Parliamentary Committees



Assisted Reproductive Technology Bill 2024

Report No. 14, 57th Parliament
Community Safety and Legal Affairs Committee
July 2024

Community Safety and Legal Affairs Committee

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All web address references are current at the time of publishing.

Contents

Chair's foreword

This report presents a summary of the Community Safety and Legal Affairs Committee's examination of the Assisted Reproductive Technology Bill 2024.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

The committee heard from a wide range of stakeholders including academics, legal and medical professionals, assisted reproductive technology providers, religious bodies, unions, donor-conceived people and donors.

This report acknowledges the historical and ongoing issues faced by donor-conceived people in gaining access to information regarding their donor-conceived status, genetic origins and health information. The committee had to consider the complex issue of whether a donor-conceived person's right to know their genetic origin outweighs a donor's right to privacy, noting a longstanding practice within the industry to assure anonymity to donors.

While acknowledging the many clinics, providers and specialists who have made it possible for people to build and grow their families via use of assisted reproductive technology, the committee found that the largely unregulated industry in Queensland is in need of a robust legislative framework to protect the interests of consumers and donor-conceived individuals, and to provide authorities with the necessary compliance and enforcement powers.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff, Queensland Health and the Department of Justice and Attorney-General.

I commend this report to the House.

Peter Russo MP

Chair

Recommendations

The committee recommends that the Assisted Reproductive Technology Bill 2024 be passed.

Executive summary

This report presents the Community Safety and Legal Affairs Committee's examination of the Assisted Reproductive Technology Bill 2024 (Bill). The primary objectives of this Bill are to establish:

- a state-based framework to regulate assisted reproductive technology (ART) services
- a donor conception information register.

During its inquiry into the Bill, the committee received and considered a variety of evidence. This included:

- 34 written submissions from stakeholders
- written and oral briefings provided by Queensland Health and the Department of Justice and Attorney-General
- evidence provided by witnesses at a public hearing in Brisbane.

The evidence received by the committee indicates that stakeholders are broadly supportive of the Bill's objectives and how it seeks to achieve them. However, some expressed concern about specific provisions, most commonly related to the proposed donor family limit, the donor conception register, and the birth certificates of donor-conceived people.

The Bill responds to 2 previous inquiries:

- the Legal Affairs and Safety Committee's Inquiry into matters relating to donor conception (LASC Inquiry)[1]
- the Office of the Health Ombudsman's recent investigation of ART providers in Queensland set out in an interim and final report (OHO ART Report 1 and 2).[2]

The Bill implements most of the recommendations made by the Legal Affairs and Safety Committee, including its central recommendation that all donor-conceived people be legislatively provided with the right to know the identity of their donor. Those recommendations not implemented by the Bill primarily relate to funding or the practicalities of implementation (being matters not typically included in primary legislation).

The Bill also implements several of the preliminary recommendations made in the OHO ART Report 1, including that legislation be introduced to provide robust oversight of ART providers operating in Queensland. The committee is satisfied that the regulatory scheme set out in the Bill would improve the oversight of ART services in Queensland, protecting the health and well-being of those who use these services.

The committee considered several issues of fundamental legislative principles raised by the Bill, as well as the potential of the Bill to limit human rights. The committee is satisfied that the Bill has sufficient regard to fundamental legislative principles, and that any limits on human rights are reasonable and justified in the circumstances.

The committee carefully considered the retrospective impact of the new donor conception register, including the adverse impact it would have on the privacy of donors, some of whom had previously expected to remain anonymous. The committee recognises that establishing this register is necessary

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1 Legal Affairs and Safety Committee, *Report No. 33, 57th Parliament – Inquiry into matters relating to donor conception*, 2022.

2 Office of the Health Ombudsman (Health Ombudsman), *Section 81 – Investigation of ART providers in QLD,* Summary report Phases 1 and 2, March 2024; Health Ombudsman, *Section 81 – Investigation of ART providers in QLD,* Final report, June 2024.

to ensure that all donor-conceived people have the ability to know the identity of their donor. However, this means placing the rights and well-being of donor-conceived people above that of donors who may have preferred to remain anonymous. The committee concluded that this is appropriate, given the donors made their decisions to donate as competent adults, while the donor-conceived offspring had no choice in the manner of their conception.

The committee was also satisfied that both the explanatory notes and statement of compatibility tabled with the Bill clearly explained its purpose, the issues it raises in relation to fundamental legislative principles, and its potential impact on human rights.

1 Introduction

This report presents the Community Safety and Legal Affairs Committee's examination of the Assisted Reproductive Technology Bill 2024 (the Bill).

1.1 Policy objectives of the Bill

The Bill has 2 main policy objectives:

- establishing a state-based framework to regulate Assisted Reproductive Technology (ART) services in Queensland
- establishing a donor conception information register in Queensland.

1.2 Assisted Reproductive Technology (ART) in Queensland

As stated in the explanatory notes, ART 'refers to treatments or procedures that address fertility'.[3] It can include a range of procedures, the most well-known of which is in-vitro fertilisation (IVF). ART services are used by a range of people who would otherwise be unable to conceive, including LGBTIQ+ families, single women and couples experiencing infertility.

In Queensland, there is a relatively small number of clinics that provide ART services, all of which are private providers. At present, there are 8 different providers operating in Queensland. Together, they run a total of 24 accredited ART units across the state.[4]

1.2.1 The current regulatory landscape

At present, there is no state-based legislation that regulates the provision of ART services in Queensland. However, the majority of other Australian jurisdictions have ART legislation in place (the Australian Capital Territory, New South Wales, South Australia, Victoria and Western Australia).[5]

ART providers operating in Queensland are required, by federal law, to maintain professional accreditation.[6] They must also comply with:

- the National Health and Medical Research Council's (NHMRC) Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research (NHMRC Guidelines)
- the Reproductive Technology Committee of the Fertility Society of Australia and New Zealand's Code of Practice for Assisted Reproductive Technology Units (RTAC Code of Practice).

However, failure to comply with the NHMRC Guidelines and RTAC Code of Practice is not an offence under federal law, where very limited enforcement mechanisms are available.[7]

In the absence of state-based legislation, Queensland is unable to enforce compliance with either the NHMRC Guidelines or the RTAC Code of Practice. In effect, the industry is self-regulated. This has recently become a source of concern, due to several high-profile cases in which it was alleged that ART providers had failed to comply with these requirements, leading to adverse impacts on people using ART services and donor-conceived people.[8]

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3 Explanatory notes, p 1.

4 Explanatory notes, p 1.

5 Explanatory notes, pp 56-57.

6 *Research Involving Human Embryos Act 2002* (Cth).

7 Explanatory notes, p 2.

8 Explanatory notes, p 2.

In late 2023, these concerns led the Minister for Health, Mental Health and Ambulance Services and Minister for Women, the Hon Shannon Fentiman MP (Minister) to direct the Office of the Health Ombudsman (Health Ombudsman) to conduct an investigation of certain issues relating to ART provision in Queensland.[9] The Health Ombudsman's final report, discussed in more detail in section 1.3.2, below, stated that its findings 'indicate a compelling case for the need for proposed legislation to regulate ART providers in Queensland and strengthen the safeguards for consumers, donors and donor-conceived children.'[10]

1.3 Bill responds to prior inquiries

The Bill is a direct response to 2 prior inquiries:

- In 2022, the Legal Affairs and Safety Committee (LASC) reported on its Inquiry into matters relating to donor conception.[11]
- In 2024, the Health Ombudsman conducted an investigation of ART providers in Queensland, following a direction from the Minister.[12]

The relevant recommendations in those reports are set out in Appendix D.

1.3.1 Legal Affairs and Safety Committee Inquiry into matters relating to donor conception

In its report, the LASC made 6 recommendations including:

- All donor-conceived persons be legislatively provided with the right to know the identity of their donor when they reach the age of 18, regardless of when they were born.
- Identifying information about donors, including their medical history, be made available on request to all donor-conceived persons when they reach the age of 18.
- A central donor conception register be established within the Registry of Births, Deaths and Marriages.[13]

In February 2023, the government indicated that it supported all of the LASC's recommendations in principle.[14]

The Bill proposes to implement most of the recommendations made in the report, including the recommendations listed above. In some cases, discussed in more detail below, the Bill proposes implementing measures that vary from what the LASC recommended. Generally, these variations are relatively minor. The recommendations made by the LASC which are not implemented by the Bill primarily relate to funding or the practicalities of implementation (i.e. matters not typically included in primary legislation).

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9 Explanatory notes, p 2.

10 Health Ombudsman, *Section 81 – Investigation of ART providers in QLD,* Final report, June 2024, p 13.

11 Legal Affairs and Safety Committee (LASC), *Report No. 33, 57th Parliament – Inquiry into matters relating to donor conception*, 31 August 2022.

12 Health Ombudsman, *Section 81 – Investigation of ART providers in QLD,* Summary report Phases 1 and 2, March 2024; Health Ombudsman, *Section 81 – Investigation of ART providers in QLD,* Final report, June 2024.

13 LASC, *Report No. 33, 57th Parliament – Inquiry into matters relating to donor conception*, 2022.

14 Government response to Legal Affairs and Safety Committee, Report No. 33, 57th Parliament – Inquiry into matters relating to donor conception, 28 February 2023.

1.3.2 Health Ombudsman's investigation of ART providers in Queensland

In March 2024, after completing Phase 1 and Phase 2 of their investigation, the Health Ombudsman provided an interim report to the Minister,[15] which she tabled when the Bill was introduced. The interim report made 36 preliminary recommendations, including 18 recommendations directed to the Minister, 17 addressed to ART providers and 1 to the Fertility Society of Australia and New Zealand Reproductive Technology Accreditation Committee (FSANZ-RTAC).[16]

The Health Ombudsman provided a final report to the Minister on 28 June 2024. A copy of that final report was provided to the committee during its inquiry. The final report made 18 recommendations to the Minister alone, 17 to ART providers alone, 1 to both the Minister and ART providers and 2 to the FSANZ-RTAC.[17]

The Bill proposes to implement the Health Ombudsman's central preliminary recommendation: that legislation be introduced to provide robust oversight of ART providers, including licensing requirements (see section 2.1 below). It would also implement several other recommendations including those relating to record-keeping requirements, the establishment of a donor-family limit, the sharing of significant medical history, and the prohibition of non-medical sex-selection (also discussed below).

The Bill does not implement some of the other recommendations made by the Health Ombudsman, including those relating to the screening of donors and guidance on person-centred care. However, Queensland Health advised the committee that consideration is being given to implementing some of these preliminary recommendations through the licensing conditions that will be imposed on ART providers.[18] It also told the committee that some recommendations, which are of a particularly clinical nature, may not be implemented in the Bill and will instead 'be considered during the development of licensing conditions and guidance material during implementation'.[19]

1.4 Public consultation

The Bill has been informed by a significant amount of public consultation.

The consultation processes that informed the Bill included:

- the LASC Inquiry into matters relating to donor conception, which received 71 submissions and heard from more than 17 witnesses
- 2 rounds of consultation conducted by Queensland Health in early 2024, during which it received written feedback from a wide range of stakeholders and held several information and consultation sessions.

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15 Health Ombudsman, *Section 81 – Investigation of ART providers in QLD,* Summary report Phases 1 and 2, March 2024.

16 Health Ombudsman, *Section 81 – Investigation of ART providers in QLD,* Summary report Phases 1 and 2, March 2024, pp 20-24.

17 Health Ombudsman, *Section 81 – Investigation of ART providers in QLD,* Final Report, 28 June 2024, pp 118-122.

18 Queensland Health and Department of Justice and Attorney-General (DJAG), joint written briefing, 5 June 2024, p 7.

19 Public briefing transcript, Brisbane, 12 July 2024, p 2.

In relation to the consultation processes it undertook, Queensland Health advised the committee:

> While stakeholders generally supported the Bill, some ART providers expressed concern about duplicating existing national requirements, increased cost to consumers and the imposition of additional barriers to access ART services.[20]

1.5 Legislative compliance

The committee examined whether or not the Bill complies with the Parliament's requirements for legislation as contained in the *Parliament of Queensland Act 2001*, *Legislative Standards Act 1992* and the *Human Rights Act 2019* (HRA).

1.5.1 *Legislative Standards Act 1992*

Fundamental legislative principles require that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament.[21]

In its examination of the Bill, the committee identified a variety of issues relating to fundamental legislative principles. In particular, the committee has considered:

- how the Bill will affect the ability of ART providers to conduct their ordinary business activities, and whether this is justified in the circumstances (see section 2.10)
- whether the retrospective impact of the Bill, including the adverse impact it will have on the privacy of donors who had previously expected to remain anonymous, is adequately justified (see section 3.1.8)
- whether the penalties associated with the new offences proposed in the Bill are proportionate to those offences and consistent with each other (see section 4.2)
- the scope of the powers granted to inspectors appointed under the Bill, and whether those powers are subject to appropriate limits and safeguards (see section 4.1.1)
- whether it is appropriate that certain decisions of chief executive are not subject to review (see section 4.3.4)
- whether the proposed independent review body (which will be responsible for authorising the use of stored gametes retrieved from a deceased or unresponsive person) will be established in a manner that has sufficient regard to the institution of Parliament (see section 2.7.4.1).

These issues are discussed in more detail in the relevant sections below.

Committee comment

Having considered these issues, as well as more minor issues of fundamental legislative principle raised by the Bill, the committee is satisfied that the Bill has sufficient regard to fundamental legislative principles. Relevant matters of fundamental legislative principles are discussed throughout sections 2-5 of this report.

[20] Queensland Health and DJAG, joint written briefing, 5 June 2024, p 13.

[21] *Legislative Standards Act 1992* (LSA), s 4(2).

1.5.2 *Human Rights Act 2019*

A law is compatible with human rights if it does not limit a human right or limits a human right only to the extent that is reasonable and demonstrably justifiable.[22]

In its examination of the Bill's compatibility with the HRA, the committee identified several human rights affected by the Bill. The human rights issues considered by the committee include:

- the impact of the new licensing requirements on the right to property and right to privacy and reputation (see section 2.10)
- the disproportionate impact of the new requirements regarding counselling and the 10-family limit on single women and LGBTIQ+ couples, which affects the right to equality, the right to protection of children and families, and the right to access health services (see section 2.6.1)
- the impact of the provisions regulating the retrieval and use of gametes from deceased or unresponsive persons on several human rights (see section 2.7.4.2)
- the impact of the donor conception information register on the right to privacy (see section 3.1.8)
- the impact of inspectors' powers on the rights to property and privacy (see section 4.1.1)
- the impact of the chief executive's power to make certain decisions on the right to a fair hearing (see section 2.1.6)
- the impact of the (limited) reversal of the onus of proof in relation to certain offences on the right to a fair hearing and rights in criminal proceedings (see section 4.2.3)

Committee comment

The committee finds that although the Bill impacts a number of human rights, any limitations are reasonably justified.

A statement of compatibility was tabled with the introduction of the Bill as required by section 38 of the HRA. The statement contained a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights.

1.6 Should the Bill be passed?

The committee is required to determine whether or not to recommend that the Bill be passed.

Recommendation 1

The committee recommends that the Assisted Reproductive Technology Bill 2024 be passed.

Sections 2 to 5 of this report set out the committee's examination of the Bill in more detail. However, those sections do not discuss all consequential, minor or technical amendments.

[22] *Human Rights Act 2019* (HRA), s 8.

2 Regulation of ART

The Bill proposes establishing a new regulatory framework for the provision of ART services in Queensland. This framework includes:

- requirements that clinics must meet when providing ART services
- restrictions on the retrieval and use of gametes and embryos
- provisions that facilitate the disclosure of health information between donor-related individuals.

2.1 Licensing scheme for ART providers

The Bill proposes a new licensing scheme for ART providers operating in Queensland.[23] This implements a key preliminary recommendation made by the Health Ombudsman.

In March 2024, the Health Ombudsman recommended 'that legislation is designed to provide robust oversight of ART providers, including the licensing of providers, audits, and investigation of non-conformities and adverse events.'[24] This preliminary recommendation was made in light of a finding that 'there are gaps in and risks in the current self-regulatory system in respect to ensuring the safety and quality of ART services.'[25]

The new licensing scheme raises some issues relating to fundamental legislative principles and human rights, which are discussed in more detail in section 2.10.

2.1.1 ART providers must have a licence

Under the new licensing scheme, ART providers must apply for and be granted a licence to provide ART services in Queensland. Providing ART services without a licence will be an offence, subject to a maximum penalty of 200 penalty units ($32,260[26]) or 2 years imprisonment.[27]

Licences will be required for clinics, rather than the individual practitioners and personnel who work within them.[28] However, clinics will be required to ensure that ART services are only provided by, or under the supervision of, a medical practitioner. The maximum penalty for non-compliance with this requirement will be 400 penalty units ($64,520) or 2 years imprisonment.[29]

Queensland Health would be responsible for the administration of the licensing scheme.

2.1.2 Licence applications and conditions

Under the Bill, to apply for a licence, an ART provider must:

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23 Bill, pt 2, div 1 and pt 2, div 4.

24 Health Ombudsman, *Section 81 – Investigation of ART providers in QLD,* Summary report Phases 1 and 2, March 2024, p 23.

25 Health Ombudsman, *Section 81 – Investigation of ART providers in QLD,* Summary report Phases 1 and 2, March 2024, p 12.

26 The value of a penalty unit is currently $161.30: Penalties and Sentences Regulation 2015, s 3, *Penalties and Sentences Act 1992*, s 5A.

27 Bill, cl 12.

28 Explanatory notes, p 5.

29 Bill, cl 13.

- hold current Reproductive Technology Accreditation Committee (RTAC) accreditation
- not be completely prohibited from providing ART services
- satisfy any additional requirements set out in regulation.[30]

Applications must be in the approved form and include specified information, such as the address of the clinic and the names of the medical practitioners who will perform or supervise ART services.[31] Applications will be subject to a fee to be prescribed in regulation.[32] Licences will be valid for the term stated in the licence, which may be up to 3 years.[33]

In deciding whether or not to grant a licence, the chief executive of Queensland Health:

- must refuse to grant the licence in specified circumstances (e.g. the person is not eligible to make an application)
- may consider a range of matters, including any previous contraventions by the applicant of their licence conditions or ART related legislation (either in Queensland or in other jurisdictions).[34]

The chief executive must provide an applicant with an information notice about their decision as soon as practicable if they refuse a licence application.[35]

Licences will be subject to:

- general conditions, which are to be prescribed by regulation
- any specific conditions imposed by the chief executive, either at the time they are granted or at any other time.[36]

General licence conditions may include conditions such as complying with ART legislation, maintaining RTAC accreditation, and providing information to the chief executive as required.[37] Specific conditions may be used to address 'a particular risk of harm that is time sensitive, requires a tailored mitigation strategy, or is limited in scope.'[38]

2.1.3 Compliance mechanisms

The Bill proposes several compliance mechanisms as part of the licensing scheme.

The chief executive would have the power to:

- issue an improvement notice to an ART provider if they reasonably believe that it is necessary for the provider to rectify a particular matter to prevent or minimise a risk to the health, safety or welfare of people receiving ART services or people born as a result[39]

30 Bill, cl 57.

31 Bill, cl 57(2)(a) and (b).

32 Bill, cl 57(2)(c).

33 Bill, cl 60.

34 Bill, cl 58(1) and (2).

35 Bill, cl 58(3)

36 Bill, cl 59.

37 Explanatory notes, p 5.

38 Explanatory notes, p 5.

39 Bill, cl 62.

- issue a prohibition notice to a licenced provider or other person if they reasonable believe that the person should be prohibited from providing some or all ART services because they have contravened a licence condition, breached relevant legislation or there is a risk to the health, safety or wellbeing of people receiving ART services or people born as a result[40]
- cancel or suspend a licence if a provider ceases to have RTAC accreditation or is completely prohibited from providing ART services by a prohibition notice, or in certain other circumstances (e.g. if a licence was granted based on false or misleading information)[41]
- maintain a public register of licenced ART providers, which may include certain information, such as the name and address of ART providers, and the names of the medical practitioners who supervise or perform ART services at that provider.[42]

The Bill sets out certain requirements that must be met by improvement and prohibition notices.[43] For example, improvement notices must state the matter that is required to be rectified.[44]

The Bill would require ART providers to notify the chief executive of certain events within specified timeframes. For example, ART providers must notify the chief executive of serious adverse events within 7 days.[45]

To facilitate effective use of these compliance mechanisms, the Bill provides the chief executive with the ability to appoint inspectors, who will have a range of powers to investigate, monitor and enforce compliance with the Act. These powers are discussed in section 4.1.

2.1.4 Stakeholder views

The Queensland Nurses and Midwives' Union and Pride in Law supported a state-based licensing system in order to facilitate greater protection of the public and enable the Queensland Government to impose consequences for non-compliance.[46] The Australian College of Nursing stated that 'the ART industry in Queensland is currently self-regulating, which may enable behaviours and treatments that are harmful to patients and their children'.[47]

Rainbow Families Queensland drew attention to the benefit imposed by 'equipping Queensland Health with the regulatory tools needed to ensure compliance'.[48] Lyndal Bubke, a donor-conceived person stated she was relieved that the legislative developments were progressing to regulate an industry where providers have, in her view, placed convenience and profit over health and safety.[49]

40 Bill, cl 63.

41 Bill, cl 64.

42 Bill, cl 65.

43 Bill, cls 62(2) and 63(4).

44 Bill, cl 62(2)(c).

45 Bill, cl 61.

46 Submission 19, p 6; Submission 31, p 3.

47 Submission 29, p 2.

48 Submission 1, p 6.

49 Submission 2, p 1.

While the Australian Medical Association Queensland Limited (AMA) recognised the importance of regulation of ART services, it noted that 'the imposition of new requirements, particularly licensing and accreditation schemes, often have significant implications for existing businesses'.[50]

2.1.5 Department response

In relation to the AMA's concerns regarding the potential implications for existing businesses, Queensland Health stated they believed the Bill struck an appropriate balance between 'the need for robust consumer protections and accessible services'.[51] They did not anticipate that the new regulation would have any adverse impact on clinic practice or cause significant flow-on effects in terms of costs to consumers or reticence to donation.[52]

2.1.6 Compatibility with human rights

The Bill potentially limits the right to a fair hearing, which is protected under the HRA,[53] because the licensing scheme confers certain decision-making powers of the chief executive, without giving ART providers an opportunity to provide input. These include the ability to make decisions about licence applications and conditions, licence suspensions and cancellations, and improvement and prohibition notices.[54]

As the statement of compatibility explains, these administrative powers 'are sufficient to substantially affect the rights and financial circumstances of licenced ART providers' and 'can be exercised without first affording the impacted licence holder applicant an opportunity to be heard.'[55] However, several factors suggest this potential limitation of the right to a fair hearing is reasonable and justified in the circumstances. These include:

- the purpose of the licensing scheme, which is to protect the health and safety of people who use ART services
- the fact that alternative approaches (such as 'show cause' notices), would impair the ability of Queensland Health to respond quickly to immediate risks
- the availability of both internal and external review mechanisms, which include the ability to apply for stays of decisions while reviews are underway (see section 4.3 below).[56]

Committee comment

The committee supports the introduction of a licensing scheme for ART providers to better protect ART patients, donors and donor-conceived people.

Evidence received by the committee indicates that there is strong support among stakeholders for the regulation of Queensland's ART industry, with many telling the committee that on the whole, they support the requirements that the Bill proposes to impose on ART providers.[57]

50 Submission 5, p 1.

51 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 6.

52 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 6.

53 HRA, s 31.

54 Bill, cls 57-59, and 62-64.

55 Statement of compatibility, p 13.

56 Statement of compatibility, pp 13-14.

57 See, for examples, submissions 1, 2, 5, 10, 16, 19, 22, 26 and 29.

2.2 Provision of information and counselling

The Bill would require ART providers to provide people with information and counselling, prior to the provision of ART services.[58] These requirements raise issues relating to fundamental legislative principles and human rights, which are discussed in more detail in section 2.10.

The scope and nature of the information that an ART provider must give to a particular person would depend on who the person is and how they are involved in the relevant ART procedure. For example, a person who is undergoing an ART procedure that does not use donated gametes or donated embryos must be provided with information about 'basic matters'. In contrast, a person undergoing an ART procedure that uses donated gametes or donated embryos must be provided with information about 'extended matters'.[59]

'Basic matters' include the availability of counselling services for the person, and the effect of a gamete provider's consent, including when it may be modified or withdrawn. 'Extended matters' include these matters plus additional matters including:

- the ART provider's obligations in relation to collecting, keeping and disclosing information about the person and their donor-conceived offspring
- the person's rights, and the rights of their donor-conceived offspring, to information from the donor conception register.[60]

Failure to provide this information prior to the provision of an ART service will be subject to a maximum penalty of 200 penalty units ($32,260).[61]

The Bill provides that prior to providing an ART service, an ART provider must provide counselling services to:

- a person who proposes to donate a gamete or an embryo for an ART procedure
- a person planning to undergo an ART procedure that uses donated gametes or a donated embryo, and their spouse (if any)
- in cases of a planned surrogate pregnancy, the intended parents, if the surrogate will undergo an ART procedure that uses donated gametes or embryos.[62]

Those who fail to provide counselling services to these people will be subjected to a maximum penalty of 50 penalty units ($8,065).[63]

ART providers must also make counselling services available to people planning to undergo an ART procedure that does not use donated gametes or donated embryos, and their spouses. Failure to make counselling available to these people will be subject to a maximum penalty of 25 penalty units ($4,032.50).[64]

The explanatory notes state that 'the matters that should be covered in counselling, qualifications of counsellors, charging of fees and other requirements relating to counselling are intended to be set out

58 Bill, pt 2, divs 2 and 3.

59 Bill, cl 14(1).

60 Bill, cl 14(2).

61 Bill, cl 14(1).

62 Bill, cl 15(1) and (2).

63 Bill, cl 15(1) and (2).

64 Bill, cl 15(3).

in regulation.'[65] The notes also state that people would be able to use an independent counsellor, rather than one employed by the ART provider, if they prefer.[66]

2.2.1 Potential impact of counselling requirement on access to ART services

In requiring ART providers to provide counselling to certain groups prior to the provision of ART services, the Bill would effectively make counselling mandatory for these people. This could potentially act as a barrier to accessing ART services. As the statement of compatibility explains, the counselling requirements:

> … may result in more time, complexity and cost for ART providers to offer treatments using donor gametes or embryos, which they may pass on to the patient in the form of increased costs. Some people may consider the requirement for counselling as intrusive and potentially a barrier to accessing treatment.[67]

Notably, these effects are likely to be disproportionately experienced by single women and LGBTIQ+ couples, because they are more likely to undergo ART treatments involving donated gametes or embryos.[68] This will impact the human rights of these groups, including their right to equality before the law, the right to protection of families and children, and the right to health services, all of which are protected by the HRA.[69]

However, the limitation of these rights could be seen as reasonable and justified in the circumstances, given that the counselling requirements are intended to protect the welfare of donor-conceived people and support informed decision making by people intending to make use of ART services, rather than to control individuals' access to ART or determine the legitimacy of their treatment.[70]

2.2.2 Stakeholder views

It is notable that organisations representing LGBTIQ+ families indicated support for the counselling requirements. For example, Rainbow Families Queensland told the committee that a survey it conducted in 2022 showed that 'relevant, quality, affordable counselling … was highly valued by our community' and:

> … few would strongly oppose it [counselling] being a mandatory feature of the regulatory framework. Rather, most concerns were framed around cost, quality of service, and also appropriateness and sensitivity of the counselling for LGBTQ+ people.[71]

Several submitters emphasised the importance of ensuring that the counselling provided under the Bill is of a high quality and specifically caters to their situation.[72] For example, one person described their counselling as 'woeful' and 'hetero-normative' while another said it was 'very basic' and 'unhelpful'.[73]

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65 Explanatory notes, p 9.

66 Explanatory notes, p 9.

67 Statement of compatibility, p 20.

68 Statement of compatibility, pp 20 -21.

69 HRA, ss 15, 26 and 37.

70 Statement of compatibility, pp 20-21.

71 Submission 1, p 6.

72 Submissions 1, 4 and 16.

73 Submission 1, pp 6-7.

The Australian and New Zealand Infertility Counsellors Association (ANZICA) suggested that the Bill should specify the qualifications required by counsellors, noting the current requirement for those providing counselling services to be ANZICA qualified and hold a current membership to the Fertility Society of Australia and New Zealand (FSANZ).[74] To achieve and maintain ANZICA membership, practitioners must go through 'many hours of practice and professional development activities specifically relevant to fertility counselling'.[75]

In terms of whether or not counselling should be mandated, as is proposed in the Bill, the AMA said that they were supportive of decisions about the necessity to attend counselling being made by the treating clinician as opposed to it being mandated for all patients.[76] Kerri Favarato, Amy Tam and Donor Conceived Australia were all supportive of mandatory counselling.[77]

Donor Conceived Australia said that while they were in support of mandatory counselling for those participating in donor conception practices, it was also 'important that those accessing counselling for issues related to third party reproductive treatment feel confident that the counsellor is independent, objective and focussed on the interests of the participating parties'.[78] Donor Conceived Australia additionally recommended that counselling be provided by professionals independent of ART providers and that they have 'specific training and experience in donor conception across the lifespan, as well as infertility'.[79]

2.2.3 Department response

Queensland Health stated that the counselling requirements would ensure that donors and people seeking ART treatment make decisions based on the 'right information' in respect of the implications of ART processes.[80] In response to submitters' concerns regarding the lack of provision for a practitioner's minimum qualifications and experience to provide ART specific counselling, Queensland Health noted that 'the Bill provides that qualifications for counsellors may be prescribed by regulation' and that 'submissions received on the ART Bill will be considered in the development of the regulation'.[81] Queensland Health added that they intend to undertake further consultation during development of the regulation.[82]

Committee comment

The committee commends the Bill's requirement that ART providers provide information and counselling to prescribed persons prior to using ART services.

The committee notes approvingly that Queensland Health will consider the submissions received by the committee in the development of the regulations and undertake further consultation to assist in developing a counselling regime that is fit for purpose.

74 Submission 4, pp 3-6.

75 Submission 4, p 3.

76 Submission 5, p 2.

77 Submission 11, p 1; Submission 14, p 1; Submission 16, p 6.

78 Submission 16, p 6.

79 Submission 16, p 6.

80 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 5.

81 Queensland Health and DJAG, joint correspondence, 8 July 2024, pp 10-11.

82 Queensland Health and DJAG, joint correspondence, 8 July 2024, pp 10-11.

2.3 Obtaining consent

The Bill sets out how and when ART providers would be required to obtain consent from donors and people undergoing ART procedures.[83] This reflects one of the preliminary recommendations made by the Health Ombudsman, who recommended that the Minister consider whether to include requirements for informed consent in proposed legislation or associated regulations.

2.3.1 Requirement to obtain consent

The Bill would require ART providers to obtain written consent from a person before certain activities associated with ART are performed and act in accordance with that consent.[84] Breaches of this requirement will be subject to a maximum penalty of 200 penalty units ($32,260).[85]

Specific consent requirements apply for different groups of people, and in relation to specific actions.[86] For example, an ART provider must obtain the consent of a gamete provider (excluding cases of donated gametes or donated embryos) to:

- use a gamete provided by them in an ART procedure
- store a gamete provided by them for an agreed amount of time
- supply a gamete provided by them to another person (including another ART provider)
- export a gamete provided by them from Queensland.[87]

In cases where a donated gamete or donated embryo is to be used, the consent of a gamete provider must include:

- the maximum number of families that may use the donated gametes or donated embryos
- the maximum period for which the donated gametes or donated embryos may be stored for use.[88]

2.3.2 Certain limits on donation not permitted

The Bill provides that a donor cannot limit the use of their donated gametes or donated embryos in an ART procedure on the basis of a protected attribute of the persons who are provided with ART services.[89] 'Protected attributes' means an attribute protected under the *Anti-Discrimination Act 1991* (AD Act).[90] This means that donors would be unable to limit the use of donate gametes or embryos to certain classes of people, such as unmarried couples or people of a particular ethnicity.

83 Bill, pt 2, div 3.

84 Bill, cl 16.

85 Bill, cl 16.

86 Bill, cls 17, 18 and 19.

87 Bill, cl 17(1).

88 Bill, cl 18(2).

89 Bill, cl 18(3).

90 Bill, cl 18(4).

2.3.3 Withdrawal or variation of consent

The Bill addresses how and when consent can be withdrawn or varied by gamete providers and people undergoing ART procedures.[91] This reflects the Health Ombudsman's preliminary recommendation to consider 'addressing the issue of withdrawal of consent by donors' in legislation.[92]

Imposing a time limit on the withdrawal or variation of consent by a gamete provider necessarily limits their human rights. However, as the statement of compatibility explains, such a limit is necessary to protect the interests and human rights of other people involved in the relevant ART treatment:

> If a provider of a donated gamete was able to modify or withdraw their consent after the gamete or resultant embryo was placed in a person's body, this could necessitate a termination of pregnancy, impacting the pregnant person's autonomy and reproductive freedom, and their human rights relating to family and medical treatment.[93]

2.3.4 Stakeholder views

All submitters that spoke to the issue specifically, supported obtaining the donor's consent prior to doing particular things with the material. Rainbow Families Queensland, however, noted that the Bill and explanatory notes were silent about what would happen should a person no longer be permitted to use their embryos if a donor withdrew their consent. They further stated that:

> … it is unclear whether the law will in effect require clinics to destroy embryos, or whether embryos will need to be moved to another jurisdiction to avoid this outcome. Complications will arise about whether consent is required to destroy a person's embryos (part of which is the patient's own genetic material) …
>
> Embryos are often potential direct biological siblings of our children, and therefore can hold enormous emotional weight for families. The choice to destroy embryos is already a difficult one, but to take this decision out of the hands of the patient will likely cause major grief for some families.[94]

The Australian Christian Lobby (ACL) drew attention to clause 18(4) of the Bill which provides that a donor cannot limit the consent of use of their donated gametes or embryos on the basis of a protected attribute of a person in accordance with the AD Act, submitting that 'many Christians believe in the sanctity of marriage and may have moral objections' to the use of their genetic material by certain people.[95] The ACL submitted that it was an exercise of a person's religious freedom to be able to dictate who would be eligible to receive and/or use their donated genetic material, noting section 116 of the Australian Constitution which 'indirectly protects religious freedom … [and] prohibits the Federal Government from prohibiting the free exercise of any religion'.[96]

The Queensland Law Society (QLS) recommended that clause 20 of the Bill (withdrawal or variation of consent) be amended to provide for a donor's consent being able to be modified or withdrawn at any time before the treatment cycle commences. The QLS noted that this clause allows for consent to be withdrawn at any time before the embryo is implanted in a person's body (and therefore, in the middle of a treatment cycle).[97] The QLS further noted that the Bill, as it is currently written in this respect, is

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91 Bill, cl 20.

92 Health Ombudsman, *Section 81 – Investigation of ART providers in QLD,* Summary report Phases 1 and 2, March 2024, p 24.

93 Statement of compatibility, p 23.

94 Submission 1, p 3.

95 Submission 16, p 6.

96 Submission 28, p 6.

97 Submission 32, p 3.

inconsistent with the 'Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research'.[98]

2.3.5 Department response

Queensland Health acknowledged stakeholders' concerns with how the consent provisions may apply.[99] It stated that generally, the Bill seeks to align provisions about consent for treatment and use of donated gametes or embryos with the NHMRC Guidelines where possible. These guidelines state that a gamete donor can withdraw consent at any time before a treatment cycle commences or before an embryo is created, whichever is sooner.[100]

In response to the ACL's concern that the prohibition in clause 18 was a violation of the freedom of religion, Queensland Health acknowledged that 'while it will prevent a donor from limiting the use of their donated gametes or embryos on the basis of a protected attribute of a person, it does not limit any person's ability to donate gametes or embryos to a person they know for their use'.[101]

Committee comment

The committee recognises that consent in the area of ART services is a difficult and often complex issue, but it considers that the Bill's provisions appropriately align with the NHMRC Guidelines where possible.

2.4 Information collection and record-keeping

The Bill would impose a variety of requirements relating to information collection and record-keeping on ART providers.[102] These requirements raise some issues relating to fundamental legislative principles and human rights, which are discussed in more detail in section 2.10.

2.4.1 Information about gamete providers

The Bill requires ART providers to collect certain information about gamete providers, including their full name, contact information, and date and place of birth. For donated gametes, ART providers would be required to collect additional information, including the donor's ethnicity and relevant medical history, as well as information about their offspring (whether donor-conceived or not).[103] If an ART provider uses a gamete or embryo without collecting this information, they will be subject to a maximum penalty of 200 penalty units ($32,260).[104]

If an ART provider supplies to, or receives gametes or embryos from, another ART provider, they must also supply or obtain the required information about the gamete provider. Failure to do so is subject to a maximum penalty of 200 penalty units ($32,260).[105]

98 Submission 32, p 3.

99 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 11.

100 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 11.

101 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 12.

102 Bill, pt 2, div 6.

103 Bill, cl 33(1).

104 Bill, cl 33(5).

105 Bill, cl 34.

2.4.2 Information about persons who undergo ART procedures

The Bill requires ART providers to collect certain information about persons who undergo ART procedures, including their full name, contact information, and date and place of birth.[106] If an ART procedure uses a donated gamete or donated embryo, they must also take reasonable steps to collect information about:

- whether a person became pregnant as a result of the procedure
- whether a child was born as a result of the procedure
- the full name, sex and date and place of birth of any child born as a result.[107]

Failure to collect this information is subject to a maximum penalty of 200 penalty units ($32,260).[108]

2.4.3 Record-keeping

The Bill will require ART providers to keep records of specified information about:

- each gamete or embryo that is, or has been, in their possession
- the ART procedures it carries out
- each child that it knows was born as a result of its ART procedures
- any other matter prescribed by regulation.[109]

These records must be kept for at least 99 years.[110] This is the time period recommended by the Health Ombudsman in their interim report,[111] and will ensure that the requisite records are available for donor-conceived people to access during their lifetime.[112]

Each failure to comply with the record-keeping requirements would be subject to a maximum penalty of 200 penalty units ($32,260).[113] It will also be an offence to destroy records, including historical records about donor conception ART procedures. This offence will be subject to a maximum penalty of 400 penalty units ($64,520).[114] These requirements would implement one of the recommendations made by the LASC.

The chief executive may authorise the destruction of a record if satisfied that this would not adversely affect any person.[115]

2.4.4 Stakeholder views

Monash IVF made several recommendations in respect of the provisions relating to information collection requirements and the proposed record-keeping obligations of ART providers. In reference

106 Bill, cl 35(1).

107 Bill, cl 35(2).

108 Bill, cl 35.

109 Bill, cl 36.

110 Bill, cl 36(1).

111 Health Ombudsman, *Section 81 – Investigation of ART providers in QLD,* Summary report Phases 1 and 2, March 2024, p 21.

112 Explanatory notes, p 15.

113 Bill, cl 36(1).

114 Bill, cl 37.

115 Bill, cl 37(3).

to clause 33(1)(a)(iii), it stated that is unclear why the place of birth is required for a gamete provider.[116] Monash IVF further submitted that clause 33(1)(b) be amended so that this information is required to be disclosed for all gametes, and not just donated gametes.[117]

At the public hearing, Kerri Favarato, when representing Donor Conceived Australia, stated that it was important for donor-conceived persons to know information such as the place of birth and family history of a genetic parent in order to build their psyche and personality.[118]

In her submission, Professor Sonia Allan OAM stated that clause 36 (which deals with the keeping of records) does not, in her view, require an ART provider to establish whether a birth has resulted from ART procedures and that there is the ability for people to 'disappear' after a treatment, and 'thus avoid having a donor-conception birth recorded on the register'.[119] Professor Allan OAM suggested that the Bill be amended to obligate the ART provider to report to the register when a procedure has been attempted 'to enable triangulation of data – i.e., if the recipient gives birth within a certain timeframe after treatment'.[120]

The ACL expressed their support for the record-keeping provisions contained in the Bill and what they perceived to be a focus on protecting 'the right to genetic identity through comprehensive record-keeping and information access for donor-conceived individuals'.[121]

2.4.5 Department response

In relation to concerns raised by stakeholders that recipient parents may want to conceal the fact their child is donor-conceived, Queensland Health noted the provision of information provisions and mandatory counselling were intended to combat this.[122] In relation to Monash IVF's concerns, Queensland Health noted the focus of OHO Report 2 on record-keeping and that the Bill 'includes requirements for the collection and retention of information relating to gamete providers, including donors, to ensure records relating to ART procedures and donor conception are available for donor-conceived persons to access during their lifetime'.[123]

In relation to submitters' concerns regarding ART providers being required to disclose particular information about historical donations which may not be in their possession, Queensland Health drew attention to clause 33(5) which provides that an ART provider must not use a gamete or embryo unless they have collected the required information.[124]

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116 Submission 24, p 2.

117 Submission 24, p 2.

118 Public hearing transcript, Brisbane, 12 July 2024, p 5.

119 Submission 26, p 6.

120 Submission 26, p 6.

121 Submission 28, p 2.

122 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 22.

123 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 22.

124 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 22.

Committee comment

The committee recognises the importance of ART providers collecting information and keeping records, especially for donor-conceived persons who wish to know their biological history. For this reason, the committee considers it appropriate that there are substantial maximum penalties for failing to comply with record-keeping requirements and for destroying records about ART procedures without authorisation.

2.5 Retrieval and use of gametes and embryos

The Bill proposes several restrictions on how gametes and embryos can be used. These restrictions reflect the position in the NHMRC Guidelines and include:

- a prohibition on the use of gametes from close family members[125]
- a prohibition on the use of ART for non-medical sex-selection[126] (as was recommended by the Health Ombudsman in their interim report).[127]

The Bill would also prohibit ART providers from carrying out procedures on children or collecting a gamete from them, subject to a maximum penalty of 400 penalty units ($64,520) or 2 years imprisonment. However, an exception will apply if a medical practitioner certifies that a child is at reasonable risk of becoming infertile (e.g. due to undergoing cancer treatment) and the provider obtains a gamete for the purpose of storing it for the child to use in the future.[128] This reflects the position in the NHMRC Guidelines.[129]

2.6 Limit on the number of donor-related Australian families

The Bill proposes limiting the number of donor-related families that can be created to 10, restricting the number of families that may use a particular gamete donor.[130] This is more specific than the NHMRC Guidelines, which require providers to minimise the number of families created using a specific donor, but do not impose a clear limit.[131]

The limit proposed in the Bill is intended 'to protect donor-conceived people, particularly from the risk of consanguineous relationships and the psychosocial impacts of having many genetic siblings'.[132] Public consultations held during the development of the Bill indicated stakeholder support for this measure.[133]

The Bill provides definitions of both 'donor-related Australian families' and 'family' for the purpose of clause 25 which places a limit on the number of donor-related Australian families. Notably:

- 'Donor-related Australian families' – families that include a person born as a result of an ART procedure carried out in Australia using a gamete obtained from the same donor or

125 Bill, cl 22.

126 Bill, cl 24

127 Health Ombudsman, *Section 81 – Investigation of ART providers in QLD,* Summary report Phases 1 and 2, March 2024, p 23.

128 Bill, cl 23.

129 Explanatory notes, p 10.

130 Bill, cl 25(1).

131 Explanatory notes, p 11.

132 Explanatory notes, p 11.

133 Explanatory notes, p 55.

using an embryo created from a gamete obtained from the same donor, and the family of the donor if the donor has a child who is born in Australia but was not donor-conceived.

- 'Family' is defined to mean a parent, their spouse (if any) and children.
- If a person has a former spouse – the person, the former spouse and the children of both the person and the former spouse comprise a separate family.
- If the person has more than one spouse – the person, any other spouse and the children of the person and the other spouse comprise a separate family.[134]

Both the introduction of a family limit, and the clear definition of the families to which this will apply, reflect the Health Ombudsman's preliminary recommendation, 'that a gamete donor family limit is clearly defined within legislation, including a definition of what constitutes a 'family''.[135]

An ART provider whose use of a donated gamete or embryo results in a breach of the 10-family limit, either knowing that this would be the result or because they failed to exercise due diligence, would be subject to a maximum penalty of 400 penalty units ($64,520) or 2 years imprisonment.[136] The due diligence requirement will require an ART provider to:

- search their records
- make reasonable inquiries of the donor
- if they have reason to believe that another Australian ART provider has obtained a gamete or embryo from the donor, request information from that other provider.[137]

2.6.1 Disproportionate impact of limit on single women and LGBTIQ+ couples

The new family limit would apply to everyone who undergoes ART treatment. However, as noted above, it would have a disproportionate impact on single women and LGBTIQ+ couples because these groups are more likely to undertake ART treatments involving the use of donated gametes or embryos. As a result, they are more likely to find that the family limit prevents them from using gametes from their preferred donor, restricting their ability to start a family in the manner of their choosing.[138] As such, the limit will impact the right to equality before the law, the right to protections of families and children, and the right to health services, all of which are protected by the HRA.[139]

However, several factors suggest that the impact of the family limit on human rights is reasonable and justified in the circumstances. These include:

- the purpose of the limit, which is intended to protect the welfare of donor-conceived people, rather than to control individuals' access to ART or determine the legitimacy of their treatment[140]

134 Bill, cl 25(2), (5) and (6).

135 Health Ombudsman, *Section 81 – Investigation of ART providers in QLD,* Summary report Phases 1 and 2, March 2024, p 21.

136 Bill, cl 25(1).

137 Bill, cl 25(3).

138 Statement of compatibility, p 20.

139 HRA, ss 15, 26 and 37.

140 Statement of compatibility, p 20.

- evidence that the current self-regulatory model – a less restrictive alternative – does not adequately achieve this purpose[141]
- the nature of the limit, which as a family limit (rather than a person limit) has been designed to include more diverse families and reduce potential adverse impacts on them.[142]

2.6.2 Stakeholder views

Many stakeholders who provided evidence to the committee indicated that they supported the proposed donor family limit.[143] However, some expressed concern about how it would operate in practice and whether it has been set at the right level.

For example, Rainbow Families Queensland, which has a focus on representing the voices of the LGBTIQ+ community, expressed concern about how the introduction of the family limit would affect the use of embryos already created and donor gametes already allocated to a person at the time the limit comes into effect.[144] They explained that this concern was heightened by the use of 'person' rather than 'family' in the relevant transitional provisions,[145] which they suggested could result in adverse impacts for same-sex couples, who often use the same donor for 2 partners.

Rainbow Families Queensland also expressed concern about how the family limit would affect couples who separate, and re-partner (meaning that they will be counted as a new family for the purposes of the limit).[146]

Other stakeholders supported the introduction of a family limit, but suggested that the threshold it imposes is too low, contains loopholes (e.g. because it only applies to children born in Australia) and/or may still result in donor-conceived people having large numbers of siblings.[147] There was disagreement in submissions about the most appropriate way to limit the number of donor-conceived people from one male's sperm donation or donations. Lyndal Bubke proposed the introduction of a person limit instead of a family limit as 'without a limit on the actual number of people created, even a ten-family limit could result in having 30-50 siblings'.[148] Ms Bubke proposed a sibling cap (to be shared across families) instead of a family limit to ensure that siblings are able to form meaningful relationships.[149]

Stephen Page, ANZICA and Rainbow Families Queensland believed the proposed limit of 10 families was appropriate. However, Professor Sonia Allan OAM and the AMA believed the limit should be decreased to 5.[150] FamilyVoice Australia believed the number should be restricted even further so that

141 Statement of compatibility, p 21.

142 Explanatory notes, p 11.

143 Submission 10.

144 Submission 1, pp 3-4.

145 Bill, cls 146-148.

146 Submission 1, p 8.

147 Submissions 2, 3, 5.

148 Submission 2, p 1.

149 Submission 2, p 1.

150 Submission 5; Submission 26, pp 1-4.

the sperm donated by any one man should only be used by a singular family.[151] The ACL proposed an embryo limit as well as limiting use of those embryos to one family.[152]

ANZICA believed the clauses relating to a 'family limit' were unclear regarding what should happen when there were 'sufficient family numbers at a time embryos were created with that donor sperm, but that before they were used for a new family, the donor created another family themselves resulting in the 10 families being exhausted'.[153]

2.6.3 Department response

In response to concerns regarding the potential need to destroy embryos already created due to the proposed family limits, Queensland Health stated that the transitional provisions are not intended to prevent consumers from completing their families, nor are they intended to gatekeep or restrict people using donated materials.[154] Queensland Health did however acknowledge that the situation may be created where a person may be unable to use donated gametes, even if the donated material had already been used to create embryos. To this end, Queensland Health drew attention to the main objects of the Bill:

> … that the best interest of the person born as a result of ART must be the paramount consideration. To otherwise allow any person who has used some of the donated gametes allocated to them before commencement, without regard for the family limit … would not be putting the interests of people born first.[155]

Regarding the range of views about the appropriateness of 10 as a suggested family limit, and suggestions for the limit to be varied, Queensland Health noted their proposed 'introduction of a nationwide 10-family limit seeks to strike a balance between ensuring protections for donor-conceived people by limiting the risks of a large number of genetic siblings, and not unduly restricting the availability of donor gametes'.[156] In response to suggestions for the limit to be lowered, Queensland Health stated that this could increase reliance on overseas donors and private donor conception arrangements, which would 'make it more difficult for donor-conceived people to form relationships with their donor and donor-conceived siblings'. Queensland Health further noted that the consent provisions in the Bill allow for a donor to set a limit to the number of families their donations may be allocated to.[157]

In response to Rainbow Families Queensland's concerns that clause 146 would only allow a person who became pregnant using donated gametes before commencement to use the remaining allocated gametes from that same donor after commencement, but not their partner,[158] Queensland Health stated this is not the policy intent. Queensland Health elaborated: 'when describing the provisions, the Explanatory Notes for the Bill describe it as "any person or couple". The policy intent is to allow a person or their spouse (if any) to carry any future pregnancies'.[159]

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151 Submission 9, p 7.

152 Submission 28, pp 4 and 7.

153 Submission 4, p 9.

154 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 41.

155 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 42.

156 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 13.

157 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 14.

158 Submission 1, pp 3-4; Queensland Health and DJAG, joint correspondence, 8 July 2024, p 42.

159 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 42.

Committee comment

The committee acknowledges submitters' concerns regarding the potential for the proposed family limit to have a disproportionate impact on single women and LGBTIQ+ couples. The committee notes the response from Queensland Health regarding the definition of 'family' and the intent of the provision to encompass varied family makeups and not just heteronormative partnerships. The committee notes the need to strike a balance between promoting the rights of donor-conceived people and not indirectly restricting the availability and use of donor gametes.

The committee also notes the commitment from Queensland Health regarding their intention to work with the industry in developing guidance material surrounding how the family limit should be applied.

The committee is therefore satisfied with the proposed family limit and believes it strikes an appropriate balance in the circumstances.

2.7 Retrieval and use of gametes from deceased or unresponsive persons

The Bill proposes a scheme for authorising the retrieval and use of gametes from deceased or unresponsive persons.[160] This is intended to fill a regulatory gap. At present, the posthumous retrieval of gametes is permitted under the *Transplantation and Anatomy Act 1979*. However, there is no legislation that deals specifically with the retrieval of gametes (rather than donated tissue more generally), nor any legislation that regulates how and when such gametes can be used.[161]

The scheme proposed by the Bill will permit the retrieval of gametes from a deceased or unresponsive person only if both of the following are satisfied:

- there is evidence that the person consented to the posthumous retrieval and use of their gametes, or had not expressly objected as this is likely to have supported their use[162]
- the request to retrieve the gametes is made by the person's surviving spouse or, in exceptional circumstances,[163] another family member of the person or their spouse who is acting on behalf of the spouse.[164]

The scheme set out in the Bill for authorising retrieval is more streamlined than the current process provided for in the *Transplantation and Anatomy Act 1979*. This reflects the fact that 'time is of the essence in these matters', as timely retrieval is likely to result in better quality gametes and improve a recipient's chances of conception.[165]

An ART provider will only be permitted to use a gamete retrieved from a deceased or unresponsive person in an ART procedure for that person's spouse if it has been approved by the independent review body established by the Bill.[166] That review body would be required to comply with any requirements prescribed by regulation,[167] and to consider several factors, including:

- the capacity of the spouse to consent

160 Bill, pt 2, div 5.

161 Explanatory notes, p 13.

162 Bill, cl 29(2).

163 Exceptional circumstances require that the spouse be incapacitated or uncontactable despite reasonable attempts to do so. See Bill, cl 30(2).

164 Bill, cl 30.

165 Explanatory notes, p 13.

166 Bill, cl 31(1).

167 Bill, cl 31(2).

- whether the spouse has undertaken appropriate counselling
- the best interests of any child born as a result of the procedure.[168]

The establishment of the independent review body responds to one of the Health Ombudsman's preliminary recommendations:

> … that consideration be given to the establishment of an independent mechanism for review of decisions about ART treatments and posthumous use of gametes and embryos, with functions similar to those performed by the Victorian Patient Review Panel as part of the proposed legislation to regulate the provision of ART services.[169]

2.7.1 Design of the scheme

According to the explanatory notes, the design of the scheme for the retrieval and use of gametes from deceased or unresponsive persons reflects feedback from stakeholders:

> … it had initially been proposed to provide for the Supreme Court to authorise the use of gametes retrieved posthumously, in line with similar provisions in the Australian Capital Territory. Stakeholders raised concerns about the considerable administrative burden this would place on the deceased person's spouse to seek approval to use the gametes. As a result, the Bill was updated to require this authority to be provided by an independent review body, consistent with the approach in the NHMRC Guidelines.[170]

2.7.2 Stakeholder views

Some stakeholders told the committee that they have concerns about the proposed scheme for the retrieval and use of gametes from deceased or unresponsive persons.

Donor Conceived Australia expressed that they did not support the retrieval and use of gametes from deceased or unresponsive persons, regardless of whether the donor has provided consent.[171] At the public hearing they expanded upon this by saying that they also considered the long-term storage of gametes to be unethical due to the psychosocial implication of a donor becoming deceased by the time the gamete or embryo is used.[172] In that regard, they recommended that the proposed storage limit of 15 years be lowered.[173]

The ACL, although not supportive of the donation of gametes or embryos, recommended that, where this is already occurring, an upper-age limit should be imposed to prevent the donation or use of gametes and embryos from persons over the age of between 40-45.[174]

The AMA were of the view that 'posthumous and ante-mortem retrieval and use of gametes was reasonable and explicit consent should not be essential given the often sudden and traumatic circumstances in such cases'.[175]

Stephen Page discussed the current provisions in relation to posthumous retrieval and use of sperm by widows at length in his submission and the logistic difficulties posed by the current Ethical

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168 Bill, cl 31(3).

169 Health Ombudsman, Section 81 – Investigation of ART providers in QLD, Summary report Phases 1 and 2, March 2024, p 24.

170 Explanatory notes, p 56.

171 Submission 16, p 7.

172 Submission 16, p 7.

173 Submission 16, p 8.

174 Submission 28, p 4.

175 Submission 5, p 2.

Guidelines governing the retrieval and use of sperm.[176] Currently retrieval can only occur in incredibly narrow circumstances and with multiple parties needing to be in attendance at the retrieval, which can often be difficult to coordinate and result in a delayed retrieval with poor results.[177] In his view:

> … the proposed changes as to retrieval make the process easier and less burdensome on widows. By enabling retrieval from someone who is unresponsive, this should mean that rather than trying to put together a team to collect at 8 p.m. on a Friday, it could be done on a Friday morning during office hours.[178]

Generally, those submitters that opposed the use of donated gametes and embryos expressed the view that it is not ethical to create a child knowing that there will be no possibility of them knowing one of their biological parents, with some taking the view that this privileged the rights of the intended parent over the rights of the unborn child.[179]

2.7.3 Department response

Queensland Health acknowledged submitters' concerns about the impact on those born as a result of posthumous or antemortem retrieval, but considered that the Bill strikes an appropriate balance between:

- protection of the rights of people born as a result of the posthumous use of donor material
- ensuring supply of donor gametes is not unduly restricted
- respect for the intended parent's choice of preferred donor.[180]

Queensland Health also noted that intended parents are required to undergo mandatory counselling which Queensland Health would expect to address the complex issues posed by the use of donor gametes where the donor is deceased.[181]

2.7.4 Consistency with fundamental legislative principles and compatibility with human rights

2.7.4.1 Whether the scheme has sufficient regard to the institution of Parliament

The scheme for the retrieval and use of gametes from deceased or unresponsive persons raises issues of fundamental legislative principles. Specifically, it raises the question of whether the Bill establishes the independent review body in a manner that has sufficient regard to the institution of Parliament.

This question arises because the Bill grants decision-making power to the independent review body but does not set out in detail how that body is to be constituted. It provides only that the independent review body:

- is to be constituted by one or more people not engaged by the ART provider in providing ART services
- must comply with any requirement prescribed by regulation.[182]

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176 Submission 10, p 20.

177 Submission 10, pp 19-20.

178 Submission 10, p 20.

179 Submissions 2, 11 and 16.

180 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 21.

181 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 21.

182 Bill, cl 31(2).

The explanatory notes state that it is expected that regulations will set out the required qualifications for members of the review board, which 'are expected to include a clinic's ethics committee (if it has one) or an appropriately qualified fertility counsellor'.[183]

2.7.4.2 Impact of the scheme on human rights

The scheme for the retrieval and use of gametes from deceased or unresponsive persons impacts several human rights protected by the HRA, including the right to privacy and reputation, the right to protection of families and children, and the right to health services.[184]

These human rights may be affected in a variety of ways, for example:

- the requirements set out for the posthumous retrieval and use of gametes could limit the ability of some people to start a family in the manner of their choosing (engaging the right to protection of families)[185] or affect their access to ART treatment (affecting their right to access health services)
- where the retrieval and posthumous use of a gamete is authorised, any child born as a result would be prevented from having a relationship with one of their biological parents (engaging their right to protection as a child)[186]
- the requirement to seek authorisation from the independent review body would require the disclosure of personal information about the surviving spouse and involve an assessment of their capacity to provide for a child's needs (affecting their right to privacy and reputation).[187]

However, several factors suggest that the impact of the scheme on human rights is reasonable and justified in the circumstances. Most notably, the scheme has been designed in a manner that recognises the complex ethical considerations involved, and the importance of ensuring that intended parents receive counselling and information about how the posthumous use of gametes could affect any children born as a result.[188] As discussed above, the design of the scheme has also been adjusted to accommodate some of the concerns raised by stakeholders.

Committee comment

The committee notes the decision to establish an independent review body to authorise the use of gametes retrieved posthumously, rather than require the Supreme Court, was made in response to stakeholder feedback during the development of the Bill. The committee acknowledges submitters' concerns that an application to the Supreme Court would impose a considerable administrative burden on people who have already experienced the loss of a loved-one.

The committee considers the independent review body appears to offer a suitable alternative to the Supreme Court. Given the complex ethical issues raised by the posthumous use of gametes, the committee suggests that further consultation be undertaken prior to the establishment of the independent review body. The committee looks forward to guidance being provided by the Government on this issue in due course, such as with respect to the qualifications, skills or experience of those to be appointed to the independent review body.

183 Explanatory notes, p 14.

184 HRA, ss 25, 26 and 37.

185 Statement of compatibility, p 26.

186 Statement of compatibility, p 26.

187 Statement of compatibility, p 26.

188 Statement of compatibility, pp 26-37.

2.8 Other restrictions on the use of gametes and embryos

The Bill proposes restrictions on the use of gametes and embryos when the gamete provider has died, and when a certain amount of time (15 years) has passed since they were obtained.[189] These restrictions are designed to promote the welfare of donor-conceived people by providing them with an opportunity to form relationships with gamete-donors or siblings in the future.[190]

If an ART provider knows, or ought reasonably to know, that a gamete provider has died, it will be prohibited from using a gamete or embryo unless:

- the gamete provider consented to its use after their death, and
- the person undergoing the ART procedure has consented after being notified of the gamete provider's death.[191]

Breaches of this prohibition will be subject to a maximum penalty of 200 penalty units ($32,260).

ART providers would be required to take reasonable steps to find out whether a gamete provider is still alive if it is more than 5 years since their donation, or more than 5 years since they were last contacted by the gamete provider.[192]

ART providers would be prohibited from using a donated gamete or embryo if it was obtained (or created) from a donation that occurred more than 15 years prior to the relevant procedure. Breaches of this prohibition will be subject to a maximum penalty of 100 penalty units ($16,130).[193]

ART providers would be permitted to use a donated gamete or embryo after the 15-year limit has expired if the chief executive approves such use. The chief executive must be satisfied that there are reasonable grounds for doing so.[194] This exception is designed to permit the use of older gametes and/or embryos where it is ethical and appropriate in the circumstances.[195]

The chief executive's decisions about whether or not to approve the use of a donated gamete or embryo after the expiration of the 15-year limit is not subject to review, an issue discussed in more detail in section 4.3.4, below.[196]

2.8.1 Stakeholder views

Rainbow Families Queensland told the committee that it supported the proposed 15-year time limit on the use of gametes and embryos, but had concerns about how this limit would operate in practice:

- ART providers may fail to disclose when a gamete was retrieved and would be under no obligation to do so
- the time limit should apply more flexibly to families if they already have a child, or are expecting a child, conceived using the relevant donor at the time the 15-year limit is reached

189 Bill, cls 26 and 27.

190 Explanatory notes, p 13.

191 Bill, cl 26(1).

192 Bill, cl 26(3) and (4).

193 Bill, cl 27(1).

194 Bill, cl 27(2).

195 Explanatory notes, p 13.

196 See also explanatory notes, p 34.

- the transitional provisions do not provide sufficient certainty for people already undergoing ART treatments who may be affected by the introduction of the time limit.[197]

The concerns expressed by Rainbow Families Queensland are particularly notable because they have a focus on representing LGBTIQ+ families, who would be disproportionately affected by the 15-year time limit. For example, in circumstances where both partners of a relationship intend to carry children, 'a set timeframe may be particularly challenging to meet, particularly if the family is not allocated gametes immediately after the donation occurs'.[198] The organisation further stated that 'some people may feel pressured to undergo more invasive treatments or have children closer together than they are comfortable with or prepared for'.[199]

Donor Conceived Australia was supportive of a limit due to the psychosocial implications for donor-conceived people due to long-term storage of gametes, but believed it should be lower than 15 years as proposed in the Bill.[200]

MinterEllison, on behalf of the Queensland Fertility Group, expressed concerns that the proposed time limit will interfere with an individual's rights over their biological material. The firm also stated its belief that a clinical decision-making body would be better placed to make the decision in relation to extensions of time for use of stored material, as opposed to the chief executive.[201]

2.8.2 Department response

While Queensland Health acknowledged submitters' concerns in relation to the 15-year time limit, it considered that the proposed limit strikes an adequate balance between the use of donated material by recipient parents and the rights and welfare of donor-conceived people.[202] In response to concerns about the limitation causing an adverse effect on those who may require more than 15 years owing to their own fertility journey, Queensland Health noted the ability for those people to apply to the chief executive for an extension of time.[203]

In response to the Queensland Fertility Group's concerns that a person will be placed in a position where they are unable to use their own biological material, Queensland Health stated that there will be no time limit for a person seeking to use or store their own biological material.[204]

Committee comment

The committee recognises the difficulty of selecting a time limit for using gametes and embryos that would be satisfactory to all stakeholders. It considers that the Bill deals with these matters in an appropriate manner.

2.9 Disclosure of health information

The Bill proposes a scheme to facilitate the disclosure of particular health information between certain genetically related people.[205] This is intended to promote the health and well-being of these people

197 Submission 1, pp 2-4.

198 Submission 1, p 2.

199 Submission 1, p 2.

200 Submission 16, pp 7-8.

201 Submission 22, p 15.

202 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 17.

203 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 17.

204 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 17.

205 Bill, pt 2, div 7.

by providing them with information about health conditions that may arise many years after a donation was made.[206]

The scheme for disclosure of health information reflects the Health Ombudsman's preliminary recommendation to consider addressing the 'obligations of ART providers in respect to disclosure of a significant medical history relating to donor-conceived child and donor' in legislation.[207] This recommendation reflects concerns that, in some cases, ART providers who have been made aware that donor-conceived children have been diagnosed with serious medical conditions have not passed this information on to other people who have used, or are planning to use, the same donor, even where the parents of donor-conceived children diagnosed with such conditions have expressly requested that the information be shared.[208]

The scheme proposed in the Bill facilitates, but does not require, the disclosure of health information either by ART providers or the chief executive.[209]

2.9.1 Disclosure by ART providers

The Bill would permit ART providers to disclose health information to certain people if a medical practitioner certifies that this is necessary:

- to prevent or reduce a serious risk to someone's life or health, or
- to warn a person about the existence of a health condition that may be harmful to them or their descendants.[210]

ART providers would be permitted to disclose health information about a donor, or a relative of a donor, to a range of people. This would include donor-conceived people and their descendants or parents, a person who became pregnant using a donated gamete, and a person who has a gamete donated by the donor.[211]

ART providers would also be permitted to disclose health information about a donor-conceived person, or a relative of a donor-conceived person, to a range of people. This would include the donor, donor-conceived siblings and their parents, and a person who has become pregnant using a gamete from the same donor.[212]

ART providers may also disclose health information to a medical practitioner treating a person to whom a disclosure may be made.[213]

206 Explanatory notes, p 15.

207 Health Ombudsman, Section 81 – Investigation of ART providers in QLD, Summary report Phases 1 and 2, March 2024, p 21.

208 Health Ombudsman, Section 81 – Investigation of ART providers in QLD, Summary report Phases 1 and 2, March 2024, pp 6-7.

209 Bill, cls 38(6) and 39(3).

210 Bill, cl 38(1).

211 Bill, cl 38(2).

212 Bill, cl 38(3).

213 Bill, cl 38(4).

In all cases, disclosures must be made by a medical practitioner acting on behalf of the ART provider.[214] They must take reasonable steps to ensure that a person does not become aware that they are donor-conceived as a result of the disclosure.[215]

The Bill expressly provides that ART providers are not required to disclose health information, even where this would be permitted.[216]

2.9.2 Disclosure by the chief executive

The chief executive would be permitted to disclose health information if an ART provider would have been permitted to do so but has not.[217] In such cases:

- the same certification requirement would apply (that the disclosure is necessary to prevent serious risk or warn about a harmful condition)
- the chief executive must be satisfied that the disclosure is reasonably necessary for this purpose.[218]

Such disclosures must be made by a medical practitioner on behalf of the chief executive.[219] Decisions by the chief executive about the disclosure of health information would not be subject to review, as discussed in section 4.3.4, below.

The Bill expressly provides that the chief executive is not required to disclose health information, even where this would be permitted.[220]

2.9.3 Stakeholder views

Evidence received by the committee indicates that the disclosure of health information among donor-related people is a key concern for some stakeholders particularly with regard to the donors being truthful in respect of the information they share about themselves, future donor-conceived people's access to that information and historical assurances of anonymity.[221]

Alexandra Eccles, a donor-conceived person, welcomed the Bill's provisions which require the sharing and disclosure of health information, and shared the significant difficulties she has faced in accessing her own health information. Ms Eccles stated this is due to her clinic's poor record keeping and stressed that clinics must be able to accurately account for each donor-conceived person and their genetic origins.[222]

Kate-Lyn Drysdale shared how her life, as a donor-conceived person, was impacted by her health concerns and where she would have benefited from being able to access a register where medical information may have been provided.[223] She submitted that clauses 38 and 39 be amended to require,

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214 Bill, cl 38(5).

215 Bill, cl 38(7).

216 Bill, cl 38(6).

217 Bill, cl 39.

218 Bill, cl 39(1).

219 Bill, cl 39(2).

220 Bill, cl 39(3).

221 Submissions 24, 28 and 33.

222 Submission 33, p 2.

223 Submission 20, p 3.

rather than 'allow', ART providers and the chief executive to disclose information where 'a medical practitioner has certified that the disclosure of information is necessary'.[224]

Monash IVF recommended that clause 38(3) (relating to who an ART provider may disclose the health information of a donor-conceived person or their relative to) be amended to include the donor's own children 'as there may be occasions where important medical information may need to be conveyed to all offspring of the donor (including after the death of the donor)'.[225]

2.9.4 Department response

In response to concerns that the Bill does not clarify who health information may be disclosed to, Queensland Health stated that the list of potential recipients in the Bill is not exhaustive. It also noted that the Bill enables 'other people to be prescribed by regulation to be provided with health information, which could include the donor's raised family'.[226]

Committee comment

The committee considers the Bill's provisions enabling the disclosure of health information by ART providers and the chief executive will benefit donor-conceived persons.

2.10 Consistency with fundamental legislative principles and compatibility with human rights

The requirements that the Bill would impose on ART providers (including those relating to licensing, the provision of information and counselling, obtaining consent, and information collection and record-keeping) would affect how those providers conduct their businesses. This raises an issue of fundamental legislative principle that legislation should not, without sufficient justification, restrict ordinary activities. In this case, the requirements imposed by the Bill could have a range of effects on businesses. For example, they might require ART providers to update internal systems or hire additional staff.

These provisions also have implications for human rights, since they are likely to affect ART providers' rights to property and to privacy and reputation which are protected under the HRA.[227] For example:

- the licensing requirements[228] may limit the right to property by limiting how ART providers can use their property
- the requirements to provide information to the chief executive include requirements to provide personal information about the individuals involved in the provision of ART services[229] as well as requirements to report adverse events,[230] affecting the right to privacy and reputation

[224] Submission 20, p 3; Bill, cls 38(1) and 39(1)(b).

[225] Submission 24, p 3.

[226] Queensland Health and DJAG, joint correspondence, 8 July 2024, p 23; Bill, cls 38(2)(f), 38(3)(f).

[227] HRA, ss 24, 25.

[228] Bill, cls 12-13.

[229] Bill, cl 57.

[230] Bill, cl 61.

- the ability of the chief executive to consider whether a person has breached ART legislation, either in Queensland or other jurisdictions, when making decisions about licences[231] may adversely affect their reputation
- the proposed public register of ART providers would include the names of medical practitioners and other personnel involved in the provision of ART services,[232] affecting their right to privacy.

Several factors suggest that these impacts are reasonable and justified in the circumstances. These include:

- many of the requirements that the Bill imposes on ART providers are consistent with the current NHMRC Guidelines, and so should not have a significant impact on businesses that provide ART[233]
- the requirements imposed by the Bill are necessary to protect the welfare of donors, people accessing ART treatments, and people born as a result[234]
- most other Australian jurisdictions impose similar requirements on ART providers, including licensing schemes[235]
- licensing schemes are widely used to regulate industries that involve risks to the public and necessarily require the provision of certain information to facilitate their effective operation[236]
- Queensland Health considered alternative options, such as education programs or continued self-regulation of the industry, but concluded these were 'unlikely to achieve the purpose of the Bill.'[237]

Committee comment

The committee notes the provisions in relation to licensing and regulation would have an impact on the regular business practices of ART providers. The committee also notes the overarching policy objectives and need to regulate the ART industry owing to the historical lack of compliance with guidelines and the resulting impact on donor-conceived people and their families.

The committee is of the view that the impact is reasonable and justified in the circumstances as it would improve oversight of the industry and implement necessary protections for people born as a result of ART.

231 Bill, cl 58.

232 Bill, cl 65.

233 Explanatory notes, p 49.

234 Explanatory notes, p 49.

235 Explanatory notes, p 49.

236 Statement of compatibility, pp 7-8.

237 Statement of compatibility, p 9.

3 Donor conception information register

The Bill proposes to establish a donor conception information register (the register)[238] and a mechanism for noting a person's status as donor-conceived via their birth certificate.[239] In doing so, the Bill will implement the central recommendations made by the LASC.[240]

Certain aspects of the register raise significant issues relating to fundamental legislative principles and human rights. These are discussed in section 3.1.8, below.

3.1 Establishment and operation of the register

The Bill will require the registrar (who will be the Registrar-General of the Registry of Births, Deaths and Marriages) to establish and maintain the new register.[241]

The Bill sets out the information to be held in the register, who will be obliged to provide it, who will be able to access that information, and how the quality of the information in the register will be maintained.

3.1.1 Information to be held in the register

The register must include information from different types of sources.[242] This would include:

- information that ART providers will be required to provide following the birth of a child[243]
- historical information, which ART providers will be required to provide within 6 months of commencement[244]
- information provided voluntarily by parties to a private donor conception procedure[245]
- other information prescribed by regulation which the registrar considers appropriate for inclusion.[246]

The register will hold different types of information about different types of people,[247] as summarised in Table 1 below. The Bill categorises this information as either 'identifying information' or 'non-identifying information', based on definitions provided in the Bill.[248]

238 Bill, pt 3.

239 Bill, pt 10, div 3.

240 The LASC recommended that all donor-conceived people be legislatively provided with the right to know the identity of their donor when they turn 18, and that a central donor conception information register be established to that end: LASC, *Report No. 33, 57th Parliament – Inquiry into matters relating to donor conception*, 2022.

241 Bill, cl 42 and Schedule 1.

242 Bill, cl 43.

243 Bill, cl 45.

244 Bill, cl 46.

245 Bill, cl 47.

246 Bill, cl 42

247 Bill, cl 44.

248 Bill, cl 40.

Table 1 Types of information included in the register

Type of person	Type of information	
Donors	Identifying	• full name • date of birth

	Non-identifying	• place of birth
		• contact information
		• ethnicity and physical characteristics
		• relevant medical history
		• donor's ID code
		• donor's profile information that is collected and kept by the ART provider, including:
		  ○ information about the donor's hobbies and interests
		  ○ information about the donor's family history
		  ○ information about the education of the donor
		  ○ photos of the donor
		  ○ correspondence of the donor
		  ○ information about the psychological history of the donor that is not relevant medical history
		• place where the donor's gamete was originally donated

Donor-conceived persons	Identifying	• full name • date of birth • place of birth • name and place of the ART provider that carried out the donor conception ART procedure
	Non-identifying	• sex of the person • number of any donor-conceived siblings (if the information is recorded and kept)
Parent/s of donor-conceived person	Identifying	• full name • date of birth
	Non-identifying	

Source: Explanatory notes, page 17 and Bill, clause 40.

3.1.2 Mandatory provision of information by ART providers

As discussed above (see section 2.4), the Bill would require ART providers to collect and maintain certain information relating to donors and ART procedures, and to take reasonable steps to determine whether a child is born as the result of a procedure.

If a birth has occurred, an ART provider must provide all relevant information to the registrar within 3 months of becoming aware of that birth. Failure to do so is subject to a maximum penalty of 100 penalty units ($16,130).[249]

ART providers would also be required to provide historical information to the registrar within 6 months of the commencement of the relevant provisions, unless this time period is extended by the registrar. This obligation will apply to a person who is no longer an ART provider, as well as medical practitioners

[249] Bill, cl 45.

who carried out donor conception procedures as part of their medical practice. Failure to comply with this requirement will be subject to a maximum penalty of 100 penalty units ($16,130).[250]

ART providers will be required to provide relevant historical information to the registrar even if the person who it is about did not consent to that disclosure, or if laws or guidelines in force at the time it was collected precluded its disclosure. In such cases, they will be protected from civil, criminal and administrative liability provided that they acted honestly and reasonably.[251]

In requiring ART providers to provide historical information to the registrar, the Bill implements one of the recommendations made by the LASC. That committee recommended that clinics involved now, and historically, with donor conception be required to retrieve and submit all donor information to a central register within a reasonable time frame.[252]

The inclusion of historical information in the register involves a degree of retrospectivity, raising issues of fundamental legislative principles, and will affect human rights, especially the right to privacy. These issues are discussed in more detail in section 3.1.8, below.

3.1.3 Disclosure of information in the register

The Bill provides that the ability of individuals to access information on the register will depend on who they are, who they are seeking information about, and (for some information) the consent of that person.[253] This is summarised in Table 2 below.

As Table 2 illustrates, access to some types of information about a person will be subject to their consent.[254] The Bill sets out how that consent is to be provided.[255]

A person whose information is included in the register:

- may provide their consent in advance of applications for access to their information being made
- must give consent in the approved way
- must state the kind of information that may be provided and to which types of applicants
- may vary or revoke their consent by providing notice to the registrar in the approved way.[256]

If an application is made to access information that requires the consent of a person, and that person has not given consent, the Bill would prohibit the registrar from contacting that person to inquire about whether or not they consent to information being provided by the applicant.[257] The explanatory notes explain the reason for this prohibition:

> This is intended to ensure the Registrar does not inadvertently disclose to a person that they are donor-conceived by attempting to contact them in relation to consent and to avoid circumstances where a

250 Bill, cl 46.

251 Bill, cl 53.

252 LASC, *Report No. 33, 57th Parliament – Inquiry into matters relating to donor conception*, 2022.

253 Bill, cl 48.

254 Bill, cl 48.

255 Bill, cl 49.

256 Bill, cl 49(1).

257 Bill, cl 49(3).

donor-conceived person may feel pressured to provide their consent to release identifying or contact information if donor siblings or the donor have made an application for the information.[258]

However, this prohibition will not apply where a donor-conceived person requests contact information about a donor, unless the donor has already given the registrar notice that they do not consent to the provision of their information to any applicant. In such cases (i.e. where there is no information about whether the donor consents or not, and so the prohibition does not apply) the registrar will be permitted to take reasonable steps to contact the donor to give them an opportunity to consent to the provision of information to the donor-conceived person.[259]

Table 2 Different types of people will be able to access different types of information

Type of person seeking access	Who the information is about	Type of information they can access	
		Without consent	**With consent**
Donor-conceived person (16 or older) and descendants	Donor	*Identifying information:* name, date of birth *Non-identifying information:* e.g. medical history, physical characteristics, donor profile	Contact information
	Donor-conceived siblings	*Non-identifying information*: year of birth, sex	*Identifying information:* name, date of birth Contact information
Donor	Donor-conceived offspring	*Non-identifying information:* year of birth, sex	*Identifying information*: name, date of birth Contact information
Parent/s of donor-conceived person **Person with parental responsibility of a donor-conceived person who is younger than 16**	Donor	*Non-identifying information:* e.g. medical history, physical characteristics, donor profile	*Identifying information:* name, date of birth Contact information
	Donor-conceived siblings	*Non-identifying information:* year of birth, sex	Identifying information: name, date of birth Contact information
Interstate donor-conceived person who is 16 or older **Offspring of a donor who is not a donor-conceived person and is 16 or older**	Donor-conceived siblings	*Non-identifying information:* year of birth, sex	*Identifying information:* name, date of birth Contact information

Source: Explanatory notes, pages 22-23; Bill, clause 48.

[258] Explanatory notes, p 81.

[259] Bill, cl 49(4).

Where the provision of information is subject to the consent of the person the information is about, the registrar must take reasonable steps to notify that person when they provide the information to another person. In such cases, the registrar must not identify the person to whom they provided the information, unless that person has consented to their identity being disclosed.[260]

The registrar's decisions about the disclosure of information held in the register will be subject to external review,[261] as discussed in section 4.3.3 below.

3.1.3.1 Provision of contact information always subject to consent

A person's contact information would only be accessible via the register where they have consented to this.[262] The Bill provides that in giving consent for their contact information to be provided, a person may specify how contact is to be made.[263]

A person who obtains other information about the donor from the register could use that information to seek them out outside the framework provided by the Bill. This would impact on the donor's right to privacy, an issue discussed in more detail in section 3.1.8 below. However, as noted in the statement of compatibility, submissions made to the LASC as part of its earlier inquiry indicated that:

> … donor-conceived people generally seek information about the donor to inform their own identity and sense of self, rather than using the information to contact the donor if the donor has not indicated that they would like to be contacted.[264]

This suggests that attempts to contact donors who have indicated that they do not consent to contact may be relatively rare.

3.1.3.2 Age requirement for access by donor-conceived persons

The Bill provides that a donor-conceived person is able to access information held in the register when they turn 16.[265] This varies from the LASC's recommendation that donor-conceived people be able to access such information when they turn 18.

The explanatory notes set out the rationale behind this departure from the LASC's recommendation, stating:

> This is intended to support donor-conceived people to access important information about their genetic origins from an age of relative maturity. This is consistent with a person of 16 years or more being able to apply to RBDM [the Registry of Births, Deaths and Marriages] for their own birth certificate or to change their sex.[266]

260 Bill, cl 50.

261 Bill, cl 56.

262 Bill, cl 48.

263 Bill, cl 49(1)(d).

264 Statement of compatibility, p 32.

265 Bill, cl 48.

266 Explanatory notes, p 21.

3.1.4 Quality of information in the register

The Bill contains several provisions designed to ensure that the information in the register is complete and accurate.[267] However, it expressly provides that the registrar is not under any obligation to ensure that the information in the register is accurate or complete.[268]

The Bill provides that the registrar may:

- require people who they reasonably believe possess or control relevant historical information about donor-conceived people to provide that information to the registrar[269]
- may correct the register on application by a person whose information is in the register, or on the registrar's own initiative[270]
- may conduct an inquiry to find out whether the information provided to them is correct and complete and may, as part of that inquiry, require ART providers and other people to provide relevant information or answer specified questions.[271]

It would be an offence to access, make, alter, delete or interfere with the information in the register without lawful authority. This offence will be subject to a maximum penalty of 100 penalty units ($16,130).[272]

3.1.5 Provision of advice regarding counselling services

When the registrar deals with an application to access information held in the register, they must advise applicants of the counselling services that are provided by counsellors with experience in donor conception.[273] However, those individuals will not be required to undergo counselling before they access information held on the register.[274]

Queensland Health advised the committee that the government has 'approved funding for counselling and support services for persons using the register including donor-conceived people and donors.'[275]

This commitment is consistent with one of the LASC recommendations. In 2022, that committee recommended that the government consider funding counselling and support services for donor-conceived persons, recipient parents and donors to facilitate positive outcomes from the recommendations in their report, utilising services with relevant and lived experience.[276]

3.1.6 Stakeholder views

Evidence received by the committee shows that there is strong support among stakeholders for the creation of the register.[277] For example, Katharine Gelber, the parent of a donor-conceived child,

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267 Bill, cls 46, 52 and 54.

268 Bill, cl 53(4).

269 Bill, cl 46(5).

270 Bill, cl 52.

271 Bill, cl 54.

272 Bill, cl 55.

273 Bill, cl 48.

274 Explanatory notes, p 23.

275 Queensland Health and DJAG, joint written briefing, 5 June 2024, p 21.

276 LASC, *Report No. 33, 57th Parliament – Inquiry into matters relating to donor conception*, 2022.

277 Submissions 1, 5, 7, 20, 25, 26 and 28.

applauded the establishment of the register, stating that the mandatory inclusion of historic information 'will make a real difference to the lives of the donor-conceived and their families.'[278]

Other stakeholders, including several people who identified as donor-conceived, stressed the importance of children's rights to know about their genetic origins and the beneficial impact of being able to access information about their donor and donor-siblings.[279]

Lyndal Bubke expressed that she would like the use of the register to extend to the donor's 'own' children and perceives there is a risk posed to these children who are unaware they are potentially related to hundreds of people who live in the same area as them.[280] Lyndal Bubke also believed that the Bill should be amended to require donors to disclose the live births of their own children to the register to ensure the registers 'reflect the full and meaningful lists of siblings for donor-conceived people'.[281]

Dr Giselle Newton believed the age to access information contained on the register should be lower than the proposed 16 years of age and that denying access to those under 16 is not in their best interests. She cited research evidence that suggests access to information and contact with genetic parents/siblings (where permitted) supports improved psychological outcomes.[282]

As previously stated in section 2.4.4, Professor Sonia Allan OAM suggested the provisions in relation to disclosure of information contained on the register be tightened to ensure accuracy and prevent people from 'disappearing' after ART treatment and avoid having a birth recorded on the register.[283] Both Professor Allan OAM and the Australian College of Nursing suggested that the clauses governing who may access the information contained on the register be extended to include descendants of donor-conceived people and interstate donor-conceived people.[284]

MinterEllison, on behalf of the Queensland Fertility Group, shared the Queensland Fertility Group's concern about the retrospective application of the requirements for sharing of historical information citing 'historical contractual obligations … and assurances of anonymity'.[285] At the public hearing, Dr Stokes of Coastal IVF said that he found the moral issue of retrospective reversal of anonymity 'very difficult to reconcile' and that he was not sure the 'need for patients to know their biological origins … overrides a person's individual right if they have given consent under a certain circumstance'.[286]

3.1.7 Department response

In response to concerns regarding the age a donor-conceived person must reach before they can access the register, the Department of Justice and Attorney-General (DJAG) noted that stakeholders hold a range of views.[287] DJAG stated that access from the age of 16 was intended to support donor-conceived people to know and access information from a relative age of maturity and raised that this

278 Submission 7, p 1.

279 Submission 8, 11.

280 Submission 2, p 2.

281 Submission 2, p 2.

282 Submission 25, p 1.

283 Submission 26, p 6.

284 Submission 26, p 7; Submission 29, p 2.

285 Submission 22, p 2.

286 Public hearing transcript, Brisbane, 12 July 2024, p 30.

287 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 29.

was consistent with provisions already contained in the *Births, Deaths and Marriages Registration Act 2023* regarding the age at which a person can apply to alter their record of sex.[288]

In respect of the retrospective application of the Bill and the impact this will have upon donors, Queensland Health stated the following:

> … while the retrospective operation of the Register will limit the right to privacy of donors, the limitation is justified due to the promotion of rights of donor-conceived people, particularly the right to equality before the law and the right to protection of children and family. Although historical donors may have been assured anonymity at the time they donated, these individuals made the decision to donate as a competent adult, in full knowledge that the donation of their gametes may result in the conception and birth of a child. By comparison, donor-conceived people had no choice in the method of their conception and subsequently should not be denied the ability to have access to information about their genetic origins due to the timing and circumstances of their birth.[289]

The committee notes these sentiments were shared by several submitters at the public hearing regarding the donor-conceived person's lack of 'power' over the manner of their conception and birth.[290]

In response to concerns about the use of the register extending to the donor's 'own children', DJAG responded that due to the Bill's focus on donor conception, no provision in the Bill requires the disclosure of information about raised children of the donor.[291] DJAG did, however, acknowledge the potential implications and importance that information about donor-conceived siblings may have for a donor's own children and how the Bill enables them, once over the age of 16, to make an application for access to information about any donor-conceived siblings.[292]

Committee comment

The committee acknowledges submitters' concerns about the retrospective application of the Bill and the reversal of historical assurances of anonymity. The committee also acknowledges the policy objective of the Bill to protect the welfare and interests of people who are born as a result of ART.[293]

Although the committee accepts that historical assurances of anonymity will be void, the committee considers the Bill achieves an appropriate balance between the need to regulate the ART industry, the rights of donor-conceived people and ensuring access to ART services is not inhibited.

3.1.8 Consistency with fundamental legislative principles and compatibility with human rights

The establishment and operation of the register raises several issues relating to human rights and fundamental legislative principles. The most significant of these relate to the right to privacy and the fact that, by incorporating historical information, the register will involve a degree of retrospectivity. Whether legislation has sufficient regard to the rights and liberties of individuals depends, in part, on whether it affects their rights or liberties retrospectively.[294]

For example, the Bill would require ART providers to provide relevant historical information to the register even if the person that information is about has not consented to its disclosure, or if laws or

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288 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 30.

289 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 35.

290 Public hearing transcript, Brisbane, 12 July 2024, pp 3, 4, 24.

291 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 30.

292 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 30.

293 Explanatory notes, p 4; Queensland Health and DJAG, joint correspondence, 8 July 2024, p 42.

294 LSA, s 4(3)(g).

guidelines in force at the time it was collected precluded its disclosure.[295] The Bill would allow a donor-conceived person aged 16 or over to access information about a donor, including identifying information, regardless of whether the donor consented to its disclosure and even if the relevant ART procedure took place before the commencement of the Bill.[296]

These kinds of provisions could affect individuals, and their rights to privacy, in a variety of ways. These effects would be most significant with respect to donors.[297] This is partially because the Bill will permit the disclosure of identifying information about the donor, to donor-conceived people without the donor's consent.[298] This means that donors who previously expected to be anonymous would no longer be so. This would be most likely for donors who donated before 2004, when 'donated gametes were often used on the condition that the donor would remain anonymous.'[299] As Queensland Health explained:

> The establishment and operation of the Register is expected to have less of an impact on donors who donated after the introduction of the NHMRC Guidelines in 2004. Guideline 5.6.1 outlines that ART providers must not use donated gametes unless the donor has consented to the release of their identifying information to persons born as a result of the donation. It is therefore anticipated that post-2004 donors would have an expectation that their identifying information would be released to donor-conceived persons.[300]

A donor's right to privacy would also be affected if they are contacted outside the framework provided by the Bill. However, as discussed in section 3.1.3.1, this is likely to be relatively rare. In addition, some donors may choose to disclose the existence of donor-conceived children to their families when they would not otherwise have done so.

The privacy of other groups, including donor-conceived people and their parents, may also be affected by the register, since it will permit the disclosure of information about donor-conceived people to certain types of people, including donors and donor-conceived siblings.[301] However, in this case, no identifying information about them can be shared without their consent.[302]

Strong argument is required to justify retrospective legislation, particularly where it affects human rights. However, a variety of factors suggest that the retrospective elements of the register, and its impact on human rights, are justified in this case. For example the Bill has been designed to limit the register's impact on the right to privacy by:

- limiting the circumstances in which identifying information will be provided without consent: this will occur only when a donor-conceived person requests information about a donor[303]

295 Bill, cls 46 and 53

296 Bill, cl 48.

297 Statement of compatibility, p 29.

298 Bill, cl 48.

299 See statement of compatibility, p 29.

300 Queensland Health and DJAG, joint written briefing, 5 June 2024, p 22.

301 Explanatory notes, p 47.

302 Bill, cl 48.

303 Bill, cl 48.

- providing that a person's contact information will only ever be released if they have provided consent to its disclosure[304]
- prohibiting the unlawful access, use or disclosure of information held on the register,[305] as well as the disclosure of confidential information obtained under the Bill other than as permitted.[306]

Other factors that suggest the retrospective elements of the register, and its impact on human rights, are justified include:

- the purpose of the register, which is intended to promote and protect the well-being of donor-conceived people
- the fact that donors who previously expected to remain anonymous made the decision to donate as a competent adult, while donor-conceived people had no choice in the manner of their conception
- evidence, including evidence received by the LASC during its prior inquiry, that 'the ability of a donor-conceived person to access information about their genetic origins is integral to supporting the person's sense of identity' and can assist them to manage their health and well-being.[307]

It is also notable that alternatives – including a prospective register that does not include historical information – were considered, but found to be incapable of achieving the Bill's objective.[308] As the statement of compatibility explains:

> This [prospective] model would be less restrictive on the right to privacy for donors who donated prior to commencement of the Bill, and who did not consent to their information being provided to or disclosed by the Register.
>
> However, this model would restrict the rights of donor-conceived people, particularly the right to equality before the law and the right to protection of children and family, as the ability of donor-conceived people to access information about their donor would depend on when they were conceived and born. Donor-conceived people conceived prior to commencement would not have the same ability to access important information about their genetic origins through the Register and would have to rely on existing access provisions under the NHMRC Guidelines to obtain information about the donor if the donor has consented to its release.[309]

This would not achieve the goal of providing all donor-conceived people with the ability to access information about their donor, as was recommended by the LASC in 2022.[310]

304 Bill, cl 48.

305 Bill, cl 55.

306 Bill, cl 140.

307 Statement of compatibility, p 30.

308 Statement of compatibility, pp 31-32.

309 Statement of compatibility, pp 31-32.

310 LASC, *Report No. 33, 57th Parliament – Inquiry into matters relating to donor conception*, 2022.

Committee comment

If the Bill is passed, the creation and operation of the register will have a significant impact on the right to privacy, particularly that of donors, and will do so in a retrospective manner. Strong argument is required to justify this kind of legislation. In this case, the committee is satisfied that such an argument has been made. As discussed above, the relevant provisions of the Bill have been designed to limit its impact on the right to privacy to what is necessary to achieve its goal: ensuring that all donor-conceived people are able to access information about their genetic origins, including the identity of their donor.

Achieving this goal necessarily entails placing the rights and well-being of donor-conceived people above that of donors who may have preferred to remain anonymous. The committee agrees that this is appropriate, given the donors made their decisions to donate as competent adults, while their donor-conceived offspring had no choice in the manner of their conception.

3.2 Birth certificates of donor-conceived people

The LASC recommended that the birth certificates of donor-conceived people be annotated to note the fact of donor conception, including the birth certificates of donor-conceived people already born.[311] As the explanatory notes observes, 'the intention of the recommendation is to ensure donor-conceived people are able to ascertain the fact of their donor conception status even in circumstances where their parent/s might not inform them.'[312]

Instead of providing for the annotation of birth certificates, the Bill provides for an addendum procedure via an amendment to the *Births, Deaths and Marriages Registration Act 2023*. Under this model, the registrar will be required to issue an addendum to a birth certificate if a donor-conceived person born in Queensland (and who is 16 or over) requests their birth certificate. The addendum must state that further information about the person's birth is available in a register kept by the registrar.[313] It will then be up to the person concerned to decide whether they wish to request that additional information.

The addendum procedure proposed in the Bill is 'broadly consistent' with the approaches taken in several other jurisdictions, including New South Wales and Victoria.[314]

3.2.1 Addendum procedure

The explanatory notes explain why the Bill proposes an addendum procedure rather than requiring the annotation of birth certificates:

> The addendum procedure achieves the intent of the LAS Committee's recommendation by providing a donor-conceived person with an independent avenue to obtain information that they are donor-conceived, while providing donor-conceived people with choice as to when and how they disclose their donor-conceived status.[315]

Similarly, the statement of compatibility explained that the annotation of birth certificates:

311 LASC, *Report No. 33, 57th Parliament – Inquiry into matters relating to donor conception*, 2022.

312 Explanatory notes, p 24.

313 Bill, cl 158.

314 Explanatory notes, p 57.

315 Explanatory notes, p 24.

> … was considered to unjustifiably limit the right to privacy of donor-conceived people, as information about the fact of their donor conception would be disclosed without their control in circumstances where provision of their birth certificate is required (for example, school enrolment or employment).[316]

In other words, by providing the opportunity to access information about a person's donor-conceived status via an addendum, rather than recording it on their birth certificate itself, that Bill would ensure that person is able to control how and when that information is disclosed to others. This will promote their right to privacy.

3.2.2 Impact of addendums on the right to privacy

In providing for addendums to birth certificates, the Bill may limit the right to privacy of the parents of donor-conceived people, and the donor-conceived people themselves, if their parents chose not to disclose the circumstances of their conception.

As the statement of compatibility explains:

> In these circumstances, the right to privacy will be limited in relation to family and home where the donor-conceived person becomes aware they are donor-conceived as a result of receiving an addendum with their birth certificate and contacting RBDM to obtain further information that outlines that they are donor-conceived. The disclosure of such information may impact upon a donor-conceived person's relationship with their parent or parents and their understanding of their own identity.[317]

Several factors suggest that this limitation of the right to privacy is reasonable and justified in the circumstances. These include the purpose of the addendums, which is to promote and protect the well-being of donor-conceived people by providing them with important information about their genetic origins.[318] It is also notable that the procedure has been designed to minimise the impact on the right to privacy of donor-conceived people and to provide an opportunity for the registrar to put donor-conceived people in contact with relevant support services.[319]

3.2.3 Stakeholder views

Stakeholders expressed mixed views about the provisions in the Bill that relate to the birth certificates of donor-conceived people.

Some stakeholders indicated support for the proposed addendum model, agreeing that it is preferable to annotating a person's birth certificate. For example, Rainbow Families Queensland stated the addendum model 'appropriately prioritises the best interests and privacy of donor-conceived children.'[320] At the public hearing, Kerri Favarato expressed that her preference was for an amendment, not an addendum to the birth certificate as an addendum is 'easy-to-remove or easy-to-lose'. She also suggested that donor-conceived people be given the option to include their genetic parent as well as their legal parent on the birth certificate.[321]

Rainbow Families Queensland expressed support for addendums to only be issued if and when a donor-conceived person requests their certificate as opposed to the annotation of all current and new birth certificates as previously recommended by the LASC in 2022.[322] It stated that this will avoid the

316 Statement of compatibility, pp 32-33.

317 Statement of compatibility, p 30.

318 Statement of compatibility, pp 30-31.

319 Statement of compatibility, p 33.

320 Submission 1, p 9.

321 Public hearing transcript, Brisbane, 12 July 2024, p 22.

322 Submission 1, p 9.

situation where children will have a birth certificate that looks obviously different from those who are not donor-conceived and will mean that third parties will not be privy to the fact a person is donor-conceived.[323]

In contrast, other stakeholders suggested that formal recognition of a child's status as donor-conceived on their birth certificate could be beneficial to their sense of identity and make it easier for parents to navigate bureaucratic systems.[324] Donor Conceived Australia believed the addendum model proposed in clause 158 'actively perpetuates the deliberate deception of donor-conceived people as to their donor conception status' and were strongly against information being included on an additional page that could be removed and/or lost.[325]

In relation to the logistics of making an application for a certificate, Dr Chantelle Baguley noted the Bill restricts who can apply for the addendum certificate to the donor-conceived person themselves, however, in her view, parents should also be able to apply for the donor-conceived persons' birth certificate to be amended prior to the child turning 16.[326] Dr Baguley also suggested that it is important to a child's sense of identity for a birth certificate to list the child's full siblings where families conceive multiple children using the same genetic parents noting the Bill does not currently provide for this.[327]

Kate-Lyn Drysdale agreed and believed that addendums to birth certificates must occur from birth.[328] Ms Drysdale also stated that 'a register is pointless' if people do not know to access it and believes the current provisions in the Bill do not clearly require the statement 'of fact of donor conception'.[329]

3.2.4 Department response

DJAG noted the general support for an addendum as opposed to an amendment of the birth certificate itself and acknowledged that some stakeholders would like recognition of donor conception on birth certificates.[330] DJAG clarified that the information contained on the addendum will simply state that 'further information about the person is held by the Registry of Births, Deaths and Marriages (RBDM)' and that it is intended that RBDM will offer support services for donor-conceived people who contact RBDM for that information.[331]

In relation to concerns regarding the fact that an addendum seeks to conceal the fact a person is donor-conceived, DJAG noted that it is now standard practice for parents to be advised that early disclosure of donor conception is the best approach.[332] In circumstances where this has not occurred, DJAG suggested that the proposed addendum model will provide an avenue for donor-conceived people to obtain that information independently and privately, and provides people with an opportunity to discuss the notation with their parents if able.[333]

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323 Submission 1, p 10.

324 Submission 6.

325 Submission 16, pp 15-16.

326 Submission 6, p 1.

327 Submission 6, p 1.

328 Submission 20, p 2.

329 Submission 20, p 3.

330 Queensland Health and DJAG, joint correspondence, 8 July 2024, pp 36-37.

331 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 37.

332 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 37.

333 Queensland Health and DJAG, joint correspondence, 8 July 2024, pp 37-38.

In relation to requests for the Bill to be amended to enable amendment of the birth certificate itself, DJAG stated that the 'inclusion of a donor's information on a birth certificate raises broader policy issues that are outside of the scope of the Bill'.[334]

Committee comment

The committee is in favour of the approach taken in the Bill to provide for an addendum procedure, instead of providing for the annotation of birth certificates. The key reasons for our support are that it would mean that the birth certificate of donor-conceived people would not be noticeably different to those of other persons and the addendum procedure is similar to the approaches taken in several other Australian jurisdictions.

[334] Queensland Health and DJAG, joint correspondence, 8 July 2024, p 38.

4 Investigation, enforcement and review mechanisms

The Bill includes a range of provisions designed to promote compliance with its requirements. This includes provisions that create new powers to investigate and enforce compliance, as well as provisions that create new offences, such as those discussed above.

The Bill also includes a range of review mechanisms to ensure that these new powers, as well as the administrative decisions made in relation to ART providers, their operations, and the new register, are subject to appropriate oversight and review.

4.1 New powers to investigate and enforce compliance

The Bill would allow the chief executive to appoint inspectors with a range of powers to investigate and enforce compliance.[335] The explanatory notes state that these powers are necessary to achieve the monitoring and enforcement functions of the proposed Act.[336]

The powers of inspectors would include the power to enter a place with consent,[337] or with a warrant,[338] and to do any of the following:

- search any part of the place
- inspect, examine or film any part of the place or anything at the place
- take for examination a thing, or a sample of or from a thing, at the place
- place an identifying mark in or on anything at that place
- take an extract from, or copy, a document at the place, or take the document to another place to copy
- produce an image or writing from an electronic document at the place or, to the extent it is not practicable, take either or both to another place to produce an image or writing from an electronic document
- take to, into or onto the place and use any person, equipment and materials the inspector requires for exercising the inspector's powers
- remain at the place for the time necessary to achieve the purpose of the entry.[339]

An inspector may do anything necessary to exercise these powers.[340] The inspector may also seize evidence and decide a seized thing is forfeited to the State under certain circumstances.[341]

4.1.1 Consistency with fundamental legislative principles and compatibility with human rights

The powers that the Bill proposes be granted to inspectors are likely to affect the rights of individuals. For example, an inspector's power to search a place could affect a person's right to privacy and their right to property. As such, these powers potentially limit human rights protected by the HRA and raise issues of fundamental legislative principles.

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335 Bill, pt 5.

336 Explanatory notes, p 40. See also statement of compatibility, p 11.

337 Bill, pt 5, div 3, subdiv 2.

338 Bill, pt 5, div 3, subdiv 3.

339 Bill, cl 89.

340 Bill, cl 89(2).

341 Bill, pt 5, div 4.

However, the powers that the Bill proposes be granted to inspectors will be subject to a number of limits and safeguards that are designed to protect the rights and liberties of individuals. For example:

- entry of any premises without consent is controlled through requirements for warrants and limitations of circumstances[342]
- an inspector may not examine, or take for examination, a gamete or embryo in the exercise of their general powers[343] or seize a gamete or embryo[344]
- inspectors must have an identity card[345] and produce or display that card when exercising their powers[346]
- in exercising a power, inspectors must take all reasonable steps to cause as little inconvenience, and do as little damage, as possible[347]
- if damage occurs during an inspection, notice must be given to the owner and a person may claim compensation.[348]

4.2 New offences created by the Bill

The Bill contains approximately 47 offence provisions, which can be grouped into offences relating to consent and provision of information,[349] licensing and enforcement,[350] prohibited use of gametes and embryos,[351] record keeping,[352] information provisions,[353] and the provisions relating to the register.[354]

These offences are designed to ensure compliance with the Bill, promoting the safety of ART services in Queensland and the well-being of donor-conceived people. To have sufficient regard for the rights and liberties of individuals, the consequences of legislation should be relevant and proportionate. This means that a penalty should be proportionate to the offence, and penalties within legislation should be consistent with each other.

As Table 3 shows, the penalties proposed in the Bill appear to be consistent with each other, with more serious offences attracting higher penalties and less serious offences attracting lower penalties.

342 Bill, cl 83.

343 Bill, cl 89(5).

344 Bill, cl 94.

345 Bill, cl 74.

346 Bill, cl 75.

347 Bill, cl 113.

348 Bill, cls 114, 115.

349 Bill, cls 14-16 and 20.

350 Bill, cls 12, 13, 61, 76, 91, 97-8, 107, 109-10, 112 and 116-17.

351 Bill, cls 22-7.

352 Bill, cls 33-7, 45-6 and 54-5.

353 Bill, cls 139-40.

354 Bill, cls 45-6 and 54-5.

Table 3 Penalties reflect the seriousness of offences

Maximum penalty	Examples of offences to which penalty applies
400 penalty units ($64,520) or 2 years imprisonment	• Failure to ensure ART services provided by, or performed under supervision of, a medical practitioner (clause 13) • Use of gametes from close family members (clause 22) • Carrying out ART procedure on a child, or obtaining a gamete from a child for use in an ART procedure (clause 23) • Breach of 10 donor-related family limit (clause 25(1))
400 penalty units ($64,520)	• Unauthorised destruction of required records (clause 37)
240 penalty units ($38,712) or 2 years imprisonment	• Non-medical sex selection (clause 24)
200 penalty units ($32,260) or 2 years imprisonment	• Provision of ART services without a licence (clause 12(1)) • Advertising or holding out that a person is an ART provider without a licence (clause 12(2))
200 penalty units ($32,260)	• Failure to provide required information about ART services (clause 14) • Failure to obtain consent prior to ART procedure (clause 16) • Failure to inform another ART provider that donor has withdrawn consent relating to gamete or embryo supplied (clause 20(3)) • Failure to provide another ART provider with information regarding donor family limit (clause 25(4)) • Unauthorised use of gamete or embryo after donor has died (clause 26(1)) • Failure to collect required information about donor, person undergoing ART procedure, or child born as a result (clauses 33-35) • Failure to keep required records for 99 years (clause 36)
100 penalty units ($16,130)	• Failure to take reasonable steps to determine whether donor still alive (clause 26(3)) • Unauthorised use of gamete or embryo after 15-year time limit for use has expired (clause 27(1)) • Failure to provide registrar with all relevant information or historical information within required time (clauses 45 and 46) • Unauthorised access to or interference with register (clause 55) • Failure to report serious adverse event (clause 61) • Providing false or misleading information to an official (clause 139)
50 penalty units ($8,065)	• Failure to provide counselling services to proposed donor or person undergoing ART procedure using donated gamete or embryo (clause 15) • Failure to comply with notice from registrar to provide information or answer specified questions without reasonable excuse (clause 54(3)) • Failure to report event that is not a serious adverse event (clause 61) • Failure to comply with certain requirements of inspectors and interfere with seized things (clauses 97 and 98) • Obstructing an inspector without a reasonable excuse (clause 116) • Impersonating an inspector (clause 117) • Unauthorised disclosure of confidential information (clause 140)
25 penalty units ($4032.50)	• Failure to make counselling service available to person undergoing ART procedure that does not involve donated gamete or embryo (clause 15(2))
10 penalty units ($1613)	• Failure by former inspector to return identity card within 21 days (clause 76)

These penalties range from a maximum penalty of 10 penalty units ($1,613) (for example, for the failure of inspector to return identity card) to 400 penalty units ($64,520) or 2 years imprisonment (for example, providing ART services without supervision by a medical practitioner).

The explanatory notes state that the penalties proposed in the Bill are based on the nature of each offence, the harm that may be caused by breaches, and the penalties imposed for equivalent offences in other jurisdictions.[355] Queensland Health advised that the penalties proposed for some offences are higher than for equivalent offences in other jurisdictions. It stated:

> This reflects the seriousness of the offences, noting that the implications of an adverse outcome on families can be lifelong. The penalties also reflect the Health Ombudsman's Summary Report which highlights there is a compelling case for legislation to regulate Queensland's ART industry and a need to strengthen safeguards for consumers, donors and donor-conceived people and to improve the quality and safety of ART services for Queenslanders.[356]

4.2.1 Stakeholder views

A small number of stakeholders expressed support for the penalties in principle but questioned whether or not the time limitation for commencing proceedings in relation to the new offences created by the Bill were sufficient.

Courtney du Toit noted the specific importance of ensuring that prescribed penalties are proportionate to those they are being imposed upon, stating the ART industry is an 'extremely wealthy and powerful industry'.[357]

Donor Conceived Australia expressed that they were strongly against clause 135(b) which states that a proceeding for an offence under the Act must start '… within 6 months after the offence comes to the complainants knowledge, but within 2 years after the commission of the offence'.[358] They believed this to be an inadequate amount of time given the trauma that such an offence may cause to donor-conceived people, recipient parents and/or donors.[359] They specifically noted that where a donor-conceived person does not access donor information from registers exactly from 16 years of age, that they will be simply unable to commence proceedings.[360]

Kate-Lyn Drysdale expressed support for the penalties but also shared that she, as a donor-conceived person, was concerned the time limits for commencing proceedings were insufficient.[361] She stated that even where people know they are donor-conceived, no information can be obtained from the registry until they are 16 years of age and consequently 'many offences as outlined in the legislation would not be discovered until long after the time limit has passed'.[362]

MinterEllison, on behalf of the Queensland Fertility Group, expressed their concern that the penalties in the Bill were particularly punitive. The firm contended that punitive penalties, in the provision of healthcare and services, may cause apprehension, reservation and fear, and ultimately be counterintuitive.[363]

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355 Explanatory notes, p 50.

356 Queensland Health and DJAG, joint written briefing, 5 June 2024, p 12.

357 Submission 12, p 2.

358 Bill, cl 135(b); Submission 16, p 14.

359 Submission 16, p 14.

360 Submission 16, p 15.

361 Submission 20, p 5.

362 Submission 20, p 5.

363 Submission 22, p 3.

4.2.2 Department response

Queensland Health acknowledged the differing stakeholder views regarding the penalties in the Bill and in response stated that it was 'important to highlight that the proposed penalties form part of a broader compliance framework in the Bill' and that 'penalties are only intended to be imposed in the most serious of breaches'.[364]

In response to concerns regarding the 'punitive' nature of the penalties, Queensland Health also drew attention to a range of other tools including issuing warnings, improvement notices, prohibition notices and the ability to suspend or cancel a licence, as well as educating providers, all of which can be used 'as part of a scalable compliance framework' before a financial penalty is imposed.[365] Queensland Health considered that the provisions in the Bill will ensure the ART industry has a clear understanding about the minimum expectation required of them which will give Queensland Health the necessary monitoring and enforcement capability that does not exist within the current framework.[366]

Committee comment

In relation to the proportionality of the proposed penalties, the committee notes Queensland Health's acknowledgement that the penalties in the Bill were higher than those in equivalent jurisdictions but that this 'reflects the seriousness of the offences, noting that the implications of an adverse outcome on families can be lifelong'.[367] The committee also notes the findings of the OHO ART Reports 1 and 2, the lack of regulation existing within the current framework and the need to implement provisions that will realistically mitigate the risk of future wrongdoing as reasons that would support the proportionality of the proposed offences and corresponding penalties.

The committee is satisfied with the proportionality of the proposed penalties and Queensland Health's reasoning for the variation in the quantum of the penalties in comparison to those in equivalent jurisdictions.

4.2.3 Consistency with fundamental legislative principles

Some offences proposed in the Bill include a limited reversal of the onus of proof, in that they provide that it is an offence to do (or fail to do) certain things without a reasonable excuse. This includes offences relating to:

- compliance with notices given by the registrar (for example, requiring the provision of information)[368]
- compliance with requirements to notify the chief executive of certain events[369]
- the return of identity cards by (former) inspectors[370]

364 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 26.

365 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 26.

366 Queensland Health and DJAG, joint correspondence, 8 July 2024, p 27.

367 Queensland Health and DJAG, joint written briefing, 5 June 2024, p 12.

368 Bill, cl 54.

369 Bill, cl 61.

370 Bill, cl 76.

- compliance with requirements relating to inspections, such as the requirement not to obstruct an inspector[371]
- the production of documents for inspection[372]
- failure to provide certain information (such as a person's name and address) if an inspector reasonably believes an offence has been committed.[373]

These provisions potentially limit human rights.[374] Specifically, they may affect the right to a fair hearing and rights in criminal proceedings, both of which are protected by the HRA.[375] For example, needing to prove that they had a reasonable excuse for failing to comply with a relevant provision could be seen as impinging on a person's right to be presumed innocent until proven guilty.

Fundamental legislative principles also require that legislation does not reverse the onus of proof in criminal proceedings without adequate justification.[376]

The statement of compatibility asserts that the limited reversal of the onus of proof is reasonable and justified because:

- it is intended to 'ensure that evidence is provided by the individual best positioned to provide that evidence'
- it will 'ensure individuals are afforded an opportunity to raise an appropriate defence for failing to comply with an obligation'
- without a 'reasonable excuse' provision, 'the relevant offences would be unnecessarily strict and penalise individuals for non-compliance with obligations that they may have been unable to comply with.'[377]

4.3 Review mechanisms

The Bill proposes a range of review mechanisms to ensure that the exercise of certain enforcement powers, decisions relating to the licensing of ART providers, and decisions relating to the new register, are subject to appropriate oversight and review. These provisions help to ensure natural justice.[378]

4.3.1 Review of decisions relating to licences

The Bill proposes that 'reviewable decisions' will be subject to internal and external review.[379] This includes certain decisions relating to the licensing scheme for ART providers.

The following decisions will be 'reviewable decisions':

- a decision to refuse to grant a licence
- a decision to impose or vary a condition of a licence under sections 59(2) or (3)

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371 Bill, cls 90, 91, 97, 98 and 116.

372 Bill, cls 108 and 109.

373 Bill, cl 107, 111, and 112.

374 Statement of compatibility, pp 15-16.

375 HRA, ss 31 and 32.

376 LSA, s 4(3)(d).

377 Statement of compatibility, p 17.

378 Explanatory notes, p 24.

379 Bill, pt 6.

- a decision to issue an improvement notice, or to refuse to revoke an improvement notice
- a decision to issue a prohibition notice, or to refuse to revoke a prohibition notice
- a decision to cancel or suspend a licence, or to refuse to lift a licence suspension.[380]

A person affected by a reviewable decision may apply to the chief executive for a review of the decision (an internal review).[381] Such applications must meet certain requirements, including being in the approved form, and being made within specified time limits (generally, 20 business days).[382] The chief executive will be required to review the decision, and make a decision to confirm, amend or substitute another decision, within 20 business days of the application being made.[383]

A person affected by a reviewable decision can request a stay of that decision from the Queensland Civil and Administrative Tribunal (QCAT).[384]

Once an internal review has been completed, the affected person may apply for an external review by QCAT.[385] Those reviews will take place in accordance with the *Queensland Civil and Administrative Tribunal Act 2009*.

4.3.2 Review of property decisions

A person affected by a 'property decision' will be able to appeal those decisions to the Magistrates Court.[386] These are decisions relating to the enforcement powers of inspectors, namely:

- a decision to refuse to return seized property, or
- a decision to forfeit seized property.

A person affected by a property decision will be able to apply for a stay of that decision from the Magistrates Court.[387]

When hearing an appeal, the Magistrates Court may confirm the property decision, substitute another decision for it, or set aside the property decision and return the matter to the chief executive with directions the court considers appropriate.[388] In the latter case, the new decision made by the chief executive will not be subject to appeal under the relevant division.[389]

4.3.3 Review of decisions relating to register

A person who applies to access or correct information in the register will be able to apply to QCAT for an external review of decision if it is not the decision they sought, or if they are dissatisfied with the decision.[390]

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380 Bill, s 119.

381 Bill, s 121.

382 Bill, s 122.

383 Bill, cl 123.

384 Bill, cl 124.

385 Bill, cl 125.

386 Bill, cl 127.

387 Bill, cl 127.

388 Bill, cl 128(3).

389 Bill, cl 129(2).

390 Bill, cl 56.

4.3.4 Certain decisions not subject to review

The Bill provides that certain discretionary decisions of the chief executive will not be subject to review. Generally, the decisions that are not subject to review are those that relate to the use of gametes and embryos. This includes the power of the chief executive to:

- approve the use of donated gametes or donated embryos beyond the 15-year time limit if satisfied that there are reasonable grounds for doing so[391]
- authorise the use of an embryo created, but not yet used, before commencement of the proposed Act, even if the use of the embryo may breach the 15-year time limit or the donor related family limit, if satisfied it is a reasonable use of the embryo.[392]

In addition, decisions by the chief executive to authorise a medical practitioner to disclose health information, on behalf of the chief executive, if the ART provider has not disclosed the information and the medical practitioner considers it is necessary to minimise a risk of harm,[393] are not subject to review.

The fact that these decisions are not subject to review raises issues of fundamental legislative principles, which include the principle that legislation should only make rights, liberties or obligations dependent on administrative power if that power is sufficiently defined and subject to appropriate review.[394]

In these cases, the explanatory notes state that:

- the reversal (via review) of decisions relating to the use of gametes or embryos beyond the 15-year time limit may not be practicable and would likely impact other rights (for example, if the reversal would result in a termination of pregnancy)[395]
- the chief executive's power to authorise the disclosure of health information is intended to minimise harm, add to rather than replace the role of ART providers in so doing, and must be exercised based on expert advice about whether such a disclosure is necessary.[396]

391 Bill, cl 27.

392 Bill, cl 148. Note this is a transitional provision.

393 Bill, cl 39.

394 LSA, s 4(3)(a).

395 Explanatory notes, p 34.

396 Explanatory notes, p 34.

5 Other notable provisions in the Bill

Several other provisions of the Bill are of particular note including the provisions relating to commencement, information sharing and the amendment of the AD Act, as well as some of the transitional provisions.

5.1 Commencement

The Bill provides that many of its provisions will commence on a date to be fixed by proclamation.[397] This includes the provisions relating to the new licensing scheme for ART providers, the donor conception information register, and the birth certificates of donor-conceived people.

In relation to the obligations regarding maintenance of the register, DJAG indicated that 'there will be a lead-in time … for the Registry of Births, Deaths and Marriages to also work with our providers to make them aware of their obligations and also assist with accessing historical records and digitising them to put on the register'.[398]

5.2 Amendment of *Anti-Discrimination Act 1991*

The Bill proposes amending the AD Act to omit section 45A. That section currently provides that section 46 of the AD Act does not apply to the provision of ART services if the discrimination is on the basis of relationship status or sexuality.[399]

Section 46 of the AD Act provides that a person who supplies goods and services (whether or not for reward or profit) must not discriminate against another person:

- by failing to supply the goods or services
- in the terms on which goods or services are supplied
- in the way in which goods or services are supplied, or
- by treating the other person unfavourably in any way in connection with the supply of goods and services.

Section 45A of the AD Act permits ART providers to discriminate against people on the basis of their relationship status or sexuality. This would, for example, permit an ART provider to refuse to provide ART services to unmarried and/or same sex couples. However, such discrimination is likely to be prohibited under the federal *Sex Discrimination Act 1984* (Cth),[400] making section 45A redundant and potentially invalid under section 109 of the *Australian Constitution.*[401]

Omitting section 45A from the AD Act will ensure this form of discrimination is also prohibited in state-based legislation.

397 Bill, cl 2.

398 Public briefing transcript, Brisbane, 12 July 2024, p 6.

399 Bill, cl 155.

400 *Sex Discrimination Act 1984* (Cth), s 22.

401 Queensland Human Rights Commission (QHRC), *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991*, July 2022, pp 399-400.

The Bill proposes omitting section 45A of the AD Act because 'it is redundant and no longer meets the clinical, ethical and community standards' and because 'ART services should be available to anyone who needs them regardless of their relationship status or sexual orientation.'[402]

This amendment will implement Recommendation 44.1 of the *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Building Belonging Report) of the Queensland Human Rights Commission (QHRC). It recommended that the AD Act be amended to 'repeal the assisted reproductive technology provision which allows discrimination on the basis of sexuality or relationship status in the area of goods and services.'[403] In making this recommendation, QHRC noted that section 45A of the AD Act may be constitutionally invalid,[404] and observed that since its introduction:

> … society's attitudes have changed as shown by the passing of marriage equality laws. The largest fertility service provider in Queensland actively advertises to and provides services for same-sex couples and single parents.[405]

Evidence received by this committee is consistent with the QHRC's observation, with several stakeholders indicating that they support the proposed removal of section 45A of the AD Act.[406]

5.3 Information sharing

The Bill includes several information sharing provisions. These provisions would:

- permit the registrar to share statistical or other non-identifying information in the donor conception information register with authorised entities[407]
- permit certain people (including the chief executive, the registrar, and their staff) to disclose confidential information obtained under the proposed Assisted Reproductive Technology Act (proposed Act) to specified entities, including the National Health Practitioner Regulation Agency or an entity in another jurisdiction responsible for the regulation of ART services, where this is reasonably necessary for the entity to exercise its functions[408]
- permit the chief executive and the registrar to share confidential or other information for the purposes of the administration of the proposed Act.[409]

The Bill's information sharing provisions would limit the right to privacy. However, the committee considers they are reasonable and justified in the circumstances because they permit information to be shared only in certain circumstances, are subject to safeguards, and are intended to enhance the safety and oversight of ART services.[410]

5.4 Transitional provisions

The Bill includes several transitional provisions. These address how its commencement will affect:

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402 Explanatory notes, p 118.

403 QHRC, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991*, July 2022, p 30.

404 QHRC, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991*, July 2022, p 399-400.

405 QHRC, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991*, July 2022, p 398.

406 Submissions 1, 10, 27 and 31.

407 Bill, cl 51.

408 Bill, cls 140(5) and (6).

409 Bill, cl 141.

410 Explanatory notes, p 48.

- the licensing of existing ART providers[411]
- donated gametes previously allocated to a person for ART procedures[412]
- donated embryos previously allocated to a person for ART procedures[413]
- embryos not yet used for ART procedures[414]
- the time limits for using gametes and embryos that existed prior to the Bill's commencement[415]
- the time within which ART providers must provide information about pregnancies and births[416]
- the obligation of ART providers to provide information about births using gametes and embryos that existed prior to the Bill's commencement.[417]

411 Bill, cl 145.

412 Bill, cl 165.

413 Bill, cl 147.

414 Bill, cl 148.

415 Bill, cl 149.

416 Bill, cl 150.

417 Bill, cl 151.

Appendix A – Submitters

Sub #	Submitter
1	Rainbow Families Queensland
2	Lyndal Bubke
3	Confidential
4	Australian and New Zealand Infertility Counsellors Association (ANZICA)
5	Australian Medical Association Queensland Limited
6	Dr Chantelle Baguley
7	Katharine Gelber
8	Whitney Graham
9	FamilyVoice Australia
10	Stephen Page, Page Provan Lawyers
11	Kerri Favarato
12	Courtney du Toit
13	Name withheld
14	Amy Tam
15	Jigsaw Queensland Incorporated
16	Donor Conceived Australia
17	Name withheld
18	Name withheld
19	Queensland Nurses and Midwives' Union
20	Kate-Lyn Drysdale
21	Legal Aid Queensland
22	MinterEllison on behalf of Queensland Fertility Group
23	Donor Conceived Aotearoa
24	Monash IVF
25	Dr Giselle Newton

26	Professor Sonia Allan OAM
27	Queensland Human Rights Commission
28	Australian Christian Lobby
29	Australian College of Nursing
30	Office of the Health Ombudsman
31	Pride in Law
32	Queensland Law Society
33	Alexandra Eccles
34	Confidential

Appendix B – Officials at public departmental briefing

BRISBANE, 12 JULY 2024

Queensland Health

- Ms Tricia Matthias, Acting Deputy Director-General, Strategy, Policy and Reform Division
- Associate Professor Catherine McDougall, Chief Medical Officer, Clinical Excellence Queensland
- Mr Leif Ettrup, Manager, Assisted Reproductive Technology Unit
- Ms Sharnie Kunde, Manager, Assisted Reproductive Technology Unit

Department of Justice and Attorney-General

- Ms Sakitha Bandaranaike, Director, Strategic Policy and Legal Services
- Ms Tara Linnan, Principal Policy Officer, Strategic Policy and Legislation
- Ms Bronwen McNeill, Project Director - Donor Conception Information Register, Registry of Births, Deaths and Marriages

Appendix C – Witnesses at public hearing

BRISBANE, 12 JULY 2024

Donor Conceived Australia

- Ms Kerri Favarato

Australian and New Zealand Infertility Counsellors Association (via videoconference)

- Dr Donna Griffiths, QLD ANZICA Jurisdiction Representative
- Ms Kathryn Millist-Spendlove, QLD Fertility Counsellor

Monash IVF

- Mr Hamish Hamilton, Chief Operating Officer
- Ms Tedd Fuell, Chief Governance & Risk Officer

Queensland Fertility Group

- Ms Melanie Sibson, Managing Director
- Ms Kathryn McMillan KC

Australian Christian Lobby

- Mr Rob Norman, Queensland State Director

Individual Donor-conceived Panel

- Ms Lyndal Bubke
- Ms Kerri Favarato

Ms Lexie Gunn and Ms Anastasia Gunn

Dr Paul Stokes, Coastal IVF

Appendix D – Recommendations implemented by the Bill

Table D.1 Implementation of recommendations made by the Legal Affairs and Safety Committee

Recommendation	Relevant provisions	Note
Recommendation 1: Rights of donor-conceived persons, including to know their genetic origins		
That all donor-conceived persons be legislatively provided with the right to know the identity of their donor when they reach the age of 18, regardless of when they were born.	Part 3 (Donor conception information register) Clause 48	• Bill proposes a lower age requirement – 16 years – consistent with relevant provisions in other Acts (e.g. applications to change a person's sex on their birth certificate). • Bill also provides descendants of donor-conceived people with a right to access the identity of a donor. • Right to access the identity of donor will be limited to donor-conceived people born as the result of a procedure carried out inside Queensland.
Recommendation 2: Extent to which identifying information about donors should be given to donor-conceived persons, taking into consideration the right to privacy of donors		
That identifying information about donors, including their medical history, be made available on request to all donor-conceived persons when they reach the age of 18.	Clauses 40, 44, 48	• Bill proposes a lower age requirement – 16 years – consistent with relevant provisions in other Acts (e.g. re applications to change a person's sex on their birth certificate). • The donor's relevant medical history is expressly included within the 'relevant information' to be held in the registry. However, medical history is classified as 'non-identifying information'. • The Bill will allow also allow parents and descendants of donor-conceived persons to access identifying and non-identifying information about donors. In the case of parents, access to identifying information is subject to the consent of the donor.
That information about the gender and year of birth of donor-conceived persons born from their donation be made available on request to all donors.	Clauses 40, 48	
That information about the gender and year of birth of donor-conceived siblings be made available on request to donor-conceived persons.	Clauses 40, 48	• The Bill also provides descendants of donor-conceived people and offspring of a donor who were not donor conceived with the ability of access this information.
That requests from donors for contact with donor-conceived persons be facilitated subject to the consent of the donor-conceived person.	Clauses 40, 48	

Recommendation	Relevant provisions	Note
That requests from donor-conceived persons for contact with their donor be facilitated subject to the consent of the donor.	Clauses 40, 48	
That requests from donor-conceived persons for contact with their donor siblings be facilitated subject to the consent of both parties.	Clauses 40, 48	• The Bill will also facilitate requests for contact made by the descendants of donor-conceived persons, and by offspring of donors who were not donor conceived, subject to consent.
Recommendation 3: Access to historical clinical records and implications of retrospectivity		
That the Queensland Government introduces legislation to prohibit the deliberate destruction of historical donor records.	Clauses 37	• The Bill prohibits the destruction of historical records, subject to a maximum penalty of 400 penalty units ($64,520).[418]
That the Queensland Government introduces legislation to require clinics involved now and historically with donor conception to retrieve, check and submit all donor information to a central register within a reasonable timeframe.	Clauses 46	• The Bill does not require ART providers to check the information they provide to the register. • The Bill requires ART providers to provide historical information within 6 months of commencement, but the registrar may extend this period where satisfied there is 'sufficient reason'. • Failure to provide the required information is subject to a penalty of 100 penalty units (currently $15,480).
That the Queensland Government introduces legislation to provide that birth certificates of donor-conceived persons be annotated to note the fact of donor conception.	Part 10, Division 3 (Amendment of *Births, Deaths and Marriages Registration Act 2023*)	• The Bill adopts the addendum model as an alternative. This will allow donor-conceived a choice regarding when and how they disclose their donor-conceived status.
That the Queensland Government introduces legislation to provide that birth certificates of donor-conceived persons already born be amended to note the fact of donor conception.	Part 10, Division 3 (Amendment of *Births, Deaths and Marriages Registration Act 2023*)	• The Bill adopts the addendum model as an alternative. This will allow donor-conceived a choice regarding when and how they disclose their donor-conceived status.

[418] From 1 July 2024, a penalty unit will be $161.30. Penalties and Sentences Regulation 2015, s 3; *Penalties and Sentences Act 1992*, ss 5, 5A.

Recommendation	Relevant provisions	Note
Recommendation 4: Access to support and counselling for donor-conceived persons, recipient parents and donors		
That the Queensland Government considers funding counselling and support services for donor-conceived persons, recipient parents and donors to facilitate positive outcomes from recommendations in this report, utilising services with relevant and lived experience.	Not provided for in Bill.	• The government has approved funding for counselling and support services for persons using the new register,[419] but its scale and timing is not clear.
That such counselling and support services should be independent of the fertility industry.	Not provided for in Bill.	
Recommendation 5: Whether a register should be established		
That a central donor conception register be established within the Registry of Births, Deaths and Marriages.	Clause 42	• Although the new register will be maintained by the registrar under the *Births, Deaths and Marriages Registration Act 2023*, it will not be a register for the purposes of that Act.
That this register be mandatory in relation to donor conception achieved within a fertility clinic.	Clause 45	• ART providers must provide relevant information to the registrar within 3 months of becoming aware of a birth. • Failure to comply is subject to a maximum penalty of 100 penalty units ($16,130).
That this register be available voluntarily to those who have pursued donor conception in private arrangements.	Clause 47	
That the Queensland Government undertake an investigation to determine how to a) encourage participants in private donor conception arrangements to lodge donor conception information on the central donor conception register and b) ensure the information is accurate.	Not fully provided for in Bill. However, cl 54 is relevant.	• The Bill provides that the registrar may conduct an inquiry to find out whether information provided to them is correct. They can require people to answer specified questions or provide other information as part of this inquiry. • Queensland Health advised the committee that the establishment of the register will be accompanied by a public awareness campaign, noting: 'It is intended that this campaign will outline the process and requirements for parties to private donor conception procedures to voluntarily lodge information with the Register.'[420]

[419] Queensland Health, written briefing, 5 June 2024, p 21.

[420] Queensland Health, written briefing, 5 June 2024, p 18.

Recommendation	Relevant provisions	Note
That the staff who operate this register to actively contact previously anonymous donors about relevant changes to the law and available support services, and permit them to lodge contact preferences.	Not fully provided for in Bill. However, cl 49(4) is relevant.	• Where a donor has not previously given a notice that they do not consent to contact, the registrar may take reasonable steps to contact a donor to provide them with an opportunity to give consent if a donor-conceived person applies to access contact information.
That the Queensland Government works with states and territories to investigate the linking of donor conception registers across jurisdictions and any potential implications.	Not provided for in Bill.	• Queensland Health advised: 'In the absence of a national register, clause 48 of the Bill allows a donor-conceived person who was born as a result of a procedure carried out in Australia but outside of Queensland, to lodge and access information on the Register about donor-conceived siblings of the person. This is intended to facilitate contact between donor-conceived siblings in Queensland and interstate where the parties consent.'[421]
Recommendation 6: Benefits, risks and implications on donor conception practices arising from any recommendations		
That all past, current and future donors be fully informed of relevant changes to the law and that they will be identifiable to those born from their donation.	Not provided for in Bill.	• The implementation of the Bill will be accompanied by a public awareness campaign, and the development of relevant resources for donors.[422]

[421] Queensland Health, written briefing, 5 June 2024, p 20.

[422] Queensland Health, written briefing, 5 June 2024, pp 21-22.

Table D.2 Implementation of preliminary recommendations made by the Health Ombudsman to the Minister

Recommendation	Relevant provisions	Note
Recommendation 1: That the issues and risks identified in respect of the **collection, storage, identification and distribution of gametes and embryos** are considered in the proposed legislation or associated regulations. This could include requirements for ART providers to use a standardised suite of processes and documents to ensure consistent record keeping and adverse event reporting, with codified information to aid in standardisation of reporting. This could also include a statewide standard for storage audit procedure, i.e. a standard document for registering tank counts which standardises the collection of all necessary information (donor number, batch number, count, etc).	Not provided for in Bill. However cls 33 and 34 are relevant.	• The Bill sets out what information an ART provider must collect about gamete providers, but it does not detail how this information should be collected. • The Bill requires ART providers to transfer information about gametes or embryos to other ART providers when they supply them with gametes or embryos.
Recommendation 3: That consideration is given to including a requirement for **more extensive screening of donors**, in terms of (1) personal and family medical histories and potential genetic conditions by personnel appropriately trained in genetics (e.g. clinical geneticists, genetic counsellors); (2) wider screening of donors to include carrier status of common (autosomal recessive) genetic conditions such as those compensable by Medicare.	Not provided for in Bill. However, cl 33 is relevant.	• The Bill requires ART provider to collect information about a donor's relevant medical history, as well as any other information prescribed by regulation. • The Bill defines 'relevant medical history' of a donor to mean any medical history or genetic test result of the donor or the donor's family that is relevant to the future health of a person who uses their donated gamete, or donor-conceived offspring or their descendants. • The Bill does not mandate screening for specific genetic conditions.
Recommendation 4: That consideration is given to requiring registered healthcare practitioners to provide **independent confirmation of a donor's medical history**.	Not provided for in Bill.	

Recommendation	Relevant provisions	Note
Recommendation 8: That consideration for the inclusion of obligations of ART providers in respect to **disclosure of a significant medical history** relating to donor-conceived child and donor, through for instance the proposed central register and legislation with respect to access to information for donor-conceived children.	Clauses 38 and 39	• The Bill facilitates, but does not require, the disclosure of health information about donors, relatives of donors, and donor-conceived persons where this is necessary to: (i) prevent or reduce a serious risk to someone's life of health; or (b) warn a person about the existence of a health condition that may be harmful to them or their descendants.
Recommendation 9: That the legislation defines the period of **time for retention of records** relating to donor ART procedures, and backups (including hard and soft copies) of such documents to mitigate loss.	Clause 36(1)	• The Bill requires that records be kept for at least 99 years, subject to a maximum penalty of 200 penalty units ($32,260).[423]
Recommendation 10: That the **time period defined** in section 121A of the *Assisted Reproductive Treatment Act 2008* (Vic) that identifying records must be kept for **at least 99 years** after creation of the record also be considered in Queensland legislation.	Clause 36(1)	• The Bill requires that records be kept for at least 99 years, subject to a maximum penalty of 200 penalty units ($32,260).
Recommendation 11: That legislation should incorporate requirements for **maintenance of records if an ART provider ceases to practise**.	Not provided for in Bill.	
Recommendation 12: That a gamete **donor family limit** is clearly defined within legislation, including a definition of what constitutes a 'family'. Consideration may also need to be given to a 'person' limit. Furthermore, consideration of limits needs to extend to both Queensland and Australia.	Clause 25	• The Bill establishes a limit of 10 donor-related families, clearly defining what constitutes a 'family' for this purpose. • This limit will extend across Australia. • A 'person' limit was considered, but a family limit is considered preferable because it is more inclusive.[424] • If an ART provider breaches the 10 donor family limit, either knowingly or because they failed to conduct due diligence, they may be subject to a maximum penalty of 400 penalty units ($64,520) or 2 years imprisonment.

[423] From 1 July 2024, a penalty unit will be $161.30. Penalties and Sentences Regulation 2015, s 3; *Penalties and Sentences Act 1992*, ss 5, 5A.

[424] Explanatory notes, p 11,

Recommendation	Relevant provisions	Note
Recommendation 19: That consideration be given to whether **requirements for informed consent** be included in proposed legislation or associated regulations.	Partly provided for in Bill, could be provided for in more detail by regulation. Clauses 14 and 16-19 are relevant.	• The Bill requires ART providers to provide donors, people undergoing ART procedures, and intended parents (in cases of surrogate pregnancy) with certain information, including matters prescribed by regulation. • The Bill requires ART provide to obtain consent from donors and people undergoing ART procedures prior to them. • Failure to comply with the relevant provisions is subject to a maximum penalty of 200 penalty units ($32,260).
Recommendation 20: That consideration is given to including requirements in legislation to ensure that the **information provided by ART providers to consumers** in advertising and consent processes is evidence-based, accurate and clinically relevant.	Not provided for in Bill. Could be provided for in regulation. Clause 14 is relevant.	• The Bill requires ART providers to provide donors, people undergoing ART procedures, and intended parents (in cases of surrogate pregnancy) with certain information, including matters prescribed by regulation. • Failure to provide this information is subject to a maximum penalty of 200 penalty units ($32,260).
Recommendation 24: Based on the NHMRC Guidelines, it is recommended that state-specific legislation explicitly affirms the position on the practice of **non-medical sex selection** in Queensland.	Clause 24	• The Bill prohibits non-medical sex-selection. Breach of prohibition is subject to a maximum penalty of 240 penalty units ($38,712) or 2 years imprisonment.

Recommendation	Relevant provisions	Note
Recommendation 25: That the proposed legislation to regulate the provision of ART services in Queensland include provisions for oversight, safeguards and **mandatory requirements for the disposal of biological material**.	Partially addressed by cl 27	• The Bill requires ART providers to dispose of donated gametes and embryos if the time limit for their use (15 years) has been reached. However, it does not address their disposal in other circumstances, or set out the process by which it is to occur. • Failure to comply with this requirement is subject to a maximum penalty of 100 penalty units ($16,130). • Queensland Health states that cl 27 'reflects' the recommendation and that 'the intended effect is that an ART provider should not continue to store a person's gametes or embryos if they no longer have their consent to use them.'[425]
Recommendation 28: That **legislation is designed to provide robust oversight of ART providers**, including the licensing of providers, audits, and investigation of non-conformities and adverse events.	Part 2 (Regulation of assisted reproductive technology), Part 4 (Licensing of ART providers), Part 5 (Investigation and enforcement)	• One of the main objects of the Bill is to regulate the provision of ART.
Recommendation 29: The issues identified in this investigation support the Queensland Health Commentary in the Regulation of Assisted Reproductive Technology Services – Consultation Paper 9 where it is stated: 'A **Queensland ART Act** would ensure greater protections for Queenslanders through oversight and safeguards for the management of non-compliance, adverse events and incidents, and transparency of the obligations of providers.'	Bill, Part 2 (Regulation of assisted reproductive technology), Part 4 (Licensing of ART providers), Part 5 (Investigation and enforcement)	• One of the main objects of the Bill is to regulate the provision of ART.

[425] Queensland Health, written briefing, 5 June 2024, p 10.

Recommendation	Relevant provisions	Note
Recommendation 30: That consideration is given to a requirement that licensed **ART providers adopt the Australian Open Disclosure Framework** – Better communication, a better way to care, noting that RTAC's Code of Practice requires ART providers to adopt policies consistent with this framework without the detailed guidance.	Not provided for in Bill	• Queensland Health advised that consideration is being given to implementing this recommendation through licence conditions for ART providers.[426]
Recommendation 33: That the proposed regulator of ART provision in Queensland implement **guidance on person centred care**, to be utilised by all Queensland ART providers.	Not provided for in Bill	
Recommendation 34: That consideration be given to addressing the issues of **withdrawal of consent by donors** in proposed legislation to regulate the provision of ART services in Queensland.	Clause 20	• The Bill addresses the withdrawal and variation of consent by donors and the time frames for doing so.
Recommendation 35: That consideration be given to the establishment of an **independent mechanism for review of decisions about ART treatments and posthumous use of gametes and embryos**, with functions similar to those performed by the Victorian Patient Review Panel as part of the proposed legislation to regulate the provision of ART services. Such consideration should include clarity on its purpose, powers, interconnection with regulators and reporting obligations.	Partly provided for in cl 31.	• The Bill establishes an independent review body to make decisions about the use of gametes retrieved from deceased or unresponsive persons.

[426] Queensland Health, written briefing, 5 June 2024, p 7.