



Reproductive Technology Council

Your ref: A751543

3 May 2019

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

Dear Mr Warner

Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018

The Reproductive Technology Council (**Council**), established under the *Human Reproductive Technology Act 1991 (HRT Act)*, has a central role in the regulation of assisted reproductive technology and related research in Western Australia, and in advising the Minister on reproductive technology and the administration and enforcement of the HRT Act,¹ and in the implementation of the *Surrogacy Act 2008 (WA) (Surrogacy Act)*.²

The Council is grateful to the Standing Committee on Legislation (**Committee**) for the opportunity to make a submission regarding the Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 (**Bill**).

Council notes that the Bill is directed to questions of eligibility for IVF and surrogacy.

Background

1. Currently, IVF procedures may not be carried out unless the eligibility criteria in s 23 of the HRT Act are satisfied. Those criteria are directed towards facilitating treatment that would benefit persons who:
 - 1.1. are unable, for medical reasons, to conceive³ or carry⁴ a child; or
 - 1.2. would otherwise be at risk of conceiving a child 'affected by a genetic abnormality or disease'.⁵

¹ Council's functions are set out in HRT Act, s14.

² See in particular Surrogacy Act, Division 2.

³ HRT Act, s 23(1)(a)(i)-(ia).

⁴ HRT Act, s 23(1)(a)(iii), with this latter criterion being directed towards facilitating approved surrogacy arrangements.

⁵ HRT Act, s 23(1)(a)(ii).

2. Further:
 - 2.1. the Surrogacy Directions 2009 (WA) (**Surrogacy Directions**) prohibit the creation of embryos for a surrogacy arrangement until the surrogacy arrangement has been approved by Council;⁶ and
 - 2.2. the Surrogacy Act limits eligibility for a transfer parentage orders to 'eligible' persons, the criteria for which substantively mirror the eligibility criteria for IVF under the HRT Act.⁷
3. Since the eligibility criteria for IVF (and by extension, surrogacy) are currently directed to medical need, single men and same sex couples are not permitted access to IVF procedures (including for surrogacy purposes) under the HRT Act. Council understands those restrictions to be inconsistent with the *Sex Discrimination Act 1984 (Cth)* (**SDA**).

Submission

4. Council supports amendments to s23 HRT Act to ensure compliance with the requirements of the SDA.
5. From a regulatory perspective, this is a sensible (indeed necessary) legislative course. If, as Council understands the position, the eligibility provisions of the HRT Act are inconsistent with the SDA then:
 - 5.1. those provisions are liable to be read down such as to become inoperative to the extent of that inconsistency in any event; and
 - 5.2. importantly, the current position puts clinics and service providers in a highly undesirable and untenable position, in that compliance with State law appears to involve providers in a breach of Commonwealth law.⁸
6. From a policy perspective, Council notes the fundamental importance of the welfare of any prospective children to any legislative decision or direction.⁹ With that in mind, Council also notes that the weight of evidence suggests that the proposed amendments are not contrary to the welfare of any resulting children.¹⁰

Additional Matters

7. Finally, Council is cognisant that additional amendments (for example, concerning screening of applicants) have been proposed to the Bill.
8. Council submits that any broader amendments to the HRT and Surrogacy Acts be dealt with in a later (and foreshadowed) tranche of legislative review, which will provide a better opportunity to engage with the wider and more complex policy and regulatory considerations they involve.

⁶ Surrogacy Directions, Direction 7.

⁷ Surrogacy Act, s19.

⁸ Council notes that in both *MW, DD, TA and AB v Royal Women's Hospital, Freemason's Hospital and the State of Victoria*, HREOC, Commissioner Kohl, 5 March 1997 and *W v D and Royal Women's Hospital*, HREOC, Commissioner Johnston, 24 December 1999, complaints concerning marital status discrimination in relation to the provision of assisted reproductive technology services were sustained and damages were awarded, notwithstanding compliance by the hospitals with State legislation at the time, and the absence of the Commission's jurisdiction to declare that legislation invalid.

⁹ That policy concern is reflected in HRT Act, ss 4 and 23; Surrogacy Act, ss 22, 23 and 27.

¹⁰ See, for example: <https://aifs.gov.au/cfca/publications/same-sex-parented-families-australia>

9. The Bill as tabled addresses an inconsistency with Commonwealth legislation and this issue is sufficiently discrete and, in light of the regulatory concerns raised above, sufficiently urgent to warrant separate and immediate attention.

In summary, Council supports the eligibility criteria for IVF and surrogacy being aligned with anti- discrimination legislation and practices, and accordingly supports the Bill as it was tabled.

Thank you again for the opportunity to participate in this important process. If it would assist the Committee I would be pleased to attend, on behalf of Council, to provide oral submissions.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Brenda McGivern', with a long horizontal stroke extending to the right.

Brenda McGivern
Chair, Reproductive Technology Council