Standing Committee on Legislation

Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018

Dr Sonia Allan (Written Submission)

No.	Question
1	For the Committee's benefit, could you please outline your qualifications and experience in the areas of assisted reproductive technology (ART) and surrogacy? I hold a Bachelor of Law (Hons), Bachelor of Arts (Psychology) (Honours), Master of Public Health (Merit), Master of Laws (Global Health Law) (Distinction) and a PhD in law in which I examined the regulation of research involving human embryos and cloning. I am trained in qualitative and quantitative research and analysis and am experienced in socio-legal research, public consultation, law reform, and report writing. I have been examining the ethical, legal and social issues pertaining to assisted reproduction and surrogacy for more than 16 years. From 2003- 2005 I worked for the Victorian Law Reform Commission on their reference on access to ART, surrogacy, legal parentage and adoption, conducting extensive consultation, research, analysis, and writing. As a legal academic and consultant, I have built expertise in health law, including that I have closely examined and written on laws, policies and practices relevant to ART and surrogacy. I have also worked extensively on issues related to donor conception. In 2011 I was awarded a Churchill Fellowship to conduct research in all countries that release information to donor-conceived people, and to bring the results of such research back to Australia. I visited clinics, agencies, and government authorities in Austria, the Netherlands, Sweden, Finland, and the United Kingdom, and consulted with authorities in Switzerland. I was also a Global Health Law Fellow at Georgetown University in Washington D.C. from 2011-2012 where I furthered my understanding of global health law issues and regulation and presented research on ART, donor conception, and surrogacy. I have 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. I have 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 at UNFPA's Asia and Pacific Regional Office in Bangkok. In 2014 I was appointed to the International Federation of Fertility Societies (IFFS) Surveillance Committee, which surveys laws, policies and practices around the world on ART and Surrogacy tri-annually. From 2015-2017 I led the review of the *South Australian Assisted Reproductive Treatment Act 2010*, having been directly appointed by the then Minister for Health in that state, the Hon. Jack Snelling. In 2018 I led and conducted the review of the Western Australian *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008.*
2	Recommendation 4 of Part 2 of your Report recommends 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.' Are the issues which 'require urgent attention' the same as the two broad issues covered by the Bill (namely availability of IVF and surrogacy for likely future infertility; and the extension of surrogacy to single men and male couples)? The two broad issues covered by the Bill, namely the availability of IVF and surrogacy for the likely future infertility; and enabling access to ART and surrogacy regardless of marital status or sexual orientation are two of the issues that I found require urgent attention.

3	Were there other matters not addressed by the Bill which the Review found 'require urgent attention'? Yes. The Bill was introduced before the review was completed, the Minister/his Department being of the view that the proposed changes were needed prior to the conclusion of the review. However, given the actual timing and passage of the Bill thus far, and that my review has now been completed, yes, there are other matters not addressed in the current Bill, that I found require urgent attention and/or should be addressed as a matter of priority. These include issues regarding: 1. Current records and record keeping practices at the Department about ART procedures and donor conception (including surrogacy); 2. Matters regarding the recording of, and access to information about donor-conception and surrogacy arrangements by people born as a result 3. Operational issues regarding the donor registers and, as a matter of priority: 4. The current regulatory structure, which requires changes to a. the model of regulation currently implemented and b. the legislation, with the review finding that - the current regulatory model is now overly bureaucratic, burdensome, and failing to meet principles of better regulation - the *Human Reproductive Technology Act 1991* and subordinate legislation is particularly outdated and difficult for those being regulated to interpret or comply with; - the *Surrogacy Act 2008* and subordinate legislation requires amendment to better support access to lawful altruistic surrogacy arrangements, while prohibiting commercial arrangements (domestically and abroad).
4	Recommendation 1 of Part 2 of your Report recommends changes to the law to provide access to IVF procedures where a patient faces impending loss of, or impairment to, their fertility. How effectively does the Bill make those recommended changes? It goes some way to making those recommended changes, but • The wording in sub-sections (a)(i)-(iii) focus on couples or women who are 'likely to benefit' and who are 'likely to be unable to conceive (or birth) a child for medical reasons'. Here it is my opinion that the drafting could be improved; the language used could be gender neutral; and there are ongoing questions regarding whether restricting access to women based on 'medical reasons' not to do with age is suitable. • It is also unclear whether proposed sections 23(a)(i) & 23(a)(ii) are meant to apply in the cases where a woman requires surrogacy due to the Bill also including proposed section 23(a)(iv) which specifically relates to surrogacy; • In addition, because of the wording of proposed section 23(a)(iv) there is scope for interpretation that an existing surrogacy arrangement is required. I note it is my view that if legislation is unclear of gives rise to points of potential ambiguity, then it is not effectively drafted.

5	Recommendation 2 of Part 2 of your Report recommends changes to the law to remove the 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 arrangement in place before being able to access ART. How effectively does the Bill make those recommended changes? It goes some way to making those recommended changes, but because of the wording of the current bill, and existing requirements for a 'lawful' surrogacy arrangement, it may still be subject to interpretation that prevents access in cases in which surrogacy is required.
6	On page 50-53 of Part 2 you discuss the difficulties in meeting the requirements for an approved surrogacy arrangement in a situation where a woman faces a health crisis which is likely to result in infertility. The Bill proposes to delete current section 23(1)(a)(iii) requiring that a woman who is unable to give birth to a child be party to an approved surrogacy arrangement before she can access IVF. On page 58 of Part 2, you state that 'The Bill does not, however, amend the requirement that an eligible woman be a party to a surrogacy agreement.' Does this comment relate to the current version of the Bill? Yes, it does. NG - Add to question 6 – "If not, which version is the Review Report referring to?" (Not applicable).
7	On page 58 you noted 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 • as yet unable to have achieved all the requisite counselling, advice, reports, and approvals to have an 'approved' surrogacy arrangement in place. Is that correct in relation to the current Bill? Yes, while the Bill removes the wording 'and be party to an approved surrogacy arrangement…' the new proposed wording in subsection 23(a)(iv) states that access to IVF is permissible if it: '*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)'.* This could be interpreted as indicating a present and existing surrogacy arrangement that is lawful due to the use of present tense. This is also reinforced by considering the subsidiary legislation (specifically Surrogacy Direction 7) which stipulates what a ***lawful*** surrogacy arrangement entails: *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.* Direction 7 of the Surrogacy Directions 2009 requires that such approval must be obtained *prior* to the surrogacy arrangement as it prevents a licensee from providing an artificial fertilisation procedure in connection with a surrogacy arrangement unless the arrangement has been approved by the RTC. Section 17 of the *Surrogacy Act* and the Surrogacy Regulations 2009, Regulation 5, then stipulate the requirements for such approval, which include a significant number of steps – which in

	practice, take a long time and have significant costs associated with them. These are listed in my review report Part 2. In my view, the wording of the proposed legislation may still be interpreted as requiring an existing, RTC approved, lawful surrogacy arrangement. I believe this would be the case unless: 1. The wording of the current proposal is amended to state, for example, '*is for the purposes of **an existing or future** surrogacy arrangement that is being or is intended to be undertaken pursuant to the requirements of the Surrogacy Act 2008'*; and/or 2. other requirements for entering into a 'lawful' surrogacy arrangement are amended (see also my other recommendations throughout the report in this regard).
8	The Department has advised that 'a surrogacy arrangement does not need to be in place before a woman can access IVF treatment under the proposed amendments.' Do you agree that is the effect of the proposed amendments? As just stated, I do not believe so, UNLESS the wording of the proposed legislation is changed to make this explicit that access may be had by those who have a lawful surrogacy arrangement or may enter a lawful surrogacy arrangement in the future, and requirements (in the subsidiary legislation) for entering into a ***'lawful'*** surrogacy arrangement are amended. To date no such amendments have been made, and therefore the proposed amendments would not/do not fully resolve the issue. 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.
9	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)' (EM page 5). Do you agree with that statement? Section 23(2) provides that *'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.'* I am not of the view that the deletion of section 23(2) is necessary as part of the current proposals in the Bill before parliament. Rather, under the current wording of the proposed legislation it might be pertinent to keep the subsection – as it may reinforce that access may be for the purposes of egg collection and storage, rather than immediate use for pregnancy, as well

	as that it may be for the purposes of a surrogacy arrangement in which a surrogate mother will become pregnant, carry and birth the child.
10	In your view: Is section 23(2) currently 'required'? Given the prescriptive nature of the provisions regarding access to ART procedures, and potential issues of clarity, then arguably any additional provision that assists to clarify the scope of such provisions and how they apply, is desirable. To this extent, the 23(2) provision may be 'required' to make clearer that access may be for the purposes of egg collection and storage, rather than immediate use for pregnancy, as well as that it may be for the purposes of a surrogacy arrangement in which another woman will become pregnant, carry and birth the child. • Would section 23(2) be any less necessary following the proposed amendments to section 23(1) in clause 11 of the Bill? No. I do not think so.
11	If proposed new sections 23(1)(a)(i) and (ii) of the HRT Act are intended to apply to harvesting of eggs with a view to likely surrogacy, do you think section 23(2) (or an amended version of it) should be retained? It is unclear whether proposed sections 23(a)(i) & 23(a)(ii) are meant to apply in the cases of surrogacy due to the Bill also including proposed section 23(a)(iv) which specifically relates to surrogacy. However, yes, I do believe that within the current proposed legislation it may be beneficial to retain section 23(2) (or an amended version of it). Ultimately, however, my recommendation in the review is to: 1. Repeal the *Human Reproductive Technology Act 1991* (WA), and that new legislation governing ART be enacted that adopts principles of better regulation and adopts a clearer approach to drafting; and 2. Amend the *Surrogacy Act 2008* to better regulate and support access to lawful altruistic surrogacy and prohibit domestic and international surrogacy.
12	Recommendation 3 of Part 2 of your Report recommends 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.' In your view, which parts of the HRT Act and the Surrogacy Act are discriminatory for the purpose of recommendation 3? In relation to the parts of these respective Acts that are discriminatory ***regarding access*** to ART or surrogacy based on sex, relationship status, gender identity, intersex status, or sexual orientation, I would first identify that it is my view that both Acts (whether a new HRT Act is enacted, or current Acts are amended) should use gender neutral language throughout. However, specific provisions of the current legislation that relate to access and may be viewed as discriminatory include: The ***HRT Act 1991 (WA)*** Section 23 – to the extent that it restricts access to IVF procedures to: - **a woman** (noting definition of woman at s 3(1) is 'woman means ***any female human'***) - **a couple** (noting definition of couple at s 23(1)(c) are persons who 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***; - does not make provision for access to ART by people who have • differential gender identity to sex, or • have intersex status and therefore, may not identify as a 'woman' or be considered a 'female human'; and/or who are not in a couple who are of the opposite sex to each other

	(there thus appears to be discrimination on the grounds of sex; gender identity; intersex status; marital or relationship status; and sexual orientation) (Note also - Section 26(1) references to a 'woman' (at (1); (1)(c); (1)(d); (1)(e) associated with decision making pertaining to control, dealing and disposal in relation to an egg in process of fertilisation or an embryo. Current proposals only change (1)(c); (1)(d)) to person, perhaps it would be necessary to change (1)(e) to person also. ***Surrogacy Act 2008*** (WA) – In relation to access to ART services to enable a woman to become pregnant using a fertilisation procedure in a clinic, Section 67 amended s 23 of the HRT Act 1991 (WA). (*to insert: (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.* I have not in preparing for this hearing had time to establish whether in Western Australia after amendment to HRT Act, this provision is automatically repealed, but it still appears in the latest version of the Act. There is a need to make it consistent with any amendment/repeal of provisions in the HRT Act or to remove it from the Surrogacy Act 2008 if the current proposals are implemented. (NB – I am not including here comment regarding the parentage provisions in the *Surrogacy Act* because you have asked me about discriminatory provisions related to ***access***).
13	Are parentage orders under section 19 of the Surrogacy Act 'services' for the purposes of the *Sex Discrimination Act 1984 (Cth)* and *Equal Opportunity Act 1984*? This is an interesting question. In the legal profession we refer to legal services. But I believe the question is directed as to whether the granting of parentage orders is a 'service' to bring it within the realms of the SDA or Equal Opportunity Act. As we have discussed, it is discriminatory to exclude people from accessing ART services based on their sex, marital or relationship status, gender identity, intersex status, or sexual orientation. There is case law that demonstrates that state laws preventing access to ART have been declared void to the extent to which they conflict with Commonwealth anti-discriminations laws. 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 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.

Further, in thinking about this question, I imagine if a Judicial officer refused to grant a parenting order based solely on a person's sexual orientation, relationship status, sex, intersex status, or gender identity that the decision could be appealed on the grounds of discrimination.

It is also important to recognise that laws have been extensively amended due to having been deemed discriminatory against certain people or groups. As an example, I draw to your attention here to the fact that in 2008 the Federal Government changed 85 laws to give same-sex couples in a de facto relationship or registered relationship the same rights as de facto opposite-sex couples. Significant changes were made that recognised same-sex parenting including that:

- A member of a same-sex couple is eligible to receive child support from their partner if their relationship breaks down;
- A member of a same-sex couple who was previously not recognised as the parent of a child can seek parenting orders from the family courts in relation to who a child lives with or spends time with, and may now be recognised as a parent of the child;
- If the same-sex partner/co-parent dies, their spouse and child/ren can receive the same benefits from superannuation as other families;
- Extended family members of both parents are legally recognised as family members of the child/ren. For example, where a female co-parent is recognised as a parent because her partner is the child/ren's birth mother, her mother will be legally recognised as the child/ren's grandmother;
- A child is now included as part of the same-sex couple's family enabling them to access family benefits under the Medicare Safety Net and the Pharmaceutical Benefits Scheme;
- the Australian Taxation Office now recognises same-sex de facto relationships and their child/ren. Same-sex co-parents are assessed as are other family types, and have equal access to benefits;
- Either same-sex co-parent is able to sign a memorandum of understanding if they need to get witness protection for their child, no matter who is biologically related to the child;
- Same-sex couples, and their child/ren are now recognised by the Australian Customs and Border Protection Service as a family for the purposes of calculating tax-free duty allowances;
- A same-sex co-parent's family is now considered when courts are working out if there is a risk of personal harm or property damage to a witness' family before publishing certain court proceedings.
- The same-sex de facto partner is now consulted and allowed to give consent to dealing with excess embryos after an IVF procedure.

I note also that intersex, transgender, hetero-sexual, same-sex, single, de-facto, or married families are protected from discrimination on grounds of 'family responsibilities', by the *Sex Discrimination Act 1984.*

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). I note, further, that in my review report I have recommended that all people who have entered into a surrogacy arrangement, whether in Western Australia, or in another jurisdiction be required to appear before the Western Australian family court for determination of legal parentage (in Western Australian cases) or parenting orders (where requirements have not been met), to determine whether such orders are in the best interests of the child.
14	Does the Bill repeal or amend the discriminatory provisions as referred to in recommendation 3? Not all of them. That is: • It focuses on discrimination based upon sex; marital or relationship status as it particularly relates to single men, and men in same-sex couples. • It does not address discrimination based on gender identity or intersex status. • It does not include gender neutral language (referring only to women, men, woman, man). • It also does not address other matters that have not yet been mentioned in this submission, such as 1) potential age discrimination and 2) introduction of differential treatment/criteria for men and women regarding access requirements (medical reasons for women, as opposed to social reasons for men)).
15	Regarding the automatic repeal of regulation 5 of the *Sex Discrimination Regulations 1984 (Cth)* (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 only applied to discrimination on the basis of sexual orientation, gender identity or intersex status, and therefore did not did not apply to discrimination against single men under the HRT Act or the Surrogacy Act? Yes, the exemption regarding the SDA to which you refer included that for the purposes of subsection 40(2B) of the Act, the following laws were prescribed: (a) the *Human Reproductive Technology Act 1991* (WA); (b) the *Surrogacy Act 2008* (WA). The provision noted that subsection 40(2B) provided 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). The exemption therefore did not apply to section 5 (sex discrimination); or section 6 (discrimination on the grounds of marital or relationship status). However, this does not mean that the exemption did not apply to some single men. That is, the SDA section 4 defines: • **'sexual orientation'** as a person's sexual orientation towards: (a) persons of the same sex; or (b) persons of a different sex; or (c) persons of the same sex and persons of a different sex. • '**gender identity'** as meaning: *'the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.'* There exist single men who, for example are asexual, homosexual, were designated female sex at birth but identify as male (and are unable to conceive a child or carry it for psychological or physical reasons) or were designated male sex at birth and identify as male who may seek ART/surrogacy for a variety of physical, psychological and/or social reasons. Prohibitions on

	providing ART or access to lawful surrogacy services to such men (regardless of whether they are single) may discriminate against them on the basis of their sexual orientation or gender identity.
16	If that is correct, does that mean that discrimination against single men under the *HRT Act* and the *Surrogacy Act* has always been inconsistent with section 22 of the Sex Discrimination Act? NG – Or had it ever been inconsistent due to the exception in section 31? I would like to pause for a moment to recognise that I understand the questions are focused on whether there are inconsistencies between the Western Australian Acts and the Commonwealth Sex Discrimination Act, as this is the basis for the current Bill you are considering. But, I do think it is pertinent to consider the basis upon which one would justify exclusion from ART or surrogacy based purely on a person being 'single' or a 'man'. It should be noted that there are many avenues to a single man becoming solely responsible for the parenting, care and upbringing of a child; including that single men can obtain sole legal parentage and parenting orders for their biological children born as a result of sexual intercourse; and access adoption and foster care in Western Australia (and therefore be solely responsible for children who are not biologically related or are more distantly related). But to return to your question - Does that mean that discrimination against single men under the *HRT Act* and the *Surrogacy Act* has always been inconsistent with section 22 of the Sex Discrimination Act? To answer this, it is helpful to first note that s 9(4) of the *Sex Discrimination Act* limits the operation of the unlawful discrimination provisions in Part II to the circumstances set out in ss 9(5)- 9(20). This ensures the provisions of Part II are given effect throughout Australia to the extent that they fall within Commonwealth legislative power. As I understand it, in terms of the availability of the SDA to male complainants, up until mid-2011, section 9(10), which had been referred to as the basis of some discrimination claims relevant to marital status, was considered to be applicable only to women – as 9(10) provided for various prescribed provisions in Part II of the SDA to have effect to the extent that the provisions give effect to a relevant international instrument and relied upon the *Convention on the Elimination of Discrimination Against Women* (CEDAW), which only referred to discrimination against women. Accordingly, in relation to discrimination against a person based on marital status, that section did not support a complaint lodged by a man under the SDA. Section 9(10) was subsequently amended in 2011[1] to include a wider array of international instruments to which Australia is party, which recognise non-discrimination in multiple forms for all people. Up until 2011 therefore, a male wishing to bring a complaint under the SDA would have had to establish that the complaint fell within the remaining ss 9(5)-9(9) and 9(11)-9(20), which reflect other heads of Commonwealth legislative power, and give s 22 effect on a gender-neutral basis.[2] The most likely of these provisions would have been that which relates to services by a corporation registered and trading within the Commonwealth – so arguably, a single male could have argued discrimination on the ground of sex or marital status, but then one must also consider that science, social mores and practices have changed over time. That is, medical technologies related to ART and surrogacy, social changes and acceptance of different family formations were evolving. Interestingly, pursuant to the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* Western Australia • became the first Australian state to allow same-sex adoptions;

[1] Sex and Age Discrimination Legislation Amendment Act 2011 (Cth)
2 AB v Registrar of Births, Deaths and Marriages [2007] FCAFC 140

- became the first Australian state to allow individual adoption (LGBT or non-LGBT)
- enabled single women and same-sex female couples to have access to ART including IVF
- recognised the de-facto female partner of a pregnant woman as the second legal parent of a child born as a result of artificial insemination or IVF; and
- allowed for both names of the defacto same-sex couple to be on the birth certificate once the child was born.

However, legislation enabling altruistic surrogacy in Western Australia was not enacted until 2008, and access to such surrogacy in Western Australia has generally been very limited. Western Australia is the only state in Australia not to permit access by same-sex partners, and one of three jurisdictions to prohibit access by single men. But times are changing, SA recently recommended amendments to permit access, and the SDA amendments also extended prohibitions on discrimination based on 'marital status' to 'marital and relationship status'.

With this in mind, I think the question should be focused on whether a single man could *now* bring a cause of action under the SDA?

Based on discrimination in relation to marital or relationship status?

Section 4: **Interpretation**
(1) In this Act, unless the contrary intention appears:

...marital or relationship status means a person's status of being any of the following:
(a) **single;**
(b) married;
(c) married, but living separately and apart from his or her spouse;
(d) divorced;
(e) the de facto partner of another person;
(f) the de facto partner of another person, but living separately and apart from that other person;
(g) the former de facto partner of another person;
(h) the surviving spouse or de facto partner of a person who has died.

Section 22 (in Div 2 of Pt II), **prohibits discrimination on the ground *inter alia* of a person's marital or relationship status in the provision of goods and services.**

In *EHT18 v Melbourne IVF* [2018] FCA 1421 it was noted that '**it is common ground that [an ART clinic] provides a "service" within the meaning of the *SDA*.**

Sections 6(1) and 6(2) address direct and indirect discrimination on the ground of marital or relationship status respectively:

1. For the purposes of this Act, a person discriminates against another 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 discriminates against another 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.

...

Note - The Australian Constitution Section 109: **Inconsistency of laws:** When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Given single women, women in same-sex de-facto relationships, married couples (same-sex male and female) and heterosexual couples may access ART in Western Australia, one may argue that excluding a *single* male (or 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 this end, I would argue that a single male should be able to access ART for the purposes of entering into a surrogacy arrangement (and in relation to couples that section 23(c)(ii) is void to the extent of the inconsistency with the Commonwealth Act and the words 'and are of the opposite sex to each other' would be struck out.)

NG - Or had it ever been inconsistent due to the exception in section 31?

Here it is necessary to address whether the exception in Section 31 applies to ART/Surrogacy treatments – which I argue it does not.

Exemptions: SDA - Section 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.*

The Section 31 exemption relates to **special measures** to achieve equality for women who are pregnant, have given birth, or who are breastfeeding. I note that in 1996, the then Sex Discrimination Commissioner, Sue Walpole issued guidelines explaining: '*a special measure is a type of affirmative action. Affirmative action may be defined as the systematic identification and elimination of the institutional barriers that women and minority groups encounter in areas of public life*.' She noted special measures encompass a broad and diverse range of actions that focus on the root cause of unequal outcomes and are taken to achieve substantive equality between groups. Special measures thus require people to look to structural barriers to equality or systemic discrimination. (See further s7D of the SDA and also CEDAW clause 4(2)).

I submit to you, therefore, that while the ambit of special measures is broad, the provision of ART services to women may not be considered '*an affirmative action which has the aim of identifying and removing institutional barriers or achieving substantive equality*' in relation to pregnancy, childbirth or breastfeeding. In fact, the provision of ART services most frequently relates to providing people, ***men and women***, the opportunity to have biologically related children, when otherwise they may not be able to. They would therefore not fall under the section 31 exemptions.

	(The equivalent EO Act provision emphasises that it is about providing equal opportunity to meet special needs in relation to employment, education, and training). Support for such a conclusion is given by considering commentary on the SDA section 30 (previously s 32) exemption which relates to providing services to one sex but not the other. In *McBain v Victoria* (2000) 99 FCR 116 Sundberg J clearly stated that it did not apply to ART, as the service is '**provided benefit to both men and women**'. His Honour stated: *Section 32 [as it then was] looks to the **nature** of the service provided. …All infertility treatments are dealt with in the one legislative scheme. …Parliament has, in effect, characterised the treatments as being of the same general nature, namely treatments aimed at overcoming obstacles to pregnancy. Accordingly, **the nature of these treatments is such that they are capable of being provided to both sexes… Whether the primary beneficiary of the treatment is a man or a woman… [t]he 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* [*which is not the case here*] (at [121]). I refer to this as it illustrates that the nature of the treatment is not one that reflects special measures or affirmative action to address systemic inequalities against women – rather, it is a treatment that is provided to both men and women for the purposes of assisting them to have a biologically related child or a child that they can parent from birth. But, to return to section 31 -- it is my view that Section 31 exemption does not apply.
17	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. Similarly, under section 23 of the HRT Act, single women and female couples would not be able to access IVF unless they have medical reasons leading to inability to conceive or give birth. 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? Based on the above discussion and reasoning I am of the view that the legislation should provide access to ART and ART for surrogacy to all people on an equal basis. The current proposed wording does not do so. I note my suggested wording in my review for eligibility was: *'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, or likely to conceive a child affected by a genetic condition or disorder or that will be unlikely to survive the pregnancy or birth or whose health would be significantly affected by the pregnancy or birth'. A couple should include 'two people who are married or in a de facto relationship with each other'.* Such people would have to also meet any other requirements under the respective Acts and subsidiary legislation (noting recommended amendments in the independent review reports).

18	Is it your understanding that 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 section 19(2) of the Surrogacy Act) in order to be eligible for a parentage order? In other words, both would be required to have medical reasons other than age for being unable to conceive or give birth to a child. Is it your understanding that under current section 19(1)(b)(ii) of the Surrogacy Act only one member of a female couple is required to have medical reasons for being unable to unable to conceive or give birth to a child? The current provision in 19(1)(b)(ii) reads An application can be made under this Part for a parentage order only if — …. (a) …. (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. Due to the inclusion of the word 'or' only one of the above criteria (i) OR (ii) needs to be met. This would mean that in the example given, under the current legislation <u>only one of the members of the female couple is required to have medical reasons (pursuant to subsection (b)(ii)).</u> Under the proposed provisions section 19(1A)(b)(ii) the new provision would read: 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. **<u>Yes, it is my understanding that under the proposed amendments *both* members of a female couple would be required to be 'eligible women'</u> (as defined in section 19(2) of the Surrogacy Act) in order to be eligible for a parentage order.** 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. I note two further things in relation to these provisions – 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 seems misplaced. – also, as an aside it is here, in the current provision, that it appears that the future infertility/need for surrogacy is attempted to be addressed (albeit in a contrary way to requirements in HRT Act and Direction 7).
19	The definition of 'eligible woman' in proposed 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 (HRT Act s 23(1)(d)). Does this lead to an effective upper age limit for access to IVF and surrogacy by women who have become infertile due solely to age? Yes. Please note discussion in Part 1 of my report on the review concerning age. (at Chapter 12.2 starting on page 276). There I note that several clinicians and the ANZICA Fertility Counsellors suggested that age restrictions for access to ART should be revised and/or clarified. The clinics 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. They also raised that there is a need to consider other factors such as the ability for women to use an egg donor, and thus being able to conceive provided medically fit to do so.
20	There is no upper age limit applicable to men for access to surrogacy under proposed section 19 of the Surrogacy Act or surrogacy-related IVF under section 23 of the HRT Act. Is this likely to result in discrimination against women contrary to section 22 of the Sex Discrimination Act? The issue of age limits in relation to men was also raised by clinics in the review. As noted in the report Part 1, some clinics were of the view that age limits should apply for men also. For example, one clinic raised the concern that they had been approached by several men who were 60 or 70 years of age seeking treatment with 30-45-year-old partners. They questioned whether they should treat in such circumstances and raised the inconsistency of applying age limits to women, but not to men. One clinic suggested that a combined age limit should apply. I note in my discussion in Report Part 1 that I found that: *'Consideration should …be had as to whether such limitations should apply only to women (as it appears is current practice) or whether age limitations should also be applied to men, or whether a combined age cut off (for example, 110 years as suggested by one clinic) would be justified. If a cut-off age or stage of life such as 'post-menopause' or otherwise is deemed appropriate, then the limit should be explained and justified, based on evidence that such limitations are, for example, in the best interests of children who may be born as a result of ART. Any matters relevant to age discrimination should also be considered.'* (See page 277).
21	In your view, how should the reference to 'age' in section 23(1)(d) of the HRT Act and section 19(3) of the Surrogacy Act be construed? In your Report Part 1 you suggest that it is currently interpreted as 'post average age of menopause'. What is your view about that interpretation? As stated in the report Part 1, the review found that there had been some inconsistency over time in how age limits were applied and that issues regarding access based on age in modern times need to be further considered. I state there that: *''in the first instance, 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.*

	Beyond this, further research and consultation should be conducted regarding the current limitation on women not being able to receive treatment by way of s 23(1)(d) having been interpreted as post 'average age of menopause'. Such research and consultation should consider whether a cut-off age or stage of life such as 'post-menopause' or otherwise continues to be appropriate, and, if so, the RTC should provide guidance on this matter to clinics… (See page 277)
22	How would proposed section 23(1)(d) of the HRT Act and section 19(3)(d) of the Surrogacy Act operate in relation to women suffering from early menopause? To what extent would they be able to access IVF or surrogacy? From recollection, I discussed early menopause with clinics during the review, and they said that it would be considered a 'medical reason' and that treatment could be provided (as it is not age-related menopause). I would recommend checking this with a clinician though.
23	How would section 23(1)(d) of the HRT Act and section 19(3)(a) of the Surrogacy Act 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(1A) of the Surrogacy Act? Would section 23(1)(d) of the HRT Act preclude her from accessing IVF? Your example illustrates once again that the requirement that a provision that requires 'the reason for infertility is not age' (or states that medical reasons for being unable to conceive 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) is very difficult to interpret.
24	In your view would it have been preferable for the Bill to have been drafted to amend section 23 of the HRT Act and section 19 of the Surrogacy Act using gender neutral language? Yes. As I noted previously, my suggested wording in my review for eligibility was: *'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, or likely to conceive a child affected by a genetic condition or disorder or that will be unlikely to survive the pregnancy or birth or whose health would be significantly affected by the pregnancy or birth'. A couple should include 'two people who are married or in a de facto relationship with each other'.* Such people would have to also meet any other requirements under the respective Acts and subsidiary legislation (noting recommended amendments in the independent review reports). NG - "If this was done what implications would this have for the child's birth certificate?" The Births, Deaths, and Marriages Registration Act 1998 is worded using gender neutral language – referring to a 'parent' and enables registration of single, heterosexual or same-sex coupled parents. (As mentioned previously this has been the case since the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* enabled both names of a defacto same-sex couple to be placed on the birth certificate once the child was born. (Sections 18 & 19). The BDM advises: *'If you are in a same sex relationship and you would like to add your partner's name (partner who consented to the Artificial Fertilisation procedure) to your child's birth registration, that parent's details may be added by completing an application form "Add parent's details to a child's birth registration" and payment of a fee. The fee payable for this application includes the issue of a replacement standard birth certificate. Both parents must also provide appropriate evidence-of-identity.'* Of course, any consequential amendments necessary should be considered when proposing new legislation to ensure parity across legislation. Note also, in relation to information and birth certificates, where donor conception or surrogacy is involved I have recommended that BDM maintain the donor register, and that there be the option for a second birth certificate to be

	issues that shows biological as well as legal parentage (including any donor(s) of gametes or embryo(s), a surrogate mother, and legal parent(s)). This would require further legislative amendment.
25	If yes, what issues may arise as a result of the Bill not using gender neutral language? The wording of the Act may be interpreted as discriminatory to people based on their gender identity and/or intersex status.
26	If the *Prohibition of Human Cloning for Reproduction Act 2002 (Cth)* s 19(2) was a reason for not introducing gender neutral language, would the problem necessarily arise in a surrogacy arrangement? If, for example, the Bill did introduce gender neutral language and an intersex couple wished to access IVF and surrogacy and ultimately obtain legal parentage of the resulting child, they would not breach *Prohibition of Human Cloning for Reproduction Act 2002 (Cth)* s 19(2) because they would be implanting an embryo into a woman, the surrogate. What are your views on this? I agree. I am not of the view that the proposed amendments should have been limited to 'a man' or a 'woman' based on the argument that there was the potential that there may be a breach of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) s 19(2) which prohibits implanting an embryo into anything other than a woman's reproductive tract. Especially in the case of surrogacy – clearly there would not be a breach of the PHCR Act.
27	Would the problem necessarily arise if the transgender or intersex person was seeking IVF for the purpose of preserving their fertility? As I understand it, the decision by the drafters of the legislation was based on whether it would be possible to treat a transgender or intersex person under the HRT Act who did not identify as a woman but had a female reproductive tract. However, I make the following points: • In fact, several options are available to transgender or intersex people for fertility treatment in Australia. • For example, for transgender males, fertility preservation may be achieved by: a. Retrieving and freezing eggs (oocyte cryopreservation). Eggs can later be fertilised via sperm from a donor or partner who can provide sperm. Embryos can then be carried by a surrogate, a partner who can carry a child, or by the man himself if he has chosen not to undergo a hysterectomy. b. Creating and freezing embryos with retrieved eggs and sperm from a donor or partner (embryo cryopreservation). Embryos can later be carried by a surrogate, the man himself, or a partner able to carry a child. c. Ovarian tissue preservation (ovarian tissue cryopreservation). This process is currently experimental. Transgender men who retain their reproductive organs may also be able to become genetic parents following transition. This entails the ceasing of hormone treatments and is not guaranteed to be successful. • I note that in 2013 Medicare removed restrictions on certain claimable items that had previously been limited to people of a particular gender, and it has been reported that between July 2015 and June 2016, 44 men utilised Medicare item #16519 (management of labour and delivery by any means) (Medicare Australia, 2016 cited by the APA). (Although, there may still be significant out-of-pocket costs) • If a transgender or intersex person was treated lawfully under the HRT Act, it is unlikely that this would give rise to prosecution under the PHCR Act – as the intention of the s 19(2) provisions was to prevent experiments that involve placing embryos for example, elsewhere in a human body, or animal. Given Medicare funding has been available to 44 men in such circumstances, this reinforces it is unlikely to be a breach of the PHCR Act.

	Personally, I am more concerned that the proposed amendments only address some discrimination, but not all discrimination that is contrary to the SDA and excludes people on the grounds of gender identity or intersex status.
28	Are you aware of any cases of transgender or intersex people seeking and being refused IVF and/or a surrogacy arrangement? Abroad – Yes. For example, in August 2018 in the United Kingdom, the Equality and Human Rights Commission (EHRC) initiated legal proceedings against the National Health Service (NHS), claiming that the NHS's refusal to offer gamete storage as a blanket policy violated the United Kingdom *Equality Act 2006*, which protects transgender people from discrimination. While the NHS widely offers gamete storage for cancer patients when clinically indicated, transgender patients looking to transition were not always offered these services. The EHRC called for the NHS to enforce a consistent standard of fertility service for transgender people. The legal action was dropped in April this year, following the NHS England's decision to issue strict guidelines that provide 'strong justification' needs to be shown for refusal to offer fertility preservation to trans patients, and that refusals not meeting this standard may be challenged in court. Studies in Australia (which are few), report a greater need for sensitive and supportive provision of information about the options available and the costs, challenges, and potential outcomes associated with them. They also report fears by some people that fertility preservation may be required prior to accessing hormones or other aspects of transitioning; and that while fertility treatment may be an option for some people, not all people will undergo such treatment. (Bartholomaeus and Riggs, 'Transgender and non-binary Australians' experiences with healthcare professionals in relation to fertility preservation, *Culture, Health & Sterility,* 2019)
29	The Bill extends to the Surrogacy Act the current powers in the HRT Act to enter, inspect, search and seize to investigate breaches or possible breaches of the Act? Do you have any comments on the need for such amendments? As per the Review Report Part 2, While proposed amendment is consistent with current legislation and the role of the Reproductive Technology Council in its current form, I note in light of the findings and recommendations of the independent review that such a proposal would have to be considered an interim measure. That is, based on the findings of the review I have recommended that the RTC be abolished and a new advisory body be established whose role would not be regulatory in nature. I also recommended that the HRT Act, HRT Regulations, and HRT Directions be repealed, and new legislation drafted to create a co-regulatory system for the governance of ART. If the recommendation that the RTC be abolished be implemented, then in the future the powers included in the current Bill before Parliament should lie with the Minister for Health and delegates. In relation to the proposed amendments to the HRT Act 1991 (WA) that would: • extend authority to an officer to investigate a breach or possible breach of the Surrogacy Act 2008 (WA) • permit a justice, where duly satisfied on the evidence, to exercise the same power available under existing section 55 of HRT Act to issue a warrant to an authorised officer or member of the police force to enter, search and seize records and other evidence, in relation to an offence or suspected offence under the Surrogacy Act the regulatory approach recommended in my report is noted.

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<tr><td></td><td>That is, the recommendations reflect that the regulatory approach should be one that emphasises cooperation, mutual respect and oversight which is responsive and flexible. This includes use of regulatory and compliance mechanisms such as education, information dissemination, good communication, an openness to feedback from those being regulated (including addressing consumer and clinic complaints), and support.

While it is also a recommendation in Part 1 of the report that powers of enforcement continue to be included in the Act and fall to the Minister/DG of the Department and/or their appointed representative, it is emphasised that such powers should only be exercised when lower level compliance mechanisms have failed or where behaviour has been, or is, particularly egregious.

I have therefore recommended that if such amendments are enacted, that the powers conferred be carried out in a manner consistent with the recommended responsive regulatory model in this report. Such powers would then complement the recommended system of regulation to enable such behaviour to be investigated and addressed if required.</td></tr>
<tr><td>30</td><td>In your opinion, are the requirements for approval of a surrogacy arrangement by the Reproductive Technology Council under section 17 of the Surrogacy Act adequate for the protection of:
• Children born as a result of surrogacy
• Intended parents
• Birth mothers?
If not, in what ways are they not adequate?
No. The findings of the review were that the requirements for approval of a surrogacy arrangement by the RTC under section 17 of the Surrogacy Act were not adequate. I refer you to the findings and recommendations in the review Reports related to the operation and functions of the RTC, and especially those in Report, Part 1, Chapter 3; and Report, Part 2, Chapter 4.

However, to highlight why it was found that the current regulatory model is not adequate, and in relation to the RTC approval process, I note that numerous parties who participated in the review, particularly in the public forums, but also via written submissions reported that the pre-approval process was ‘unnecessary’, ‘bureaucratic’, ‘stressful’, ‘costly’, ‘burdensome’, ‘misplaced’, ‘inappropriate’, ‘yet another hurdle’, and/or ‘a barrier to accessing ART’. The lack of resourcing, inadequate provision of information or support, and the general treatment of ‘intended parent(s)’ as well as people born as a result of donor conception was cause for consistent complaint. Notably, the issues raised during the review in relation to the RTC’s role and functioning regarding pre-approval of surrogacy arrangements were consistent with those raised in relation to the terms of reference discussed in Part 1 of the report. This includes issues and complaints raised by donor-conceived people, consumers, counsellors and clinicians.

It was suggested by people who participated in the review that the more appropriate place for exploring the suitability of the arrangement and whether the parties should proceed was via the counselling process and clinical assessment by suitably qualified medical practitioners. In addition, there was significant evidence presented to the review that the numerous requirements for pre-surrogacy reports and RTC approval, which were in addition to counselling and legal advice, were not only barriers to accessing surrogacy in WA, but were driving people overseas. I also did not find the current process to adequately operationalise the requirement that the best interests of children to be born as a result of such arrangements should be considered as paramount.</td></tr>
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In relation to improving the system I therefore made extensive recommendations to modernise and streamline the regulatory system and to provide adequate protections and support for intended parents, birth mothers, and children, as follows:

1. The requirements for RTC pre-approval of a surrogacy arrangement and all references to such approval should be repealed. (Repeal Surrogacy Act 2008 (WA) ss 15 and 16; Surrogacy Regulations, Reg 5; Surrogacy Directions, Direction 7).
2. That current legislative requirements for pre-surrogacy psychological and medical assessments and reports be repealed. (Noting I also recommended more suitable mechanisms to protect the best interests of children and to support the parties to a surrogacy arrangement).
3. That requirements for counselling and legal advice prior to surrogacy arrangements taking place are essential and should be maintained for the intending parent(s), the surrogate mother and her partner (if any), but that such requirements should not apply to donors of gametes or embryos.
4. Rather, that current provisions in the Surrogacy Act 2008 (WA) that require donors of gametes or embryos to sign the surrogacy agreement and meet all counselling and legal advice requirements in relation to that agreement should be repealed, and that the consent and counselling process for gamete and embryo donation in Western Australia should include the prospect of such gametes or embryos being used in a surrogacy arrangement.
5. Recommendation 13, provides that Section 17 of the Surrogacy Act 2008 (WA) should be amended to provide:

17. Requirements for surrogacy arrangement

A surrogacy arrangement may proceed only on the basis that:

a) the birth mother has previously given birth to a live child and has reached 25 years of age or if younger is assessed by a qualified counsellor to be an adult of sufficient maturity, and

b) that the intended parent(s) have reached 25 years of age or if one or both is/are younger that they are assessed by a qualified counsellor to be an adult of sufficient maturity, and

c) the arrangement is set out in a written agreement signed by —

(i) each of the intended parents; and

(ii) the birth mother and her husband or de facto partner (if any); (**the *parties)*** and

d) each of the parties referred receives independent legal advice about the legal requirements for entering into a surrogacy arrangement and the effect of the surrogacy arrangement;

e) each of the parties undertakes in person counselling sessions with a qualified counsellor

(i) **prior to the arrangement taking place** about

1. the implications of the surrogacy arrangement; and

2. the best interests and welfare of any child that will be born as a result;

(ii) **in circumstances in which a pregnancy has been achieved** at least one counselling session in each trimester that the pregnancy continues; and

(iii) **post- miscarriage or birth of a child(ren)** whether stillborn or live at least one counselling session with a qualified counsellor; and where the child is live-born about the effects of a legal parentage order before consenting to the parentage order.

Section 17A

a) When undertaking the counselling required pursuant to section 17

i) the intending surrogate mother and her partner (if any) must engage in such counselling with a qualified counsellor of her/their choice;

ii) the intending parent(s) must engage in counselling with a different qualified counsellor of their choice to that of the surrogate mother and her partner (if any);

iii) the parties to the surrogacy arrangement must engage in at least one joint session concerning the implications of the intended arrangement with all parties agreeing as to the qualified counsellor they will engage.

7. That Regulation 4 of the Surrogacy Regulations 2009 (WA) – which provides for what should be discussed during implications counselling and for a certificate to be issued at the end of counselling – should be maintained.

8. That opportunities for individual and joint counselling provided for in Surrogacy Directions 12 and 13 continue to be available throughout the pregnancy and after birth to each of the parties to a surrogacy arrangement in addition to the above required counselling.

9. That the *Surrogacy Act 2008* (WA) be amended to insert a requirement that a report to the Court about the application for a parentage order be prepared by an 'independent counsellor' (post-birth) which is to include whether the proposed parentage order is in the best interests of the child and reasons for that opinion, including reference to:

- each affected party's understanding of the social and psychological implications of the making of a parentage order (both in relation to the child and the affected parties)
- each affected party's understanding of the principle that openness and honesty about a child's birth parentage is in the best interests of the child
- the care arrangements proposed by the applicant or applicants in relation to the child
- any contact arrangements proposed in relation to the child and his or her birth parent or parents or biological parent or parents
- the parenting capacity of the applicant or applicants
- whether any consent given by the birth parent or parents to the parentage order is informed consent, freely and voluntarily given
- any other relevant matters.

10. That definitions and terminology concerning counsellors be amended to:

- remove all reference to 'approved counsellors'
- include 'qualified counsellor' who is a qualified mental health professional
- include 'independent counsellor' who is a qualified counsellor who is not the counsellor who counselled the birth mother, the birth mother's partner (if any) or an intended parent about the surrogacy arrangement and is not connected with a medical practitioner who carried out a procedure that resulted in the conception or birth of a child.

11. The Minister/DG/Department should provide guidance to the public regarding the expected costs of required professional services for counselling (per session) and legal advice in Western Australia.

12. The Minister/DG/Department should provide information to the public regarding what should be covered when independent legal advice is obtained, as well as sample templates for written surrogacy agreements that meet the requirements of the Western Australian legislation.

13. Dispensation provisions that exist in the Surrogacy Act 2008 (WA) s 21(3) & (4) in relation to requirements that must have been met before the Court may make a transfer of parentage order should be maintained.

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Regarding the Paramountcy of the Welfare of the Child, I also recommended a more robust and public health focused approach to screening and risk assessment as follows:

14. The Minister/DG/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 criteria to be considered such as:

- previous convictions relating to harming children
- child protection measures taken regarding existing children
- violence or serious discord in the family environment
- mental or physical conditions
- drug or alcohol abuse
- medical history, where the medical history indicates that any child who may be born is likely to suffer from a serious medical condition
- other circumstances likely to cause serious harm to any child.
- outline the process to be followed when there is a concern about the welfare of any child who may be born as a result of a surrogacy arrangement (or an existing child)
- provide for referral to, and consultation with, external experts, authorities, agencies, and/or support services
- allow for criminal record, ANCOR and/or child protection order checks in individual cases that raise significant concern.

A form should also be developed that all providers of treatment must use and on which the outcomes of the assessment must be recorded and that may be audited by the Minister from time to time.

15. That the Surrogacy Act 2008 (WA) (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).

16. Provision should be made in the Surrogacy Act 2008 that it is an offence for applicant(s) to provide false information during the welfare of the child assessment.

17. Information should be provided to applicants regarding avenues available to them for review (as appropriate).

18. That, consistent with Recommendation 65 in Part 1 of this report, provision should be made in the Western Australian legislation and/or directions that there be no obligation upon health practitioners or ART clinics to provide surrogacy treatment.

I also recommend extraterritorial prohibitions on commercial surrogacy that extend to the facilitation of such arrangements by agents, ‘support services’ or clinics regardless of their business structure.
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“One submission to the committee has said that WA has a very low surrogacy volunteering rate compared to other States and that this is a fundamental issue that the Government should resolve. Was this an issue identified in your Review?”

Western Australia has only a small number of surrogacy arrangements approved in the time since the legislation was enacted. It was the finding of my review that this has a lot to do with many unnecessary hurdles and barriers to accessing lawful altruistic surrogacy.

I did not make a finding on whether there is a ‘low volunteering rate’ compared to other states, as that might risk comparing apples with oranges. That is, many of the barriers to surrogacy in Western Australia do not exist in the other states and this means that there are generally less
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	arrangements taking place in Western Australia. 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 engaging in surrogacy within the state. In addition, one must take into consideration the size of the population in Western Australia, when compared for example, to the three Eastern States of New South Wales, Queensland, and Victoria. It is smaller.
32	"One submission to the committee has said that a child has a right to know and preserve their biological heritage (both familial and cultural). Was this an issue identified in your Review?" Yes. There is extensive discussion of this matter, and I have made extensive recommendations about this in the review reports. Please see the review Report (Part 1) especially Chapters 4, 5 and 6. My recommendations concerning the recording and release of information concerning donor-conception, are recommended to apply to people born as a result of donor-conception using ART and surrogacy arrangements. Access to information should include access to information about biological heritage, both familial and cultural, and should include information about donor(s), surrogate mother and siblings. I would like to add here that this is an issue that I found is in need of urgent attention in relation to the records being kept, the operation of the current system, and recommendations to move the registers to the Births Deaths and Marriages and to establish a much more suitable system for access to information and support.
33	"Are there increased risks to surrogate mothers? If so, what are those risks? There are risks for surrogate mothers. **Medical Risks** Like any other pregnancy surrogate pregnancies involve the same medical risks of carrying and giving birth to a child. There is also the risk of miscarriage or preterm labour. With gestational surrogacy there are some further medical risks associated with IVF treatments, including injecting oneself with fertility hormones (bruising; allergies); increased pre-menstrual syndrome symptoms; cramping or bleeding from embryo transfer procedure; infection (risk low). In Australia, because there is a one embryo transfer policy, the risk of having multiples is lower than in other countries. **Emotional Risks** There are sometimes emotional challenges for potential surrogates to consider. Pregnancy can be a difficult process; some surrogate mothers may find the pregnancy more emotionally challenging because they will not keep the child; there are the usual risks of depression during or post birth; there may also be an experience of grief or loss following the birth of the baby. It is important that a person has independent support from a mental health professional during the surrogacy arrangement and that no pressure is placed in terms of relinquishment or keeping the baby. **Impact on family** It is also important to consider how a surrogacy arrangement may impact the surrogate mother's own family; her relationship with her partner (if any); her children (if any); her ability to meet her home and work commitments. **Relationship with intending parent(s)** There may be risks concerning the intending parent(s) not wanting to take the baby – this does not appear to occur frequently. The relationship with the intending parent(s) is also important in terms of emotional well-being for everyone. **Relinquishment**

	Under the current law a surrogate mother is the legal mother of any child(ren) born as a result of the surrogacy arrangement. In Western Australia, where it is a traditional surrogacy arrangement there is no requirement for her to relinquish the child if she changes her mind. Where there is a gestational surrogacy arrangement using the 'intending parent's' gametes or embryos, the Court will make an order that is in the best interests of the child. In the latter case, this means that even if the surrogate mother wishes to keep the child, if the Court finds this is not in the child's best interests, she will be required to adhere to the Court orders – which may involve transfer of legal parentage, parental orders, etc. In the alternative, intending parent(s) may also change their minds. If this occurs the surrogate mother will be the legal mother of the child and will have to decide whether she will keep the baby or place the baby into foster care or for adoption. **Altruistic Surrogacy: Family Pressure** Altruistic surrogacy is not without risks. There may be pressure within families for a woman to become an altruistic surrogate. A robust pre-surrogacy counselling approach should explore whether such a situation exists and support the women to make informed decisions freely and voluntarily as to *whether* she wishes to act as a surrogacy mother *or not.* **Commercial Surrogacy: Exploitation/Commodification/Trafficking** Where commercial surrogacy is permitted there is an increased risk of exploitation and/or commodification of women's reproductive capabilities and women of lower socio-economic status. In countries where commercial surrogacy occurs there is an increased risk and reality of human trafficking. While some will argue that a woman should be free to do what she wishes with her body and to charge a fee for doing so, the broader societal implications and impacts, and the risks for vulnerable women (as well as for children) have not been deemed acceptable anywhere in Australia nor in most nations of the world.
34	"What did your Review conclude about the efficacy of gestational surrogates being informed of such risks under WA's existing regime?" As I understand it, a surrogate mother should be informed of medical and psychological risks during medical and counselling sessions. She should be informed of any legal risks during the legal sessions. However, the review found that the level of information available and/or provided to all parties was variable. I have made recommendations about the provision of information, counselling sessions, and legal advice to ensure that all parties to the arrangement are fully informed, and independently supported throughout any surrogacy arrangement and beyond. These recommendations could be implemented now, as a matter of policy, to ensure that parties considering or engaging in a surrogacy arrangement can make fully informed decisions, and provide legal consent having an understanding of the broad nature of the treatment, the risks involved, and the legal requirements, rights and responsibilities regarding entering into such an arrangement.

I submit this to the standing committee on legislation inquiry into the *Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2019*.

Kind regards,
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