

Guidance Note for Registered ART Providers

Assisted Reproductive Treatment Amendment Act 2020 (Vic)

ISSUED: June 2020

This Guidance Note is intended to provide implementation support to registered assisted reproductive treatment providers (ART providers) in Victoria to ensure a smooth transition to new laws relating to the removal of existing requirements to conduct criminal records and child protection order checks under the *Assisted Reproductive Treatment Act 2008* (ART Act). It is not intended to be legal advice. ART providers may seek their own legal advice in relation to the legislative changes. The Guidance Note is intended to assist ART providers in understanding the legislative changes and their implications, and support ART providers in making any necessary updates to their treatment procedure consent forms and associated patient materials, policies and website content.

Overview

What are the key amendments in the *Assisted Reproductive Treatment Amendment Act 2020*?

- The *Assisted Reproductive Treatment Amendment Act 2020* (the Amendment Act) amends the ART Act to remove the requirement that a woman and her partner, if she has one, and parties to a surrogacy arrangement, must undergo a criminal records and child protection order check prior to accessing assisted reproductive treatment.
- In practice, this means that ART providers will no longer be required to ask a woman seeking treatment and her partner, if any, or parties to a surrogacy arrangement to:
 - undergo a criminal records check
 - arrange for a child protection order check to be undertaken by the Department of Health and Human Services
 - assess the checks to determine whether any offences or orders detailed in the checks give rise to a presumption against treatment.
- While the checks will no longer be required, a number of safeguards will remain in place.
- In particular, ART providers will continue to have a statutory obligation to have regard to the Guiding principles set out in section 5 of the ART Act when making a decision about whether to treat a person. These principles include that the welfare and interests of the child to be born are paramount.
- ART providers will continue to be able to refuse treatment if they reasonably believe that a child to be born from treatment may be at risk of abuse or neglect. The Patient Review Panel will have an ongoing role in reviewing any decision by an ART provider on this basis.

Will there be changes to the Assisted Reproductive Treatment Regulations 2019?

- In addition to the changes to the ART Act, the Assisted Reproductive Treatment Regulations 2019 will be amended to remove the statement in the consent form at Schedule 1- Consent to carrying out a treatment procedure, that a counsellor has sighted a criminal records check.

- It is intended that these changes will commence on the same day the Amendment Act commences, on 8 July 2020.
- Clinics will need to update consent to treatment forms so that from the date of commencement, 'Part C - Statement from a counsellor' is removed from the form.

When do the amendments take effect?

- The Amendment Act was passed by the Legislative Council on 4 June 2020 and received Royal Assent on 10 June 2020. It is intended that the amendments will commence on 8 July 2020.
- Following commencement of the Amendment Act, any existing presumptions against treatment based on a criminal records or child protection order check, will no longer apply.

What practical steps should ART providers take to comply with the amendments?

- Following commencement of the Amendment Act and changes to the Assisted Reproductive Treatment Regulations 2019, ART providers should ensure that their consent forms are updated to reflect the removal of the requirement for criminal records and child protection order checks for those seeking treatment. ART providers should also review and update their policies and website content to reflect these changes.
- It is recommended that all staff engaged by ART providers are provided with relevant information and training as appropriate, to ensure they are aware of the amendments and their practical implications.
- Counsellors providing counselling to those seeking to undergo a treatment procedure should review their policies and practices ahead of the legislative changes, to ensure these are in line with the amendments once they commence.

How will the amendments change the requirements for treatment by ART providers?

- The effect of the amendments will be to remove the existing legislative requirement for an ART provider to consider whether a presumption against treatment arises in respect of a person seeking to access treatment procedures in Victoria.
- The requirements as to consent set out under section 11 of the ART Act will be revised by the amendments, so that the counsellor who provides counselling on behalf of an ART provider to the woman and her partner, if any, before they undergo a treatment procedure will no longer be required to:
 - provide a statement that he or she has sighted a criminal records check in relation to the woman and her partner, if any; or
 - request permission for a child protection order check to be conducted in relation to the woman and her partner, if any, as part of the consent process.
- Further, the current requirement for ART providers to conduct a child protection order check in relation to a person under section 12 of the ART Act will also be removed under the legislative changes. Accordingly, ART providers will no longer be required to ask the Secretary of the Department of Health and Human Services to prepare a statement as to whether a child protection order has been made removing a child from the care of the woman or her partner before carrying out a treatment procedure on the woman.

How will the amendments affect treatment carried out under a surrogacy arrangement?

- In circumstances where a treatment procedure is carried out under a surrogacy arrangement, the requirements set out in section 42 of the ART Act will be revised by the amendments so that the parties to the surrogacy arrangement will no longer need to undergo criminal records or child protection order checks prior to commencing treatment.

- For ART providers, this amendment means that a counsellor who provides counselling on behalf of an ART provider to the parties to a surrogacy arrangement will no longer be required to provide a statement that he or she has sighted a criminal records check for the individuals concerned.
- Moreover, ART providers will no longer be required to ask the Secretary of the Department of Health and Human Services to prepare a statement as to whether a child protection order has been made removing a child from the care of a person who is party to the surrogacy arrangement before carrying out a treatment procedure.

What options are available to an ART provider if they are concerned about the welfare of a child to be born from an ART treatment procedure?

- Although the existing presumption against treatment will be removed, certain legislative safeguards will remain in place.
- In deciding whether to treat any person, ART providers will have an ongoing statutory obligation to have regard to the Guiding principles set out in section 5 of the ART Act. These principles include that the welfare and interests of the child to be born are paramount.
- Accordingly, ART providers will continue to be able to refuse treatment following commencement of the amendments in circumstances where they reasonably believe that a child to be born from an ART treatment procedure may be at risk of abuse or neglect.
- In circumstances where ART providers refuse treatment as a result of concerns that a child to be born may be at risk of abuse or neglect, the Patient Review Panel will have a continuing role in reviewing such decisions by ART providers.

How will the amendments affect a person who was previously unable to access an ART procedure as a result of a presumption against treatment?

- A person who was previously unable to access an ART procedure or proceed with a surrogacy arrangement as a result of a presumption against treatment arising from a criminal records or child protection order check, or a determination by the Patient Review Panel that there is a barrier to treatment, will be able to seek treatment from an ART provider following commencement of the amendments.
- A person will also be able to seek treatment in circumstances where the Victorian Civil and Administrative Tribunal (VCAT) has previously upheld a decision by the Patient Review Panel in respect of an adverse determination, or such a decision by VCAT has been upheld by the Supreme Court.
- Being able to make an application for treatment at a later time recognises that a decision that there is a barrier to treatment is based on circumstances which exist at a particular point in time, and that those circumstances may change.
- ART providers will continue to have a statutory obligation to have regard to the Guiding principles set out in section 5 of the ART Act when making a decision about whether to provide treatment in these circumstances. These principles include that the welfare and interests of the child to be born are paramount.
- Treatment may be refused by ART providers to any individual, whether or not they were previously subject to a presumption against treatment or adverse determination, where they reasonably believe that a child to be born from treatment may be at risk of abuse or neglect. The Patient Review Panel will have an ongoing role in reviewing any decision by an ART provider on this basis.

How will the amendments affect individuals seeking treatment before commencement?

- It is intended that the amendments will commence on 8 July 2020.

- Until this time, the current provisions of the ART Act apply, which require a woman and her partner, if any, or parties to a surrogacy arrangement to undergo criminal records and child protection order checks prior to accessing treatment.
- ART providers should maintain a 'business as usual' approach to considering criminal records and child protection order checks and presumptions against treatment until commencement of the amendments.

How will the amendments affect individuals where criminal records and/or child protection checks are pending at the time of commencement?

- Following commencement of the amendments, there will no longer be a requirement for criminal records or child protection order checks to be completed in order to access assisted reproductive treatment. This means that a person could return to an ART provider where their application for treatment could continue to be progressed without waiting for the outcome of such checks. Any checks finalised after commencement will not need to be provided to a clinic.

How will the amendments affect individuals seeking treatment after commencement?

- From the date of commencement of the amendments, individuals will be able to access treatment through an ART provider without completing criminal records and child protection order checks.
- In practical terms, this means that individuals seeking treatment will no longer be required to undergo criminal records and child protection order checks under the ART Act will no longer be required to:
 - obtain and provide a counsellor with a criminal records check; or
 - give permission for a child protection order check to be conducted as part of the consent process.
- Any individual who was previously been unable to access treatment under the ART Act as a result of a presumption against treatment or decision by the Patient Review Panel that there is a barrier to treatment, will be able to commence treatment with an ART provider, if all other legislative requirements for treatment are satisfied.
- Treatment remains subject to certain safeguards including that the welfare and interests of a child to be born from treatment are paramount. In addition, a clinic can continue to refuse treatment if they reasonably believe that a child to be born from treatment may be at risk of abuse or neglect.

How will the amendments affect the functions of the Patient Review Panel?

- With the removal of the requirement for criminal records and child protection order checks, the Patient Review Panel will no longer undertake a review function in respect of a presumption against treatment.
- To the extent that an ART provider decides to refuse treatment on the basis that they reasonably believe that a child to be born from treatment may be at risk of abuse or neglect, the Patient Review Panel will continue to have a role in reviewing such decisions by an ART provider.