

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

Introduction and First Reading

Bill introduced, on motion by **Mr R.H. Cook (Minister for Health)**, and read a first time.

Explanatory memorandum presented by the minister.

Second Reading

MR R.H. COOK (Kwinana — Minister for Health) [3.47 pm]: I move —

That the bill be now read a second time.

This bill amends the Human Reproductive Technology Act 1991—the HRT act—and the Surrogacy Act 2008 to enable male same-sex couples and single men access to surrogacy to become parents. The government is committed to upholding the values of equality, fairness and diversity. When unjustifiable discrimination is demonstrated in our laws, we will move to correct it. This bill recognises that the best interests of children are served when they can grow up in an environment in which they are cared for, loved and supported. A growing body of sociological and psychological research shows that it is a supportive and loving environment, not sexual orientation or whether there are two parents or one, that is important for the development of happy and well-adjusted children. At a legislative level, this is promoted by having strong and comprehensive safeguards that are already in place, which are designed to protect the welfare and best interests of a child born to a surrogate.

Community attitudes towards equality were clearly revealed in the results of the 2017 Australian Marriage Law Postal Survey—64 per cent of Western Australians supported same-sex marriage. The commonwealth subsequently passed laws enabling marriage equality. Diversity is something to be embraced, not denied. We have a responsibility to do all we can to support loving and committed families in whatever shape or form those families take. The broadening of access to surrogacy proposed under the bill adds to the family formation options of adoption and fostering that are already available to male same-sex couples and single men in WA. Australian census results indicate an increase in reporting of family diversity, with 23 700 male same-sex couples in 2016, which is a rise of 2.6 per cent compared to the 2011 census. The proportion of male same-sex couples with children was 4.5 per cent.

Surrogacy provides parents who cannot conceive or give birth the opportunity to have a child of their own, and has been a long, careful and considered journey in WA. A parliamentary select committee report published in 1999 supported the development of surrogacy laws; however, it was nearly a decade later before the Surrogacy Act was passed by Parliament. Almost a decade on, this bill represents another significant milestone in this journey as we now remove the current restrictions on access to surrogacy for male same-sex couples and single men. The changes will bring WA into line with all other Australian jurisdictions that permit male same-sex couples to engage in altruistic surrogacy, with the exception of the Northern Territory, which has no relevant laws. The main amendments to the current legislation within this bill are in response to the 2013 amendments to the commonwealth Sex Discrimination Act 1984, 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 Human Reproductive Technology Act and the Surrogacy Act from application of the Sex Discrimination Act expired on 31 July 2017. To delay action in response to this would be unwise. Consequently, there is some urgency for making these amendments to the state legislation to address issues of discrimination and any inconsistency arising under the Sex Discrimination Act. Clearly, this is the right thing to do. Failure to do so presents an unacceptable risk of litigation and the prospect of provisions of the relevant state legislation—the HRT act—being held by a court to be invalid. The amendments will, 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 and state legislation—the Western Australian Equal Opportunity Act 1984.

One benefit we expect to see following the enactment of this bill is that by broadening access to altruistic surrogacy in WA, 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—an important part of their identity—and for the children and arranged parents there are difficulties in establishing legal parentage, even through the courts, which impacts on the rights of these children.

The matter of access to in-vitro fertilisation and surrogacy is complicated for intersex, transgender and gender diverse people, and include issues around the reproductive capability of individuals. This requires further careful consideration and will be examined as part of an independent and comprehensive review of these acts, which is currently underway. However, it is likely to be some time before the recommendations arising from that review are considered and any legislative response is drafted and then implemented.

Provisions in the bill dealing with eligibility for surrogacy are consistent with and closely follow the New South Wales, Queensland and Tasmanian surrogacy laws, and are a move towards a nationally consistent approach. The key changes to the legislation being proposed in this bill are as follows: under the existing provisions of the HRT act, single women, irrespective of their sexual orientation, heterosexual couples, and female same-sex couples will be able to benefit from access to IVF or surrogacy based on their medical need. The proposed changes will expand that access to surrogacy to include male same-sex couples and single men, irrespective of their sexual orientation. This is achieved by amending section 23 of the HRT act to allow an IVF procedure to be carried out for the purposes of a surrogacy arrangement where there are “medical or social reasons”. “Medical or social reasons” is defined under new section 19(IA) of the Surrogacy Act to mean an eligible woman or man in the case where there is one arranged parent; in the case where there are two arranged parents, a married or de facto couple who are an eligible woman and a man; or two eligible women or two men. “Eligible woman” is defined in section 19(2) of the Surrogacy Act to mean a woman who is likely to be unable to conceive a child due to medical reasons not by reason of advanced age or excluded for a prescribed reason; or although able to conceive a child, is likely to be unable to give birth due to medical reason; or although able to conceive a child, any such child is likely to be affected by a genetic abnormality or a disease. For all practical purposes, “social reasons” in terms of access to surrogacy is intended to apply to male same-sex couples and single men. Women will still need to meet the existing criteria of having medical reasons to access IVF and surrogacy, including providing the least invasive treatment necessary in order to have a child.

Section 19 of the Surrogacy Act is amended to enable an application to be made for a parentage order in circumstances where there were “medical or social reasons” for the surrogacy arrangement at the time the arrangement was entered into. Eligible male same-sex couples and single men will be able to apply for a parentage order provided all the usual requirements under the act are met, including the arranged parents must reside in Western Australia, that at least one arranged parent is 25 years of age, the arranged parents must meet the eligibility criteria, and the surrogacy arrangement has first been approved by the Reproductive Technology Council. The existing requirements include that the council may approve a surrogacy arrangement only if the arrangement has been entered into before the birth mother becomes pregnant; the birth mother has reached 25 years of age; the arrangement is in writing and signed by all parties involved, including any donors; the parties must have undertaken counselling, medical and psychological assessments to support their suitability for surrogacy and the parties have received legal advice about the effect of the surrogacy arrangement; and the council must be satisfied that at least three months before any approval is given, these steps have been taken in order to allow a cooling off period before the commencement of treatment.

Another proposal contained within this bill concerns the provisions for fertility preservation for medical reasons, in particular to benefit cancer patients. Doctors have expressed uncertainty about whether a woman who is presently fertile, but who is soon to become infertile as a result of a medical disease, condition or treatment, such as chemotherapy, is permitted to have her eggs fertilised to create an embryo through IVF for future use. A select committee report in 1999 considered this issue and recommended changes. Accordingly, in 2002, those amendments were made to the eligibility criteria in section 23 of the HRT act to remove the term “infertile” and instead permit access to the procedure to include a woman or couple who are unable to conceive a child for medical reasons. Even with this change, some medical practitioners remained concerned about whether it is lawful for them to create embryos through IVF for women who are not yet but are about to become infertile due to medical reasons. 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. In those circumstances, prior to undergoing medical treatment, the woman could have her eggs fertilised and any resulting embryos frozen for possible later use. Similarly, persons who as members of a couple are about to become infertile for medical reasons will be eligible for IVF treatment in those circumstances.

To effect this change, the words “likely to be” will be inserted immediately before the words “unable to conceive a child due to medical reasons” and “unable to give birth to a child due to 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.

The proposed amendments provide an opportunity to strengthen some of the advisory, investigation and search powers in relation to surrogacy regulation, which are wanting. Changes to section 14 of the HRT act make it clear that the functions of the council extend to advising the minister and the CEO of the Department of Health on matters of administration and enforcement of the Surrogacy Act. The existing provisions of these acts do not specifically provide for this. Section 54 of the HRT act authorises an officer to investigate a breach or possible breach of that act. Proposed section 55A of the HRT act will extend that authority to an officer to similarly investigate a breach or possible breach of the surrogacy act. The provision will also permit a justice, when duly satisfied on the evidence, to exercise the same power available under section 55 of the HRT act to issue a warrant to an authorised officer or member of the police force to enter and search, and seize records and other evidence, in relation to an offence or suspected offence under the Surrogacy Act.

This bill incorporates a number of amendments to the HRT act that flow from the changes to allow male same-sex couples and single men access to surrogacy and fertility preservation for medical reasons. These include changes to the wording of the preamble; the meaning of a couple in section 21; and reference to “person” in place of “woman” and their spouse or de facto partner on whose behalf an embryo is developed regarding consent to use the embryo under section 22 or the vesting of rights in the embryo under section 26.

Finally, a number of sections of the HRT act will also be amended to correct some minor errors and outdated references to other acts.

This bill recognises and embraces the diversity of family and removes discrimination experienced by men with regard to surrogacy. I commend this bill to the house.

Debate adjourned, on motion by **Ms L. Mettam**.