

# **Government of Western Australia: Response to the recommendations from The Review of the Western Australian *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008***

## **Introduction**

The McGowan Government wishes to thank Associate Professor Allan for her comprehensive review of the *Human Reproductive Technology Act 1991* (HRT Act) and *Surrogacy Act 2008* (Surrogacy Act). The report of the review is detailed, insightful and inclusive. Overall the Government supports most of the recommendations, which will provide a strong foundation for new legislation in this complex and sensitive area, while at the same time safeguarding public and professional confidence.

The Government will look closely at how the recommendations can be effectively implemented and how best this can be resourced. Work to operationalise this will begin directly and will be considered within the Government's commitment to provide for better, less burdensome regulation which benefits those who need help to have a family, service providers and the wider community.

**29 July 2021**

## **Response to the recommendations from The Review of the Western Australian *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008* (Part 1)**

### **Recommendation 1**

Provision should be made in the *HRT Act* and *Surrogacy Act* for review of their operation and effectiveness every five years after the date of the report from the last review being received by the Minister.

### **Recommendation 2**

The *HRT Act*, HRT Regulations, and HRT Directions be revised and/or repealed to create a co-regulatory system for the governance of assisted reproductive technology (ART) including setting the parameters for ART practice in Western Australia, implementing principles of cooperation and responsive regulation in the carrying out of the Department of Health's (DoH) regulatory functions, and attending to matters discussed in the review of the *HRT Act* and *Surrogacy Act*.

### **Recommendation 3**

The framework legislation provides overarching principles that emphasise:

- the paramountcy of the health and welfare of any child to be born as a result of ART
- the health and safety of those accessing ART, donors and surrogate mothers
- principles of non-discrimination
- the values of non-commercialisation of human reproductive materials or capabilities.

### **Recommendation 4**

The framework legislation provides that:

- conditions of registration may be applied to all clinics/practitioners or be responsive to a clinic's practices if required (for example, if a clinic fails to meet Reproductive Technology Accreditation Committee (RTAC) standards, registration might be limited to six months instead of a year with requirements that the clinic address the issue)
- directives may be issued by the Minister from time to time as the need arises, informed by advice received from the new body, research, or broader consultation to allow for responsive and flexible regulation.

### **Recommendation 5**

The Reproductive Technology Council (RTC) be abolished and a new 'body' be established whose role is to:

- provide the Minister/Director General (DG) of the DoH with information regarding any research that may inform regulation and governance of ART
- advise the Minister/DG of the DoH regarding medical, social, scientific, ethical, legal, and moral issues arising from ART and any necessary directives/conditions of registration needed to clarify acceptable practice in Western Australia.

### **Recommendation 6**

The advisory body's membership include in addition to membership reflective of the current RTC at least a donor of gametes/embryos, a recipient of ART, a person born as a result of donor-conception, and that each membership role be represented by one person each.

### **Recommendation 7**

The advisory body's membership should be rotated every three years to allow other members of the public and professions to participate and that reappointments should only occur if there is no other person who has expressed interest in being on the advisory body.

### **Recommendation 8**

That the current committees of the RTC should be discharged and their functions repealed. This should occur alongside recommended changes to the *HRT Act* regarding licensing, storage periods, posthumous use of gametes and PGD (Function of the scientific advisory committee will continue within the broader remit of the new advisory body functions).

### **Recommendation 9**

Requirements for 'approved counsellor' status be repealed, and all references to 'approved counsellor' be amended to counsellor. That counsellors be appropriately qualified AHPRA registered mental health professionals (for example, a psychologist) or equivalent (for example, a suitably degree qualified social worker).

### **Recommendation 10**

The Minister/DG/DoH should:

- a) provide information to the public and health professionals regarding what is permissible under the Act
- b) receive from clinics a copy of the RTAC audit and any recommendations for improvement, and any further reports necessary to inform the Minister/DG of action that has been taken in response
- c) impose any conditions of registration that may need to be applied
- d) consider the results of any inspection or audit undertaken by a suitably qualified person appointed by the Minister and any appropriate enforcement action to be taken by the Minister or the DG of the DoH on the Minister's behalf
- e) report annually (per calendar year) on the above, as well as on outcomes of ART in Western Australia, and any other matters decided by the Minister/DG of the DoH.

### **Recommendation 11**

Powers of enforcement continue to be included in the *HRT Act* and fall to the Minister for Health or DG of the DoH to be exercised only when lower-level compliance mechanisms have failed or where behaviour has been or is particularly egregious.

### **Recommendation 12**

Right of review concerning Government decision making is set out in the legislation and/ or relevant DoH communications and be clearly communicated to the public and clinics.

### **Recommendation 13**

The Minister, DG of the DoH, and the advisory body be supported in their functions by DoH staff member(s), including functions relevant but not limited to the implementation of the *HRT Act* and public education, and that such staff be the point of contact for people who wish to seek ethical or policy guidance or raise issues regarding the *HRT Act*, which may then be referred to the advisory body or Minister for Health or DG of the DoH as required.

### **Recommendations 1 to 13**

**Supported in principle noting further work will be required to inform the drafting of a new HRT Act and proposed coregulatory model. This will provide the opportunity for the development of a modern regulatory framework, which will be responsive and help to simplify the way assisted reproductive technology is regulated, while protecting the welfare of participants, children who might be born, and the public.**

### **Recommendation 14**

Identified issues regarding the data collection held by the Data and Information Unit be addressed as a matter of priority (urgency) to ensure data held is accurate and reliable.

### **Recommendation 15**

The recommended revision of the *HRT Act* and Human Reproductive Technology Directions (HRT Directions) include revision of provisions, policy and processes that have proved not to be working in relation to data collection and reporting regarding ART in Western Australia.

### **Recommendation 16**

The DoH streamline its reproductive technology data collection and reporting to align with the yearly ANZARD reporting including updating the data dictionary to mirror Australia and New Zealand Assisted Reproduction Database (ANZARD), adding to ANZARD the additional Category C data-points specific to Western Australia and moving the reporting requirements to be per the calendar year.

### **Recommendation 17**

No 'Category D' data be added, and therefore ANZARD not be required to establish changes to its databases other than to accommodate additional Category C data-points (thus avoiding the Western Australian clinics and government incurring unnecessary costs).

### **Recommendation 18**

The DoH's processes regarding data collection be revised so that once data is verified via the ANZARD process clinics then provide a copy of such verified data re-linked with identifiers to the DoH Data and Information Unit for the purposes of monitoring, quality control, public reporting, policy and research as required.

### **Recommendation 19**

The Minister for Health and/or the DG decides who will generate the annual data report, with the options being either:

- the Data and Information Unit work cooperatively with the DoH support staff to produce an annual report. (Noting this will require an additional staff member who has reproductive technology data expertise being situated in the Data and Information Unit)
- the Government otherwise commission ANZARD to generate a specific report for Western Australia (like New Zealand) at an estimated cost of \$20,000-\$30,000 per annum.

**Recommendation 20**

The revised *HRT Act* includes provisions that would enable linkage between the Reproductive Technology Register (RT Register) and other Western Australian registers, including but not limited to the Midwives Notification System, and Birth, Deaths and Marriages (BDM) registers (noting this is where it is recommended donor-conception registers will be held).

**Recommendations 14 to 20**

**The Government is committed to ensuring that data in relation to assisted reproductive technology is managed appropriately. The Department of Health informs the Government that significant data reforms and validations have been progressed and further initiatives are being implemented in line with these recommendations.**

**The Government supports annual reporting of ART data by the Department of Health and data linkage for health research, subject to protection of sensitive personal information.**

**Recommendation 21**

An audit should be undertaken of the data held on the RT Register as a matter of priority to ensure that all data held in relation to donors, recipients, and donor-conceived people is accurate and reliable, and may be linked with confidence.

**Recommendation 22**

New legislative provisions be drafted that provide for a donor-conception register that operates in a manner that will best serve access to information by donor-conceived people, donors, and recipients.

**Recommendation 23**

Pursuant to section 45 of the *HRT Act*, the DG of the DoH should cause a donor-conception register to be kept at the office of BDM (in a manner approved by the Minister for Health, and in consultation with other relevant government departments as required). Noting that any new Act in the future should maintain provision for the donor-conception register and its operation.

**Recommendation 24**

The donor conception register should be supported by an independent agency that is contracted to provide intermediary and support services to those seeking information about genetic heritage and biological relations, those about whom information is sought, and their immediate families; and relevant search and find services.

**Recommendation 25**

Any necessary provision required to enable such an agency to operate in an effective manner (including but not limited to being able to access necessary records via BDM, co-operation by clinics, and otherwise as required) be made.

**Recommendation 26**

Provision should be made within the new HRT Directions that intermediary services be optional except in cases that involve the retrospective release of identifying information in which case the intermediary

service should, after locating the donor, make the initial contact to advise of an inquiry, explain the contact veto option, and provide further support if requested.

**Recommendation 27**

Section 49(2a) and s 49(2d) of the *HRT Act* be amended to remove the requirement for ‘approved counselling’ prior to release of identifying information to a donor-conceived person about their donor; and in the interim, pursuant to s 49(2f) the DG include in new Directions that ‘approved counselling’ means counselling a person chooses to engage in and may include a discussion with the intermediary and support service provider about the implications of access to information.

**Recommendation 28**

Provision be made for intermediary and support services to be provided free of charge to donor-conceived people, donors, recipients, and/or their families in relation to access to identifying information about genetic heritage and relations, via government subsidy to the providing agency and/or fees levied upon clinics or as otherwise determined by the Government.

**Recommendation 29**

Section 49(2e) of the *HRT Act* be amended to enable access to identifying information about donors by all donor-conceived people when they reach the age of 16 or sufficient maturity, regardless of when they were born, subject to a contact veto system for those conceived prior to 1 July 2004; and that in the interim the DG provide direction regarding section (2e)(b)(ii) which allows release provided there was adequate information provision before donation that future changes in legislation might enable information to be divulged or communicated without the donor’s consent.

**Recommendation 30**

The DG make provision within the new HRT Directions that donors be actively notified by clinics of all live births, sex of the child(ren), and year of birth, resulting from their donation(s).

**Recommendation 31**

The DG make provision within the new HRT Directions that donor-conceived people, upon request to the Donor Conception Register and/or a clinic, be provided with non-identifying information regarding the number, sex and year of birth of any donor-siblings, including the donor’s own children.

**Recommendation 32**

Provision should be made for voluntary registration of consent upon the register by a donor-conceived person (or their recipient parent if the person is under 16) to enable access to identifying information about that person by their siblings or donor.

**Recommendation 33**

The new HRT Directions make provision for outreach to donors and donor-conceived people by the intermediary and support services in special circumstances. For example, if there is a serious heritable illness or a matter about which the donor/donor-conceived person should be notified.

**Recommendation 34**

The new HRT Directions make provision for voluntary registration on the central donor conception register by people for whom records may have been destroyed but are aware of their donor-code, and as a result of DNA testing identifying biological relatedness, subject to the testing being recognised as

a legally valid test in establishing relatedness (e.g. from a NATA accredited facility) and any other requirements of BDM (or the relevant government authority) to ensure the integrity of the data held upon the register.

#### **Recommendation 35**

Legislative provision should be made to require an addendum to a donor-conceived person's birth-certificate notifying the person that there is more information held about them on the register. This addendum should be available to the donor-conceived person when they request their birth certificate after the age of 16 or when they are of sufficient maturity to enable them to decide if they wish to seek further information.

#### **Recommendation 36**

The HRT Directions provide that recipient parents must be supported prior to receiving treatment using donated gametes or embryos, during pregnancy, and after the birth of a child(ren) via provision of information, education and clinics, and fertility counsellors about the importance of disclosure to children about their donor-conceived status, how to have discussions with children about such status, and the law providing the child with rights of access to information about their donor.

#### **Recommendation 37**

The HRT Directions require that donors must be provided information and counselled at the time of donation about the importance of disclosure to children about their donor-conceived status, and the law in Western Australia and that donation cannot be accepted without consent to a person born as a result of such a donation having access to identifying information.

#### **Recommendations 21 to 37**

**Supported in principle. The Government is of the view that information about a person's biological heritage should be protected in perpetuity. All donor-conceived persons should have access to identifying information about their donor regardless of the year they were born. Further consultation is required regarding processes for the release and management of identifying information taking into consideration issues of confidentiality and privacy for all participants.**

**Intermediary and support services should be available to people as an option, there should be no charge, and the proposed agency should have the necessary authority to operate effectively.**

**Further consideration needs to be given to operational implications, resources and legislative requirements.**

#### **Recommendation 38**

Legislative provision be made to allow the issuance of a second birth certificate at the request of a donor-conceived person, or person born as a result of surrogacy, or their legal parent(s) (if the person is under the age of 16) that contains factual information about a person's genetic and birth heritage.

#### **Recommendation 38**

**This is a complex matter. Further research and consultation will be required to consider the implications of this recommendation.**

### **Recommendation 39**

The Minister repeal s24 of the *HRT Act* and Direction 6.8 of the HRT Directions which stipulate time limits for storage of embryos and gametes respectively, and provide in the new *HRT Act*/HRT Directions that a person or couple, for whom gametes or embryos will be stored for their personal use in assisted reproduction, and the clinic must discuss and agree upon in writing:

- a) the storage period for the person or couple's gametes/embryo(s) that suits their circumstances
- b) the conditions and period of time upon which the gametes/embryos will be stored and will cease to be stored
- c) the gametes/embryos not being stored beyond death of a person unless there is consent regarding the posthumous use of such gametes or embryos by the surviving spouse.

### **Recommendation 39**

**The Government supports alignment of requirement for storage of gametes and embryos with National Health and Medical Research Council *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research (2017)* (NHMRC Ethical Guidelines). Amendments to the HRT Directions in June 2021 have addressed issues related to storage of gametes.**

### **Recommendation 40**

The Minister/DG provide in the (new) HRT Directions the conditions pursuant to which a clinic may lawfully remove the gametes or embryo(s) from storage and allow them to succumb. Such conditions should include the failure of a person or couple to pay the storage fees (if any) for a period of more than five years and/or the failure of a person or couple to consent to a further storage period after the previously agreed storage period has expired, and there has been an inability to contact or trace the person or couple after reasonable attempts to do so have been made in relation to non-payment of storage fees or during the three months preceding the end of the storage period.

### **Recommendation 41**

The new HRT Directions detail what constitutes a 'reasonable attempt' in relation to seeking contact with a person or couple who have stored gametes/embryos where storage fees have not been paid for a period of five years, or the expiry date of agreed storage is about to be/has been reached.

### **Recommendations 40 and 41**

**Not supported. Clinics have procedures and policies to deal with such matters – it should not fall to Government to set out the circumstances of embryo disposal for non-payment of storage fees.**

### **Recommendation 42**

A section be drafted for inclusion in the (new) *HRT Act*/HRT Directions that donated gametes/embryos should not be stored for a period of more than 15 years from the date of donation, and not after a) the gamete donor (donor of ova or sperm) has reached the age of 50 or is deceased; or b) in relation to a



donated embryo, the donor(s) (or any gamete provider where the embryo has been created using both donated eggs and sperm) has reached the age of 50 or is deceased; unless authorisation has been granted by the Minister/DG. Such authorisation must not be given unless the Minister/ DG is satisfied that there are reasonable grounds for extending the storage period having regard to any relevant guidelines issued by the Minister/DG.

#### **Recommendation 42**

**Not supported. The Government is of the view that the NHMRC Ethical Guidelines for use of gametes provided by donors are sufficient, in that the recipient can make an informed choice.**

**Placing limitations on use within 15 years, or when a donor has reached a certain age may cause concern if some people have not completed their families.**

#### **Recommendation 43**

Section 26(2) of the *HRT Act* be maintained (in the current or any new legislation) in that it provides for the maintenance of storage where a couple for whom an egg in the process of fertilisation or an embryo disagree about its continued storage. Further clarification should be provided in the HRT Directions – consistent with the NHMRC Ethical Guidelines – by requiring discussion to take place (at the time embryos are being stored) about the clinic’s policy in relation to disputes, any pre-agreement by the parties and discussion regarding what the law provides. The HRT Directions should also specify that a decision to suspend the agreed time period should be reviewed every five years and that any subsequent discard without the consent of both parties should be in accordance with the *HRT Act* and agreement made at the time of storage.

#### **Recommendation 44**

The HRT Directions provide that persons who are physically incapacitated maintain the right to direct what happens to their stored gametes or embryos.

#### **Recommendation 45**

The HRT Directions provide that if a person suffers incapacity that results in lack of cognitive function or decision-making capacity, but such incapacity is not expected to be permanent (i.e. the person is expected to recover), then any storage limit be suspended until the person recovers. If it is decided by a medical professional that they will not recover, at which point their prior wishes, and any agreement regarding storage should be taken into account, as well as any legislative provisions or directions relating to the vesting of rights in any spouse/survivor, to determine if or when such gametes/embryos may be permitted to succumb.

#### **Recommendation 46**

Section 26(1)(b) of the *HRT Act* be maintained (in the present Act and any new legislation) in that it provides that in relation to rights to the control of, or power to deal with or dispose of, any human egg undergoing fertilisation or human embryo that is outside of the body of a woman in the event of one member of a couple in whom the rights are vested, those rights vest solely in the survivor. What happens after death should be determined by the law on the posthumous use of gametes and embryos.

#### **Recommendations 43 to 46**

**Noted. These recommendations will be the subject of further consultation.**

#### **Recommendation 47**

The HRT Directions provide that if both members of a couple die (for example in an accident), the clinic must allow any stored gametes/embryos to succumb, following approval by the Minister/DG of the DoH.

#### **Recommendation 47**

**Not supported. It is a matter for the clinic to ensure that consents reflect the wishes of the couple regarding ongoing storage of gametes/embryos.**

#### **Recommendation 48**

The HRT Directions provide that subsequent spouses of the surviving partner, or the relatives, of a deceased person, do not have the 'right' to make decisions about the continued storage of gametes or embryos. The right vests solely in the person's surviving spouse as per s 26(1), which is subject to provisions relevant to the posthumous use of gametes/embryos.

#### **Recommendation 48**

**Noted.**

#### **Recommendation 49**

In redrafting the *HRT Act* and repealing any current Directions, that provision be made that 'retrieval of gametes from a person who is unconscious and near death, or after their death may occur only when the requirements of s 22 of the *Human Tissue and Transplant Act (WA)* have been met, and only for the purpose of use by the surviving spouse or partner of the person, or a surrogate mother, for the purposes of bearing a child(ren) who will be cared for by the surviving spouse or partner.'

#### **Recommendation 50**

In redrafting the *HRT Act* (and repealing any current HRT Directions) that provision be made that: 'The posthumous use of gametes or embryos collected before or after a person's death may only occur when:

- the deceased person left clearly expressed oral or written directions consenting to such use following their death or there is some evidence that the dying or deceased person would have supported the posthumous use of their gametes by the surviving partner
- the deceased was an adult at the time of their death
- the request to do so has come from the surviving spouse or partner of the deceased person, and not from any other relative
- the gametes or embryos are intended for use by the surviving spouse or partner for the purposes of bearing a child(ren) who will be cared for by the spouse/partner

- sufficient time has passed so that grief and related emotions do not interfere with decision-making
- the surviving prospective parent (the spouse or partner) has undergone appropriate counselling
- the surviving prospective parent (the spouse or partner) has been provided with sufficient information to facilitate an accurate understanding of the potential social, psychological and health implications of the proposed activity for the person who may be born.'

#### **Recommendation 51**

In redrafting the *HRT Act* (and repealing any current HRT Directions) that provision be made that 'court approval is not required where the above conditions have been met.'

#### **Recommendation 52**

In redrafting the *HRT Act* and repealing any current HRT Directions that provision be made that 'where there is evidence that a person has expressly objected to the posthumous use of their stored gametes or embryos, or the posthumous collection and/or use of gametes, the posthumous collection/use of the stored gametes or embryos to achieve pregnancy is prohibited'.

#### **Recommendation 53**

In cases in which a child(ren) have been born as the result of posthumous use of a deceased partner's gametes or an embryo made with such gametes, that provision in the *Births, Deaths and Marriages Registration Act 1998* be made to enable the deceased to be listed on the child(ren)'s birth certificate as a parent of that child.

#### **Recommendation 54**

Further research, consideration, and targeted consultation be undertaken in relation to any other necessary consequential amendments to the *Western Australian Administration Act 1903* and *Family Provision Act 1972*.

#### **Recommendations 49 to 54**

**The Government supports further consideration and research related to the posthumous use of gametes or embryos.**

#### **Recommendation 55**

Provisions in the *HRT Act* and HRT Directions requiring RTC approval for (Preimplantation Genetic Diagnosis (PGD) and related matters be repealed, subject to a condition of registration that clinics adhere to the NHMRC Ethical Guidelines regarding the use of PGD, including the restriction that PGD be used only to screen embryos for conditions that will be seriously harmful to a child born with such a condition.

#### **Recommendation 56**

Provision should be made either via the *HRT Act* or HRT Directions (as required) that PGD for the purposes of tissue typing an embryo for subsequent stem cell therapy for a parent, sibling or other relative is acceptable subject to meeting the requirements of the NHMRC Ethical Guidelines.

#### **Recommendation 55 and 56**

**Supported in principle. The Government is of the view that the NHMRC Ethical Guidelines are sufficiently clear on the acceptability of PGD, tissue typing e.g. saviour sibling, and requirements for information, counselling and consent.**

#### **Recommendation 57**

It be a condition of registration that clinics do not engage in false or misleading advertising or practices in relation to treatments or practices that may be considered experimental, do not have a sound evidence-base, or that are not supported by research to improve birth outcome.

#### **Recommendation 58**

It be a condition of registration that clinics obtain informed consent from patients in relation to all ART treatments, including but not limited to any 'add-on' treatments offered to the patient undergoing ART or to the gametes/embryos that will be used in the patient's treatment, and that clinics do not provide treatments that are unnecessary or motivated by interests that are non-therapeutic.

#### **Recommendations 57 and 58**

**Supported in principle noting the RTAC Code of Practice requirement for information to be presented in a way that can be understood and that the conclusion is not misleading and further consideration as to possible overlap with other regulators (such as the Australian Competition and Consumer Commission).**

#### **Recommendation 59**

Western Australia should enact uniform legislation to the *Commonwealth Research Involving Human Embryos Act 2002* (Cth) and the *Prohibition on Cloning for Human Reproduction Act 2002* (Cth), in keeping with its COAG commitments regarding research involving human embryos and prohibited practices.

#### **Recommendation 60**

Western Australia should consider how best to incorporate changes to Commonwealth legislation regarding human embryo research and related matters into its own law (for example via legislation, regulations, and/or directions) to allow for future flexibility, responsiveness, and regular review in anticipation of further advances in science and emerging technologies.

#### **Recommendation 61**

Western Australia should engage with any national/COAG led public consultations and seeking of scientific advice regarding mitochondrial donation, gene technology, or other relevant emerging technologies, as well as exploring its own stance on such issues further via the recommended advisory body.

#### **Recommendations 59 to 61**

**Supported.**

**Recommendation 62**

The Minister/DG provide clear and consistent guidance regarding how section 23(1)(d) of the *HRT Act* stipulating the reason for infertility must not be age, should be interpreted and applied.

**Recommendation 63**

Further research and consultation be conducted regarding the current section 23(1)(d) requirements having been interpreted as post ‘average age of menopause’ and whether a cut-off age or stage of life such as ‘post-menopause’ or otherwise continues to be appropriate.

**Recommendation 64**

Further consideration should be given to whether such limitations should only apply to women (as it appears is current practice), whether age limitations should also be applied to men, or whether a combined age cut off would be justified.

**Recommendations 62 to 64**  
**Noted.**

**Recommendation 65**

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 ART treatment.

**Recommendation 65**  
**Noted. This aligns with the NHMRC Ethical Guidelines which state: *A member of staff or a student who expresses a conscientious objection to the treatment of an individual patient or to an ART procedure is not obliged to be involved in that treatment or procedure, so long as the objection does not contravene relevant anti-discrimination laws...***

**Recommendation 66**

Further consultation be had with members of the LGBTQI community, ART clinicians, counsellors, people born as a result of ART, legal and ethics experts and other interested parties, on issues related to egg sharing or use of an embryo formed with one partner’s ova by the other female partner in a same-sex relationship.

**Recommendation 67**

The DoH provide education and information to clinics and consumers regarding the acceptable provision of treatment, treatment options, patient consent, and patient autonomy to decide the nature of treatment undertaken; as well options regarding what to do with excess embryos, and the provision of support in decision making in this regard (e.g. counselling).

**Recommendations 66 and 67**  
**Noted.**

## **Response to the recommendations from The Review of the Western Australian *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008* (Part 2)**

### **Recommendation 1**

Noting the recommendation in Part 1 of the report that the *HRT Act* be repealed and that a new Act be drafted, the *HRT Act* and the *Surrogacy Act* and related directions and regulations should be amended to provide for access to IVF procedures in circumstances in which a patient faces the impending loss of, or significant impairment to, their fertility or the ability to carry or bear a child in addition to providing for such access by person(s) who were already infertile or unable to carry or bear a child.

### **Recommendation 2**

Noting the recommendation in Part 1 of the report that the *HRT Act* be repealed and that a new Act be drafted, that the *HRT Act*, the *Surrogacy Act* and related directions and regulations be amended to remove any 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 agreement in place before being able to access ART. The *HRT Act* s23(1)(iii) and the Surrogacy Directions 2009, Direction 7 requirements for an RTC-approved surrogacy arrangement prior to a person undergoing a fertilisation procedure, should be repealed.

### **Recommendation 3**

That discriminatory provisions within the *HRT Act* and the *Surrogacy Act* 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 of priority.

### **Recommendation 4**

That the Minister for Health should progress interim measures as far as is possible to address issues raised in the review that require urgent attention, recognising that further reform is required as a matter of priority.

### **Recommendation 5**

That the wording of relevant ART and surrogacy legislation and associated regulations and directions in Western Australia be drafted or amended as required to refer to an 'eligible person or couple' (rather than 'man' 'men' 'woman' or 'women') which should then further be defined to include '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'.

### **Recommendation 6**

That the Western Australian Government consult the Commonwealth concerning issues related to transgender pregnancy, which may involve access to ART by a man who has a female reproductive tract, to determine the status of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth), s19(2) which provides that a person commits an offence if the person intentionally places a human embryo in the body of a human, other than in a woman's reproductive tract and any implications

relevant to the amendments to the *Sex Discrimination Act 1984* (Cth) and/or access to ART or surrogacy.

### **Recommendations 1 to 6**

**Supported.**

### **Recommendation 7**

The existing surrogacy process should be modernised and streamlined, including that only necessary obligations should be imposed on the parties to the arrangement.

### **Recommendation 8**

Noting recommendation 5 in Part 1 of this report to abolish the current RTC and establish an advisory body, the role of which would be neither that of a 'regulatory' nor 'approval body', and on the basis of the below recommendations, the requirements for RTC pre-approval of a surrogacy arrangement and all references to such approval should be repealed. (Repeal *Surrogacy Act* ss 15 and 16; *Surrogacy Regulations*, Reg 5; *Surrogacy Directions*, Direction 7).

### **Recommendation 9**

That current legislative requirements for pre-surrogacy psychological and medical assessments and reports be repealed. (Noting more suitable mechanisms to protect the best interests of children and to support the parties to a surrogacy arrangement are recommended below).

### **Recommendation 10**

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). Such requirements should not apply to donors of gametes or embryos.

### **Recommendation 11**

Current provisions in the *Surrogacy Act* 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.

### **Recommendation 12**

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.

### **Recommendation 13**

That section 17 of the *Surrogacy Act* 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 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.

#### **Recommendation 14**

Regulation 4 of the Surrogacy Regulations 2009– 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.

#### **Recommendations 15**

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.



**Recommendation 16**

That the *Surrogacy Act* 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.

**Recommendation 17**

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.

**Recommendations 7 to 17**

**Noted with further consultation required and recognising the ongoing work led by the Council of Attorney Generals’ Working Group to inform national consistency in legal and policy frameworks regulating surrogacy in Australia.**

**Recommendation 18**

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

**Recommendation 18**

**Not supported. The government is not in a position to provide guidance on the expected costs of professional services, particularly in the light of the complex nature of diagnosis, therapeutic, and legal matters.**

**Recommendation 19**

The Minister/DG/DoH 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.

**Recommendation 19**  
**Not supported. There is a risk the information provided in this format may constitute legal advice. The recommendation is inconsistent with requiring participants to obtain independent legal advice.**

**Recommendation 20**

Dispensation provisions that exist in the *Surrogacy Act* s21(3) & (4) in relation to the requirements that must have been met before the Court may make a transfer of parentage order are appropriate and should be maintained.

**Recommendation 20**  
**Noted.**

**Recommendation 21**

The Minister/DG/DoH 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.

### **Recommendation 22**

That the *Surrogacy Act* (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).

### **Recommendation 23**

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

### **Recommendation 24**

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

#### **Recommendations 21 to 24**

**Government supports drafting of a new Surrogacy Act. Further consultation is required in relation to risk factor screening for health, psychosocial assessment and criminal record checks.**

### **Recommendation 25**

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.

#### **Recommendation 25**

**Noted. This aligns with the NHMRC Ethical Guidelines which state: *A member of staff or a student who expresses a conscientious objection to the treatment of an individual patient or to an ART procedure is not obliged to be involved in that treatment or procedure, so long as the objection does not contravene relevant anti-discrimination laws...***

### **Recommendation 26**

If the recommendations to repeal the RTC pre-approval requirements are implemented, that the *Surrogacy Act* be amended to include a provision that in exceptional circumstances the section 17 requirement for the intended surrogate mother to have previously given birth may be dispensed with, provided the counsellor is of the view that dispensation of the requirement is appropriate following assessment of the woman's individual circumstances during pre-surrogacy counselling. Such evaluation should be included in the certificate of counselling which must be provided to the Family Court of Western Australia after the birth of a child(ren) when the application for transfer of legal parentage is made.

#### **Recommendation 26**

**Government supports drafting of a new Surrogacy Act. Further consultation is required taking into account any issues identified in other jurisdictions regarding the need for the surrogate mother to have previously given birth.**

**Recommendation 27**

Changes to the *Surrogacy Act* in relation to the availability of traditional and gestational surrogacy are not required.

**Recommendation 28**

Changes to the *Surrogacy Act* requiring a genetic connection between the intended parent(s) and the child(ren) who will be born as a result of a surrogacy arrangement are not required.

**Recommendation 29**

That the current public policy position that altruistic surrogacy is permitted subject to meeting certain criteria required by the law and that commercial surrogacy is prohibited, should be maintained.

**Recommendation 30**

The reimbursement for costs provisions for altruistic surrogacy are comparable with New South Wales and Queensland and as such do not require amendment. However, clearer information needs to be provided to people concerning what may be reimbursed in altruistic surrogacy arrangements.

**Recommendations 27 to 30**

**Noted.**

**Recommendation 31**

The current ability for intended parent(s) and women who are willing to volunteer to act as altruistic surrogates is acceptable and consistent with laws that permit altruistic surrogacy and should be maintained.

**Recommendation 32**

Provision should be made in the Western Australian legislation, regulations or directions that clinics in Western Australia may advertise for altruistic surrogates. This would require amendment of Surrogacy Directions 2009, Direction 9 – which currently prohibits clinics from actively recruiting birth mothers – to make clear that such prohibitions do not include advertising to inform people that they may approach the clinic to express their interest in volunteering to act as an altruistic surrogate. The Directions should maintain that clinics may introduce a woman who has approached the clinic, offering to be a birth mother, to prospective arranged parents. They must not charge a fee for doing so, otherwise they would be in contravention of s 9 of the Act.

**Recommendation 33**

Information should be made available to the public by the Minister/DG/DoH to assist in raising public awareness about surrogacy laws that relate to advertising in Western Australia.

**Recommendation 34**

That it would not be suitable to allow the establishment of ‘agencies’, ‘agents’ or any other kind of ‘brokerage’ or introductory service regarding surrogacy in Western Australia that involves payment of a reward or valuable consideration. The reason for this is to prevent assisted reproduction clinics or

other organisations profiting from assisting to arrange altruistic surrogacy arrangements, and thus transforming an altruistic arrangement into a commercial surrogacy arrangement.

**Recommendation 35**

That prohibitions on the introduction of parties to a surrogacy arrangement for valuable consideration, and on providing a service knowing that the service is to facilitate a surrogacy arrangement that is for reward, remain as law in Western Australia.

**Recommendation 36**

That the Minister ensures that laws, regulations, and/or directions are clear that such prohibitions do not extend to the provision of lawful services in relation to surrogacy arrangements nor prevent free and voluntary support groups from operating and enabling people to get in touch with each other.

**Recommendation 37**

That the current law be maintained regarding surrogacy arrangements being unenforceable subject to the relevant exceptions regarding:

- the enforceability of agreements as to the reimbursement of reasonable expenses related to the surrogacy arrangement
- the ability of the Family Court of Western Australia to make parentage orders without the birth mother's consent, if that order is in the best interests of the child and the birth mother is not the child's genetic parent and at least one arranged parent is the child's genetic parent.

**Recommendation 38**

That the Minister/DG/DoH ensure that the public is provided information about the provisions of the Surrogacy Act regarding the unenforceability of altruistic surrogacy arrangements, and the exceptions that apply.

**Recommendation 39**

That the Minister/DG/Department work to greatly improve the availability and accessibility of information and support to the public and those who provide lawful services in relation to lawful surrogacy arrangements in Western Australia. This should include, but is not limited to, clear and accessible information about:

- the law
- what is expected of clinics, counsellors and lawyers in relation to the provision of services, support, information, and advice
- the expected and reasonable costs of a surrogacy arrangement in Western Australia.

**Recommendation 40**

That the Department and relevant Government units and staff who are responsible for supporting the Act be adequately resourced, provided training, and supported in the commissioning and/or development of additional resources that address the shortcomings identified in information provision in this report and submissions made to the review.

### **Recommendation 41**

Information provided by the State Government should also inform people of voluntary community support groups available to people facing issues related to infertility and inability to carry or bear a child due to their social or medical circumstances.

#### **Recommendations 31 to 41**

**Noted.**

### **Recommendations 42**

That the Western Australian Government seeks to address matters that may lead some people to travel to other jurisdictions to engage in commercial surrogacy arrangements including, but not limited to:

- the current Western Australian law which serves to exclude certain people from accessing altruistic surrogacy in Western Australia
- the impact of Commonwealth citizenship and passport laws
- lack of uniformity of extraterritorial prohibitions across the states

via introducing necessary amendments to remove barriers to accessing altruistic surrogacy, consulting with the Commonwealth regarding laws that do not correspond to the public policy position taken in Australia and discussing with other jurisdictions the need for harmonisation regarding extraterritorial prohibitions relevant to commercial surrogacy.

### **Recommendation 43**

That the Western Australian Government considers the recommendations in this report in light of the need to increase access to altruistic surrogacy in Western Australia which in turn may serve to reduce the number of people from Western Australia who seek international commercial surrogacy.

### **Recommendation 44**

That the Western Australian Government amends the *Surrogacy Act* to provide for extraterritorial application of the law – consistent with New South Wales, Queensland, and the Australian Capital Territory – which would make it an offence to enter into, or engage in, other practices related to commercial surrogacy arrangements abroad and/or other prohibited practices.

### **Recommendation 45**

That the Western Australian Government consults with the Commonwealth about the provision of uniform information to the public concerning the Commonwealth laws that *‘comprehensively criminalise human trafficking, slavery and slavery-like practices, including servitude and forced labour’* noting *‘these offences have extended geographical jurisdiction and could apply to international commercial surrogacy arrangements that involve the exploitation of the surrogate mother or the child’* (referred to by the Australian Government in its response to its House of Representatives Standing Committee inquiry into surrogacy).

#### **Recommendation 46**

That the Western Australian Government requires that all applicant parent(s) who are granted entry into Australia (on whatever basis) with a baby born as a result of an overseas surrogacy arrangement with whom they intend to reside in Western Australia, should be issued with notice that they *must* appear before the Family Court of Western Australia within a specified time to allow the Court to consider whether the granting of parenting orders is in the best interests of the child.

#### **Recommendation 47**

That the Western Australian Government monitors ongoing discussion and outcomes concerning the work of The Hague Conference on Private International Law and the Australian Law Reform Commission (ALRC) on matters relevant to legal parentage.

#### **Recommendation 48**

That commercial surrogacy is prohibited in Western Australia and the findings of this review do not support changing that. Altruistic surrogacy is permitted, but only when criteria are met that are intended to ensure the psychological and sociological well-being of all parties involved, and that it is undertaken in a manner that sees the best interests of children as paramount. It would not be appropriate for the State to then endorse practices elsewhere (for example via recognition of legal parentage orders in cases of international surrogacy) that do not meet the standards agreed upon for citizens within the State or by those who choose to uphold the law rather than circumvent or breach it.

#### **Recommendation 49**

That the Western Australian Government considers whether it is necessary to make explicit provision in the relevant legislation that states that the transfer of legal parentage is not available in circumstances in which a child has been born as the result of an international commercial surrogacy arrangement that offends the law in Western Australia.

#### **Recommendations 42 to 49**

**Noted. Further consultation is required referencing the ongoing work led by the Council of Attorney Generals' Working Group to inform national consistency in legal and policy frameworks regulating surrogacy in Australia.**

#### **Recommendation 50**

That current proposals before Parliament to amend the *HRT Act* to confer power on the RTC to advise the Minister for Health in relation to the administration and enforcement of the *Surrogacy Act* be considered an interim measure in light of the findings and recommendations of this review. In particular, the recommendations that the RTC be abolished and a new advisory body be established whose role would not be regulatory in nature.

#### **Recommendation 51**

If the recommendation that the RTC be abolished is implemented, then in the future powers related to the administration and enforcement of the *Surrogacy Act* should lie with the Minister and delegates.

### **Recommendation 52**

Current proposed amendments to the *HRT Act* would also:

- extend authority to an officer to investigate a breach or possible breach of the *Surrogacy Act*
- permit a justice, where duly satisfied on the evidence, to exercise the same power available under existing section 55 of the *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*.

It is recommended that if such amendments are enacted, that the powers conferred be carried out in a manner consistent with the recommended responsive regulatory model proposed in this report. That is, they would only be used when other compliance measures have failed, or the behaviour is particularly egregious. Such powers would then complement the recommended system of regulation to enable such behaviour to be investigated and addressed if required.

### **Recommendation 53**

That the Minister and the DoH give further consideration to, and conduct research and consultation, regarding:

- whether ‘reciprocal arrangements’ directed toward State-based births, deaths, and marriages registers and/or Courts responsible for the transfer of parentage in relation to lawful altruistic surrogacy arrangements, should be introduced
- the extent to which such reciprocal arrangements should apply
- what should occur should one state changes its laws in a manner that is inconsistent with the laws of Western Australia.

### **Recommendation 54**

That the Western Australian Minister approach the Commonwealth Government with a view to allowing in vitro fertilisation (IVF) surrogacy treatments to be considered by Medicare as any other IVF treatment.

### **Recommendation 55**

It is consistent with the law to impose restrictions on the import and export of human reproductive material and to promote compliance with the requirements of the *HRT Act* and *Surrogacy Act*. It is recommended that discretion be exercised in situations in which there are exceptional circumstances – to be decided on a case-by-case basis and approval sought from the Minister for Health or delegate. It is recommended that in such circumstances decisions should uphold the welfare of any child that may be born as a result of ART and/or surrogacy as the paramount consideration. Also to be considered are the welfare of participants, the interests or impact of any decision on existing children within the applicant family, and the law.

### **Recommendations 50 to 55**

**Noted. Further consideration is required regarding regulatory oversight, disciplinary tools and administration of surrogacy legislation.**