

Acts Amendment (Lesbian and Gay Law Reform) Act 2002 – Amendment of the Human Reproductive Technology Act 1991 and the Artificial Conception Act 1985

The *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (the Act) comes into effect on 21 September 2002. The Act amends a number of pieces of legislation, including the *Human Reproductive Technology Act 1991* (the HRT Act) and the *Artificial Conception Act 1985* (the AC Act). For your information, attachment A provides a copy of the relevant sections of the HRT Act and the AC Act showing the changes that are made by the Act.

The terminology of “de facto partner” and “de facto relationship” are used throughout the Act. In relation to the HRT Act and the AC Act these terms are interpreted in accordance with provisions that have been inserted in the *Interpretation Act 1984*. The definitions of de facto relationship and de facto partner include same sex relationships as well as heterosexual relationships. The definition of de facto relationship does not rely on a specified duration of the relationship, but provides a range of matters that should be considered in relation to a decision about whether a person is in a de facto relationship. The relevant section, section 13A of the *Interpretation Act 1984* is also included at attachment A.

The effect of the changes to the HRT Act and the AC Act are summarised below.

HUMAN REPRODUCTIVE TECHNOLOGY ACT 1991

- The amendments makes provisions that allow a woman who is unable to conceive a child for medical reasons, or whose child is likely to be affected by a genetic abnormality or disease, to have access to *in vitro* fertilisation procedures. There is no restriction on whether the woman is married, single or in a de facto relationship with a person of the same or opposite sex. The provision that the reason for the infertility must not be age remains a requirement.
- Provision is also made for heterosexual couples to access *in vitro* fertilisation procedures where the woman is not infertile, but there are medical reasons preventing them conceiving a child, (for example the man is infertile) or their child is likely to be affected by a genetic abnormality or disease. A fertile single woman, or a fertile woman in a same sex relationship, is not able to access *in vitro* fertilisation procedures, but is able to access artificial insemination, under the direction of a licensee, to attempt to achieve a pregnancy.
- The amendments remove the requirement that a heterosexual de facto couple wishing to access *in vitro* fertilisation procedures must have been in a relationship for five out of the last six years. Although this requirement has been removed it is noted that the stability of the relationship is still a relevant consideration in section 23(e). Section 23(e) requires that an *in vitro* fertilisation procedure can not be provided without consideration of

the welfare and interests of any child who may be born as a result of the procedure.

- There are also some consequential amendments to:
 - allow the Code of Practice or directions issued under the HRT Act to make provision for identifying the persons on whose behalf gametes, eggs in the process of fertilisation or embryos are developed or stored, and clarify that the development or storage may be on behalf of a single woman or lesbian couple
 - reflect the position that gametes or embryos may be stored on behalf of either a couple or a single person
 - provide that rights to control, or power to deal with or dispose of an egg in the process of fertilisation or an embryo that is outside of the body of a woman, may vest in a single woman or in a couple.

ARTIFICIAL CONCEPTION ACT 1985

The amendments make provision for legal status of a child born to a woman in a same sex relationship. The amendments also clarify some uncertainty that previously existed about the legal status of the donors of gametes or embryos where the husband or de facto partner of a woman undergoing an artificial fertilisation procedure had not given consent to the procedure.

- The definition of “fertilization procedure” is replaced with a definition of “artificial fertilisation procedure” that refers to the definition in the HRT Act. This clarifies that all fertility treatments covered under the HRT Act (including GIFT procedures) are covered by the AC Act.
- Where a woman undergoes an artificial fertilisation procedure and gives birth to a child as a result, she is the mother of the child, whether she provided the ovum or not.
- Where a woman undergoes an artificial fertilisation procedure with the consent of her same sex de facto partner, the partner will be legally recognised as a parent of any child born as a result. The consent of the partner is presumed, but the presumption is rebuttable. The new section is consistent with the provisions in section 6 relating to a man who consents to his wife or de facto partner undergoing an artificial fertilisation procedure.
- A “donor” of gametes or embryos used in an artificial fertilisation procedure is not a parent of a resulting child. This means that a sperm or ova donor, or embryo donors, including a known donor, has/have no parental rights or responsibilities in respect of a resulting child. This does not apply in circumstances where a sperm provider is married to, or in a de facto relationship with, the mother. In that case section 6 provisions apply and the sperm provider will be the father of the child if he consented to the procedure.

Directions and Guidelines

As a result of the changes to the eligibility requirements and the changes to the AC Act the Directions under the HRT Act published in the Western Australian Government Gazette on 3 October 1997 (the Directions) and the Draft Guidelines (the Guidelines) published in the Western Australian Gazette on 22 March 1993 require amendment.

In the interim, where the term “de facto partner” appears in the Directions it should be interpreted in accordance with the Interpretation Act and which includes a reference to the same sex de facto partner.

Where the word “couple” appears in the Directions it should be interpreted as including a reference to a single woman who is undergoing treatment not as a member of a couple.

In particular:

- Where a woman seeking IVF treatment has a spouse, or de facto partner (including a same sex partner) any person to whom the licence applies must ensure that that spouse or de facto partner has given effective consent to the procedure.
- A person to whom a licence applies or an Exempt practitioner should ensure that information provided to a donor or donors of gametes or embryos about the effect of the *Artificial Conception Act 1985* reflects the amendments set out above.
- Where a woman is seeking to use sperm from a known donor the person to whom a licence applies or an Exempt practitioner should clarify and document the nature of the relationship between the woman and the donor. If the relationship is a de facto relationship consent procedures for de facto partners must be complied with.
- In relation to decisions about storage of an embryo created or donated for for the purposes of providing IVF treatment to a single woman, the woman has right to make such decision in her own right.
- Consideration of the eligibility for IVF should continue to be fully documented, including the assessment of the welfare of the participants and any resulting child, which is still required under section 23 of the HRT Act.

Clinics should consider whether their current procedures and consent forms require amendment to give effect to the changes introduced by the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002*. If amendments are made the revised forms and procedures should be forwarded to the Reproductive Technology Council for approval.