



Government of **Western Australia**
Department of **Health**
Office of the Director General

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Mr Mark Warner
Committee Clerk
Standing Committee on Legislation
Legislative Council
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005

Via email: lclc@parliament.wa.gov.au

Dear Mr Warner

**HUMAN REPRODUCTIVE TECHNOLOGY AND SURROGACY LEGISLATION
AMENDMENT BILL 2018**

I am writing in response to a letter dated 17 April 2019 from Hon Sally Talbot MLC, Chair, Standing Committee on Legislation, inviting the Department of Health (DOH) to provide a written submission on the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018.

Accordingly, please find enclosed DOH's written submission. Should any further information be required, please contact Audrey Koay, Executive Director, Patient Safety and Clinical Quality Directorate, on 9222 4082 or email Audrey.Koay@health.wa.gov.au.

Yours sincerely

Dr D J Russell-Weisz
DIRECTOR GENERAL

7 May 2019

Att: Submission to the Western Australian Legislative Council Standing Committee on Legislation

DEPARTMENT OF HEALTH
SUBMISSION TO THE WESTERN AUSTRALIAN LEGISLATIVE COUNCIL
STANDING COMMITTEE ON LEGISLATION

7 May 2019

Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018

Background

The Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 (the Bill) currently before the Committee deals with:

- amendments to the *Human Reproductive Technology Act 1991* (the HRT Act) in Part 2 of the Bill; and
- amendments to the *Surrogacy Act 2008* (the Surrogacy Act) in Part 3 of the Bill.

Purpose of the proposed amendments

Allowing same sex male couples and single men access to surrogacy

Currently Western Australian legislation only enables eligible women (regardless of their sexual orientation or relationship status) and eligible heterosexual couples to access in-vitro fertilisation (IVF) and parentage orders.

That position is no longer consistent with:

- the acceptance of same-sex relationships in Australia, reflected, for example, in provision being made for same-sex marriage; and
- the position in other Australian jurisdictions.

There is also a significant risk that section 23 of the HRT Act, to the extent that it confines access to IVF procedures to eligible women and heterosexual couples, and denies access to male same-sex couples and single men, is inconsistent with section 22 of the *Sex Discrimination Act 1984* (Cth) (the SDA).

The proposed amendments, which are largely consistent with other Australian jurisdictions, provide same-sex male couples and single men in Western Australia with access to altruistic surrogacy, through the use of IVF procedures for the surrogate, as another means of forming a family.

Every Australian jurisdiction apart from Western Australia has legislation that enables male same-sex couples (or their equivalents) to apply for a parentage order.

Single men may access parentage orders (or their equivalents) in New South Wales, Queensland, Tasmania, and Victoria, but not in Western Australia, South Australia or the Australian Capital Territory. South Australia has recently proposed legislative amendments to enable single men and single women to apply for parentage orders (or their equivalents).

Table 1: Overview of eligibility across Australian jurisdictions

Eligibility	WA	ACT	NSW	QLD	SA	TAS	VIC
Medical need *	✓	✓	✓	✓	✓	✓	✓
Social need **	x	✓	✓	✓	✓	✓	✓
Heterosexual couple	✓	✓	✓	✓	✓	✓	✓
Female same sex couple	✓	✓	✓	✓	✓	✓	✓
Single female	✓	x	✓	✓	x	✓	✓
Male same sex couple	x	✓	✓	✓	✓	✓	✓
Single male	x	x	✓	✓	x	✓	✓

*- eligible woman/women (unable/unlikely to conceive, carry or birth a child on medical grounds or child may have a genetic condition or unlikely to survive pregnancy or birth)

** - a man or a male couple

The risk of inconsistency with the SDA has arisen since the last exemption from provisions of the SDA protecting persons from discrimination on, amongst other grounds, the ground of sexual orientation, expired on 31 July 2017. As the provision of IVF treatment is likely to be a service within the meaning of the SDA, the protection from discrimination on the ground of sexual orientation is likely to be engaged, and there is a significant risk that the prohibition on single men and male same-sex couples accessing IVF treatment in section 23 of the HRT Act would be inconsistent with section 22 of the SDA. The proposed amendments address that risk.

It is important to emphasise that the proposed amendments in the Bill before the Committee only relate to altruistic surrogacy in Western Australia. **Surrogacy for reward or commercial surrogacy is not permitted** in Western Australia (or any other jurisdiction) and this Bill will not change that. Federal reviews of surrogacy and parentage legislation and state reviews in South Australia and New South Wales affirm this position as well as the latest review of the Western Australian legislation.

The proposed amendments may also lessen the drive for people to go overseas to engage in commercial surrogacy. It is estimated that across Australia, about 250 children a year enter the country with citizenship by descent related to an international surrogacy arrangement. These children will, in most cases, never know who the egg donor was, or who gave birth to them which are an important part of their identity. Further, for the children and the arranged parents there are legal difficulties in establishing parentage, even through the courts. In most of these cases, the arranged parents do not seek a legal solution, to the detriment of the children.

Broadening access for likely infertility

The proposed amendments will also make it clear that an IVF procedure may be provided when a woman faces the likely loss of her fertility. For example, a woman may require chemotherapy for cancer treatment, with the attendant risk (or perhaps certainty) that she will become infertile. As it stands, section 23 of the HRT Act does not permit an IVF procedure to be carried out unless it is likely to benefit a person who *is* unable to conceive or give birth to a child for medical reasons.

Further, the resulting lack of certainty is presenting a problem in practice. Medical practitioners advise they remain concerned they may be breaking the law by creating embryos through IVF for women who are not yet, but are likely to become infertile due to medical reasons. The proposed amendments clarify the situation for women and medical practitioners, and make it clear that it is lawful to provide treatment for women likely to be facing impending infertility.

The proposed amendments will insert the wording “likely to be” unable to conceive in section 23 of the HRT Act (which will also be reflected in section 19 of the Surrogacy Act). This change will make it clear that a woman is eligible for IVF treatment if, for example, there is a likelihood of her becoming infertile as a result of disease or a medical procedure (e.g. cancer and undergoing radiation or chemotherapy).

This enables egg collection prior to such medical treatment, as well as the fertilisation of eggs and freezing of any resulting embryos for possible later use.

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

Other matters in the Bill

The proposed amendments also strengthen the advisory and investigative powers in relation to surrogacy regulation.

Section 14 of the HRT Act will be amended to clarify that the functions of the Reproductive Technology Council will apply to matters of administration and enforcement of the Surrogacy Act.

Part 5 of the HRT Act will also be amended to enable an “authorised officer” under the Act to have the power to investigate possible breaches of the Surrogacy Act, in the same way as presently exists for possible breaches of the HRT Act. In addition, provision is made for a justice to issue a warrant in relation to an offence under the Surrogacy Act, in the same way as provided for under the HRT Act.