

## Consumer Summary: Ministerial Expert Panel on Assisted Reproductive Technology and Surrogacy Final Report

On 18 May 2023 the WA Government announced they were accepting the recent recommendations made by a ministerial taskforce on reproductive technology and putting them into two new bills for parliament. This is a summary of the process, Health Consumers' Council submission and work, and the changes planned.

### The scope and process of this review

In 2018 the WA Government commissioned an independent review of the *Human Reproductive Technology (HRT) Act* and *Surrogacy Act*, known as The Allan Review.

Health Consumers' Council hosted community focus groups to gather input for the reviewer, Professor Sonia Allan. Professor Allan also conducted individual interviews and received 126 written submissions. In 2019, 122 recommendations were made and the government's response to the review was tabled in 2021.

Whilst the majority of the Allan Review recommendations were supported, several were identified by the government as needing further consideration. This, together with delays (including those related to COVID), led to the convening of a Ministerial Expert Panel (MEP) in May 2022. The MEP contained a number of experts in the field of Assisted Reproductive Technology. Unfortunately, there were no Surrogacy clinical experts on the panel and HCC's advocacy to include at least one consumer did not yield any changes. As far as we are aware, there was also no open/public in-person consumer consultation; on the positive side, the survey and public discussion paper released were both detailed and in relatively accessible language. We were able to make a written submission, host a community briefing, and encourage individuals affected to make submissions. Almost all the changes we advocated for have been recommended, which highlights the power of community involvement and advocacy.

### The new legislation and regulation

This review proposes to repeal the *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008* and replace them with one act which will cover assisted reproductive technology including surrogacy. The new legislation will keep licensing functions with the CEO of the Department of Health and put more onus on ART providers, requiring them to operate within certain codes of practice and ethical guidelines.

The Reproductive Technology Council (RTC) which, as the Allan Review details, has long been considered overly bureaucratic and burdensome by consumers and ART clinics alike, will be disbanded and a lot of the decision-making power (on matters such as the need for surrogacy) will go back to the clinical professionals practicing as licensed ART providers. A new advisory/review board will be established for the purpose of decision making on contentious or innovative ART procedures.

The MEP talks a lot about modernising and streamlining due to the unnecessarily onerous burden on consumers and duplication for ART providers. Some of the positive changes include:

- No need for surrogacy arrangements to be approved. The decision-making will lie with the clinicians.

- Decisions around storage of gametes and embryos to be made between patients and licensed ART providers (without regulatory body approval in the main).
- Decisions around import and export of gametes and embryos to be made between patients and licensed ART providers (without regulatory body approval in the main).

#### Access for all

The proposed legislation will expand access to ART (including surrogacy) for all. It will not discriminate on grounds which include, but are not limited to, sexual orientation, relationship status, gender identity, disability, race, or religion. The legislation will also use gender inclusive language.

#### Reciprocal IVF

The proposed legislation will permit reciprocal IVF – where one person in a same-sex partnership contributes their egg, and the other person is the carrier of the baby. This allows both members of the partnership to contribute, one as the biological parent and one as the birth parent. This is common overseas but to date has been banned in WA.

#### All children deserve parents

There will be a route to legal parentage for those born via overseas surrogacy for the 400 plus children of WA parents who are currently not recognised. The recent MEP review has acknowledged that between 2008 and 2022, only 24 children have been born via surrogacy in WA, compared to an estimated 400 being born overseas in that time. The panel acknowledged that people did not go overseas out of preference but because the law gave them little choice. The new law will allow children already born via overseas surrogacy, who have been granted citizenship by descent, to have their parentage recognised by WA law. This parentage route will be available for a period of two years, for children already born overseas, but it will not continue in order to deter overseas surrogacy. The review notes that improved access and streamlining should reduce the need to go overseas.

#### Not criminalising overseas surrogacy

The Allan Review recommended WA prohibit commercial surrogacy overseas and apply sanctions similarly to NSW, QLD and ACT, but the MEP has recommended not to proceed with this. The report notes that sanctions are rarely imposed in the other states as they are not in the best interests of the child and notes that expanding access to altruistic surrogacy in WA will likely reduce demand on overseas commercial surrogacy anyway.

#### Donor conceived children's right to understand their genetic heritage

The proposed legislation will make provision for a central donor register and access for donor conceived people to identifying information about their donor, regardless of when they were born. Currently, people born after the donor register was developed in 2004 can access identifying information once they reach 16 years of age, however donor consent is required for people born before this and the information must be sought by approaching the original ART provider. The proposed legislation will retrospectively remove donor anonymity but allow for contact preferences including contact vetoes. The legislation will require ART providers to notify all donors whose gametes are used and give information about the year of birth and sex assigned at birth of any resulting children. The legislation will also expand the Donor Conception Information Service to support donor conceived people.

The MEP report recommended an addendum to birth certificates noting details of donor connection (including surrogacy) and that donor conceived people be notified at 16 years of age that more information is held about them at the Office of Births Deaths and Marriages.

### Finding surrogates in WA

In the context of the low numbers of WA surrogacy, the MEP report notes that it is very difficult to find a surrogate in WA. Advertising is legal in WA so long as it is not commercial, where as it isn't legal in some other states. However, the review notes that knowledge of this fact is limited and that ART providers have not exercised opportunities to connect intended parents and surrogates. In our view, this has been due to fear of breaching complex and often confusing laws. The report emphasises that ART providers can and should advertise and broker for altruistic surrogacy. The report also notes there is a strong case for community education and public awareness campaigns in this space. It remains to be seen if this will happen in practice, but it certainly sounds positive.

The new legislation will also drop the requirement for the surrogate to have previously given birth to a live child.

### The surrogacy process

The existing legislation requires steps to be taken in a certain order, has built in wait time, and the requirement for dossier submission to the RTC (who sit monthly) to gain approval for surrogacy. The new legislation will remove the requirement for RTC approval and the mandatory clinical psychology assessment (it will remain an option if deemed clinically appropriate by the licensed ART provider). These things should cut timelines. In addition, the reimbursement of expenses has been widened to include things like childcare and will better reflect loss of income.

### Stem cell and mitochondrial disease research

The current WA law prevents embryonic stem cell research and the review highlights that there is a risk of scientists relocating away from WA because of this. The proposed legislation will include strict regulation whilst also keeping up with the rapid pace of science. The legislation will allow people at risk of passing on mitochondrial disease to have reproductive options for biological children without the increased risk of their child having mitochondrial disease.

### Posthumous collection and use of gametes

WA is the only jurisdiction in Australia that prohibits the posthumous use of gametes. The MEP recommends this be changed, with strict regulation – including that the deceased was an adult at the time of their death, that the surviving partner is to use the gametes and their grief is assessed, that the wishes of the deceased are considered, and the best interests of the child are considered. The proposed legislation permits the posthumous use of:

- embryos created from the gametes of a person who subsequently dies
- gametes and reproductive tissue collected prior to, or after, a person's death.

### Consumer perspectives on emerging technology

The area of reproductive technology is fast-paced, and innovative practice is essential for the best possible patient outcomes. The MEP report acknowledges this but also adds regulation around informed consent and rationale being explained to consumers, as well as not providing treatments of unknown efficacy.

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