

STANDING COMMITTEE ON LEGISLATION

HUMAN REPRODUCTIVE TECHNOLOGY AND SURROGACY LEGISLATION AMENDMENT BILL 2019



**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 20 MAY 2019**

SESSION THREE

Members

**Hon Dr Sally Talbot (Chair)
Hon Nick Goiran (Deputy Chair)
Hon Colin de Grussa
Hon Simon O'Brien
Hon Pierre Yang**

Hearing commenced at 3.35 pm**Dr BRENDA McGIVERN****Chair, Reproductive Technology Council, sworn and examined:**

The CHAIR: On behalf of the committee, I would like to welcome you to the hearing. Today's hearing will be broadcast. Before we go live, I would just like to remind all parties that if you have any private documents with you, keep them flat on the desk to avoid the cameras. Please begin the broadcast.

We now require you to take either the oath or the affirmation.

[Witnesses took the affirmation.]

The CHAIR: You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Dr McGivern: Yes, I have.

The CHAIR: These proceedings are being recorded by Hansard and broadcast on the internet. Please note that this broadcast will also be available for viewing online after this hearing. You can advise the committee if you object to the broadcast being made available in this way. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record and please be aware of the microphones and try and talk into them. Ensure you do not cover them with papers or make noise near them.

I remind you that your transcript will be made public. If, for some reason, and this goes to the point you raised before the hearing, you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in private session. If the committee grants your request, any public and media in attendance will be excluded from the hearing.

Until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean the material published or disclosed is not subject to parliamentary privilege. Would you like to make an opening statement to the committee?

Dr McGivern: Thank you. I would. The principal matter that I would like to address is the timing of the proposed questions that have been put to me and some issues that arise in connection with that. These are fairly extensive. They run to three and a half pages, some 40 identified questions, many of which are fairly technical. They were sent in at 5.26, I think it was, on Friday evening to the health department, who, of course, then were only in a position to send them on to me mid-morning this morning. That, of course, colours the degree to which I have been able to get across the questions, and particularly the technical matters raised in them, and to seek, for example, where you ask, "What is council's view on this?" If council has not had an opportunity to consider the questions themselves, I may not be in a position to answer that without taking council's view as a whole, rather than just my own.

Of course, to the extent that they raise matters of law, there are certain things that may have to be put, for example, to legal and legislation services. I think it is important to raise that as a context for my responses.

The other matter that I think is important, perhaps, is to just reiterate the role of council. Some of the questions would suggest that that is necessary because there are questions around particular

matters of drafting, for example. Whereas council has a role under statute to advise on matters connected with reproductive technology and the like, we do not draft legislation. We often do not even see the draft legislation. We may see it and we may be asked to comment on it, but we are not responsible for drafting it and we do not engage in that process. Again, that should probably colour the responses to the questions you have raised.

The CHAIR: They are all very fair and reasonable points. I should apologise on behalf of the committee for the short notice. Sometimes when the Parliament refers legislation to a committee, they give them a considerable period of time to do it; it can be done more or less at leisure. In the case of this bill, that is not the case. We have a very short reporting deadline. We decided that perhaps it would be—for some witnesses it works and for some it does not—preferable to give you some notice of the questions, even if it was very short, than to bowl 40 questions up to you as you walked in the door.

As far as being able to answer those questions, there are a number of options available to you. You can, of course, take questions on notice. If we ask you questions where you have to go away and look it up or speak to other people, that is perfectly fine to do that. You may also want to refer the committee to the appropriate person to whom the question should be addressed, if it is not you.

Dr McGivern: Thank you.

The CHAIR: Then, of course, there may be questions that are simply not relevant and you can talk to that as well, as we go through. I should also say, and I think this was covered in our email to you, that the committee may ask other questions as well, which is why it is always something that the committee has to consider about whether or not we send you questions because members will have questions of their own and also questions may arise during this hearing. What I suggest we do is start from the beginning and work our way as far through as we can.

Dr McGivern: Certainly.

The CHAIR: You have partially addressed this in your opening comments. I was going to start with a question that is not actually on the list, which is to invite you to describe for the benefit of members what exactly the Reproductive Technology Council is.

Dr McGivern: It is a body that is set up under the Human Reproductive Technology Act. Its principal functions are to oversee the licensing and the implementation of matters arising under that act. The other function that it has is, when it is called upon to do so, to provide advice to the minister or other officers under the legislation in respect of matters regarding reproductive technology.

Hon NICK GOIRAN: Was the council given the opportunity to provide advice in respect of the bill that is currently under consideration by parliament?

Dr McGivern: In a general way, yes. The level of technicality that has been raised in some of these questions, no, but generally speaking we were asked what our position was and what sorts of matters should be taken into account. So that is, in a general sense, yes.

Hon NICK GOIRAN: Do council get to see a draft bill earlier than the bill that is currently before parliament?

Dr McGivern: No.

The CHAIR: Is the council a regulator in this field?

Dr McGivern: It is a regulator, yes.

The CHAIR: Let us start with question 1. The health department's submission states at page 3 that a surrogacy arrangement does not need to be in place before women can access IVF treatment

under the proposed amendments. Can you confirm whether proposed new HRT act sections 23(1)(a)(i) and (ii) will require a lawful 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?

Dr McGivern: There are two parts, I suppose. The question begins by reference to a departmental submission. Again, I should draw the distinction between the department and the council. Whatever I say is not made in response to that. The other part of your question is, is a surrogacy arrangement necessary in order for her to have IVF treatment? The short answer to that, of course, is no, because the HRT act does not only respond to matters of surrogacy.

The CHAIR: The second question is: if the intended operation of proposed new section 23(1)(a)(i) and 23(1)(a)(ii) is that lawful surrogacy arrangements are not required, does it mean that the benefit under those proposed new sections can include an embryo that can be used for surrogacy?

Dr McGivern: That is a tricky question. Perhaps I can answer it in this way: my understanding of it is, if I can skip to what you have on notice as question 4, that the —

The CHAIR: Question 3 is clearly relevant here as well.

Dr McGivern: Of course. The reason it is tricky is because of the directions. This is what I do not think has been picked up in a lot of these questions. A lot of the questioning, and indeed, the amendments themselves, go to the two acts rather than the directions. Direction 7 of the Surrogacy Directions requires there to be a surrogacy arrangement in place in order for an assisted fertilisation procedure to be provided to a person in connection with a surrogacy arrangement. So if the intention is that it is going to be used for surrogacy, then there should be a surrogacy arrangement. Does that make sense? That is, I think, what causes some difficulty in the interpretation and the restrictions because that creates an effective restriction that is not apparent in the act itself.

On the face of it, I think that that might be an intended benefit, but I think you would have to read that, at the moment, that benefit could not really be realised because of direction 7 of the Surrogacy Directions. I hope that makes the answer clear.

The CHAIR: I think it does. We heard from the department this morning. One of the things they informed us was that, for example, egg harvesting is not covered by the provisions that then go on to relate to surrogacy.

Dr McGivern: That is right.

The CHAIR: I guess that is the exact point you are making, is it not?

Dr McGivern: Yes. So egg harvesting, yes, not the actual fertilisation. The artificial fertilisation procedure may not be offered in connection with an intended surrogacy unless there is a surrogacy arrangement in place.

[3.50 pm]

The CHAIR: I might cut now to question 5. This is about part 2, page 58 of the Allan report, where there is an apparent confusion because it says, “The bill does not, however, amend the requirement that an eligible woman be a party to a surrogacy arrangement.” As far as you are aware, does this comment by Dr Allan relate to the current version of the bill?

Dr McGivern: I do not know what version of the bill Dr Allan had recourse to. I am unable to answer that.

The CHAIR: Would you say that her comment at part 2, page 58, relates to the legislation that is before the parliament? “The bill does not, however, amend the requirement that an eligible woman be a party to a surrogacy agreement.”

Dr McGivern: I would say that is true if you are talking about an eligible woman under the Surrogacy Act, yes.

The CHAIR: Dr Allan goes on to say, the same reference, part 2, page 58 that, “In its current form, the proposed legislation would therefore continue to prevent women from accessing assisted reproductive technology who are, for example, 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, or as yet unable to have achieved all the requisite counselling, advice, reports and approvals to have an approved surrogacy arrangement in place.” Is that a correct reading in relation to the bill?

Dr McGivern: The bill, as it stands in light of direction 7, so I think direction 7 is the thing that I have to keep coming back to, and those same cut-offs. Insofar as the woman is undergoing, for example, egg harvesting, none of that applies because none of the wraparound requirement for an arrangement applies. Insofar as there is an artificial fertilisation procedure in connection with an intended surrogacy, then yes, I think all of that does apply.

The CHAIR: I think you have answered 7. My colleagues will quickly pull me up if they do not agree.

Hon NICK GOIRAN: Just to clarify with regards to question 6, then, when Dr Allan says, “In its current form, the proposed legislation would therefore continue to prevent women from accessing assisted reproductive technology” —

Dr McGivern: That is not true. That is far too broad a statement. That is why I was saying to the extent that it applies to an assisted fertilisation procedure in connection with a surrogate and intended surrogacy.

Hon NICK GOIRAN: Then that would be true?

Dr McGivern: Then that would be true.

Hon NICK GOIRAN: But if it was for egg harvesting, then it would not be true?

Dr McGivern: That is right.

Hon NICK GOIRAN: Yes, because egg harvesting would not be considered accessing assisted reproductive technology?

Dr McGivern: No. It would not be an IVF procedure and it would not be an assisted fertilisation procedure.

The CHAIR: Just to further clarify that point, in relation to direction 7 and the interaction between direction 7 and the act, how is it determined whether a procedure is in connection with a surrogacy act or a surrogacy arrangement?

Dr McGivern: I think that is a matter of judgment. So, for example, if a woman was shortly to lose her uterus so that it would be impossible for her ultimately to carry a child, then you would anticipate that the creation of an embryo, where it is known that that is the basis on which the embryo is being created, is fact-driven; it is contextual. Whether or not a woman is likely to be able to carry a child would usually determine whether or not the creation of the embryo was going to be in connection with a surrogacy arrangement, or an intended surrogacy arrangement.

The CHAIR: So it is context-specific?

Dr McGivern: Yes.

The CHAIR: In the RTC's view, what was the rationale for deleting HRT act section 23(2)?

Dr McGivern: Again, I am going to seek to answer this in two parts. I cannot give council's view. This is not a matter that I have been able to put to council. On a brief reading of the legislation, I can offer up an observation, but it would be a personal observation. If that is going to be helpful, I am happy to provide that observation.

The CHAIR: Yes, we can take it in that framework.

Dr McGivern: I would suggest that it becomes redundant, given the intended change in the way that that section is drafted. When you now read the section, it now begins, "The procedure", and then goes on to say, "would likely benefit" or "is directed to a surrogacy arrangement", whereas the old drafting was, "Where the procedure would likely benefit", and then it had a whole sub-list of things. So subsection (2) was needed to clarify that, whereas the fact that, now, subsection (1) is a lot more granular in its application, and so subsection (2) is no longer needed.

The CHAIR: The council submitted that the current HRT act, section 23, is inconsistent with the Sex Discrimination Act 1984. In council's view, are any provisions of the Surrogacy Act inconsistent with the commonwealth SDA and the WA Equal Opportunity Act?

Dr McGivern: Again, let me begin with the premise of that question. Council did not submit 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.

Hon NICK GOIRAN: Further to that, who provided that advice?

Dr McGivern: Legal and legislative services, from recollection, but I am basing this just on personal recollection. I would need to go back and check the records.

Hon NICK GOIRAN: And that is a sub-body within the Department of Health?

Dr McGivern: That is correct. I suppose the next part to what I am going to say, and this probably relates to a number of the questions that follow, is that discrimination law are matters of constitutional law, for example. It does not sit within the ambit of what the council does as a body. We take advice on matters of law and legal interpretation. So, yes, to the extent that it is a regulator and it needs to then seek and obtain advice on the interpretation of the legislation, it will do that, and it will act to the best of its ability on that advice. Will council, sort of independently, form a view on fine, drafting points of inconsistency? No; that is not its function. The submission was that we understand that it is. We also are given to believe that the amendments are directed to addressing that inconsistency. That probably goes to a later question, in fact.

The only matter that I would raise in connection with that is, again, the direction 7. Again, this is not council's view—I have not been able to take council's view on these questions—but as to the provisions of the Surrogacy Act, my inclination is that to the extent that an issue arises under the Surrogacy Act, it arises because of direction 7 and not otherwise.

The CHAIR: We might take that as question 10 as well. Question 11, are parentage orders, under section 19 of the Surrogacy Act, services for the purposes of the Sex Discrimination Act and the Equal Opportunity Act?

Dr McGivern: In my personal view, no. That is a fairly technical legal question. I can give you my view of it. Can I tell you that that is absolutely the way that that would be ultimately tested and interpreted? No, I cannot. I would certainly not understand orders of any court to be services of any kind.

[4.00 pm]

Hon NICK GOIRAN: It may help if the witness could indicate her professional qualification in this respect.

Dr McGivern: Yes. I am legally qualified. I am not, however, a lawyer advising the council. I think it is very important that I raise that matter. Whereas I might happily say that I can sort of give you a view, understand that although I am legally qualified, I am not a discrimination lawyer, either by way of qualification or practice, and I do not advise council. I act on council as the client for that advice.

The CHAIR: Thank you. I go to question 12. Regarding the automatic repeal of section 5 of the SDA, as amended by the Sex Discrimination Amendment (Exemptions) Regulation 2016 on 1 August 2017, is it correct that prior to its repeal, the exemption in regulation 5 applied only 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?

Dr McGivern: I do not think that is a matter I am qualified to answer.

The CHAIR: All right. We might move to question 15. Under 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 section 19 of the Surrogacy Act. Do you know what the policy reason might be for requiring women to have medical reasons?

Dr McGivern: As to what it might be as opposed to what it is, I can proffer a view. Since we are not the drafters of this and we do not sit as the minister, or indeed the department, I can only proffer that view in that qualified way. To provide some explanation, my understanding would be that women are not otherwise precluded from parenting, if they have reproductive capacity as a woman. My suggestion would be that the policy distinction that is being drawn here is that men do not otherwise have the capacity to parent without access. For example, single men or same-sex male couples would not otherwise have the capacity to parent, whereas with women, unless there is a medical reason, they would ordinarily have the capacity to parent. The need, if you like, for assistance and assisted reproductive technology is demonstrated by that medical ground.

The CHAIR: And would that apply to section 23 of the HRT act as well?

Dr McGivern: Yes.

The CHAIR: Does the requirement for women to have medical reasons give rise to discrimination against women that is inconsistent with section 22 of the Sex Discrimination Act and section 20 of the Equal Opportunity Act?

Dr McGivern: As indicated earlier, I am not a discrimination lawyer and I have not received advice on that.

Hon NICK GOIRAN: Did the council receive advice on how the current act could be amended without widening the scope of applicants?

Dr McGivern: I would need to take that on notice. I do not recall having that advice.

The CHAIR: We will make that the first question on notice. Do you need that clarified? You will receive it in writing.

Dr McGivern: Yes. In writing would be fine.

The CHAIR: I go to question 18. Under proposed section 19(1A)(b)(ii) of the Surrogacy Act, both members of a female couple would be required to be eligible women as defined in proposed new section 19(2) of the Surrogacy Act in order to be able to apply for parentage orders. In other words,

both would be required to have medical reasons other than age for being able unable to conceive or give birth to a child. Currently, only one member of a female couple is required to be an eligible person. What is the policy reason for requiring that both members of a female couple have medical reasons in order to access surrogacy?

Dr McGivern: I would refer you to my previous answer—that is, I cannot give you the policy reason that it was done. I can proffer a view that it is likely best explained for the same reason—that is, 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.

The CHAIR: You have explained the current arrangements. What about the policy reason for changing that requirement so that, as envisaged by the bill, it would now apply to both members of a female couple?

Dr McGivern: As I indicated before, I think the best explanation for that—although, as I say, I am proffering a view as opposed to answering what the policy reason was—is that, viewed as a couple, if one has the capacity, then the couple is not prevented from parenting. Does that make sense?

The CHAIR: Yes, it does.

Dr McGivern: It is only when both lack reproductive capacity in terms of conception and/or being able to carry a child to term. 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.

The CHAIR: Returning to the question of the need arising from a person's age, the definition of "eligible women" in proposed new section 19(2) of the Surrogacy Act requires medical reasons. Under section 19(3)(a) of the Surrogacy Act, these reasons do not include a reason arising from a person's age. The reason for infertility under proposed section 23 of the HRT act also specifically excludes age—that is, HRT act, section 23(1)(d). This does not appear to be the case in other states. What is the policy reason for excluding age as a medical reason and a reason for infertility for women?

Dr McGivern: This is a longstanding section. I do not think anybody on the current council was even around, let alone providing policy advice on this matter, at the time that it was drafted. In terms of what the policy reason was, I simply cannot answer that. Again, in terms of what might be the case, as opposed to what is, I suspect that this goes to the issue of enabling people to parent at a time that they ordinarily would. In other words, that the idea behind this, as to reproductive technology, was to address an inability that arose at a time that you would normally expect to have that ability. I think the policy really reflects the way that assisted reproductive technology was being directed and thought about at the time.

The CHAIR: Does this effectively lead to an upper age limit, perhaps, as to IVF and surrogacy by women who have become infertile due solely to age?

Dr McGivern: Yes—save that I would not say that there is any particular age, as such, that is the limit. But, yes, effectively I think it does.

The CHAIR: By contrast, there is no upper age limit applicable to men for access of surrogacy under proposed section 19 of the Surrogacy Act or surrogacy and related IVF under section 23 of the HRT act. Was a maximum age for men to access surrogacy considered in the drafting of the bill?

Dr McGivern: I honestly do not know. We did not draft the bill. It was not a matter that was put to council.

Hon NICK GOIRAN: Further to that, has council never had a discussion about the appropriate age limit for men in a new surrogacy regime?

Dr McGivern: Certainly not that I recall.

[4.10 pm]

The CHAIR: How would proposed HRT section 23(1)(d) and the Surrogacy Act section 19(3)(d) operate in relation to women suffering from early menopause? To what extent would they be able to access IVF or surrogacy?

Dr McGivern: I think that is again a fairly difficult question. I think, generally speaking, as a matter of clinical judgment, if the clinician was satisfied that the reason was not age but other factors, then that would not preclude access.

The CHAIR: How do you think that reference to age in the HRT act, section 23(1)(d), and the Surrogacy Act, section 19(3), will be construed?

Dr McGivern: I think something along the lines of what Dr Allan has suggested. Having said that, does council agree with that interpretation? This is not a matter I have been able to put to council—specifically, in the way that it has been put—so to the extent that you would like me to seek council's views, I would need to do that separately. I think that is a fairly sensible working interpretation of the legislation.

The CHAIR: Okay. That is question 25.

Dr McGivern: Perhaps further to that, the only way that I would nuance that is that it would probably be an assessment of both objective and subjective factors. For example, I would not simply say the average of menopause would be the age, so you would simply look to the statistics and say, "The statisticians tell us that this is the average age; therefore, that is the hard limit." I do not think that is the way it would work at all.

The CHAIR: Are there any current directions on any issue of age limits?

Dr McGivern: No.

Hon NICK GOIRAN: By definition, an average is an average, so there would be a typical lower limit and an upper limit.

Dr McGivern: That is right. That is why I was saying it is a combination of objective and subjective. I think, in making the assessment—in this particular woman, is age the reason for infertility?—in the clinical judgment that needs to be made, you would factor in a range of matters.

Hon NICK GOIRAN: That would be an age range?

Dr McGivern: Yes.

Hon NICK GOIRAN: What would you say would be the typical age range?

Dr McGivern: I would need to take that on notice. I mean, I could give you a rough idea, but that would not be my—I would prefer probably to move to that.

Hon NICK GOIRAN: I think in an earlier hearing it was suggested 45 to 55.

Dr McGivern: That sounds about right. I would probably say probably over 45, but that sounds about right. That would not strike me as —

Hon NICK GOIRAN: Would you say that under the current provisions of the act, and moving forward even with the bill if it were passed, a 70-year-old female would not qualify?

Dr McGivern: I would say that, yes.

Hon NICK GOIRAN: Would a 70-year-old male qualify under the amended provisions?

Dr McGivern: Probably.

Hon SIMON O'BRIEN: Section 23(1)(d) is what we are talking about, when it states —

the reason for infertility is not age or some other cause prescribed for the purpose of this paragraph ...

Are there in fact any regulations provided in relation to this matter? Has anything been prescribed?

Dr McGivern: No.

Hon SIMON O'BRIEN: We are just left with the age aspect.

The CHAIR: You have already said there are no current directions on this issue. Do you know whether it is proposed to issue directions or other explanatory material in the future?

Dr McGivern: I am not aware of it specifically. Having said that, the Allan report is of course fairly recent, so a number of matters will need to be looked at by the department. Again, we are not the direction-creating or issuing entity. I am not aware of that particular matter being addressed, no.

Hon NICK GOIRAN: Has the Reproductive Technology Council's view been sought by government in the preparation of its response to the Allan report?

Dr McGivern: In a general sense or specifically in relation to these matters?

Hon NICK GOIRAN: Either/or.

Dr McGivern: In a general sense—not directly, so not in the preparation of their response. We have certainly been invited to provide any response that we might want to make, but not directly in relation to the department's response, no.

Hon NICK GOIRAN: The council has not seen a draft response from the government?

Dr McGivern: No.

The CHAIR: How would the HRT act, section 23(1)(d), and the Surrogacy Act, section 19(3)(a), operate in relation to a woman aged, for example, 55 who has always been infertile due to a medical condition? Would she be an eligible woman for the purposes of proposed section 19(1)(a) of the Surrogacy Act, and would the HRT act, section 23(1)(d), preclude her from accessing IVF?

Dr McGivern: That is a really tricky question. The answer is—in my role on council, I would be seeking advice on that. If that was a matter that came to us, I would seek legal advice on that. I think that is a very tricky question.

The CHAIR: Question 28. Why has the bill not been drafted to amend HRT act, section 23, and 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 who are of intersex status.

Dr McGivern: In relation to your earlier matters in terms of my responses, I would direct you to the drafters.

Hon SIMON O'BRIEN: Fair enough. The HRT has nothing to do with this bill, so there is a limit to what sorts of questions we can put to our witness.

The CHAIR: We will go to question 31. Are you aware of any historical cases of transgender or intersex people seeking and being refused IVF and/or a surrogacy arrangement?

Dr McGivern: Not off the top of my head, but it is probably better that I take that matter on notice.

The CHAIR: We will make that the second question on notice, question 31.

Question 32: was there a practical need for the powers to enter, inspect, search and seize to be extended to investigate breaches or possible breaches of the Surrogacy Act? If there were, could you explain that need?

Dr McGivern: Need? I think it is practically sensible in the sense that at the moment, the Surrogacy Act only directs itself to the council in a very limited way. It contemplates the functions of council being in connection with the approval of surrogacy arrangements. That is all under part 3, division 2. That is really the only time that council is really contemplated as having a function under the Surrogacy Act. The Surrogacy Act seems to be directed largely at what the Family Court is going to do. Having said that, the Surrogacy Act also tends to work on the assumption that surrogacy is going to take place with assisted reproductive technology services. There is a connection there somewhere. Further, the act creates offences, and it is certainly not our role to deal with offences per se, but you could understand that if a practice was committing offences under the Surrogacy Act and was an assisted reproductive technology provider, that there would be implications, for example, in terms of their holding a licence and so on.

The pragmatic response is to say that to the extent that these things are connected, then there should be an opportunity for council as the licensing body to be able to inspect in connection with those matters. I would say it is a pragmatic matter rather than a practical need. Has there been much need to date that we are aware of? No. Pragmatically, should it be there? Probably.

[4.20 pm]

The CHAIR: Question 33: does the Surrogacy Act currently contain any powers for officers to investigate breaches or possible breaches of that act?

Dr McGivern: Again, not directly. That is the problem. So it does create offences which suggests that if there were problems with the way a clinic was operating, there is a level of uncertainty around whether or not you could use the powers under the Human Reproductive Technology Act. So, not directly, would be my response.

Hon NICK GOIRAN: I understand that under the Human Reproductive Technology Act, there are existing powers along these lines.

Dr McGivern: Yes.

Hon NICK GOIRAN: The purpose of this bill is to mirror them to some extent, or to provide them under the Surrogacy Act. I also understand that under the Human Reproductive Technology Act that such powers are subject to the obtaining of a warrant first, and that this bill would allow those powers without the provision of a warrant. Were any of those matters brought to the attention of the council and discussed prior to the bill being before parliament?

Dr McGivern: Not that I recall, but I would probably like to take that on notice as well.

The CHAIR: We will make that the third question on notice.

Hon NICK GOIRAN: Further to that, the Reproductive Technology Council, then, under the existing powers under the Human Reproductive Technology Act, do they direct these authorised officers to enter, inspect, search and seize? The existing powers, who directs that those things be undertaken? Is that the Reproductive Technology Council or somebody else?

Dr McGivern: The council only inspects premises or goes to premises generally to look at licensing matters, not to necessarily investigate offences. I do not know if that answers the question. If you are asking more generally, perhaps I could give you a more detailed response again on notice.

The CHAIR: That is the fourth question on notice. The terms “medical reasons for infertility” and “inability to give birth”, how are they determined in practice?

Dr McGivern: They are clinical judgments made by the treating practitioner.

The CHAIR: Are there difficulties that are commonly encountered by IVF service providers when determining the presence or absence of medical reasons?

Dr McGivern: My suggestion would be that you would need to go to the medical service providers.

The CHAIR: What is council’s view of the requirements in the Surrogacy Act, section 17C for counselling and advice prior to the council approving a surrogacy arrangement?

Dr McGivern: I have not had an opportunity to canvass the council as a whole. I can certainly refer to matters that I do know council have addressed themselves to in the context of the Allan review. That is that counselling requirements and implications counselling be conducted by a broader group. In other words, the ability to offer counselling to be opened up beyond “approved counsellors” to address issues, for example, of interstate access and/or regional access. Beyond that, I would need to take council’s view.

The CHAIR: Do you want to take that on notice?

Dr McGivern: I can do, yes.

The CHAIR: That is the fifth question on notice.

Question 37: the council submitted that additional amendments such as the screening of surrogacy applicants should be considered separately to the bill. Despite that submission, what is the council’s view on extending the section 17 requirements as part of the current bill to include working with children checks or criminal record checks?

Dr McGivern: Again, to the extent that council has formed a view—it did so in relation to making a written submission to the review of the legislation—council expressed the view that additional screening was probably not necessary because of the degree to which there are already certain checks in place. In terms of counselling, getting legal advice, and welfare considerations, for example, being part of all of that, that there was probably a sufficient level of protection and scrutiny around people entering into these arrangements. It also seemed to be inconsistent to raise it in respect of surrogacy when similar screening would not be necessary for IVF. That disjunct would not seem to make sense. In any event, it probably was not necessary because there was enough wraparound.

Hon NICK GOIRAN: How does the Reproductive Technology Council currently satisfy itself that applicants for surrogacy do not have prior convictions in relation to child sex offences?

Dr McGivern: Well, it does not directly satisfy itself of that in the sense that that is not part of the requirements. So there is no reason to specifically look into it. It may be that matters are picked up in counselling reports or whatever. But does it seek to satisfy itself of those things? Well, no, that is not part of the criteria that we are required to take into account when approving an arrangement.

Hon NICK GOIRAN: Precisely.

The CHAIR: What is the current number of surrogates and the rate of surrogacy in WA?

Dr McGivern: I can only refer you at this stage to the figures that come out of our annual report. In the last reported year, there were six applications that were approved of a total of 34—not applications—in the life of us approving surrogacy arrangements.

Hon NICK GOIRAN: To be clear there, I think you are saying that there were six —

Dr McGivern: In one year.

Hon NICK GOIRAN: — in the last calendar year, which is 2018.

Dr McGivern: 2017–18 was the reporting period.

Hon NICK GOIRAN: So in the last reported financial year there were six applications, and there have been a total of 34?

Dr McGivern: There were six approvals and there have been 34 approved surrogacy arrangements in total. Those figures, I have literally, just before coming in, had a quick check in our report so I would refer you to our annual report for those figures.

Hon NICK GOIRAN: You mentioned six approvals. How many applications were there?

Dr McGivern: I would need to take that on notice. I just cannot remember. From recollection, I—no, I am not going to try to make it up. I would need to go and look.

The CHAIR: Is that figure available in the annual report?

Dr McGivern: I think so. Again, I would need to go and check. I have had very little opportunity, as you can imagine, to go and check all of this before the hearing today.

The CHAIR: It is probably just as easy for you to take it on notice.

Dr McGivern: Yes.

Hon NICK GOIRAN: Further to that, if the information is not in the annual report, is it available to council in any event?

Dr McGivern: Yes.

Hon NICK GOIRAN: You would be able to access that information?

Dr McGivern: Of course.

The CHAIR: Question on notice 6 is the total number of applications. I will just read the question back to you. Question 6 is how many approvals and applications for surrogacy arrangements in 2017–18.

Hon NICK GOIRAN: 2017–18 and in the life of the scheme.

Dr McGivern: Yes.

The CHAIR: What is your earliest reporting date?

Dr McGivern: Our reports go back almost 30 years, but not under surrogacy, of course.

The CHAIR: 2008.

Dr McGivern: Yes.

The CHAIR: Is the demand for surrogates greater than the number of surrogates available?

Dr McGivern: I would suggest that is a matter to put to service providers. We only see the tail end of that.

The CHAIR: In your opinion, will the bill increase the demand for surrogacy in Western Australia?

[4.30 pm]

Dr McGivern: I think it is likely, in the sense that if the eligibility requirements are broadened, it stands to reason that there would be more demand for the service, yes.

Hon NICK GOIRAN: How long has the witness been on the Reproductive Technology Council?

Dr McGivern: I would need to go and check. It has been at least 11 years, but it may be longer.

Hon NICK GOIRAN: During that period of time, do you recall ever receiving an application by a single female for a surrogacy arrangement?

Dr McGivern: If you are asking my personal recollection, I simply do not recall. We get a lot of material to look at. I would need to check records before I could give you any response. That should come through at some point.

The CHAIR: Was your question about the witness's personal recollection?

Hon NICK GOIRAN: Yes.

Dr McGivern: I simply do not recall.

Hon NICK GOIRAN: For what it is worth, it is consistent with an answer provided earlier today.

The CHAIR: We have a couple of extra questions that have been drafted by Hon Nick Goiran, so I might hand over to him to ask you the remaining questions.

Hon NICK GOIRAN: Thank you, Chair. The review by Associate Professor Sonia Allan at one point refers to an RT register, which I presume is short for "reproductive technology" register.

Dr McGivern: Yes.

Hon NICK GOIRAN: Perhaps that is a phrase you are familiar with. In any event, do you know who manages that register?

Dr McGivern: The reproductive technology unit.

Hon NICK GOIRAN: That brings me to another question: can you assist the committee by explaining the difference in function between the reproductive technology unit and the Reproductive Technology Council?

Dr McGivern: The unit is a subdivision of the health department. As I have indicated, the council is not of the department. It is supported, it has a level of administrative wraparound support to draw upon through the department, but the council is an independently appointed statutory body.

Hon NICK GOIRAN: Does the reproductive technology unit report to council —

Dr McGivern: No.

Hon NICK GOIRAN: — or just supports council?

Dr McGivern: It supports council.

Hon NICK GOIRAN: So who does the unit report to?

Dr McGivern: Presumably the minister, since it is a departmental unit.

Hon NICK GOIRAN: My next question was addressed earlier today. I move then to: what measures does the Reproductive Technology Council presently oversee which ensure that gestational surrogates are advised of the increased risks associated with gestational surrogacy?

Dr McGivern: I am not sure I understand the question about the "increased risks".

Hon NICK GOIRAN: I can elaborate. We just heard from Associate Professor Allan that the increased risks to surrogate mothers include medical risks, emotional risks, the impact on family, the relationship with the intending parent, relinquishment, family pressure, amongst other things.

It was quite a detailed response. She made it clear to us that there are different additional risks, especially for surrogate mothers over and above risks —

Dr McGivern: I see; rather than —

Hon NICK GOIRAN: — that would be the case in every pregnancy.

Dr McGivern: I see. Thank you. I understand the question better.

Hon NICK GOIRAN: I just want to be clear that those risks are being communicated to people before they sign up.

Dr McGivern: The council relies very heavily on the expertise of counsellors in that regard. Our role is a role for approving arrangements under the act. There are certain criteria, of course, that we are required to take into account. Adequate counselling is one of those, but it is a subset. For example, it is often in counselling reports that you will see those matters being addressed, and it is common that they are. From a medical advice perspective, it is also important that the gestational mother is medically assessed. Again, there is a level of reliance on proper clinical practice, including informing patients of any particular material risks associated with proposed treatment. That obligation exists independently of council, and council, I think, is entitled to expect that medical risks will be a matter of communication between the clinician and a patient.

Hon NICK GOIRAN: Do you know if the rate of foetal mortality in a surrogate pregnancy is higher than in what I am going to refer to as an ordinary pregnancy?

Dr McGivern: I will certainly need to take that matter on notice. I would need to request the stats for that.

Hon NICK GOIRAN: It has not been a point of discussion by the council over the years, or a concern that has been raised?

Dr McGivern: No, not that I recall.

Hon NICK GOIRAN: The council obviously has access to data in relation to these pregnancies and it is reported in the annual report, as we discussed earlier. Is the council involved in any research projects and the like as a result of the collection of that data?

Dr McGivern: Council itself has not conducted research, no.

Hon NICK GOIRAN: Is it a possible power or function for the council, or is that just outside the remit of the council?

Dr McGivern: That is outside the remit of council.

The CHAIR: I will formally close the proceeding. You have taken six questions on notice. Because this committee is on a very tight turnaround time, as far as reporting to the house goes, is it possible that you could provide those answers to us by close of business Friday?

Dr McGivern: I can try.

The CHAIR: If possible, if you could give us answers as they become available. Do not hold them back and give them to us in one go, if that is the case.

Dr McGivern: Yes. As I have explained, I am in need of data and people and access to those support structures, so it will very much depend. I do not know, for example, how many questions on notice might have gone to the department, and the split of their resources between answering those and supporting council and answering theirs. I will certainly endeavour to get them to you by Friday. That is probably the best I can do.

The CHAIR: Perhaps you could keep in touch with our advisers on that matter.

Dr McGivern: Yes.

The CHAIR: Thank you. I appreciate that. Thank you for attending today. Please end the broadcast.

A transcript of this hearing will be forwarded to you for correction. If you believe that any corrections should be made because of typographical or transcription errors, please indicate these corrections on the transcript. Errors of fact or substance must be corrected in a formal letter to the committee. When you receive your transcript of evidence, the committee will advise you when to provide your answers to questions taken on notice. If you want to provide additional information or elaborate on particular points, you may provide supplementary evidence for the committee's consideration when you return your corrected transcript of evidence.

Dr McGivern: Thank you. What is the time line for the return of the transcript?

The CHAIR: Ten days.

Dr McGivern: Okay. Thank you.

The CHAIR: Thank you very much for coming in today. It has been very useful.

Hearing concluded at 4.39 pm
