

South Australia

Assisted Reproductive Treatment (Posthumous Use of Material and Donor Conception Register) Amendment Act 2024

An Act to amend the *Assisted Reproductive Treatment Act 1988* and to make related amendments to the *Births, Deaths and Marriages Registration Act 1996*, the *Family Relationships Act 1975* and the *Surrogacy Act 2019*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Assisted Reproductive Treatment (Posthumous Use of Material and Donor Conception Register) Amendment Act 2024*.

2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

Part 2—Amendment of *Assisted Reproductive Treatment Act 1988*

3—Amendment of section 9—Conditions of registration

Section 9(1)(c)(iv)—delete subparagraph (iv) and substitute:

(iv) if—

- (A) the human reproductive material—
 - in the case of human semen or a human ovum—was collected from a person who has died (the *donor*); or
 - in the case of a human embryo—was created from gametes of a person who has died (the *donor*); and
- (B) before the donor died, the donor consented to the use of the human reproductive material after their death in the provision of the proposed assisted reproductive treatment; and
- (C) if the donor gave any directions in relation to the use of the human reproductive material—the directions have, as far as is reasonably practicable, been complied with; and
- (D) the assisted reproductive treatment is provided for the benefit of a person who, immediately before the death of the donor, was living with the donor on a genuine domestic basis (whether the treatment is carried out on that person or on another person for the purposes of a lawful surrogacy agreement);

4—Insertion of section 14A

Before section 15 insert:

14A—Application of Part

This Part applies in relation to assisted reproductive treatment whether provided before or after the commencement of this Part.

Note—

The rights of access to information and obligations to provide information under this Part apply despite any previous obligation to maintain secrecy or other restriction on the disclosure of information.

5—Amendment of section 15—Donor conception register

- (1) Section 15(2)—delete "on the register—" and substitute:
on the register, the following information (if known):
- (2) Section 15(2)(c)—delete "(if known)"
- (3) Section 15(2)—after paragraph (c) insert:
 - (ca) information provided under section 15B; and
- (4) Section 15(3) and (4)—delete subsections (3) and (4) and substitute:
 - (3) The Minister may include on the donor conception register any particulars provided by the Registrar of Births, Deaths and Marriages under section 15B(3) (including, to avoid doubt, information that does not relate to assisted reproductive treatment provided in accordance with this Act).
 - (4) If the Minister is satisfied, based on any information received by the Minister, that an entry in the donor conception register is not correct, the Minister must correct that entry.
 - (4a) Subject to subsections (4d) and (8), a person is only entitled to have access to information contained in the donor conception register in accordance with the regulations or an authorisation of the Minister under subsection (4b).
 - (4b) The Minister may, by instrument in writing, authorise the disclosure of information, or a class of information, contained in the donor conception register to a person or class of person specified in the instrument of authorisation.
 - (4c) An authorisation under subsection (4b) may be subject to conditions specified in the instrument of authorisation.
 - (4d) A person engaged in connection with the administration of this Part may disclose particular information contained in the donor conception register if the person believes on reasonable grounds that the disclosure is necessary to address a serious and imminent risk to the health, safety or welfare of any person.

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Part 2—Amendment of *Assisted Reproductive Treatment Act 1988*

- (5) Section 15(6), (7) and (8)—delete subsections (6), (7) and (8) and substitute:
- (6) Any person (not being a registered provider of assisted reproductive treatment) may provide information of a prescribed kind to the Minister for inclusion in the donor conception register.
 - (7) A registered provider of assisted reproductive treatment must provide the Minister with information required by the Minister for inclusion in the donor conception register in the manner and form determined by the Minister.
Maximum penalty: \$120 000.
 - (8) Nothing in this section entitles a person to obtain information contained in the donor conception register if the Minister has determined, in the Minister's absolute discretion, that disclosure of the information would—
 - (a) be an unjustifiable intrusion on the privacy of the person to whom the information relates; or
 - (b) give rise to a serious risk to the health, safety or welfare of any person; or
 - (c) be inappropriate because the information may be unreliable or misleading.
 - (9) The Minister must establish and maintain written guidelines regarding the exercise of the Minister's discretion under subsection (8).
 - (10) The Minister must ensure that guidelines established and maintained under subsection (9) are published on a website determined by the Minister.
 - (11) A person who is dissatisfied with a decision of the Minister under subsection (8) may apply to the Tribunal under section 34 of the *South Australian Civil and Administrative Tribunal Act 2013* for a review of the decision.
 - (12) In this section—
donor means a person who provided human reproductive material for the purposes of assisted reproductive treatment on the understanding that they would not be a parent or legal guardian of a child born as a consequence of the treatment.

6—Insertion of sections 15A, 15B, 15C and 15D

After section 15 insert:

15A—Authorisation of entities

- (1) The Minister may, by notice in the Gazette, authorise an entity to do any of the following:
 - (a) to assist the Minister in obtaining any information for the purposes of this Part;
 - (b) to provide counselling or support services;

- (c) to facilitate the exchange of information between, or contact between, donors and other persons involved in donor conception;
- (d) to perform a function of a kind prescribed by the regulations.

Note—

The Minister may also delegate functions under this Part to an entity authorised under this section (see section 19).

- (2) An authorisation made by notice under this section may be subject to conditions specified in the notice.
- (3) The Minister or any other person engaged in connection with the operation of this Act may disclose information obtained while so engaged (including information contained in the donor conception register) to an entity authorised under this section to enable that entity to exercise a function under this section.

15B—Notice requiring provision of information etc

- (1) The Minister may, by notice in writing, for the purpose of preparing and maintaining the donor conception register, require a person or a public authority to provide the Minister with such information as the Minister may require.
- (2) A person must not—
 - (a) without reasonable excuse, refuse or fail to comply with a notice given to the person under subsection (1); or
 - (b) knowingly or recklessly provide false or misleading information to the Minister for the purposes of this Part (whether in response to a notice under subsection (1) or otherwise).

Maximum penalty: \$10 000.

- (3) The Minister may, by notice in writing, require the Registrar of Births, Deaths and Marriages to provide information, or specified kinds of information, in relation to donors (within the meaning of the *Births, Deaths and Marriages Registration Act 1996*) recorded in the Register maintained under the *Births, Deaths and Marriages Registration Act 1996*).
- (4) No obligation to maintain secrecy or other restriction on the disclosure of information applies to the Registrar of Births, Deaths and Marriages or any other person or public authority for the purposes of complying with a notice under this section.
- (5) In this section—

public authority means—

- (a) an agency or instrumentality of the Crown; or
- (b) a person or body prescribed by the regulations.

15C—Freedom of Information Act 1991 does not apply

The donor conception register, and any other document held for the purposes of this Part that relates to a particular person, are not subject to access under the *Freedom of Information Act 1991*.

15D—Liability

- (1) A registered provider of assisted reproductive treatment or other person required or permitted to provide information under this Part does not incur any civil or criminal liability in respect of providing that information honestly and in good faith.
- (2) No civil or criminal liability attaches to a person engaged in the administration of this Act, for an honest act or omission in the performance, exercise or discharge, or purported performance, exercise or discharge, of a function under this Act in connection with this Part.
- (3) No civil or criminal liability attaches to the Crown for any act or omission in relation to the performance, exercise or discharge, or purported performance, exercise or discharge, of a function in connection with this Part.

7—Amendment of section 16—Record keeping

- (1) Section 16—after subsection (2) insert:
 - (2a) A person who is in possession of any records or other documents relating to the provision (whether before or after the commencement of this subsection) of assisted reproductive treatment must keep those records or documents in accordance with the regulations.
Maximum penalty: \$50 000.
- (2) Section 16—after subsection (3) insert:
 - (4) The Minister may, on the Minister's own motion or on application (made in a manner and form determined by the Minister) by a person who is required to make a record or keep a document under this section, authorise the transfer of any such documents to another person.
 - (5) An authorisation under subsection (4)—
 - (a) must be given by instrument in writing; and
 - (b) may be subject to such conditions as the Minister thinks fit and specifies in the authorisation; and
 - (c) must be given to any person transferring the documents and to the person to whom the documents are to be transferred pursuant to the authorisation.

- (6) A person transferring documents pursuant to an authorisation of the Minister under subsection (4), and any person to whom such documents are transferred, must comply with the conditions specified in the authorisation.

Maximum penalty: \$50 000.

8—Amendment of section 18—Confidentiality

- (1) Section 18(1)—delete subsection (1)
- (2) Section 18(2)—delete "other confidential" and substitute:
personal
- (3) Section 18(2)—delete "in the administration of this Act or" wherever occurring
- (4) Section 18(2)(b)—delete paragraph (b)
- (5) Section 18—after subsection (2) insert:
- (2a) A person engaged or formerly engaged in connection with the operation of this Act must not disclose personal information obtained while so engaged except—
- (a) in the case of information obtained in connection with the operation of Part 3—to the extent that they may otherwise be authorised or required to disclose that information under that Part; or
- (b) in any other case—
- (i) as required or authorised by or under this or any other Act; or
- (ii) in the administration of this Act; or
- (iii) with the consent of the person to whom the information relates.

Maximum penalty: \$10 000 or imprisonment for 6 months.

- (6) Section 18—after subsection (3) insert:
- (4) In this section—
- personal information*** means information or an opinion, whether true or not, relating to an individual or the affairs of an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Schedule 1—Related amendments

Part 1—Amendment of *Births, Deaths and Marriages Registration Act 1996*

1—Amendment of section 4—Interpretation

Section 4—after the definition of *doctor* insert:

donor means a person who provided human reproductive material for the purposes of an insemination procedure (whether assisted reproductive treatment, within the meaning of the *Assisted Reproductive Treatment Act 1988*, or any other form of artificial fertilisation procedure) on the understanding that they would not be a parent or legal guardian of a child born as a consequence of the procedure;

donor conception means conception of a child by an insemination procedure (whether assisted reproductive treatment, within the meaning of the *Assisted Reproductive Treatment Act 1988*, or any other form of artificial fertilisation procedure) using human reproductive material provided by a donor;

2—Amendment of section 14—How to have the birth of a child registered

Section 14(5)—delete subsection (5) and substitute:

- (2) If the child was born as a result of donor conception, the birth registration statement must state that fact and include particulars of the identity (if known) of the donor.
- (3) The fact that a person is described as a donor in a birth registration statement in accordance with this section, or in an entry about the birth in the Register—
 - (a) does not constitute an acknowledgement of parentage for the purposes of the *Family Relationships Act 1975* or any other law; and
 - (b) does not otherwise operate to make that person the mother or father of the child for the purposes of any other law.

3—Amendment of section 18—Alteration of details of parentage after registration of birth

Section 18—after "child's parents" wherever occurring insert:

or a donor

4—Amendment of section 46—Issue of certificate

Section 46(1b)—delete subsection (1b) and substitute:

- (1a) If the Register indicates that a person was born as a result of donor conception, a birth certificate issued under subsection (1)(a) when the person is still under the age of 18 years—
 - (a) where the person was born before the commencement of this subsection—

- (i) may only indicate that the person was born as a result of donor conception (without providing any details of the donor)—
 - (A) if the person has been granted access to that information in the donor conception register under Part 3 of the *Assisted Reproductive Treatment Act 1988*; or
 - (B) with the written consent of each legal parent or guardian of the person; and
- (ii) may only indicate that the person was born as a result of donor conception and include any details of the donor—
 - (A) if the person has been granted access to that information in the donor conception register under Part 3 of the *Assisted Reproductive Treatment Act 1988*; or
 - (B) with the written consent of the donor and each legal parent or guardian of the person; or
- (b) where the person was born after the commencement of this subsection—must indicate that the person was born as a result of donor conception but may only include any details of the donor—
 - (i) if the person has been granted access to that information in the donor conception register under Part 3 of the *Assisted Reproductive Treatment Act 1988*; or
 - (ii) with the written consent of the donor and each legal parent or guardian of the person.
- (1b) If the Register indicates that a person was born as a result of donor conception, a birth certificate issued under subsection (1)(a) when the person is of or over the age of 18 years may, at the request of the person, do any of the following:
 - (a) indicate that the person was born as a result of donor conception;
 - (b) include any details of the donor.
- (1c) A failure to comply with a requirement of subsection (1a) or (1b) does not affect the admissibility or validity of a birth certificate.

Part 2—Amendment of *Family Relationships Act 1975*

5—Amendment of section 10C—Rules relating to parentage

- (1) Section 10C(2)—delete "If" and substitute:

Except as provided in subsection (5a), if

(2) Section 10C—after subsection (5) insert:

- (5a) If a woman becomes pregnant in consequence of a fertilisation procedure using an ovum from, or an embryo created by using an ovum from, another person—
- (a) who has died; and
 - (b) who, immediately before their death, was the woman's spouse, or was living with the woman in a qualifying relationship; and
 - (c) who had consented to the use of the ovum or embryo for the purposes of the fertilisation procedure,
the deceased person—
 - (d) will be conclusively presumed to have caused the pregnancy; and
 - (e) will be taken to be the co-parent of any child born as a result of the pregnancy.

Part 3—Amendment of *Surrogacy Act 2019*

6—Amendment of section 4—Interpretation

Section 4(1)—after the definition of *domestic partner* insert:

human reproductive material means—

- (a) a human embryo; or
- (b) human semen; or
- (c) a human ovum;

7—Amendment of section 18—Court may make orders as to parentage of child born as a result of lawful surrogacy agreement

(1) Section 18(1)(a)—after subparagraph (i) insert:

- (ia) in a case where subsection (1a) applies—that the relationship between the child and the deceased person is as specified in the order; and

(2) Section 18—after subsection (1) insert:

- (1a) If, in proceedings under subsection (1) brought by an intended parent, the Court is satisfied that human reproductive material used in relation to the relevant lawful surrogacy agreement came from a person—
- (a) who has died; and
 - (b) who, before their death—
 - (i) was a party to the lawful surrogacy agreement; or
 - (ii) consented to the human reproductive material being used in relation to the lawful surrogacy agreement,

the Court may make an order under subsection (1)(a)(ia) declaring the relationship between the child and the deceased person.

- (3) Section 18(5)(b)—after "parents" insert:
(if alive at the time of the order)
- (4) Section 18(5)(d)—after "agreement" insert:
(if alive at the time of the order)

8—Amendment of section 19—Court may revoke order under section 18

Section 19(3)(a)—after subparagraph (ii) insert:

- (iia) that the relationship between the child and a deceased person in relation to whom an order had been made under section 18(1)(a)(ia) is as specified in the order; and

9—Amendment of section 21—Court to notify Registrar of Births, Deaths and Marriages

- (1) Section 21—after paragraph (c) insert:
 - (ca) the full name and any other prescribed particulars of any deceased person in relation to whom an order is made under section 18(1)(a)(ia) or section 19(3)(a)(iia);
- (2) Section 21(g)—delete "or an intended parent" and substitute:
, an intended parent or a deceased person the subject of an order under section 18(1)(a)(ia)