Queensland Health

Guidance for ART providers: Retrieval of gametes from deceased or unresponsive persons

Guidance for ART Providers | Assisted Reproductive Technology Act 2024

The Assisted Reproductive Technology 2024 (ART Act) includes provisions relating to posthumous and antemortem retrieval of gametes.

The ART Act includes a streamlined process to authorise the retrieval of gametes from a person after they have died. It also includes a process to retrieve gametes from a person if they are unresponsive before they die.

This fact sheet summarises the new process in Queensland, including assisted reproductive technology (ART) providers' obligations if they are involved in the process.

Previous process under the *Transplantation and Anatomy Act 1979*

Posthumous retrieval of gametes was previously permitted in Queensland under part 3 of the *Transplantation and Anatomy Act 1979* and supported by the relevant parts of the NHMRC Guidelines. However, the requirements in the Transplantation and Anatomy Act are general and relate to the posthumous donation of all tissue. They are not specific to gametes.

The Transplantation and Anatomy Act requires the authorisation or consent of the deceased person's senior available next of kin, along with the authorisation of a hospital's designated officer or a coroner, depending on whether or not the deceased person is in a hospital or in the coroner's jurisdiction.

New process under the ART Act

The new requirements are in part 2, division 5 of the ART Act. The new process automatically authorises the retrieval of gametes from a deceased or unresponsive person, provided a number of prerequisites are met.

Consent

The retrieval can only occur if appropriate consent is in place. In order for the retrieval to be authorised, there must be evidence that the person either:

- consented to the retrieval of their gametes for use in ART by their spouse; or
- had not expressly objected to the posthumous use of their gametes in an ART procedure for their spouse and the person is likely to have supported the posthumous use of their gametes for that purpose.

The ART Act is not prescriptive about what form this evidence can take. Everyone's circumstances are different. It could take the form of, for example:

- text messages and emails
- the spouse and family members' recollection of conversations with the deceased person.

What is important is that there is *some evidence* to support the retrieval.

For a person to be considered 'unresponsive' for the purposes of the ART Act, the following must be met:

- their respiration or circulation of blood is being maintained in a hospital by artificial means; and
- a medical practitioner, who is a designated officer[1] for the hospital, has certified in writing that they have carried out a clinical examination of a person and that they are of the opinion that the person would die if the artificial means of respiration or circulation of blood was withdrawn.

If the person's death is required to be reported to a coroner, or a coroner is investigating the death, there is an additional step. The retrieval is not authorised unless a coroner has:

- given consent for the retrieval; or
- has advised that a coroner's consent is not required.

Request

Only certain people are authorised to make a request to retrieve a gamete:

- the deceased person's spouse;[2] or
- in exceptional circumstances, any member of the deceased person's or the spouse's family, acting on the spouse's behalf.

Exceptional circumstances where it would be appropriate for a family member to make such a request are that an urgent decision must be made for the gamete to be successfully used in the future and the spouse:

- is incapacitated and cannot reasonably make an informed decision; or
- the spouse cannot be contacted despite reasonable attempts to do so.

This may happen, for example:

- where a couple are involved in an accident that kills one partner and leaves the other unconscious in hospital (and thus unable to request the retrieval); or
- where the spouse is overseas or in a remote location and is unable to be contacted.

Retrieval

Once these prerequisites are met, the retrieval of a gamete must be performed by, or under the supervision of, a medical practitioner. The retrieved gametes can then be stored by an ART provider.

Queensland Health does not need to be involved in these processes in its capacity as the regulator of the ART Act. No authorisation from Queensland Health is necessary. Queensland Health will only become involved if any potential issues with compliance arise.

The ART Act clarifies the spouse's surrogate may also use the gametes retrieved in an ART procedure.

[1] A designated officer is defined in section 6 of the *Transplantation and Anatomy Act 1979* as the medical superintendent of a hospital and his or her nominees (being medical practitioners) appointed by the medical superintendent in writing. The person or body having control and management of a hospital may also appoint persons to be designated officers. For the ART Act, the designated person must be a medical practitioner.

[2] This includes de facto and civil partners.

Obligations for ART providers

In short, your obligations under the ART Act, before performing any posthumous or antemortem gamete retrieval procedure are:

- if the person is still alive but unresponsive, obtain certification in writing from a hospital's designated officer that they are of the opinion that the person would die if artificial respiration or circulation of blood was withdrawn.
- confirm that the person requesting the retrieval is the deceased person's spouse, or a family member of the deceased person or spouse, if exceptional circumstances exist.
- confirm that there is evidence that the deceased or unresponsive person either:
  - consented to the retrieval of their gametes for their spouse's use; or
  - had not expressly objected to the posthumous use of their gametes in an ART procedure for their spouse; and is likely to have supported the use.
- if the deceased person is in the coroner's jurisdiction, ensure a coroner has either given consent for the retrieval or has advised that their consent is not required.
- arrange for the retrieval to be performed by, or under the supervision of, a medical practitioner.

If the retrieval occurs at a hospital, the designated officer, who is also a medical practitioner, must record the following in the person's hospital record as soon as practicable after the retrieval:

- the retrieval of the gamete;
- the name of the person who requested the retrieval; and
- if the person who requested the retrieval was not the spouse, the exceptional circumstances that applied.

Subsequent use of gametes from deceased or unresponsive people

There is a separate process in the ART Act to authorise the subsequent use of the retrieved gametes in an ART procedure. Those provisions will commence at a later date, following the implementation period. This will allow time for the subordinate regulation supporting the ART Act to be developed, which is proposed to include more information about this process, particularly regarding the qualifications of an independent review body that will need to authorise use of the gametes. In the interim, ART providers should continue with current practices for determining use of gametes from deceased people under the NHMRC Guidelines. This includes ensuring sufficient time has passed so that:

- grief and related emotions do not interfere with decision-making;
- the prospective parent has undergone counselling; and
- an independent body has reviewed the circumstances and supports the proposed use.

The new process in the ART Act is substantially similar to the current process. It will authorise ART providers to use a gamete that has been retrieved from a deceased or unresponsive person in an ART procedure if its use has been authorised by an *independent review body*.

Note that this will not be a single body, but rather any body that meets the requirements in the legislation.

An independent review body must consist of one or more persons who are not engaged by the ART provider in providing ART services. The qualifications of the body or individual will be prescribed in regulation, and are expected to include a clinic's ethics committee (if it has one) or an appropriately qualified fertility counsellor.

When considering authorising the use of gametes, an independent review body will be required to consider a range of factors, namely:

- whether the spouse has the capacity to consent to the procedure;
- whether the spouse has undertaken appropriate counselling;
- the best interests of any child born as a result of the procedure, including:
  - whether the spouse has the capacity to provide for the child's emotional, intellectual and other needs; and
  - whether the child is likely to have safe and stable living arrangements; and
- any other matter an independent review body considers appropriate.

Additional information

The information in this document should not be relied on as a substitute for other professional or legal advice.

This guidance is designed to be read alongside, and is not a substitute for, the:

- *Assisted Reproductive Technology Act 2024*
- Supporting explanatory notes

Key contacts

For more information contact the Assisted Reproductive Technology Unit:
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