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Commissioner
ALRC

***By Email:*** humantissue@alrc.gov.au

Dear Commissioner

**HUMAN TISSUE LAWS REVIEW**

This submission is about how Human Tissue Acts apply to eggs, sperm, embryos and human milk.

**My opinion**

The contents of this submission are my opinion, arising from:

1. Having become a dad, with my husband, of my beautiful daughter through known egg donation and surrogacy in Queensland.

2. Having experienced infertility.

3. Having advised, since 1988, in over 2,000 surrogacy journeys for clients throughout Australia, and at last count 39 other countries.

4. Having acted for widows from NSW, Queensland, Victoria and Western Australia who have undertaken posthumous use and/or retrieval of either their late husband's or partner's sperm, or embryos created from that sperm.

5. Working as a solicitor since 1987, a specialist family lawyer since 1988, and an accredited family law specialist since 1996, including being an Independent Children's Lawyer for 15 years.

6. Appearing in many pioneering court cases in Australia about surrogacy.

7. Advising many of Australia's IVF clinics about regulatory matters.

8. Serving in various assisted reproductive technology (ART) committees, nationally and internationally, including being co-founder of the International Surrogacy Forum.

9. Making, since 2011, many submissions to various reviews or inquiries about surrogacy/ART.

10. Presenting at numerous local, national and international conferences and seminars about ART.

11. Writing about ART in numerous articles.

12. Advocating for law reform in Queensland concerning non-responsive and posthumous retrieval, that led to the enactment of sections 28 to 32 of the *Assisted Reproductive Treatment Act 2024* (Qld).

13. Teaching Ethics and the Law in Reproductive Medicine for 5 years at The University of New South Wales, as well as guest lecturer in various universities about ART.

14. Being principal advocate for and co-author of a policy of the American Bar Association about a proposed Hague surrogacy convention.

15. Co-authoring one chapter and writing another chapter in books relating to surrogacy.

16. Authoring two books: *When Not If: Surrogacy for Australians* (2022),self-published, and *International Assisted Reproductive Technology* (2024), American Bar Association.

**Disclosure**

I am:

1. Member, Australian Law Reform Commission, Surrogacy Review, Advisory Committee

2. Legal Practice Director of Page Provan Pty Ltd, an incorporated legal practice in Brisbane that specialises in family and fertility law.

3. Secretary of the Fertility Society of Australia and New Zealand

4. Fellow, International Academy of Family Lawyers, including co-chair Gender Identity and Sexuality Committee, member, Parentage and Forced Marriage Committees

5. Fellow, Academy of Adoption and Assisted Reproduction Attorneys, member, International and ART Committees

6. International Representative, American Bar Association, Family Law Section, Assisted Reproductive Technology Committee, including member, International Sub-Committee

7. Member, Australian Lawyers for Human Rights, LGBTQIA+ Committee

8. Member, International Advisory Committee, Growing Families

9. Member, Queensland Law Society

10. Member, Law Council of Australia, Family Law Section

11. Member, Family Law Practitioners Association of Queensland

**FIVE ISSUES**

There are five issues I wish to address:

1. Engagement with the fertility industry.

2. The likely impact on posthumous retrieval by your proposal that they be covered by *Assisted Reproductive Technology* (ART) *Acts* and not *Human Tissue Acts* (HTAs).

3. Competition at death between retrievals on behalf of the grieving spouse, and that for donation.

4. Whether human milk should remain within the definition of tissue.

## 1. Engagement with the Fertility Industry

It is a pity that there is not one fertility specialist, embryologist or fertility lawyer on your advisory committee. The direction proposed in your review concerning posthumous retrieval will mean that widows in our two biggest States, NSW and Victoria[1], who have recently lost their husbands as a result of sudden deaths, such as accidents or strokes, and currently can retrieve their late husband's sperm, will not be able to do so.

It is a pity that, unlike the ALRC surrogacy review, also currently underway, which sought out the views of members of the Fertility Society of Australia and New Zealand board as to issues of concern, your review has not.

I seek that you, without delay, add a member to your advisory committee who is in the fertility industry so that there can be active discussion at this stage about the impact of this proposal, with the assistance of someone who has experience of posthumous retrieval.

I also seek that you seek to engage with the Fertility Society of Australia and New Zealand, as the peak industry body, again to inform you in your considerations about the issues raised in this submission.

## 2. The likely impact on posthumous retrieval by your proposal that they be covered by ART Acts and not HTAs.

The comment is made at [50] of your Issues Paper:

> *"It may be more appropriate to regulate this issue* [posthumous retrieval] *using assisted reproductive treatment laws using assisted reproductive treatment laws rather than HTAs."*

To deny a widow[2] that ability to retrieve is a tragedy. To overlook the potential impact of that inability by many widows is grievous. Your issues paper has not, to all appearances, considered decided case law on this very point.[3]

Let me be clear. HTA's in *every* State and Territory enable posthumous retrieval to be authorised.

If your proposal were to transpire, without substantial change to the nation's *ART Acts* (outside your remit), then widows will in some States and likely both Territories be denied the ability to undertake posthumous retrieval of their husband's sperm- with all that entails.

If the current 3 month rapid review by Health Ministers of the IVF industry results in *ART Acts* that allow for posthumous retrieval of eggs and sperm for the reproductive needs of their partner (which none do currently, other than Queensland's), I have no difficulty with eggs, sperm and embryos being excised from the definition of tissue in the HTA's. However, if that development does not transpire, then eggs, sperm and embryos need to remain within the definition of tissue, so that widows and widowers continue to have the ability to retrieve those gametes for their later reproduction, if they so wish.

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[1] As well as added barriers imposed on widows in other States and both Territories, with the exception of Queensland.
[2] Although widowers can make these applications, overwhelmingly they are made by widows.

**WHY MIGHT THIS ABILITY BE LOST?**

Put simply, use of HTA's to facilitate posthumous retrieval is the only way in most States that retrievals can be undertaken.

The prime method of posthumous retrieval by widows of their late husbands' sperm around the nation is by use of procedures under the HTA's and not by utilising court orders. No ART Act permit posthumous retrieval, except the *ART Act 2024* (Qld). The *ART Act 2024* (ACT) requires court approval for storage and use of gametes retrieved posthumously, but does not give jurisdiction to the Court to order retrieval.

There has not been any apparent consideration by you that in many cases of posthumous retrieval that coronial consent is required.

Because you have not covered the issue in your issues paper, I will now do so, as set out in **Table 1**. I have not included the provisions about coronial consent.

**Table 1: Legal authority to retrieve gametes posthumously**

| State/ Territory | HTA provision authorising unresponsive or posthumous retrieval of gametes | Does the ART Act permit unresponsive or posthumous retrieval? | Does the Court have jurisdiction to order retrieval? |
|---|---|---|---|
| **ACT** | *Transplantation and Anatomy Act 1978*, ss.27, 28 | No | Unclear |
| **NSW** | *Human Tissue Act 1983*, ss. 23, 24 | No | No |
| **NT** | *Transplantation and Anatomy Act 1979*, ss.18-19B | N/A | Unclear |
| **Qld** | N/A | Yes, *ART Act 2024*, ss. 28-30, 32 | No |
| **SA** | *Transplantation and Anatomy Act 1983*, ss. 21, 22, 24 | No | Yes |
| **Tasmania** | *Human Tissue Act 1985*, ss.23, 24, 26 | N/A | Unclear |
| **Victoria** | *Human Tissue Act 1982*, ss.24A-26 | No | No |
| **WA** | *Human Tissue and Transplant Act 1982*, s.22 | No | Yes, if the HTA retrieval does not occur |

As **Table 1** makes plain, if your proposal to excise eggs, sperm and embryos so that they are the subject of ART Acts, only that in Queensland gives clear authority to obtain the retrieval.

The inevitable result is that grieving widows will be unable to retrieve, or in those jurisdictions where it might be possible to retrieve by court order, have to endure a costly, stressful and uncertain court process within 24 hours of their husband's death.

## COURT AUTHORITY TO RETRIEVE- BY STATE AND TERRITORY

### Australian Capital Territory

Since the enactment of the *ART Act 2024* (ACT), s.37, authority to store or use must be obtained from the Supreme Court.

It is unclear if the Court has jurisdiction to order retrieval. If the Court takes the same view as the Supreme Courts of NSW and Victoria, it does not.

### New South Wales

Retrieval orders have been made. However, court authority to do is doubtful at best, without reliance on the provisions of the HTA: *Chapman v South Eastern Sydney Local Health District* (2018) 98 NSWLR 208; *Noone No 2 v Genea Limited* [2020] NSWSC 1860; *Re Adams (No 2)* [2021] NSWSC 794. *Noone No 2* and *Adams* are clear that the HTA provisions are to be relied upon in order to retrieve.

Despite such clear warnings, nevertheless the Chief Health Officer has in *Policy Directive PD2024_023* said:

> *"The designated officer must not authorise removal of gametes unless:*
>
> - *the deceased person provided prior written consent for the removal and use of their gametes, or*
>
> - *there is a court order obtained by the deceased's family authorising removal."*

The result, for a newly widowed client of mine last year, was to engage through my office, over 24 hours, with a Sydney hospital in seeking to have the authorisation made by the designated officer. When it seemed that would not be given, my client – through me – told the hospital that if authorisation was not given, my client would, in order to enable the retrieval and to preserve viable sperm, have the corpse moved to the morgue, and authorise the retrieval there.

It was made plain to the hospital that if that event came to pass, then no donations would be able to be undertaken. The deceased was an organ donor. It grieved my client that in order to enable her to proceed with posthumous retrieval, donations would not be available- but she had no choice.

Despite being such a clear position being provided by my client, authorisation was not given by the designated officer. My client caused the corpse to be moved to the morgue. She authorised the retrieval. Viable sperm was retrieved.

No organs were able to be donated, as a result.

My client, already traumatised by the sudden death of her husband, was doubly traumatised by the intransigence by the hospital. The hospital had been told- bluntly- that there was little prospect of a retrieval order being made by the court. The hospital lawyer was clear that the only way that retrieval could be made was under the HTA, and that a Court order could not be made. As officers of the Court, we are under a duty to tell the Court of relevant case authority, including unfavourable case authority.

My client was further traumatised by receiving between 6 and 8 phone calls per day from the hospital's organ donor team, pressuring her to proceed with the donation. She should have been treated with kindness and respect. She was not.

No widow should have had to go through what my client went through.

Despite the size of Sydney, there is only one specialist who regularly performs posthumous retrievals. If he is not available, they cannot be done. This is a common problem in regional areas, and has at times been also difficult in Brisbane, despite there being several doctors who undertake posthumous retrievals. In Sydney, at least, none of the major IVF clinics will undertake this work. In most places, urologists have not been trained or prepared to do this work. It is often very much a lottery to put together in short time a doctor who can retrieve, a scientist who can take and preserve, and get them to the same place on time, while dealing with at times serious obstruction from the hospital, and the tyranny of distance.

**Northern Territory**

There is no reported case law about posthumous retrieval in the Territory. I do not know if a posthumous retrieval order would be made.

**Queensland**

The Court does not have jurisdiction to make posthumous retrieval orders, although they have been made in the past. The appropriate procedure is under the HTA: *Re Cresswell* [2018] QSC 142. The HTA provisions have not been replaced by the ART Act, which also allows non-responsive retrieval.

On the first occasion that non-responsive retrieval was attempted last year, by a widow client of mine, officers at Royal Brisbane and Women's Hospital refused to authorise retrieval until it was certain that the man had died. This refusal flew in the face of the clear statutory provisions.

**South Australia**

The Court has jurisdiction to make posthumous retrieval orders: *Re H, AE* [2012] SASC 177. Whether the Court would be of that opinion today, in light of the NSW, Queensland and Victorian cases, is unclear.

**Tasmania**

There is no reported case law about posthumous retrieval in Tasmania. I do not know if a posthumous retrieval order would be made.

**Victoria**

The Court does not have jurisdiction to make posthumous retrieval orders. The appropriate procedure is under the HTA: *AB v Attorney-General for the State of Victoria* [2005] VSC 180; *P v Melbourne Health* [2019] VSC 500.

**Western Australia**

The Court does have jurisdiction: *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C [2013] WASC 3* and subsequent cases; although the Court would prefer if the designated officers just did their job and authorised retrieval, rather than the Court having to do so. Seaward J stated in *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte CH* [2023] WASC 487 at [32]-[34]:

*"32. As can be seen from the requirements of s 22 of the Act, it is not necessary that a person seeking an order for the removal of tissue obtain a court order to that effect. Rather, s 22 of the Act sets out a process whereby a designated officer in the relevant hospital can grant that authorisation.*

*33. During the hearing I asked counsel for the applicant whether attempts had been made to obtain the authorisation from the designated officer. The court was informed that the applicant had made those attempts, but the hospital did not make the designated officer available, despite a request from counsel for the applicant to speak to the designated officer, and there was (to the best of the applicant's understanding) no consideration of the applicant's case by the designated officer.*

*34. As this urgent application was made on an ex parte basis, I do not have the benefit of any explanation from the hospital as to what occurred or why. However, it is disappointing that it appears that, once again, an applicant has been required to attend court on an urgent basis and in traumatic circumstances to obtain an order that may, if the designated officer considered all criteria to be met, be granted in a faster and more streamlined manner. In this regard I endorse the following observations of Edelman J in Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C*

*23.The Human Tissue and Transplant Act establishes a relatively straightforward regime. In this case the hospital was aware of, and had, a designated officer under the Act. Section 4 of the Act provides that the designated officer may, in writing, delegate any of his or her powers (other than the power to delegate). The authorisation for the removal of the spermatozoa from Ms C's deceased husband could have been given by the authorised officer, or someone delegated to make the decision (and inquiries of Ms C) on his behalf.*

*24. In future, the most efficient procedure to follow in an urgent case such as this would be for any request for extraction of spermatozoa to be directed by the hospital to the designated officer who can consider the matters raised in s 22 of the Human Tissue and Transplant Act which I have described above. If the designated officer is unavailable he or she can, in writing (by email or fax) delegate the power to another officer. The delegation can occur beforehand or at the time of the request."*

## 3. Competition at death between retrievals on behalf of the grieving spouse and that for donation.

In the last year, my office has had three cases of a widow wanting to undertaking posthumous retrieval while the hospital sought to remove donor organs. These cases have been:

- **The good**. Rockhampton Hospital earlier this year were highly co-operative, respectful, pleasant and efficient. Both organ donation and retrieval of viable sperm were able to be achieved quickly.

- **The bad**. In one case last year, Royal Brisbane and Womens Hospital knew for 24 hours of our involvement, but only mentioned to us at close to 5pm on a Friday that death was soon, and that the man was an organ donor. No one bothered to communicate that with us (and therefore the doctor and scientist undertaking the retrieval) until that point. The Hospital tried to assert that the donation should have priority over the posthumous retrieval. As with the Sydney case, the greater good of donation to others was seen as more important by some hospital officials than the immediate need of the widow.

- **The ugly**. This was the Sydney case described above.

*If* hospitals could follow standard procedures in these cases, and be aware that posthumous retrievals may occur- the process can be highly co-operative, respectful, pleasant and efficient, as it was in Rockhampton.

Earlier this year, I worked with Caboolture Hospital and Monash IVF to write a simple protocol for donor teams in hospitals to be aware of this issue, and hopefully replicate that which occurred in Rockhampton, to enable both donation and posthumous retrieval to occur (when both are authorised).

I wish that a priority for this inquiry be to seek how that Caboolture approach can be replicated nationwide.

**4. Whether human milk should remain within the definition of tissue.**

Queensland alone has legislated that the definition of human tissue excludes milk, for the reasons you say.

The inclusion of human milk within the definition of tissue has another impact. The vast majority of Australian intended parents through surrogacy undertake surrogacy overseas rather than at home. In doing so, they tiptoe through a legal minefield here.

It is common for overseas surrogacy agreements to have provision for the surrogate to be compensated or reimbursed for the provision of milk after the baby is born. Australian intended parents are potentially committing offences under Australian HTA's in the ACT, NSW, NT, SA, and WA by proceeding with that agreement.

This is because of the effect of long arm criminal laws, such as s.10C of the *Crimes Act 1900* (NSW), which extend jurisdiction. There are no applicable long arm laws in Victoria and Tasmania. It is not an issue in Queensland, because milk has been removed from the definition of tissue, for similar policy reasons as you identify.

The sooner that milk is removed from the definition of tissue, the better.

I consent to publication of this submission.

If I can be of any further assistance, please contact me.

Yours faithfully
**Page Provan Pty Ltd**

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