POSTHUMOUS GAMETE RETRIEVAL AND REGULATORY DISCONNECTION: AN ANALYSIS OF AUSTRALIAN CASE LAW

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In light of the Western Australian Supreme Court decision in Ex parte CH *(2023), this article examines the use of human tissue legislation to authorise posthumous gamete retrieval across Australia. While courts routinely rely on these statutes to permit retrieval, their application is flawed in this context given that many jurisdictions prohibit the subsequent use of gametes in posthumous conception. Through an analysis of statutory frameworks and relevant case law, the article argues that current legislative approaches are misaligned. It calls for a unified legal regime that regulates both retrieval and use, to ensure coherence and prevent unnecessary litigation for surviving partners.*

I INTRODUCTION

On 21 December 2023, Seaward J of the Supreme Court of Western Australia delivered a written judgment authorising the retrieval of sperm from a deceased man.[1] The facts of *Ex parte CH*[2] are particularly distressing. The couple were married for 40 years and had two children together, both of whom had died in separate tragic accidents not many years apart.[3] The applicant testified that prior to her husband's death, the couple had a settled intention of using his sperm with a surrogate to have another child.[4] Indeed, the couple had visited fertility experts in this regard and had

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[1] *Re Section 22 of the Human Tissue and Transplant Act 1982* (WA); *Ex parte CH* [2023] WASC 487 ('*Ex parte CH')*.

[2] Ibid.

[3] Ibid [6]–[7].

[4] Ibid [11].

considered the applicant's cousin as a potential surrogate.[5] Despite these preliminary plans, extenuating circumstances including COVID-19 and the death of the applicant's mother-in-law prevented the couple from storing the deceased's sperm before he passed, leading to the present application.[6]

This case is not unique, and the issue of posthumous gamete retrieval has been considered by courts across Australia on several occasions, including in Western Australia ('WA').[7] This particular case garnered media attention due to the age of the surviving partner.[8] The applicant, aged 62, is significantly older than the typical claimant in these types of cases.[9] Generally speaking, requests for posthumous gamete retrieval come from surviving partners of reproductive age and in circumstances where they will carry the pregnancy themselves.[10] This case therefore raises ethical concerns on the use of surrogacy with posthumous conception and sparks broader debate on the morality of aging parenthood in the age of assisted human reproduction. Beyond these concerns, however, what this case has truly highlighted is a growing trend of regulatory disconnect across Australia in posthumous gamete retrieval cases, and such is the central issue considered by this article.

Posthumous gamete retrieval is not specifically governed by legislation in WA. In *Ex parte CH*,[11] the Court followed a line of factually similar cases and deemed the retrieval of sperm lawful under section 22 of the *Human Tissue and Transplant Act*

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[5] Ibid [8].
[6] Ibid [10].
[7] See *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C* [2013] WASC 3 ('*Ex parte C*'); *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte H* [2020] WASC 99 ('*Ex parte H*'); *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte M* [2008] WASC 276 ('*Ex parte M*'); *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte P* [2022] WASC 477 ('*Ex parte P*'); *S v Minister for Health (WA)* [2008] WASC 262.
[8] Royce Kurmelovs, 'Western Australian woman, 62, permitted to have sperm removed from her dead husband', *The Guardian* (online, 3 January 2024) <https://www.theguardian.com/australia-news/2024/jan/03/wa-woman-sperm-removed-dead-husband-fertilisation-wa-supreme-court>; Rachel Siden, 'Australian court allows 62-year-old woman to have dead husband's sperm collected', *PET Bionews* (online, 8 January 2024) <https://www.progress.org.uk/australian-court-allows-62-year-old-woman-to-have-dead-husbands-sperm-collected/>.
[9] Ibid.
[10] Although this is not always the case and there has been a recent increase in cases whereby surviving parents have requested the retrieval of gametes from their deceased children with the aim of using the gametes in posthumous conception to have genetic grandchildren. See *R (on the application of Mr and Mrs M) v Human Fertilisation and Embryology Authority* [2016] EWCA Civ 611; *Petithory Lanzmann v France*, App No 23038/19 (ECtHR, 12 November 2019); *Re Estate of Nikolas Colton Evans*, No C-1-PB-09-000304, 2009 WL 7729555 (Tex Prob 7 April 2009); Georgia Canton, 'Woman Uses Dead Son's Sperm for IVF Grandchildren', *Bionews* (online, 19 February 2018) <https://www.bionews.org.uk>; Anthony Starza-Allen, 'Texan Judge Permits Post-Mortem Sperm Collection', *Bionews* (online, 14 April 2009) <https://www.bionews.org.uk/>.
[11] *Ex parte CH* (n 1).

1982 (WA).[12] This provision permits designated officers to harvest 'tissue' from a corpse for specified purposes, at the request of the deceased's most senior available next of kin.[13] Despite this finding however, any subsequent use of the harvested gametes is currently prohibited in WA.[14] This is due to ministerial directions that prevent state licence holders from using, or authorising the use of, gametes in assisted reproduction after the gamete source has died.[15] As such, if the applicant in *Ex parte CH* does intend to use the gametes in the future, she will need to pursue further litigation and have the sperm transferred to a storage facility in a jurisdiction where posthumous conception is lawful.[16] The Court alluded to this reality in its judgment and emphasised that the terms of the current order were limited to gamete retrieval only, and did not pertain to any future use of the gametes by the applicant in WA.[17]

To date, several cases across Australia have seen courts closely scrutinise the relevant jurisdiction's human tissue legislation, leading to varied conclusions on whether the statutes may be used for posthumous gamete retrieval.[18] *Ex parte CH* represents yet another example in a line of divided litigation where an Australian court *has* invoked state human tissue legislation in this context.[19] However, given that the gametes cannot be used by the applicant in WA for the very purpose for which they were harvested, ie for posthumous conception, it seems implausible that the legislation was intended for such use.[20] The ability to harvest sperm under the

[12] *Human Tissue and Transplant Act 1982* (WA) s 22(1)–(2)(b); *Ex parte CH* (n 1) [25]–[26], citing the decisions in n 7 above.
[13] *Human Tissue and Transplant Act 1982* (WA) s 22(1)–(2)(b). The specific purposes for which tissue can be harvested are outlined in s 22(1)(b). They include use of the tissue for therapeutic, medical, or scientific purposes.
[14] Western Australia, *Human Reproductive Technology Act 1991* Directions, No 201, 30 November 2004, 5435 Direction 8.9 ('Direction 8.9').
[15] Ibid.
[16] This has been the general trend in the case law: *Kate Jane Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118; *Re Estate of Edwards* (2011) 81 NSWLR 198; *Re H, AE (No 3)* [2013] SASC 196 ('*Re H, AE*'); *Roblin v Public Trustee for the Australian Capital Territory* [2015] ACTSC 100; *Re Cresswell* [2019] 1 Qd R 403; *Chapman v South Eastern Sydney Local Health District* [2018] NSWSC 1231 ('Chapman'); Amy Thomasson and Marco Rizzi, 'Consent in Posthumous Reproduction: Giving the Deceased a Voice without Drowning out the Living in Cases of Unexpected Death' (2021) 48 *University of Western Australia Law Review* 557, 558.
[17] *Ex parte CH* (n 1) [30].
[18] See, eg, *Re Gray* [2001] 2 Qd R 35; *Baker v Queensland* [2003] QSC 2; *Y v Austin Health* (2005) 13 VR 363; *Re Cresswell* (n 16); *Chapman* (n 16).
[19] Ibid [25]–[28].
[20] Direction 8.9 (n 14).

statute is merely a technicality, highlighting a classic case of regulatory disconnection.[21]

In light of the ruling in *Ex parte CH*, this piece questions the applicability of Australian human tissue legislation to posthumous gamete retrieval. Part II introduces the concept of regulatory disconnection and outlines how it manifests in cases of posthumous gamete retrieval. It then provides a comprehensive overview of the regulatory context for posthumous gamete retrieval and conception across Australia. Part III critiques the case law on this issue and examines whether human tissue statutes are appropriately invoked in these cases. The case law considered in Part III focuses exclusively on posthumous sperm retrieval. This is due to the lack of available case law on the retrieval and use of female gametes in posthumous conception. In addition, the case law considered is limited to *post-mortem* sperm retrieval and does not consider the retrieval of gametes from comatose or dying patients. Ultimately, this article argues that human tissue legislation was not drafted with assisted human reproduction in mind and is therefore being misapplied by Australian courts in these cases. It proposes that posthumous gamete retrieval should be regulated independently from human tissue statutes and should align with any existing state or territory laws governing the use of gametes in posthumous conception. This will ensure that gametes are not harvested in circumstances where they cannot be used.

II Regulatory Disconnection and Posthumous Conception

This Part introduces the concept of regulatory disconnection and outlines how this can arise in cases of posthumous gamete retrieval. In addition, this Part provides an overview of the regulatory context for posthumous gamete retrieval and conception across Australia. It examines the national regulation of artificial reproductive technology ('ART'), and explores how state and territory laws, alongside the National Health and Medical Research Council ('NHMRC') guidelines, specifically address posthumous gamete retrieval and conception. In doing so, this Part provides context for which the case law can be later critiqued.

[21] Rosalind Croucher, 'Laws of Succession versus the New Biology: Reflections from Australia' (2017) 23(1) *Trusts and Trustees* 66, 67; Christopher Mills, 'Australia after Cresswell and Chapman: A Legal and Regulatory Paradox, or an Opportunity for Uniformity?' (2020) 27(3) *Journal of Law and Medicine* 741, 741.

A *Regulatory Disconnection*

Regulatory disconnection has been described as the mismatch between current laws and new technologies.[22] It occurs when regulatory approaches are designed for the technological landscape of the past and require 'reconnection'.[23] This can be seen when new technologies are not covered by existing laws and enter a regulatory void, or alternatively, when older technologies morph beyond the forms that were originally contemplated by earlier regulatory regimes and there is ambiguity regarding the application of existing regulations.[24] The latter scenario is evident in gamete retrieval cases across Australia, where courts have been inconsistent on whether human tissue legislation can be used in this context.[25]

The regulatory disconnection across Australia stems directly from the legal distinction made between posthumous gamete retrieval and its subsequent use. For viable sperm to be procured from a deceased man, the retrieval must be carried out promptly, ideally within the first 24 to 36 hours after death.[26] Thus, courts typically treat requests for posthumous gamete retrieval on an interlocutory basis. If the application for retrieval is granted, the Court can deal with the matter of using the gametes in posthumous conception at a later stage.[27] When the gamete retrieval procedure is considered by courts in isolation, judges need not consider the wider regulatory context and any subsequent use of the tissue by the applicant is not determined until a later date.[28] It is this distinction between retrieval and use that creates a regulatory gap and leads to inconsistent decisions such as in *Ex parte CH*, where courts can (by technicality) utilise human tissue statutes to authorise posthumous gamete retrieval even when the gametes cannot be lawfully stored or used in that jurisdiction by virtue of ancillary laws.[29]

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[22] Roger Brownsword, *Rights, Regulation and the Technological Revolution* (Oxford University Press, 2008) 160.
[23] Lyria Bennett Moses, 'How to Think about Law, Regulation and Technology: Problems with "Technology" as a Regulatory Target' (2013) 5(1) *Law, Innovation and Technology* 1, 7.
[24] Ibid.
[25] Mills (n 21) 741; Benjamin Kroon et al, 'Post-Mortem Sperm Retrieval in Australasia' (2012) 52 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 487, 488.
[26] Cappy Miles Rothman, 'A Method for Obtaining Viable Sperm in the Postmortem State' (1980) 34(5) *Fertility and Sterility* 512, 512.
[27] Croucher (n 21) 67. See, eg, *Re Denman* [2004] QSC 70; *Y v Austin Health* (n 18).
[28] This reasoning formed the basis of Habersberger J's decision in the Victorian Supreme Court case of *Y v Austin Health* (n 18) [68]. The Judge noted that if the Court had refused the widow's application for posthumous sperm retrieval, then she could never become pregnant by the deceased. However, if the application was granted, the possibility of using the sperm in the future remained open to the plaintiff, pending further consideration by the court.
[29] Shelly Simana, 'Creating Life after Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?' (2018) *Journal of Law and Biosciences* 329, 331.

B *The Regulatory Context*

1 *Regulation of ART in Australia*

The Commonwealth of Australia is a federation consisting of six states: New South Wales ('NSW'), Queensland, South Australia ('SA'), Tasmania, Victoria, and WA, and two mainland self-regulating territories: the Northern Territory ('NT') and Australian Capital Territory ('ACT'). Under the federal system of government, the power to make law is divided between a central parliament and regional parliaments.[30]

It is not within the remit of the Australian federal Parliament to enact national laws on ART. Like many matters in relation to health, legislating on the use of ART falls within the power of individual state and territory parliaments.[31] In this regard, each Australian state and territory has separate laws relating to ART.[32]

Table 1

State/Territory	**Artificial Reproductive Technology Statute**
Victoria	*Assisted Reproductive Treatment Act 2008* (Vic)
New South Wales	*Assisted Reproductive Technology Act 2007* (NSW)
Queensland	*Assisted Reproductive Technology Act 2024* (Qld)
South Australia	*Assisted Reproductive Treatment Act 1988* (SA)
Western Australia	*Human Reproductive Technology Act 1991* (WA)
Tasmania	No ART legislation
Northern Territory	No ART legislation (adopts South Australian law)
Australian Capital Territory	No ART legislation

[30] Parliamentary Education Office and Australian Government Solicitor, *Australian Constitution with Overview and Notes by the Australian Government Solicitor* (October 2010) 4 <https://www.pmc.gov.au/sites/default/files/foi-logs/foi-2021-017.pdf>/

[31] Despite this, in 2002, the Council of Australian Governments agreed to pass nationally consistent laws which prohibited human cloning and other unacceptable practices associated with reproductive technology. The *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) bans certain practices in relation to human embryos and cloning. In addition, the *Research Involving Human Embryos Act 2002* (Cth) regulates the creation and use of human embryos outside of the human body and imposes sanctions on those who misuse embryos. These are national statutes and are applicable to all Australian states and external territories: Sonia Magri, 'Research on Human Embryos, Stem Cells and Cloning: One Year Since the Passing of Australian Federal Legislation: Australia, Around the World, and Back Again' (2003) 10(4) *Murdoch University Electronic Journal of Law* 35, 35.

[32] Belinda Bennett, 'Posthumous Reproduction and the Meaning of Autonomy' (1999) 23(2) *Melbourne University Law Review* 286.

States such as WA and Victoria have enacted extensive ART legislation in the form of the *Human Reproductive Technology Act 1991* (WA) and the *Assisted Reproductive Treatment Act 2008* (Vic). The *Human Reproductive Technology Act 1991* (WA) establishes a Reproductive Technology Council[33] and provides for a Code of Practice to set out the rules and guidelines for ART in WA.[34] The legislation also establishes a licencing system for ART providers in the state[35] and prohibits certain practices in relation to human cloning, the use of human gametes, and embryo research.[36] Likewise, Victoria's *Assisted Reproductive Treatment Act 2008* (Vic) is an extensive statute that establishes the Victorian Assisted Reproductive Treatment Authority[37] and Patient Review Panel.[38] In addition, the Act provides for a mandatory system of registration for ART clinics[39] and regulates a range of ART practices such as surrogacy,[40] the use of gametes and embryos, and posthumous conception.[41]

The ART legislation in NSW and SA is not as comprehensive. The *Assisted Reproductive Technology Act 2007* (NSW) establishes a system of registration for ART providers.[42] However, the NSW statute only regulates certain aspects of ART such as the use of gametes and embryos,[43] and surrogacy.[44] Similarly, the *Assisted Reproductive Treatment Act 1988* (SA) merely provides for a system of registration for ART providers.[45] Queensland has more recently enacted the *Assisted Human Reproductive Treatment Act 2024* (Qld), which introduces a licensing and oversight regime for ART providers.[46] However, the Act has only been partially commenced, and as such, its regulatory framework is not yet fully operational.[47]

The NT does not have any specific ART legislation in place. However, the NT tends to adopt the position at law in SA. The NT Department of Health requires that clinics in that jurisdiction comply with the SA ART statute, provided such compliance does not

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[33] *Human Reproductive Technology Act 1991* (WA) pt 2 s 8.
[34] Ibid pt 3.
[35] Ibid pt 4 div 1.
[36] Ibid pt 4A–4B.
[37] *Assisted Reproductive Treatment Act 2008* (Vic) pt 10.
[38] Ibid pt 9.
[39] Ibid pt 8.
[40] Ibid pt 4.
[41] Ibid pt 5.
[42] *Assisted Reproductive Technology Act 2007* (NSW) pt 2 div 1 s 6.
[43] Ibid pt 2 div 3.
[44] Ibid pt 3 div 3.
[45] *Assisted Reproductive Treatment Act 1988* (SA) pt 2.
[46] *Assisted Human Reproductive Act 2024* (Qld) pt 2 div 1.
[47] 'Guidance for Assisted Reproductive Technology Providers on Commencement, Assisted Reproductive Technology Act 2024', *Queensland Health* (Web Page, 2024) <https://www.health.qld.gov.au/__data/assets/pdf_file/0023/1360832/assisted-reproductive-technology-guidance.pdf>.

conflict with any NT laws.[48] Tasmania and the ACT do not have any legislation which regulates the use of ART. These regions tend to follow national guidelines and codes of practices closely.[49]

2 *Regulation of ART practice and research*

The regulation of clinical practice and medical research varies considerably throughout the country. WA follows a licencing system.[50] Any clinic conducting ART in WA must be in receipt of a licence granted by the Commissioner of Health.[51] Likewise, ART legislation in Queensland will require clinics to have a licence.[52] However, this part of the statute has yet to commence.[53] SA, Victoria, and NSW adhere to a system of registration. It is expected that clinics who provide ART services in these states are registered with the appropriate body.[54] The NT also follows a system of registration by virtue of the requirements in SA. ART Treatment centres in Tasmania, and the ACT are self-regulated. They are not required to be licenced or registered to provide ART services.[55]

At a national level, the Fertility Society of Australia ('FSA') is the self-regulating body that represents doctors, researchers and consumers in reproductive matters across the country.[56] In 1987, the FSA established a subcommittee, the Reproductive Technology Accreditation Committee ('RTAC'), to set standards for the use of ART across Australia and to offer accreditation to treatment centres that adhere to national standards and the FSA Code of Practice.[57] The current code of practice was revised in 2024. Its primary objective is to continually monitor and improve the quality of care offered to people receiving fertility treatment.[58] The code outlines criteria which must be adhered to by clinics to achieve accreditation from the

[48] SA laws then in force continue to apply in the NT (unless repealed or inconsistent): *Northern Territory Interpretation Act 1978* (NT) s 3.
[49] Ibid.
[50] *Human Reproductive Technology Act 1991* (WA) pt 4 div 1.
[51] Ibid s 27.
[52] *Assisted Human Reproductive Act 2024* (Qld) pt 2 div 1.
[53] *Queensland Health* (n 47).
[54] *Assisted Reproductive Treatment Act 1988* (SA) pt 2; *Assisted Reproductive Treatment Act 2008* (Vic) pt 8; *Assisted Reproductive Technology Act 2007* (NSW) pt 2 div 1 s 6.
[55] Samantha Pillay, 'Assisted Reproductive Technology in Australia: The Legal Landscape', *Barry Nillsson* (Blog Post, 18 June 2025) <https://bnlaw.com.au/knowledge-hub/insights/assisted-reproductive-technology-in-australia-the-legal-landscape/>.
[56] 'About FSA', *Fertility Society of Australia* (Web Page, 2019) <https://www.fertilitysociety.com.au>.
[57] 'RTAC', *Fertility Society of Australia* (Web Page, 2019) <https://www.fertilitysociety.com.au/rtac/>.
[58] The Fertility Society of Australia and New Zealand Reproductive Technology Accreditation Committee, *Code of Practice for Assisted Reproductive Technology Units* (December 2024) 2.

RTAC.[59] It also provides general standards for clinical practice.[60] Accredited clinics are audited each year and a failure to comply with national standards can result in loss of accreditation.[61] Registration laws in some states require that treatment centres are accredited by the RTAC. For instance, in Victoria registered ART providers must first have prior accreditation from the RTAC.[62]

The National Health and Medical Research Council ('NHMRC'), which is Australia's specialist body for health and medical research, is also relevant here. It is the primary funding body for medical research in Australia and is responsible for setting and maintaining quality standards in relation to public health and health research.

The NHMRC issues guidelines on a range of issues such as clinical practice, public and environmental health, research and ethics.[63] In terms of ART, the NHMRC first published the *Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* in 2017.[64] These guidelines are intended for clinicians and researchers, and outline various ethical standards for the use of ART.[65] The guidelines deal with matters relating to the storage and donation of gametes and embryos[66] and also provide guidance on more ethically contentious issues such as surrogacy, sex selection and posthumous conception.[67] In addition, the guidelines contain a set of principles which guide the general practice of ART and support clinicians in decision making.[68]

The NHMRC guidelines are intended to be read in conjunction with existing federal, state or, territory legislation. They create an expansive framework for the use of ART across Australia.[69] It is expected that all Australian clinics engaging in ART procedures will abide by these principles. However, the guidelines do not have legislative force.[70] The strength of their influence is determined by the RTAC

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[59] Ibid 2.
[60] Ibid 1.
[61] Ibid 6.
[62] *Assisted Reproductive Treatment Act 2008* (Vic) s 74. Regulations in SA also require RTAC accreditation for the purposes of registration: *Assisted Reproductive Treatment Regulations 2010* (SA) cl 6.
[63] 'About Us', *National Health and Medical Research Council* (Web Page) <https://www.nhmrc.gov.au/about-us>.
[64] National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2017* (updated 2023) ('NHMRC').
[65] Ibid 14.
[66] Ibid 37 and 39.
[67] Ibid 45, 48 and 55.
[68] Ibid 14.
[69] Ibid 11.
[70] Anita Stuhmcke, 'The Legal Regulation of Foetal Tissue Transplantation' (1996) 4 *Journal of Law and Medicine* 131, 135.

accreditation process which requires compliance with the guidelines.[71] As such, only practitioners in states such as SA and Victoria are legally obligated to follow the guidelines and could incur fines if they fail to do so.[72] Other states which have legislation for ART in place simply use the guidelines as an overarching framework for conducting ART procedures.[73]

3 *Regulation of posthumous conception under state and territory legislation*

At present, the states of Victoria, Queensland, and NSW are the only jurisdictions in Australia whose ART legislation makes provision for posthumous conception.

Table 2

State/Territory	**Provisions for Posthumous Conception**
Victoria	Use permitted under ss 46–48 *Assisted Reproductive Treatment Act 2008* (Vic)
New South Wales	Use permitted under ss 17–23 *Assisted Reproductive Technology Act 2007* (NSW)
Queensland	Use permitted under ss 26-31 *Assisted Reproductive Technology Act 2024* (Qld)
South Australia	NHMRC guidelines
Western Australia	Posthumous use of gametes entirely prohibited under Direction 8.9 pursuant to *Human Reproductive Technology Act 1991* (WA)
Tasmania	NHMRC guidelines
Northern Territory	NHMRC guidelines
Australian Capital Territory	NHMRC guidelines

[71] Keith Harrison et al, 'Continuous Improvement in National ART Standards by the RTAC Accreditation System in Australia and New Zealand' (2017) 57 *New Zealand Journal of Obstetricians and Gynaecologists* 49, 50.

[72] SA has given the guidelines some legislative force by virtue of their statutory registration requirements: Sonia Allen, 'Post-Humous Use of Gametes' (2018) *Health Law Central, Information, Education, Research and Policy* <http://www.healthlawcentral.com/assistedreproduction/post-humous-use-gametes/>; *Assisted Reproductive Treatment Regulations 2010* (SA) cl 6. Compare *Assisted Reproductive Treatment Act 2008* (Vic) s 74.

[73] Croucher (n 21) 72.

The laws in Victoria, Queensland, and NSW are restrictive and require that pre-mortem written consent has been obtained from the gamete provider prior to undertaking the procedure.[74] In both Victoria and Queensland, additional approval is also required from an independent Patient Review Panel before the gametes or embryos can be used.[75] The requesting party must also have undergone professional counselling prior to the procedure. ART legislation in NSW further requires the person receiving treatment to acknowledge and provide written consent to the use of the deceased's gametes.[76]

ART legislation in WA does not regulate posthumous conception.[77] However, as noted earlier in this article, directions published by the Minister for Health do not permit licence holders to knowingly use or authorise the use of gametes in treatment after the source has died.[78] Thus, in WA, posthumous conception is entirely prohibited.[79] Other states and territories do not have any statutory provisions in place to either permit or forbid the practice of posthumous conception. As such, they rely on the NHMRC guidelines on this issue.[80]

4 *Regulation of posthumous conception under NHMRC Guidelines*

The NHMRC *Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* were most recently updated in 2023 and include specific provisions regarding posthumous conception.[81] The guidelines deem posthumous conception to be a controversial practice that raises specific ethical issues.[82] Clinics are required to have clear policies in place for the storage of gametes or embryos, and the source should clearly stipulate their position on what is to be done with stored cells in the event of death.[83] Unless a particular state or territory prohibits the continued storage of gametes or embryos after death, the guidelines provide that the cells should remain in storage and be made available for use, or be disposed of in accordance with the wishes of the deceased as expressed in their storage consent form.[84] There is an express prohibition on the posthumous use of stored gametes or

[74] *Assisted Reproductive Treatment Act 2008* (Vic) s 46(b); *Assisted Reproductive Technology Act 2007* (NSW) s 23(a); *Assisted Reproductive Technology Act 2024* (Qld) s 22(1)(a).
[75] *Assisted Reproductive Treatment Act 2008* (Vic) s 47; *Assisted Reproductive Technology Act 2024* (Qld) s 31(3).
[76] *Assisted Reproductive Technology Act 2007* (NSW) s 23(c).
[77] *Human Reproductive Technology Act 1991* (WA).
[78] Direction 8.9 (n 14).
[79] Ibid.
[80] Croucher (n 21) 72.
[81] NHMRC (n 64).
[82] Ibid 42.
[83] Ibid 55.
[84] Ibid 57.

embryos if the deceased has expressed an objection to this throughout their lifetime.[85]

The guidelines further provide for limited instances in which the absence of consent will not act as a bar to treatment. This is in cases where the gametes or embryos in question were placed in storage prior to the publication of the guidelines. As clinics were not previously required to document the source's views on posthumous conception, the source's wishes may not be available.[86] Furthermore, the guidelines acknowledge that gametes can be harvested from the deceased post-mortem. Thus, their views in this respect may be unknown.[87] In these scenarios, consent requirements are not as demanding, and the guidelines provide that clinics may provide treatment if the request comes from the deceased's surviving spouse or partner and there is some evidence that the deceased would have supported the application, or at the very least, there is no indication that they would have objected.[88]

5 *Posthumous gamete retrieval*

The only ART statute in Australia that provides for posthumous gamete retrieval is Queensland's *Assisted Reproductive Technology Act 2024* (Qld).[89] Although legislation in both Victoria and NSW provides for the use of gametes and embryos in posthumous conception, neither statute legislates for the retrieval of gametes post-mortem.[90] The NHMRC guidelines do provide for clinics to harvest gametes after death if the request comes from the deceased's surviving partner and there is no evidence that the deceased would have objected.[91] The guidelines advise that court approval is sought prior to the retrieval, and further state that courts should have an appropriate legal basis in which to grant the order.[92] In this regard, much of the case law focuses on whether human tissue legislation is an acceptable legal basis in this context.[93]

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[85] Ibid.
[86] Ibid 56.
[87] Ibid.
[88] Ibid 57.
[89] *Assisted Reproductive Treatment Act 2024* (Qld) s 31.
[90] *Assisted Reproductive Treatment Act 2008* (Vic) s 46; *Assisted Reproductive Technology Act 2007* (NSW) s 23(a).
[91] NHMRC (n 64) 56.
[92] Ibid.
[93] See, eg, *Re Estate of Edwards* (n 16); *Re H, AE* (n 16); *Ex parte C* (n 7); *Re Gray* (n 18); *Baker v Queensland* (n 18); *Re Cresswell* (n 16).

All Australian states and territories have distinct human tissue legislation (see Table 3). There are subtle differences across the statutes. However, in every human tissue statute across the country, the term 'tissue' has been defined broadly to include: an organ; a part of the human body; or a *substance* which has been extracted from, or from a part of, the human body.[94] The only instance in which sperm and ova are precluded from this definition of tissue is for the purpose of the donation of tissue by a living person. Thus, for certain legislative purposes, gametes will fall under the definition of 'tissue'.[95]

Table 3

State/Territory	**Provision for Removal of Human Tissue**
Victoria	Section 26 *Human Tissue Act 1982* (Vic)
New South Wales	Section 23 *Human Tissue Act 1983* (NSW)
Queensland	Section 22 *Transplantation and Anatomy Act 1979* (Qld)
Southern Australia	Section 21 *Transplantation and Anatomy Act 1983* (SA)
Western Australia	Section 22 *Human Tissue and Transplant Act 1982* (WA)
Tasmania	Section 23 *Human Tissue Act 1985* (Tas)
Northern Territory	Section 19(A) *Transplantation and Anatomy Act 1979* (NT)
Australian Capital Territory	Section 27 *Transplantation and Anatomy Act 1978* (ACT)

[94] *Human Tissue and Transplant Act 1982* (WA) s 3; *Human Tissue Act 1982* (Vic) s 3; *Human Tissue Act 1983* (NSW) s 4; *Transplantation and Anatomy Act 1979* (Qld) s 4; *Transplantation and Anatomy Act 1983* (SA) s 5; *Human Tissue Act 1985* (Tas) s 3; *Transplantation and Anatomy Act 1978* (ACT) s 2; *Transplantation and Anatomy Act 1979* (NT) s 4.

[95] Nicola Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand' (2015) 46(3) *Victoria University of Wellington Law Review* 725, 744.

Each statute grants designated officers the authority to harvest 'tissue' from a corpse.[96] If the deceased has not consented to the harvesting of tissue after their death, the provisions permit the deceased's most senior available next of kin to consent on the deceased's behalf. Prior to carrying out the extraction, the designated officer must make sufficient inquiries and be satisfied that the deceased would not have objected to this.

In addition, all statutes require that the tissue is harvested for the purposes of transplantation into the body of another living person, or for use in other therapeutic, medical, or scientific purposes.[97] It is this aspect of the respective statutes which has prevented some courts from using human tissue legislation as a basis for gamete retrieval.[98] Courts have been divided on whether the retrieval of gametes for use in posthumous conception falls under one of these designated purposes.[99] Notably, since the partial commencement of Queensland's *Assisted Reproductive Technology Act 2024* (Qld), the *Transplantation and Anatomy Act 1979* (Qld) no longer applies to the retrieval of gametes for posthumous conception in Queensland.[100]

III An Analysis of Gamete Retrieval Cases

This Part provides an analysis of leading cases on posthumous gamete retrieval and critiques the courts' use of human tissue legislation in these cases. In doing so, this Part demonstrates how the lack of uniform laws on both posthumous gamete retrieval and conception has led to several instances of regulatory disconnection across Australia. The result has been inconsistent rulings, whereby courts authorise gametes to be retrieved posthumously under human tissue statutes, but the gametes cannot be used by the applicant in that jurisdiction by virtue of ancillary laws.

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[96] *Human Tissue and Transplant Act 1982* (WA) s 22; *Human Tissue Act 1982* (Vic) s 26; *Human Tissue Act 1983* (NSW) s 23; *Transplantation and Anatomy Act 1979* (Qld) s 22; *Human Tissue Act 1985* (Tas) s 23; *Transplantation and Anatomy Act 1978* (ACT) s 27; *Transplantation and Anatomy Act 1979* (NT) s 19(A).

[97] *Human Tissue Act 1982* (Vic), s 26(1)(a)–(b); *Human Tissue and Transplant Act 1982* (WA) s 22(1)(a)–(b). The *Transplantation and Anatomy Act 1979* (NT) s 19(A) states that the tissue must be removed from the deceased for an 'authorised purpose'. 'Authorised purpose' is defined in s 4(a) of that Act as 'transplantation to another person's body, use for other therapeutic purposes and use for other medical or scientific purposes'. See further *Transplantation and Anatomy Act 1978* (ACT) s 27(1)(a); *Transplantation and Anatomy Act 1979* (Qld) s 22(1)(c); *Transplantation and Anatomy Act 1983* (SA) s 21(1)(a)–(b); *Human Tissue Act 1985* (Tas) s 23(1)(a); *Human Tissue Act 1983* (NSW) s 23(1)(a).

[98] *Re Gray* (n 18); *Baker v Queensland* (n 18).

[99] *Re Gray* (n 18); *Y v Austin Health* (n 18); *Re Cresswell* (n 16).

[100] *Assisted Reproductive Treatment Act 2024* (Qld) s 32.

The traditional approach of courts was to reject applications for posthumous gamete retrieval.[101] For example, in the Queensland Supreme Court case *Re Gray*,[102] Chesterman J held that there was no legislation in Queensland which could be used to authorise the removal of gametes from a deceased man.[103] The Court, considering an *ex parte* application for the retrieval of sperm from a man who died suddenly, held that ART treatment did not qualify as a 'therapeutic, medical or scientific purpose'.[104] Thus, the harvesting of sperm for use in posthumous conception by the deceased's widow could not be authorised under s 22 of the *Transplantation and Anatomy Act 1979* (Qld).[105] The same approach was taken in a factually similar case by the Queensland Supreme Court in *Baker v Queensland*.[106] Here, the applicant sought the urgent extraction of sperm from her husband who died unexpectedly.[107] Despite clear evidence as to the couple's intention to start a family together, the court could not distinguish the facts of this case from those in *Re Gray.* Muir J found there was no legislative authority in Queensland allowing for the extraction of sperm from a deceased man for later use by his widow in assisted reproduction.[108] This reasoning is not unique to courts in Queensland with the same rationale has been applied by courts elsewhere, for example in NSW.[109] However, to date, there is no consensus on the matter, and courts in several Australian jurisdictions have deemed state human tissue legislation a lawful basis for authorising posthumous gamete retrieval. This is on the understanding that assisted reproduction falls under the meaning of a 'medical purpose' under the relevant state statutes.[110]

In the Victorian Supreme Court case of *Y v Austin Health*,[111] Habersberger J made a distinction between the removal of tissue after death for the purposes of transplantation into the body of another living person, and the removal of tissue after death for use in other medical purposes.[112] The Judge held that the extraction of sperm from a deceased man for later use by his widow in assisted reproduction could not be regarded as the removal of tissue for the purposes of transplantation.[113]

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[101] Tony Keim, 'Life after Death: Providing Hope for Shattered Lives or Creating a Lifetime of Unintended Consequences?' (2019) 39(7) *Proctor* 22, 22.
[102] *Re Gray* (n 18).
[103] Ibid [5].
[104] Ibid [22].
[105] Ibid.
[106] *Baker v Queensland* (n 18).
[107] Ibid [1].
[108] Ibid [4].
[109] *Chapman* (n 16); Keim (n 101) 22.
[110] *Re Estate of Edwards* (n 16); *Re Floyd* [2011] QSC 218; *Re H, AE* (n 16); *Ex parte C* (n 7).
[111] *Y v Austin Health* (n 18).
[112] Ibid [36].
[113] Ibid.

In the Court's view, a 'transplantation' involved the removal of a body part or product from one person and replacing it into the body of another, in order to perform the same function. It was noted that the sperm in this case would be removed from the deceased and used by the applicant to become pregnant. This could not be characterised as a transplantation.[114] Nevertheless, the Court observed that 'fertilisation procedures' are referred to as 'medical procedures' in the *Infertility Treatment Act 1995* (Vic).[115] Thus, the Judge was satisfied that the procurement of sperm for use in posthumous reproduction met the requirement of 'medical purpose' under s 26 of the *Human Tissue Act 1982* (Vic).[116] The same interpretation was applied by the NSW Supreme Court in *Re Estate of Edwards.*[117] Here, the Court held that it was lawful to harvest sperm from a deceased man under s 23 of the *Human Tissue Act 1983* (NSW) on the basis that the later use of the sperm by the deceased's surviving partner in assisted reproduction fell under the meaning of a 'medical purpose'.[118]

With respect however, the courts' application of the human tissue statutes in these cases is questionable. ART legislation in both Victoria and NSW prohibits the use of gametes in posthumous conception without express consent from the deceased.[119] In both cases, the Court authorised sperm to be harvested at the request of the deceased's surviving partner in the absence of consent.[120] This is despite the fact that making use of the gametes in posthumous conception in those states would be unlawful.[121] Given that the gametes could not be used for the very purpose in which they were harvested, the rulings are, with respect to the Court, arguably misconceived.

Despite this, there is a line of authorities across several states and territories which has interpreted the procurement of gametes for use in posthumous conception as a 'medical purpose' under the relevant jurisdiction's human tissue legislation.[122] The decision of Brown J in the Queensland Supreme Court case of *Re Cresswell*[123] is

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[114] Ibid [37].
[115] Ibid [38].
[116] Ibid [39].
[117] *Re Estate of Edwards* (n 16).
[118] Ibid [32].
[119] *Assisted Reproductive Treatment Act 2008* (Vic) s 46; *Assisted Reproductive Technology Act 2007* (NSW) s 23(a).
[120] *Y v Austin Health* (n 18); *Re Estate of Edwards* (n 16).
[121] *Assisted Reproductive Treatment Act 2008* (Vic) s 46; *Assisted Reproductive Technology Act 2007* (NSW) s 23(a).
[122] Croucher (n 21) 67–8. The retrieval of sperm was categorised as a medical purpose in the state of Victoria in *AB v AG Victoria* [2005] VSC 180; in NSW in *Re Estate of Edwards* (n 16); in Queensland in *Re Floyd* (n 110); in SA in *Re H, AE* (n 16); and in WA in *Ex parte C* (n 7).
[123] *Re Cresswell* (n 16).

significant. This case concerned an application for an order granting the applicant possession of sperm posthumously harvested from her late partner.[124] Before determining whether the applicant was entitled to possession of the sperm, the court first considered whether the sperm had been harvested lawfully.[125] Brown J referenced several factually similar cases across Australia and in particular, considered the relevance of human tissue legislation in those states and territories to the retrieval of gametes after death.[126] The Court noted that under Queensland's *Transplantation and Anatomy Act 1979*, the legislative phrase 'medical purpose' did not apply to the deceased, and could be applied to third parties.[127] Furthermore, the Court held that the phrase 'medical purpose' extended beyond the provision of medical treatment. The Court noted that the process of assisted reproduction interferes with the normal operation of a physiological function. Therefore, it falls under the definition of a 'medical purpose' and the procurement of gametes for use in assisted conception may be authorised under section 22 of the Queensland Act.[128]

Brown J further rejected the Queensland Government's *Guidelines for Removal of Sperm from Deceased Persons for IVF: Consent Authorisation and Role of IVF Organisations*,[129] which advise that prior court authorisation is necessary to proceed with posthumous gamete retrieval.[130] The Court was of the view that the statutory regime in Queensland does not require parties to apply to the court, but rather the correct process is to acquire consent for the retrieval in accordance with the *Transplantation and Anatomy Act 1979* (Qld).[131] This position also appears to go against the NHMRC guidelines on this issue which advise that court approval should be sought prior to gamete retrieval.[132] In this respect, many superior court judges have made comments regarding judicial involvement in the process of posthumous gamete retrieval, noting that if the authority to harvest gametes after death derives from state legislation, the court has no role in authorising the retrieval.[133] This has

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[124] Ibid [1]–[9].
[125] Ibid [17]–[96].
[126] Ibid [17]–[47].
[127] Ibid [77].
[128] Ibid.
[129] State Coroners Guidelines, *Guidelines for Removal of Sperm from Deceased Persons for IVF: Consent, Authorisation and Role of IVF Organisations* (2022) ch 4. These guidelines were amended in December 2022; however, the version referred to by the Court in the judgment was the 2013 version: *Re Cresswell* (n 16) [162].
[130] *Re Cresswell* (n 16) [162]; Stephen Page, 'Two Worlds Colliding: The Science and Regulation of Assisted Reproductive Treatment' (2020) 156 *Precedent* 32, 37.
[131] *Re Cresswell* (n 16) [47]; Page (n 130) 37.
[132] NHMRC (n 64) 57.
[133] See, eg, Mills (n 21) 746–7; Thomasson and Rizzi (n 16) 560; *Chapman* (n 16) [58]; *Re Estate of Edwards* (n 16) [30]. Even in *Re Gray* (n 18), Chesterman J held that if the authority to harvest sperm

been the case even in judgments from WA where the subsequent use of gametes in posthumous conception is unlawful.[134]

Re Cresswell[135] has been applauded by commentators for clearly outlining the applicability of state human tissue legislation to the retrieval of gametes after death.[136] Lupton argues the judgment has brought welcome clarity to what was previously a confused area.[137] In addition, Mills suggests that the approach taken by the court appears to be the one originally intended by the state's human tissue statute, noting that

> the HTA in all jurisdictions provides specifically that foetal tissue, sperm (or semen) and ova are excluded from the definition of 'tissue' for the purposes of *living* tissue donation. The HTAs contain no such exclusionary clauses with regard to posthumous tissue donation.[138]

Thus, Mills suggests that human tissue statutes across Australia were in fact designed to cover the retrieval of gametes after death.[139]

Nevertheless, the recently enacted *Assisted Reproductive Technology Act 2024* (Qld) now expressly rejects this interpretation. The statute provides that posthumous gamete retrieval is not to be authorised under the state's human tissue legislation, and instead sets out specific consent and procedural requirements within the ART statute itself.[140] This legislative development directly overrules the approach taken in *Re Cresswell*[141] and removes any ambiguity as to how such procedures are to be regulated in Queensland.

Indeed, the position of the Court in *Re Cresswell*[142] is also increasingly doubtful in states and territories that have both human tissue and ART legislation such as Victoria, NSW, and WA.[143] In the NSW Supreme Court decision of *Chapman v South Eastern Sydney Local Health District* ('*Chapman*'),[144] the Court correctly identified

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from a deceased man did derive from statute, then there would be no need for the court to play a role: at [22].

[134] See, eg, *Ex parte H* (n 7) [18]; Thomasson and Rizzi (n 16) 561.

[135] *Re Cresswell* (n 16).

[136] 'IVF and Legal Precedent: Re Cresswell Qld', *Rule of Law Institute of Australia* (Web Page, 1 August 2018) <https://www.ruleoflaw.org.au/ivf-and-legal-precedent-re-cresswell-qld/>; Mills (n 21) 746.

[137] Michael Lupton, 'The Post-Mortem Use of Sperm: Some Clarity at Last' (2019) 3(6) *International Journal of Medical Science and Health Research* 1, 2.

[138] Mills (n 21) 746.

[139] Ibid.

[140] *Assisted Reproductive Technology Act 2024* (Qld) ss 31–2.

[141] *Re Cresswell* (n 16).

[142] Ibid.

[143] This was highlighted by the Court in *Chapman* (n 16) [68].

[144] Ibid.

the conflict that exists between the state's human tissue and ART statutes.[145] The Court accepted that posthumous gamete retrieval can technically be authorised by the deceased's next of kin under s 23(2) of the *Human Tissue Act 1983* (NSW). However, the Judge further observed that the subsequent preservation and storage of sperm without the deceased's prior consent would be unlawful under s 25 of the *Assisted Reproductive Technology Act 2007* (NSW).[146] Thus, while in theory human tissue legislation in NSW makes the collection of gametes after death (without prior consent from the source) permissible, it is merely a technicality given the prohibition in another statute. In *Chapman*, Fagan J rightly observed that it is unlikely the human tissue statute was drafted with the intention that it would be applied in this way.[147] Ultimately, the authorisation by next of kin for the removal of gametes from a deceased person under s 23(2) of the *Human Tissue Act 1983* (NSW) will be ineffective, given it will result in a breach of the NSW ART legislation.[148] It is simply a case of regulatory disconnection that one piece of legislation could be used to authorise collection, while another prohibits it.

A similar point could be raised in relation to the co-existing human tissue and ART statutes in other jurisdictions. As discussed earlier, Victoria's ART statute requires express consent from the deceased for posthumous conception.[149] Thus, in the absence of express consent from the deceased, gametes harvested posthumously under the *Human Tissue Act 1982* (Vic) cannot be lawfully used in that state.[150] The gametes will therefore need to be exported elsewhere to be used for the purpose in which they were retrieved, as was the case in *Y v Austin Health.*[151] The same issue arises in WA due to the ministerial direction that forbids posthumous conception in that state.[152] This position may change in the future. In 2023, the WA Ministerial Expert Panel recommended continuing the collection of gametes from deceased persons, while also permitting posthumous use under a clear consent framework.[153]

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[145] Ibid; Talitha Fishburn, 'Birthing a Legal Lacuna: The Extraction and Use of Sperm Without Consent' (2018) 49 *Law Society of NSW Journal* 84, 84.
[146] *Chapman* (n 16) [68]. Section 25 of the *Assisted Reproductive Technology Act 2007* (NSW) makes it an offence to continue to store the gametes of a deceased person without their consent: Fishburn (n 145) 84.
[147] *Chapman* (n 16) [68].
[148] Ibid.
[149] *Assisted Reproductive Treatment Act 2008* (Vic) s 46.
[150] Ibid.
[151] *Y v Austin Health* (n 18).
[152] Direction 8.9 (n 14).
[153] Government of Western Australia Department of Health, *Ministerial Expert Panel on Assisted Reproductive Technology and Surrogacy Final Report* (2023) Recommendations 19–20.

The WA Government has given *in principle* support to this, though no policy change has occurred to date.[154]

As such, the current position remains, where gametes can be retrieved but not lawfully used in WA. Using WA's human tissue legislation to authorise the retrieval of sperm post-mortem, as has been done in a line of case law including most recently in *Ex parte CH*,[155] merely creates a scenario in which the applicant must transfer the gametes away from WA to be used. Middleton and Buist describe this as a 'paradox'.[156] The authors argue that if gametes cannot be lawfully used in a state, then it should not be the case that they can be lawfully harvested.[157] Simana makes the related point that when laws do not specifically deal with both the retrieval *and* use of gametes in posthumous conception it can lead to inconsistent outcomes, whereby gametes can be retrieved after death, but cannot be used in posthumous conception.[158]

What's more, the applicants in these cases are then required to engage in further litigation, and have the harvested gametes deemed as 'property', so that they can be transferred to a jurisdiction where they can be used in assisted conception.[159] And whilst it is not the purpose of this particular article to discuss the theoretical difficulties with treating posthumously retrieved gametes as property, I have argued elsewhere that the categorisation of gametes (which have been harvested post-mortem, and which have never been within the control of the source during their lifetime) as property, is problematic.[160] Indeed, it lends further support to the argument that human tissue legislation should not be used in this context.

Nevertheless, courts across Australia have continued to use human tissue legislation as a means of authorising posthumous gamete retrieval, even when doing so conflicts with relevant state ART statutes or rules.[161] In the NSW Supreme Court case

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[154] Government of Western Australia Department of Health, *MEP on ART and Surrogacy: Government Response to MEP Report Recommendations* (undated) 6–7 <https://www.health.wa.gov.au/~/media/Corp/Documents/Health-for/ART/Government-Response-to-MEP-Report-Recommendations.pdf>. I am grateful to the anonymous reviewer for directing me towards these reports.

[155] *Ex parte C* (n 7); *Ex parte H* (n 7); *Ex parte M* (n 7); *Ex parte P* (n 7); *S v Minister for Health (WA)* (n 7); *Ex parte CH* (n 1).

[156] Sarah Middleton and Michael Buist, 'Sperm Removal and Dead or Dying Patients: A Dilemma for Emergency Departments and Intensive Care Units' (2009) 190(5) *Medical Journal of Australia* 244, 245.

[157] Ibid 246.

[158] Simana (n 29) 331.

[159] *Y v Austin Health* (n 18); *Re Estate of Edwards* (n 16); Thomasson and Rizzi (n 16) 558.

[160] Claire McGovern, 'Reproduction after Death: The Ethical and Legal Challenges in the Regulation of Posthumous Conception in Ireland' (PhD Thesis, National University of Ireland Maynooth, 2022).

[161] See *Re Vernon* [2020] NSWSC 608; *Noone v Genea Ltd* [2020] NSWSC 1860.

of *Re Vernon*,[162] Rothman J rejected the observations of the Court in *Chapman*[163] entirely, and suggested that the storage of sperm from a deceased man without his consent did not automatically breach s 25 of the *Assisted Reproductive Technology Act 2007* (NSW).[164] In the Court's view, the wording of s 25, which requires consent from the 'gamete provider' to legally store gametes, did not necessarily translate to mean the 'gamete source'. The Court held that the consent required for storing gametes could be provided by the deceased's surviving partner who *supplied* the clinic with the sperm.[165] However, this is a considerably expansive interpretation of the wording in this section, under which there are no clear limits on who the gamete provider may be. Indeed, in the subsequent case of *Noone v Genea Ltd*,[166] counsel for the NSW Attorney-General put forward arguments that the interpretation of 'gamete provider' as construed by the court in *Re Vernon*[167] should not be adopted.[168]

It seems the most recent approach is for courts to grant automatic possession of the gametes to the applicant, so that the gametes can be removed to another jurisdiction. This was the reasoning of the Court in *Re Adams*.[169] The Court cited *Re Vernon*[170] with approval and held that so long as the applicant is granted property rights in respect of the gametes, there is no breach of ART legislation while arrangements are made to transport the tissue.[171] Despite this observation, the Court did not engage in any detailed property analysis, but rather accepted that there was existing precedent for awarding the applicant possession of the gametes.[172] There was no mention of treating the harvested gametes as property in the most recent judgment of *Ex parte CH*.[173] However, given that the law in WA will not permit the gametes to be used,[174] it is inevitable that the Court will be required to engage in a similar property analysis should the case progress. This is of course, in itself problematic when, as I have argued elsewhere, the arguments used by courts to justify finding property in posthumously retrieved gametes are not necessarily well founded.[175]

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[162] *Re Vernon* (n 161).
[163] *Chapman* (n 16).
[164] *Re Vernon* (n 161) [56], [58].
[165] Ibid [58].
[166] *Noone v Genea Ltd* (n 161).
[167] *Re Vernon* (n 161).
[168] *Noone v Genea Ltd* (n 161) [49].
[169] *Re Adams (a pseudonym) (No 2)* [2021] NSWSC 794.
[170] *Re Vernon* (n 161).
[171] *Re Adams (a pseudonym) (No 2)* (n 169) [37].
[172] Ibid [36].
[173] *Ex parte CH* (n 1).
[174] Direction 8.9 (n 14).
[175] McGovern (n 160).

Of course, regulatory disconnection is not inherently problematic, and many innovations can and do fall comfortably within the scope of an existing regulatory framework.[176] The difficulty with regulatory disconnection arises when there is insufficient consideration of the potential harms and benefits of a new technology. In such cases, existing laws may begin to be applied to novel contexts by default. Over time, this practice can create expectations or presumptions that this is the most appropriate legal approach. As a result, it can become difficult, if not politically or practically impossible, to introduce regulatory changes later, even when the implications of the technology have become clearer.[177]

Furthermore, there are sometimes principled reasons why certain issues should be regulated separately. This is an argument that could be raised in the case of gametes as they are distinct from, and should potentially be treated differently to, organs and other human tissue. Marshall notes that there are substantial differences between organs and gametes.[178] Firstly, organs are considered lifesaving and gametes are not. Furthermore, gametes have the potential to create new life and contain readily usable genetic information.[179] Bills makes a similar observation, claiming that gametes should not be likened to organs, and that unlike with harvesting organs, posthumous gamete retrieval is not for the greater good, but rather for the benefit of the deceased's next of kin.[180] This distinction was highlighted by the New Zealand High Court in the case of *Re Lee*.[181] Here, the Court considered the applicability of New Zealand's *Human Tissue Act 2008* to the retrieval of gametes after death. The Court stated that New Zealand's Parliament made a deliberate decision to exclude gametes from the statutory definition of 'human tissue' for the purposes of the statute. Heath J recognised that the harvesting of gametes will raise different 'ethical and public interest issues' to the retrieval of other bodily tissue.[182]

The distinction between organs and gametes aside, however, the problem with human tissue legislation across Australia being used to authorise the harvesting of gametes from the dead is that it creates a mismatched situation in many jurisdictions, whereby the gametes can be lawfully retrieved, but they cannot be

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[176] Anna Butenko and Pierre Larouche, 'Regulation for Innovativeness or Regulation of Innovation?' (2015) 7(1) *Law, Innovation and Technology* 52, 68; Moses (n 23).
[177] Butenko and Larouche (n 176) 69.
[178] Lorna Marshall, 'Intergenerational Gamete Donation: Ethical and Societal Implications' (1998) 178 *American Journal of Obstetrics and Gynaecology* 1171, 1172.
[179] Ibid. See also Neil Maddox, 'Limited, Inclusive and Communitarian: In Defence of Recognising Property Rights in the Human Body' (2019) 70(3) *Northern Ireland Legal Quarterly* 289.
[180] Katrina Bills, 'The Ethics and Legality of Posthumous Conception' (2005) 9 *Southern Cross University Law Review* 1, 11.
[181] *Re Lee* [2018] 2 NZLR 731 (HC).
[182] Ibid [63].

lawfully stored or used in posthumous conception absent the deceased's consent.[183] Kroon and others note that posthumous gamete retrieval in Australia has simply been 'unexpectedly caught' by laws that were intended to deal with other issues.[184] Indeed, both Fishburn and Cherkassky separately describe it as a legal lacunae that the retrieval of gametes for use in posthumous conception has been deemed lawful across Australia in this way.[185] If human tissue statutes were truly intended to allow the harvesting of gametes after death for use in posthumous conception, then the provisions relating to the retrieval of gametes would be consistent with legislative provisions relating to the storage and use of gametes in posthumous conception. This is not the case.[186] Instead, human tissue legislation has merely provided a loophole for some courts in Australia to grant requests for posthumous gamete retrieval in the absence of consent from the deceased.[187] This is undesirable when the later use of the tissue might be prohibited.

IV CONCLUSION

This article has provided an overview of the legal landscape on posthumous gamete retrieval and conception across Australia, and has critiqued the courts' use of human tissue legislation in gamete retrieval cases. The case law demonstrates a very clear case of regulatory disconnection — whereby state or territory human tissue legislation is being used as a means to authorise posthumous gamete retrieval despite not being drafted with the technology in mind. What we learn from these cases is that ART laws on posthumous conception need to specifically address the retrieval of gametes. This will give physicians clarity on the validity of retrieving gametes and will prevent the issue from reaching the courts entirely. Furthermore, specific regulation of gamete retrieval will stop instances of regulatory disconnection, whereby the harvesting of gametes after death is caught by laws which are designed to regulate other areas. Most importantly, laws on the retrieval of gametes after death must align with laws that regulate the storage and use of gametes in posthumous conception. Otherwise, we are left with the kind of legal paradox seen in *Ex parte CH*[188] where a court authorises the removal of gametes yet

[183] Simana (n 29) 331.
[184] Kroon et al (n 25) 488.
[185] Fishburn (n 145) 84; Lisa Cherkassky, 'Is Interference with a Corpse for Procreative Purposes a Criminal Offence?' (2021) 85(3) *Modern Law Review* 577, 582.
[186] Middleton and Buist (n 156) 246.
[187] Croucher (n 21) 70.
[188] *Ex parte CH* (n 1).

makes it clear that the tissue cannot be used in the very jurisdiction that permitted its retrieval.[189]

This disconnect does more than just complicate legal reasoning. It also has practical and emotional consequences for grieving partners who are then compelled to pursue further litigation to have the gametes exported. If posthumous conception is to be regulated coherently, retrieval and use must be governed by a unified legal framework and not by repurposed statutes applied out of context. Queensland's recent enactment of the *Assisted Reproductive Technology Act 2024* (Qld) is a welcome example of such reform, explicitly rejecting the use of human tissue legislation for this purpose and instead placing posthumous gamete retrieval within a clear ART-based regulatory regime.[190]

[189] Ibid [30].
[190] *Assisted Reproductive Technology Act 2024* (Qld) ss 31–2.