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The Hon Ruth Forrest MLC
Inquiry Chair
Government Administration Committee "A"

***Email: c/- Stuart.Wright@parliament.tas.gov.au***

Dear Minister

**INQUIRY IN RELATION TO SURROGACY BILL 2011 AND SURROGACY (CONSEQUENTIAL AMENDMENTS) BILL 2011**

Thank you for your letter of 27 June 2011.

I confirm that I will be available to give verbal evidence by teleconference at the public hearing on Monday, 11 July 2011 from 3.30pm.

You have sought advice from me in relation to the legal requirements recommendations to protect the effect of parties and to prevent any foreseeable disagreements ending in arbitration.

I have advised clients from Queensland, New South Wales, the ACT, Victoria, Western Australia and China about altruistic surrogacy arrangements and commercial surrogacy arrangements in California, Massachusetts, Ohio, Illinois, India, Thailand and Russia.

**Overall view**

In general terms, I am of the view that the Bill has got the balance right, but there are certain details I want to address to the Committee.

The starting point with surrogacy is to recognise that those who seek surrogacy do so when it is the option of last resort. For them natural conception has not worked or is not available, IVF and ART services have not worked or are not available, and children are not available via adoption.

The second point that stands out with surrogacy is that it is a process of love. Those entering the process of surrogacy usually do so with great caution and trepidation, having tried or investigated other ways of conceiving children, and all they want to do is to have a child or children of their own.

Altruistic surrogacy arises when someone, typically another family member or close friend (occasionally not such a person), approaches the intended parents and says to them something like:

> "We know that it has been very hurtful to you not to have children. We know that you want to have children. We want to give you the most precious gift we can, which is the ability to have children."

I have two cases under way at the moment where the surrogate or proposed surrogate is the mother of the intended mother, so she will in effect be the grandmother of the child. I have had other cases where the proposed surrogate is the sister of the proposed mother or her niece or aunt and a number of cases when she is the best friend.

The stand out requirements that I see that need to occur to make surrogacy work are that there is a fundamental trust between the intended parents and the surrogate and her partner, that the arrangement between the parties is clear and that all parties concerned have thorough counselling and legal advice before they enter into a surrogacy arrangement.

I have had the benefit of reading:

- Both Bills;
- Hansard of both Houses; and
- the Select Committee report on surrogacy.

I do not know how your Members of Parliament debate other legislation, but it is a relief to see the debate of this legislation, in both Houses, to be remarkably polite and courteous.

**Recent case in Queensland**

Last year a legal precedent was created in Queensland when the first parentage order was made in Queensland. A gay couple had engaged in surrogacy with a good friend of one of them before the legalisation of surrogacy in Queensland. The parties had entered into an oral surrogacy arrangement. Because the transaction was illegal, they did not have the benefit of counselling or of legal advice.

Subsequently, well and truly during the course of the pregnancy, they entered into a written surrogacy arrangement.

The child was born shortly before the Surrogacy Act 2010 Qld commenced.

Within a few months of the child being born a parentage order was made by the court, there having been an independent assessment of the process by a social scientist, the judge being satisfied that the proposed order was in the child's best interests.

The surrogacy involved was a traditional surrogacy. This meant that the eggs used were those of the surrogate and necessarily an IVF clinic was not involved. Essentially these 3 people did it by themselves with the sperm of one of the men being used to fertilise the woman.

Recently the Courier-Mail ran a series of stories arising from this transaction because the surrogate had now expressed regrets that she had given away her genetic child. It seemed from

the newspaper report that she was quite traumatised by that process. Not surprisingly, the couple who ended up with the child considered that nothing ought to change.

I believe that there are a number of lessons evident from that case:

1. The genie is out of the bottle. Ordinary men and women have the capacity to enable women to become pregnant via a traditional surrogacy without the use of an IVF clinic.

2. It is preferable not to ban this process, because the ban will in any case be ineffective, but much better that those involved are educated about the implications about the process and have very clear guidelines about what may or may not happen.

3. It is a crying shame that the mother involved did not have counselling or legal advice before she undertook the process. We can only speculate as to whether or not she would have proceeded. Certainly I can say that I have clients, a gay couple who are undertaking a traditional surrogacy. The proposed surrogate is from New South Wales. Traditional surrogacy is not banned in New South Wales or Queensland. The legislative requirements in both New South Wales and Queensland require certain steps, particularly a written surrogacy arrangement, counselling advice and legal advice, all of which have happened. These parties have entered into this arrangement with their eyes wide open, which is as much as anyone can ask when entering the brave new world of surrogacy.

4. It would certainly have been preferable, in my view, that the surrogate had entered into a written surrogacy arrangement before becoming pregnant. The view of the Queensland Select Committee on the response to Queensland's laws concerning altruistic surrogacy was that it was imperative that the surrogacy arrangement be entered into at that point so that there was no pressure upon the surrogate during the course of the pregnancy. That way she would not feel compelled to enter into it. I believe that that view is absolutely right.

**Written surrogacy arrangement**

I am heartened to see the remarks by the Leader of the House that the government will amend the Surrogacy Bill so as to ensure that the surrogacy arrangement is in writing. I consider that that amendment is essential. Nothing focuses the mind more than putting an arrangement down in black and white. My experience in acting for many clients who have entered into surrogacy arrangements is that they take their obligations very seriously even though a surrogacy arrangement in Queensland, as is proposed in Tasmania, is not legally binding save for the question of payment of the surrogate's expenses (or repayment of those expenses).

There are certain aspects of a surrogacy arrangement that by being entered into are able to be properly focused, which I do not believe would happen adequately if the surrogacy arrangement could be left as an oral one.

I endorse the comments of the Select Committee at p.32:

> "The Committee accepts that there is much wisdom in requiring the prospective parties to an altruistic surrogacy agreement to enter into a formal pre-conception agreement detailing all of the anticipated roles, contributions, expectations and potential outcomes (both short-term and long-term) relating to the agreement. Potential harm to the child at the centre of a pre-conception altruistic surrogacy agreement and the parties to the

> agreement is too great to leave any aspect of such an agreement to chance ... it may be that a pre-conception altruistic surrogacy agreement can form a useful adjunct to the counselling required in order to obtain ethics clearance for any subsequent pregnancy ... at the very least, requiring such an agreement prior to a commissioned pregnancy would serve to ensure that surrogacy does not become a fall-back provision in the case of an unclaimed pregnancy.
>
> Such an agreement is reasonably necessary to exhibit the intention of the parties to safeguard the best interests of any child that is born as a consequence of the agreement. The agreement would also have a secondary benefit in establishing from the outset an appropriate level of expectation in the minds of all parties as to a range of possible outcomes. While such an agreement should remain legally unenforceable, it should be a document of which, once lodged with the Court, a Court can subsequently take due cognisance when making any subsequent orders relating to a child born as a result of an altruistic surrogacy agreement."

**Criminalisation**

Queensland in 1988 legislated to criminalise all forms of surrogacy. This legislative ban simply did not work. In the period between 1988 and about 2009 there were between 2 and 7 prosecutions for surrogacy under that Act, the maximum penalty for which was about a $200 fine.

In about 1989 I attended upon a client who quickly told me that she had been paid $10,000 by a couple to have a child (so fairly obviously it was a traditional surrogacy) and she had decided to keep both the money and the child. Cunningly, she had discovered that there was little risk of the child being removed from her care because of the risk to the intended parents of prosecution, and that there was no risk of money having to be repaid because the contract was void and therefore the money fell where it lay. That child presumably now is aged about 22.

There have been 2 notorious cases concerning surrogacy in the Family Court, one of which was reported and the other not. Both originated in Brisbane. Both cases came before then Justice Jordan who ordered in both cases that the child live with the surrogate. The well known reported case was Re Evelyn which following being dealt by his Honour went on appeal to the Full Court of the Family Court and then an attempted appeal to the High Court.

The facts of Re Evelyn demonstrate why surrogacy ought to be regulated and why parties ought to have mandatory counselling and legal advice before entering into written surrogacy arrangements.

The intended parents in Re Evelyn lived in Queensland where surrogacy was illegal. Their friends, a doctor and his wife, lived in Adelaide, where surrogacy was also illegal. The doctor and his wife proposed to have a child for the intended parents. It is unclear from the law reports as to whether it was a traditional or gestational surrogacy.

There was no counselling involved and no legal advice.

After the child was born it was handed over to the intended parents. Within a few weeks of the child's birth, the doctor and his wife visited the child. The child's natural mother then took the child and the intended parents did not take any action to prevent her (no doubt having received legal advice by that stage that they could not as they did not have the benefit of what is now a parentage order in their favour).

The matter was then fought out bitterly in the Family Court. I would guess that each of the parties spent several hundred thousand dollars in legal fees and endured heartbreak. The court ordered that the child live with the surrogate and her husband.

**Gay and lesbian or single intended parents**

Gay and lesbian intended parents, if not more than anyone else, know someone who has engaged in ART or artificial insemination and have the ability quite easily to engage as anyone might in traditional surrogacy.

I have seen in Hansard comments which were to the effect that gay and lesbian or single intended parents should not be able to access surrogacy because the ideal for surrogacy is that of a married man and woman because every child deserves a mother and a father.

The reality, having acted for male and female single intended parents and gay and lesbian intended parents, is that those clients have a very strong desire to have children in exactly the same way as married couples. To legislate to prevent them from accessing surrogacy would, in my view, be a mistake as it would mean that they would be more inclined to access commercial surrogacy overseas or to move out of the State to a jurisdiction that does not discriminate against them. Currently Queensland, New South Wales, Victoria and the Northern Territory do not discriminate against gay or lesbian or single intended parents. The ACT allows couples to seek surrogacy (including gay and lesbian couples) but not single people. South Australia discriminates against single people and gay and lesbian couples. Western Australia allows married couples and heterosexual de facto couples to apply for surrogacy and single women. It does not allow single men nor lesbian couples nor gay couples.

**Case example**: Bill and Ben were clients of mine who are a gay couple living in Western Australia. They are aware that Western Australian law specifically discriminated against them, as a result of which Bill and Ben were undertaking commercial surrogacy through a clinic in India. They would have preferred to have undertaken altruistic surrogacy in Western Australia.

As the Select Committee stated at p.31:

> "It is perhaps unsurprising that the Committee has found that surrogacy is a fact of life in Tasmania. Both traditional and gestational surrogacy does occur. While the incidence is rare, advances in ART means that the proportion of the community for which altruistic gestational surrogacy may be an option is growing ... while a certain amount of moral and ethical controversy surrounds the question of surrogacy, the Committee has formed the view that it is a fact of life."

**Forum shopping**

The reality is that those desperate to have children, and who have adequate resources, will not be impeded by legislative roadblocks.

The Select Committee referred at p.31 of its report to the evidence of an expert witness, Professor Ken Kirkby, who said:

> "I think it is an unstoppable tide. It is best to work with technology than go into battle against it. People have a genuine wish to have children and have used all sorts of very

> arduous techniques. IVF is a very arduous process for many people, with very low success rates. This has a much higher success rate, as I understand it, because the people are chosen for their fertility and not for infertility. It is so straightforward that it is not going to stop and you have to go with it."

The Standing Committee stated that it was:

> "firmly of the view that the central preoccupation of both legislators and the executive government, when setting laws and high policy in the area of surrogacy, must be the best interests of the children born and raised into adulthood as a result of any surrogacy agreement" (p.31).

I would certainly endorse that view.

The reality is that those who have the means will not be stopped by legislative roadblocks that deny their desire to have a child.

My experience in Queensland, which alone of all the States criminalised all forms of surrogacy, is that Queenslanders, despite an extraterritorial ban, continued and continue to access surrogacy overseas through commercial clinics. They have done this in one of two ways. The first way is to express outrage that the legislature should impede their attempts to have children and therefore thumb their nose at the law, all the while believing (with good reason) that the risk of prosecution is extremely low. The other way is to forum shop and move interstate where going to overseas commercial surrogacy clinics is not an offence. It is not an offence to do so currently in Tasmania, Victoria, South Australia, Western Australia or the Northern Territory. It is an offence, extraterritorially, in Queensland, New South Wales and the ACT.

The futility of such a ban is probably best illustrated in Victoria. Victoria had such a ban contained within its Infertility Treatment Act 1995 Vic. There were no prosecutions under that legislation. Members may recall many years ago there was an SBS TV series of a gay couple from Victoria who underwent commercial surrogacy in California. That couple was not prosecuted. When I raised about a year ago it had been illegal under that Act, the response I received from the National Convenor of Gay Dads Australia, whose members undertook commercial surrogacy overseas, was that no member in Victoria had ever been prosecuted under that legislation.

In April this year the Victorian regulator, VARTA, ran a seminar on overseas reproductive care which was essentially a "how to" guide of accessing overseas commercial surrogacy clinics and bringing a child back safely.

The reality is that if Tasmania legislates for such an extraterritorial ban then if the example of Queensland and Victoria are any guide, Tasmanians will not report it to authorities, or move interstate.

Cost was once a barrier for undertaking commercial surrogacy overseas. It is no longer so. The cost estimated by me for domestic altruistic surrogacy is in the range of $40,000 to $60,000 (primarily IVF and hospital fees but with legal and counselling fees added). There is a similar cost for undertaking commercial surrogacy in India or Thailand. The cost of undertaking surrogacy in the United States is between $80,000 to $120,000 although with the cost of medical expenses in the United States I am aware of one case where it cost the parties $300,000.

Those in the policy debate often talk about the "market". One doctor operating a clinic in India indicated in March this year when she spoke on the SBS Insight program that there were currently 3,000 clinics in India offering commercial surrogacy.

**A further barrier to treatment – donor eggs and sperm**

In Western Australia, the ACT and South Australia (though there is an exception in South Australia for medical reasons) there is a requirement that at least one of the intended parents is the genetic parent of the child. There is no such restriction in the Northern Territory, Queensland, New South Wales or Victoria.

**Example**: Francine was a single woman living in Victoria. She decided to have a child. She had difficulty with her eggs. Donor sperm was not available to her. Under then Victorian legislation she was not able to undertake surrogacy. Instead she undertook surrogacy in California where both donor sperm and donor eggs were available.

**Case example**: Bob and Mary were a married couple living in Victoria. They wished to undertake surrogacy. They did not have an altruistic surrogate available. They perceived that there were significant barriers to surrogacy in Victoria with significant delays and costs associated with the State regulator as well as the difficulty in being able to locate a surrogate. Instead, they intended to undertake surrogacy in India. The position was also quite clear that if there had been an extraterritorial ban on commercial surrogacy they would have moved interstate so that they could undertake that surrogacy.

**Extraterritorial ban**

It appears assumed, from the Liberals' attempted amendment in the Lower House, that there is no extraterritorial ban in the Surrogacy Bill. I respectfully disagree with that view. Section 39(2) contains a number of offences under the heading "Commercial brokerage or advertising of surrogacy arrangements prohibited". When one looks at the offences which relate to "for payment or anticipation of payment" the offences are not restricted to brokerage or agency but encompass commercial surrogacy. It is my view the offence outlined in section 39(2)(a) of "in anticipation of payment initiate any negotiations with a view to the making of a surrogacy arrangement" is in effect an extraterritorial ban as is the offence in (c) of compiling "any information with a view to its use in making, or negotiating the making of, any surrogacy arrangements".

In my view a web history of commercial surrogacy clinics overseas or of accessing information about commercial surrogacy clinics, with the intent of engaging a clinic, may be sufficient to consist the key element of the offence, "compiling", and the nature of the offence would be committed in Tasmania, not overseas.

**Birth mother's spouse, if any, should be a party to the surrogacy arrangement**

I agree with the Deputy Leader of the Opposition, Mr Rockliff, that the birth mother's spouse should be a party to the surrogacy arrangement. The reality is that if the partner does not keenly support the surrogacy it will not proceed or there will be difficulties. My experience is that the partners of the proposed surrogates are keen to be parties to the proposed arrangement. I agree that that person must also be a party to the surrogacy arrangement in terms of accessing legal and counselling advice and therefore be a party to consent of the parentage orders. The risk is that if

the partner is not involved then he (or she) could stymie the whole arrangement including if necessary making an application to the Family Court.

I understand the view that such an approach is "paternalistic". However, such a view, in my opinion, is mistaken. Not to have the surrogate's partner fully supportive, involved and signed up risks creating havoc for the child.

I note at this point the National Health and Medical Research Council guidelines (referred to below) which relevantly provide the clinics:

> "Participants in ART have the right to decide for themselves whether or not to take part in the proposed procedures. Clinics must obtain the consent of all participants in ART procedures (and, where relevant, their spouse or partner). Section 9 provides guidelines on obtaining consent."

**Age of surrogate**

I agree with the Deputy Leader of the Opposition that the age of 25 is an appropriate age. I accept that it is an arbitrary age, but having acted for young parents over the years in the family law and child protection context, subject to judicial direction, I consider 25 to be an appropriate age. However, as Professor Milbank has stated, there needs to be an "out" given to special circumstances available to judges. Queensland has such an exception.

**Case example**: The intended mother, aged 26, had a medical condition that rendered her infertile from the age of 24. The advice from her doctors is that she would never be able to have children naturally or via IVF. Surrogacy was her only option. Her sister, aged 22, was prepared to be her surrogate even though her sister had never had a child.

Under Queensland legislation, ordinarily a parentage order could not be made (and therefore a clinic would be reluctant to treat), for a surrogate aged under 25, except if there were special circumstances. The advice of doctors was that it was highly likely that the sister at the age of 24 would have the same medical condition as her sister, the intended parent. The advice of doctors was that there were special circumstances which would justify the proposed surrogacy arrangement. My view was that there were such special circumstances and that it was highly likely that if the clinic, through use of its ethics committee, deemed that medically and after counselling and legal advice it was appropriate to proceed with the surrogacy, then it was appropriate to do so and it was highly likely in those circumstances that a court would consider that there were special circumstances justifying the need to make a parentage order.

It is suggested by Mr Hidding MHA that there are no age restrictions in the ACT and South Australia. That is not correct, with respect. There are no stated restrictions in the ACT or South Australia. What this means, however, is that treatment can only commence for those who are adults, ie the age of majority at 18, because under that age any procedure would be considered to be a special medical procedure and would require the prior approval of the Family Court. There would also be licence implications for the clinics in providing surrogacy services to minors.

Clinics throughout Australia are bound by the ethical guidelines issued by the Fertility Society of Australia and the National Health and Medical Research Council. These are formally titled "Ethical guidelines in the use of assisted reproductive technology in clinical practice and research

2004 (as revised in 2007 to take into account the changes in legislation)"[1]. The guidelines state in section 9.4:

> "Before clinical ART procedures are undertaken, clinicians must ensure that consent obtained from all participants (and, where relevant, the spouses or partners) is informed, voluntary, competent, specific and documented, and remains current."

As a matter of law, consent cannot be obtained from a child or even from the parent of a child for a special medical procedure such as ART. Consent is needed to be obtained from the Family Court.

**Medical or social need**

I would support a test that there be a medical or social need for the surrogacy. This would be consistent with similar legislation for example in Queensland and New South Wales. An outcome of that legislation is that for lesbian couples a medical need of both women must be demonstrated. Curiously, within the Queensland and New South Wales legislation a medical need needs to be demonstrated in respect of any woman who is an intended parent, but only a social need in respect of a man, it being self evident that men cannot give birth.

Mr Wilkinson MLC points out that the ACT does not require a medical or social need. In reality, the ACT does require a medical or social need. The ACT legislation only allows a parentage order to be made in favour of residents of the ACT where the procedure is undertaken in the ACT. My experience in dealing with the Canberra Fertility Clinic who are, as I understand it, the sole providers of surrogacy services in the ACT, is that this medical or social need needs to be demonstrated to be able to pass the requirements of the clinic's ethics committee before treatment can commence.

**Uniform legislation**

I would certainly endorse the Select Committee's desire that there needs to be uniform legislation. There is no such uniform legislation, but a mish mash. There is an assumption by each State legislature that a surrogacy transaction begins and ends in that State. The reality of course is otherwise. I have had a number of cases where the surrogate has lived in a different State to the intended parents. Because the transactions are crossing State boundaries, this adds a level of red tape and cost to the parties so as to ensure that they are complying with State laws. This could be avoided by a national law.

**Family Court**

A clear difference between the Bill and the Select Committee report is that the Select Committee recommended at p.35:

> "That supervision and sanction of lawful, albeit unenforceable, pre-conception altruistic surrogacy agreements together with the making of relevant parent recognition orders and general parenting orders be referred to the Family Court."

[1] Viewed on 5 July 2011 at http://www.nhmrc.gov.au/_files_nhmrc/file/publications/synopses/e78.pdf

Alone of all the States Western Australia has its own Family Court, the Family Court of Western Australia. There has always been the ability of all the other States including Tasmania to have their own Family Court. Tasmania has never chosen to have its own Family Court.

The result is that the courts which administer Family Law Act 1975 matters in Tasmania, namely the Family Court of Australia and the Federal Magistrates Court of Australia, are Federal courts. Following the High Court decision in Re Wakim (1999)[2] in which the High Court partly struck down the cross-vesting scheme, State legislatures have been unable to confer jurisdiction on Commonwealth courts. Unless Tasmania is to constitute and fund its own Family Court, this recommendation of the Select Committee is impractical and unable to be enacted, which explains the difference between the Bill and the report. Certainly if there were subsequent agreement between the Commonwealth and State there could be a referral of powers of surrogacy by the State to the Commonwealth, a course which is certainly advocated by the Law Council of Australia, so that there is national uniform legislation administered by the Family Court.

**Possible requirement for the surrogate to have had a child before**

Mr Hidding MHA has stated that there ought to be a requirement that a surrogate has previously had a child. I would suggest that this does not need to be a requirement of the legislation. I note that there are differing approaches in other States about whether the surrogate needs to have previously had a child. It is generally a requirement in Western Australia and a requirement in Victoria, but is not a requirement in the ACT, New South Wales, South Australia, the Northern Territory or Queensland. The realities are these:

- Generally surrogates are those women who have previously had children and for whom the process of pregnancy and childbirth was a breeze. They want to share the joy of children to those for whom having children is an impossibility. The motive of these surrogates, incidentally, is not limited to childless heterosexual couples but has also from my experience to gay couples.

- For these women it is not a great intellectual exercise in having children, but merely sharing the love of having children.

- The fear of many is that surrogates on giving birth will seek to retain the child and the parties will then be stuck in a Re Evelyn social and legal disaster.

- Some clinics, from my experience, such as IVF Australia in Sydney and the Canberra Fertility Clinic, which have been the pioneers of surrogacy in Australia, have been insistent, even though there has been no government regulation to that effect, that the surrogate must have had a child previously.

- In reality it is highly unlikely in my view in most cases that a surrogate will ever be found who will be prepared to carry a child for someone else without having carried a child herself previously. I have outlined above, however, an exception which was the example of the 22 year old woman who was prepared to be the surrogate for her 26 year old sister, in a family where each of them would soon be precluded from having any children. If there were to be such a restriction, in my view there is not a need for such restriction given the dynamics of surrogacy, then there ought to be an exception for special circumstances such as the one I described.

[2] [1999] HCA 27; 198 CLR 511; 163 ALR 270; 73 ALJR 839

**Reasonable expenses**

I respectfully disagree with the statement by Mr Hidding MHA that it is possible under the Bill that a woman could be paid $75,000.00 to become the birth mother for intended parents because of the repayment of "reasonable expenses". The concept of what is "reasonable" would ultimately be determined by a magistrate. It is an objective test. I have no doubt whatsoever that the payment of $75,000.00 as mentioned by Mr Hidding MHA would not be reasonable and would constitute an offence under the Bill.

As a matter of practice, I believe that it is extremely helpful in drafting surrogacy arrangements to have a comprehensive list such as is contained in the Queensland or New South Wales Acts. The list in Victoria, for example, is much more restrictive meaning that certain payments that could be made in Queensland or New South Wales would constitute a criminal offence in Victoria.

I would ask you that if you are considering such a list that you copy either the legislation of New South Wales or that of Queensland. I do this in this context. When the then New South Wales Attorney indicated that Queensland's legislation was to be replicated in New South Wales, there were a number of changes including about this issue of costs. When I had to deal with my first cross border case (when the New South Wales Bill had not been enacted) I could not tell from reading the 2 provisions side by side about how they were different. Ultimately I had to have 2 of my staff members read the 2 provisions side by side to identify the differences. For some reason they were different in form but not in substance. To have another different provision in Tasmania when there might be cross border surrogacies will only add to cost and delay on the part of those seeking the surrogacy with no discernible benefit.

**Proposed parenting plan**

I note that the Opposition propose that there be an approved plan signed up at the time of the hearing, basing this on Western Australian provisions. I consider that this is a step that could lead to conflict and increased costs which would be best avoided by there not being such a requirement. I do not believe that there is a need for such a requirement.

**National birth certificate**

Whilst this might be advisable it requires the cooperation of the 8 States and Territories and the Commonwealth. The current scheme which enables an order to be made in one State to take effect in another State appears to be effective and with the passage the Bill would apply throughout Australia (with the exception of the Northern Territory).

**Who is a counsellor?**

I note the comments by Mr Wilkinson MLC about the different approaches taken in different States about who is a counsellor. I do not see that there is a need for a bureaucratic process to require the secretary of the department to accredit a particular counsellor. I consider that it is adequate for a psychologist, infertility counsellor or social worker (as is set out in the Queensland legislation) to be sufficient. The Queensland experience is that most undertaking surrogacy will do so through a clinic and be referred to the clinic's counsellor who is typically both a member of ANZICA and a psychologist.

I do not see that there is necessarily any magic in the counsellor being a psychologist.

**Case example**: Recently I attended upon clients who were intended parents. One of them was a psychologist. That client took objection to attending upon other psychologists for the purposes of counselling as she considered that the mandatory requirement of psychologists undertaking the Minnesota Multiphasic Personality Inventory (commonly called the "MMPI") was unduly intrusive and really did not cover the issue that concerned her, namely whether or not she received adequate counselling and could enter into a surrogacy arrangement with her eyes wide open and be able to give fully informed consent. I referred her and her husband to a social worker familiar with surrogacy matters who was a member of the Australian Association of Social Workers. That flexibility may not have been available in other States.

The concern was raised that a counsellor associated with any clinic might not be considered appropriate, presumably because of an assumption that a would-be surrogate might be "persuaded" to proceed.

I believe, from my experience at least, that the concerns are misplaced. Clients report to me that these counsellors:

- Provide highly professional counselling;
- The risks and traps of surrogacy are clearly explained;
- Empower their clients to make well-informed choices;
- Engage in between 4 to 8 hours counselling.

The further check and balance is that, irrespective of which counsellor is used, the clinic must satisfy itself of informed, voluntary consent, prior to commencing treatment.

**Need for the report**

Mr Wilkinson MLC has raised the issue that under the Bill there is no requirement for an independent report to be obtained for the benefit of the court. This process adds cost. The cost of obtaining such a report in Queensland is about $3,500.00. A similar type report in New South Wales I would estimate would cost between $6,000.00 and $8,000.00. Despite that cost, nevertheless, I believe that it is useful evidence for a court to obtain an independent voice for the child as to whether or not the proposal is in the child's best interests. It provides an assessment for the court which the court itself cannot undertake and it is a step which I believe would be beneficial to add to the Bill.

**Criminal record clearance**

Mr Wilkinson MLC has identified that Victoria requires such a clearance as it does also for a child protection clearance. There is no such requirement in any other jurisdiction. My view is that it would be extremely unlikely that those seeking surrogacy would ever fail one of these checks because of the unique characteristics of those seeking surrogacy, namely that it is an option of last resort at large expense, full of ethical considerations in which the process must be extremely well thought through and in a time consuming manner. It is burdensome for most people to undertake a surrogacy process. In my view it does not need to be more burdensome through such checks.

**Conception**

I am very concerned that the Bill copies legislation from Queensland and New South Wales in section 14(2)(c)(i) that the surrogacy arrangement was made before the child was ***conceived.***

The problem with this Bill as with the Queensland and New South Wales Bills is that there is no definition of what "conceived" means. In Queensland, for example, there was no reference (as there was not in your Attorney's second reading speech) of what this meant. Nor was there any reference in the explanatory memorandum. The best that we had to go on was the Select Committee report which recommended that surrogates sign surrogacy arrangements before they are pregnant so that they are not subjected to duress once pregnant.

My concern arises because many couples have viable eggs and sperm but the mother to be is unable to carry the child to term. These couples have tried for many years (I have clients who have tried for 15 years) through IVF and have frozen embryos.

If conception is the test then, what is conception? There is a view within the community and certainly by some doctors that conception occurs when cells divide. That occurs at the time of creation of the embryo which is then frozen. There is a view by other doctors that conception occurs at the time of implantation. There is yet another view that conception occurs following implantation at the time that the pregnancy takes.

The problem arises because if conception occurs as a matter of law at any time before implantation then the intended parents can never obtain a parentage order. In my view this is disastrous for the child and could easily be cured by specifying that the event in the provision is at the time of implantation, not conception.

I have had to advise several couples in Queensland who have frozen embryos and several surrogates where the frozen embryos relied on by the intended parents that there is a real risk in each case that the court (in Queensland and in one case in New South Wales) may not make a parentage order because of this provision and that the fall back position must be to make an application to the Family Court for a parenting order (which will not change the birth certificate) or, if available, an adoption order.

One of the difficulties is that parties applying for a parentage order may incur between $7,000 and $15,000 in legal costs to only discover that they cannot proceed any further and then have to incur substantially most of those costs in another application, either adoption or a parenting order under the Family Law Act.

**Conclusion**

I look forward to giving evidence and assisting the committee.

Yours faithfully

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