Access to Assisted Reproductive Treatment

The Assisted Reproductive Treatment Act 1988 (SA) and Assisted Reproductive Treatment Regulations 2010 provide for when a person may access assisted reproductive treatment (A.R.T.) in South Australia. The law does this by setting ‘conditions’ for registration for clinics providing A.R.T. that determine to whom, and under what circumstances, clinics may provide such treatment.

Under the current law a person (or couple) can access A.R.T. at a registered clinic if they satisfy one of the following criteria:

- the woman or her partner are, or appear to be, infertile;
- there is a risk that a serious genetic defect, disease or illness would be transmitted to a child if A.R.T. was not used;
- the woman’s deceased genuine domestic partner/spouse has left written instructions (prior to his death) that his sperm could be used by his widow to conceive a child (posthumously);
- the treatment is for the purposes of a recognised surrogacy agreement; or
- the woman or her genuine domestic partner/spouse may become infertile in the future due to a serious medical condition or disease, or its treatment (for example, cancer or chemotherapy).

Registered Clinics must also ensure that the woman is under the average age of menopause.

Providers must also adhere to National Health and Medical Research Council Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2004 (revised 2007) (NHMRC Guidelines).

(See Fact Sheet 3)

There is a maximum penalty of $120,000 for a clinic that provides A.R.T. services outside of these requirements.

Do the conditions apply to all forms of assisted reproduction?

No. The access requirements are found in the conditions of registration for clinics that provide A.R.T.

The conditions of registration do not apply to assisted insemination (AI) provided by a health professional approved by the Minister (for example, a GP) or AI provided for free (for example, self-insemination or insemination of a friend). AI in such circumstances would not be subject to, for example, the infertility requirements.

Note – there are currently no approved health professionals in SA providing AI.
What’s different to the previous legislation and regulations?

The subject of this review is to evaluate the operation and effectiveness of the current law in light of changes introduced in 2010. It is therefore important to note what is different (and what is the same) regarding access to A.R.T. in the current act to that which existed before 2010.

The 2010 amendments maintained some of the previous requirements regarding who could access A.R.T., and in what circumstances—including, for example, requirements of infertility for more invasive treatments, or risk of a child being born with a serious genetic defect. The changes to the Act and regulations did however introduce a number more instances in which A.R.T. could be used including:

a) when there appears to be a risk that a ‘serious disease or serious illness would be transmitted to a child conceived naturally’;

b) if a woman or man living with a woman on a genuine domestic basis had an illness which may in the future result in infertility; and

c) for the post-humous use of sperm in the circumstances described above.

The amendments also included the deletion of the marital requirement for access to A.R.T., enshrining in legislation the judgment in *Pearce v South Australian Health Commission* (1996) 66 SASR 486 – which held it was inconsistent with Commonwealth laws against discrimination on the grounds of marital status in the provision of services.

Other eligibility requirements were removed from the law. These included that:

1) The woman who was to undergo treatment and her partner, if any, had to sign a statutory declaration stating neither was subject to a term of imprisonment or to outstanding charges for an offence for which imprisonment may be imposed on conviction; neither spouse had been found guilty of a sexual offence involving a child; whether either spouse had been found guilty of an offence involving violence; and/or whether either spouse had had a child permanently removed from his or her guardianship under any Act or law of the State or any other place (other than by adoption). If any of the above applied, infertility treatment was not to be provided;

2) Infertility treatment should cease if the above signed declaration was found to be false, or if one of the conditions relevant to the declaration became true;

3) Infertility treatment should cease if a licensee was of the opinion that either spouse had become ill or had a disease or disability that would interfere with the ability and capacity of the couple to care for a child throughout childhood; and

4) Applicants had to undergo counselling about the psychological and physical outcomes of infertility treatment for children born as a consequence of the application of A.R.T. and if donor gametes or embryos were to be used they had to be informed of current opinion on the disclosure to children born in consequence of the use of donor reproductive material, and about access to donor information.

Note - The Assisted Reproductive Treatment Act 1988 enshrines the principle of the paramountcy of the welfare of any child born as a result of A.R.T. This principle may be used to influence a clinic’s decision about who can access A.R.T. (see Fact Sheet 2).

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**Other current issues**

The South Australian Law Reform Institute (SALRI) has recently undertaken an audit of South Australia’s laws to identify any legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status.

With respect to A.R.T. the SALRI has recommended that the eligibility criteria for A.R.T. be amended to

(a) clarify that a person can access A.R.T. if, in the person’s circumstances, they are unlikely to become pregnant other than by an assisted reproductive treatment procedure and

(b) include the guiding principle that people seeking to undergo A.R.T. procedures must not be discriminated against on the basis of their sexual orientation, marital status or religion.

SALRI are undertaking a further review of the assisted reproductive treatment provisions of the South Australian *Family Relationships Act 1975* with regard to discrimination. The *Family Relationships Act 1975* does not form part of the review of the A.R.T. Act.
Questions

We are interested in hearing from people about their experience and views regarding the changes to eligibility criteria in 2010. The following questions may help you to inform the review:

1. What are your views and/or experiences regarding access to assisted reproductive treatment in South Australia?

2. What are your views and/or experiences regarding access to artificial insemination in South Australia?

3. The screening provisions in the SACRT Code of Ethical Clinical Practice were intended to prevent people from accessing treatment who may have posed a risk to a future child. Has their removal had any impact upon those who access A.R.T., or the children that result?

4. Some requirements such as the above-mentioned counselling provisions (which existed in the prior Code of Ethical Clinical Practice) no longer exist in the Act or regulations. Is referral to the NHMRC Guidelines satisfactory for matters related to access, eligibility and the provision of assisted reproductive treatment? Why or why not?

5. What are your views and/or experiences regarding certain conditions not being specifically in the South Australian Act or regulations? (i.e. those provisions that were repealed along with the Code of Ethical Clinical Practice).

Please feel free to comment on anything else that is relevant.

The Review of the Act

The Assisted Reproductive Treatment Act 1988 provides that a review must take place of the operation and effectiveness of the Act as soon as possible after the fifth anniversary of the changes that came into effect on or after 1st September 2010. The review will particularly focus upon the operation and effectiveness of the Act in relation to:

> the requirement that the welfare of any child born as a consequence of A.R.T. is to be treated as being of paramount importance, and accepted as a fundamental principle, in respect of the operation of the Act, as well as in the provision of assisted reproductive treatment;

> the replacement of the previous licensing scheme with a registration scheme for A.R.T. clinics;

> the dissolution of the SA Council on Reproductive Technology and its Code of Ethical Clinical Practice;

> amending eligibility for access to A.R.T. services—noting that such conditions relate to the circumstances in which, and to whom, A.R.T. may be provided;

> allowing for the establishment of a donor conception register; and

> provisions for record keeping and confidentiality.

The review will include examination of research and practice, and invite public submissions relevant to the above matters. It will lead to a report, which will include recommendations regarding the regulation of assisted reproductive treatment in South Australia. The report will be tabled in Parliament and made publically available. The recommendations will be considered by the Minister.
We Invite You To Make a Submission

Complete the online submission form on the YourSAy website to provide your views in relation to the issues under review.

Email a submission to Associate Professor Sonia Allan at HealthPolicyLegislation@sa.gov.au with subject heading ‘A.R.T. Act Review’

Post a submission to
A/Professor Sonia Allan
A.R.T. Act Review,
C/- Policy and Intergovernment Relations Unit,
SA Health, PO Box 287, Rundle Mall,
ADELAIDE SA 5000

Join the discussion on the YourSAy website.

Please note that all submissions are public unless marked ‘confidential’. Public submissions will be posted on the YourSAy website, and the author may be cited in the final report. Authors of ‘confidential’ submissions will not be referred to by name. We cannot accept anonymous submissions.

Submissions close on Friday 15 April 2016.

More Information

For general information on topics relevant to the review of the Assisted Reproductive Treatment Act 1988 (SA) see the following Fact Sheets:

Fact Sheet 1: Introduction to the Review
Fact Sheet 2: Paramountcy of the Welfare of the Child
Fact Sheet 3: Registration Scheme for A.R.T. Clinics
Fact Sheet 4: Dissolution of SA Council on Reproductive Technology, and its Code of Ethical Clinical Practice
Fact Sheet 5: Access to Assisted Reproductive Treatment
Fact Sheet 6: Establishment of a Donor Register
Fact Sheet 7: Record Keeping and Confidentiality

Disclaimer

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Prepared by Associate Professor Sonia Allan, for the Assisted Reproductive Treatment Act 1988 (SA) review, January 2016.