

HUMAN REPRODUCTIVE TECHNOLOGY AND SURROGACY LEGISLATION AMENDMENT BILL 2018

EXPLANATORY MEMORANDUM

Introduction

The Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 (the Bill) primarily provides for amendments to the *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008* to enable male same-sex couples and single men access to surrogacy.

The amendments will enable more equitable access to assisted reproductive technology (ART) services for such persons and enable compliance, by service providers, with the *Sex Discrimination Act 1984* (Cth) the *Equal Opportunity Act 1984* (WA) on the grounds of sex and sexual orientation.

The amendments provide clarity that a woman is, or a married or de facto couple are, eligible for in vitro fertilisation (IVF) treatment if “likely to be” unable to conceive or give birth to a child as a result of disease, a medical condition or medical treatment.

The amendments make clear the functions of the Reproductive Technology Council (Council) in section 14 of the *Human Reproductive Technology Act 1991* extend to advising the Minister and the CEO in relation to the *Surrogacy Act 2008*.

Provision is made to extend investigation and search powers available under sections 54 and 55 of the *Human Reproductive Technology Act 1991*, in relation to the *Surrogacy Act 2008* for the purpose of ensuring compliance with that Act by providers of reproductive technology treatment or in connection with such treatment.

Provision is also made to correct some minor errors and outdated references in the existing *Human Reproductive Technology Act 1991*.

Part 1 of the Bill, which provides the short title and commencement provisions, will come into operation on the day on which the Bill receives Royal Assent.

Part 2 and 3 of the Bill will commence subsequently on a day fixed by proclamation, to enable planned implementation. Part 2 amends the *Human Reproductive Technology Act 1991* and Part 3 amends the *Surrogacy Act 2008*.

Part 1 – Preliminary

This Part provides for the short title and commencement provisions.

Clause 1: Short title

This clause provides the Act may be cited as the *Human Reproductive Technology and Surrogacy Legislation Amendment Act 2018*.

Clause 2: Commencement

This clause provides for commencement of the Act.

Part 1 will come into operation on the day on which the Act receives Royal Assent.

The remainder of the Act, being Parts 2 and 3, will come into operation on a day fixed by proclamation, to enable time for planned implementation. This will provide stakeholders such as fertility clinics, the Family Court and the Registry of Births, Deaths and Marriages with sufficient time to transition to the new arrangements, including time to prepare forms and update websites, and to ensure they will be able to comply with the new arrangements.

Part 2 – Human Reproductive Technology Act 1991 amended

This Part provides for amendments to the *Human Reproductive Technology Act 1991*.

Clause 3: Act amended

This clause provides for the *Human Reproductive Technology Act 1991* to be amended by this Part.

Clause 4: Preamble

This clause provides for the Preamble paragraph B to be amended to reflect the changes made to the eligibility requirements for IVF under section 23 of the *Human Reproductive Technology Act 1991* and the circumstances in which parentage orders can be made under section 19 of the *Surrogacy Act 2008*.

Clause 4(a) refers to the Preamble paragraph B which provides the purpose and justification for the creation of a human embryo in vitro is to assist persons to have children. In this clause, the words “unable to conceive children naturally due to medical reasons” are deleted and replaced with “likely to be unable to conceive or give birth to children naturally due to medical reasons”. This has the effect that an embryo may be created through IVF to assist a person to have children where it is likely the person will become infertile or unable to give birth as a result of disease, a medical condition or medical treatment.

Clause 4(b) inserts the words “or who are unable to conceive children naturally due to social reasons and who are parties to a lawful surrogacy arrangement,” in relation to persons who may be assisted to have children. This wording reflects changes made in new section 19(1A) of the *Surrogacy Act 2008* and for all practical purposes is intended to mean male same-sex couples and single men who seek to be arranged parents.

Clause 5: Section 3 amended

This clause inserts in section 3(1) a meaning for “surrogacy arrangement”. Clause 8 amends section 18(1)(ca), to delete the same meaning given there for “surrogacy arrangement”.

Clause 6: Section 6 amended

This clause amends section 6(4) of the existing Act to delete an erroneous reference to section 6(3). Section 6(3) was repealed by *No. 17 of 2004 s.9*.

Clause 7: Section 14 amended

This clause amends section 14(1) to make clear that the functions of Council extend to advising –

- the Minister generally as to the administration and enforcement of the *Surrogacy Act 2008*;
- the CEO generally as to the administration and enforcement of the *Surrogacy Act 2008* and particularly on disciplinary matters.

Clause 8: Section 18 amended

This clause amends section 18(1)(ca) to delete the meaning of “surrogacy arrangement” provided there. This term is now defined instead in section 3(1).

Clause 9: Section 21 amended

This clause replaces section 21(i)(ii) to reflect the changes made to section 23 of the *Human Reproductive Technology Act 1991* and section 19 of the *Surrogacy Act 2008*, in order that the meaning of couple in the new section 21(i)(ii) is not restricted to those who are of different sexes or both female and includes male same-sex couples who are married or in a de facto relationship with each other.

Clause 10: Section 22 amended

This clause amends section 22(1)(e)(ia) to provide that where an embryo resulting from an IVF procedure is being developed on behalf of a person and their spouse or de facto partner, if any, effective consent is required from each of those persons to any use of the embryo outside the body of a woman.

In clause 10(a), the second reference to “woman” in section 22(1)(e)(ia) is replaced with “person” to reflect that an embryo may now be developed on behalf a person other than a woman.

Similarly in clause 10(b), the word “her” in section 22(1)(e)(ia) is replaced by “the person’s” in reference to a spouse or de facto partner of the person.

Clause 11: Section 23 amended

Clause 11(1)(a) deletes paragraph (a) of section 23(1) of the *Human Reproductive Technology Act 1991* and replaces it with new paragraph (a) which has four subparagraphs, (i) to (iv).

New sections 23(1)(a)(i) and 23(1)(a)(ii) respectively extend eligibility for an IVF procedure to include circumstances where it would be likely to benefit -

- a couple who are “likely to be” unable to conceive a child for medical reasons;
or
- a woman who is “likely to be” unable to conceive or give birth a child for medical reasons.

The words “unable to conceive a child due to medical reasons” have been deleted and replaced with “likely to be unable to conceive or give birth to a child due to medical reasons”.

This makes provision for a woman to be eligible for IVF treatment if there is a likelihood of her becoming infertile or unable to give birth as a result of disease, a medical condition or medical treatment (e.g. cancer and undergoing irradiation or chemotherapy). Prior to undergoing such medical treatment, a woman would be able to have her eggs fertilised and any resulting embryo/s frozen for possible later use.

Similarly, a couple (as defined in new section 23(1)(c)) will be eligible for IVF treatment if there is a likelihood they will become unable to conceive a child as a result of disease, a medical condition or medical treatment.

The amendment is consistent with Recommendation 5b of the Select Committee Report 1999 on the *Human Reproductive Technology Act 1991*, "That all women be eligible for IVF treatment if there is any likelihood of them becoming infertile as a result of disease or a medical procedure."

The Government of the day supported Recommendation 5b, but noted an exception should not be used to allow treatment as a 'hedge' against a general age-related risk of infertility, rather than in response to a risk specific to a particular woman.

Amendments made to section 23 of the *Human Reproductive Technology Act 1991* by No. 3 of 2002 (*Acts Amendment (Lesbian and Gay Law Reform) Act 2002*) removed the restriction that only *infertile* couples were eligible for IVF. Eligibility for IVF was expanded to include single women and couples "who are unable to conceive a child for *medical reasons*".

However, some uncertainty remains about whether this wording is restrictive and refers to the temporal circumstances of a woman being *presently* unable to conceive a child, or extends to a woman being eligible for IVF if she is presently fertile but *likely to become* unable to conceive in the future due to medical reasons or treatment. New sections 23(1)(a)(i) and 23(1)(a)(ii) are intended to provide clarity in this regard, by insertion of the words "*likely to be*" unable to conceive or give birth to a child for medical reasons.

New section 23(1)(a) is qualified by existing section 23(1)(d) which provides the reason for infertility must not be age or a prescribed reason. Accordingly, in order to be eligible for an IVF procedure, the reason a person is likely to be unable to conceive or give birth to a child, must not be their age. As is currently the case, the requirements set out in paragraphs (b) to (e) of section 23(1) will also need to be met in order for persons to be eligible for IVF.

New section 23(1)(a)(iii) retains existing criterion that an IVF procedure may be carried out where it would be likely to benefit a couple or a woman whose child would otherwise be likely to be affected by a genetic abnormality or a disease.

New section 23(1)(a)(iv) permits a surrogacy procedure to be carried out where it is for the purpose of a lawful surrogacy arrangement and for which there are "medical or social reasons" as provided in section 19(1A) of the *Surrogacy Act 2008*.

This extends the category of persons who may access surrogacy by permitting a surrogate to undergo an IVF procedure for a male same-sex couple (if married or in a de facto relationship with each other) or single man, where these men seek to become arranged parents, provided the surrogacy arrangement has been approved by Council and all relevant requirements of the *Human Reproductive Technology Act 1991* and *Surrogacy Act 2008* have been met.

Clause 11(1)(b) deletes paragraph (c) of section 23(1) and replaces it with new paragraph (c) which has the effect of removing the restriction that members of a couple in a de facto relationship are to be persons of the opposite sex.

Clause 11(2) deletes section 23(2) which is no longer required due to the effect of new section 23(1)(a)(iv). Section 23(1)(a)(iv) –

- replaces the existing requirement that an IVF procedure be “likely to benefit” a woman who is unable to give birth to a child due to medical reasons and is a party to a surrogacy arrangement;
- enables an IVF procedure to be carried out on a surrogate for the purposes of a lawful surrogacy arrangement, for which there are medical or social reasons under section 19(1A) of the *Surrogacy Act 2008*.

Under new sections 23(1)(a)(i), 23(1)(a)(ii) and 23(1)(a)(iii), the benefit likely to result from an IVF procedure would involve the pregnancy of a member of a couple who are, or the woman who is, likely to benefit.

Clause 12: Section 26 amended

Clause 12(a) amends section 26(1)(c) to delete the reference to “woman” and replaces it with “person”. This reflects changes that will permit a single man access to lawful surrogacy. The amendment has the effect that where upon fertilisation, the rights to an egg undergoing fertilisation or an embryo vest in a single person on whose behalf the egg or embryo is developed, that person is not restricted to a being a woman.

Similarly, clause 12(b) amends section 26(1)(d) to delete the reference to “woman” and replaces it with “person”, in terms of the requirements for participants to give effective consent to any ongoing use of an egg undergoing fertilisation, once the egg or embryo is no longer required for the purposes of the couple or “person” for whom it was developed.

Clause 12 (c) amends section 26(1)(d) to insert the word “embryo” in the latter part of the paragraph, in order to correct an omission in the existing Act. Existing paragraph (d) begins with reference to both an egg undergoing fertilisation and an embryo, but omits to deal with use of an embryo if all participants to a procedure have given effective consent.

Clause 13: Section 33 amended

Section 33(2)(ea) is amended to correct the existing Act, which refers to section 29(5)(a) instead of section 29(5)(aa).

Clause 14: Section 53R amended

Section 53R(5) is amended to update the title of the Act referred to in that provision, which is now the *Prohibition of Human Cloning for Reproduction Act 2002* (title amended by No.172, 2006).

Clause 15: Section 55A inserted

This clause inserts new section 55A into the *Human Reproductive Technology Act 1991* to deal with use of certain powers in connection with the *Surrogacy Act 2008*.

Subsection (1) makes provision for an officer duly authorised under the *Human Reproductive Technology Act 1991* to have the powers available under section 54 of that Act, to investigate a breach or possible breach of the *Surrogacy Act 2008* by a licensee or in connection with the provision of reproductive technology treatment. An intended effect is that the powers available here not be limited to investigation of a licensee (i.e. may be a person or entity other than a licensee) where the breach or possible breach of the *Surrogacy Act 2008* is in connection with the provision of reproductive technology treatment. Section 54 provides the basis upon which such an investigation may take place.

Subsection (2) makes provision for a justice to issue a warrant in accordance with section 55(1) of the *Human Reproductive Technology Act 1991*, in relation to an offence under the *Surrogacy Act 2008* if there is reason to suspect that an offence has been or is likely to be committed by a licensee or in connection with the provision of reproductive technology treatment.

Subsection (3) is self-explanatory.

Clause 16: *Various references to Commonwealth Act amended*

This clause provides for the updated title of the “*Prohibition of Human Cloning for Reproduction Act 2002* (Commonwealth)” to be inserted where there is reference to the earlier Act in provisions of the *Human Reproductive Technology Act 1991* listed in the table (title amended by No. 172, 2006).

Part 3 – Surrogacy Act 2008 amended

This Part provides for amendments to the *Surrogacy Act 2008*.

Clause 17: *Act amended*

This clause provides for the *Surrogacy Act 2008* to be amended by this Part.

Clause 18: *Section 19 amended*

Clause 18(1) replaces paragraph (b) of section 19(1) of the *Surrogacy Act 2008* regarding the circumstances in which an application can be made for a parentage order. The new paragraph (b) requires there to have been medical or social reasons for the surrogacy arrangement, at the time the surrogacy arrangement was entered into.

Clause 18(2) deletes existing section 19(2) of the *Surrogacy Act 2008* and inserts new section 19(1A) and new section 19(2).

Section 19(1A) provides the circumstances in which there are “medical or social reasons” for a surrogacy arrangement, for the purposes of subsection (1)(b), as follows:

- if there is one arranged parent, that person must be an eligible woman or a man; or

- if there are 2 arranged parents, the couple must be married to each other or in a de facto relationship with each other and be –
 - an eligible woman and a man; or
 - 2 eligible women; or
 - 2 men.

This has the effect of expanding the category of persons who may enter into a lawful surrogacy arrangement and make an application for a parentage order, to include a male-same sex couple who are married to, or in a de facto relationship with, each other and a single man. If a same-sex female couple were seeking to be arranged parents under a surrogacy arrangement, both women would need to be an “eligible woman”.

“Eligible woman” is defined in new section 19(2) and means a woman who –

- is likely to be unable to conceive a child due to medical reasons (not by reason of age or excluded for a prescribed reason under section 23(1)(d) of the *Human Reproductive Technology Act 1991*); or
- although able to conceive a child, is likely to be unable to give birth to a child due to medical reasons; or
- although able to conceive a child, the child is likely to be affected by a genetic abnormality or a disease.

This has the effect of retaining the requirement that there be medical reasons (not social reasons) for a woman who is an intended arranged parent, to enter into a surrogacy arrangement. Those reasons must not arise due to the woman’s advanced age. The insertion of the wording “likely to be” unable to conceive and “likely to be” unable to give birth, uses consistent terminology and reflects the changes made to broaden the eligibility criteria for a woman to access IVF under section 23(1)(a) of the *Human Reproductive Technology Act 1991*, where she is presently fertile but likely to become unable to conceive or give birth as a result of disease, a medical condition or medical treatment.

Clause 18(3)(a) amends section 19(3) to reflect the changes made to section 23(1)(a) of the *Human Reproductive Technology Act 1991* and section 19(2) of the *Surrogacy Act 2008*, that a woman be “likely to be” unable to conceive.

Clause 18(3)(b) amends section 19(3) to reflect the changes to existing section 19(2) of the *Surrogacy Act 2008* which delete the definitions of “eligible person” and “eligible couple”. Paragraph (a) of the definition of “eligible woman” is inserted in section 19(3) in place of those definitions.

In reference to the definition of “eligible woman”, the reason a woman is “likely to be unable to conceive a child” must be due to medical reasons and not be -

- a reason arising from her advanced age; or
- a reason prescribed for the purpose of section 23(1)(d) of the *Human Reproductive Technology Act 1991*.