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By Email: HRTSR@health.wa.gov.au

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Dear Associate Professor Allan

Equality for rainbow families in WA: response to the review of the Western Australian *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008*

We welcome the review of the *Western Australian Human Reproductive Technology Act 1991 (HRA)* and the *Surrogacy Act 2008 (Surrogacy Act)*.

The Human Rights Law Centre (**HRLC**) is a national not-for profit organisation dedicated to protecting and promoting human rights in Australia and in Australian activities overseas. The HRLC has advocated for reforms relating to the regulation of human reproductive technology and surrogacy in other states and territories.

There has been increasing recognition of the role that same-sex parents play in Australian society and the law is increasingly recognising the diversity of families. Families come in all shapes and sizes, but the most important thing for any child is love and a safe and secure home. Children do best in a stable family with loving parents and role models regardless of whether those parents are straight or lesbian, gay, bisexual, trans and intersex (**LGBTI**).

Across Australia there are many LGBTI parents successfully raising their children. It is estimated that about 11 per cent of gay men and 33 per cent of lesbian women are parents.¹ Yet there are many loving and committed non-heterosexual couples who have been arbitrarily excluded from starting a family, or who have instead travelled interstate or overseas to do so. This review has the potential to remove direct discrimination against LGBTI people who are in relationships and prohibited from starting a family.

1. Human reproductive technology

Almost all states and territories allow same-sex couples to access human reproductive treatment (for example, in vitro fertilisation and donor insemination) on an equal basis to different sex couples. Western Australia allows couples to have children using some forms of human reproductive

¹ Deborah Dempsey, *Same-sex Parented Families in Australia*, *Australian Institute of Family Studies* (December 2013) <www.aifs.gov.au/cfca/publications/same-sex-parented-families-australia>.

technology, however section 23 continues to draw a distinction between same-sex and different-sex couples.

Section 23 of the HRA provides that an in vitro fertilisation procedure may be carried out where it would be likely to benefit 'persons who, as a couple, are unable to conceive a child due to medical reasons', who must be either married to each other or in a de facto relationship with each other and of the opposite sex to each other.

Recommendation

We recommend that direct discrimination between same-sex and different-sex couples is removed from section 23 of the *Western Australian Human Reproductive Technology Act 1991*.

2. Altruistic surrogacy

Altruistic surrogacy is available for same-sex couples in all states and territories except the Northern Territory and Western Australia. In Western Australia, a couple must be of the opposite sex and married to each other or in a de facto relationship with each other to seek a parenting order following a surrogacy arrangement.² The Surrogacy Act also refers to the eligibility criteria in section 23 of the HRA in determining whether a couple is an eligible couple for the purposes of surrogacy.

Same-sex male couples who have a close relationship with a friend or family member in Western Australia who is willing to carry their child are currently unable to do so, despite research showing that children of same-sex parents fare as well as children of different-sex parents on scales of emotional, social and educational development.³

The restriction on surrogacy for gay men is outdated, discriminatory and out of step with contemporary Australian standards and legal regulation of surrogacy in other states and territories. We refer to the South Australian Law Reform Institute's *Rainbow Families: Equal Recognition of Relationships and Access to Existing Laws Relating to Parentage, Assisted Reproductive Treatment and Surrogacy* report sets out in detail a range of compelling reasons to remove the discriminatory ban on access to surrogacy on the basis of relationship status and / or sexual orientation.⁴

Recommendation

We recommend that direct discrimination between same-sex and different-sex couples is removed from section 19 of the Surrogacy Act.

We welcome the opportunity to discuss these matters further with you. Please feel free to contact us if you have any queries in relation to this letter.

Yours sincerely



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² *Surrogacy Act 2008* (WA) s 19.

³ Ken W Knight, Sarah EM Stephenson, Sue West et al 'The kids are OK: it is discrimination not same-sex parents that harms children' (2017) 207(9) *Medical Journal of Australia* 374.

⁴ South Australian Law Reform Institute, 'Rainbow Families: Equal Recognition of Relationships and Access to Existing Laws Relating to Parentage, Assisted Reproductive Treatment and Surrogacy' (2010) https://law.adelaide.edu.au/sites/default/files/docs/family_recognition_and_surrogacy_report.pdf.