



IMPROVING ACCESS TO ARTIFICIAL REPRODUCTIVE TECHNOLOGY AND SURROGACY IN WESTERN AUSTRALIA: IMPENDING CHANGES AND MISSED OPPORTUNITIES FOR REFORM

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The Assisted Reproductive Technology and Surrogacy Act 2025 (WA) ('the ARTS Act') represents a significant overhaul of the laws that govern assisted reproductive technology (ART') and surrogacy in Western Australia. Following years of consultation, independent review and legislative delay, the ARTS Act consolidates and replaces three existing statutes governing artificial conception, human reproductive technology and surrogacy. Its reforms are intended to simplify access to ART and modernise the legal framework in response to increasing reliance on treatments such as in-vitro fertilisation. This comment examines key reforms introduced by the ARTS Act and identifies unresolved issues and missed opportunities. It argues that, although the ARTS Act marks an important step towards a more contemporary and accessible regulatory framework, some issues — including parentage where a person or couple enters into an international surrogacy arrangement and informal family creation — were overlooked and require further legislative attention.

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I INTRODUCTION

The *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) (*ARTS Act*) was a long time coming for advocates and their clients.¹ First promised in 2017 by former Premier Mark McGowan,² the reforms faced many roadblocks — including a nearly 24-hour successful filibuster³ — and were the subject of two independent reports, one by Sonia Allan in 2019,⁴ and another by a Ministerial Expert Panel (*MEP*) in 2022.⁵ The substantive provisions of the *ARTS Act* are expected to commence in mid-2027 after an 18-month implementation period.⁶ The *ARTS Act* updates many of Western Australia's ('WA') antiquated and in some instances discriminatory⁷ laws around artificial reproductive technology ('ART'). At the highest level, the *ARTS Act* implements the *MEP*'s recommendation that three pieces of legislation — the *Artificial Conception Act 1985* (WA), *Human Reproductive Technology Act 1991* (WA) and *Surrogacy Act 2008* (WA) (*Surrogacy Act*) — and the associated regulations be repealed and essentially combined into one statute.⁸ It is hoped that this will simplify access to ART⁹ in the face of increasing reliance on in-vitro fertilisation ('IVF') in particular.¹⁰ This comment outlines some of the key changes made by the

¹ 'Yeah WA!', Sarah Jefford (Blog Post, 31 January 2026) <<https://sarahjefford.com>>.

² Courtney Withers and Daryna Zadvirna, 'WA's Surrogacy and IVF Laws Overhauled as Legislation Passes State Parliament', *ABC News* (online, 3 December 2025) <www.abc.net.au>.

³ Jacob Kagi, 'WA Liberal MP Nick Goiran Succeeds in Surrogacy Bill Filibuster after a Nearly 24-Hour Speech', *ABC News* (online, 10 April 2019) <www.abc.net.au>.

⁴ Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and Surrogacy Act 2008* (Report: Part 2, January 2019).

⁵ Government of Western Australia Department of Health, *Ministerial Expert Panel on Assisted Reproductive Technology and Surrogacy* (Report, 31 December 2022) (*MEP Report*).

⁶ 'New assisted reproductive technology and surrogacy Act for Western Australia from mid-2027', *Government of Western Australia Department of Health* (Web Page, 5 February 2026) <www.health.wa.gov.au>.

⁷ *MEP Report* (n 5) 21; Allan (n 4) xxix, 54–62; *Dunn v WA Reproductive Technology Council* [2026] WASCA 65, [10] (*Dunn*).

⁸ *MEP Report* (n 5) ix.

⁹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 13 August 2025, 1978 (Meredith Hammat, Minister for Health).

¹⁰ The Australian and New Zealand Assisted Reproduction Database estimates that 1 in 18 children are born from in-vitro fertilisation each year: 'Australian and New Zealand Assisted Reproduction

ARTS Act as well as identifying outstanding issues and missed opportunities for reform.¹¹

II WHAT HAS CHANGED?

A Improving Access to ART

The *ARTS Act* has made several amendments aimed at improving access to ART, including removing discriminatory eligibility requirements and lowering the minimum age for surrogates. This Part considers each of these changes in turn.

1 Removing Discriminatory Eligibility Requirements for Access to ART and Surrogacy

Perhaps most significantly, the *ARTS Act* has no requirement to prove any particular need (for example, medical or social need)¹² to access ART or surrogacy, instead promoting self-determination, as long advocated by practitioners and scholars in the area.¹³ WA is only the second Australian jurisdiction to open access to ART and surrogacy in this way.¹⁴ Under the *ARTS Act*, a surrogacy arrangement is valid provided it is in writing and signed by the parties, each party to the arrangement is 18 years old, the arrangement is not for reward, the relevant consents are given and the formalities and requirements for implications counselling and independent legal advice are met before the surrogate becomes pregnant.¹⁵ Access to surrogacy and ART in WA was historically limited to:

- an ‘eligible person’, defined as a woman who could not conceive due to medical reasons, would likely conceive a child affected by a genetic abnormality or disease OR was medically unable to give birth;¹⁶ and

Database’, *National Perinatal Epidemiology and Statistics Unit* (Web Page, September 2024) <www.unsw.edu.au>.

¹¹ Where specific sections are referred to, these reflect the Assisted Reproductive Technology and Surrogacy Bill 2025 (WA) as passed by the Legislative Assembly given the operative sections of the *ARTS Act* are not yet in force.

¹² Due to a person’s sexual orientation or relationship status.

¹³ See, eg, ‘Social Surrogacy: Choosing How to Grow a Family’, *Sarah Jefford* (Blog Post, 31 January 2026) <<https://sarahjefford.com>>; Neera Bhatia and Lily Porceddu, ‘Donors and Dads Online: Emerging Trends and Legal Implications Involving the Internet in the Creation of Non-Traditional Families in Australia’ (2022) 43(2) *Adelaide Law Review* 912, 918; Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Interim Report of the Independent Review of Assisted Reproductive Treatment* (Report, October 2018) 1.

¹⁴ The Australian Capital Territory being the first: Millie Dale and Taylor Macdonald, ‘Regulating Surrogacy in Australia’, *Human Rights Law Centre* (Web Page, 17 April 2015) <www.hrlc.org.au>.

¹⁵ Assisted Reproductive Technology and Surrogacy Bill 2025 (WA) cl 108(1) (‘ARTS Bill’).

¹⁶ *Surrogacy Act 2008* (WA) s 19(2) (‘Surrogacy Act’); *Human Reproductive Technology Act 1991* (WA) s 23(1)(a) (‘HRT Act’).

- an ‘eligible couple’, defined as ‘2 people of opposite sexes’ who were married or in a de facto relationship and could not conceive due to medical reasons OR would likely conceive a child affected by a genetic abnormality or a disease.¹⁷

In the surrogacy context, a person or couple had to meet the relevant eligibility requirement to apply to the Family Court of WA for a parentage order, which transferred legal parentage of the child from the birth parent (and their partner, if they had one) to the intended parent(s).¹⁸ In the ART context, a person or couple had to meet the relevant eligibility requirement in order to have an IVF procedure carried out.¹⁹

Allan’s review identified that these eligibility requirements conflicted with federal anti-discrimination law — namely s 22 of the *Sex Discrimination Act 1984* (Cth) (*‘SD Act’*) which prohibits discrimination in the provision of goods or services based on things including, relevantly, a person’s sex, sexual orientation or relationship status²⁰ — and should be amended accordingly.²¹ Section 19 of the *Surrogacy Act* was ultimately successfully challenged, with a majority of the WA Court of Appeal finding that it was inconsistent with s 22 of the *SD Act* and therefore invalid to the extent of the inconsistency in accordance with s 109 of the *Constitution*.²² This finding was made on the basis that, in considering whether to make a parentage order under s 19, the Family Court of WA is a ‘person’ providing ‘services’ under the *SD Act*, and is therefore prohibited from discriminating against intended parent(s) on the basis of their sex or sexual orientation, as is currently required of it.²³ The lack of such eligibility requirements in the *ARTS Act* ensures consistency with anti-discrimination law and appropriately broadens access to both ART and surrogacy.

2 Lowering the Minimum Age for Surrogates

In an effort to improve the availability of surrogates, the *ARTS Act* lowers the age that a person can act as a surrogate from 25 to 18 years old.²⁴ This change was however

¹⁷ *Surrogacy Act* (n 16) s 19(2); *HRT Act* (n 16) s 23(1)(a).

¹⁸ *Surrogacy Act* (n 16) s 19(1)(b).

¹⁹ *HRT Act* (n 16) s 23(1)(a).

²⁰ As the relevant statutes restricted access to ART and surrogacy to heterosexual couples and single women with medical need.

²¹ Allan (n 4) 54–62.

²² *Dunn* (n 7) [10].

²³ *Ibid.*

²⁴ *ARTS Bill* (n 15) cl 108(1); *Surrogacy Act* (n 16) s 17(a)(i).

subject to criticism both when debated in Parliament²⁵ and since by leading surrogacy expert and lawyer Sarah Jefford, who noted that '[s]urrogacy is the most complex of challenges, and a reasonable safeguard is that a surrogate be 25'.²⁶ There is limited research as to whether there is any medical reason to enforce a minimum age of over 18, although one study suggests 21 years old should be the minimum age.²⁷ It seems the concern is instead about a potential lack of maturity,²⁸ the risk of coercion,²⁹ and that women of this age 'have not yet had the life experience to fully understand the long-term implications of becoming a surrogate'.³⁰ However, as suggested by Jefford, these matters can be dealt with at the coal-face³¹ — there remain requirements for both intended parents and surrogates to receive counselling 'about the arrangement and its social and psychological implications'³² and to obtain independent legal advice.³³ These requirements will no doubt ensure that prospective surrogates who are not sufficiently 'mature' or who are at risk of being coerced (the latter of which the author notes is not a risk solely associated with the age of the surrogate) are identified and such arrangements do not proceed, or proceed with a different surrogate.

B Posthumous Reproduction

The *ARTS Act* also addresses a longstanding paradox in the regulation of posthumous reproduction in WA, where reproductive material could be retrieved posthumously 'with the consent of the deceased or, in the absence of this, with the consent of the deceased's senior available next of kin, provided the deceased had no known objection to removal',³⁴ but could not be used in WA.³⁵ The *ARTS Act* essentially

²⁵ Western Australia, *Parliamentary Debates*, Legislative Council, 16 September 2025, 3042 (Libby Mettam), 3046 (Shane Love), 3050–1 (Lachlan Hunter).

²⁶ Sarah Jefford OAM (LinkedIn, November 2025) <www.linkedin.com> ('LinkedIn Post').

²⁷ Although it does not provide any scientific reasoning for this conclusion and the article cited provides evidence only for an upper age limit: Mara Simopoulou et al, 'Risks in Surrogacy Considering the Embryo: From the Preimplantation to the Gestational and Neonatal Period' (2018) (1) *BioMed Research International* 10.1155/2018/6287507:1–9, 2.

²⁸ Western Australia, *Parliamentary Debates*, Legislative Council, 16 September 2025, 3046 (Shane Love).

²⁹ *Ibid.*

³⁰ *Ibid* 3051 (Lachlan Hunter).

³¹ Jefford, LinkedIn Post (n 26).

³² *ARTS Bill* (n 15) cl 108(1)(e)(i).

³³ *Ibid* cl 108(1)(e)(ii).

³⁴ Amy Thomasson and Marco Rizzi, 'Consent in Posthumous Reproduction: Giving the Deceased a Voice without Drowning Out the Living in Cases of Unexpected Death' (2021) 48(2) *University of Western Australia Law Review* 557, 560. See *Human Tissue and Transplant Act 1982* (WA) s 22(2)(a)–(b), (8) ('HTT Act').

³⁵ The prohibition was imposed by way of a licencing condition on practitioners undertaking

introduces a new regulatory regime for dealing with posthumous reproduction, including an express provision affording legal parentage to the deceased person,³⁶ as recommended by Allan and other scholars to avoid leaving the child's legal parentage in limbo.³⁷ Rather than treating reproductive material in the same way as other types of tissue as has historically been the case under the *Human Tissue and Transplant Act 1982 (WA)* ('*HTT Act*'), where reproductive material was included in the broad definition of 'tissue',³⁸ a separate part is to be added to the *HTT Act* dealing with the removal of reproductive material after death.³⁹ Part 3A of the *HTT Act* will provide that a 'designated officer for the hospital may authorise the removal of reproductive material' from the deceased with the consent of either the spouse or de facto partner of the deceased, or if they are not available, the 'senior available next of kin'.⁴⁰ The inclusion of a specific part in the *HTT Act* acknowledges that the use of reproductive material, particularly when it is removed after death, has different consequences and involves mediating different interests (including the reproductive autonomy of the surviving partner) compared to other types of tissue.⁴¹

It then seems that material removed posthumously can be used by the surviving partner with the approval of the Assisted Reproductive Technology Advisory and Review Board ('the Board'),⁴² which is yet to be established. Where the material was extracted or the embryo created before death, the *ARTS Act* requires either the deceased person's written consent⁴³ or approval of the Board for use.⁴⁴ Given the inclusion of a separate clause dealing with reproductive material removed after death, it appears the *ARTS Act* contemplates situations where a deceased person has not expressly consented to the posthumous use of their reproductive material before their death, although this will depend on how the interaction between the relevant sections is interpreted. In either case (ie, whether the reproductive material is extracted or embryo created before or after death), a deceased person's

reproductive technology procedures: Western Australia, *Gazette: Special*, No 201, 30 November 2004, 5435 [8.9].

³⁶ ARTS Bill (n 15) cl 34(2).

³⁷ Allan (n 4) xxiv; Thomasson and Rizzi (n 34) 569.

³⁸ *HTT Act* (n 34) s 3 (definition of 'tissue').

³⁹ ARTS Bill (n 15) cl 326.

⁴⁰ *Ibid.*

⁴¹ Amy Thomasson, 'Embryos as Property in Family Law Proceedings: The Implications of and Questions arising from *Leena & Leena*' (2025) 36(3) *Australian Journal of Family Law* 256, 270.

⁴² ARTS Bill (n 15) cl 75(2).

⁴³ In the form described in cl 50(2) and (3) of the ARTS Bill (n 15).

⁴⁴ *Ibid* cl 76(1).

reproductive material or embryos may only be used by the surviving partner for their reproductive purposes.⁴⁵

Any application for the use of the reproductive material — defined as ‘material taken from the human body for the purpose of being used to conceive or create an embryo’,⁴⁶ including a gamete or tissue containing a gamete⁴⁷ — or embryo of a deceased person in an ART procedure must be made to the Board by an ART licensee with the consent of the deceased person’s surviving partner.⁴⁸ In deciding the application, the Board is required to consider the ‘explicit wishes’ of the deceased person, ‘the deceased person’s intentions in relation to becoming a parent’, and the best interests of the prospective child.⁴⁹ These factors are broadly consistent with those recommended by the MEP,⁵⁰ which themselves are based on the National Health and Medical Research Council’s Ethical Guidelines on the use of ART.⁵¹

However, a distinction is made between when an *embryo* can be used after the death of a person who was an intended parent of the prospective child and when a person’s *reproductive material* can be used contrary to their consent. The Board can only approve the use of an *embryo* after one of the intended parents dies contrary to their consent if:

- the deceased person consented to the embryo being donated, either before or after their death;
- the surviving partner withdraws their consent to the donation; and
- the surviving partner wishes to use the embryo for their reproductive purposes.⁵²

The Board cannot approve the use of the embryo contrary to the consent of the deceased person if the above requirements are not met. In contrast, the Board cannot approve the use of the deceased person’s *reproductive material*, where it was extracted before death, on *any* grounds if such use is contrary to their consent (ie, there is no equivalent carve-out for reproductive material).⁵³ Reading between the lines, given the distinction and carve-out are not referred to in the extrinsic materials

⁴⁵ Ibid cls 74(2)(a), 75(2)(a), 76(1).

⁴⁶ Ibid cl 9(1).

⁴⁷ Ibid cl 9(2).

⁴⁸ Ibid cl 83(1), (2).

⁴⁹ Ibid cl 83(3).

⁵⁰ MEP Report (n 5) 38.

⁵¹ National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2017* (Updated 2023) (Guidelines, 17 April 2023) 57–8.

⁵² ARTS Bill (n 15) cls 76(2), 83(6)(a).

⁵³ Ibid cl 83(6)(b).

accompanying the *ARTS Act*, Parliament appears to have deliberately designed a very limited carve-out in order to accommodate situations where the surviving partner has contributed their genetic material to an embryo with the deceased. The carve-out does however directly contradict the note at s 76(1), which states:

The Board cannot approve use of the deceased person's reproductive material or embryos for the use mentioned in subsection (1) if that use is contrary to the deceased person's consent. See section 83(6).

A more accurate way of framing this note would be to refer directly to the distinction between reproductive material and embryos for the purpose of posthumous use. The inclusion of a statutory prohibition on the use of a deceased person's reproductive material contrary to their consent — despite the fact that the Board is required to consider the 'explicit wishes of the deceased person'⁵⁴ in any application for posthumous use — appears to be an attempt by Parliament to balance the various ethical views about the appropriateness of posthumous reproduction more broadly.⁵⁵ It seems that Parliament wanted to expressly remove from the Board's discretion an ability to approve posthumous use of reproductive material where it was contrary to the deceased's express wishes.

There is no requirement in the *ARTS Act* that the surviving partner undergo implications counselling or a grief-focussed assessment of their decision-making capacity, as recommended by the MEP.⁵⁶ The author however finds the absence of a provision requiring counselling for all applications for posthumous use wholly appropriate, provided the Board is in some way expressly empowered to consider the presence or absence of counselling where relevant. This is because there may be situations where implications and grief counselling are not necessary or appropriate — depending for example on the circumstances of the deceased person's death — and accordingly, in the view of the author, this matter is best left to the discretion of the Board. While counselling should not be mandated in the *ARTS Act* (as a requirement for approval), it may be appropriate to prescribe it as a relevant consideration in the impending regulations.⁵⁷ This seems more appropriate to the author than, for example, considering the presence or absence of counselling in the assessment of the best interests of the prospective child under cl 83(3)(c).

⁵⁴ Ibid cl 83(3)(a).

⁵⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 13 August 2025, 1981 (Meredith Hammat, Minister for Health). See generally Thomasson and Rizzi (n 34) 564–9.

⁵⁶ *MEP Report* (n 5) xv, 37.

⁵⁷ Either as a requirement for informed consent under cl 51(2)(c) or as a matter the Board must consider in deciding the outcome of an application for posthumous use under cl 83(3)(d).

III MISSED REFORM OPPORTUNITIES

A *The Pathway to Parentage*

Parentage of children born through ART was historically dealt with under the *Artificial Conception Act 1985* (WA), which included certain presumptions.⁵⁸ These presumptions are now reflected in the *ARTS Act* with updated gender-inclusive language.⁵⁹ However, the *ARTS Act* is a missed opportunity to simplify the pathway to parentage for intended parents who enter into a legally compliant surrogacy arrangement in Australia, and consider the provision of a support payment to surrogates (in addition to reimbursing the surrogate's reasonable expenses, which is currently the only monetary amount they are permitted to receive).⁶⁰ The *ARTS Act* maintains the requirement that intended parents apply to the Family Court for a parentage order — which transfers parentage from the birth parent(s) to the intended parents — no earlier than 28 days after the child is born.⁶¹ This is despite evidence as recently as 2022 that the post-birth transfer process can take up to six months and cost up to AUD6,000.⁶²

The Australian Law Reform Commission ('ALRC') is currently undertaking a review of Australia's surrogacy laws.⁶³ It has proposed the introduction of an administrative pathway to parentage for approved surrogacy arrangements, which would see intended parents recognised as the child's legal parents from birth.⁶⁴ This inverts the current approach but retains safeguards by allowing a surrogate to apply for a declaration of parentage if for some reason the intended parents renege on the agreement.⁶⁵ This better gives effect to the intention of the parties and reduces the burden on intended parents, particularly given that issues with relinquishment by the surrogate or a change of mind on the part of intended parents appear to be

⁵⁸ For example, that the pregnant person is the birth parent of any child that results from the pregnancy, regardless of whether their own reproductive material or embryo was used: *ARTS Bill* (n 15) cl 32(1).

⁵⁹ Rather than referring to sex, gender or marital status, the *ARTS Bill* (n 15) simply uses 'person' throughout.

⁶⁰ *ARTS Bill* (n 15) cl 106.

⁶¹ *Ibid* cl 119(1), (2)(a).

⁶² Tyson Culhane-Smith, 'Australian Surrogacy Process Chart: A Complete Guide to Surrogacy', *Surrogacy Australia* (Web Page, December 2022) 12 <www.surrogacyaustralia.org>. See also Australian Law Reform Commission, *Review of Surrogacy Laws* (Discussion Paper 89, 16 October 2025) 57 ('*Review of Surrogacy Laws*').

⁶³ *Review of Surrogacy Laws* (n 62).

⁶⁴ *Ibid* 56.

⁶⁵ *Ibid* 56–8.

rare.⁶⁶ The WA government may simply be waiting to see what the ALRC ultimately recommends in this regard, but it does seem to the author to be a missed opportunity to reduce the administrative burden in an already complex system.

The *ARTS Act* also fails to address the legal parentage of children born pursuant to an international commercial surrogacy arrangement. The ALRC has again proposed for discussion a pathway to parentage for unapproved surrogacy arrangements (including overseas surrogacy arrangements) rather than leaving children in legal limbo as is currently the case.⁶⁷ The hope might be that the liberalisation of surrogacy in WA means that everyone will follow the ‘approved’ pathway — certainly, there is research indicating that 92% of Australian intended parents would choose to engage in domestic surrogacy rather than overseas surrogacy if that option were available.⁶⁸ However, this optimistic attitude risks overlooking the reality that people will still seek out surrogacy overseas for a variety of reasons, including an inability to find a local surrogate, egg donor or both, the perception that the process is ‘quicker’ overseas, and the desire to ‘access surrogacy in their country of origin’ if they were not born in Australia.⁶⁹

The *ARTS Act* does not fill the ‘legislative vacuum’⁷⁰ regarding the legal status of children who have already been born through international surrogacy and currently reside in WA. Other than formal adoption, there is no legal mechanism for parents of these children to be recognised as such on the child’s birth certificate.⁷¹ Parents who have already had children via international surrogacy are left without recourse to recognition as the legal parent of their child. There remains a conflict between the inability to confer legal parentage where a child is born via international surrogacy, on one hand,⁷² and the Commonwealth Government allowing children born as a result of such arrangements to enter Australia and affording them citizenship or visas, on the other.⁷³ While it is no longer a criminal offence to enter into a surrogacy

⁶⁶ Although now over a decade old, a study by Pip Trowse in 2011 found only two reported cases in Australia of a surrogate refusing to relinquish the child: Pip Trowse, ‘Surrogacy: Is it Harder to Relinquish Genes?’ (2011) *Journal of Law and Medicine* 18(3) 614, 624–5. There has however been at least one case since Trowse’s study: *Lamb and Anor & Shaw* [2017] FamCA 769.

⁶⁷ *Review of Surrogacy Laws* (n 62) 58–60.

⁶⁸ Ezra Kneebone et al, ‘Australian Intended Parents’ Decision-Making and Characteristics and Outcomes of Surrogacy Arrangements Completed in Australia and Overseas’ (2023) 26(6) *Human Fertility* 1448, 1451.

⁶⁹ Stephen Page, ‘Surrogacy in Australia: The “Failed Experiment”?’ (2023) 174 *PrecedentAULA* 22.

⁷⁰ *Bernieres and Anor & Dhopal and Anor* [2017] FamCAFC 180, [62], quoting *Bernieres and Anor & Dhopal and Anor* [2015] FamCA 736, [121].

⁷¹ Gay Dads WA, Submission No 74, *Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (16 March 2018) 49–52.

⁷² *Farnell v Chanbua* [2016] FCWA 17 (Thackray J), [559], [561]–[572].

⁷³ Allan (n 4) 181–2.

arrangement for reward in WA,⁷⁴ and therefore it is not possible to be prosecuted for engaging in international commercial surrogacy,⁷⁵ the law should be coherent and align with the best interests of the child. This arguably dictates that a child be raised by their intended parents — and that they be recognised as the child's legal parents — in their country of residence. This should, in the view of the author, take precedence over supporting the public policy position taken against commercial surrogacy, which in any event may be shifting given that the ALRC is considering the provision of payments to surrogates beyond reimbursement.⁷⁶ Given the *ARTS Act* has made surrogacy so accessible, there will hopefully be fewer parents who engage in international surrogacy — either on a commercial or altruistic basis — because they are no longer precluded from accessing surrogacy in WA, and accordingly the inability to confer legal parentage in such circumstances will become less of an issue prospectively. However, the *ARTS Act* maintains the pretence that children born of international surrogacy arrangements do not exist by failing to provide for transfers of legal parentage.⁷⁷

B Access to ART for Trans and Gender Diverse People

While the *ARTS Act* appropriately uses gender-inclusive language, this creates a potential inconsistency with s 19(2) of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth). Section 19(2) makes it an offence to place 'a human embryo in the body of a human other than in a woman's reproductive tract'. In circumstances where WA does not impose any requirement for medical treatment on those wanting to change their legal gender,⁷⁸ this could lead to a situation where

⁷⁴ Clause 111 of the *ARTS Bill* (n 15) merely 'prohibits' entering a surrogacy arrangement for reward, whereas s 8 of the *Surrogacy Act* (n 16) made it an offence to do so.

⁷⁵ Section 8 of the *Surrogacy Act* (n 16) has extraterritorial effect by virtue of s 12 of the *Criminal Code* (WA), although it has 'little practical effect' given some aspect of the offence must occur in WA: Reproductive Technology Council, Submission No 122, *Submission on the Review of the Western Australian Human Reproductive Technology Act 1991 (WA) and the Surrogacy Act 2008 (WA)* (16 March 2018) 15.

⁷⁶ See Question M, which asks whether an 'additional support payment' should be available 'to recognise the surrogate's time, effort, inconvenience and unique contribution to the surrogacy arrangement': *Review of Surrogacy Laws* (n 62) 51–3; Shannon Schubert and Jean Bell, 'Debate Grows over Australia's Surrogacy Laws as More Couples Look Overseas', *ABC News* (online, 28 June 2025) <www.abc.net.au>.

⁷⁷ Despite the fact that in 2024–25, 369 children born through surrogacy arrangements overseas acquired Australian citizenship by descent: Department of Home Affairs, 'The Administration of the Immigration and Citizenship Programs' (15th ed, October 2025) 43 [213]. According to surrogacy lawyer Stephen Page, more than 3,300 Australian children have been born to overseas surrogates: Janelle Miles and Kate McKenna, 'Australia's Complex Patchwork of Surrogacy Laws Is Leaving Some Children in Legal Limbo', *ABC News* (online, 2 May 2025) <www.abc.net.au>.

⁷⁸ Section 36J(1) of the *Births, Deaths and Marriages Registration Act 1998* (WA) permits self-declared changes of legal sex and gender.

a transgender man or non-binary person is refused access to ART — despite the *ARTS Act* permitting access — on the basis that it would be an offence for the provider to place a human embryo in their body (because they may not be a ‘woman’ at law and for the purpose of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth)). This issue was identified by Allan in her independent review of the *Human Reproductive Technology Act 1991* (WA), where she recommended that the WA government consult with the Commonwealth on the matter.⁷⁹ This is not the first instance of inconsistency between WA and Commonwealth legislation — the historic eligibility criteria for surrogacy being one example⁸⁰ — but it is perhaps novel that this time outdated Commonwealth legislation potentially conflicts with more progressive legislation at the state level. Priority should be given to resolving this inconsistency, preferably by amending the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth), before the situation described above becomes reality. It would be a shame for genuinely progressive legislation at the state level to be kiboshed due to an incidental inconsistency with Commonwealth legislation, particularly given it would have the unintended consequence of again restricting access to ART for trans and gender diverse people, therein discriminating against them in a potentially prohibited way.⁸¹

C Regulating Informal Family Creation

The drafting of the *ARTS Act* also presented an opportunity to regulate informal sperm donation, a type of ‘informal family creation’ which is on the rise.⁸² Informal family creation encapsulates both informal sperm donation (ie, sperm donation that does not occur through an ART provider) and the practice of people using the internet, in particular social media, to find co-parents, known as elective co-parenting.⁸³ Informal sperm donation in particular ‘circumvents the use of regulated fertility clinics’⁸⁴ and is currently unregulated — a Netflix documentary released in 2024 titled ‘The Man with 1,000 Kids’ followed one prolific donor who travelled the world donating his sperm through online groups and lied to

⁷⁹ Allan (n 4) 60, 62.

⁸⁰ Dunn (n 7).

⁸¹ Ibid [10].

⁸² Bhatia and Porceddu (n 13); Deakin University, ‘Law Must Catch Up with Growing Popularity of Informal Sperm Donation’ (Media Release, 18 April 2023) <www.deakin.edu.au>; Neera Bhatia, ‘Informal Sperm Donation Is on the Rise. So Are the Risks’, *The Age* (Melbourne, 22 July 2025) 21; Henrietta Cook, ‘Wild West of Sperm Donation Reviewed’, *The Age* (Melbourne, 21 July 2025) 4.

⁸³ Bhatia and Porceddu (n 13) 912, 915.

⁸⁴ Ibid. The *ARTS Act* expressly excludes self-insemination from the definition of an ART procedure: ARTS Bill (n 15) cl 8(2).

prospective mothers about how many children he had fathered.⁸⁵ Beyond the lack of traditional safeguards, including limits on the number of children a donor can father, genetic screening, urine testing for sexually transmitted infections as well as blood tests for Hepatitis B and C among other viruses,⁸⁶ there are also concerns about coercion in the informal sperm donation space, with reports that some donors, having agreed to 'artificial insemination' in the first instance, have subsequently pressured prospective parents into 'natural insemination' (ie, penetrative sex).⁸⁷ The growing practice of informal family creation is seen as a response to sperm shortages, costly fees associated with accessing donor catalogues and ART procedures and consultations, as well as inhibitive access requirements in some jurisdictions.⁸⁸ While the *ARTS Act* has solved the latter issue by opening access to ART to anyone, there is also a desire from some to have a relationship with the person providing their sperm,⁸⁹ which formal pathways do not offer given a donor's identity is only released upon request by the child after they have turned 18 years old.⁹⁰

A consideration for future reform is whether to introduce a register for informal sperm donors, although there are concerns that this will push the practice further underground.⁹¹ This is increasingly a public health issue, one that requires in-depth consideration of why people are choosing to take an unregulated and arguably riskier path to parenthood, rather than engaging with registered ART clinics and services.⁹² Some relevant options for reform were floated in the recent review of ART and IVF regulation and accreditation, including a targeted public education campaign and an expansion of the YourIVFSuccess website to 'enable more informed consumer choice and consent'.⁹³ Future research should explore whether the removal of eligibility requirements in the *ARTS Act* reduces the number of people choosing the informal pathway.

⁸⁵ Maani Truu, 'Inside the Facebook Group where Australian Women Subvert the System and Go Looking for Sperm', *ABC News* (online, 28 July 2024) <www.abc.net.au>.

⁸⁶ Ibid; Bhatia and Porceddu (n 13) 941–4; 'Donation Steps', *Sperm Donors Australia* (Web Page) <www.spermdonorsaustralia.com.au/>.

⁸⁷ Annika Blau and Tynan King, 'Inside Facebook's Sperm Marketplace', *ABC News* (online, 8 December 2024) <www.abc.net.au>; Bhatia and Porceddu (n 13) 942–3; Bhatia (n 82).

⁸⁸ Truu (n 85); Bhatia and Porceddu (n 13) 923–8.

⁸⁹ Truu (n 85); Bhatia and Porceddu (n 13) 923–8.

⁹⁰ 'Using a Sperm Donor', *IVF Australia* (Web Page) 4 <www.ivf.com.au>.

⁹¹ Bhatia and Porceddu (n 13) 949.

⁹² Bhatia (n 82).

⁹³ Euan M Wallace and Victorian Department of Health, 'Rapid Review of Assisted Reproductive Technology and In Vitro Fertilisation Regulation and Accreditation in Australia' (Report, 26 September 2025) 72.

IV CONCLUSION

While some of the matters overlooked by Parliament in drafting the *ARTS Act* are likely to be dealt with by the ALRC's review of surrogacy laws,⁹⁴ legislative reform — if WA's experience is anything to go by — could be years if not decades away and would require a complex negotiation with states and territories.⁹⁵ As well as outlining the ways in which the law has changed in WA, this comment has synthesised some of the missed opportunities for reform in the hope that they will not fade entirely from the public consciousness — meaningful reform is still required in the parentage space surrounding surrogacy as well as in relation to informal sperm donation. That said, legislative reform is rarely if ever perfect. It must be acknowledged that the passage of the *ARTS Act* is a feat in itself. The *ARTS Act* is a well-intentioned piece of legislation that makes necessary amendments to a suite of laws dealing with ART. It is important that the relevant regulations are drafted in the same spirit and with the same intent as the *ARTS Act* — to make it easier for people to access ART — rather than being unnecessarily prescriptive and burdensome for those trying to start a family.

⁹⁴ Review of Surrogacy Laws (n 62) 11, 48–53.

⁹⁵ Ibid 14–17.