), there would be ‘medical and social reasons’ for a surrogacy arrangement if:

(a) in the case of a surrogacy arrangement involving 1 arranged parent, the arranged parent is an eligible woman or a man; or

(b) in the case of a surrogacy arrangement involving 2 arranged parents, the arranged parents are married to, or in a de facto relationship with, each other and are —

(i) an eligible woman and a man; or

(ii) 2 eligible women; or

(iii) 2 men.
CHAPTER 3
Other issues arising from the current regulatory regime

What constitutes ‘lawful’ surrogacy (confusion with ‘approved’ surrogacy)

3.1 Current section 23(1)(a)(iii) of the HRT Act provides that, in order for a woman who is unable to give birth to a child due to medical reasons to undergo an IVF procedure, she must be a party to a ‘surrogacy arrangement ... that is lawful’. Unfortunately, neither the HRT Act nor the Surrogacy Act define what constitutes a ‘lawful’ surrogacy arrangement. The Committee notes that the Surrogacy Act defines a surrogacy arrangement in section 3 but does not refer to ‘lawful’ or ‘unlawful’ surrogacy arrangements. It does, however, prohibit commercial surrogacy arrangements.90

FINDING 6

3.2 The Committee’s interpretation of the two Acts is that a ‘lawful’ surrogacy arrangement is one which is not prohibited by the Surrogacy Act—in other words, an altruistic surrogacy arrangement. The Department confirmed this interpretation.91

3.3 In the Committee’s view, a male couple or a single man could currently have a lawful (that is, altruistic) surrogacy arrangement, but they would not be able to access IVF procedures for the purposes of the surrogacy arrangement,92 nor would they be eligible for parentage orders.93

FINDING 7
For the purposes of the Human Reproductive Technology Act 1991 and the Surrogacy Act 2008, a ‘surrogacy arrangement that is lawful’ is an altruistic surrogacy arrangement.

3.4 Due in part to the lack of a statutory definition for ‘lawful’ surrogacy arrangements, there has been confusion amongst ART providers over what that term means. The Allan Report indicated that, in practice, a ‘lawful’ surrogacy arrangement is taken to mean a surrogacy arrangement which is ‘approved’ by the RTC under section 17 of the Surrogacy Act. Evidence submitted to Dr Allan’s review showed that ART clinicians and the RTC have this mistaken view of the meaning of ‘lawful’—compounded by the requirements of direction 7 of the Surrogacy Directions,94 which provides as follows:

Approval of surrogacy arrangements

A licensee is not to provide an artificial fertilisation procedure in connection with a surrogacy arrangement unless the arrangement has been approved by the Council

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90 See Surrogacy Act Part 2, Division 2. In this Act, a commercial surrogacy arrangement is termed ‘surrogacy arrangement that is for reward’: Surrogacy Act s 6.
91 Chad Martino, Acting Director, Office of the Director General, Department of Health, Email, 10 June 2019.
92 HRT Act s 23.
93 Surrogacy Act s 19.
94 Allan Report, Part 2, pp 51-3.
in accordance with the requirements in the *Surrogacy Act 2008* section 17.

(underlining added)

### 3.5

Dr Allan emphasised that the Department’s interpretation of the ART legislation is not necessarily consistent with that of the ART providers:

The other thing that I found during the review was that regardless of the department’s interpretation of how the act operated, the department does not provide legal advice, and quite clearly held to that, to clinics or to consumers. So you need to take into consideration how those clinics and consumers will interpret the legislation, and how it has been interpreted in the past. \(^{95}\)

...  

**Dr Allan**: ... Again, one of the problems that the review revealed was that sometimes the internal interpretation given to something by the department is not the interpretation that is being given by the clinics or by the people who are trying to harvest their eggs or access ART. If the department, or the reproductive technology unit, refuses to provide that advice to the clinics or to the people who are seeking ART, then whatever interpretation the department makes is moot. We need to look at whether or not people are able to harvest their eggs, are able to access ART or whether they are not, because the legal advice that they are required to get independently is actually telling them otherwise. I hope that that makes sense.

**The CHAIR**: Yes; it does.

**Hon NICK GOIRAN**: A further question to that, Dr Allan: do you think it is appropriate for the Reproductive Technology Council, which is in a sense the regulator or decision-maker in this matter, to be providing advice to would-be applicants and service providers?

**Dr Allan**: I think it would be appropriate that if they have a policy or an interpretation of the legislation on a matter that is unclear, that they make that readily available to people who are trying to access ART. It is not that they would be offering legal advice to people, but it would and should be their role to make clear what people can and cannot do under the act.\(^{96}\)

### 3.6

Paragraphs 5.9–5.14 in Chapter 5 provide further discussion on the difficulties which the confusion over the meaning of a ‘lawful’ surrogacy arrangement has caused.

### 3.7

The confusion is further illustrated by the fact that the Committee received opinions from two Senior Counsel who interpreted the term in a third way—that the lawfulness of a surrogacy arrangement is also dependent on the arranged parents satisfying the eligibility criteria for parentage orders:

- The Solicitor-General suggests that the Surrogacy Act contemplates that a ‘lawful’ surrogacy arrangement is one which can ultimately result in a successful application for parentage orders. Since male couples (and presumably single men) cannot apply for parentage orders, the Solicitor-General interprets the prohibition to mean that they also cannot enter into a lawful surrogacy arrangement.\(^{97}\)

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95 Dr Sonia Allan, Legal academic and consultant, *Transcript of evidence*, 20 May 2019, p 5.

96 Dr Sonia Allan, Legal academic and consultant, Hon Dr Sally Talbot MLC, Chair, and Hon Nick Goiran MLC, Deputy Chair, Committee, *Transcript of evidence*, 20 May 2019, p 7.

Mr McIntyre SC viewed surrogacy as a ‘process’ which includes parentage orders. Given that there are strict eligibility requirements for applying for parentage orders, those same requirements act as effective eligibility criteria for access to surrogacy generally.98

FINDING 8
There is confusion in the assisted reproductive technology industry over what constitutes a ‘lawful’ surrogacy arrangement. This is due to the combined effect of the following two factors:

a) The lack of a statutory definition for ‘lawful’ surrogacy arrangements.

b) The wording in direction 7 of the Surrogacy Directions 2009.

3.8 Further, direction 7 of the Surrogacy Directions may not be authorised by the Surrogacy Act because it requires ‘approved’, rather than ‘lawful’, surrogacy arrangements to be in place before a person can undergo an artificial fertilisation procedure in connection with a surrogacy arrangement. The directions are unlikely to have been scrutinised by the Delegated Legislation Committee because the directions are not a disallowable instrument.99

3.9 The discussion in this section demonstrates that there is unresolved confusion over what constitutes a ‘lawful’ surrogacy arrangement. As such, the HRT Act should be amended to define the term.

RECOMMENDATION 1
Amend the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 to insert a definition of a ‘surrogacy arrangement that is lawful’ into the Human Reproductive Technology Act 1991. This could be effected in the following way:

Clause 5
Page 3, after line 22 — To insert:

lawful surrogacy arrangement means a surrogacy arrangement other than a surrogacy arrangement that is for reward;

Page 3, after line 24 — To insert:

surrogacy arrangement that is for reward has the meaning given in the Surrogacy Act 2008 section 6;

3.10 Further, and irrespective of Recommendation 1, the Committee makes the following recommendation in relation to direction 7:100

RECOMMENDATION 2
Review and amend direction 7 of the Surrogacy Directions 2009 as necessary.

98 Greg McIntyre SC, Barrister, Opinion, 5 June 2019, p 7 and see also, p 8.

99 HRT Act s 3(8).

100 In addition, the Committee notes that direction 7 purports to require an approved surrogacy arrangement before an ‘artificial insemination procedure’ can be undertaken in connection with surrogacy. This is because the term ‘artificial fertilisation procedure’ used in direction 7 is defined in the HRT Act to include both an ‘artificial insemination procedure’ and an IVF procedure (as defined in the HRT Act). However, the requirement in the HRT Act for a ‘lawful’ surrogacy arrangement only applies to IVF procedures. The HRT Act does not prescribe eligibility criteria for artificial insemination procedures, but merely regulates the licensing of providers of those services. This should be considered when reviewing direction 7.
Unusual placement of eligibility criteria for access to surrogacy

3.11 It is unclear to the Committee why the eligibility criteria for access to surrogacy are split between:

- section 17 of the Surrogacy Act—requirements for ‘approved’ surrogacy arrangements (see paragraph 2.17)
  and
- section 19 of the Surrogacy Act—requirements for applying for parentage orders (see paragraphs 2.20–2.24).

3.12 The Committee considers (see paragraphs 3.13–3.14) that the parentage order phase is too late in the surrogacy process to be imposing a second round of eligibility criteria. At that stage, the surrogacy arrangement has been realised, the surrogacy pregnancy has already taken place, the child has already been born and presumably, the child would already have been placed into the care of the arranged parents.\(^\text{101}\)

3.13 The Bill amends the eligibility criteria for parentage orders and, in so doing, maintains the current separation in the eligibility criteria for access to surrogacy. Dr Allan described the imposition of eligibility criteria at the parentage order phase as a ‘misplacement’:

Could I comment also on the placement of that eligibility criteria, because, again, it seems like things are really misplaced in terms of where they sit in the act. ... I am not sure why the eligibility criteria is linked to parenting orders rather than access in the first place.\(^\text{102}\)

3.14 In her submission to the Committee, Dr Allan also noted:

1. that by the time we are at parentage orders, it would be more suitable to have a provision that requires that applicants can demonstrate that they have met the requirements of the Surrogacy Act which generally should have been established prior to entering into the agreement, and throughout (eg. via counselling) (again note my recommendations in the review report regarding streamlining this); and

2. that the focus of legal parentage or parenting orders should be whether such an order is in the best interests of the child (note my recommendations in the review report Part 2 regarding how this would be monitored and established).

Having eligibility criteria here [at the parentage order phase] seems misplaced.\(^\text{103}\)

3.15 See Table 2 on page 55 and for an example of how this could lead to an undesirable outcome for female couples.

3.16 The Department provided the following explanation for imposing the ‘second round’ of eligibility criteria:

Parentage orders are legally enforceable, surrogacy arrangements are not. If a person wishes to have the benefit of a parentage order, section 16 of the Surrogacy Act requires not merely that there be a surrogacy arrangement, but that

\(^{101}\) The transfer of care from the birth parents to the arranged parents can take place as early as within 28 days after the birth: Dr Maureen Harris, Manager, Reproductive Technology Unit, Department of Health, Transcript of evidence, 20 May 2019, p 17.

\(^{102}\) Dr Sonia Allan, Legal academic and consultant, Transcript of evidence, 20 May 2019, p 16.

\(^{103}\) Submission 72 from Dr Sonia Allan, 29 May 2019, pp 13-14.
the arrangement be approved. That is the link under the Surrogacy Act between surrogacy arrangements and parentage orders. The link between the eligibility criteria in the HRT Act and parentage orders is in section 19 of the Surrogacy Act.  

3.17 The Committee did not find this explanation to be persuasive.

**FINDING 9**

Eligibility criteria for surrogacy arrangements are better placed at the time of approval of the arrangement rather than at the time of parentage orders.

**RECOMMENDATION 3**

The Government propose amendments to give effect to Finding 9.

**Inconsistency with Sex Discrimination Act 1984 (Cth) regarding gender identity and intersex status**

3.18 The Allan Report notes that discrimination on the basis of gender identity and intersex status:

> appear not to have been included in the current Bill due to a need to clarify the impact of provisions in the *Commonwealth Prohibitions on Human Reproductive Cloning Act 2002* [sic]... which will take time.  

3.19 Intersex status is defined in section 4 of the SDA as follows:

> "intersex status" means the status of having physical, hormonal or genetic features that are:

    (a) neither wholly female nor wholly male; or
    (b) a combination of female and male; or
    (c) neither female nor male.

3.20 The Committee notes that discrimination on the ground of intersex status is defined in section 5C of the SDA.

3.21 The term ‘transgender’ is not used in the SDA. Section 5B of the SDA deals with discrimination on the ground of ‘gender identity’, which is defined as:

> the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention of not), with or without regard to the person’s designated sex at birth.

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104 Chad Martino, Acting Director, Office of the Director General, Department of Health, Email, 10 June 2019.
106 See Appendix 8.
107 The Macquarie Dictionary defines ‘transgender’ as ‘of or relating to a person whose gender identity is different from their physiological gender.’
108 SDA s 4.
3.22 According to the advice received by the Committee, the proposed amendments to section 19 of the Surrogacy Act may not extend the availability of surrogacy to transgender people or people of intersex status, as proposed section 19(1A) requires:

- in the case of 1 arranged parent, the arranged parent be an eligible woman or a man
- in the case of 2 arranged parents, they be either a man and a woman, 2 eligible women or 2 men.

3.23 Mr McIntyre SC advised that in his opinion:

> Section 19(1A) is also discriminatory on the basis of intersex status and gender identity, disadvantaging persons who do not fit the binary categories referred to of "woman" or "man".109

The amendment needs to be entirely gender neutral, rather than a shift only to extend the service to men or male couples. It needs to avoid binary gender references, so as to not exclude persons of inter-sex status or discriminate against a person on the basis of gender identity.110

3.24 The Committee raised this issue with the Department with the following response:

**The CHAIR:** ... why has the bill not been drafted to amend the HRT Act section 23 and the Surrogacy Act section 19 to use gender-neutral language? This would avoid discrimination issues for people who either do not identify as a man or a woman, or are of intersex status.

**Ms Laurence:** Access is currently based on reproductive capability. Issues of broader access for intersex and gender diverse persons and the terminology used will be addressed as a result of the recent report. It will require consultation with relevant stakeholders and further policy analysis. Some issues will require a resolution in connection with the commonwealth government.111

3.25 The Committee finds that section 23(1)(a)(iii) of the HRT Act may be inconsistent with section 22 of the SDA in that it requires providers of IVF services to discriminate against transgender people and people of intersex status.

**FINDING 10**

Section 23(1)(a)(iii) of the *Human Reproductive Technology Act 1991* may be inconsistent with section 22 of the *Sex Discrimination Act 1984* (Cth) in that it may require providers of in vitro fertilisation services to discriminate against transgender people and people of intersex status.

**RECOMMENDATION 4**


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110 ibid., p 10.
111 Jane Laurence, Director/General Counsel, Legal and Legislative Services, Department of Health and Hon Dr Sally Talbot MLC, Chair, Committee, *Transcript of evidence*, 20 May 2019, p 12.
CHAPTER 4
Scrutiny of clause 4 (Human Reproductive Technology Act 1991 proposed amended Preamble)

Part 2 Clause 4—Amends Human Reproductive Technology Act 1991
Preamble

4.1 Clause 4 of the Bill proposes the following amendments to Part B of the Preamble to the HRT Act:

Parliament considers that the primary purpose and only justification for the creation of a human embryo in vitro is to assist persons who are likely to be unable to conceive or give birth to children naturally due to medical reasons, or unable to conceive children naturally due to medical reasons or whose children are otherwise likely to be affected by a genetic abnormality or a disease, or who are unable to conceive children naturally due to social reasons and are parties to a lawful surrogacy arrangement, to have children, and this legislation should respect the life created by this process.

4.2 In the Committee’s view, the words ‘or who are unable to conceive children naturally due to social reasons and are parties to a lawful surrogacy arrangement’ do not accurately reflect the provisions of proposed section 23(1)(a)(iv). If the House supports those provisions, then the Preamble should be amended to be consistent with proposed section 23(1)(a)(iv).

RECOMMENDATION 5

Amend the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 to ensure consistency between clause 4 of the Bill and section 23 of the Human Reproductive Technology Act 1991. This could be effected as follows:

Clause 4

Page 3, lines 8 to 13 — To delete the lines and insert:

(a) delete “persons who are unable to conceive children naturally due to medical reasons or” and insert:

certain persons (being persons who are likely to be unable to conceive or give birth to children naturally due to medical reasons, or

Page 3, lines 16 to 18 — To delete the lines and insert:

or who are parties to a lawful surrogacy arrangement for which there are medical or social reasons under the Surrogacy Act 2008)
CHAPTER 5
Scrutiny of clause 11 *(Human Reproductive Technology Act 1991 proposed amended section 23)*

Part 2 Clause 11(1)—Amends Human Reproductive Technology Act 1991 inserting proposed new section 23(1)(a)(i), (ii), (iii) and (iv) and proposed new section 23(1)(c)

Summary of clause 11(1)
5.1 As noted above, the amendments to section 23(1) in clause 11(1) of the Bill are intended to:
- provide clarification that IVF procedures are available in circumstances of likely future infertility or inability to give birth due to medical reasons
- make access to surrogacy through the use of ART available to male same-sex couples and single men.

These issues will now be considered in turn.

Clause 11(1)—IVF available for likely future infertility or inability to give birth due to medical reasons

**Background**
5.2 Proposed new HRT Act s 23(1)(a)(i), (ii) and (iii) in clause 11 of the Bill would permit the use of an IVF procedure where the procedure would be likely to benefit:
- a couple likely to be unable to conceive a child due to medical reasons: s 23(1)(a)(i)
- a woman likely to be unable to conceive or give birth to a child due to medical reasons: s 23(1)(a)(ii)
- or
- a couple or woman whose child would otherwise be likely to be affected by a genetic abnormality or a disease: s 23(1)(a)(iii).

5.3 Proposed new HRT Act s 23(1)(a)(iv) would permit the use of an IVF procedure for the purposes of a lawful surrogacy arrangement for which there are medical or social reasons under Surrogacy Act s 19(1A).

5.4 The Allan Report Part 2 recommended that the HRT Act, the Surrogacy Act and related directions and regulations be amended to:

5.4.1 provide for access to IVF procedures in circumstances in which a patient faces the impending loss of, or significant impairment to, their fertility or the ability to carry or bear a child in addition to providing for such access by person(s) who are already infertile or unable to carry or bear a child.112

5.4.2 remove any requirement that a person who needs to preserve their fertility for future treatment in which a surrogacy arrangement may be required, must already have a surrogacy agreement in place before being able to access ART. The HRT Act, section 23(1)(a)(iii) and the Surrogacy Directions, direction 7 requirements for an RTC

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112 Allan Report Part 2, recommendation 1, p 61.
approved surrogacy arrangement prior to a person undergoing a fertilisation procedure, should be repealed.\textsuperscript{113}

5.5 The Committee considered whether these two aspects of the Allan Report would be addressed by the proposed amendments.

\textit{Availability of IVF in circumstances of likely future infertility}

5.6 The second reading speech noted:

Doctors have expressed uncertainty about whether a woman who is presently fertile, but may soon become infertile as a result of a disease, condition or treatment (such as chemotherapy), is permitted to have her eggs fertilised to create an embryo through IVF, for future use.

This Bill is intended to make clear that a woman can be eligible for IVF treatment if there is a likelihood of her becoming infertile or unable to give birth as a result of disease, a medical condition or medical treatment.

To effect this change, the words ‘likely to be’ have been inserted immediately before ‘unable to conceive or give birth to a child for medical reasons’ in the eligibility criteria for IVF under section 23 of the HRT Act, as well as the corresponding provisions in section 19 of the Surrogacy Act.\textsuperscript{114}

5.7 This change is effected by inclusion of the words ‘likely to be’ in proposed section 23(1)(a)(i), (ii) and (iii).

5.8 The Committee is satisfied that proposed section 23(1)(a)(i), (ii) and (iii) clarify that a woman who is presently fertile but may soon become infertile as a result of a disease, condition or treatment (such as chemotherapy) would be permitted to have her eggs fertilised to create an embryo through IVF, for future use.

\textit{Requirement for a ‘lawful’ surrogacy arrangement}

5.9 The second reading speech and the Explanatory Memorandum are both silent on the issue addressed in recommendation 2 of Part 2 of the Allan Report (see paragraph 5.4.2 above), namely whether a lawful surrogacy arrangement is required before a woman who needs to preserve their fertility for future treatment can access an IVF procedure for the purpose of creating an embryo for future use.

5.10 The Allan Report noted that under the current law, a woman facing a medical crisis which may result in infertility or inability to give birth would be prevented from accessing an IVF procedure to preserve her fertility if her circumstances prevented her from entering into an approved surrogacy arrangement,\textsuperscript{115} and concluded that:

It is the finding of the review that it is unacceptable to leave a young girl, teenager, or woman who is faced with impending infertility/inability to carry and/or bear children unable to access ART in order to preserve her fertility at a crucial time. Requirements that a surrogacy arrangement already be in place are also unacceptable as they may create pressure or a sense of urgency to enter into a surrogacy arrangement and to engage in meeting all requirements and any approvals at a time in which she may be too sick to do so, or not ready to

\textsuperscript{113} ibid., recommendation 2, p 61.

\textsuperscript{114} Hon Alanna Clohesy MLC, Parliamentary Secretary to the Minister for Health, Western Australia, Legislative Council,\textit{ Parliamentary Debates (Hansard)}, 10 October 2018, p 6771.

\textsuperscript{115} ibid., pp 51–2.
undertake surrogacy due to age, relationship status, or lack of a person willing to act as an altruistic surrogate.\textsuperscript{116}

5.11 The word ‘lawful’ in section 23(1)(a)(iii) is therefore interpreted by ART providers as referring to an approved surrogacy arrangement under section 17 of the Surrogacy Act.

5.12 This contrasts with the Department’s evidence to the Committee that ‘lawful’ in section 23(1)(a)(iii) and proposed section 23(1)(a)(iv) refers to ‘a surrogacy arrangement that is not for reward’ (in other words does not require approval under section 17).\textsuperscript{117} As noted in Finding 7 at page 21, the Committee found that ‘lawful’ in section 23(1)(a)(iii) and proposed section 23(1)(a)(iv) means ‘an altruistic surrogacy arrangement’.

5.13 Dr Allan referred to direction 7 of the Surrogacy Directions, which provides:

\textit{Approval of surrogacy arrangements}

A licensee is not to provide an artificial fertilisation procedure in connection with a surrogacy arrangement unless the arrangement has been approved by the Council in accordance with the requirements in the \textit{Surrogacy Act 2008} section 17.

5.14 As discussed in Chapter 3 (paragraphs 3.1–3.10), in the Committee’s view, direction 7:

- may not be authorised by the Surrogacy Act because it requires ‘approved’, rather than ‘lawful’, surrogacy arrangements to be in place before a person can undergo an artificial fertilisation procedure in connection with a surrogacy arrangement\textsuperscript{118}
- should be reviewed and amended as necessary.\textsuperscript{119}

5.15 The Committee notes that Dr Allan recommends that direction 7 be repealed:

\textbf{Recommendation 2}

Noting the recommendation in Part 1 of the report that the \textit{HRT Act} be repealed and that a new Act be drafted, that the \textit{HRT Act 1991 (WA)}, the \textit{Surrogacy Act 2008 (WA)} and related directions and regulations be amended to remove any requirement that a person who needs to preserve their fertility for future treatment in which a surrogacy arrangement may be required, must already have a surrogacy agreement in place before being able to access ART. The \textit{HRT Act 1991 (WA)}, s23(1)(c)(iii) [sic] and the Surrogacy Directions 2009, Direction 7 requirements for an RTC approved surrogacy arrangement prior to a person undergoing a fertilisation procedure, should be repealed.\textsuperscript{120}

5.16 The Committee has received conflicting evidence as to the effectiveness of the proposed amendments in dealing with this issue.

5.17 The Allan Report stated:

\begin{quote}
The Bill does not ... amend the requirement that an eligible woman be a party to a surrogacy agreement.
\end{quote}

In its current form, the proposed legislation would, therefore, continue to prevent women from accessing ART who are, for example:

\begin{itemize}
\item ibid., p 53.
\item Chad Martino, Acting Director, Office of the Director General, Department of Health, Email, 10 June 2019.
\item Paragraph 3.8.
\item Paragraph 3.10.
\item Allan Report Part 2, p 61.
\end{itemize}
• too young or too sick to have already entered into a surrogacy arrangement
• as yet unable to have found a person willing to act as a surrogate mother for them
• as yet unable to have achieved all the requisite counselling, advice, reports, and approvals to have an ‘approved’ surrogacy arrangement in place.

Thus if the current Bill is enacted without amendment, further reform will be required to remove the requirement for an ‘approved’ surrogacy arrangement (see above at 3.2). Should the recommendations of this report be implemented in full, new legislation should be drafted to ensure such matters are addressed.\textsuperscript{121}

5.18 In her submission to the Committee, Dr Allan confirmed that opinion,\textsuperscript{122} and went on to say:

I believe it is pertinent to note here, that during the review consultation that the RTU informed me that it was their view that women could collect and store their eggs for fertility preservation – under the current legislation; however, it was also repeatedly reported by the clinics (and consumers) that the Department (RTU) does not give advice or respond to requests to clarify the Act, other than telling them that they must seek their own legal advice. In turn, the review found that the Department/RTU’s interpretation of the Act was not the same as that of clinics nor did it reflect the experience of people who made submissions to the review.

The current situation is that the review found that what happens in practice is that women are told by clinicians that they are not able to preserve their fertility unless they have an approved surrogacy arrangement in place prior to the procedure (as per Direction 7). The review also received a submission from the Australian Medical Association, Western Australian Branch, which was written by the former chair of the RTU, an obstetrician/gynaecologist, that included content confirming this interpretation. (Submission 96).

Thus, with respect, while the Department has attempted to clarify and enable access for women faced with impending infertility, via the proposed amendment, I do believe there is remaining ambiguity and it is also necessary to acknowledge that the subordinate legislation still exists. Experience indicates that one must consider the interpretation that may be given by clinics and consumers in this regard. Any ambiguity is therefore of concern.\textsuperscript{123}

5.19 Contrary to Dr Allan’s view, the Department submitted that:

A surrogacy arrangement does not need to be in place before a woman can access IVF treatment under the proposed amendments.\textsuperscript{124}

5.20 In its evidence, the Department confirmed that in no circumstances are proposed sections 23(1)(a)(i) or (ii) intended to require a surrogacy arrangement to be in place in circumstances where a woman is currently fertile but is likely to be unable to conceive or give birth to a child.\textsuperscript{125}

\textsuperscript{121} ibid., p 58.
\textsuperscript{122} Submission 72 from Dr Sonia Allan, 29 May 2019, p 3.
\textsuperscript{123} ibid., p 4.
\textsuperscript{124} Submission 70 from the Department of Health, 7 May 2019, p 3.
\textsuperscript{125} Jane Laurence, Director/General Counsel, Legal and Legislative Services, Department of Health, Transcript of evidence, 20 May 2019, p 3.
The Explanatory Memorandum states:

Under new sections 23(1)(a)(i), 23(1)(a)(ii) and 23(1)(a)(iii), the benefit likely to result from an IVF procedure would involve the pregnancy of a member of a couple who are, or the woman who is, likely to benefit.\textsuperscript{126} (underlining added)

This suggests that proposed sections 23(1)(a)(i), 23(1)(a)(ii) and 23(1)(a)(iii) would not enable a woman to undertake IVF for the purposes of future treatment in which a surrogacy arrangement may be required, as the ‘benefit’ in the case of surrogacy would be the pregnancy of the birth mother and not the woman undergoing the IVF procedure.

The Department has accepted that the Explanatory Memorandum is ‘not definitive’ and should be amended to clarify this issue.\textsuperscript{127}

**RECOMMENDATION 6**

Amend the Explanatory Memorandum for the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 to clarify that, under proposed sections 23(1)(a)(i), (ii) and (iii) of the \textit{Human Reproductive Technology Act 1991}, the benefit likely to result from an IVF procedure does not always need to involve the pregnancy of a member of a couple who are, or the woman who is, likely to benefit.

In her submission to the inquiry, Dr Allan suggested the following amendment to proposed section 23(1)(a)(iv) of the HRT Act as a solution to this issue:

(iv) is for the purposes of a \textit{existing or future} surrogacy arrangement that is \textit{lawful} being or is intended to be undertaken pursuant to the requirements of \textit{and} for which there are medical or social reasons under the \textit{Surrogacy Act 2008 section 19(1A)}.

The Committee has not inquired into the policy behind the requirement in proposed section 23(1)(a)(iv) that a surrogacy arrangement be ‘lawful’. The Committee does not therefore recommend Dr Allan’s proposed amendment, as it would have the effect of removing that requirement.

In the Committee’s view, there are three possible approaches to this issue:

5.26.1 Accept that the Department’s interpretation of proposed section 23(1)(a) is correct and that Dr Allan’s concerns are adequately addressed by proposed sections 23(1)(a)(ii) and 23(1)(a)(iv).

5.26.2 Accept that there is at least some doubt (as expressed by Dr Allan) as to whether, under proposed section 23(1)(a), a woman facing likely future inability to give birth would be required by section 23(1)(a)(iv) to have a lawful surrogacy arrangement in place before she could undertake an IVF fertilisation procedure, as the procedure could only be ‘for the purposes of a surrogacy arrangement’. To avoid this interpretation, proposed section 23(1)(a)(iv) could be amended to replace the words ‘a surrogacy arrangement that is lawful’ with the words ‘an existing surrogacy arrangement’, in combination with new subsections 23(2) and 23(3) to specifically provide that a woman facing future infertility or inability to give birth would not be


\textsuperscript{127} Chad Martino, Acting Director, Office of the Director General, Department of Health, Email, 31 May 2019, Attachment, Question 3, p 1.

\textsuperscript{128} Submission 72 from Dr Sonia Allan, 29 May 2019, p 4.
required to have a lawful surrogacy arrangement in place before she could undertake an IVF procedure.\footnote{129}

5.26.3 Proposed section 23(1)(a) could be redrafted in its entirety to separate the eligibility criteria for IVF generally on the one hand, and IVF for surrogacy purposes on the other, and to specifically provide that a woman facing likely future inability to give birth would not be required to have a lawful surrogacy arrangement in place before she could undertake an IVF fertilisation procedure.

5.27 Of these options, for the avoidance of doubt, the Committee suggests adopting the approach set out in paragraph 5.26.2 for the following reasons:

- Dr Allan’s evidence on this issue indicates that, at the very least, there is uncertainty as to how proposed section 23(1)(a) would be interpreted in relation to this issue.
- The issue could potentially affect women in very vulnerable situations in relation to the preservation of limited fertility.
- There is sufficient uncertainty in the wording of proposed section 23(1)(a) to warrant its amendment.

5.28 Accordingly, the Committee recommends the following amendment to proposed section 23(1)(a)(iv) in clause 11(1), together with the insertion of new subsections 23(2) and 23(3) in clause 11(2), as set out in Recommendation 10 (page 42).

**RECOMMENDATION 7**

Amend clause 11(1)(a) of the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018. *Human Reproductive Technology Act 1991* proposed new section 23(1)(a)(iv), to clarify that the procedures in proposed sections 23(1)(a)(i) to (iii) of the *Human Reproductive Technology Act 1991* can be accessed without the requirement for an existing surrogacy arrangement. This could be effected as follows (in combination with Recommendation 10):

**Clause 11(1)(a)**

Page 5, lines 21 to 22 — To delete “a surrogacy arrangement that is lawful and” and insert:

an existing lawful surrogacy arrangement

5.29 If the approach set out in paragraph 5.26.3 is preferred by the House, the Committee would favour the separation in section 23(1)(a) of the HRT Act of:

- the criteria for IVF for the purposes of an existing surrogacy arrangement (in proposed section 23(1)(a)(iv))
- other circumstances not for the purposes of an existing surrogacy arrangement, including circumstances where a surrogacy arrangement may be required in the future (in proposed section 23(1)(a)(i), (ii) and (iii)).

**Clause 11(1)—Extending IVF access for surrogacy purposes to single men**

5.30 Currently, an IVF procedure cannot be carried out on a surrogate mother for the purposes of a surrogacy arrangement with a single man, as section 23(1)(a)(iii) only permits IVF for the purposes of a surrogacy arrangement where the procedure ‘would be likely to benefit a woman who is unable to give birth to a child due to medical reasons and is a party to a surrogacy arrangement ... that is lawful’.

\footnote{129} As to the recommended new subsections 23(2) and 23(3), see paragraph 5.77 and Recommendation 10.
5.31 Proposed section 23(1)(a)(iv) of the HRT Act (outlined in paragraph 5.3) provides that an IVF procedure may be carried out where the procedure:

is for the purposes of a surrogacy arrangement that is lawful and for which there are medical or social reasons under the Surrogacy Act 2008 section 19(1A).

5.32 Proposed section 19(1A)(a) of the Surrogacy Act (outlined in paragraphs 7.2 and 7.3) provides that there are ‘medical or social reasons’ for a surrogacy arrangement if:

in the case of a surrogacy arrangement involving 1 arranged parent, the arranged parent is an eligible woman or a man.

5.33 The Solicitor-General advised in his written opinion that, in his view, the combined effect of the proposed amendments to section 23 of the HRT Act and section 19 of the Surrogacy Act would be to overcome the discrimination against single men identified in relation to the current provisions.130

5.34 Mr McIntyre SC advised that in his opinion, the amendments proposed by the Bill eliminate this inconsistency with the SDA and the EO Act.131

5.35 In the Committee’s view, the amendments proposed by the Bill resolve the issue of discrimination against single men under the HRT Act.132

**FINDING 11**

The amendments proposed by the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 resolve the issue of discrimination against single men under the Human Reproductive Technology Act 1991.

**Clause 11(1)—Extending IVF access for surrogacy purposes to male couples**

5.36 Similarly, for the same reasons set out in paragraph 5.30, an IVF procedure cannot currently be carried out on a surrogate mother for the purposes of a surrogacy arrangement with a male couple.

5.37 As in relation to single men, proposed section 23(1)(a)(iv) of the HRT Act would apply, together with proposed section 19(1A)(b) of the Surrogacy Act (outlined in paragraphs 7.2 and 7.3 below), which provides that there are ‘medical or social reasons’ for a surrogacy arrangement if:

in the case of a surrogacy arrangement involving 2 arranged parents, the arranged parents are married to, or in a de facto relationship with, each other and are —

(i) an eligible woman and a man; or

(ii) 2 eligible women; or

(iii) 2 men.

132 However, see the discussion on new areas of discrimination in paragraphs 5.41 to 5.69.
5.38 The Solicitor-General advised in his written opinion\textsuperscript{133} that, in his view, the combined effect of the proposed amendments to section 23 of the HRT Act and section 19 of the Surrogacy Act would be to overcome the discrimination against male couples identified in relation to the current provisions.

5.39 As noted above in relation to single males, Mr McIntyre SC advised that, in his opinion, the amendments proposed by the Bill eliminate this inconsistency with the SDA and the EO Act.\textsuperscript{134}

5.40 In the Committee’s view, the amendments proposed by the Bill resolve the issue of discrimination against male couples under the HRT Act.\textsuperscript{135}

\textbf{FINDING 12}

The amendments proposed by the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 resolve the issue of discrimination against male couples under the \textit{Human Reproductive Technology Act 1991}.

\textbf{Clause 11(1)—New areas of discrimination arising from clause 11(1) of the Bill}

\textit{‘Medical reasons’ for women}

5.41 The Committee notes that IVF is not currently available to women under section 23 of the HRT Act unless unable to conceive or give birth due to ‘medical reasons’, or if the child ‘would otherwise be likely to be affected by a genetic abnormality or a disease’. This applies whether or not a woman is a member of a couple. Eligibility for parenting orders under Surrogacy Act s 19(1) and (2) is similarly limited. Women who do not have a fertility issue can access treatment with donor sperm through artificial insemination conducted by a medical practitioner covered by section 28 of the HRT Act, but they are not eligible to obtain treatment with IVF.

5.42 This is would be unchanged by the amendments proposed by the Bill.

5.43 Various submissions to the Committee were concerned about ‘double standards’ which would be created by the extension of surrogacy and related IVF procedures to single men and male couples for ‘social reasons’, while women would still be required to have ‘medical reasons’.\textsuperscript{136}

5.44 The Committee questioned the Department as to the policy reasons for this, with the following response:

\textbf{The CHAIR:} Of the amendments proposed by the bill, single females and female couples, unlike single men and male couples, would be required to have medical reasons to be eligible for a parenting order under the Surrogacy Act, section 19. What is the policy reason requiring women to have medical reasons?

\textbf{Dr Harris:} I can answer that for you. The policy reasons are to start people down the path that is least interventionist. Women can have donor insemination, which

\textsuperscript{133} Joshua Thomson SC, Solicitor-General, Opinion, 9 May 2019, p 10, paragraph 61.
\textsuperscript{134} Greg McIntyre SC, Barrister, Opinion, 5 June 2019, p 10.
\textsuperscript{135} However, see the discussion on new areas of discrimination in paragraphs 5.41–5.69.
\textsuperscript{136} Submission 30 from Rosemary Pol, 30 April 2019; submission 31 from Gordon de Snoo, 30 April 2019; submission 35 from Melanie Bosveld, 1 May 2019; submission 36 from John Bron, 1 May 2019; submission 39 from Gerrit Griffioen, 1 May 2019; submission 41 from Daniel Minchin, 2 May 2019 and submission 64 from Natasha Martin, 3 May 2019.
does not require any hormone treatment—so, usually not any hormone treatments. It is less intrusive. Putting people on a path is to prevent unnecessary access to invasive procedure, thereby minimising any associated risks with IVF. There are also ethical considerations for health professionals against providing treatment where it is unnecessary or excessive; and, also, altruistic surrogates are motivated to help people who are unable to bear a child themselves, not because a woman would want someone else to carry a baby for a social reason. It is in some ways to avoid people using surrogacy as a tool of convenience.  

5.45 The Department referred to the concept of ‘reproductive capability’ as the basis for access to IVF treatment under the current provisions.  

5.46 Dr Allan’s evidence on this issue was as follows:  

Also, what [the Bill] does is introduce another area of potential discrimination, whereby it creates differential treatment or criteria for men and women regarding access requirements, where it limits women’s access to medical reasons only, as opposed to social reasons for men. There may be social reasons why women cannot have children otherwise.  

5.47 Mr McIntyre SC was of the opinion that section 19 of the Surrogacy Act and/or section 23 of the HRT Act as amended by the Bill would require or allow discrimination against women contrary to SDA section 22 in the provision of IVF services (for the proposes of surrogacy or otherwise), by requiring that women have ‘medical reasons’ for being unable or likely to be unable to conceive or give birth to a child, as:  

a pre-requisite for the provision of the service which applies only to women is a distinction based on sex and so is made unlawful by the SDA.  

5.48 The Solicitor-General advised that in his opinion:  

The effect of the proposed amendments is to impose a test upon women who wish to undertake an in vitro fertilisation procedure which requires them to qualify by demonstrating medical reasons for the procedure (and that applies to both females in a same-sex couple), whereas that is unnecessary for males. This potentially represents unlawful discrimination against women.  

5.49 The advice provided to the Committee is that the amendments proposed by the Bill to section 23(1)(a) of the HRT Act would be inconsistent with section 22 of the SDA. This would arise as a result of the requirement in proposed HRT Act s 23(1)(a)(ii) and s 23(1)(a)(iv) that women have ‘medical reasons’ for being unable to give birth or carry a child, by comparison with proposed s 23(1)(a)(iv), which would allow men to access IVF for surrogacy purposes for ‘social reasons’. Providers of IVF services would therefore be required to treat women less favourably than men in the provision of those services, contrary to SDA s 22.

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137 Dr Maureen Harris, Manager, Reproductive Technology Unit, Department of Health and Hon Dr Sally Talbot MLC, Chair, Committee, Transcript of evidence, 20 May 2019, p 7.  
138 Jane Laurence, Director/General Counsel, Legal and Legislative Services, Department of Health, Transcript of evidence, 20 May 2019, p 12.  
139 Dr Sonia Allan, Legal academic and consultant, Transcript of evidence, 20 May 2019, p11.  
FINDING 13

The advice provided to the Committee is that the amendments proposed by the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 to section 23(1)(a) of the Human Reproductive Technology Act 1991 would be inconsistent with section 22 of the Sex Discrimination Act 1984 (Cth) because they would create discrimination against women not currently present.

5.50 As to whether this new area of discrimination could be avoided, the Solicitor-General’s opinion stated:

The test for access to [IVF procedures] should be the same for all men and women in order to ensure compliance with section 22 and 32 of the Sex Discrimination Act, as construed by Sundberg J in [McBain v Victoria] [2000] FCA 1009. This may be based upon medical difficulties for each sex, or upon social reasons applicable to each sex. The appropriate approach to adopt is a policy matter for Parliament.141

5.51 Dr Allan stated:

it would make sense to provide access to ART, and access to ART for surrogacy, to all people on an equal basis. [...] I was trying to give an example in the review that you can actually have wording that is gender neutral, and also treats people equally.142

5.52 Dr Allan provided the following example of a provision which might achieve that result:

“a person or couple who, due to medical or social reasons, are unlikely to be able to conceive, carry or bear a child; unlikely to survive a pregnancy or birth; likely to conceive a child affected by a genetic condition or disorder that would be unlikely to survive, or that would be unlikely to survive the pregnancy or birth; or whose health would be significantly affected by the pregnancy or birth”. Then a couple should include “two people who are married or in a de facto relationship with each other.” This would encompass anybody who has a medical or social reason to access ART or surrogacy, without saying that women need to have medical reasons; men need to have social reasons; and if you are intersex, transgender or otherwise, you cannot.143

5.53 The Committee finds that if access to IVF for surrogacy purposes is to be made available to single men and male couples, the discrimination described in Finding 13 could only be avoided by:

5.53.1 requiring single men and male couples to have ‘medical reasons’ for accessing IVF for surrogacy purposes

or

5.53.2 removing the requirement for women to have ‘medical reasons’.

5.54 The Committee does not consider either of 5.53.1 or 5.53.2 to be appropriate amendments to the Bill, for the following reasons.

5.55 In relation to 5.53.1, in the Committee’s view such an amendment would not take into account the inability of a single man or male couple to conceive a child naturally. For example, as men and women are not biologically equal when it comes to carrying and giving

142 Dr Sonia Allan, Legal academic and consultant, Transcript of evidence, 20 May 2019, p 16.
143 ibid.
birth to a child, some may argue that a provision granting men access to IVF procedures that does not take that fact into account does not provide ‘equal’ access to IVF procedures.

5.56 IVF, by its nature, is of most potential benefit to those who are not able to conceive children naturally (whether due to medical or social reasons). In this regard, the Committee notes the concept of ‘reproductive capability’ identified by the Department as the basis for access to IVF under the current provisions.\(^{144}\)

5.57 In relation to 5.53.2, the scope of the Committee’s inquiry into the Bill:
- has been limited to the stated policy of the Bill\(^{145}\)
- has therefore not included the question whether the policy of requiring women to have medical reasons should be changed. In the Committee’s view, this issue would require a broader inquiry than the Committee has been able to undertake in the time available to it.

5.58 The Committee notes that the discrimination which would arise is a result of the grant of new eligibility to men. No existing rights would be taken away from women as a result of the amendments (with the possible exception of the eligibility for surrogacy of female couples, as discussed at paragraphs 7.17-7.31).

5.59 In summary, the Committee finds:
- the Bill would likely result in unlawful discrimination against women as a result of the requirement that women have ‘medical reasons’
- any resulting discrimination would be as a result of the grant of additional rights to men, rather than a reduction of the existing rights of women\(^{146}\)
- the Committee has not been able to identify an amendment to the Bill to remove this likely discrimination without significant policy implications
- whether to pass the Bill involves a weighing up of:
  - the need to address the existing inconsistency with the SDA as a matter of urgency
  - the likely resulting discrimination against women as a result of the retention of the existing requirement for ‘medical reasons’
- further review to examine the nature of the discrimination should be undertaken.

**FINDING 14**

If the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 is passed extending eligibility for surrogacy to single men and male couples for ‘social reasons’, this would likely result in unlawful discrimination against women as a result of the existing requirement for women to have ‘medical reasons’. This cannot be avoided other than by a fundamental change to the policy of the Bill, and to the existing policy of reproductive capability as the basis for the availability of in vitro fertilisation procedures.

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\(^{144}\) Jane Laurence, Director/General Counsel, Legal and Legislative Services, Department of Health, Transcript of evidence, 20 May 2019, p 12.

\(^{145}\) See paragraph 1.6.

\(^{146}\) With the exception of access to surrogacy by female couples, in relation to which the Committee has recommended a possible amendment to the Bill at page 59 (Recommendation 13).
**Age-related infertility for women**

5.60 For IVF to be available to women, section 23(1)(d) of the HRT Act requires that:

> the reason for infertility is not age or some other cause prescribed for the purpose of this paragraph.\(^\text{147}\)

5.61 A similar limitation applies under section 19(3) of the Surrogacy Act in relation to eligibility for parentage orders (see paragraphs 7.34–7.35).

5.62 Accordingly, there are currently no upper age limits for access to surrogacy or IVF other than that the medical reasons for infertility cannot include ‘age-related reasons’ or ‘reasons arising from a person’s age’. This would be unchanged by the Bill.

5.63 The Committee questioned the Department as to the policy reasons for excluding age as a ‘medical reason’ and a ‘reason for infertility’ for women. The Department responded:

> The policy reason for excluding age as a ‘medical reason’ and a ‘reason for infertility’ in the original HRT and Surrogacy Acts is that it was considered that it was not appropriate to extend a person’s fertility beyond the biological point at which their fertility would naturally end. This does not just affect women. Men’s fertility generally diminishes with age and therefore if the reason for infertility is age in respect of the man’s ability to produce viable gametes, then the couple would not be eligible under section 23(1)(a)(i) by reason of section 23(1)(d).

> Matters related to the age of the parent (regardless of sex) are relevant to the welfare and best interests of the child to be born as a result of any IVF procedure, which the licencee is required to consider under section 23(1)(e) of the HRT Act. So while there is no express age limit for either sex, age is a factor when considering treatment.\(^\text{148}\)

5.64 As to whether this leads to an effective upper age limit for women for access to IVF and surrogacy, the Department advised:

> Each case is considered on its own merits. However, women who do not have any medical reasons for being infertile other than age, would not be able to access IVF.\(^\text{149}\)

5.65 The Department advised that a maximum age for men to access surrogacy was not considered in the drafting of the Bill.\(^\text{150}\)

5.66 Dr Allan gave the following evidence to the Committee:

> **The CHAIR:** Do [section 19(3)(a) of the Surrogacy Act and section 23(1)(d) of the HRT Act] lead to an effective upper age limit for access to IVF and surrogacy by women who have become infertile solely due to age?

> **Dr Allan:** Yes. I mean, as I understand it from talking to the clinics, it is not a strict age limit, because, clearly, with infertility related to age, we are talking about menopause. There is a bracket in terms of age as to when women enter menopause and when women are no longer able to have children—the upper age is around 55; the lower age is around 45. It can be anywhere in between that a woman generally enters menopause. I refer you to part 1 of my report on the

\(^{147}\) No other causes are prescribed for the purposes of HRT Act s 23(1)(d).

\(^{148}\) Chad Martino, Acting Director, Office of the Director General, Department of Health, Email, 31 May 2019, Attachment, Question 25, p 3.

\(^{149}\) ibid.

\(^{150}\) Dr D Russell-Weisz, Director General, Department of Health, Letter, 24 May 2019, Attachment, Question 26, p 2.
review, at chapter 12.2, starting on page 276, where I do make some comments concerning age. There, I note that several clinicians, as well as the ANZICA fertility counsellors, suggested that age restrictions for access to ART should be revised and/or clarified, and that the clinics had also noted that the RTC has been inconsistent regarding when it has viewed a woman’s age as acceptable, and that the age of menopause is unclear. It does not create an upper age limit, but the current provisions of the act and the proposed section clearly continue this issue around age for women, not for men.\footnote{Dr Sonia Allan, Legal academic and consultant and Hon Dr Sally Talbot MLC, Chair, Committee, Transcript of evidence, 20 May 2019, p 17.}

5.67 The Committee asked various witnesses to comment on the hypothetical scenario of a 55-year-old woman who had always been infertile, as to how proposed HRT Act s 23(1)(d) and Surrogacy Act s 19(3)(a) would operate in that scenario: would she be an ‘eligible woman’ for the purposes of proposed Surrogacy Act s 19(1A)? Would HRT Act s 23(1)(d) preclude her from accessing IVF? The witnesses responded as follows:

Table 1. 

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<thead>
<tr>
<th>Hypothetical scenario—55-year-old woman who has always been infertile due to medical reasons</th>
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<tr>
<td><strong>Department of Health</strong></td>
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<tr>
<td><strong>Dr Sonia Allan</strong></td>
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<tr>
<td><strong>Chair, Reproductive Technology Council</strong></td>
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</tbody>
</table>
5.68 The Allan Report Part 1 noted that there was a degree of uncertainty amongst licensees as to how the requirement that ‘medical reasons’ for infertility not include age should be interpreted. The Report stated:

it is incumbent upon the Minister for Health and his Department to provide clear and consistent communication regarding how the current age limits should be interpreted and applied. This may occur via the recommended new Directions, conditions of registration and/or education of clinics and community.\footnote{Allan Report Part 1, p 277.}

5.69 When asked whether it was proposed to issue Directions or other explanatory material on this issue, the Department responded:

this was not something which was considered as part of the Bill but will be considered as part of the body of work following the Allan Report, perhaps as a matter for the proposed advisory body to consider.\footnote{Dr D Russell-Weisz, Director General, Department of Health, Letter, 24 May 2019, Attachment, Question 30, p 3.}

5.70 Mr McIntyre SC advised:

Excluding age from the medical reasons for refusing the service would not breach the SDA but does breach the Age Discrimination Act 2004 (Cth) s 14.\footnote{Greg McIntyre SC, Barrister, Opinion, 5 June 2019, p 12.}

5.71 The Committee notes, however, that section 14 of the Age Discrimination Act 2004 (Cth) is subject to an exemption in relation to ‘anything done by a person in direct compliance with an Act of a State or Territory, or a regulation or any other instrument made under an Act of a State or Territory’. Due to its time constraints, the Committee has not fully inquired into this issue.

\textbf{FINDING 15}

As a result of the passing of the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018, proposed section 19(3) of the Surrogacy Act 2008 and section 23(1)(d) of the Human Reproductive Technology Act 1991 would create different effective age limits for men and women for access to in vitro fertilisation procedures and surrogacy.

\textbf{RECOMMENDATION 8}

The Department of Health provide clear and consistent communication regarding how the current age limits should be interpreted and applied. As noted in the report by Dr Sonia Allan, The review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008, prepared for the Minister for Health and dated January 2019, this may occur via the recommended new directions, conditions of registration and/or education of clinics and community.

\textbf{RECOMMENDATION 9}


\footnote{Allan Report Part 1, p 277.}
\footnote{Dr D Russell-Weisz, Director General, Department of Health, Letter, 24 May 2019, Attachment, Question 30, p 3.}
\footnote{Greg McIntyre SC, Barrister, Opinion, 5 June 2019, p 12.}
\footnote{Age Discrimination Act 2004 (Cth), s 39(4).}
Chapter 5  Scrutiny of clause 11

Part 2 Clause 11—Proposed deletion of section 23(2)

5.72 Clause 11(2) of the Bill proposes to delete subsection 23(2) of the HRT Act, which provides:

Subsection (1) does not require that the benefit likely to result from the procedure involve the pregnancy of a member of the couple who are, or the woman who is, likely to benefit.

5.73 The Explanatory Memorandum states that subsection 23(2) is ‘no longer required due to the effect of the new section 23(1)(a)(iv)’.¹⁵⁹

5.74 Dr Sonia Allan gave the following evidence on this issue:

The CHAIR: The bill proposes to delete section 23(2) of the HRT act as it “is no longer required due to the effect of new section 23(1)(a)(iv)”. That is from the explanatory memorandum, page 5. Do you agree with that statement?

Dr Allan: Yes. I am not sure that deletion of 23(2) is necessary as part of the current proposals in the bill before the Parliament. When I looked at that, based on this question, I was not sure that the amendment in 23(1)(a)(iv) does away with the need to clarify that access “does not require that the benefit likely to result from the procedure involves the pregnancy of a member of the couple who are, or the woman who is, likely to benefit”. Rather, I think that section 23(2), under the current wording of the proposed legislation, might be pertinent to keep, because it might reinforce that access may be for the purposes of egg collection and storage rather than immediate use for pregnancy, as well as it might be for the purposes of a surrogacy arrangement in which a surrogate mother will become pregnant, carry and birth the child rather than the woman who is accessing treatment.¹⁶⁰

5.75 On this issue, the Department advised:

The current section 23(1)(a)(iii) already allows for the benefit to be the pregnancy of a surrogate, but section 23(2) was added to put the matter beyond doubt. The Explanatory Memorandum for the clause of the Bill inserting section 23(1)(a)(iii) and section 23(2) stated “The clause amends the section to make it clear that in vitro fertilisation procedures can be provided to a woman who does not herself meet the eligibility requirements in section 23 of that Act if the treatment is provided in connection with a surrogacy arrangement where the arranged parents meet those eligibility criteria.”¹⁶¹

5.76 As discussed in paragraphs 5.17–5.18, Dr Allan advised the Committee that proposed section 23(1)(a)(iv) of the HRT Act could be construed so as to apply to a woman facing likely future infertility or inability to give birth, and so require her to have an approved surrogacy arrangement in place before accessing an IVF procedure.

5.77 To avoid this interpretation, the Committee recommends that new subsections 23(2) and 23(3) be inserted to clarify the situations in which proposed section 23(1)(a)(iv) would apply.


¹⁶⁰ Dr Sonia Allan, Legal academic and consultant and Hon Dr Sally Talbot MLC, Chair, Committee, Transcript of evidence, 20 May 2019, pp 7-8.

¹⁶¹ Chad Martino, Acting Director, Office of the Director General, Department of Health, Email, 31 May 2019, Attachment, Question 9, p 1.
RECOMMENDATION 10

Amend clause 11(2) of the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 to clarify that the procedures in proposed sections 23(1)(a)(i) to (iii) of the Human Reproductive Technology Act 1991 can be accessed without the requirement for an existing surrogacy arrangement. This could be effected as follows (in combination with Recommendation 7):

**Clause 11(2)**

Page 6, line 1 — To delete the line and insert:

(2) Delete section 23(2) and insert:

Nothing in subsection (1) prevents the carrying out of a procedure referred to in paragraph (a) of the definition of *in vitro fertilisation procedure* under subsection (1)(a)(i), (ii) or (iii) in circumstances where

- (a) any human egg undergoing fertilisation, or human embryo, derived from the procedure may later be used for the purposes of a lawful surrogacy arrangement; but

- (b) a lawful surrogacy arrangement does not yet exist.

(3) A procedure referred to in paragraph (b) of the definition of *in vitro fertilisation procedure* cannot be carried out for the purposes of a surrogacy arrangement unless subsection (1)(iv) applies, whether or not subsection (1)(a)(i), (ii) or (iii) also applies.
Overview of Human Reproductive Technology Act 1991 proposed section 55A

6.1 Clause 15 of the Bill proposes to insert section 55A into the HRT Act.

Proposed section 55A(1)—extending Human Reproductive Technology Act 1991 section 54 powers

6.2 Proposed section 55A(1) extends the existing powers under section 54 for the purposes of investigating actual or possible contraventions of the Surrogacy Act. That is, the investigative powers available under section 54 of the HRT Act would apply to breaches of the HRT Act and the Surrogacy Act.

6.3 Proposed section 55A(1) of the HRT Act, read with current section 54,\(^{162}\) raises Fundamental Legislative Principles (FLPs) 5 and 6:

5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?

6. Does the Bill provide appropriate protection against self-incrimination?

6.4 This is because section 54 of the HRT Act\(^ {163}\) empowers an ‘authorised officer’\(^ {164}\) to, amongst other things:

- without a warrant:
  - enter and inspect any premises\(^ {165}\) on which the officer has reasonable cause to believe that certain things (set out in subsections (1)(a)(i)-(v)) have occurred, are occurring, or are likely to occur.\(^ {166}\) These things include the carrying out of any artificial fertilisation procedure\(^ {167}\) and the commission of an offence under either the Surrogacy Act or the HRT Act\(^ {168}\).
require any person in possession of relevant records to produce them for inspection\textsuperscript{169} 

• take human gametes, eggs or embryos, and records\textsuperscript{170} 

• require a licensee\textsuperscript{171} to provide information and answer questions\textsuperscript{172}—a person is not excused from providing information or answering a question on the ground that the answer might incriminate them.\textsuperscript{173}

6.5 The Department informed the Committee that, since 2008, authorised officers have undertaken five section 54 investigations, one in each of the following years: 2011, 2012, 2014, 2017 and 2018. In each of these cases, the clinics cooperated fully and the authorised officers relied upon sections 54(1)(b)(i) and (ii).\textsuperscript{174}

Proposed section 55A(2)—extending Human Reproductive Technology Act 1991 section 55 powers

6.6 Proposed section 55A(2) extends the existing investigative powers under current section 55 to contraventions of the Surrogacy Act. That is, the investigative powers available under section 55 of the HRT Act would apply to breaches of the HRT Act and the Surrogacy Act.

6.7 Unlike in section 54 of the HRT Act, section 55 investigative powers require a warrant issued by a judicial officer. Section 55\textsuperscript{175} empowers a Justice of the Peace, in certain circumstances, to issue a warrant in relation to premises at which there is reason to suspect that an offence against either the Surrogacy Act or HRT Act is, or is likely to be, committed. The warrant entitles the holder (either an authorised officer or a police officer) to:

• enter the premises, with such other persons and using such force as may be necessary
• arrest people
• seize records and other things
• search the premises and people in or near the premises.

6.8 The Department advised that no section 55 warrants have yet been issued and there have been no circumstances, relating to the HRT Act, in which the Department has required the assistance of the police.\textsuperscript{176}

The need for investigative powers in the Surrogacy Act 2008

6.9 The Department confirmed that investigative powers are not currently available in the Surrogacy Act:

the powers [for authorised officers] are absent or uncertain under the Surrogacy Act, and that limits the investigation of any breaches or possible breaches of the

\begin{flushleft}
\textsuperscript{169} See HRT Act s 54(1)(c).
\textsuperscript{170} See ibid., ss 54(1)(a), (2) and (3).
\textsuperscript{171} ‘Licensee’ primarily means the holder of a storage licence, a practice licence, both types of licences or an exemption issued under Part 4: HRT Act ss 3 and 27. The term ‘licensee’ also includes other people, such as ‘a person who is authorised under section 30 to carry on the practice of a licensee’: see HRT Act s 3.
\textsuperscript{172} See HRT Act s 54(1)(b).
\textsuperscript{173} See ibid., s 54(4).
\textsuperscript{174} Dr D Russell-Weisz, Director General, Department of Health, Letter, 24 May 2019, Attachment, p 5.
\textsuperscript{175} As it is proposed to be modified by HRT Act proposed section 55A(3): ‘For the purposes of this section [proposed section 55A], references in sections 54 and 55 to this Act [usually, the HRT Act] include references to the Surrogacy Act 2008.’
\textsuperscript{176} Dr D Russell-Weisz, Director General, Department of Health, Letter, 24 May 2019, Attachment, p 5.
\end{flushleft}
Surrogacy Act. The department has had to rely upon the police to investigate any alleged breaches, and they do not always have the capacity to deal with such matters.177

6.10 Further, the Department advised that, although no complaints have been received regarding Western Australian clinics’ compliance with the Surrogacy Act, there have been allegations against people and other organisations which were related to the facilitation of commercial surrogacy. The assistance of the police was sought on two occasions.178

6.11 The Committee has not had the time in this inquiry to consult with WA Police about the proposition that they do not always have capacity to deal with these matters.

Allan Report recommendations regarding investigative powers

6.12 Clause 15 of the Bill is consistent with Recommendation 51 of the Allan Report, in that enforcement powers under the Surrogacy Act should be exercised by the Department, not the RTC:

Recommendation 51

If the recommendation [in the Allan Report] that the RTC be abolished is implemented, then in the future powers related to the administration and enforcement of the Surrogacy Act should lie with the Minister for Health and delegates.179

6.13 In relation to clause 15 of the Bill, the Allan Report recommended that:

Recommendation 52

... if such amendments are enacted, that the powers conferred be carried out in a manner consistent with the recommended responsive regulatory model proposed in this report. That is, they would only be used when other compliance measures had failed, or the behaviour was particularly egregious. Such powers would then complement the recommended system of regulation to enable such behaviour to be investigated and addressed if required.180

6.14 During her hearing with the Committee, Dr Allan expanded on Recommendation 52 in Part 2 of her report, as follows:

In this regard, introducing these powers and measures would be fine as long as they were used as a last resort, because the model of regulation that I propose is one that includes regulatory and compliance mechanisms such as education, information, dissemination, good communication and an openness to feedback from those being regulated, rather than this command and control approach, which is all about policing. It is a very different environment, and one that I found was not conducive to supporting people who are accessing ART and surrogacy.181

177 Jane Laurence, Director/General Counsel, Legal and Legislative Services, Department of Health, Transcript of evidence, 20 May 2019, p 12.
178 Dr D Russell-Weisz, Director General, Department of Health, Letter, 24 May 2019, Attachment, p 5.
180 ibid., p 194.
181 Dr Sonia Allan, Legal academic and consultant, Transcript of evidence, 20 May 2019, p 24.
**Human Reproductive Technology Act 1991 proposed section 55A(1)—relating to Human Reproductive Technology Act 1991 section 54**

**Fundamental Legislative Principle 5—entry, search and seizure without a warrant**

6.15 The Committee notes that the power to enter under section 54 of the HRT Act can apply to any premises, not just ART clinics and other commercial premises.\(^{182}\)

6.16 The Department provided the following justifications for proposed section 55A(1), which relates to section 54 of the HRT Act:

The inclusion of these powers is to mirror the existing provisions under the HRT Act and to bring WA’s legislation in line with those of other Australian jurisdictions.

The introduction of these powers under sections 54 and 55 in the original HRT Act was considered necessary at the time to deal with the difficult and complex issues associated with the artificial reproductive technology (ART) industry, which was seen as an emerging, complex medical innovation. The Government noted in its Second Reading Speech of the Bill in the Legislative Council that it would be difficult to legislate in a tight way to control the industry.

Accordingly, coercive investigative powers were introduced in section 54. Section 54 details the lengths to which it may be necessary to go to in order to achieve maximum enforcement in a challenging and specialised area. Parliament noted that this was a powerful provision and it was introduced to operate as a strong deterrent and a potent weapon for policing the provisions of the Act.

It was noted during debate in the Legislative Council in 1991 that “Commonwealth law generally requires people to go through a [much] more formal process [sic]”\(^{183}\) in regards to rights of entry and seizure. That is, a warrant of some form is required before powers of entry can be used, which is the process outlined in section 55 of the HRT Act.

As a result, subsection (6) was inserted into section 54. This subsection tempers the broad powers available to authorised officers under section 54:

- The power must be exercised at a reasonable time and at reasonable intervals;
- [If the power is exercised at times and intervals which are unreasonable,] The authorised officer must record the grounds or reasonable belief for taking the action [at times and intervals which are unreasonable], have someone witness that record, and note the date and time; and

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\(^{182}\) See footnote 165.

\(^{183}\) The full quote is as follows: ‘The Commonwealth law generally requires people to go through a much more formal procedure to ensure that rights of entry and seizure are not exercised arbitrarily. It requires a warrant to be taken or some other form of complaint sworn before powers of entry can be used. What I propose is novel and administratively a lot simpler. First, there is a requirement that the power be exercised at reasonable times and at reasonable intervals. However, it allows reasonable time and reasonable intervals to be bypassed where an officer has good grounds or a reasonable belief. The two are slightly different in their substance. However, he must record what are the good grounds or reasonable beliefs and have someone witness that record and note the date and the time. The officer must make up his mind and make a record of how he made up his mind so that, if a question later becomes relevant as to whether he had good grounds or reasonable belief, that record has been made and kept by the commissioner. It should be a fairly simple process because all he has to do is write it down and the final reporting is done at a later stage.’ See Hon Peter Foss MLC, Western Australia, Legislative Council, Parliametary Debates (Hansard), 29 August 1991, p 4138.
• The Director General of Health must keep those records.

It was noted in Parliament that this subsection (6) was a novel approach, but administratively more simple than requiring a warrant for each inspection or search. There is a power for an authorised officer to enter and inspect premises if they believe that an offence is being committed. In those circumstances, waiting for a warrant before entering and inspecting could result in loss of potentially valuable evidence. A warrant does not need to be obtained before these powers are used, and instead subsection (6) ensures any use of those section 54 powers is reasonable.184

6.17 Much is made of the need to respond quickly to offences:

The power to enter and search any premises in section 54 is available if there is a belief that an offence is being committed. This is distinct from section 55 [which requires a warrant].185 These circumstances may require immediate action by the authorised officer, and waiting for the approval of a warrant may impede a quick response.186

6.18 However, section 54(1)(a)(v)187 authorises entry and inspection, and search and seizure, if there is reasonable cause to believe that an offence against the Surrogacy Act 'has been, is being or is likely to be, committed'. Similarly, sections 54(1)(a)(iii) and (iv) relate to conduct that has occurred, is occurring, or is likely to occur. This suggests that the investigative powers will not always be exercised contemporaneously with the conduct being investigated. However, the Committee accepts that most investigations will involve some urgency.

6.19 When the Committee queried why the Department required the investigative powers in both sections 54 and 55, the Department acknowledged that:

there is some overlap between the powers available in section 54, and the powers available in section 55 to enter, search and seize, under a warrant. However, this has not caused any problems in practice.

As outlined above, section 54 was originally inserted to operate as a strong deterrent against misconduct in the industry.188

6.20 The Committee notes also that section 54 powers require an authorised officer to have 'reasonable cause to believe' that an offence 'has been, is being or is likely to be, committed', while section 55 only requires the authorised officer or police officer to have 'reason to suspect' that an offence 'is, or likely to be, committed. 'Belief' is a higher threshold than suspicion.189

185 The warrant under section 55 may be issued if the Justice of the Peace is satisfied that there is reason to suspect that an offence against the Act 'is, or is likely to be, committed': HRT Act s 55(1), as it is proposed to be modified by HRT Act proposed section 55A(3).
186 Dr D Russell-Weisz, Director General, Department of Health, Letter, 24 May 2019, Attachment, p 5. A similar reason was given on p 4.
187 As it is proposed to be modified by HRT Act proposed section 55A(3): 'For the purposes of this section [proposed section 55A], references in sections 54 and 55 to this Act [usually, the HRT Act] include references to the Surrogacy Act 2008.'
188 Dr D Russell-Weisz, Director General, Department of Health, Letter, 24 May 2019, Attachment, p 5.
189 A ‘reasonable suspicion’ is a ‘suspicion based on facts which, objectively seen, are sufficient to give rise to an apprehension of the suspected matter: R v Chan (1992) 28 NSWLR 421; 63 A Crim R 242. Reasonable suspicion involves less than a reasonable belief but more than a possibility; some factual basis must exist for the belief: R v Rando (2001) 126 A Crim R 562; [2001] NSWCCA 540. It does not require proof on the ‘balance of probabilities’. It is an inclination of the mind towards assenting to, rather than rejecting, a proposition: George v Rockett (1990) 170
6.21 However, the Committee is of the view that, contrary to the Department’s assertions,\footnote{See the quote in paragraph 6.16.} the extensive investigative powers in section 54 are not adequately tempered by the requirements in subsection (6). This is because subsection (6) deals only with the timing of the investigative action, not the grounds for the authorised officer’s belief in the matters set out in section 54(1)(a).

6.22 Where an authorised officer wishes to rely upon section 54(1)(a), they should be obliged, in addition to the existing requirements of section 54(6), to record the ‘reasonable causes’ which led them to ‘believe’ that any of the things prescribed in sections 54(1)(a)(i)-(v) have occurred, are occurring, or are likely to occur. That record should be made prior to exercising the powers and, likewise, be written, signed, witnessed and placed on the register kept by the Director General under section 54(6).

**RECOMMENDATION 11**

Amend section 54 of the Human Reproductive Technology Act 1991 to include a new requirement for the authorised officer, when relying upon section 54(1)(a), to record the reasonable cause(s) which led them to believe that any of the things prescribed in sections 54(1)(a)(i)-(v) have occurred, are occurring, or are likely to occur. As with records made and kept under section 54(6), these records should be made prior to exercising the powers and also be written, signed, witnessed and placed on the register kept by the Director General of the Department of Health. This amendment could be effected as follows:

**New clause 14A**

Page 6, after line 26 — To insert:

**14A. Section 54 amended**

After section 54(6) insert:

(6A) Before exercising a power under subsection (1)(a), an authorised officer must record in writing each reasonable cause that forms the basis of the authorised officer’s belief for the purposes of subsection (1)(a).

(6B) A record made under subsection (6A) must —

(a) be signed by the authorised officer in the presence of a witness; and

(b) be signed by the witness; and

(c) include the date and time that the record was signed by the authorised officer; and

(d) be placed, as soon as practicable, by the authorised officer on the register referred to in subsection (6).

**Fundamental Legislative Principle 6—adequate protection against self-incrimination?**

6.23 Section 54(4) of the HRT Act provides that a person is not excused from complying with a requirement under section 54 to answer any question or produce any thing\footnote{For example, under sections 54(1)(b) and (c).} on the grounds that the answer or the production of that thing might incriminate them or render

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CLR 104; 93 ALR 483; [1990] HCA 26. To say that a suspicion is reasonable does not necessarily imply that it is well-founded or that the grounds for suspicion must be factually correct: *Tuc v Manley* (1985) 62 ALR 460: online *Encyclopaedic Australian Legal Dictionary*, LexisNexis. Viewed 9 June 2019.
them liable to a penalty. If clause 15 of the Bill is passed, the requirement to answer any question or produce any thing could relate to activities under the Surrogacy Act.\textsuperscript{192}

6.24 Section 54(4) abrogates the common law privilege against self-incrimination, which has been described as follows:

It has been a firmly established rule of the common law, since the seventeenth century, that no individual can be compelled to incriminate himself (or herself). An individual may refuse to answer any question, or to produce any document or thing, if to do so ‘may tend to bring him (or her) into the peril and possibility of being convicted as a criminal’.\textsuperscript{193}

6.25 However, the privilege is not absolute—in some circumstances, it may be modified or excluded by legislation to facilitate the Government’s investigative activities. The public benefit gained from the abrogation of privilege should usually outweigh the resultant harm.

6.26 The Department provided the following justification for section 54(4) and its application to activities under the Surrogacy Act:

Again, this provision is included in the Bill to mirror the powers available for breaches or suspected breaches of the HRT Act. Similar provisions are found in other legislation within WA (for example, the Health Services Act 2016, the Food Act 2008 and the Public Health Act 2016) and in other jurisdictions (for example, NSW also limits the protection on self-incrimination in the Assisted Reproductive Technology Act 2007).

The HRT Act, when introduced in 1991, was a significant piece of legislation that impacted a policy issue fundamentally important to society, namely the origins of life. It was noted in 1991 that there may be circumstances where laboratories have the opportunity to tamper with life at its earliest stages. Accordingly, there were strong policy reasons for ensuring licensees in the industry were policed effectively. Section 54, as mentioned above, is a strong deterrent and a powerful provision intended to achieve this outcome. These policy reasons remain.

During debate in Parliament in 1991, in relation to section 54 the Government stated that this industry is “a highly specialised area in which it will be necessary when pursuing enforcement to have highly technical and specified information, otherwise the pursuit of the enforcement will fail.”

On a balance of the public interest and the abrogation of the privilege against self-incrimination, it was considered that the HRT Act should allow for coercive information gathering to ensure adequate regulatory oversight. The current Bill does not propose deviating from the original policy intent.\textsuperscript{194}

6.27 While abrogating the privilege, section 54(4) does provide a limited safeguard—an answer given by a person pursuant to a requirement is not admissible in evidence against the person:

- in any civil proceedings
- in any proceedings for an offence, other than:

\textsuperscript{192} See HRT Act sections 54(1)(b) and (c), read with proposed section 55A(3).

\textsuperscript{193} Sorby v Commonwealth (1983) 152 CLR 281 at p 288 per Gibbs CJ.

\textsuperscript{194} Dr D Russell-Weisz, Director General, Department of Health, Letter, 24 May 2019, Attachment, p 6.
- under the HRT Act or, if clause 15 of the Bill is passed, the Surrogacy Act[^195]
- perjury
  - or
- an offence arising out of the false or misleading nature of that answer.

6.28 In addition, an authorised officer may only require an answer to a question or the production of a thing at reasonable times and reasonable intervals.[^196]

[^195]: For the purposes of this section (proposed section 55A), references in sections 54 and 55 to this Act (usually, the HRT Act) include references to the Surrogacy Act 2008: HRT Act proposed section 55A(3).

[^196]: See further, the quote in paragraph 6.16.
CHAPTER 7
Scrutiny of clause 18 (Surrogacy Act 2008 proposed amended section 19)

Overview of Surrogacy Act 2008 proposed amended section 19

Extending parentage orders to male couples and single men—proposed section 19(1A)

7.1 The Bill proposes to extend the right to apply for parentage orders to male couples and single men by amending the eligibility criteria that are prescribed in section 19 of the Surrogacy Act.\(^{197}\) The Bill proposes to extend the criteria by introducing the concept of ‘medical or social reasons’ for surrogacy arrangements. Such reasons are required to be present when the arrangement is entered into in order for the arranged parent(s) to be eligible to apply for parentage orders.\(^{198}\)

7.2 Proposed section 19(1A) provides:

there are medical or social reasons for a surrogacy arrangement if—

(a) in the case of a surrogacy arrangement involving 1 arranged parent, the arranged parent is an eligible woman or a man; or

(b) in the case of a surrogacy arrangement involving 2 arranged parents, the arranged parents are married to, or in a de facto relationship with, each other and are —

(i) an eligible woman and a man; or

(ii) 2 eligible women; or

(iii) 2 men.

7.3 Single men and male couples are accommodated in proposed subsections 19(1A)(a) and (b)(iii), respectively.

7.4 ‘Medical reasons’ are already required under the current eligibility criteria for parentage order applications. The Second Reading Speech indicates that the addition of the requirement for ‘social reasons’ is only intended to benefit male couples and single men:

For all practical purposes, “social reasons” in terms of access to surrogacy is intended to apply to male same-sex couples and single men.\(^{199}\)

7.5 The Committee notes that opinions differ as to whether the current prohibition on male couples and single men applying for parentage orders is inconsistent with the SDA (see paragraphs 2.56–2.57 and Finding 3). What is clear is that there is an effective prohibition on male couples and single men accessing surrogacy arrangements. The effective prohibition arises because, currently, they cannot:

- access IVF procedures for the purposes of a surrogacy arrangement (this is addressed by clause 11 of the Bill)\(^{200}\)

\(^{197}\) Bill cl 18, particularly subclauses (1) and (2).
\(^{198}\) ibid., cl 18(1), proposed new Surrogacy Act s 19(1)(b).
\(^{199}\) Hon Alanna Clohesy MLC, Parliamentary Secretary to the Minister for Health, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 10 October 2018, p 6771.
\(^{200}\) Refer to Bill cl 11(1), HRT Act proposed s 23(1)(a)(iv) and proposed new s 23(1)(c).
• obtain legal parentage of any child who is born from a surrogacy arrangement to which they are a party (this is addressed by clause 18 of the Bill).

7.6 If male couples and single men have access to IVF for the purposes of surrogacy, the Committee is of the view that it is necessary to remove the prohibition in order to:

• bring surrogacy arrangements involving male couples and single men (as the arranged parents) clearly within the terms of the Surrogacy Act

• allow the Family Court to consider the best interests of children.

7.7 Removing the prohibition will provide the male arranged parent(s) with the opportunity to obtain the full legal rights and obligations of being a parent. As Dr Allan explained, the child resulting from such surrogacy arrangements would also be given the opportunity to enjoy the full benefits of the legal parent-child relationship:

Whether or not the granting of parentage orders could be seen as a ‘service’ for the purposes of the SDA and Equal Opportunity Act, I think it important here to note that the focus of such orders is the child.

Thus, once a person has lawfully accessed ART for the purposes of a surrogacy arrangement, it is important to enable the Court to appropriately grant legal parentage orders. Here again, the issue of discrimination is important, but particularly so in relation to the child. Legal recognition of parents gives rise to a set of rights and responsibilities (or obligations) under the law that serve to protect and maintain children. Children who do not have their parent-child relationship recognised may have reduced rights and/or entitlements than other children within the community. For example, the same-sex co-parent [who cannot obtain legal parentage] may not:

• have the power to make decisions about medical treatment for the child, including removal of tissue and blood transfusions;

• appoint a testamentary guardian for the child;

• bring about legal proceedings on behalf of the child;

• make decisions or meet legal obligations concerning schooling or employment for children under 17 years of age;

• be entitled to be party to child protection hearings;

• be entitled to be present if the child is being questioned by police;

In addition, the child may not be able to lay claim to the co-parent’s estate if adequate provision in a will has not been made or the co-parent dies intestate (without a will). Children may also be separated from their primary caregivers should their biological parent die. For example, they could end up living with a distant relative in such circumstances rather than their co-parent who has looked after them all their life.

Thus, the lack of recognition of certain family structures and the parent-child relationships within them has important ramifications for the children of these families. In fact, recognition of legal parentage in different family formations is fundamental to the rights of the child: the right to birth registration, the right to an identity, and the collections of rights that relate to the parent’s obligations to care for their child.

...
So, whether or not we classify the granting of parentage orders as being a service, it seems incredibly remiss of Western Australia not to enable a Court the ability to consider what is in the best interests of children in regard to their legal parentage or parenting orders, which in 2019 in Australia, may include recognising their male, female, intersex, transgendered, binary, non-binary, married, de-facto, heterosexual, or same-sexed partnered or single parent(s).  

**FINDING 16**

If male couples and single men have access to in vitro fertilisation procedures for the purposes of surrogacy, it is necessary also to extend the right to apply for parentage orders to male couples and single men.

**New definition of ‘eligible woman’—proposed new section 19(2)**

7.8 The Bill proposes to delete the current definitions of ‘eligible couple’ and ‘eligible person’. The definition of ‘eligible couple’ is subsumed into the proposed new categories of arranged parents who are couples, while ‘eligible person’ is to be replaced with a definition of ‘eligible woman’ in proposed new section 19(2), as follows:

In subsection (1A) —

*eligible woman* means a woman who —

(a) is *likely to be* unable to conceive a child due to medical reasons not excluded by subsection (3) [that is, age-related inability to conceive]; or

(b) although able to conceive a child, is *likely to be* unable to give birth to a child due to medical reasons; or

(c) although able to conceive a child, is likely to conceive a child affected by a genetic abnormality or a disease. *(underlining added)*

7.9 The proposed definition of ‘eligible woman’ is effectively the same as the current definition of ‘eligible person’, except for the addition of the words ‘likely to be’ in proposed subsections (a) and (b), as indicated above. The effect of those words is to accommodate women who are facing likely, future infertility issues.

**Clause 18(1), Surrogacy Act 2008 proposed new section 19(1)(b)—timing of ‘medical or social reasons’**

7.10 The Bill proposes to introduce a subtle, but possibly significant, shift in the timing of when parentage order applicants are required to demonstrate the presence of ‘medical or social reasons’ for not being able to have a child. The Explanatory Memorandum and the Second Reading Speech do not explain the need for this change.

7.11 Currently, section 19(1)(b) requires applicants to have medical reasons for their inability to have children:

when the surrogacy arrangement was entered into or after that time but before the application is made ...  

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201 Submission 72 from Dr Sonia Allan, 29 May 2019, pp 6-8.
202 See Bill cl 18(2).
203 Surrogacy Act s 19(1)(b).
7.12 The Bill proposes to require applicants to show that they had medical or social reasons for being unable to have children at the time when the ‘arrangement was entered into’. This shift in timing could have consequences for some applicants whose surrogacy arrangements are affected by the period of transitioning from the current regime to the proposed regime. The following hypothetical scenario is one example of the difficulties which could arise:

<table>
<thead>
<tr>
<th><strong>Table 2. Hypothetical scenario—female couple affected by transition from current to proposed regime</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Events occurring under the current Surrogacy Act</strong></td>
</tr>
<tr>
<td>- Single female who is currently unable to conceive due to a medical condition.</td>
</tr>
<tr>
<td>- She receives IVF procedures for creating an embryo using her own eggs. She has the embryo frozen for future use, to preserve her fertility.</td>
</tr>
<tr>
<td>- She meets a female partner and they decide to start a family.</td>
</tr>
<tr>
<td>- She attempts an IVF procedure to implant one of her stored embryos but is told that she will no longer be able to successfully carry the pregnancy to term.</td>
</tr>
<tr>
<td>- She and her partner, who is fertile, decide to enter into an altruistic surrogacy arrangement as the arranged parents. They make this decision based on their eligibility to apply for parentage orders once the baby is born.</td>
</tr>
<tr>
<td>- The RTC approves their surrogacy arrangement.</td>
</tr>
<tr>
<td>- One of her stored embryos is implanted into the surrogate/birth mother.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Events occurring under the Surrogacy Act as amended by the Bill</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>- The surrogate/birth mother gives birth to the baby.</td>
</tr>
<tr>
<td>- She and her partner apply for parentage orders but are unsuccessful because they were not both medically unable to have children at the time when they entered into the surrogacy arrangement.</td>
</tr>
</tbody>
</table>

7.13 The Department provided the following justification for the proposed shift in timing:

The current section 19(1)(b) was drafted to include the words “when the surrogacy arrangement was entered into or after that time but before the application is made” to address the recommendation by Standing Committee on Legislation in their report on the Surrogacy Bill 2007 dated May 2008, that “the parents of a child born to a surrogacy arrangement prior to the commencement of [the Surrogacy Act] may, if the requirements of section 17 have been met, apply for a parentage order within 12 months of the commencement of the legislation” (see page 56, Recommendation 11).

As the Surrogacy Act has been in place for over 10 years, the reason for that wording is no longer applicable and therefore the current Bill amends the wording of section 19(1)(b) to reflect that position.

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204 Bill cl 18(1), Surrogacy Act proposed new section 19(1)(b).
205 Under HRT Act s 23(1)(a)(ia).
206 ibid.
208 ibid., s 17.
209 Under HRT Act s 23(1)(a)(iii).
210 Chad Martino, Acting Director, Office of the Director General, Department of Health, Email, 13 June 2019.
7.14 In the Committee’s view, this reasoning does not account for possibilities such as those outlined in the above Table 2. In other words, it only contemplates the redundancy of old transitional arrangements without considering new transitional arrangements.

7.15 The Committee recommends that the timing requirements of current section 19(1)(b) be retained.

**RECOMMENDATION 12**

Amend clause 18(1) of the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018, proposed new section 19(1)(b) of the *Surrogacy Act 2008*, to also allow applicants for parentage orders to have medical or social reasons after the time when the surrogacy arrangement was entered into but before the application is made. This could be effected as follows:

**Clause 18(1)**

Page 9, line 9 — To delete “into.” and insert:

into or after that time but before the application is made.

7.16 In the event that the above Recommendation is not accepted by the House, transitional provisions should be inserted into the Bill.

**Clause 18(2), Surrogacy Act 2008 proposed section 19(1A)(b)(ii)—shift in policy for female couples; a new area of discrimination?**

7.17 Under current Surrogacy Act s 19(1)(b)(ii), only one member of a female couple is required to be an ‘eligible person’ in order to be eligible for a parentage order:

An application can be made under this Part for a parentage order only if —

... (b) when the surrogacy arrangement was entered into or after that time but before the application is made —

(ii) one of the arranged parents, or the arranged parent if there is only one, is an eligible person. (underlining added)

7.18 This essentially means that only one member of that couple must have medical reasons (other than menopause) to be unable to have a child.

7.19 However, proposed section 19(1A)(b)(ii) will require both members of a female couple to be ‘eligible women’, meaning both of them must have medical reasons (other than menopause) preventing them from having children. This appears to be a shift in policy that has not been explained in either the Explanatory Memorandum or the Second Reading Speech. The Department’s explanation of the policy was that:

it is to prevent unnecessary invasive procedures—also, ethical issues for health professionals providing treatment. If you have two women, a couple, and either one of them is able to—if one is infertile, but the other one is able to carry a baby, then you are in a situation where together as a couple they can have a child. So, again, it is the same as before. That now becomes a social reason, and you have got a surrogate there who wants to help the couple who cannot have a baby, or a
person who cannot have a baby. I think that is a different set of circumstances, and the policy is built around that.\textsuperscript{211}

7.20 When asked why this policy is not given effect in the current Surrogacy Act, the Department explained that the current section 19:

allows for single women who need access to surrogacy to have that pathway available to them if there is a medical need. The way the law is it does not think about them—at the moment, it does not say whether they need to be a couple or not. ... The way the system is set up at the moment, it does not really take into consideration a couple.\textsuperscript{212}

7.21 However, current section 19(1)(b)(ii) clearly does contemplate women who are members of a couple, or at least are co-parents.\textsuperscript{213}

7.22 Dr Allan and Dr McGivern, Chair of the RTC, also offered their views on the reasons underpinning the new, more stringent requirement. Dr Allan submitted as follows:

I am guessing that the drafters were trying to prevent surrogacy when one woman could carry, although no reasoning or explanation for this is provided in the explanatory memorandum.\textsuperscript{214}

7.23 Dr McGivern stated that:

viewed as a couple, if one has reproductive capacity, then there is not the same demonstrated need for assistance in this way. Bearing in mind, incidentally, that the restrictions that exist under section 23 are in respect of a particular kind of assisted-reproductive technology—that is, IVF, as opposed to artificial insemination. There is no requirement for eligibility criteria of this kind for artificial insemination. If there is medical capacity to conceive and carry a child, then the couple, viewed collectively, would have access to the ability to parent other than through IVF and/or surrogacy.

... I would suggest that the policy reason, the thing that best explains that, is this reference back to need for that kind of intervention in order to become a parent.\textsuperscript{215}

7.24 The Committee finds there is no connection between increasing the eligibility requirements for female couples seeking to apply for a parentage order and the key policy of the Bill, which is to address discrimination against male couples and single men.

7.25 The hypothetical scenario contained in the table below illustrates how the proposed changes could disadvantage female couples.

\textsuperscript{211} Dr Maureen Harris, Manager, Reproductive Technology Unit, Department of Health, \textit{Transcript of evidence}, 20 May 2019, pp 8–9.

\textsuperscript{212} ibid., p 10.

\textsuperscript{213} That is, the parents of a child who are not also in a relationship with each other.

\textsuperscript{214} Submission 72 from Dr Sonia Allan, 29 May 2019, pp 13–14.

\textsuperscript{215} Dr Brenda McGivern, Chair, Reproductive Technology Council, \textit{Transcript of evidence}, 20 May 2019, p 7.
Table 3. Hypothetical scenario—female couple, one 50 years old and infertile due to age, one 40 years old and infertile due to medical reasons

<table>
<thead>
<tr>
<th>Scenario under the current Surrogacy Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Female couple: one partner 50 years old and infertile due to age, the other 40 years old and unable to give birth to a child due to a medical condition.</td>
</tr>
<tr>
<td>• They have someone willing to act as an altruistic surrogate for them.</td>
</tr>
<tr>
<td>• They are able to access altruistic surrogacy under the Surrogacy Act, and associated IVF procedures under HRT Act.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Scenario under the Surrogacy Act as amended by the Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Same couple.</td>
</tr>
<tr>
<td>• They have someone willing to act as an altruistic surrogate for them.</td>
</tr>
<tr>
<td>• They are unable to apply for parentage orders under proposed section 19 of the Surrogacy Act, or the associated IVF procedures under proposed HRT Act section 23(1)(a)(iv), because one of them is infertile due to age, and is therefore not an ‘eligible woman’ for the purposes of section 19(2) of the Surrogacy Act.</td>
</tr>
<tr>
<td>• Under proposed Surrogacy Act section 19(1A)(b)(ii), they must both be ‘eligible women’ in order to access surrogacy and associated IVF procedures.</td>
</tr>
<tr>
<td>• If the same 40 year-old woman was a member of an opposite-sex couple, that couple would have access to surrogacy and associated IVF procedures as a result of proposed section 19(1A)(b)(i).</td>
</tr>
</tbody>
</table>

**FINDING 17**

Proposed section 19(1A)(b)(ii) of the Surrogacy Act 2008 will lessen the effective availability of surrogacy for female couples because it will require both members of the couple to be unable to have children due to medical reasons. Under current section 19(1)(b)(ii), only one member of the female couple is required to meet that criterion.

**FINDING 18**

Neither the Second Reading Speech nor the Explanatory Memorandum for the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 identify a need for increasing the eligibility requirements for female couples seeking to apply for parentage orders.

7.26 Dr Allan also identified that the shift in the policy could result in unfair outcomes for people who are affected by the transition from the current to the proposed regime:

> Technically, does this mean that they can access ART for the purposes of a surrogacy arrangement, they might get approval, but they are not going to get parenting orders if both of them were not medically infertile? I am not sure why the eligibility criteria is linked to parenting orders rather than access in the first place. I mean, the results of those proposed amendments are that two women would be required to have medical reasons for a surrogacy arrangement under the new provisions.\(^{216}\)

\(^{216}\) Dr Sonia Allan, Legal academic and consultant, Transcript of evidence, 20 May 2019, p 16.
Table 2 on page 55 contains a hypothetical scenario based on the above evidence.

**FINDING 19**

The shift in policy represented by proposed section 19(1A)(b)(ii) of the *Surrogacy Act 2008* (in clause 18(2) of the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018) could result in unfair outcomes for people who are affected by the transition from the current to the proposed regime.

**FINDING 20**

Proposed section 19(1A)(b)(ii) of the *Surrogacy Act 2008* (in clause 18(2) of the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018) gives rise to new discrimination against female couples but it is unlikely that this amounts to unlawful discrimination under the *Sex Discrimination Act 1984* (Cth).

If the House is of the view that the rights of female couples under the existing eligibility requirements should not be diminished, then the current eligibility requirements for female couples should be retained.

**RECOMMENDATION 13**

The current eligibility requirements for female couples seeking to apply for parentage orders could be retained in the following way:

**Clause 18(2)**

Page 9, line 23 — To delete “2 eligible women; or” and insert:

2 women, 1 of whom is an eligible woman; or

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217 When read with SDA s 22.
218 ibid.
219 Greg McIntyre SC, Barrister, Opinion, p 7 and see also, pp 12-13.
7.31 If, instead, the House wishes to support the proposed new eligibility requirements for female couples, the Bill should incorporate a transitional provision.

Other new areas of discrimination

‘Medical reasons’ for women

7.32 For the same reasons as those discussed at paragraphs 5.41–5.59, proposed section 19(1A) of the Surrogacy Act, when read with proposed new section 19(2), will discriminate against women (who are the arranged parent(s) in a surrogacy arrangement) seeking to apply for parentage orders. However, it is unlikely that this discrimination would be unlawful under section 22 of the SDA.

7.33 Even though there is a possibility of unlawful discrimination against women in this area, the Committee does not recommend the removal of the requirement for medical reasons for women at this time, due to the reasons stated in paragraphs 5.53–5.59.

Age-related infertility for women

7.34 For the same reasons as those discussed at paragraphs 5.60–5.71, Surrogacy Act proposed amended section 19(3), when read with proposed sections 19(1A) and (2), will discriminate against women (who are the arranged parent(s) in a surrogacy arrangement) seeking to apply for parentage orders. However, because of exemptions in the Age Discrimination Act (Cth) referenced at paragraph 5.71, it is unclear whether this discrimination will be unlawful.

7.35 Due to this inquiry’s constraints, the Committee is of the view that consideration of age-related infertility for women requires separate review.

Remaining inconsistency with Sex Discrimination Act 1984 (Cth)

Transgender people and people of intersex status

7.36 For the same reasons as those discussed at paragraphs 3.18–3.25, proposed section 19(1A) of the Surrogacy Act, when read with proposed new section 19(2), may discriminate against transgender people and people of intersex status (who are the arranged parent(s) in a surrogacy arrangement) seeking to apply for parentage orders. However, it is unlikely that this discrimination would be unlawful under section 22 of the SDA.

7.37 Despite the uncertainty surrounding the possibility of unlawful discrimination in the area of parentage orders, the Committee considers it would be prudent for the Government to consider transgender and intersex people’s access to surrogacy arrangements when it provides its response to the Allan Report recommendations.

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220 See Bill cl 18(2).
221 See paragraphs 2.56–2.57 and Finding 3.
222 See Bill cls 18(2) and (3).
223 See also, the reasons in paragraphs 2.56–2.57 and Finding 3.
224 See Recommendation 9.
225 See Bill cl 18(2).
226 See paragraphs 2.56–2.57 and Finding 3.
227 See Recommendation 4.
CHAPTER 8
Supplementary Notice Paper 88/1

8.1 Supplementary Notice Paper No. 88 issued on 11 February 2019 proposes a number of amendments to the Bill.

8.2 For the information of the House the Committee notes the following information related to some of the proposed amendments which has come to its attention in the course of the inquiry.

**Extraterritoriality**

8.3 The Allan Review recommended that the government amend the Surrogacy Act to provide for extraterritorial application of the prohibition against commercial surrogacy.\(^{228}\)

8.4 Provisions providing for extraterritorial application of surrogacy laws apply in Queensland, New South Wales and the Australian Capital Territory. The Allan Report noted the lack of uniformity of extraterritorial prohibitions across the states.\(^{229}\)

8.5 One submission received by the Committee opposed extraterritorial application of the prohibition against commercial surrogacy.\(^{230}\)

8.6 The Committee has not inquired into this issue.

**Working with children checks**

8.7 Submission number 50, which supports the Bill, also supports ‘the requirement for all parties to undergo a criminal record screen’.\(^{231}\)

8.8 Submission number 52, which also supports the Bill, submits that ‘there should be safe guards in place to eliminate the possibility of a child being raised in danger’.\(^{232}\)

8.9 A private submission also supported the Bill and said:

> I strongly believe that the possession of a Working with Children Check would increase the safety and further reassure families ... \(^{233}\)

8.10 The Committee has not inquired fully into this issue, but did raise it with some witnesses.

8.11 The Commissioner for Children and Young People gave the following evidence:

**The CHAIR:** What is your view on extending the section 17 requirements as part of the current bill to include, for example, working with children checks?

**Mr Pettit:** Working with children checks are an interesting tool for a range of items. They are for a point in time, unfortunately. They can indicate whether that person has a particular standing in the community at a point in time. My understanding from having worked with the council or having read what the council do, I think they consider a range of issues that are similar to the working with children checks. If the council thought it was an extra layer of issue that

\(^{228}\) Allan Report Part 2, recommendation 44, p 189.

\(^{229}\) ibid., pp 172-3.

\(^{230}\) Submission 66 from Rebecca Kalpakoff, 3 May 2019.

\(^{231}\) Submission 50 from Rhianna Nilsen, 3 May 2019.

\(^{232}\) Submission 52 from Ricardo De Castro, 3 May 2019, p 2.

\(^{233}\) Submission 9, from a private citizen, 22 April 2019, p 1.
should be included, as per Victoria, then we would certainly support that. At the moment, what we are seeing is that this is strong enough to ensure the safety of all children and the wellbeing of children.\textsuperscript{234}

8.12 The Allan Report considered the different requirements for screening of surrogacy applicants in Australian and international jurisdictions,\textsuperscript{235} and noted the 2016 submission of the Australian Human Rights Commission to the Commonwealth House of Representatives Standing Committee inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements, calling for criminal record checks and working with children checks:

Although recognising differences between foster care, adoption and surrogacy arrangements they drew the analogy that in each of these arrangements ‘there is a regulatory regime administered by the State which provides for the transfer of parental responsibility for children’. It was their view that that the involvement of the State created an obligation to ensure the best interests of the child, which includes protection ‘against injury or abuse while in the care of parents or legal guardians’ and ‘the taking of preventative measures … [which require] assessing the possibility of future risk and harm ...\textsuperscript{236}

8.13 As noted in paragraph 9.9, the Allan Report made recommendations regarding various safeguards concerning the best interests and welfare of children in surrogacy arrangements.\textsuperscript{237}

8.14 The RTC submitted to the inquiry that any broader amendments to the HRT and Surrogacy Acts (for example, concerning the screening of applicants) should be dealt with in a later (and foreshadowed) tranche of legislative review, which will provide a better opportunity to engage with the wider and more complex policy and regulatory considerations they involve.\textsuperscript{238}

\textsuperscript{234} Colin Pettit, Commissioner for Children and Young People and Hon Dr Sally Talbot MLC, Chair, Committee, \textit{Transcript of evidence}, 22 May 2019, pp 9-10.

\textsuperscript{235} Allan Report Part 2, Chapter 5.

\textsuperscript{236} ibid., p 92.

\textsuperscript{237} See paragraph 9.9.

\textsuperscript{238} Submission 68 from the Reproductive Technology Council, 3 May 2019, p 2.
CHAPTER 9  
Other matters

9.1 In addition to the issues discussed elsewhere in this Report, there were a number of other issues raised with the Committee in evidence and submissions which were either of interest in relation to surrogacy generally, or were identified as requiring legislative attention. Those issues were:

- The welfare and best interests of children born as a result of surrogacy.
- The right of children born as a result of surrogacy to know their biological and cultural heritage.
- The rate of ‘volunteering’ for altruistic surrogacy in Western Australia and the likely impact of the Bill on the demand for Western Australian surrogates.
- Whether additional checks such as criminal record checks should be included in the approval process for surrogacy arrangements under Surrogacy Act s 17.
- The extent to which surrogacy may result in negative outcomes for surrogate mothers.
- The extent to which surrogacy may result in negative outcomes for children born as a result of surrogacy.

9.2 Given its timeframe, the Committee focussed its inquiry on the matters set out earlier in this Report and only briefly considered these additional issues. The evidence and submissions received on each of these issues is briefly outlined below.

9.3 The Committee heard evidence in the course of its inquiry that the Bill may result in:

- an increase in the incidence of surrogacy arrangements in Western Australia and accordingly in the demand for Western Australian surrogate mothers.\(^{239}\)
- a corresponding decrease in the demand for international surrogacy arrangements by Western Australian intended parents.\(^{240}\)

9.4 In this regard, the Committee noted Dr Allan’s recommendation as follows:

> That the Western Australian Government considers the recommendations in this report in light of the need to increase access to altruistic surrogacy in Western Australia which in turn may serve to reduce the number of people from Western Australia who seek international commercial surrogacy.\(^{241}\)

9.5 These additional matters have some relevance to the effect of the Bill on Western Australian children, arranged parents and surrogate mothers. The Committee therefore draws attention to these additional matters.

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\(^{239}\) Jane Laurence, Director/General Counsel, Legal and Legislative Services, Department of Health, Transcript of evidence, 20 May 2019, p 15; Dr Brenda McGivern, Chair, Reproductive Technology Council, Transcript of evidence, 20 May 2019, pp 12–13.

\(^{240}\) Jane Laurence, Director/General Counsel, Legal and Legislative Services, Department of Health, Transcript of evidence, 20 May 2019, p 15; Colin Pettit, Commissioner for Children and Young People, Transcript of evidence, 22 May 2019, p 4.

\(^{241}\) Allan Report Part 2, recommendation 43, p 189.
The welfare and best interests of children born as a result of surrogacy

9.6 Section 23(1)(e) of the HRT Act provides that an IVF procedure (whether or not for the purposes of surrogacy) may only be carried out if:

consideration has been given to the welfare and interests of —

(i) the participants; and

(ii) any child likely to be born as a result of the procedure

and in the opinion of the licensee that consideration does not show any cause why the procedure should not be carried out.

9.7 Direction 5 of the Surrogacy Directions provides:

Welfare of child paramount

When a person to whom a licence applies or an exempt practitioner is considering whether to provide an artificial fertilisation procedure in connection with a surrogacy arrangement —

(a) the welfare of any child that may be born as a result of the procedure is to be the paramount consideration; and

(b) the welfare of any existing child of the birth mother, a donor or the arranged parents is to be taken into account.

9.8 Section 21(2)(g) of the Surrogacy Act requires that the court, before it makes a parentage order, be satisfied that it is in the best interests of the child for the court to make the proposed order.

9.9 In addition to these existing requirements, as part of the wider reform of the HRT Act and the Surrogacy Act, the Allan Report recommended:

9.9.1 Section 17 of the Surrogacy Act be amended to include a requirement that each of the parties to a surrogacy arrangement undertakes in-person counselling sessions with a qualified counsellor, prior to the arrangement taking place, about the implications of the surrogacy arrangement and the best interests and welfare of any child who will be born as a result.242

9.9.2 The Minister/Director General/Department should develop guidelines that provide for a clear and consistent risk assessment framework and process to be used by clinicians/health professionals when assessing applicants and their partners (if any) in relation to the welfare principle, prior to their engaging in a surrogacy arrangement. Such guidelines should:

- include various criteria relevant to the welfare of the child
- outline the process to be followed when there is concern about the welfare of a child
- provide for referral to, and consultation with, external experts, authorities, agencies and/or support services

242 ibid., recommendation 13, p 85.
9.9.3 That the Surrogacy Act (and/or associated regulations/directions) be amended to require the use of the above guidelines in the pre-surrogacy counselling process to undertake a risk assessment (screening) of each of the intending parent(s), the intended surrogate mother, and her partner (if any).

9.9.4 Provision should be made in the Surrogacy Act that it is an offence for applicant(s) to provide false information during the welfare of the child assessment.

9.10 Dr Allan stated in her evidence:

I recommend a public health approach to screening for children in terms of the welfare principal. I mentioned before also a pre-check before legal parentage which would be consistent with the other states—Queensland and New South Wales—around whether or not that order would be in the best interests of a child.

9.11 Considerations as to the best interests of children apply to all children born as a result of surrogacy, whether in Western Australia or internationally. The Committee considers that the welfare of children born to Western Australian parents should be managed by Western Australian law rather than the law of another jurisdiction.

9.12 The Commissioner for Children and Young People, in his evidence to the Committee, expressed the following view:

The CHAIR: ... In your view, are the best interests of children born as a result of surrogacy to WA single men and male couples best served by either the passing of the bill or maintaining the status quo, where surrogacy for those people and couples is only available in other jurisdictions?

Mr Pettit: I think passing the bill is the right way to go, but with the caveats that there are signals that some of the improvements of how we can support young people into the future could be considered into the future by the Parliament.

9.13 Some submitters made similar arguments to this. Other submitters expressed the view that surrogacy is, by its nature, not in the best interests of the child.

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243 Australian National Child Offender Register.
244 ibid., recommendation 21, p 107.
245 ibid., recommendation 22, p 108.
246 ibid., recommendation 23, p 108.
247 Dr Sonia Allan, Legal academic and consultant, Transcript of evidence, 20 May 2019, p 26.
248 Colin Pettit, Commissioner for Children and Young People and Hon Dr Sally Talbot MLC, Chair, Committee, Transcript of evidence, 22 May 2019, p 9.
250 Submission 2 from Brendan Jones, 15 May 2019; submission 15 from Dr Catherine Lynch, 24 April 2019; submission 51 from Frank Kosaras, 3 May 2019; submission 55 from FamilyVoice Australia, 1 May 2019; submission 57 from the Association of Relinquishing Mothers (Vic), 3 May 2019 and submission 62 from the Association for Reformed Political Action, 3 May 2019.
The right of children born as a result of surrogacy to know their biological and cultural heritage

9.14 This issue was raised in submissions to the inquiry, including from the Commissioner for Children and Young People.251

9.15 As with general considerations as to the best interests and welfare of children, this consideration applies to all children born as a result of surrogacy, whether in Western Australia or internationally. The Committee considers that access to information is likely to be better managed in Western Australia than some international jurisdictions.

9.16 Dr Allan noted in her evidence:

I can say it did appear that there were four to five times the number of families in Western Australia going to another state or overseas to engage in surrogacy than those engaging within the state. That, to me, is something that we should be considering because that takes them away from all sorts of things and all sorts of protections; so, too, the child. It may also make it much more difficult for the child to have a relationship with their surrogate mother if they want to have one in the future which is often the case when altruistic arrangements take place where people share a similar environment or live in the same state. There is often more contact than if it is a distance arrangement or an arrangement made commercially overseas and then the child is brought back.252

9.17 As part of the recommended wider review of the HRT Act, the Allan Report made extensive recommendations regarding the provision and availability of information relevant to donor-conceived people (whether in relation to surrogacy or IVF procedures generally).253

9.18 The Commissioner for Children and Young People expressed the following view when asked about this issue, and its impact on considerations of the best interests of children born as a result of surrogacy:

I think in the best interests of children has to be weighed in a whole range of things. This is one issue, and it is one issue that is important to the development of a child. I think we have to make sure that every child is safe and well. That has to be the paramount consideration. What was asked of me was what I think about this particular issue. I think it is one thing that needs to be addressed, but it should not hold up the fact that we stop this process from happening because we need to make sure every child is safe, well and cared for. That is something that we all, hopefully, aspire to.254

The rate of ‘volunteering’ for altruistic surrogacy in Western Australia and the impact of the Bill on the demand for surrogates

9.19 There was a suggestion in one of the submissions which supported the Bill that the rate of volunteering as a surrogate mother in Western Australia is low.255

251 Submission 67 from the Commissioner for Children and Young People, 1 May 2019, p 2. See also submission 15 from Dr Catherine Lynch, 24 April 2019; submission 50 from Rhianna Nilsen, 3 May 2019; submission 51 from Frank Kosaras, 3 May 2019; submission 54 from Lara Mitchell, 3 May 2019; submission 55 from FamilyVoice Australia, 1 May 2019 and submission 57 from the Association of Relinquishing Mothers (Vic), 3 May 2019.

252 Dr Sonia Allan, Legal academic and consultant, Transcript of evidence, 20 May 2019, p 28.


255 Submission 22 from Peter Ravi-Pinto, 29 April 2019.
9.20 When asked about this issue, Dr Allan:

- noted that her Review did not find that Western Australia has a very low surrogacy volunteering rate\(^{256}\)
- expressed reservations about this argument, to the extent that it could be used to support the legalising of commercial surrogacy.\(^{257}\)

**Should additional checks such as criminal record checks be included in the approval process for surrogacy arrangements under *Surrogacy Act 2008* section 17?**

9.21 Two submissions to the inquiry suggested that criminal record checks and/or working with children checks be required as part of the surrogacy process.\(^{258}\)

9.22 As noted above,\(^{259}\) the Allan Report recommended that:

- as part of the wider review, guidelines for risk assessment of applicants and their partners allow for criminal record, ANCOR\(^{260}\) and child protection order checks in individual cases that raise significant concern
- the Surrogacy Act be amended to require the use of the guidelines in the pre-surrogacy counselling process to undertake a risk assessment (screening) of each of the intended parents, the intended surrogate mother, and her partner (if any).\(^{261}\)

9.23 The Committee notes that there was no evidence that checks of this kind were available in international surrogacy arrangements. Therefore, children born as a result of international surrogacy may not have these protections and indeed may have less protection than afforded by current Surrogacy Act s 17. To the extent that the Bill will result in a decrease in international surrogacy arrangements, the Committee is of the view that it may result in greater protection for Western Australian children born as a result of surrogacy.

9.24 A majority of the Committee, comprising Hon No Giyan, Simon O’Brien and Colin de Grussa MLCs, is of the view that additional checks such as criminal record checks should be considered for inclusion in the approval process for surrogacy arrangements.

9.25 A minority of the Committee, comprising Hon Dr Sally Talbot and Pierre Yang MLCs, notes that the need for additional checks such as criminal record checks has not been established by the evidence.

**The extent to which surrogacy may result in negative outcomes for surrogate mothers and children born as a result of surrogacy**

9.26 Some submissions suggested that, as the Bill may result in an increased number of surrogacy arrangements in Western Australia, it may in turn result in an increase in negative outcomes for Western Australian surrogate mothers.\(^{262}\)

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\(^{256}\) Dr Sonia Allan, Legal academic and consultant, *Transcript of evidence*, 20 May 2019, p 27.

\(^{257}\) ibid., p 28.

\(^{258}\) Submission 9, from a private citizen, 22 April 2019 and submission 50 from Rhianna Nilsen, 3 May 2019.

\(^{259}\) Paragraph 9.9.2.

\(^{260}\) Australian National Child Offender Register.


\(^{262}\) See, for example: submission 18 from Joan Smurthwaite, 18 April 2019; submission 23 from Dr Susan Hawthorne, 23 April 2019; submission 33 from FINNRAGE (Australia), 2 May 2019; submission 57 from Association of Relinquishing Mothers (Vic), 3 May 2019; submission 64 from Natasha Martin, 3 May 2019.
9.27 While the Committee did not inquire into this issue, it was raised with some witnesses.

9.28 Dr Allan reviewed a submission to the Committee\(^{263}\) which, in Dr Allan’s words:\(^{264}\)

> presents a limited number of studies that present findings of certain risks (hypertension, multiple pregnancies, pre-eclampsia, premature birth) related to egg donation and/or gestational surrogacy. The submission the [sic] posits that providing surrogacy to single or same-sex coupled males will ‘increase risks to women and children in Western Australia’.

9.29 Dr Allan responded:

- Although there was some evidence about specific risks associated with ART, including some research related to egg donation, multiple births, and surrogacy pregnancies, a search of the research reveals papers that reflect variable findings; risk factors that apply to anyone undergoing ART (whether for surrogacy or not).
- Some risks may be increased in jurisdictions, that for example, do not practice single embryo transfer (such as the United States). Note Australia has a single embryo transfer policy and that this has better results for women and children.
- There are differential results in the research on the health outcomes for children born as a result of ART procedures, and we need to be mindful that procedures have advanced.\(^{265}\)

9.30 Importantly, Dr Allan concluded:

> I am assuming that the logic applied by the author of Submission 18 is based on concern that if access by single men or same-sex couples is permitted there may be more altruistic arrangements – but this is equally flawed. It is not that such arrangements do not take place, it is that they are currently taking place interstate or overseas. There is no greater risk to women and children if they take place in Western Australia, indeed the findings to my review found that excluding people from or creating barriers to lawful altruistic surrogacy in Western Australia meant some people were led into much risker situations involving commercial arrangements, multiple embryo transfers, and more overseas.\(^{266}\)

9.31 In her evidence to the Committee, Dr Allan outlined the risks which may apply to surrogate mothers in addition to the risks that apply to women in every pregnancy situation.\(^{267}\) However, Dr Allan was of the view that risks to surrogate mothers can be managed by appropriate counselling and informed voluntary consent.\(^{268}\)

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\(^{263}\) Submission 18 from Joan Smurthwaite, 18 April 2019.

\(^{264}\) Dr Sonia Allan, Email, 29 May 2019, Attachment 2, Question 2, p 2.

\(^{265}\) Dr Sonia Allan, Email, 29 May 2019, Attachment 2, Question 2, p 3.

\(^{266}\) ibid., p 4.

\(^{267}\) Dr Sonia Allan, Legal academic and consultant, Transcript of evidence, 20 May 2019, pp 29-30.

\(^{268}\) Dr Sonia Allan, Email, 29 May 2019, Attachment 2, Question 2, p 2.
9.32 The Department was asked how many surrogacy pregnancies were underway in Western Australia, and how many have resulted in a live birth. The Department’s answer was as follows:

As of 22 May 2019, there have been 19 pregnancies and 14 live births through surrogacy in WA.

NB: these data cannot be used to derive any conclusions about the incidence of pregnancy loss for surrogacy compared to other cohorts. Also, these data exclude current ongoing pregnancies.  

9.33 Some submissions suggested that, as the Bill may result in an increase in the number of surrogacy arrangements in Western Australia, it may in turn result in an increase in negative outcomes for children born as a result of surrogacy in Western Australia.

9.34 The Committee did not inquire into this issue, but the issue was raised with some witnesses.

9.35 As with general considerations as to the best interests and welfare of children, in the Committee’s view this consideration applies to all children born as a result of surrogacy, whether in Western Australia or internationally. In the Committee’s view, outcomes are likely to be better managed in Western Australia than in some international jurisdictions.
10.1 The Committee has made findings and recommendations to:

- clarify the operation of the current HRT Act and Surrogacy Act
- improve the operation of the Bill, if passed.

10.2 The Committee commends the report to the House.

Hon Dr Sally Talbot MLC
Chair
# APPENDIX 1

## STAKEHOLDERS CONTACTED, SUBMISSIONS RECEIVED AND PUBLIC HEARINGS

### Stakeholders contacted

<table>
<thead>
<tr>
<th>Number</th>
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<tbody>
<tr>
<td>1</td>
<td>Hon Roger Cook MLA, Minister for Health</td>
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<td>2</td>
<td>Department of Health</td>
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<td>3</td>
<td>Reproductive Technology Council</td>
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<td>4</td>
<td>Dr Sonia Allan</td>
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<td>5</td>
<td>Australian Human Rights Commission</td>
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<td>Western Australian Equal Opportunity Commission</td>
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### Submissions received

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<td>Jasmine Shah</td>
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<td>Matthew Pincott-Clements</td>
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<td>Adoptee Rights Australia Inc.</td>
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## Public hearings held

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<td>20 May 2019</td>
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<tr>
<td></td>
<td>o Dr David Russell-Weisz, Director General</td>
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<td>o Dr Duncan Williamson, Assistant Director General</td>
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<td>o Jane Laurence, Director/Counsel – Legal and Legislative Services</td>
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<td>o Dr Maureen Harris, Manager Reproductive Technology Unit</td>
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<td>20 May 2019</td>
<td>• Dr Sonia Allan</td>
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<td>20 May 2019</td>
<td>• Reproductive Technology Council</td>
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<td></td>
<td>o Dr Brenda McGivern, Chair</td>
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<td>22 May 2019</td>
<td>• Office of the Commissioner for Children and Young People</td>
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<td>o Colin Pettit, Commissioner</td>
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<td>o Patricia Heath, Director, Policy and Research</td>
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<td></td>
<td>o Lynton Bennett, Principal Policy officer</td>
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APPENDIX 2

OPINION FROM GREG MCINTYRE SC

GREG MCINTYRE, S.C.
BARRISTER

MEMORANDUM OF ADVICE

Introduction

I am instructed that the Standing Committee on legislation is considering the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 (Bill) proposes amendments to the Human Reproductive Technology Act 1994 (WA) (HRT Act) and the Surrogacy Act 2008 (WA) (Surrogacy Act) and is seeking an opinion on the following questions:

1.1 Are any parts of the HRT Act and/or the Surrogacy Act inconsistent with the Sex Discrimination Act 1984 (Cth) (Sex Discrimination Act)?
1.2 If so:
Which sections of the Sex Discrimination Act give rise to inconsistency?
1.2.2 Which sections of the HRT Act and/or the Surrogacy Act are inconsistent with the Sex Discrimination Act and how are they inconsistent?
1.2.3 Does such inconsistency remain in light of the exemption in section 31 of the Sex Discrimination Act? If so, how?
1.2.4 What are the consequences of inconsistency?
1.2.5 Did the effect of inconsistency change upon the repeal of regulation 5 of the Sex Discrimination Regulations 1984 (Cth) on 1 August 2017?
1.2.6 To what extent do the amendments proposed by the Bill rectify the inconsistency?
1.2.7 Can any inconsistency be rectified only by the extension of access to surrogacy to

LEVEL 3, COUNCIL HOUSE, 27-29 ST GEORGE'S TCE
PERTH, WESTERN AUSTRALIA 6050

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Mr Nigel Pratt
Clerk of the Legislative Council
Office of the Clerk
Legislative Council
Parliament House
4 Harvest Terrace
West Perth WA 6005

Email: clerkc@parliament.wa.gov.au
single men and male couples, as proposed by the Bill?
1.3 Would the amendments proposed by the Bill give rise to any inconsistency with the Sex Discrimination Act not present in the existing law?
1.4 If so:
1.4.1 Which sections of the Sex Discrimination Act would give rise to inconsistency?
1.4.2 Which sections of the HRT Act and/or the Surrogacy Act as amended would be inconsistent with the Sex Discrimination Act and how would they be inconsistent?
1.4.3 What would be the consequences of inconsistency?
1.5 Do any parts of the HRT Act and/or the Surrogacy Act conflict with the Equal Opportunity Act 1984 (Equal Opportunity Act)?
1.6 If so:
1.6.1 Which sections of the HRT Act and/or the Surrogacy Act give rise to the conflict?
1.6.2 What are the consequences of the conflict?
1.6.3 To what extent do the amendments proposed by the Bill resolve the conflict?
1.7 Would the amendments proposed by the Bill give rise to any conflict with the Equal Opportunity Act not present in the existing law?
1.8 If so:
1.8.1 Which sections of the HRT Act and/or the Surrogacy Act as amended would give rise to the conflict?
1.8.2 What would be the consequences of the conflict?
2.1 Does the making of a parentage order under section 19 of the Surrogacy Act constitute a ‘service’ for the purposes of section 22 of the Sex Discrimination Act?
2.2 If not, does a combined reading of section 19 of the Surrogacy Act and section 23 of the HRT Act result in inconsistency with section 22 of the Sex Discrimination Act and with what result?
2.3 Would section 19 of the Surrogacy Act and/or section 23 of the HRT Act as amended by the Bill require or allow discrimination against women contrary to section 22 of the Sex Discrimination Act in the provision of IVF services (for the purposes of surrogacy or otherwise) by:
   2.3.1 requiring that women have ‘medical reasons’ for being unable or likely to be unable to conceive or give birth to a child?
   2.3.2 excluding age from ‘medical reasons’ for the purposes of section 19(2) of the Surrogacy Act and section 23(1) of the HRT Act?
2.4 In the case of IVF for the purposes of surrogacy, would section 19(1A)(b)(ii) of the Surrogacy Act and/or section 23(1)(a)(iv) of the HRT Act as amended by the Bill require or allow discrimination against female couples contrary to section 22 (by reference to section 5 or 5A) of the Sex Discrimination Act by requiring that both members of a female couple be ‘eligible women’ as defined in section 19(2) of the Surrogacy Act?
2.5 Would section 19 of the Surrogacy Act and/or section 23 of the HRT Act as amended by the Bill require or allow discrimination against transgender and/or intersex people contrary to section 22 (by reference to section 5B or section 5C) of the Sex Discrimination Act?

Context

The Second reading speech for the Bill stated:

The main amendments to the current legislation within this Bill respond to the 2013 amendments to the Sex Discrimination Act 1984 (Cth), which made discrimination on the grounds of sexual orientation, gender identity and intersex status, unlawful in all
States and Territories.
Commonwealth regulations that were in place exempting the HRT Act and
Surrogacy Act from application of the Sex Discrimination Act, expired on 31 July
2017. Failure to respond to this, would be unwise due to an unacceptable risk of
litigation and the prospect of provisions of the relevant State legislation (HRT Act)
being held by a court to be invalid.

The amendments will -
o firstly, provide equitable access to surrogacy through use of assisted
reproductive technology for male same-sex couples and single men, and
o secondly, enable licensed fertility clinics and practitioners to provide such
services without discrimination on the basis of sex and sexual orientation, in
compliance with Commonwealth and State legislation (Equal Opportunity Act
1984 (WA)).

‘Commonwealth regulations’ in the second reading speech refers to regulation 5 of the Sex
Discrimination Regulations 1984 (Cth). Regulation 5 was inserted in 2013 by the Sex
Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Statuses)
Regulation 2013 (Cth) and reads as follows:

5. Exemption for things done in direct compliance with prescribed laws
(1) For subsection 40(2B) of the Act, all laws of the Commonwealth, the
States and the Territories, as in force on 1 August 2013, are
prescribed.

Note: Subsection 40(2B) provides for an exemption from Divisions 1 and 2 of
Part II (prohibition of discrimination) of the Act as applying by reference
to section 5A (sexual orientation), 5B (gender identity) or 5C (intersex
status) of the Act. The exemption applies to things done in direct
compliance with a prescribed law of the Commonwealth, a State or a
Territory.

(2) This regulation ceases to have effect at the end of 31 July 2014 as if it
had been repealed by another regulation.

A new regulation 5 was substituted in 2016,2 as follows:
5. Exemption for things done in direct compliance with prescribed laws
(1) For the purposes of subsection 40(2B) of the Act, the following laws
are prescribed:
(a) the Human Reproductive Technology Act 1991 (WA);
(b) the Surrogacy Act 2008 (WA).

Note: Subsection 40(2B) provides for an exemption, in relation to anything
done by a person in direct compliance with a prescribed law, from
Divisions 1 and 2 of Part II (prohibition of discrimination) of the Act, as
applying by reference to:
(a) section 5A (sexual orientation); or
(b) section 5B (gender identity); or
(c) section 5C (intersex status).

(2) This regulation is repealed at the start of 1 August 2017.
The *Sex Discrimination Act 1984* (Cth) (SDA) s 5 defines sex discrimination as follows:

**Sex discrimination**

(1) For the purposes of this Act, a person (in this *subsection* referred to as the *discriminator*) discriminates against another person (in this *subsection* referred to as the *aggrieved person*) on the ground of the sex of the aggrieved person if, by reason of:

(a) the sex of the aggrieved person;

(b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or

(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different sex.

(2) For the purposes of this Act, a person (the *discriminator*) discriminates against another person (the *aggrieved person*) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

It also defines in a similar form discrimination on the grounds of sexual orientation (s 5A), gender identity (s 5B), intersex status (s 5C), marital or relationship status (s 6), pregnancy or potential pregnancy (s 7), breast feeding (s 7AA) and family responsibilities (s 7A).

The SDA defines Indirect Discrimination as follows:

**Indirect discrimination: reasonableness test**

(1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in *subsection* 5(2), 5A(2), 5B(2), 5C(2), 6(2), 7(2) or 7AA(2) if the condition, requirement or practice is reasonable in the circumstances.

(2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
(b) the feasibility of overcoming or mitigating the disadvantage; and

(c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

The SDA includes in Division 4, entitled “Exemptions” s 31, which provides:

**Pregnancy, childbirth or breastfeeding**

Nothing in Division 1 or 2 renders it unlawful for a person to discriminate against a man on the ground of his sex by reason only of the fact that the first-mentioned person grants to a woman rights or privileges in connection with pregnancy, childbirth or breastfeeding.

**EOA**

The *Equal Opportunity Act 1984* (WA) (EOA) in Part II, Division 2 mirrors those definitions for discrimination on the ground of sex (s 8), marital status (s 9), pregnancy (s 10) and breast feeding (s 10A). It applies those prohibitions against discrimination to discrimination in work (Div 2, ss 11-17), education (s 18), access to places and vehicles (s 19), goods, services and facilities (s 20), accommodation (s 21), land (s 21A) and clubs (s 22).

The EOA sets out the following provision in Part II, Division 5 as “Exceptions to Part II”

**28. Pregnancy or childbirth**

Nothing in Division 2 or 3 renders it unlawful for a person to discriminate against a man on the ground of his sex by reason only of the fact that the first-mentioned person grants to a woman rights or privileges in connection with pregnancy, childbirth, breast feeding or bottle feeding.

Unlawful discrimination is treating, or proposing to treat, someone *unfavourably* because of a personal characteristic protected by the law.

The so-called pregnancy and childbirth “exemption” in the SDA and “exception” in the EOA have some relevance to the HRT Act and Surrogacy Act, but it in my view they do not truly amount to an exception or exemption and merely declare, for the avoidance of doubt, that according one person a right or privilege does not have the effect of denying another a right. In any event those provisions make it clear that the according of such rights cannot amount to a breach of the SDA or EOA.

**HRT Act**

It is proposed by the Bill to amend the HRT Act to amend s 21(i)(ii) by deleting the words “whether they are different sexes or both female” That amendment is necessary to avoid inconsistency with the SDA and EOA because, without the amendment a same-sex male couple would be denied the capacity to consent to dealings with egg or embryos on their behalf.
The proposed amendment of s 22(1)(e)(ia) to replace “woman” with “person” and “her” with “person’s”. Those amendments are necessary to avoid inconsistency with the SDA and EOA. Without the amendments the HRT Act would continue to treat less favorably a male, or intersex person on whose behalf a human egg or embryo is being developed.

The Bill proposes to amend s 23(1)(c) of the HRT Act by deleting the words “and are of the opposite sex”. Those words unlawfully discriminate on the basis of sex, sexual orientation and marital status, denying a couple of the same sex the right to benefit from an IVF procedure. Their deletion is necessary to avoid inconsistency with the SDA and EOA.

If one starts with the proposition that a healthy male is unable to conceive for a physiological or social reason rather than a “medical” reason, with “medical” may be interpreted as being used in the HRT Act to mean something requiring to be cured therapeutically, then the HRT Act s 23(1)(a) makes no allowance for a single male or male couple or person or persons of inter-sex status having access to the procedure, thus treating persons in those categories less favorably, inconsistently with the SDA ss 5, 5A, 5B and 22 and the EOA ss 8 and 20.

Without the amendments, the denial of a person of an IVF procedure because of the operation of the HRT Act S 23(1)(c) unamended would be the denial of a service, being the IVF procedure, on the ground of the sex, gender identity or inter-sex status of the person, contrary to s 22 of the SDA and the EOA s 20. The provision is thus inconsistent with SDA and EOA.

Section 23(1)(a)(iv), which is proposed by the Bill to be added to the HRT Act provides that an IVF procedure may be carried out where the procedure -

is for the purposes of a surrogacy arrangement that is lawful and for which there are medical or social reasons under the Surrogacy Act 2008 section 19(1A).

It is gender neutral and does not infringe any provision of the SDA or EOA.

Surrogacy Act

Sub-section 19(2) of the Surrogacy Act presently breaches the SDA and EOA because it limits an “eligible couple” to “2 people of opposite sexes” and sub-section 19(3) does also by using the term “eligible couple” as defined in sub-section 19(2). The proposed amendments to those provisions in the Bill eliminate those inconsistencies with the SDA and EOA.

It is proposed by the Bill to insert in lieu of s 19(2) of the Surrogacy Act the following -

(1A) For the purposes of subsection (1)(b), there are medical or social reasons for a surrogacy arrangement if—
(a) in the case of a surrogacy arrangement involving 1 arranged parent, the arranged parent is an eligible woman or a man; or
(b) in the case of a surrogacy arrangement involving 2 arranged parents, the arranged parents are married to, or in a de facto relationship with, each other and are —
(i) an eligible woman and a man; or
(ii) 2 eligible women; or
(iii) 2 men.
(2) In subsection (1A) — eligible woman means a woman who —
(a) is likely to be unable to conceive a child due to medical reasons not excluded by subsection (3); or
(b) although able to conceive a child, is likely to be unable to give birth to a child due to medical reasons; or
(c) although able to conceive a child, is likely to conceive a child affected by a genetic abnormality or a disease.

These provisions discriminate against a couple comprising two females, on the ground of sex, contrary to s 5 of the SDA, where one is eligible and another is not, on the basis of the sex of the ineligible woman, because the provision treats such a couple less favourably than it does a 2 men who are not required to be ‘eligible’ and a heterosexual couple where the male is not required to be ‘eligible’. It also indirectly discriminates on the ground of sexual orientation, contrary to s 5A of the SDA, by effectively imposing a requirement on a female that her sexual orientation be different in order to be an ‘eligible woman’.

In order not to be inconsistent with the SDA on the basis of sex, it would need to delete the word “eligible” from sub-paragraph 19(1A)(b)(ii) and amend s 19(2) to replace the word “woman” with “person”, creating a definition of “eligible person”.

Without the amendments I have suggested being made, there would be a prohibition upon two women in a same-sex relationship, where one of them did not have a medical reason for being unable to conceive a child, from being permitted to enter into a surrogacy relationship, where one of the couple did not choose to conceive a child and the other was an “eligible woman” unable to conceive a child.

The provision is also discriminatory on the basis of intersex status and gender identity, disadvantaging persons who do not fit the binary categories referred to of “woman” or “man”.

In order to avoid those forms of discrimination and s 19(1A) and (2) of the Surrogacy Act having a discriminatory interaction with s 23(1)(a)(iv) of the HRT Act, Section 19(1A) and (2) would need to be amended to read:

(2) For the purposes of subsection (1)(b), there are medical or social reasons for a surrogacy arrangement if a person is -

(a) likely to be unable to conceive a child; or
(b) although able to conceive a child, is likely to be unable to give birth to a child; or
(c) although able to conceive a child, is likely to conceive a child affected by a genetic abnormality or a disease.

It is also to be noted that sub-section 19(3) provides as follows:

(3) The medical reasons for being unable to conceive a child that are referred to in the definitions of eligible couple and eligible person do not include —

(a) a reason arising from a person’s age; or
(b) a reason prescribed for the purpose of the Human Reproductive Technology Act 1991 section 23(1)(d).
Sub-paragraph 19(3)(a) is inconsistent with the Age Discrimination Act 2004 (Cth) s 14 and a decision based on that section would be contrary to s 28 of that Act, which prohibits discrimination on the ground of age. Sub-paragraph 19(3)(a) should be deleted. It may be possible to devise a reason to prescribe under the Human Reproductive Technology Act 1991 section 23(1)(d) related to health, rather than a generalisation as to age which achieves the aim of the provision, which I imagine was intended to reduce expenditure on reproductive technology where a person was regarded as well beyond ordinary child-bearing capacity. That may be able to be determined medically, rather than being assumed based upon age.

The process of surrogacy is a service. The prohibition on entering into a surrogacy arrangement would result in providers of that service acting in accordance with the Surrogacy Act refusing to provide that service and unlawfully discriminating on the grounds of sex and sexual orientation, contrary to the SDA s 22, the EOA s 20 and the Age Discrimination Act, as it is presently proposed to be enacted.

HRT Act and Surrogacy Act generally

I can see nothing else in the provisions of the the HRT Act or the Surrogacy Act inconsistent with the SDA or EOA because it disadvantages a person on the basis of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breast feeding or family responsibilities.

Parentage Order

A parentage order is provided for under the Surrogacy Act. The Act provides as follows:

26. Effect of parentage order

(1) The effect of a parentage order is that, for the purposes of the law of this State —

(a) the relationship between the child whose parentage is transferred and each of the arranged parents is to be treated as being that of child and parent; and

(b) the relationship between the child whose parentage is transferred and each of the child’s birth parents is to be treated as not being that of child and parent; and

(c) the relationships of all persons to the child whose parentage is transferred, to each of the arranged parents, and to each of the birth parents of the child are to be determined in accordance with this section. (2) If a parentage order is made, an appointment, in a deed or will existing at the time the parentage order is made, of a person as the guardian of the child whose parentage is transferred, ceases to have effect.

The effect of a parentage order is to declare rights.
The question is posed as to whether the making of a parenting order is a “service”, as that terms is used under the SDA.

The SDA s 4 provides that -

"services" includes:

(a) services relating to banking, insurance and the provision of grants, loans, credit or finance;
(b) services relating to entertainment, recreation or refreshment;
(c) services relating to transport or travel;
(d) services of the kind provided by the members of any profession or trade; and
(e) services of the kind provided by a government, a government authority or a local government body.

It is an inclusive definition which does not take it beyond its ordinary meaning.

The declaration of rights comprised in a parentage order is not a service.

Conclusions

On the basis of the discussion above my answers to the specific questions raised are:

1.1 Are any parts of the HRT Act and/or the Surrogacy Act inconsistent with the Sex Discrimination Act 1984 (Cth) (Sex Discrimination Act)?

Yes

1.2 If so:
Which sections of the Sex Discrimination Act give rise to inconsistency?

Sections 5, 5A, 5B, 5C and 22.

1.2.2 Which sections of the HRT Act and/or the Surrogacy Act are inconsistent with the Sex Discrimination Act and how are they inconsistent?

The HRT Act s 23(1)(c) and sub-sections 19(2) and (3) of the Surrogacy Act are inconsistent by treating a person less favorably because that person is of a sex, gender identity or inter-sex status which is not the opposite sex of a person who forms a couple with that person.

1.2.3 Does such inconsistency remain in light of the exemption in section 31 of the Sex Discrimination Act? If so, how?

Section 31 of the SDA does not operate to eliminate the sexual discrimination occasioned by the operation of sub-sections 19(2) and (3) of the Surrogacy Act and 25(1)(c) of the HRT
Act, as identified in 1.2.2 above, because it operates only on the events of pregnancy, childbirth, breast feeding or bottle feeding. The process of IVF and significant aspects of the transaction of surrogacy precede pregnancy, childbirth and breast feeding or bottle feeding

1.2.4 What are the consequences of inconsistency?

The consequence of inconsistency is that because the inconsistency is between Commonwealth and State legislation those provisions of State legislation are invalid as a result of the operation of s 109 of Constitution (Cth). The legislation would thus be read down by a Court, if the matter was challenged in Court, and subsequently applied as if the words “and are of the opposite sex” did not appear in s 23(1)(c) of the HRT Act and the words “and are of the opposite sex” did not appear in sub-section 19(2) of the Surrogacy Act: Western Australia v Commonwealth (1995) 183 CLR 373 at 451. University of Woolongong v Metwally (1984) 158 CLR 447. However, a State administrator of the provision would probably feel constrained, in the absence of such a court ruling to apply the words as in the State legislation, in a discriminatory fashion, unless and until such a challenge was successfully mounted.

1.2.5 Did the effect of inconsistency change upon the repeal of regulation 5 of the Sex Discrimination Regulations 1984 (Cth) on 1 August 2017?

Yes, change occurred because of the repeal of that regulation had an impact in relation to the application it had to sexual orientation, gender identity and intersex status as defined in sections 5A, 5B and 5C of the SDA.

1.2.6 To what extent do the amendments proposed by the Bill rectify the inconsistency?

The amendments proposed by the Bill eliminate the inconsistency, except for what is said below about s 19(1A).

1.2.7 Can any inconsistency be rectified only by the extension of access to surrogacy to single men and male couples, as proposed by the Bill?

In part. However, it needs to be entirely gender neutral, rather than a shift only to extend the service to men or male couples. It needs to avoid binary gender references, so as to not exclude persons of inter-sex status or discriminate against a person on the basis of gender identity.

1.3 Would the amendments proposed by the Bill give rise to any inconsistency with the Sex Discrimination Act not present in the existing law?

Yes.

1.4 If so:
1.4.1 Which sections of the Sex Discrimination Act would give rise to inconsistency?

Sections 5, 5A, 5B, 5C and 22.

1.4.2 Which sections of the HRT Act and/or the Surrogacy Act as amended would be inconsistent with the Sex Discrimination Act and how would they be inconsistent?
Section 19(1A) and (2) of the Surrogacy Act and s 23(1)(a)(iv) of the HRT Act.

1.4.3 What would be the consequences of inconsistency?

Those sections of the Surrogacy Act and HRT Act would be inoperative and they would be read down to exclude the words giving rise to the inconsistency, so as to have an operation as though the legislation is read as I have suggested above it should be amended to read.

1.5 Do any parts of the HRT Act and/or the Surrogacy Act conflict with the Equal Opportunity Act 1984 (Equal Opportunity Act)?

Yes.

1.6 If so:
1.6.1 Which sections of the HRT Act and/or the Surrogacy Act give rise to the conflict?

The HRT Act s 23(1)(c) and sub-sections 19(2) and (3) of the Surrogacy Act are inconsistent with the EOA by treating a person less favorably because that person is of a sex which is a particular sex which is not the opposite sex of a person who forms a couple with that person and also treats persons less favorably on the basis of sexual orientation, gender identity and inter-sex status.

1.6.2 What are the consequences of the conflict?

Because the HRT was enacted in 1991 and the Surrogacy Act was enacted in 2008, both after the enactment of the EOA in 1984, the ordinary rule of statutory construction which applies, where there is an inconsistency between pieces of legislation enacted by the same Parliament, is that the Parliament’s intention is presumed to be to repeal the earlier legislation to the extent of its inconsistency with later legislation, so that the effect of the later legislation will prevail to favour the HRT Act and Surrogacy Act over the EOA, causing those administering the HRT Act and Surrogacy Act to do so in a way which discriminates on the basis of sex, which includes matters related to sex, i.e., gender identity, sexual orientation and inter-sex status.

1.6.3 To what extent do the amendments proposed by the Bill resolve the conflict?

The amendments resolve the conflict, subject to what is said below about s 19(1A).

1.7 Would the amendments proposed by the Bill give rise to any conflict with the Equal Opportunity Act not present in the existing law?

The proposed amendments give rise to a conflict with the EOA not presently existing.

1.8 If so:
1.8.1 Which sections of the HRT Act and/or the Surrogacy Act as amended would give rise to the conflict?

The proposed amendments give rise to a conflict with the EOA sections 8 (sex discrimination) and 20 (discrimination in the provision of services).
1.8.2 What would be the consequences of the conflict?

Because the HRT was enacted in 1991 and the Surrogacy Act was enacted in 2008, both after the enactment of the EOA in 1984, the ordinary rule of statutory construction where there is an inconsistency between pieces of legislation enacted by the same Parliament is that the Parliament’s intention is to repeal the earlier legislation to the extent of its inconsistency with later legislation, so that the effect of the later legislation will prevail to favour the HRT Act and Surrogacy Act over the EOA, causing those administering the HRT Act and Surrogacy Act to do so in a way which discriminates on the basis of sex, which includes matters related to sex, i.e., gender identity and inter-sex status.

2.1 Does the making of a parentage order under section 19 of the Surrogacy Act constitute a ‘service’ for the purposes of section 22 of the Sex Discrimination Act?

No.

2.2 If not, does a combined reading of section 19 of the Surrogacy Act and section 23 of the HRT Act result in inconsistency with section 22 of the Sex Discrimination Act and with what result?

No

2.3 Would section 19 of the Surrogacy Act and/or section 23 of the HRT Act as amended by the Bill require or allow discrimination against women contrary to section 22 of the Sex Discrimination Act in the provision of IVF services (for the proposes of surrogacy or otherwise) by:

2.3.1 requiring that women have ‘medical reasons’ for being unable or likely to be unable to conceive or give birth to a child?

Yes. A pre-requisite for the provision of the service which applies only to women is a distinction based on sex and so is made unlawful by the SDA.

2.3.2 excluding age from ‘medical reasons’ for the purposes of section 19(2) of the Surrogacy Act and section 23(1) of the HRT Act?

Excluding age from the medical reasons for refusing the service would not breach the SDA but does breach the Age Discrimination Act 2004 (Cth) s 14.

2.4 In the case of IVF for the purposes of surrogacy, would section 19(1A)(b)(ii) of the Surrogacy Act and/or section 23(1)(a)(iv) of the HRT Act as amended by the Bill require or allow discrimination against female couples contrary to section 22 (by reference to section 5 or 5A of the Sex Discrimination Act) by requiring that both members of a female couple to be ‘eligible women’ as defined in section 19(2) of the Surrogacy Act?

Yes. Section 19(1A)(b)(ii) of Surrogacy Act does discriminate against a couple comprising two females, on the ground of sex, contrary to s 5 of the SDA, where one is eligible and another is not on the basis of the sex of the ineligible woman, because the provision treats...
such a couple less favourably than it does 2 men, who are not required to be ‘eligible’ and a heterosexual couple where the male is not required to be ‘eligible’. It also indirectly discriminates on the ground of sexual orientation, contrary to s 5A of the SDA, by effectively imposing a requirement on a female that her sexual orientation be different in order to be an ‘eligible woman’.

Section 23(1)(a) (iv) of the HRT is gender neutral, so does not infringe the SDA.

2.5 Would section 19 of the Surrogacy Act and/or section 23 of the HRT Act as amended by the Bill require or allow discrimination against transgender and/or intersex people contrary to section 22 (by reference to section 5B or section 5C) of the Sex Discrimination Act?

Yes, section 19 of the Surrogacy Act and section 23 of the HRT Act as amended by the Bill require or allow discrimination against transgender and/or intersex people contrary to section 22 (by reference to section 5B or section 5C) of the Sex Discrimination Act.

G M G McIntyre SC
5 June 2019
APPENDIX 3

OPINION FROM SOLICITOR GENERAL

SOLICITOR-GENERAL
WESTERN AUSTRALIA

INCONSISTENCY BETWEEN HUMAN REPRODUCTIVE TECHNOLOGY ACT 1991 (WA), SURROGACY ACT 2008 (WA), SEX DISCRIMINATION ACT 1984 (CTH) AND EQUAL OPPORTUNITY ACT 1984 (WA)

OPINION

Introduction


2. I have effectively been asked whether the reproductive technology legislation, without the proposed amendments contained in the Bill, is inconsistent with the Sex Discrimination Act 1984 (Cth) or the Equal Opportunity Act 1984 (WA). I shall refer to the Sex Discrimination Act and the Equal Opportunity Act together as the “anti-discrimination legislation”. I have also been asked whether the proposed amendments contained in the Bill rectify any inconsistency which I may identify. I will address the specific questions upon which I have been asked to advise at the end of this opinion.

3. Nothing in this advice concerns whether the proposed amendments contained in the Bill are desirable or undesirable as a matter of public policy. This opinion is solely concerned with the legality of the present versions of the reproductive technology legislation, and whether the Bill adequately addresses any legal problems in the existing legislation which I may identify.

In vitro Fertilisation and Artificial Insemination

4. Section 23 of the HRT Act governs the circumstances in which an “in vitro fertilisation procedure” may be carried out in Western Australia.

5. Broadly, section 3(1) of the HRT Act defines an “in vitro fertilisation procedure” as a procedure which is consequent upon the removal of a human egg from the body of a woman, or a procedure directed at introducing a human egg into the body of a woman, for fertilisation purposes.

6. This is different from an “artificial insemination procedure”, which does not involve a human egg outside the body of a woman. Section 3(1) defines an “artificial insemination procedure” as a procedure where human sperm is introduced, by a non-coital method, into the reproductive system of a woman but which is not, and is not an integral part of, an in vitro fertilisation procedure.

7. Section 23(1) of the HRT Act prescribes a number of conditions which must be satisfied before an in vitro fertilisation procedure may be carried out. There are no particular conditions for carrying out an artificial insemination.

Level 28, David Malcolm Justice Centre, 28 Barrack Street, Perth, Western Australia 6000
Telephone: (08) 9261 1806  Facsimile: (08) 9261 1385
e-mail: solgen@justice.wa.gov.au
procedure, except that the person performing the procedure shall be licensed to do so or exempt from having a licence. See sections 6(1) and 28(3) of the HRT Act. The sex and condition of the persons involved in the procedure are not prescribed in the HRT Act or the Human Reproductive Technology Regulations 1993 (WA).

The Persons who Qualify for an In Vitro Fertilisation Procedure: HRT Act

8. Section 23(1)(a) prescribes the persons who must be likely to benefit from the procedure. An in vitro fertilisation procedure can only be carried out when it is likely to benefit one of four categories of person. Two categories relate specifically to the availability of an in vitro fertilisation procedure for a woman, one category relates to the availability for a "couple", and one category relates to the availability for both a woman and a "couple".

9. The first category is where there is a woman who is unable to conceive a child due to medical reasons. See section 23(1)(a)(i).

10. A second category is where a woman is unable to give birth to a child due to medical reasons and is a party to a lawful surrogacy arrangement, as defined in section 3 of the Surrogacy Act. See section 23(1)(a)(ii).

11. A third category is where there are persons who, "as a couple", are unable to conceive a child due to medical reasons. See section 23(1)(a)(iii).

12. A fourth category is where there is "a couple" or a woman whose child would otherwise be likely to be affected by genetic abnormality or a disease. See section 23(1)(a)(iv).

13. A "couple" is defined, for the purposes of section 23(1)(a) in section 23(1)(c). It means persons who are "married to each other" or "in a de facto relationship with each other".

14. Prior to 8 December 2017, this definition of "couple" would have confined the availability of an in vitro fertilisation procedure to couples who were of the opposite sex. That is because, prior to 8 December 2017, the definition of "married" would have been read in the context of the Marriage Act 1961 (Cth), which defined "marriage" as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

15. On 8 December 2017, the definition of "marriage" contained in the Marriage Act 1961 was changed by the Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth), to mean the union of 2 people to the exclusion of all others, voluntarily entered into for life. This now comprehends marriage between same-sex couples.

16. As a consequence of this change, an in vitro fertilisation procedure would be available to a same-sex couple who have become married, where they are "unable to conceive a child due to medical reasons" or "whose child would otherwise be likely to be affected by genetic abnormality or a disease". However, I do not consider that, practically, this would expand the availability of an in vitro fertilisation procedure to same-sex couples.
17. That is because, the concept of “medical reasons” was enacted at a time when Parliament contemplated that *in vitro* fertilisation procedures would only be available to couples of opposite sex. In those circumstances, the nature of the “medical reasons” contemplated by Parliament at that time would not have included an inability for a couple to conceive due to a couple being of the same sex. That is confirmed by the definition of “couple” in section 23(1)(c) which was adopted by the WA Parliament at the time, and which continues to be present in the *HRT Act*, which was carefully designed at the time to exclude same-sex couples.

18. Similarly, I do not consider that a same-sex couple would be able to claim that they are within the category of a “couple … whose child would otherwise be likely to be affected by a genetic abnormality or a disease”, simply because they are of the same sex. In context, this category follows two previous categories, in sections 23(1)(i) and (ia), relating to the inability of “a couple” or a woman to conceive a child due to medical reasons. Consequently, this further category, which refers to “a couple or a woman” whose child would otherwise be likely to be affected by a genetic abnormality or a disease is concerned with a situation where a couple or a woman is able to conceive, but the child who is conceived is likely to be adversely affected.

19. For these reasons, as a matter of substantive operation, I consider that the present form of sections 23(1)(a) and (c) of the *HRT Act* only permit an *in vitro* fertilisation procedure to be carried out where the procedure is likely to benefit:

(a) persons who, as an opposite-sex married or de facto couple, are unable to conceive a child due to medical reasons; or

(b) a woman who is unable to conceive a child due to medical reasons; or

(c) an opposite-sex married or de facto couple or a woman whose child would otherwise be likely to be affected by a genetic abnormality or a disease; or

(d) a woman who is unable to give birth to a child due to medical reasons and is a party to a surrogacy arrangement (as defined in the *Surrogacy Act*, section 3) that is lawful.

20. Where there is a same-sex married or de facto female couple, and one member of that couple is unable to conceive a child due to medical reasons, or is unable to give birth to a child due to medical reasons, that member of the same-sex couple would be able to qualify for an *in vitro* fertilisation procedure if this was likely to benefit her.

21. Where there is a same-sex married or de facto male couple, that couple would not be able to make an arrangement with a particular female for that female to undergo an *in vitro* fertilisation procedure. That is because no member of the same-sex male married or de facto couple would qualify as a person likely to benefit from an *in vitro* fertilisation procedure, given the present terms of sections 23(1)(a) and (c) of the *HRT Act*. No person in the couple would be a woman, so sections 23(1)(a)(ia) and (iii) would not apply. As I have explained, the reason why the couple were unable to conceive would not be
regarded as due to medical reasons. Hence, section 23(1)(a)(i) would not apply. Lastly, neither the male couple, nor any woman, would be able to say that they could conceive but their child would otherwise be likely to be affected by a genetic abnormality or a disease. Hence, section 23(1)(a)(ii) would not apply.

22. There is a further reason why a same-sex married or de facto male couple would not qualify for an in vitro fertilisation procedure, within the category stated in section 23(1)(a)(iii). Apart from that category being limited to a woman, it is not possible for a lawful surrogacy arrangement to be entered under the Surrogacy Act for reasons which I will now outline.

The Surrogacy Act

23. Section 19 of the Surrogacy Act presently only contemplates lawful surrogacy arrangements being entered as a basis for obtaining a parentage order where the arranged parents of the child carried by a surrogate mother are of opposite sexes.

24. As explained, this would separately prevent a same-sex married or de facto male couple from having the benefit of access to an in vitro fertilisation procedure, even if the HRT Act permitted such access.

25. There may also be other instances where a same-sex married or de facto male couple is unconcerned by the specific identity of a surrogate mother. The important issue for such a couple may be the artificial insemination of any appropriate surrogate mother and the fertilisation of her eggs, as opposed to the need for an in vitro fertilisation procedure to take place in respect of particular female eggs belonging to a woman benefitting from the procedure.

26. In such cases, entirely apart from the qualification requirements of the HRT Act for those who wish to undertake an in vitro fertilisation procedure, the Surrogacy Act would also not permit the same-sex male couple to utilise an artificial insemination procedure with a surrogate mother.

The Sex Discrimination Act

27. Among other things, section 22 of the Sex Discrimination Act makes it unlawful for a person who provides goods or services, or makes facilities available, to discriminate against another person on the ground of that other person's sexual orientation, or marital or relationship status, by refusing to provide that other person with the goods or services, or to make the facilities available to the other person. This applies to the Crown in right of a State.

28. In this context, discrimination upon the basis of a person's sexual orientation means that an aggrieved person is treated less favourably on the ground of his or her sexual orientation than, in circumstances that are the same or are not materially different, to the way in which another person who has a different sexual orientation would be treated. See section 5A.

29. Likewise, discrimination upon the basis of a person's marital or relationship status means that an aggrieved person is treated less favourably than another person on the ground of that person's marital or relationship status than, in circumstances that are the same or are not materially different, to the way in
which another person who has a different marital or relationship status would be treated. See section 6.

30. Section 22 applies to the provision of services or facilities. The term “services” includes services of the kind provided by the members of any profession or trade, and services of the kind provided by a government, a government authority or a local government body. It has been held that the provision of medical services for the purposes of carrying out an *in vitro* fertilisation procedure attracts the operation of section 22, as the services are of the kind provided by the members of any profession or trade. See *McBain v Victoria* [2000] FCA 1009; (2000) 99 FCR 116 at [10]. In my view, the provision of services by a public medical hospital or clinics also falls within the concept of services of the kind provided by a government authority. As well, to the extent that facilities are required for the purposes of an *in vitro* fertilisation procedure, I consider that these facilities are also within the terms of section 22.

31. There is a qualification to the principle stated in section 22. Section 32 provides that nothing in Division 2 of the *Sex Discrimination Act* (which includes section 22) applies to or in relation to the provision of services the nature of which is such that they can only be provided to members of one sex.

32. In *McBain*, the *Infertility Treatment Act 1995* (Vic) only permitted a “fertilisation procedure”, which was broadly similar to an *in vitro* fertilisation procedure under the *HRT Act*, to be carried out upon a woman who was married or in a de facto relationship with a man, and genuinely living with that man. A fertilisation procedure could not be performed unless a doctor was satisfied that the woman was unlikely to become pregnant from an oocyte produced by her, and sperm produced by her husband, other than by a treatment procedure.

33. Justice Sundberg rejected the argument that section 32 permitted discrimination against a single woman for the purposes of receiving an *in vitro* fertilisation procedure. His reasoning is set out at [15]. In effect, it was that the nature of the service provided was, broadly, medical treatment aimed at overcoming obstacles to pregnancy, whether the obstacle was impotent sperm or an unsound human egg. He said:

"Whether the primary beneficiary of the treatment is a man or a woman, in the typical case the service is directed to achieving the desire of the couple to have a child. The fact that for biological reasons the embryo is placed into the body of the woman is but the ultimate aspect of the procedure. To concentrate solely on that aspect is not to view the overall "nature" of the service. The vice of the argument is that in order to bring the case within s 32 it is necessary to select from the scope of the service only that part of it that is provided on or with the assistance of a woman. Section 32 is intended to deal with services which are capable of being provided only to a man or only to a woman. The example given in argument is apt - a man who tells his doctor he wants a hysterectomy."
34. A particular aspect of this reasoning is the focus upon broadly characterising the nature of the service. The fact that it was characterised as the provision of medical treatment aimed at overcoming obstacles to pregnancy meant that this service ought to be available to both men and women, and was not a service which could only be provided to women.

35. It is possible to describe the effect of applying Sundberg J’s reasoning to males, assuming that it is correct to adopt precisely the same level of characterisation. If a single male, or one or other males in a male couple, has impotent sperm, or other medical difficulties in producing sperm, which may be used for conception, the relevant male ought to qualify for an *in vitro* fertilisation procedure with the human egg from a woman of his choice, to avoid discriminating against him upon the basis of sexual orientation or marital status. The impotence of his sperm would be an obstacle to pregnancy with the woman he has chosen.

36. It follows that a law which does not permit the provision of services for an *in vitro* fertilisation procedure to a male with impotent sperm, or other medical difficulties in producing sperm which may be used for conception, would be discriminatory upon the basis of sex. If the law did not permit the provision of services for an *in vitro* fertilisation procedure to a male with impotent sperm, or other medical difficulties in producing sperm which may be used for conception, because he was a member of a same-sex married or de facto male couple, that would be discriminatory upon the basis of sexual orientation or marital status.

37. Equally, even if an *in vitro* fertilisation procedure was available to males in either of these categories, if a law did not permit such a male from making a lawful arrangement with a surrogate mother, practically speaking that law would prevent the provision of *in vitro* fertilisation services to the relevant male. Such a law, in its operation, would also have a discriminatory effect.

**Equal Opportunity Act**

38. Section 9 of the *Equal Opportunity Act* is in materially similar terms to section 6 of the *Sex Discrimination Act*. Both define what constitutes discrimination upon the ground of marital status. Section 350 of the *Equal Opportunity Act* is equivalent to section 5A of the *Sex Discrimination Act*. Sections 20, 30 and 35Y of the *Equal Opportunity Act* are in materially equivalent terms to sections 22 and 30 of the *Sex Discrimination Act*. However, there is no equivalent to the exception contained in section 32 of the *Sex Discrimination Act* in respect of discrimination upon the grounds of sexual orientation.

39. As there is correspondence between the relevant provisions of the *Equal Opportunity Act* and the *Sex Discrimination Act*, the points made in the last section about the *Sex Discrimination Act* apply equally to the proper construction of the *Equal Opportunity Act*. The *Equal Opportunity Act* may operate concurrently with, and may also supplement, the *Sex Discrimination Act*, to the extent that limits upon Commonwealth constitutional power prevent the *Sex Discrimination Act* operating: see sections 9, 10 and 11 of the *Sex Discrimination Act*. 
Inconsistency between Reproductive Technology Legislation and Anti-Discrimination Legislation

40. As I have explained, adopting the reasoning of Sundberg J in *McBain* leads to the conclusion that the present form of section 23 of the *HRT Act* discriminates against single males, and same-sex married or de facto male couples. It does not permit a male with impotent sperm, or other medical difficulties in producing sperm which may be used for conception, to obtain the benefit of an *in vitro* fertilisation procedure, whereas it permits a female with unsound human eggs to do so. In order to rectify this, it would be necessary to amend both section 23 of the *HRT Act* as well as section 19 of the *Surrogacy Act*. Section 19 would require amendment, at least in so far as it applies to persons who qualify for an *in vitro* fertilisation procedure pursuant to section 23 of the *HRT Act*.

41. I consider that the nature of the service provided by way of a fertilisation procedure under the *Infertility Treatment Act* considered in *McBain* was materially the same as the service provided by way of an *in vitro* fertilisation procedure under the *HRT Act*. In both cases, the service involves fertilisation of a human egg outside a woman’s body, to overcome medical reasons why a successful pregnancy cannot occur naturally.

42. In *Duckworth v Water Corporation* [2012] WASC 30; (2012) 261 FLR 185 at [31], Edelman J considered that there was considerable authority for the proposition that trial judges in Australia should, as a matter of comity, follow other decisions of equivalent trial judges in Australia on Commonwealth or uniform national law, unless those decisions are plainly wrong. Justice Edelman was then sitting as a justice of the WA Supreme Court. He is now a justice of the High Court of Australia.

43. Justice Sundberg held that provision of an *in vitro* fertilisation procedure was not a service which could only be provided to members of one sex for the purposes of section 32 of the Commonwealth *Sex Discrimination Act*. Given the considerable authority to which Edelman J referred concerning an uniform approach to Commonwealth legislation, this reasoning should be applied unless plainly wrong.

44. While an *in vitro* fertilisation procedure requires placement of a fertilised egg into a woman, as Sundberg J points out this is “but the ultimate aspect of the procedure” and the procedure has a purpose of overcoming medical reasons preventing a successful pregnancy which may be attributable to either a man or a woman.

45. In my view, there is much to commend this reasoning. It is a narrow view of the *in vitro* fertilisation procedure to say that because the last step can only be carried out upon a woman, by re-introducing an egg into her body, the whole procedure can only be provided to a woman. That evidently ignores that the procedure necessarily requires the involvement of a man, or sperm from a man. In any event, I do not think that it can be said that, as a matter of legal reasoning, Sundberg J’s reasoning is plainly wrong.

46. Consequently, I consider that section 23 of the *HRT Act*, read with section 19 of the *Surrogacy Act*, impermissibly discriminates against a single male or a
male in a same-sex married or de facto male couple. This discrimination occurs where, for medical reasons, such a male is unable to provide potent sperm for natural conception of a child. Due to the male’s sex, sexual orientation or marital status, he is not qualified to have access to the services and facilities necessary for an in vitro fertilisation procedure with the human egg of a woman of his choice. This is discrimination which is contrary to section 22 of the Sex Discrimination Act, or sections 20 and 35Y of the Equal Opportunity Act.

Advice about Particular Questions

47. I have been asked to provide advice in response to particular questions. I will now do so upon the basis of the above analysis.

1.1 Are any parts of the HRT Act and/or the Surrogacy Act inconsistent with the Sex Discrimination Act?

48. Yes. Section 23 of the HRT Act is inconsistent with section 22 of the Sex Discrimination Act, or sections 20 and 35Y of the Equal Opportunity Act, depending upon which piece of anti-discrimination legislation is applicable.

1.2 If so:

1.2.1 Which sections of the Sex Discrimination Act give rise to the inconsistency?

49. Section 22 of the Sex Discrimination Act.

1.2 If so:

1.2.2 What are the consequences of the inconsistency?

50. Section 22 of the Sex Discrimination Act provides that it is unlawful for a person providing services or facilities to discriminate on particular grounds. Hence, it is unlawful for any person providing services or facilities for an in vitro fertilisation procedure not to provide those services or facilities to a single male, or a male in a same-sex married or de facto relationship, who has medical difficulties in producing sperm to be used for conception, upon the ground that the relevant person is male or is in a same-sex male couple.

51. Further, it is unlawful for a person providing services or facilities for an in vitro fertilisation procedure not to provide those services or facilities to a single male, or a male in a same-sex married or de facto relationship, upon the ground that the relevant male has not entered a lawful surrogacy agreement under section 19 of the Surrogacy Act. The combined requirement of section 23(1)(a)(iii) of the HRT Act and section 19 of the Surrogacy Act operate in an impermissibly discriminatory way to prevent a single male, or a male in a same-sex married or de facto relationship, from being able to undertake an in vitro fertilisation procedure.

1.2 If so:

1.2.3 Did the effect of inconsistency change upon repeal of regulation 5 of the Sex Discrimination Amendment (Exemptions) Regulation 2016 (Cth) on 1 August 2017?
52. Section 40(2B) of the *Sex Discrimination Act* provides that nothing in Division 1 or 2 (which includes section 22), as applying by reference to sections 5A, 5B or 5C, affects anything done by a person in direct compliance with a law of the Commonwealth, or of a State or Territory, that is prescribed by the regulations for the purpose of this subsection.

53. Regulation 5 of the *Sex Discrimination Amendment (Exemptions) Regulation 2016* (Cth) provided that the HRT Act and the Surrogacy Act were both prescribed for the purposes of section 40(2B) of the *Sex Discrimination Act*. It also provided that the regulation was repealed at the start of 1 August 2017.

54. It follows that, until repeal of regulation 5, it was lawful for a person providing the services or facilities for an *in vitro* fertilisation procedure to apply the qualifying criteria in section 23 of the HRT Act, even if they had the effect of discriminating against a person contrary to sections 5A, 5B or 5C of the *Sex Discrimination Act*. Since the repeal of regulation 5, that exemption to the operation of the *Sex Discrimination Act* no longer applies.

1.2 If so....

1.2.4 To what extent do the amendments proposed by the Bill rectify the inconsistency?

55. The amendments proposed in the Bill alter the qualifying criteria for a person to receive an *in vitro* fertilisation procedure, by amending section 23(1) of the HRT Act.

56. In particular, in order for a couple to qualify for such a procedure, there is no longer any requirement that the couple be of the opposite sex. This will be achieved by repealing section 23(1)(c) of the HRT Act.

57. As well, the proposed amendments remove section 23(1)(a)(iii), which provided one category of qualification for a person to receive an *in vitro* fertilisation procedure. This category was restricted to a woman who was unable to give birth to a child due to medical reasons, and who was also a party to a lawful surrogacy agreement. This is to be substituted with a different category, which provides that a person may receive an *in vitro* fertilisation procedure where the procedure is for the purposes of a surrogacy arrangement that is lawful and for which there are medical or social reasons under the *Surrogacy Act*, section 19(1A).

58. It is also proposed that sections 19(1)(b) and 19(1A) should be added to the *Surrogacy Act*. These provisions permit a surrogacy arrangement for medical or social reasons if, in the case of a surrogacy arrangement involving one arranged parent, the arranged parent is an “eligible woman” or a man. Further, these provisions permit a surrogacy arrangement for medical or social reasons if, in the case of a surrogacy arrangement involving 2 arranged parents, the arranged parents are married to, or in a de facto relationship with, each other and are “an eligible woman and a man”, 2 “eligible women”, or 2 men.

59. An “eligible woman” means a woman who is likely to be unable to conceive a child due to medical reasons (other than by reason arising from a person’s age or for other prescribed reasons); a woman who, although able to conceive a
child, is likely to be unable to give birth to a child due to medical reasons; or a woman, although able to conceive a child, is likely to conceive a child affected by a genetic abnormality or a disease.

60. The effect of these provisions is to permit a woman with medical reasons for being unable to conceive or to give birth to enter into a lawful surrogacy arrangement, either as a single parent, as part of a heterosexual couple or as part of a homosexual couple (but only if the other partner also has medical problems in conceiving or giving birth). As well, these provisions permit a single male or a male couple to enter a lawful surrogacy arrangement, although it is unnecessary for a male to demonstrate medical difficulties in providing sperm that can be used to conceive a child in order to enter such an arrangement.

61. The combined effect of the proposed amendments to section 23(1) of the HRT Act and section 19 of the Surrogacy Act is to overcome the type of discrimination which exists in the present versions of the legislation. Hence, I consider that the Bill rectifies the inconsistency between the reproductive technology legislation and the anti-discrimination legislation which I have identified.

62. The proposed amendments may go further than simply rectifying the inconsistency which I have identified. That inconsistency is based upon preventing discrimination against a single male, or males in a same-sex married or de facto couple, who have medical difficulties in producing sperm which can be used for conceiving a child. The proposed amendments permit access to an in vitro fertilisation procedure for such males without a requirement that the relevant male demonstrate medical difficulties in producing potent sperm. Accordingly, the effect of the proposed amendments is to impose a test upon women who wish to undertake an in vitro fertilisation procedure which requires them to qualify by demonstrating medical reasons for the procedure (and that applies to both females in a same-sex couple), whereas that is unnecessary for males.

63. In my view, creating such a distinction potentially represents unlawful discrimination against women who wish to access an in vitro fertilisation procedure. I consider that the test for access to the in vitro fertilisation procedure should be the same for all men and women in order to ensure compliance with sections 22 and 32 of the Sex Discrimination Act, as construed by Sundberg J. This may be based upon medical difficulties for each sex, or upon social reasons applicable to each sex. The appropriate approach to adopt is a policy matter for Parliament.

64. One way to resolve this difficulty might be for Parliament to amend the Bill to provide that, where there are male or female same-sex couples, the inability for those couples to conceive a child together is a medical reason why that couple is unable to conceive a child. That would make access to an in vitro fertilisation procedure equally available to same-sex couples, whether they are male or female couples. Nevertheless, practically speaking, a same-sex female couple might choose to use an artificial insemination procedure instead of an in vitro fertilisation procedure, whereas that choice would not be available to a same-sex male couple. This approach would make the test of demonstrable
medical reasons for an in vitro fertilisation procedure equally applicable to all persons (single or couples, male or female).

65. In making the observations in paragraphs [63]-[64], I should not be understood to be saying that no policy reasons may exist for distinguishing between the availability of an in vitro fertilisation procedure between males and females. However, in order to comply with sections 22 and 32 of the Sex Discrimination Act, the only policy reason which can justify such a distinction must be based upon the fact that the provision of the services for an in vitro fertilisation procedure can only be provided to members of one sex. As I have explained, that is contrary to the reasoning of Sundberg J in McBain.

1.3. Do any parts of the HRT Act and/or the Surrogacy Act conflict with the Equal Opportunity Act?

66. Yes. I refer to my answer to question 1.1 above.

1.4. If so:

1.4.1. What are the consequences of the conflict?

67. To the extent that only the Equal Opportunity Act is applicable to a particular situation, and the Sex Discrimination Act is not also applicable, the consequence would be that it would be necessary to determine how inconsistent provisions of two State Acts could be reconciled. In my view, it is likely that the particular and specific terms of the HRT Act and the Surrogacy Act would prevail over the general terms of the Equal Opportunity Act. That would permit the discrimination which I have identified in paragraph [46] above.

1.4. If so:...

1.4.2. To what extent do the amendments proposed by the Bill resolve the conflict?

68. I refer to my answer to question 1.2.4 above. This applies equally to the inconsistency between the relevant provisions of the reproductive technology legislation and the Equal Opportunity Act.

JOSHUA THOMSON SC
SOLICITOR-GENERAL

9 May 2019
APPENDIX 4

FUNDAMENTAL LEGISLATIVE PRINCIPLES

Does the Bill have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?

2. Is the Bill consistent with principles of natural justice?

3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?

4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?

5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?

6. Does the Bill provide appropriate protection against self-incrimination?

7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?

8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?

9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?

10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?

11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?

13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?

14. Does the Bill allow or authorise the amendment of an Act only by another Act?

15. Does the Bill affect parliamentary privilege in any manner?

16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?


**APPENDIX 5**

**HRT ACT SECTION 23**

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<th>Human Reproductive Technology Act 1991</th>
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(8) For the purposes of this Act a consent to the use or keeping of any human gametes, a human egg undergoing fertilisation or a human embryo shall not be taken to be effective unless —

(a) it is given in writing; and

(b) any condition to which it is subject is met; and

(c) it has not been withdrawn; and

(d) those gametes are, or that egg or embryo is, kept and used in accordance with the consent.

(9) Where a consent required by or under this Act is not given, or is not effective, or is not complied with that matter may be a cause for disciplinary action or proceedings for an offence but does not necessarily affect the rights of any person.

[Section 22 amended: No. 17 of 2004 s. 16.]

23. **When procedures may be carried out**

(1) An in vitro fertilisation procedure may be carried out where —

(a) it would be likely to benefit —

(i) persons who, as a couple, are unable to conceive a child due to medical reasons; or

(ii) a woman who is unable to conceive a child due to medical reasons; or

(ii) a couple or a woman whose child would otherwise be likely to be affected by a genetic abnormality or a disease; or

(iii) a woman who is unable to give birth to a child due to medical reasons and is a party to a surrogacy arrangement (as defined in the *Surrogacy Act 2008* section 3) that is lawful; and

(b) each of the participants required to do so has given an effective consent; and
(c) any persons seeking to be regarded, in applying paragraph (a), as members of a couple are —
   (i) married to each other; or
   (ii) in a de facto relationship with each other and are
       of the opposite sex to each other;

and

(d) the reason for infertility is not age or some other cause
    prescribed for the purpose of this paragraph; and

(e) consideration has been given to the welfare and interests
    of —
       (i) the participants; and
       (ii) any child likely to be born as a result of the
            procedure,
    and in the opinion of the licensee that consideration does
    not show any cause why the procedure should not be carried out,
    but not otherwise.

(2) Subsection (1) does not require that the benefit likely to result
    from the procedure involve the pregnancy of a member of the
    couple who are, or the woman who is, likely to benefit.

[Section 23 amended: No. 3 of 2002 s. 74; No. 17 of 2004 s. 17;
No. 47 of 2008 s. 67.]

24. Storage

   (1) In relation to the storage of any human gametes, human egg
       undergoing fertilisation or human embryo —
       (a) the primary purpose stated in any consent to the storage
           of a human embryo must relate to the probable future
           implantation of that embryo or its probable future use
           under an NHMRC licence; and
Appendix 6

Surrogacy Act Section 19

Division 3 — Transfer of child’s parentage

19. **Circumstances for seeking parentage order**

   (1) An application can be made under this Part for a parentage order only if —

   (a) the arranged parents reside in Western Australia and at least one arranged parent has reached 25 years of age;
   
   (b) when the surrogacy arrangement was entered into or after that time but before the application is made —

   (i) the arranged parents are an eligible couple; or
   
   (ii) one of the arranged parents, or the arranged parent if there is only one, is an eligible person.

   (2) In subsection (1)(b) —

   **eligible couple** means 2 people of opposite sexes who are married to, or in a de facto relationship with, each other and who, as a couple —

   (a) are unable to conceive a child due to medical reasons not excluded by subsection (3); or

   (b) although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or a disease;

   **eligible person** means a woman who —

   (a) is unable to conceive a child due to medical reasons not excluded by subsection (3); or

   (b) although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or a disease; or

   (c) although able to conceive a child, is unable for medical reasons to give birth to a child.
(3) The medical reasons for being unable to conceive a child that are referred to in the definitions of eligible couple and eligible person do not include —
   (a) a reason arising from a person’s age; or
   (b) a reason prescribed for the purpose of the Human Reproductive Technology Act 1991 section 23(1)(d).

20. Applying for a parentage order

(1) In the circumstances described in section 19, the arranged parents may, if the making of the order would not be prevented by section 16(1), apply in accordance with this section for a parentage order.

(2) The application can be lodged with the court only after a period of 28 days has elapsed since the day on which the child is born.

(3) The application cannot be lodged with the court more than 6 months after the day on which the child is born except with the leave of the court, which may be given in exceptional circumstances.

(4) If the child was born before the day fixed under section 2(b) as the day on which this section comes into operation, the application may, despite subsection (3), be lodged within one year after that day.

(5) Before the court considers the application, a certified copy of the child’s birth certificate must, if it is available, have been lodged with the court.

21. Court may make parentage order

(1) The court may, on an application made under section 20(1), make a parentage order.

(2) Before it makes a parentage order the court has to be satisfied that —
   (a) the circumstances that section 19 requires for applying for a parentage order exist; and
Surrogacy Directions 2009

Given by the CEO of the Department of Health under section 31 of the Act.

1. Citation
   These directions are the *Surrogacy Directions 2009*.

2. Commencement
   These directions come into operation as follows —
   (a) directions 1 and 2 — on the day on which these directions are published in the *Gazette*;
   (b) the rest of the directions — on the day on which the *Surrogacy Act 2008* section 66 comes into operation.

3. Terms used in these directions
   In these directions —
   *arranged parents* has the meaning given in the *Surrogacy Act 2008* section 14;
   *birth parents* has the meaning given in the *Surrogacy Act 2008* section 14;
**donor** has the meaning given in the *Surrogacy Act 2008* section 17(b)(iii);

**exempt practitioner** has the meaning given in the HRT Directions;

**HRT Directions** means the directions given by the Commissioner of Health and published in the *Gazette* on 30 November 2004;

**parties** has the meaning given in the *Surrogacy Act 2008* section 17(c);

**surrogacy arrangement** has the meaning given in the *Surrogacy Act 2008* section 3.

4. **Purpose**

These directions are given to set the standards for the use of artificial fertilisation procedures in connection with surrogacy arrangements.

5. **Welfare of child paramount**

When a person to whom a licence applies or an exempt practitioner is considering whether to provide an artificial fertilisation procedure in connection with a surrogacy arrangement —

(a) the welfare of any child that may be born as a result of the procedure is to be the paramount consideration; and

(b) the welfare of any existing child of the birth mother, a donor or the arranged parents is to be taken into account.

6. **Harm minimisation**

When providing an artificial fertilisation procedure in connection with a surrogacy arrangement a person to whom a licence applies or an exempt practitioner is to ensure that the risk of physical, social and psychological harm to the birth parents, the arranged parents and any donor is minimised.

7. **Approval of surrogacy arrangements**

A licensee is not to provide an artificial fertilisation procedure in connection with a surrogacy arrangement unless the arrangement has been approved by the Council in accordance with the requirements in the *Surrogacy Act 2008* section 17.

8. **Clinic surrogacy coordinator**

(1) Each licensee who offers, whether by advertising or any other means, to provide reproductive technology treatment in connection with a surrogacy arrangement is to nominate a person to carry out the role of clinic surrogacy coordinator.
(2) The role of the clinic surrogacy coordinator is to —
(a) be the primary contact point for persons who have inquiries about surrogacy arrangements; and
(b) ensure that prospective parties to a surrogacy arrangement are given information referred to in direction 10; and
(c) coordinate the assessment processes and counselling in connection with a surrogacy arrangement; and
(d) assist parties in making an application to the Council for the approval of a surrogacy arrangement; and
(e) coordinate the provision of ongoing counselling and support referred to in direction 12; and
(f) facilitate counselling referred to in direction 13.

(3) A clinic surrogacy coordinator is to be available at the licensed premises during normal business hours.

9. Role of clinic in introducing parties to surrogacy arrangement

(1) A licensee is not to actively recruit a woman to be a birth mother.

(2) A licensee may arrange for a woman who has approached the licensee offering to be a birth mother to be introduced to prospective arranged parents.

10. Information to be provided

(1) Before arranging for any assessment process in connection with a surrogacy arrangement to commence, a person to whom a licence applies or an exempt practitioner is to give each proposed party to the surrogacy arrangement information about —
(a) the assessment process to be undertaken in connection with the surrogacy arrangement; and
(b) the Artificial Conception Act 1985; and
(c) the Surrogacy Act 2008; and
(d) the rights of donors, participants and children born as a result of the surrogacy arrangement to access identifying and non-identifying information in accordance with the Human Reproductive Technology Act 1991 and the Surrogacy Act 2008; and
(e) the medical and social implications in relation to surrogacy and for children born as a result of a surrogacy arrangement.

(2) The information referred to in subdirection (1) is to be provided by giving an oral explanation and also giving written material that has been approved by the Council.
11. Consent of arranged parents

(1) A person to whom a licence applies or an exempt practitioner is not to carry out an artificial fertilisation procedure in connection with a surrogacy arrangement unless at the time of, or immediately prior to, the carrying out of the procedure effective consent is given by the arranged parents.

(2) The consent referred to in subdirection (1) is additional to consent referred to in the HRT Directions Part 3.

12. Ongoing counselling and support

A licensee is to ensure that each party to a surrogacy arrangement for which the licensee is providing reproductive technology treatment is to have access to counselling and support services in connection with the arrangement at each of the following times —

(a) following a decision by the Council in relation to an application for the approval of a surrogacy arrangement;
(b) during treatment in connection with a surrogacy arrangement;
(c) following a decision to discontinue treatment;
(d) during any pregnancy that results from treatment;
(e) following the miscarriage or birth of any child born in connection with a surrogacy arrangement.

13. Counselling requirements during any pregnancy

If a pregnancy in connection with a surrogacy arrangement results from the use of an artificial fertilisation procedure provided by a licensee, the licensee is to make all reasonable efforts to facilitate joint counselling for the birth mother and the arranged parents at each of the following times —

(a) 20 weeks after the beginning of a pregnancy;
(b) 34 weeks after the beginning of a pregnancy;
(c) within 14 days after a miscarriage or the birth of a child.

14. Information to be provided by licensee

A licensee who provides an artificial fertilisation procedure in connection with a surrogacy arrangement is to include with information required under the HRT Directions direction 2.6 any additional information requested by the Executive Officer about the arranged parents, the birth parents and any donor.

15. Annual reporting

A licensee who provides an artificial fertilisation procedure in connection with a surrogacy arrangement is to include in the annual report required under the HRT Directions direction 2.18 the information set out in Schedule 1 of these directions.
Schedule 1 — Annual reporting requirements

1. Unit ID.
2. Number of clients who commenced treatment with the intention of becoming arranged parents in a surrogacy arrangement.
3. Number of arranged parents who sought Council approval for a surrogacy arrangement.
4. Number of surrogacy arrangements approved by the Council.
5. Number of surrogacy arrangements involving treatment using egg or sperm provided by a donor.
6. Number of surrogacy arrangements involving treatment using embryos created from egg and sperm provided by donors.
7. Number of surrogacy arrangements where a party has withdrawn from a surrogacy arrangement and the reason for that withdrawal.
8. Number of pregnancies in connection with surrogacy arrangements.

Dr PETER FLETT, Chief Executive Officer.
APPENDIX 8

SDA—SOME RELEVANT SECTIONS

5 Sex discrimination

(1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sex of the aggrieved person if, by reason of:
   (a) the sex of the aggrieved person;
   (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
   (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;
the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different sex.

(2) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.

5A Discrimination on the ground of sexual orientation

(1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person’s sexual orientation if, by reason of:
   (a) the aggrieved person’s sexual orientation; or
   (b) a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person; or
   (c) a characteristic that is generally imputed to persons who have the same sexual orientation as the aggrieved person;
the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different sexual orientation.

(2) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person’s sexual orientation if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.
5B Discrimination on the ground of gender identity

(1) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person’s gender identity if, by reason of:

(a) the aggrieved person’s gender identity; or
(b) a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person; or
(c) a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different gender identity.

(2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person’s gender identity if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.

5C Discrimination on the ground of intersex status

(1) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person’s intersex status if, by reason of:

(a) the aggrieved person’s intersex status; or
(b) a characteristic that appertains generally to persons of intersex status; or
(c) a characteristic that is generally imputed to persons of intersex status;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who is not of intersex status.

(2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person’s intersex status if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of intersex status.

(3) This section has effect subject to sections 7B and 7D.

6 Discrimination on the ground of marital or relationship status

(1) For the purposes of this Act, a person (in this subsection referred to as the **discriminator**) discriminates against another person (in this subsection referred to as the **aggrieved person**) on the ground of the marital or relationship status of the aggrieved person if, by reason of:

(a) the marital or relationship status of the aggrieved person; or
(b) a characteristic that appertains generally to persons of the marital or relationship status of the aggrieved person; or
(c) a characteristic that is generally imputed to persons of the marital or relationship status of the aggrieved person;
the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different marital or relationship status.

(2) For the purposes of this Act, a person (the *discriminator*) discriminates against another person (the *aggrieved person*) on the ground of the marital or relationship status of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same marital or relationship status as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.

### 22 Goods, services and facilities

(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

(2) This section binds the Crown in right of a State.

### 31 Pregnancy, childbirth or breastfeeding

Nothing in Division 1 or 2 renders it unlawful for a person to discriminate against a man on the ground of his sex by reason only of the fact that the first-mentioned person grants to a woman rights or privileges in connection with pregnancy, childbirth or breastfeeding.

### 32 Services for members of one sex

Nothing in Division 1 or 2 applies to or in relation to the provision of services the nature of which is such that they can only be provided to members of one sex.
APPENDIX 9

EO ACT—SOME RELEVANT SECTIONS

8. Discrimination on the ground of sex

(1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sex of the aggrieved person if, on the ground of —
   (a) the sex of the aggrieved person; or
   (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
   (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person,
   the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

(2) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition —
   (a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply; and
   (b) which is not reasonable having regard to the circumstances of the case; and
   (c) with which the aggrieved person does not or is not able to comply.

[Section 8 amended: No. 74 of 1992 s. 40.]

9. Discrimination on the ground of marital status

(1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the marital status of the aggrieved person if, on the ground of —
   (a) the marital status of the aggrieved person; or
   (b) a characteristic that appertains generally to persons of the marital status of the aggrieved person; or
   (c) a characteristic that is generally imputed to persons of the marital status of the aggrieved person,
   the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different marital status.

(2) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the marital status of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition —
(a) with which a substantially higher proportion of persons not of the same marital status as the aggrieved person comply or are able to comply; and
(b) which is not reasonable having regard to the circumstances of the case; and
(c) with which the aggrieved person does not or is not able to comply.

[Section 9 amended: No. 74 of 1992 s. 40.]

20. **Goods, services and facilities**

It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person’s sex, marital status, pregnancy or breast feeding —

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or
(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

[Section 20 amended: No. 2 of 2010 s. 15.]

30. **Services for members of one sex**

Nothing in Division 2 or 3 applies to or in relation to the provision of services the nature of which is such that they can only be provided to members of one sex.

35AA. **Gender history**

(1) For the purposes of this Part, a person has a gender history if the person identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex.

(2) In subsection (1) —

   **opposite sex** means a sex of which the person was not a member at birth.

[Section 35AA inserted: No. 2 of 2000 s. 28.]

35AB. **Discrimination on gender history grounds**

(1) For the purposes of this Act, a person (in this subsection referred to as the **discriminator**) discriminates against a gender reassigned person on gender history grounds if, on the ground of the gender reassigned person having a gender history, the discriminator treats the gender reassigned person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person not thought by the discriminator to have a gender history.

(2) A reference in subsection (1) to something done on the ground of a person having a gender history includes a reference to something done on the ground of —

   (a) a characteristic that appertains generally to persons who have a gender history; or
   (b) a characteristic that is generally imputed to persons who have a gender history.

(3) For the purposes of this Act, a person (in this subsection referred to as the **discriminator**) discriminates against a gender reassigned person on gender history grounds if on the ground of the person having a gender history the discriminator —
(a) treats the person as being of the person’s former sex; or
(b) requires the person to comply with a requirement or condition —
   (i) with which a substantially higher proportion of persons who do not have a gender history comply or are able to comply; and
   (ii) which is not reasonable having regard to the circumstances of the case; and
   (iii) with which the gender reassigned person does not or is not able to comply.

[Section 35AB inserted: No. 2 of 2000 s. 28.]

35AL. Goods, services and facilities

It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against a gender reassigned person on gender history grounds —
(a) by refusing to provide the gender reassigned person with those goods or services or to make those facilities available to the gender reassigned person; or
(b) in the terms or conditions on which the first-mentioned person provides the gender reassigned person with those goods or services or makes those facilities available to the gender reassigned person; or
(c) in the manner in which the first-mentioned person provides the gender reassigned person with those goods or services or makes those facilities available to the gender reassigned person.

[Section 35AL inserted: No. 2 of 2000 s. 28.]

35O. Discrimination on the ground of sexual orientation

(1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sexual orientation of the aggrieved person if, on the ground of —
(a) the sexual orientation of the aggrieved person; or
(b) a characteristic that appertains generally to persons of the sexual orientation of the aggrieved person; or
(c) a characteristic that is generally imputed to persons of the sexual orientation of the aggrieved person,

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who is not of that sexual orientation.

(2) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of sexual orientation if, on the ground of —
(a) the sexual orientation of; or
(b) a characteristic that appertains generally to persons of the same sexual orientation as; or
(c) a characteristic that is generally imputed to persons of the same sexual orientation as,
any relative or associate of the aggrieved person, the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who is not of that sexual orientation.

(3) For the purposes of this Act, a person (in this subsection referred to as the **discriminator**) discriminates against another person (in this subsection referred to as the **aggrieved person**) on the ground of the sexual orientation of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition —

(a) with which a substantially higher proportion of persons who are not of the sexual orientation of the aggrieved person comply or are able to comply; and

(b) which is not reasonable having regard to the circumstances of the case; and

(c) with which the aggrieved person does not or is not able to comply.

[Section 35O inserted: No. 3 of 2002 s. 52.]

35Y. **Goods, services and facilities**

It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person’s sexual orientation —

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

[Section 35Y inserted: No. 3 of 2002 s. 52.]
## GLOSSARY

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Altruistic surrogacy</td>
<td>where the woman who intends to be, or becomes, the birth mother in a surrogacy arrangement does not receive any payment or reward from which she derives a profit. Note, she may receive reimbursement of expenses actually incurred</td>
</tr>
<tr>
<td>ART</td>
<td>assisted reproductive technology includes a range of methods used to circumvent human infertility, including in vitro fertilisation (IVF), embryo transfer (ET), gamete intra-fallopian transfer (GIFT), artificial insemination (AI), all manipulative procedures involving gametes and embryos and treatment to induce ovulation or spermatogenesis when used in conjunction with the above methods</td>
</tr>
<tr>
<td>Artificial fertilisation procedure</td>
<td>any artificial insemination procedure or in vitro fertilisation (IVF) procedure (HRT Act)</td>
</tr>
<tr>
<td>Artificial insemination procedure</td>
<td>a procedure where human sperm are introduced, by a non-coital method, into the reproductive system of a woman but which is not, and is not an integral part of, an in vitro fertilisation procedure (HRT Act)</td>
</tr>
<tr>
<td>Bill</td>
<td>Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018</td>
</tr>
<tr>
<td>Birth mother</td>
<td>a woman who conceives and gives birth to a child</td>
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<tr>
<td>Birth parent(s)</td>
<td>includes the birth mother and her partner (if any)</td>
</tr>
<tr>
<td>Commercial surrogacy</td>
<td>(also referred to as ‘compensated’ or ‘for-profit’ surrogacy) where the birth mother in a surrogacy arrangement is paid a fee or receives reward from which she derives a profit</td>
</tr>
<tr>
<td>Committee</td>
<td>Standing Committee on Legislation</td>
</tr>
<tr>
<td>Department</td>
<td>Department of Health</td>
</tr>
<tr>
<td>Embryo</td>
<td>once the egg has joined with the sperm it is called an embryo</td>
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<tr>
<td>EO Act</td>
<td><em>Equal Opportunity Act 1984</em> (WA)</td>
</tr>
<tr>
<td>Gamete</td>
<td>a word that describes both the male and female reproductive cells i.e. the spermatozoa (sperm) and oocytes (eggs)</td>
</tr>
<tr>
<td>HRT Act</td>
<td><em>Human Reproductive Technology Act 1991</em> (WA)</td>
</tr>
<tr>
<td>Implanting</td>
<td>the embedding of the embryo in the lining of the uterus six to seven days after fertilisation</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
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<tr>
<td>Infertility</td>
<td>the inability to conceive after a year of unprotected intercourse in women under 35 or after six months in women over 35, or the inability to carry a pregnancy to term. Also included are diagnosed problems such as anovulation, tubal blockage, and low sperm count. The ‘causes’ of infertility may relate to ovulation, tubal or uterine factors, the male-factor, sperm mucous interaction, endometriosis, sexual dysfunction, or be simply unexplainable</td>
</tr>
<tr>
<td>Intended parent(s)</td>
<td>person or persons who intend to become the legal parent of a child born through surrogacy. Also referred to as ‘arranged’ parent(s) or ‘commissioning’ parent(s)</td>
</tr>
<tr>
<td>IVF</td>
<td>in vitro fertilisation a process by which eggs are fertilised by sperm outside the womb in a controlled environment: either a test tube or Petri dish. The process is performed by a reproductive endocrinologist at an IVF clinic</td>
</tr>
<tr>
<td>Parentage order</td>
<td>court order that transfers parentage from the birth parent(s) to the intended parent(s) as part of the surrogacy arrangement</td>
</tr>
<tr>
<td>RTC</td>
<td>Reproductive Technology Council</td>
</tr>
<tr>
<td>SDA</td>
<td><em>Sex Discrimination Act 1984</em> (Cth)</td>
</tr>
<tr>
<td>Surrogacy</td>
<td>the practice by which a woman who is to become pregnant (and her partner if any) agrees to surrender permanently the child born of that pregnancy to another person or couple (the intended parent(s)). The intent is that the other person or couple will be the parent(s) of the child</td>
</tr>
<tr>
<td>Surrogacy Act</td>
<td><em>Surrogacy Act 2008</em> (WA)</td>
</tr>
<tr>
<td>Surrogacy arrangement/agreement</td>
<td>an agreement between the prospective birth parent/s and intended parents regarding their intention to enter into an arrangement and the terms upon which they agree</td>
</tr>
<tr>
<td>Surrogacy Directions</td>
<td><em>Surrogacy Directions 2009</em> (WA)</td>
</tr>
<tr>
<td>Surrogate mother</td>
<td>an agreement between the prospective birth parent/s and intended parents regarding their intention to enter into an arrangement and the terms upon which they agree</td>
</tr>
</tbody>
</table>
Standing Committee on Legislation

Date first appointed:
17 August 2005

Terms of Reference:
The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'4. Legislation Committee
4.1 A Legislation Committee is established.
4.2 The Committee consists of 5 Members.
4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of the Bill.'