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PARLIAMENT OF TASMANIA

LEGISLATIVE COUNCIL
GOVERNMENT ADMINISTRATION COMMITTEE 'A'

INQUIRY INTO SURROGACY BILL 2011 AND SURROGACY (CONSEQUENTIAL AMENDMENTS) BILL 2011

Members of the Committee:

Hon Rosemary Armitage MLC
Hon Ruth Forrest (Chair) MLC
Hon Vanessa Goodwin MLC
Hon Greg Hall MLC
Hon Paul Harriss MLC
Hon Jim Wilkinson MLC

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EXECUTIVE SUMMARY

1. Government Administration Committee "A" (the Committee) was established by resolution of the Legislative Council and its operation is governed by Sessional Orders agreed to by the Council.

2. By resolution of the Legislative Council on 14 June 2011, the *Surrogacy Bill 2011* (No. 7) and the *Surrogacy Bill (Consequential Amendments) 2011* (No. 8) were referred to the Committee for Inquiry and report (the terms of reference).

3. In conducting the Inquiry, the Committee has not been required to consider the merits of surrogacy. Rather, the Inquiry is intended to scrutinise the surrogacy Bills as introduced to the Legislative Council by the Tasmanian Government.

4. The primary focus of the Inquiry has been the *Surrogacy Bill 2011* (the Bill). The body of the report deals with that Bill. The *Surrogacy (Consequential Amendments) Bill 2011* is dealt with separately in the report.

5. As a guiding principle to this report, the Committee has resolved their in principle support for regulation of altruistic surrogacy in Tasmania and is therefore supportive of the Tasmanian Government's decision to introduce surrogacy legislation to the Parliament.

6. It will be a matter for individual Members of the Legislative Council to consider the merits of surrogacy per se as part of the debate on the surrogacy Bills in the Council in due course. This report intends to inform Members of the Council as part of the debate on the Bills and any amendment to the Bills the Government may be required to consider.

7. The Committee has undertaken the task of Inquiry by scrutinising the Bills, gathering evidence and considering what, if any, amendments should be

recommended in order to ensure the most appropriate process by which a surrogacy arrangement might be undertaken in Tasmania.

8. The Legislative Council has previously undertaken a Select Committee Inquiry in relation to the overarching question of surrogacy during 2008 (Report 21) which is discussed later in this report. It was apparent to the Committee from a review of the Hansard transcript of debate on the Surrogacy Bills in the House of Assembly, that the Government was broadly guided by, and supportive of, the 2008 report of the Legislative Council when drafting the surrogacy Bills.

9. There have already been a number of Inquiries in relation to surrogacy in other States of Australia, some of which are referenced throughout this report. An example of a recent report is the 2009 report of the Legislative Council of New South Wales Standing Committee on Law and Justice '*Legislation on altruistic surrogacy in NSW*'.

10. The reader is encouraged to consider the previous Legislative Council report into surrogacy and reports completed by other Parliamentary Committees for further background information in relation to key concepts associated with surrogacy in Australia.

11. Tasmania is the last State of Australia to consider the introduction of surrogacy legislation. Surrogacy is an issue of divided opinion within the Tasmanian community and surrogacy legislation will not be supported by all stakeholders, should it be enacted in Tasmania.

12. In preparing this report, careful consideration has been given by the Committee to the need to find a difficult balance between a prescriptive and non-prescriptive Bill. An overly prescriptive surrogacy process may unreasonably restrict the number of surrogacy arrangements in Tasmania. A Bill without adequate provisions may lack sufficient safeguards to ensure that

the interests of the child remain paramount and that the interests of the other parties to a surrogacy arrangement are also protected.

13. As the Term of Reference was to consider the Bills before the Council, rather than the broader issue of the appropriateness or otherwise of surrogacy per se, the Committee did not call for public submissions as part of the Inquiry process. However eight submissions were received and considered by the Committee. Further information in relation to the written submissions received can be found at **APPENDIX A.**

14. The Committee sought to receive evidence from a select group of witnesses that would assist the Committee in its deliberations regarding the structure of the Bill and the administration of surrogacy arrangements in Tasmania. Some of the written submissions were received from witnesses who appeared before the Committee.

15. The Committee wishes to thank the witnesses for their time and valuable contributions in relation to this Inquiry.

16. The witnesses that gave evidence as part of the Inquiry can be categorised as follows:

    a. Legal experts;
    b. Court administrators;
    c. Government Agencies;
    d. Child welfare and advocacy experts;
    e. An ethicist (academic);
    f. A fertility specialist;
    g. Other jurisdictions.

17. A full list of witnesses can be found at **APPENDIX B**.

18. Although there are a range of issues that have been identified by the Committee in relation to the Bill and that will be discussed further in this report, the Committee notes that the Bill in its current form does not deal adequately with the paramount interests of the child and in particular, the principles that should be applied.

19. Whilst there are references to the 'best interests' of the child under Part 4 of the Bill, particularly at Clause 20, the Bill appears to have been drafted with the paramount interests of the surrogate and intended parents primarily in mind. The interests of these parties under the Bill are acknowledged, however, the child, whether conceived or otherwise, should be of highest priority under the Bill.

20. In considering the paramount interest of the child, the Bill places considerable responsibility on the Children's Division of the Magistrates Court of Tasmania to administer surrogacy arrangements without the aid of expertise from a suitable and experienced Agency such as Adoption and Permanency Services within the Department of Health and Human Services.

21. Given the skills and experience of Adoption and Permanency Services (the Agency), they are well placed to take on an administrative and support role, subject to appropriate resources being available to do so.

22. In reaching this view, the Committee believes the Act should be administrated by the Minister for Human Services. In the circumstances, the Magistrates Court should continue in its intended core role of determining parentage orders, which through the involvement of the Agency, should be a simplified role.

23. Furthermore, the Bill is drafted in such a way as to presume that a pregnancy associated with a surrogacy arrangement is a straight forward matter in which disputes or complications are unlikely to arise.

24. The Bill is reliant on disputes or problems being adjudicated on at the conclusion of the pregnancy by the Court, rather than the emphasis being placed on discussion and agreement prior to a surrogacy arrangement being entered into and prior to conception.

25. In the circumstances, the Committee has concluded the Bill will require further consideration by Government and significant amendment.

FINDINGS

26. The Committee is supportive of the principle of altruistic surrogacy being legislated for in Tasmania. The Committee however concluded from the evidence, that the Bill would be enhanced by a series of amendments to:

    a. strengthen the planning for, and birth of, any child born of a surrogacy arrangement; and

    b. ensure that the interests of a child born of a surrogacy arrangement are paramount.

27. The Committee has also concluded that the Bill should be further strengthened to better protect the interests of the parties to a surrogacy arrangement and should better define the roles and responsibilities of parties with support, advice and decision making roles under the Bill.

28. The Committee makes the following findings from the evidence obtained during the course of the Inquiry:

    a. The Bill does not adequately treat the interests of the child as paramount;

    b. Written arrangements are not currently a mandatory requirement under Clause 4(6) of the Bill;

    c. There may be a risk of unintended breaches of the legislation occurring at Clause 39(2)(c) by a person compiling information concerning commercial surrogacy arrangements, whilst they are researching surrogacy arrangements more generally;

    d. The Bill does not limit surrogacy arrangements to medical or social need;

    e. The Bill does not prescribe a role for a supporting agency to appropriately assist the parties to a surrogacy arrangement in relation to counselling and other support processes;

    f. The administration of the Act resides with the Minister for Justice;

g. The Bill does not include a formal regulator as is the case in some other jurisdictions such as Victoria, where surrogacy arrangements are oversighted by a Patient Review Panel;

h. Eligibility (suitability) criteria for intended parent/s are not prescribed in the Bill, with the exception of a minimum age requirement;

i. Minimum standards for counsellors are not prescribed under Clause 44 of the Bill;

j. Minimum standards for legal practitioners who may provide legal advice to any of the parties to a surrogacy arrangement are not prescribed in the Bill;

k. Part 6 of the Bill gives responsibility to the Registrar of Births, Deaths and Marriages with regard to the management of birth related records;

l. The Bill does not provide discretion for the Court to appoint a child advocate;

m. The Bill does not provide discretion for the Court to request independent court reports;

n. The Bill does not adequately deal with the process by which the parties to a surrogacy arrangement, or a child born out of a surrogacy arrangement, may access the birth or genetic information of the child;

o. The Bill does not currently require the birth mother's spouse (if any) to be a party to the surrogacy arrangement;

p. The Bill does not include the requirement for the birth mother to have previously given birth to a child;

q. The Bill prescribes a minimum age of the birth mother as being 21 years of age, which the Committee believes to be appropriate;

r. Clause 14(5) and 19(5) of the Bill enables the Court to require a birth mother to relinquish the child if she has no genetic relationship to the child and at least one of the intended parents do;

s. The biological link between the birth mother and child is significant but is not acknowledged under the Bill;

t. The Bill does not provide the same level of prescription as some other jurisdictions in relation to the birth mother's costs;

u. The Clause 3 definition of "relevant party" at Sub-Clause (b) and (c) is confusing;

v. Clause 8(2)(b) of the Bill may limit the right of the birth mother to enforce the payment of the costs of the pregnancy in circumstances where the pregnancy is terminated on the basis of a medical indication;

w. Amendments to the *Surrogacy (Consequential Amendments) Bill 2011* may be required if recommended amendments to the *Surrogacy Bill 2011* are made.

RECOMMENDATIONS

29. The Committee has concluded that a number of amendments to the Bill are required in order to support a statutory framework that will maintain the interests of the child as paramount and that will ensure a range of other important factors are taken into account.

30. The Committee makes the following recommendations:

    a. Clause 20 be removed and the Bill redrafted to instead include guiding principles in relation to the paramount interests of the child at the front of the Bill. The guiding principles should prescribe the requirement for all parties with responsibility under the Bill to act at all times in the best interests of the child. The Committee recommends that Section 6 of the Queensland *Surrogacy Act 2010* be used as the model legislation for the purpose of the drafting of the guidelines;

    b. Clause 39(2)(c) be reviewed and amended as appropriate to ensure that there be no risk of unintended breaches occurring. The Committee recommends that specific consideration be given to the evidence of Mr Stephen Page in relation to this Clause;

    c. Clause 46 of the Bill be amended to prescribe responsibility for the administration of the Act to reside with the Minister for Human Services and the responsible Department being the Department of Health and Human Services;

    d. Additional Clause/s be added to prescribe a supporting role for Adoption and Permanency Services under the Department of Health and Human Services, whilst maintaining the existing role of the Magistrates Court in the determination of parentage orders. The Committee recommends that similar provisions to those found under Part II of the *Adoption Act 1988* may be appropriate in the circumstances;

    e. Adoption and Permanency Services be provided with appropriate resources to undertake this additional role;

    f. Clause 44 of the Bill be amended to prescribe the minimum standards of accreditation required of a counsellor in order to undertake their

functions and that section 10H(4) of the South Australian *Statutes Amendment (Surrogacy) Act 2009* be used as the model legislation for the purpose of the drafting of the Clause;

g. A Clause be added to prescribe minimum standards for legal practitioners who may provide legal advice in relation to surrogacy. It is recommended that the same minimum standards as an independent children's lawyer be required of the legal practitioner, including minimum standards for practice experience in family law and the legal practitioner having appropriate advocacy and mediation experience;

h. An additional Clause be added to provide eligibility (suitability) criteria for intended parents. It is recommended that section 15(1)(b) to (f) of the *Adoption Regulations 2006* be used for the purpose of drafting the Clause;

i. Part 6 of the Bill be amended to replace the role of the Registrar of Births, Deaths and Marriages with a prescribed role for Adoption and Permanency Services in relation to the management, of and access to, surrogacy records, whilst maintaining Clause 29, which acknowledges the existing role of the Registrar in relation to birth registration;

j. The Bill be amended to provide similar principles in relation to the accessing of birth or genetic information by defined parties as provided for under Part VI, Division 2 of the *Adoption Act 1988;*

k. A child born to a surrogacy arrangement should have the right to access information in relation to gamete donors under the Bill and this information should be managed by Adoption and Permanency Services;

l. Clause 4(6) of the Bill be amended to require mandatory written arrangements and that the arrangement must include the birth mother, birth mother's spouse (if any) and the intended parent/s. In certain circumstances, such as in cases where separation or divorce proceedings are afoot at the time of the arrangement, it may not be appropriate for the birth mother's spouse to be a party to the arrangement and to accommodate this, exceptional circumstance provisions should be included in the Bill;

m. A Clause is added to prescribe a role for a child advocate to be appointed at the discretion of the Court. It is recommended that Division 10 of the *Family Law Act 1975* be used as the model legislation for the purpose of the drafting of this additional Clause;

n. Clause 14(2)(c) of the Bill be amended to include the requirement for the birth mother to have previously given birth to a live child with exceptional circumstance provisions to be available to the Court;

o. Clause 7 of the Bill be amended to provide further criteria in relation to the costs that can be claimed by the birth mother as part of a surrogacy arrangement. It is recommended that section 11 of the Queensland *Surrogacy Act 2010* be used as the model legislation for the purpose of the drafting of the Clause;

p. Clause 8(2)(b) of the Bill be amended to enable the costs of the pregnancy to be claimed by the birth mother, when the pregnancy is terminated on a medical indication;

q. Clauses 14 and 19(5)(c) and (d) be deleted from the Bill in order to reflect the importance of the biological as well as the genetic linkages to the child as being relevant and important considerations for the court;

r. A Clause be added to provide discretion to the Court to request an independent court report;

s. A Clause is added to limit surrogacy arrangements to medical or social need in the determination of parentage orders by the Court. It is recommended that section 30 of the *New South Wales Surrogacy Act 2010* be used as the model legislation for the purpose of the drafting of the Clause;

t. That further consideration be given to the definition of “relevant party” (b) and (c) under Clause 3 of the Bill;

u. A review of the *Surrogacy (Consequential Amendments) Bill 2011* be undertaken in light of these recommendations.

SURROGACY IN TASMANIA

Surrogacy Contracts Act 1993

31. Tasmania's current legislation in relation to surrogacy is the *Surrogacy Contracts Act 1993*. When introducing this legislation, the Minister for Community Services stated that the purpose of the Bill was to prohibit surrogacy contracts in Tasmania. In addition to prohibiting entering into any arrangement in relation to a surrogacy contract, the Act specifically prohibits:
    - The introduction of prospective parties;
    - Inducing another person;
    - Arranging or negotiating;
    - Making or receiving payment or reward;
    - Providing any technical or professional services in relation to achieving a pregnancy; and
    - Publishing or causing to be published an advertisement, notice, or other document.

32. The Act also makes it an offence '*to induce a person to become pregnant for the purpose of surrendering custody and guardianship of, or right in relation to, a child born as a result of the pregnancy'*.

33. Currently within Tasmanian legislation, any surrogacy contract, altruistic or otherwise, is void and unenforceable at law.

Legislative Council Select Committee on Surrogacy 2008

34. A Legislative Council Select Committee was formed by Order of the Council in 2008 to inquire into and report on the issue of surrogacy. The Committee identified a range of concerns around the current restrictive legislation and its place in modern society as infertility becomes more prevalent.

35. That Committee noted surrogacy legislation was being changed nationally to represent the changing views and needs of society. The Committee noted

that "*altruistic surrogacy will require the eventual repeal of the Surrogacy Contracts Act 1993 and its replacement with nationally consistent legislation.*"[1]

36. The Committee made eight recommendations to facilitate altruistic surrogacy within Tasmania. Those recommendations were:
    a. Change in the current Section 5 of *Surrogacy Contracts Act 1993* to remove the inclusion of legal, psychiatric or psychological services from '*services in relation to achieving a pregnancy'*;
    b. To legally recognise '*parentage achieved by surrogacy arrangements'*;
    c. Nationally consistent birth certificates and parental data register;
    d. That the making of parentage orders for '*lawful, albeit unenforceable, pre-conception altruistic surrogacy agreements'* be referred to the Family Court;
    e. That the parties to the surrogacy arrangement undertake counselling and legal advice, a report of which should be lodged with the Courts when any '*pre-conception altruistic surrogacy agreement is made'*;
    f. That the parties to the surrogacy arrangement be no less than 21 years of age;
    g. That prospective surrogates have previously carried at least one child to term; and
    h. Parties should lodge an application for parentage orders to the Family Court between six weeks and six months from the date of birth of the child.[2]

Second Reading Speech

37. The *Surrogacy Bill 2011* was introduced into the House of Assembly on 15 March 2011 with the intention of repealing the current *Surrogacy Contracts Act 1993.* The Bill recognises that under the current legislation, surrogacy arrangements are illegal and restrictive in today's society. The Bill is not discriminatory in specifying requirements for intended parents and seeks to

[1] Select Committee on Surrogacy Report July 2008, p. 4
[2] *Ibid*, p. 6-7

ensure protection for all parties involved in an altruistic surrogacy arrangement.[3]

38. The Bills have yet to be read a second time in the Legislative Council. However, during debate in the House of Assembly, the Attorney-General raised the following points:
    a. The new approach to decriminalising altruistic surrogacy was '*guided by and implements much of*' the Legislative Council Select Committee on Surrogacy's report completed in 2008;
    b. The introduction of the Bills was timely considering that the Standing Committee on Attorneys-General have developed model laws and other States and Territories have '*all passed legislation in recent years'* that '*allows altruistic surrogacy and regulates surrogacy-related matters including providing a legal mechanism for the transfer of the parentage of the child from the birth parents to the intended parents';* and
    c. That community responses to both the Standing Committee of Attorneys General (SCAG) and Select Committee process had indicated support for surrogacy.

Debate on the Bills in the House of Assembly

39. The Bills were debated in the House of Assembly in April 2011. Several themes were raised as issues of concern. These included, but were not limited to:
    - Paramount interest of the child;
    - Knowledge of genetic heritage;
    - Open-endedness of the Bill, (eg. allowing overseas surrogates);
    - No minimum age of intended parents or surrogate;
    - Issues arising from disability or disease;
    - Issues arising from the birth mother's attachment to the child;
    - Emphasis on altruistic surrogacy arrangements only;
    - Parentage orders transferring parentage from birth mother to intended parents;

[3] *Surrogacy Bill 2011 – fact sheet*

- Costs incurred by birth mother;
- Stringency of surrogacy laws should reflect the adoption process; and
- Requirements of intended parents, single, heterosexual or homosexual couples, fertility or medical issues. [4]

[4] Hansard Transcript, April 12 and 14, 2011 *House of Assembly*

SURROGACY LEGISLATION IN OTHER JURISDICTIONS – AN OVERVIEW

40. The Committee found that surrogacy legislation in other jurisdictions is either a prescriptive process, such as under the Victorian and Western Australian legislation, or minimalist in structure, such as in the United Kingdom.

41. The second distinct difference between surrogacy legislation across jurisdictions is that it may be overseen by a regulator, such as in Victoria and Western Australia or left in the hands of those involved as parties to an arrangement to navigate according to the legislative rules under the guidance of the court system.

42. With the exception of the Northern Territory, all States of Australia and the Australian Capital Territory currently have in place surrogacy legislation.

Victoria	*Assisted Reproductive Treatment Act 2008* *Status of Children Act 1974* (amended)
NSW	*Surrogacy Act 2010*
Queensland	*Surrogacy Act 2010*
Western Australia	*Surrogacy Act 2008* and *Surrogacy Regulations 2009*
South Australia	*Statutes Amendment (Surrogacy) Act 2009*
ACT	*Parentage Act 2004*
UK	*Surrogacy Arrangements Act 1985*

43. In addition to state based legislation, the National Health and Medical Research Council (NHMRC) guidelines regulate the use of assisted

reproductive treatment nationally, to the extent that State legislation has not affected these.[5]

44. A paper released in early 2009 by SCAG described the elements that should be included in surrogacy legislation to achieve harmonisation. The Committee has noted that some Australian surrogacy legislation was enacted before the proposed model was released and in other cases afterwards. The broad framework of the model includes consideration of the following issues:

- Surrogacy arrangements
- Parentage orders
- Consent
- Eligibility for a parentage order – same sex couples
- Residency
- Eligibility for ART – infertility treatment
- Eligibility – age and previous pregnancies
- Approval process
- Screening
- Donor register
- Retrospectivity and transitional arrangements
- Advertising
- Brokerage
- Mutual recognition
- Commonwealth issues

45. Internationally, United Kingdom legislation relating to surrogacy is minimalist in nature. It merely defines the concept of surrogacy, affirms that altruistic surrogacy is not enforceable and criminalises commercial surrogacy.[6] In New Zealand the situation is similar.[7]

[5] SCAG, 'A Proposal for a National Model to Harmonise Regulation of Surrogacy', January 2009, p. 1; NHMRC, 'Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research', June 2007, p. 43 and p. 57
[6] *Surrogacy Arrangements Act 1985* (UK)
[7] *Human Assisted Reproductive Technology Act 2004* (NZ)

46. Possibly the least restrictive jurisdiction is California, where surrogacy in all forms is tolerated, including commercial surrogacy. Precedent has established that the Californian courts will favour intended parents and not the birth mother.[8] In some other US states, surrogacy remains illegal.[9]

47. Israel has prescriptive legislation on surrogacy, influenced by the Judaic belief system. Two notable features of the Israeli model are that, firstly, a committee initially approves and then supervises the process, and secondly, the surrogate mother must be anonymous and unrelated to the intended parents.[10]

48. In general terms, surrogacy legislation in Australia tends to work in the following way, which will be discussed in further detail later in this report:

    a. The surrogacy arrangement is made in the correct form between eligible parties;

    b. The birth mother proceeds to become pregnant and a child is born;

    c. A parentage order is applied for and the Court accepts the application if various conditions are met, usually that phase 1 was completed properly;

    d. A parentage order is made, transferring parentage to the intended parents, but only if phases 1 and 2 were completed properly and subject possibly to other conditions;

    e. The new parenting arrangements are registered.

49. Minimalist legislation exists in the United Kingdom in that it only seeks to regulate point a) above by making commercial surrogacy an offence.

50. Prescriptive legislation in Victoria and Western Australia regulates various aspects of points a) to e) above, in slightly different terms in each case, but

[8] NSW Legislative Council Standing Committee on Law and Justice, 'Legislation on Altruistic Surrogacy in NSW', May 2009, p. 21
[9] Legislative Council of Western Australia Standing Committee on Legislation, 'Surrogacy Bill 2007', report 12, p. 16
[10] NSW Legislative Council Standing Committee on Law and Justice, *op cit*, p. 22

nevertheless in some degree of detail. In these two jurisdictions, the eventual granting of a parentage order means fulfilling the necessary requirements at every stage.

51. As it stands, the Tasmanian Bill is relatively minimalist regarding points a) and b), but is more prescriptive in relation to points c) to e).

52. The question of how to design surrogacy legislation is complex and a difficult issue to settle. By way of example as to the challenges associated with settling on a model of legislation, a New South Wales Parliamentary Committee on surrogacy could not agree upon this core issue:

> …*The majority of the Committee adopts the principle that Government regulation of altruistic surrogacy in NSW should be kept to a minimum. The other Committee members believe that this minimalist approach is highly problematic because it fails to acknowledge and address a number of issues that arise from surrogacy*.[11]

53. Its report also noted that the majority of witnesses that appeared advised the New South Wales Parliamentary Committee that it should favour minimalist legislation because prescriptive legislation caused more problems than it solved.[12] At this time, it appears there has not been a review of the New South Wales surrogacy legislation post-enactment that might provide a more definitive impression of whether these predictions have eventuated.

[11] NSW Legislative Council Standing Committee on Law and Justice, *op cit*, p. 67
[12] *Ibid*, p. 54

THE TASMANIAN SURROGACY BILL 2011 – A COMPARATIVE ANALYSIS BETWEEN JURISDICTIONS

PHASE 1: AGREEMENT OF PARTIES

A Surrogacy Arrangement is Made Between the Parties

54. The Tasmanian Bill provides that the arrangement is established between the birth mother and the intended parent/s verbally or in writing – Clause 4(2).

55. In the Australian Capital Territory and Victoria, arrangements may be written or oral. In other jurisdictions, it must be written and signed. South Australian legislation requires a lawyer's certificate to be attached certifying that the legal implications were explained to the parties and that the agreement was signed in the lawyer's presence.[13]

56. Parties to the agreement in Tasmania must include the birth mother, the intended parent/s and may include others such as the birth mother's spouse – Clause 4(2) and (3). This is largely consistent with rules that apply in other jurisdictions.

57. In Israel by comparison, the surrogate mother must be anonymous and unrelated to the intended parents. [14]

58. Eligibility to make a surrogacy arrangement does not directly translate into assured eligibility to make a parentage order. In practice this may be safeguarded or addressed through the requirement to seek legal advice about the effect of the arrangement in advance or the involvement of a regulator.

59. Legal advice is not mandatory in the Tasmanian Bill at the point of making an arrangement but the absence of any legal advice may affect the likelihood of a parentage order being granted.

[13] *Statutes Amendment (Surrogacy Act) 2009* (SA) s.10HA
[14] NSW Legislative Council Standing Committee on Law and Justice, *op cit*, p. 22

60. Pursuant to Clause 14(2)(a)(i), the Court must be satisfied that the parties received independent legal advice at the time of the arrangement before a parentage order may be subsequently granted. Nonetheless, this requirement can be overlooked at the Court's discretion - Clause14 (3)(a).

61. In most Australian jurisdictions, there is a requirement for the parties to seek legal advice and counselling. In Western Australia, there must be a three-month period between the time when legal advice and counselling was provided to the parties and when the Reproductive Technology Council (RTC) approves the arrangement. Without the Council's written approval of the arrangement, a parentage order cannot subsequently be granted.

62. The Council also has responsibility for checking whether the arrangement is in accordance with the Western Australia Act, which includes consideration of whether the birth mother is 25 years of age; has given birth to a live child; that relevant parties have all signed a written agreement; that counselling has been completed; psychological assessment completed; legal advice obtained and medical advice obtained. [15]

63. The Tasmanian Bill proposes that a surrogacy arrangement is not enforceable – Clause 8(1).

64. There is variance in Australia on enforcement of agreements. The Australian Capital Territory, Victoria and South Australia are silent on the question of enforceability.

65. Under the Tasmanian Bill, the birth mother's surrogacy costs at Clause 7 can be enforced even though the arrangement is not completed as planned, such as when no child is born or when a child is born and the intended parents subsequently do not apply for parentage. If the birth mother decides to keep the child (does not consent to a parentage order), costs are not enforceable – Clause 8.

[15] *Surrogacy Act 2008* (WA), s.16 and s.17

66. Queensland has a similar provision to the Australian Capital Territory.[16] In New South Wales, costs are enforceable provided the arrangement was made prior to conception.[17] In Western Australia, costs are enforceable regardless of the eventual outcome. The Western Australian and New South Wales Acts are also more prescriptive than the Tasmanian Bill in relation to the types of costs that are reasonable, such as medical, travel, earnings foregone, counselling and insurance.[18] This may become important if the Court had to determine whether the payment was commercial in nature. While costs are enforceable, the intended parents could be living interstate or elsewhere outside the court's jurisdiction.

67. Under the Tasmanian Bill, a commercial surrogacy arrangement (where reward or benefit is gained) is not permitted under Clause 38. An application for a parentage order may be quashed on the grounds that the arrangements were commercial in nature under Clause 14(2)(a)(ii).

68. Under the Tasmanian Bill, the intended parent/s and the birth mother must have attained 21 years of age when the surrogacy arrangement was made at Clause 14(2), otherwise the Court may decide against granting a parentage order.

69. There are differences between Australian jurisdictions regarding the age of birth parent/s and intended parent/s, ranging from 18 years to 25 years. In Queensland, a court may dispense with the age requirement in exceptional circumstances at the time of determining whether to make a parentage order.[19]

[16] *Surrogacy Act 2010* (Qld) s.15
[17] *Surrogacy Act 2010* (NSW), s. 6
[18] *Surrogacy Act 2008* (WA), s.6 and s.7; Surrogacy Act 2010 (NSW), s. 7
[19] *Surrogacy Act 2010* (Qld) s. 23

70. In Victoria, the legislation requires that the birth mother has previously carried a pregnancy and given birth to a live child.[20]

71. Under the Tasmanian Bill there is no requirement for the surrogate mother to have carried a live child to term.

Genetic Connection

72. The Tasmanian Bill does not require a genetic connection between the child and the intended parent/s. This is the case in the majority of other jurisdictions.

73. In the Australian Capital Territory and Western Australia however, at least one of the intended parents must also be a genetic parent of the child.[21]

Approval by Relevant Authority (the Regulator)

74. Though not part of the Tasmanian Bill, in some other jurisdictions, the surrogacy arrangement must be endorsed or approved by a regulator subject to conditions. Nonetheless, to access treatment to assist with the pregnancy, NHMRC guidelines would apply.

75. In Victoria, the Patient Review Panel (PRP) is the prescribed authority and in Western Australia, the RTC is the prescribed authority. Checks are made to ensure the arrangement has been properly formulated. [22]

76. The question of whether to include some form of regulator or arbiter being involved in the surrogacy arrangement is probably the most notable difference between surrogacy legislation among Australian jurisdictions. Without any initial oversight of the surrogacy arrangement, matters of procedure as required by whichever relevant Act are tested at the time of applying for a parentage order, when mistakes could be irreversible. The Tasmanian Bill does not provide for a regulator, but would allow the court to permit

[21] *Parentage Act 2004* (ACT), s.24; *Surrogacy Act 2008* (WA), s.21(4)
[22] *Assisted Reproductive Technology Act 2008* (Vic), s.40

exceptions at that later stage if aspects were not completed in strict accordance with the Act.

77. In recommendation 5, the New South Wales Parliamentary Committee on surrogacy recommended that an '*independent, government-appointed, expert review panel'* should be considered to oversee surrogacy arrangements.

78. However, this panel would only have had oversight to the extent of ensuring that the parties are adequately aware of their '*legal rights and responsibilities*'.[23] In relation to the psychological preparedness of the parties, the committee argued that this should be left in the hands of those providing surrogacy services:

> *The majority of the Committee believes that decisions regarding psychological preparedness of parties and the delivery of fertility treatment itself should be left largely in the hands of psychologists, psychiatrists, other counsellors and clinicians with relevant qualifications and experience in the field, to be made with regard to the individual characteristics and circumstances pertaining to particular surrogacy arrangements.*[24]

79. Recommendation 5 was not established in New South Wales legislation, as the New South Wales *Surrogacy Act 2010* does not establish such a panel. Nonetheless, the thread of the Committee's report is difficult to reconcile because its Members questioned the role of a regulator in dealing with legal issues, and believed it to be unnecessary for psychological or emotional issues.

80. A Western Australian Committee recommended creating a surrogacy review panel to approve surrogacy arrangements for precisely the opposite reasons to the New South Wales Committee. In that case, the Committee's Members were *'firmly'* swayed to this view because they believed any psychological

[23] NSW Legislative Council Standing Committee on Law and Justice, *op cit*, p. 101
[24] *Ibid,* p. 67

assessment ought to be '*independent of the clinic that will provide the treatment.*'[25]

Same Sex Parent and/or Single Parents

81. The Tasmanian Bill does not preclude same-sex parents or single people from being intended parents. This is the same as legislation in other jurisdictions such as Queensland and New South Wales.

82. In South Australia and Western Australia by contrast, only heterosexual couples are eligible to be intended parents.[26]

Fertility

83. The Tasmanian Bill is silent in relation to the fertility of intended parents.

84. Legislation in three interstate jurisdictions requires that a person may only seek surrogacy services if infertility is an apparent issue or there is a medical need.[27]

Commercial Surrogacy

85. Commercial surrogacy is an offence under Clause 38 of the Tasmanian Bill.

86. This is consistent Australia wide. NHMRC guidelines clearly warn that it would be '*ethically unacceptable*' for clinics to facilitate commercial surrogacy.[28]

87. In California, surrogacy in all forms is tolerated, including commercial surrogacy, and precedent has established that the Californian courts will favour intended parents and not the birth mother.[29]

[25] Legislative Council of Western Australia Standing Committee on Legislation, *op cit*, p. 45-46
[26] *Surrogacy Act 2008* (WA), s.19(2); *Statutes Amendment (Surrogacy Act) 2009* (SA) s.10HA(2)(b)(iii)
[27] *Surrogacy Act 2008* (WA), s.17 and s.19; *Statutes Amendment (Surrogacy Act) 2009* (SA) s.10HA; *Surrogacy Act 2010* (Qld) s.14 and s.22
[28] NHMRC, *op cit*, p. 57
[29] NSW Legislative Council Standing Committee on Law and Justice, *op cit*, p. 21

Fitness of Intended Parents and the Birth Mother (suitability assessment)

88. There is no test within the Tasmanian Bill as to the fitness (suitability) of the intended parents or the birth mother other than a minimum age of 21 years.

89. In Victoria, a person with a criminal record for sexual or violent offences or that is subject to a child protection order is prevented from accessing artificial reproductive technology (ART) treatment.[30]

90. In South Australia, at the time of considering whether to make a parentage order, the Court is required to decide whether the intended parents are '*fit and proper*' to become parents.[31]

91. In Victoria, the legislation requires that the birth mother has previously carried a pregnancy and given birth to a live child,[32] a test aimed at ensuring the birth mother is adequately prepared through past experience.

PHASE 2: PREGNANCY

Pre-Pregnancy

92. Under the Tasmanian Bill, a Court is not to take into account the method of conception at the stage of determining whether to make a parenting order under Clause 21.

93. In some States, intended parents are prevented from seeking surrogacy services unless certain conditions are met, such as having medical issues preventing a natural pregnancy. In this area the Tasmanian Bill is silent and specifies that the method of conception should not be taken into account. In Victoria, an ART provider may only carry out a procedure to facilitate surrogacy if the relevant authority has approved the surrogacy arrangement.[33]

[30] *Assisted Reproductive Technology Act 2008* (Vic), s.14
[31] *Statutes Amendment (Surrogacy Act) 2009* (SA) s.10HB(10)
[32] *Assisted Reproductive Technology Act 2008* (Vic), s.40
[33] *Assisted Reproductive Technology Act 2008* (Vic), s.39

94. In the Australian Capital Territory, any conception procedure must have occurred within the Australian Capital Territory.[34] This means that if Australian Capital Territory residents travel interstate or abroad to access ART, they would be disqualified from seeking a parentage order in the Australian Capital Territory.

95. Under the Tasmanian Bill, in order to satisfy the Court at the point of making a parentage order, the parties to the surrogacy arrangement should undergo counselling from an accredited counsellor about the arrangement and its social and psychological implications before the child is conceived – Clause 14(2)(d)(i). Counselling is also required after the birth of the child and before the parentage order is made under Clause 14(2)(d)(ii). This is not mandatory and the Court may decide at its discretion to overlook this requirement under Clause 14(3)(a). The counsellor does not need to be in any sense 'independent', although they should be accredited under Clause 44.

96. In Victoria, parties must undergo counselling before a surrogacy arrangement is entered into.[35]

97. In New South Wales, an application for a parentage order must be accompanied by an independent counsellor's report, but this does not need to occur at the time of the arrangement. However, separate New South Wales legislation stipulates that an ART provider must not provide a woman with services to facilitate surrogacy, unless first receiving an assessment report from an independent counsellor who interviewed all parties in relation to the surrogacy arrangement.[36]

98. Under the Queensland Act, an appropriately qualified independent counsellor must present the Court with an affidavit and surrogacy guidance report to verify that the parties received counselling (pertaining to social and psychological implications, care arrangements and the child's best interests).

[34] *Parentage Act 2004* (ACT), s.24(a)
[35] *Assisted Reproductive Technology Act 2008* (Vic), s.43
[36] *Assisted Reproductive Technology Act 2007* (NSW), s. 15A

To be independent, the person who provided counselling in relation to the surrogacy arrangement must not provide counselling in relation to the parentage order and must not have a direct connection with a medical practitioner involved in any procedure that resulted in the birth of the child, such as being employed by the same fertility clinic.

99. To be qualified, the Queensland Act lists numerous professional bodies to which the counsellor should be a member, but also exempts this requirement if the counsellor has the experience, skills or knowledge.[37]

100. By comparison, under the Tasmanian Bill, Clause 44 states that the Secretary of the Department of Justice may accredit counsellors based on qualifications and experience. NHMRC guidelines mean that a person seeking ART should have received counselling in advance.[38]

The Birth Mother Does Not Become Pregnant

101. Under the Tasmanian Bill, the birth mother may still be reimbursed for costs under Clause 8(2)(a) as determined in the surrogacy arrangement.

The Birth Mother Successfully Becomes Pregnant

102. Under the Tasmanian Bill, any arrangement made for surrogacy is not a surrogacy arrangement for the purpose of the Act if the arrangement is made after the birth mother becomes pregnant - Clause 4(5)(a).

103. This clause provides that an arrangement must be effected before the birth mother becomes pregnant. Additionally, the Bill requires, for the Court to make a parentage order, that each party received counselling before the child was conceived.

104. When conception involves reproductive technology and frozen embryos, this process begins before pregnancy (e.g. when embryos were frozen and stored). The lack of clarity in the Bill could create doubts or anomalies that

[37] *Surrogacy Act 2010* (Qld) s. 19, s. 31 and s. 32
[38] NHMRC, *op cit*, p. 43

the Court would have to resolve because conception and pregnancy are not defined.

105. United Kingdom legislation similarly states that a surrogacy arrangement is only such if made before the surrogate mother began to carry the child. Unlike surrogacy legislation in Australia, the United Kingdom Act avoids doubt by specifying that, if treatment were involved, a woman carrying a child would be regarded as such at the point of insemination. [39]

106. Under the Tasmanian Bill, any pre-existing arrangement may only be varied in terms of reimbursement of the birth mother's costs under Clause 4(5)(b); and the birth mother has the right to manage the pregnancy notwithstanding anything contained in the surrogacy arrangement - Clause 9(2).

107. Only Queensland legislation contains a similar provision.[40] In all other cases, the legislation is silent as to whether the birth mother has an exclusive right to manage the pregnancy.

The Birth Mother Becomes Pregnant but no Child is Born

108. Under the Tasmanian Bill, the birth mother may still be reimbursed for costs under Clause 8(2)(b) as determined in the surrogacy arrangement as agreed or varied if a birth mother becomes pregnant but no child is born through no action taken by or requested by the birth mother. This suggests that if a birth mother sought a termination of pregnancy on any grounds, costs associated with becoming pregnant, medical care during the pregnancy prior to the termination of the pregnancy and medical care following the termination may not be required to be reimbursed.

A Child is Born

109. Under the Tasmanian Bill, in order to satisfy a court at the point of making a parentage order, the parties to the surrogacy arrangement should undergo counselling from an accredited counsellor about the arrangement and its social and psychological implications after the birth of the child and before the

[39] *Surrogacy Arrangements Act 1985* (UK), s. 1
[40] *Surrogacy Act 2010* (Qld) s. 16

parentage order is made under Clause 14(2)(d). This is not mandatory and the Court may decide at its discretion to overlook this requirement under Clause 14(3).

110. By comparison, post-birth counselling is a requirement in Western Australia and New South Wales, but not required elsewhere (or, alternatively, counselling is required at some stage though the point in time is unspecified). In Western Australia, both the birth parent/s and intended parent/s need to receive counselling,[41] whereas in New South Wales, only the birth parent/s need counselling post-birth.[42] In South Australia, this is not mandated, but the Court has the power to direct the parties to undergo counselling before deciding whether to make a parentage order.[43]

111. Notwithstanding anything in the Bill, the birth parent/s are required pursuant to the *Births Deaths and Marriages Act 1999* to register the child's birth under Clause 29 of the Bill.

PHASE 3: APPLYING FOR PARENTAGE

Parentage Application

112. In terms of eligibility, the Tasmanian Bill provides that only the intended parent/s may apply for a parentage order in relation to the child under Clause 11(1). Conditions and exceptions to this principle are outlined below.

113. In the Australian Capital Territory, one of the intended parent/s must also be a genetic parent of the child.[44] There is not such a requirement in the Tasmanian Bill.

114. Under the Tasmanian Bill, the intended parent/s must then serve on the birth parent/s a copy of the application under Clause 11(4).

[41] *Surrogacy Act 2008* (WA), s.21(2)(b)
[42] *Assisted Reproductive Technology Act 2007* (NSW), s.35(2)
[43] *Statutes Amendment (Surrogacy Act) 2009* (SA) s.10HB(12)
[44] *Parentage Act 2004* (ACT), s.24

115. There are no equivalent provisions in surrogacy legislation elsewhere in Australia. However, notwithstanding the absence of this provision, there is an implicit requirement for the intended parents, upon seeking a parentage order, to contact the birth parent/s to obtain their consent prior to the order being made, as without consent the Court could not ordinarily proceed.

116. If, under the surrogacy arrangement in Tasmania, there was one intended parent, only that same person may apply for parentage under Clause 11 and Clause 12(1) of the Bill.

117. If, under the surrogacy arrangement, there were two intended parents, only these two same people jointly may apply for parentage under Clause 12(3).

118. There are provisions under the Tasmanian Bill, for circumstances where the intended parents have separated. They may choose to apply jointly or singularly under Clause 12(4) although the Court must deal with the applications together under Clause 12(7).

119. If one intended parent makes an application in this situation, the other intended parent must be served with a copy of the application under Clause 12(6). This must occur with 14 days of the date of the hearing in relation to the application under Clause 11(1).

120. In general, leave of the Court is required or special rules apply for intended parent/s to apply on a sole basis and for exceptional circumstances such as where a couple have separated or a person has died. In South Australia, as a matter of principle, the Court may not proceed with an application unless the birth mother has consented, though the Court can dispense with this requirement if the birth mother has died or is not contactable.[45] In Victoria, there are only provisions for the intended parent/s to make an application

[45] *Statutes Amendment (Surrogacy Act) 2009* (SA), s.10HB(7)

jointly.[46] In this area, the Tasmanian Bill provides a degree of flexibility for changing circumstances over time.

121. If, at the time of the arrangement, two intended parents were in fact not spouses, neither may apply - Clause 12(5).

122. If one intended parent has died, the surviving parent may apply under Clause 11(1) and 12(8).

123. In terms of timing, the Tasmanian Bill provides that an application may be lodged with the Court not less than 30 days after the date of birth and not more than six months after the date of birth under Clause 13(1)(a). In addition, the application must commence within 14 days of the birth parent/s being provided with a copy of the application pursuant to Clause 11(4) and 13(1)(b). The Court may grant leave to lodge an application after six months in exceptional circumstances under Clause 13(2).

124. While there are slight differences, generally the earliest an application can proceed is one month after birth and the latest is six months after birth. In this area, the Tasmanian Bill is consistent with the rest of Australia. Also, in Tasmania, the Court may grant leave for an application after this time. In the Australian Capital Territory and South Australia, there is no recourse available after the specified time period – at least not within the scope of surrogacy legislation.

PHASE 4: MAKING A PARENTAGE ORDER

Court to Make Parentage Order

125. Under the Tasmanian Bill, the Court can make a parentage order if various criteria are met.

[46] *Status of Children Act 1974* (Vic), s.20

126. Firstly, the parties to the surrogacy arrangement received independent legal advice in relation to the arrangement and the implications of a parentage order under Clause 14(2)(a)(i).

127. As noted earlier in the report, in most Australian jurisdictions, such as in Western Australia, there is a requirement for the parties to seek legal advice and counselling.[47]

128. Under the Tasmanian Bill, the birth mother must have attained 21 years of age when the surrogacy arrangement was made under Clause 14(2)(b).

129. Minimum age requirements vary elsewhere in Australia, ranging from 18 to 25 years.

130. Each party to the arrangement under the Tasmanian Bill must have received counselling from an accredited counsellor about the arrangement and its social and psychological implications before and after the birth of the child under Clause 14(2)(d).

131. Post-birth counselling is a requirement in Western Australia and New South Wales, but not required elsewhere (or, alternatively, counselling is required at some stage though the point in time is unspecified). In Western Australia, both the birth parent/s and intended parent/s need to receive counselling,[48] whereas in New South Wales only the birth parent/s need counselling post-birth.[49] In South Australia, this is not mandated, but the Court has the power to direct the parties to undergo counselling before deciding whether to make a parentage order.[50]

132. There are provisions under the Tasmanian Bill for circumstances where the intended parents have separated. They may choose to apply jointly or singularly under Clause 12(4), although the Court must deal with the

[47] *Surrogacy Act 2008* (WA), s.16 and s.17
[48] *Surrogacy Act 2008* (WA), s.21(2)(b)
[49] *Assisted Reproductive Technology Act 2007* (NSW), s.35(2)
[50] *Statutes Amendment (Surrogacy Act) 2009* (SA) s.10HB(12)

applications together under Clause 12(7). If one intended parent makes an application in this situation, the other intended parent must be served with a copy of the application under Clause 12(6). This must occur with 14 days of the date of the hearing in relation to the application under Clause 12(6) and 14(2)(e).

133. At the time of the hearing, a parentage order may be made if the child is living with one/both of the intended parent/s named in the parentage order, and each intended parent is resident in Tasmania under Clause 14(2)(f)(i) and (ii).

134. Other jurisdictions also consider residency and living arrangements criteria at either the date of lodging the application or at the date of the hearing. Victoria is the most restrictive in this regard. Any conception procedure must have occurred within Victoria, the intended parent/s must live in Victoria at the time of making the application and the child must be living with the intended parent/s at the time the application is made.[51]

135. Each person who is a relevant party (the birth mother, the birth mother's spouse, the birth parent and the intended parent/s) consents to the parentage order under Clause 14(2)(f)(iii); and the Court considers whether the proposed order is in the best interests of the child under Clause 14(2)(g).

136. The requirement for all relevant parties to consent is a standard feature of surrogacy legislation in Australia.

137. Nonetheless, the Court can proceed under the Tasmanian Bill, to make an order if some criteria cannot be met under subsection 2 provided the proposed order is in the best interests of the child under Clause 14(3).

138. The Court may also make an order when the birth mother and/or spouse has not consented at the time of the hearing:

[51] *Status of Children Act 1974* (Vic), s.20(1)(a) and (b); s. 22(c)

a. due to the birth mother's and/or spouse's lack of mental capacity to give consent, death, or having become non-contactable; and
b. Because the child is now living with the intended parent/s who applied for the parentage order; and
c. Provided the Court considers that making the order is in the best interests of the child under Clause 14(4)(c).

139. Surrogacy legislation in Australia generally allows the Court to dispense with the need for consent if the birth mother has died, lost capacity or cannot be contacted and the Tasmanian Bill is consistent in this area.

140. Under the Tasmanian Bill, the Court may also proceed to make a parentage order even though one or more of the birth parents have not consented to the making of the order and the child is also not living with the intended parent/s under Clause 14(5)(a). This is permitted provided that the Court is satisfied that the child was not conceived using the sperm or egg of one of the birth parent/s under Clause 14(5)(c) and (d) and at least one of the intended parent/s provided the sperm or egg that resulted in the birth of the child. In other words, if there is no genetic connection between one of the birth parents and the child, and there is a genetic connection with at least one of the intended parents, even if the birth parent/s does not consent, the Court has an overriding power to proceed and make a parentage order.

141. Whilst it made no recommendation on this question, a Western Australia Parliamentary Committee observed that when the Court is empowered to make a parentage order, in even limited circumstances, without the consent of the birth mother, this means a court can in fact enforce a surrogacy arrangement. The Committee noted this as a 'contentious' problem, as the intended parents would be powerless if, for instance, the birth mother dies or lost capacity to consent. [52]

[52] Legislative Council of Western Australia Standing Committee on Legislation, *op cit*, p. 57

142. Nevertheless, the clear intent of the Tasmanian Bill not to make surrogacy arrangements enforceable under Clause 8(1) might conflict with Clause 14, which provides an avenue, albeit narrow, for the Court to transfer parentage without the birth mother's consent to complete the surrogacy arrangement.

143. By contrast, there is not a similar level of protection for the birth mother if the intended parents could not be contacted; from this perspective, the surrogacy arrangement is unenforceable.[53] There is some protection through enforcement of costs, but the intended parents might move interstate or elsewhere outside the Court's jurisdiction.

144. A Queensland Parliamentary Committee was particularly concerned about the possibility of forced relinquishment:

> *The committee does not support any change to the automatic recognition of the birth mother as the legal parent irrespective of her or the intending parents' genetic relationship with the child. The committee believes that this position reflects a cautionary approach which seeks to protect the birth mother and prevent forced relinquishment. Although there is considerable evidence of birth mothers relinquishing, the committee takes the view that the gestational relationship is an uncertain one.*[54]

145. As such, the Committee recommended

> *…That the Queensland Government maintains the status quo where the birth mother is automatically recognised as the legal parent irrespective of her or the intending parents' genetic relationship with the child.*[55]

[53] Parliament of South Australia Social Development Committee, 'Inquiry into Gestational Surrogacy', November 2007, p. 49
[54] Queensland Legislative Assembly, 'Investigation into Altruistic Surrogacy Committee: Report', October 2008, pp. 55-56
[55] *Ibid*, pp. 55-56

146. Queensland legislation asserts positively at s.17 that until a parentage order is made, a presumption remains in favour of the birth mother. It does however, provide for the Court to dispense with the need for consent in limited circumstances. The Committee's report did not allude to supporting any possible exemption. [56]

147. Under the Tasmanian Bill, the Court may also consider other matters it considers relevant under Clause 14(6).

148. In South Australia, the Court is required to decide whether the intended parents are "fit and proper" to become parents.[57]

149. As a general principle under the Tasmanian Bill, the child will be transferred to the intended parent/s if all parties consent and in the absence of any evidence to show this would be contrary to the best interests of the child under Part 4 of the Bill.

150. Other jurisdictions also apply the best interests of the child test. The Queensland Act, for example, goes further and contains a series of guiding principles according to which the Act is to be administered (child's present/future best interests in terms of status, relationships, health and wellbeing),[58] whereas in the Tasmanian Bill, the only guiding principle is that the child's best interests are paramount in general terms under Clause 20.

151. The Western Australia Act states that a presumption exists that the child's best interests are to be for the child to be transferred to the intended parents, unless evidence to the contrary arises.[59]

152. In Victoria, the Act expressly states that the only rebuttal against this presumption is evidence that the birth mother did not consent to the surrogacy arrangement.[60]

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[56] *Ibid*, pp. 55-56 and p. 77
[57] *Statutes Amendment (Surrogacy Act) 2009* (SA) s.10HB(10)
[58] *Surrogacy Act 2010* (Qld) s.3
[59] *Surrogacy Act 2008* (WA), s.13

153. The United Nations Convention on the Rights of the Child affirms that the best interests of the child shall be the primary consideration where action, such as in a court, involves a child.[61] The Convention also requires that a child must not be separated from his or her parents without consent unless there is judicial review.[62]

154. The Tasmanian Bill intends that Court proceedings on the subject of parentage orders are usually to be held in closed session.

155. This rule is consistent with other Australian surrogacy legislation.

156. The Tasmanian Bill does not expressly require the provision of certain documents or written information at the time of making a parentage order.

157. This is largely inconsistent with surrogacy legislation in Australia, which although having differences, requires birth certificates and/or counsellor's reports and evidence of the provision of legal advice to be produced. Queensland is the most prescriptive, requiring affidavits of relevant parties, lawyers and counsellors, the birth certificate and a copy of the surrogacy arrangement.[63]

158. The Australian Capital Territory Act does not expressly require the provision of certain documents at the time of making a parentage order, but may take into account the fact that a counselling assessment exists.

A Multiple Birth Occurs

159. Under the Tasmanian Bill, if there is a multiple birth, the Court may make the same decision in relation to both siblings, whereby there are parentage orders for each living sibling under which they are transferred to the intended parent/s - Clause 15.

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[60] *Status of Children Act 1974* (Vic), s.21
[61] Convention on the Rights of the Child, Art.3
[62] *Ibid*, Art.9
[63] *Surrogacy Act 2010* (Qld) s.25

Appeal Period

160. Under the Tasmanian Bill, a relevant party may appeal to the Supreme Court against a decision to refuse or grant a parentage order within 30 days after the person received notice of the decision - Clause 23(1) and (2).

161. There is no limited appeal period in New South Wales and Queensland.[64] Nonetheless, if there is a problem and the intent is to quash a parentage order, applying for it to be discharged rather than appealing the original decision may reverse the outcome.

Effect of Parentage Orders on Legal Relationships

162. Once the parentage order is made under the Tasmanian Bill, the child becomes the child of the intended parent/s and ceases to be the child of the birth parent/s - Clause 24(1).

PHASE 5: REGISTRATION

Registration of the Parentage Order

163. Under the Tasmanian Bill, as soon as reasonably practicable after the making of a parentage order, the Registrar of the Court must send a copy of the order to the Registrar of Births Deaths and Marriages - Clause 31.

164. The Registrar is to re-register the child by making reference to Clause 32 of the Act and a reference to identify the birth as it was shown prior to the parentage order - Clause 32.

165. Tasmania may send and receive parentage orders between other States and Territories, known as a corresponding order - Clause 35.

166. As the Northern Territory does not have any surrogacy legislation, it is unclear what the implications would be for a family formed through surrogacy, who wished to relocate to or from the Northern Territory or another location where no surrogacy legislation exists.

[64] *Assisted Reproductive Technology Act 2007* (NSW), s.48; *Surrogacy Act 2010* (Qld) s.49

The Child's Access to Information Concerning Conception and Parentage

167. This information cannot be released without due process under the Tasmanian Bill. A person must not publish information that would identify a person who is party to a surrogacy arrangement or the child at Clause 40(2), unless authorised to do so by the Court. A relative of the child may apply to the Court for authority to publish a relevant matter in relation to the child if the child is over the age of 18 years.

168. Subsequent access to Court records is also restricted and the Court may decide whether to release all or part of the record - Clause 43.

169. Legislation in other Australian jurisdictions also contains procedures for the release of information on a limited or restrictive basis.

170. Under the Tasmanian Bill, the Registrar of Births, Deaths and Marriages must issue an extract from the register or surrogacy record on the same terms applicable under the *Births, Deaths and Marriages Act*. Any extract from or certified copy of, an entry on the register must not contain any reference alluding to an identity prior to the existence of the parentage order - Clause 37.

171. By comparison, in New South Wales there is both an original birth certificate kept as well as the full birth record. The full birth record will contain particulars of any parentage order. When a person, born as a result of surrogacy, has attained the age of 18 years, he or she can access both records. [65]

172. Article 8 of the United Nations Convention on the Rights of the Child states:

    - *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.*

[65] *Assisted Reproductive Technology Act 2007* (NSW), s.55

- *Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.*[66]

Discharge or Annulment

173. Part 5 of the Tasmanian Bill contains provisions for discharging or annulling a parentage order which is a standard feature of surrogacy legislation in Australia.

[66] Convention on the Rights of the Child, Art.8

THE TASMANIAN SURROGACY BILL 2011 – ISSUES ARISING FROM INQUIRY

174. The Committee heard from a range of witnesses during the course of the Inquiry who provided differing perspectives in relation to the Bill.

175. The evidence was generally supportive of the principles underlying the Bill but was divided on whether a minimalist or prescriptive model of surrogacy arrangement should be provided for.

176. There was general consensus amongst the witnesses that the Bill provided for a non-prescriptive model of surrogacy arrangement and was amongst the least prescriptive in Australia.

177. The Committee identified a number of issues from the evidence and from the Committee's analysis of the Bill requiring further consideration:

GUIDING PRINCIPLES

178. Several guiding principles in relation to surrogacy were identified during the course of the Inquiry that the Committee believed required further consideration.

The Paramount Interests of the Child

179. The Committee was concerned that the paramount interests of the child should be adequately recognised and protected under the Bill.

180. The Committee noted there was reference to the interests of the child at Clauses 13, 14, 15, 19 and 20 of the Bill, referred to as '*best interests*'.

181. The Committee heard from a range of witnesses who expressed concerns in relation to the provisions for the protection of the child.

182. The Commissioner for Children, Ms Aileen Ashford stated in her evidence that

…my belief is that the best interests of the child should be paramount and that is not clear in the bill. We think it is too vague. If you look at the other bills that I think we referred to, which was the Queensland Surrogacy Act and the New South Wales Surrogacy Act, the guiding principles are the best interests of the child are paramount and that is not clear, that is not what the draft of the current bill says.[67]

183. The Commissioner for Children's position was also supported by Ms Anna Grant from Butler McIntyre Butler who stated in her evidence that from her experience in family law matters

…. my concern is that the best interests of the children provision is just, 'If everyone consents we would consider it to be in the best interests of the child,' which again seems fairly weak. The section that deals with legal advice is broad as to what you have to advise on. I think the provision is a bit akin to the legal advice that we have to provide under the Relationships Act. [68]

and in the context of comparative legislation involving the interests of children noted that

All the child-focused legislation - the Family Law Act, Children Young Persons and Their Families Act in this jurisdiction, and the Adoption Act - all spend a great deal of time setting out what is in the best interests. They are based on the principle that the best interests of the child is paramount. [69]

184. Professor Jeff Malpas was also concerned by the intent of the Bill in respect of the interests of the child

[67] Ms Aileen Ashford, Hansard Transcript, 11 July 2011, p. 11
[68] *Ibid,* p. 39
[69] *Ibid,* p. 44

The child looks like they are being treated as property and that is one of the reasons I am feeling a little uncomfortable about it.[70]

185. Mr Tim Vaatstra from Adoption and Permanency Services provided a useful comparison between the *Adoption Act 1988* and the Bill in respect of how the interests of the child are considered

I guess the biggest difference for me in understanding where surrogacy is coming from is that in adoption we have the convenience that the child actually exists and so the paramountcy principle really is the focus of what we are doing. Everything we do under the Adoption Act is about the best interests of the child and I guess the focus is a little different, at least at the beginning point in the surrogacy legislation, in that the child doesn't exist yet and we are looking to facilitate the wishes of commissioning parents and through that parents trying to ensure that the best interests of the child are met. There is a different focus there which makes it easier for us to have our focus on the paramountcy principle.[71]

186. The Committee concluded the Bill does not adequately deal with the paramount interests of the child and that the Bill requires strengthening in that regard. In particular, the Committee noted section 6 of the *Queensland Surrogacy Act 2010* which details with a number of guiding principles and concluded the Bill would be strengthened by the inclusion of similarly prescribed principles at the beginning of the Bill.

Territorial Provisions

187. The Committee considered the question of the territorial provisions under the Bill and in particular Clauses 33, 35 and 39.

188. Mr Stephen Page from Harrington Lawyers was concerned about possible ambiguity at Clause 39

[70] Prof Jeff Malpas, Hansard Transcript 12 July 2011, p. 17-18
[71] Mr Tim Vaatstra, Hansard Transcript, 1 August 2011, p. 16-17

The one concern I had was about that brokerage clause that unintentionally means that if people are intending to go and look for commercial surrogacy overseas - which I do not encourage people to do - then as I read that bill they have every means of unintentionally being caught up in that section. Because they are compiling a list on their computer of overseas commercial surrogacy clinics with the intention of making payment, then suddenly the next you know they have committed an offence. I think it is clause 39(2) (c). It is just a provision that says for the intention of making payment or receiving payment you compile a list. There is no extra-territorial aspect in the bill as it stands but that provision really does provide for an extra-territorial element to it. It may be that is what the Parliament wants but it is not apparent on the face. It certainly was not stated in the second reading speech. There is no reference to it.[72]

189. Having considered this evidence, the Committee remains concerned that the inclusion of Clause 39(2)(c) may lead to unintended breaches of the Act by a well-intended person simply researching the background to surrogacy.

Medical or Social Need

190. The Committee contemplated the question of whether the Bill should restrict surrogacy arrangements to medical or social need. The New South Wales and Queensland Acts restrict surrogacy arrangements to cases where medical or social need has been demonstrated.

191. The Committee noted the comments of Mr Stephen Page in his written submission where he noted his support for such provisions being included in the Bill in line with the Queensland and New South Wales Acts although he did not articulate the reasons for his position. [73]

192. The Committee noted section 30 of the New South Wales *Surrogacy Act 2010* which prescribes the terms of medical and social need. In particular, the

[72] Mr Stephen Page, Hansard Transcript, 11 July 2011, p. 31
[73] S. Page, *op cit,* p.9

Committee noted the meaning of ‘eligible woman’ at sub-section 3 in the context of medical need.

193. The Committee also noted that section 14 of the *Queensland Surrogacy Act 2010* provided similar requirements in relation to medical and social need and in particular, the meaning of ‘eligible woman’ under sub-section 2 in the context of medical need.

194. The Committee concluded the Bill would be strengthened by the inclusion of a Clause that would limit surrogacy arrangements to medical or social need.

ROLES AND RESPONSIBILITIES

Administration of the Act: Whether the Department of Health and Human Services should be the Responsible Agency under Clause 46 of the Bill

195. Responsibility for administrative arrangements under the Bill was considered carefully by the Committee. In particular, the Committee noted that currently under Clause 46, the Department of Justice is the prescribed Agency '*Until provision is made in relation to this Act by order under section 4 of the Administrative Arrangements Act 1990*'.

196. Due to the Committee's priority that the paramount interests of the child be adequately protected under the Bill, evidence was sought from Department of Health and Human Services, Adoption and Permanency Services as to whether they would be suitably positioned to administer surrogacy arrangements.

197. Mr Tim Vaatstra, Manager of Adoption and Permanency Services advised the Committee that

> *There is an expertise there in our service to have a role like that because that is what we do already. I do not necessarily have a firm view on whether that should be part of the legislation or not, but there is the expertise and then obviously it comes down to resourcing as to whether or not that is something that we can pick up. But the expertise is there. The counselling is similar to what we do with relinquishing parents; we counsel them about the impacts of relinquishing their child and we do all that. The legal advice would be something that you would want lawyers to do probably but, as I say, the expertise is there; it is really not a question of that, it is around what it is going to look like and how much it is going to cost.*[74]

198. Resourcing was however noted by Mr Vaatstra as a concern subject to the role that Adoption and Permanency Services might be required to undertake

[74] T. Vaatstra, *op cit,* p. 2

It depends on what is the outcome of the model care. If, say, you wanted or the legislation demanded some counselling for people coming back for that information, then that would be an addition. If you wanted a more robust service at the front end -adoptions, administering the cases right the way through and providing information perhaps at the start, overseeing the agreements or doing counselling at that stage - then, again, additional resources would be needed there.[75]

199. The Committee noted the potential for Adoption and Permanency Services to provide a range of support services, whether in-house or through facilitated external service providers as appropriate (counselling and legal) and that they had a range of suitable expertise within the Agency.

200. The Committee also noted the evidence of Mr Vaatstra that they did not provide legal counselling but were limited to explaining the major aspects of the adoption legislation.

201. The Committee concluded the administration of surrogacy arrangements would be an appropriate and natural extension of the existing role, expertise and responsibilities of Adoption and Permanency Services under the *Adoption Act 1988* but that their capacity to do so would be subject to having sufficient resources provided by Government in order to fulfil the role.

202. The Committee also concluded that the Agency could make a positive contribution in supporting the intended role of the Court under Parts 4, 5 and 6 of the Bill through the provision of counselling, any suitability assessment, legal advice and other relevant information. In these circumstances, the Court would be aided by the work of the Agency which would likely reduce the burden on the court in the determination of parentage orders.

[75] T. Vaatstra, *op cit,* p. 5

The Role of a Regulator

203. The Bill does not provide for any form of regulator to oversee and determine surrogacy arrangements. This task is confined to the Court as part of a judicial process.

204. The Committee heard from the Hon Susan Morgan, the Chair of the Patient Review Panel (PRP) within the Victorian jurisdiction. The Committee noted the Victorian model provided for a prescriptive process involving the parties participating in various discussions, assessments and ultimately a hearing under the control of the PRP.

205. The Committee noted that the PRP role requires that they are involved much earlier in the process than the Court would do under the Bill in that they are required to approve the surrogacy arrangement prior to conception.

206. Ms Morgan noted in relation to the surrogacy hearings conducted by the PRP that

> *We have five people sitting there and these people are confronting five people they do not know and have never seen before. We make an enormous effort to keep the hearings as informal as possible and we have found that is quite easy with the surrogacy applications…In most cases I am able to say that the reports we have from the counsellors, psychologists and lawyers are so comprehensive that we probably won't have many questions. A lot of the surrogacy applications we could probably determine from the papers. But my view is that people deserve to come and be heard and meet the people who are going to make such an important decision with them. So the surrogacy cases normally don't take terribly long and are very informal and are consistent with natural justice et cetera.*[76]

[76] Hon Susan Morgan, Hansard Transcript, 2 August 2011, p. 6

207. By contrast, Professor Millbank was not supportive of a surrogacy model such as the Victorian model that included a regulator in that she did not support a prescriptive model of surrogacy.

> *…I think that the various States have become carried away in wanting to include more and more detailed substantive and procedural requirements in the legislation in the hopes of perfecting a surrogacy regime that looks in the abstract as if it will guarantee good results. My basic argument to you today is that you cannot set those things in stone.* [77]

208. Mr Stephen Page also provided useful evidence on the regulatory process applied in Victoria and Western Australia and the challenges associated with the prescriptive model in those jurisdictions

> *…. is considerably more expensive than doing it interstate and it is considerably slower. There appear to be a series of roadblocks. The first requirement in Victoria and WA is that you must have your counselling and legal advice and your surrogacy arrangement in place. Then you have to run it past the regulator and you have to have approval from the regulator. In Victoria it is the Patient Review Panel and only when you had approval from the Patient Review Panel can you then proceed with the next stage, which is to then commence treatment. So you cannot have treatment at that point. Victoria also requires a criminal check and a child safety check. Both of those have to be undertaken first. Once you have got past that and you can undertake treatment, then you go to the final stage in which hopefully the child is conceived, carried, born and then you have a parentage order made. What I have heard about the last stage in Victoria is that it is straightforward. It seems to be the same as the other States but it's that process of getting it past the post from the review panel*. [78]

[77] Prof Jennifer Millbank, Hansard Transcript, 11 July 2011, p. 15
[78] S. Page, *op cit,* p. 28

209. Having considered the evidence in relation to the merits or otherwise of a regulator overseeing surrogacy arrangements, the Committee was not generally in favour of the degree of prescription and associated costs to the parties found under the Victorian and Western Australian models. The Committee did however conclude that a model that provided some oversight by Adoption and Permanency Services, during the planning for a surrogacy arrangement including the provision of, or brokering access to, counselling and legal advice, would strengthen the administration of surrogacy arrangements.

Eligibility Criteria for Intended Parents (Suitability Assessment)

210. The Committee noted that given the role of the Court in the determination of parentage orders, that the Bill did not provide eligibility criteria for intended parents that may provide assistance to the Court or an Agency.

211. The Committee was particularly concerned by the absence of criteria in relation to the issue of any previous criminal convictions for the intended parents.

212. The Committee noted that the Bill provided broad discretion to the Court that required consideration of the order being in the best interests of the child.

213. The Commissioner for Children noted in her written submission to the Inquiry that she was supportive of criminal record and child protection checks being completed in line with the *Victorian Reproductive Treatment Act 2008*. The Commissioner believed this should be limited to intended parents but noted the added complexity associated with undertaking this form of check.[79]

214. The Hon Susan Morgan explained in her evidence that in Victoria , the intended parents are required to undergo police and child protection checks

[79] Commissioner for Children written submission of 1 September 2011

as part of the process which the Committee concluded to be a form of eligibility criteria.[80]

215. The Committee also noted the provisions of the *Adoption Act 1988* for the purpose of comparison in relation to the suitability of potential parents.

216. Mr Vaatstra advised the Committee that under the *Adoption Act 1988*

> *We are approving people for children who exist, whereas I know the focus of this bill has been very much what seems to me to be a fairly hands-off approach to the whole thing. I think if you are introducing something like that, this changes the whole nature of the bill. Whether I have a hard and fast view on it either way, I do not know. You do not vet parents who have their own kids. I think that is a really tough ethical issue.*[81]

217. The Committee concluded that the Bill would benefit from the inclusion of a suitability assessment process for intended parents.

Counsellors, Legal Practitioners and Other Support Parties

218. The issue of counsellor and legal practitioner accreditation under the Bill was considered by the Committee.

219. The Committee noted that Clause 44 of the Bill provides for the Secretary of the Department of Justice to '*accredit as a counsellor*' a person that in their opinion '*has appropriate qualifications and experience*' and that Clause 44 as drafted did not apply to the role of legal practitioners.

220. The Committee also noted with concern that counselling was not mandatory under the Bill in that the Court could grant a parentage order under Clause 14(2) or 19(2) without counselling having been completed.

[80] S. Morgan, *op cit,* p. 7
[81] T. Vaatstra, *op cit,* p. 30

221. In her evidence, Ms Anna Grant noted her concerns in relation to the requirements surrounding legal advice being sought. She was concerned that the Magistrate at their discretion may grant an application even though advice had not been obtained

> *… the court can be satisfied if it is in the best interests of the child to make the parenting order even though there has not been legal advice. I think that is a concern. It is the same with the counselling. I think legal advice and counselling is a necessary evil.*[82]

222. Professor Jenni Millbank was supportive of the Tasmanian model that provided for the Court to consider individual matters with discretion and therefore did not agree with this perspective.

> *Where I think the Australian approach has failed has been in not including sufficient discretion and flexibility to the court to deal with circumstances of mistaken non-compliance or inability to comply with the various legislative requirements. I have to say I think that the various States have become carried away in wanting to include more and more detailed substantive and procedural requirements in the legislation in the hopes of perfecting a surrogacy regime that looks in the abstract as if it will guarantee good results. My basic argument to you today is that you cannot set those things in stone in advance and really the aim of this kind of legislation is setting down a basic framework and some goals for outcomes and some goals for process, but leaving some discretion to the court to still grant legal parentage orders in cases where not every requirement has been fulfilled, but that the orders are still clearly in the best interests of the child and/or there are exceptional circumstances that justify that.*[83]

223. Ms Grant was also concerned that even if legal advice had been sought, that an applicant could seek legal advice from a legal practitioner regardless of their relevant experience in surrogacy or family law related matters

[82] Ms Anna Grant, Hansard Transcript, 11 July 2011, p. 38
[83] Prof J. Millbank, *op cit,* p.14-15

Under the Relationships Act jurisdiction the solicitor who gives the certificate must be a solicitor admitted to the Federal Court practice, which would assume that that solicitor has family court experience, particularly here. So there is an effort in the legislation to make sure that you are seeing a practitioner who is experienced.[84]

224. Mr Stephen Page noted in relation to the question of the standard of counselling and legal advice sought by the parties to a surrogacy arrangement that

The Canberra Fertility Clinic requires the most extensive counselling and legal advice to be undertaken before any surrogacy arrangement can proceed past its ethics committee. It is a very rigorous process. I have had clients who have done it and gone through that clinic. Unlike the procedure in New South Wales and Queensland where the advice that lawyers give clients before the surrogacy arrangement is signed, and that advice remains privileged as it does for everyone else going to see a lawyer, in Canberra they actually require the written advice that you give the client to be supplied to the clinic. You have to cover certain points. You have 10 points to cover or thereabouts. They have all to be covered in the advice or it will not get past the ethics committee.[85]

225. The Committee concluded that the Bill required strengthening in relation to the requirement for the accreditation of counsellors under Clause 44 and that a minimum standards should also be prescribed in the Bill for legal practitioners. The Committee believed this would strengthen the protection for the parties in seeking advice from a legal practitioner with suitable expertise in family law matters.

[84] A. Grant, *op cit,* p.42
[85] S. Page, *op cit,* p. 28

The Registrar of Births, Deaths and Marriages

226. The Committee considered the role of the Registrar of Births, Deaths and Marriages in the context of a possible role for Adoption and Permanency Services in the administration of records under the Bill.

227. The Committee heard that Adoption and Permanency Services already managed the adoption records for any adoption post 1968 and would liaise with the Office of Births, Deaths and Marriages to obtain birth certificate records as appropriate. Mr Vaatstra stated

> *We record birth parents' details, details surrounding the adoption and the reasons for the adoption. So there is a whole bunch of information that is recorded at the time of the adoption which we maintain, and that is maintained in the Department of Health and Human Services. We have an adoption information system register and a system that is prescribed under our act. From there we receive applications for access to information - it might be from adoptees, birth parents, birth relatives and it could also be from adoptive parents - and then there are different provisions for different people as to what they are allowed to receive under the act. Progressively, over time, more and more openness has been allowed. For adoptees, they are allowed full access to information, including identifying details around birth parents.*[86]

228. The Committee also noted the ability of the Adoption and Permanency Services to provide counselling and support services in conjunction with any record keeping role. Mr Vaatstra stated

> *Our act requires us to counsel people who make application for information. It is not counselling in the sense of psychological counselling; it is more talking about what it means to access the information and some of the things that adopted people experience when they get this information - feelings and those sorts of things. Also we talk about what our act provides, what you can and cannot access*.[87]

[86] T. Vaatstra, *op cit,* p. 19
[87] *Ibid*

229. The Committee heard from the Office of Births, Deaths and Marriages. Ms Ann Owen outlined in her evidence, the process by which an adoption order would be managed

> *When there's an adoption order it is forwarded to the registry to register it and we would have the original birth record and we would lock that down so the information is held in our database. If somebody had approached adoption services in the belief they had been adopted, they would then make them undergo counselling and make them aware that there's a possibility that their birth parent or parents had nominated not to be contacted. They have a register of people who do not wish to be contacted. If the applicant has had the counselling session they can then apply to us for a records-only birth record, which would show the name and identify of the birth mother and potentially birth father. That would be released to them as a records-only document, not a legal document, one that is stamped with that endorsement. It doesn't give them names or addresses but they have undergone that counselling and my understanding is that they work with adoption services to progress contacting one of the individuals if possible.* [88]

230. The Committee also heard from interstate jurisdictions. Ms Sandra Salcedo from the Australian Capital Territory Office of Births, Deaths and Marriages noted the role of another Agency in the administration of records within their jurisdiction

> *The only way anyone can obtain their original birth certificate is by going through the Department of Community Services and they have to obtain a consent order from them and then they bring it to us, stating that they can have access to their original birth certificate.*[89]

231. The Committee concluded that a more limited role for the Registrar of Births, Deaths and Marriages in line with their current role for adoptions would be

[88] Ms Ann Owen, Hansard Transcript, 11 July 2011, p. 5
[89] Ms Sandra Salcedo, Hansard Transcript, 2 August 2011, p.14

appropriate under the Bill and in that regard, Part 6 of the Bill requires amendment.

232. The Committee concluded that Adoption and Permanency Services should have prescribed responsibility for the management of surrogacy records under Part 6 of the Bill. The role of the Registrar would therefore be limited to the administration of the birth certificate information. The Committee also believes that the Agency would be able to provide the appropriate counselling and support services associated with an application for access to records in the same way that they already provide these services in relation to applications for adoption records.

SURROGACY ARRANGEMENTS

Written Arrangements

233. The Committee and witnesses were consistently concerned about the fact that a surrogacy arrangement may be made orally and that there was not a requirement for a written arrangement to be made. Clause 4(6) of the Bill prescribes that an '*arrangement may be made orally or in writing*'.

234. The Committee did not understand why such an important arrangement between the surrogate and intending parent/s would not be made in writing when there were many elements to the arrangement that had the potential to result in a dispute or uncertainty between the parties. This was particularly the case because of the fact that surrogacy arrangements were not commonplace and that as such, the parties to an arrangement were likely to be unfamiliar with the problems and issues that may arise.

235. Professor Millbank, who was generally not supportive of a prescriptive model of surrogacy, did confirm her support for a written arrangement being required

> *that is one of the few areas where I do think that the bill could be amended and that would be useful because it helps people to spell out what it is they think they are agreeing to. It is not that you are binding anyone to it, it is about clarifying expectation but again if that has not been*

done I still think you have to leave a discretion with the court to make the orders anyway.[90]

236. The Committee was persuaded by the evidence of Mr Stephen Page in relation to the importance of written arrangement being in place

If it is written then people can focus on it. They can look at it; there is certainty as to what people are agreeing to. There is then certainty. It is one thing to discuss matters in counselling with the counsellor, but it is another to go to a lawyer and say what does this actually mean. If it is an oral arrangement, what can the lawyer advise about that? The lawyer can say the usual things about surrogacy, what can go wrong medically, what can go wrong with the surrogate changing her mind or the intended parents changing their minds. They can certainly cover those concepts but cannot be specific about what you have agreed upon. This idea of having it in writing is so important.[91]

237. The Committee accepted that the parties entering into an arrangement would be doing so with the best of intentions. Given the fact that surrogacy is a complex arrangement in which multiple issues and problems may arise during and after the pregnancy, some form of written arrangement would be necessary to assist the parties and that Clause 4(6) of the Bill should be amended accordingly.

A Child Advocate

238. The Committee received evidence from some witnesses that questioned whether the Bill should in fact require that a child advocate be a party to the process.

239. The Committee believed the concept of a child advocate was worth consideration.

[90] Prof J. Millbank, *op cit,* p. 15
[91] S. Page, *op cit,* p. 29

240. The Commissioner for Children in particular was supportive of a child advocate being appointed at the commencement of a surrogacy arrangement.

> *The other thing in this is that before anything happens, there is no one there talking about what this means for the child. This is all an adult space that everyone is in at the moment; no one's there giving independent advice about what this might mean for the child, at the very beginning of the process.*[92]

241. Mr Norman Reaburn from the Legal Aid Commission explained the role of a court appointed child advocate currently in the context of family law matters which was of valuable assistance to the Committee.

> *In both these jurisdictions the independent children's lawyer, as it were, operates without a client. In other words, while he is there to represent the best interests of the child he is not there to represent the child and the child cannot give that lawyer instructions.*[93]

242. The Committee believes there may be cases when the Court would need to appoint a child advocate. Section 68L of the *Family Law Act* makes provision for an independent children's lawyer to be appointed when considered necessary. The advice provided by Adoption and Permanency Services at the beginning of the process may limit the need for the involvement of a child advocate as issues in relation to the child would be canvassed prior to the surrogacy arrangement proceeding.

Independent Reports to the Court

243. The Committee noted that the surrogacy legislation in Queensland and New South Wales makes provision for an independent report to be provided to the Court in support of an application for a parentage order (section 17 of the New South Wales *Surrogacy Act 2010* and section 32 of the Queensland *Surrogacy Act 2010*).

[92] A. Ashford, *op cit,* p. 16
[93] Mr Norman Reaburn, Hansard Transcript, 1 August 2011, p. 34

244. In both jurisdictions the report is to be prepared by an independent counsellor and address a range of matters, including the counsellor's assessment of each party's understanding of the implications of the parentage order, the care arrangements proposed for the child and whether the counsellor considers the proposed parentage order is in the best interests of the child.

245. In his written submission to the Committee, Mr Stephen Page noted that this process adds cost to the Court proceedings, ranging from $3500 in Queensland to between $6000-$8000 in New South Wales. Despite the cost, he considered 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.* [94]

246. The Committee concluded that the front-end process involving Adoption and Permanency Services would reduce the need for an independent report. However the Bill should include a provision to allow the Court to request an independent report if considered necessary.

THE PARTIES TO A SURROGACY ARRANGMENT

The Parties Who May Gain Access to Birth Information

247. The Committee considered the issue of the parties who may gain access to birth information under the Bill and noted that Clause 37 provided limited direction to the Registrar of Births, Deaths and Marriages in that regard.

248. Given the potential role that Adoption and Permanency Services may play in relation to supporting surrogacy arrangements, the Committee concluded that the Bill should more appropriately follow the same principles in relation to the

[94] S. Page, written submission, p. 21

accessing of birth information as prescribed under Part VI, Division 2 of the *Adoption Act 1988*.

249. In particular, the Committee noted the provisions under the Adoption Act, which included:
    a. the requirement for the applicant to undergo counselling;
    b. the rights of an adopted person to information under the age of 18; and
    c. the rights of birth and adoptive parents to information.

250. The Committee was also concerned that the child's access to their genetic history was not contemplated adequately under the Bill. Mr Vaatstra from Adoption and Permanency Services noted his experience in relation to the *Adoption Act 1988* and the importance of an adopted person having full access to information

> *There was a lot of positive stuff about that legislation but one of the deficits, which we realised later, was really around access to information. It was enshrined in that legislation about secrecy around adoptions so that everything should be kept confidential and even the new birth certificate was designed to hide the fact that the child was adopted, and that reflected attitudes at the time in society about these matters.*
>
> *Twenty years or so after that another big review was done - I think in 1985 - of adoption legislation and at that time they decided that there were a lot of concerned people - adoptees and birth parents - who really thought it was important to have access to information about their biological history. So the biggest change that happened in our current legislation was that access to information was allowed. Our act is quite specific now about what we can release to people and when, and particularly to adoptees and birth parents there is quite free access to information about their genetic history and adoption records.*[95]

[95] T. Vaatstra, *op cit,* p. 16

251. Dr Bill Watkins believed there should be mandatory registration if donor gametes were used.

> *When I came back to Hobart in 1996 we started introducing voluntary identification and then around 2000 we said, 'No, you can't donate unless you agree to be identified'. Then in about 2005 it became a regulation for us to work under, so we were way ahead of the game there.... Some clinics have complained that the anonymity bit scares them off - the loss of it - but in my experience no.*[96]

252. Dr Watkins added

> *I suppose the only issue from our point of view has traditionally been who stores that information. We have never had a leak. I don't know of any clinic in Australia that has ever had a leak when it has been held privately. It does worry most of us because we are so into the confidentiality side that it would be just terrible if information got out there before it was meant to get out there. In a public sort of system you just worry a little bit... I have no trouble with somebody else storing the data. If somebody else could store the data for us it would be fantastic. It would be a weight off our minds.*[97]

253. Professor Malpas was also supportive of this position and noted;

> *On the issue of making sure that children have full access to their parentage details, I think that is absolutely crucial. I think there has to be a way of ensuring that children, once they reach an appropriate age, are able to request details regarding their birth that will give them access to all the details regarding their birth. So the fact that they are the product of surrogacy should not be hidden from them. I think there are ways that you could get around that by modifying the way in which we structure birth certificates. That might give some rise to some larger problems again*

[96] Dr Bill Watkins, Hansard Transcript, 1 August 2011, p. 44-45
[97] *Ibid.*

across jurisdictions and so on, perhaps inconsistencies between one area and another.[98]

254. The Committee also took into account a recent Australian Senate Legal and Constitutional Affairs References Committee Report of February 2011 into Donor conception practices in Australia, which made a series of recommendations in support of a donor conceived person's right to access information in relation to their background.[99]

255. The Committee concluded that the Bill would require amendment to enable a role for Adoption and Permanency Services in relation to the management of records associated with a surrogacy arrangement and that this should include information in relation to donor gametes.

The Parties to the Surrogacy Arrangement

256. The definition of the birth mother's spouse was noted under Clause 5 of the Bill. The Committee was concerned by the definition in that it did not appear to consider circumstances whereby the birth mother had a new spouse part way through the pregnancy.

257. The Committee was also concerned that Clause 4 of the Bill, which outlines the meaning of a surrogacy arrangement, did not provide for the birth mother's spouse as an automatic party to the arrangement.

258. The Committee was concerned that there was an inherent risk in disputes arising from an arrangement should the birth mother's spouse not be a party to the surrogacy arrangement in that the spouse may not be supportive of the arrangement.

259. The Committee was also concerned that the Clause 3 definition of "relevant party" at Sub-Clause (b) and (c) was confusing.

[98] Prof J. Malpas, *op cit,* p. 5
[99] http://www.aph.gov.au/senate/committee/legcon_ctte/donor_conception/report/b02.htm

260. The Committee concluded that the parties to the arrangement should include the:
    a. Birth mother;
    b. Birth mother's spouse, if any; and
    c. Intended parents.

261. The Committee noted however that in certain circumstances, such as separation or divorce proceedings being afoot at the time of the arrangement, that it may not be appropriate for the birth mother's spouse to be a party to the arrangement.

The Minimum Age of the Surrogate Mother

262. The Committee considered the age of the birth mother under Clause 14(b) of the Bill. The Committee noted from the evidence that other jurisdictions tended to prescribe a minimum age for the birth mother and that it was generally in the range between 18 and 25.

263. Professor Malpas noted, from an ethical perspective, that it was a difficult question to determine a prescribed age

> *To some extent that is always going to be a somewhat arbitrary decision. It is going to be the point at which we think a young person has sufficient autonomy and independence to make decisions of their own. Hopefully it would be an age that would be consistent with the way we make those decisions elsewhere. I guess the two obvious ages that spring to mind would be either 18 or 25. I am not sure that you would want to allow it any younger than 18.*[100]

264. Professor Millbank by contrast did not believe there should be a minimum age prescribed in the Bill

[100] Prof. J. Malpas, *op cit,* p. 5

You have to have facilitative processes through information-giving and counselling, and a case-by-case assessment of whether that maturity and that capability for consent and giving of consent is actually present. So an age limit of 25 or a banning of genetic surrogacy or a requirement of a lawyer's certificate I would say are all examples where you are trying to guarantee something through a broad category that is much better assessed on an individual basis.[101]

265. The Committee concluded that there should be a minimum age for the birth mother and that the age prescribed in the Bill of 21 years would appear to be appropriate.

Whether the Surrogate Mother has previously had a Child

266. Evidence was received regarding the issue of whether the birth mother had previously given birth to a child. There were some concerns expressed that such a restriction may result in some parties being denied access to surrogacy. Concern was also expressed that unless a birth mother had experienced pregnancy and had given birth previously, she may be ill prepared for the experience and find it difficult to relinquish the child.

267. The Hon Susan Morgan held the view

I think it is very important that the surrogate already has a child. You could imagine if it was the surrogate's first child and the reluctance to surrender. It might be greater than if she already has children. We found that the surrogates, all of them, who have children old enough, and usually they do, have already discussed it with their children and they are well aware of the process. I just think it is very important that the surrogate already has children.[102]

[101] Prof. J. Millbank, *op cit,* p. 17
[102] S. Morgan, *op cit,* p.12

268. Professor Jenni Millbank acknowledged that the birth mother having previously had a child was a desirable element but warned against mandating it as it would remove the ability to individually assess cases.

> *We have had one disputed surrogacy arrangement in Australia and that involved a birth mother who had had three kids already. The surrogacy arrangement was her idea and she repeatedly raised it with the intended parents over a three-year period, yet when she had the child she was painfully depressed, could not bear the relinquishment, missed the child, thought she had made a terrible mistake and litigated for two years to get the child returned to her. This was a case in the 1990s case Re Evelyn. You can hope that if someone has had children before then they know what they are doing, but maybe they won't. Equally, there might be someone who has never had children who does understand themself sufficiently to know this is something that they can do and can do well. As it happens a lot of the clinics do require or prefer that a woman already has her own children, has completed her own family, for reasons that include not just psychological readiness but also, as you said, the possibility that pregnancy can go wrong and can impair your future fertility, for example. I can see that it is a desirable element but I would encourage you not to mandate it on the basis that you just lose that ability to make a case-by-case assessment.*[103]

269. The Committee concluded that unless there are exceptional circumstances, the Bill should prescribe the requirement for the birth mother to have previously given birth to a live child.

Genetic Linkage

270. The Committee received evidence in relation to the importance of the genetic and biological linkages between the birth mother and unborn child and considered how this issue was dealt with in the Bill under Clause 14 and 19 (5).

[103] Prof. J. Millbank, *op cit,* p.20

271. Professor Jeff Malpas stated

> *They are in a very close relationship and there are all sorts of ways in which we thought there was no genetic influence but there has been. We might at some point in the future come to realise that actually the relationship between a child in the womb and the mother is a relationship that does have an effect. Certainly we know it has an effect on the subsequent growth of the child because we know that what a mother does and the mode of life of a mother carrying the child will have an effect on that child's subsequent development.*
>
> *.... That suggests that we should not treat the birth mother as simply a truck that happens to be carrying something inside it that is not affected. The relationship is a much closer one. That is one of the reasons for thinking that it is not just inappropriate to treat the mother as a human being as a manufacturer in this way but also the relationship between the mother and the child is a very close one biologically. It is obscured when we just talk about the genetic relationship as opposed to the gestational relationship or whatever. If I were to make another criticism of the legislation it is that that distinction is relied upon too heavily in a lot of this discussion, as if the relationship between the birth mother and the child that she carries is not a close and vital relationship. It is precisely because it is a close and vital relationship that we need to be very careful about these sorts of arrangements.*[104]

272. The Committee concluded that the current provisions under Clause 14 and 19 (5)(c) and (d) in relation to the granting of a parentage order were unreasonable and should be removed on the basis that the provisions discriminated against the rights of a birth parent who did not have a genetic linkage. The Committee concluded that the provisions in the Bill potentially denied the strong connection and bond that can be formed between a

[104] Prof, J. Malpas, *op cit,* p.19

pregnant woman and her unborn child even in the absence of a genetic attachment.

The Surrogate Mother's Costs

273. The Committee considered the terms upon which surrogacy costs can be claimed under Clause 7 and the enforcement of costs under Clause 8 of the Bill.

274. The Committee noted that some surrogacy legislation in other jurisdictions, such as under section 11 of the Queensland *Surrogacy Act 2010*, provided for a more prescriptive framework of the types of costs that can be claimed by the birth mother as part of the surrogacy arrangement.

275. In particular, the Committee noted that the Queensland legislation included provision for costs such as lost earnings and insurance costs and in general terms provided a clearer prescription on the types of costs that could be claimed.

276. The Committee was also concerned by the wording under the enforcement provisions of the Bill at Clause 8(2)(b), which suggested that if a birth mother sought a termination of pregnancy on any grounds that the costs associated with becoming pregnant, medical care during the pregnancy prior to the termination of the pregnancy and medical care following the termination may not be required to be reimbursed.

277. The Committee noted that this Clause may also conflict with the intention of the Bill at Clause 9 in relation to the right of the birth mother to manage the pregnancy.

278. The Committee concluded the Bill would benefit from the addition of further prescription in line with the Queensland legislation in relation to the meaning of the birth mother's surrogacy costs under Clause 7 and that further consideration of Clause 8(2)(b) was required.

SURROGACY BILL (CONSEQUENTIAL AMMENDMENTS) 2011

279. The Committee noted the proposed amendments to various Acts under the Bill as part of the Inquiry.

280. The Committee concluded that a further review of the Bill would be required in light of the recommendations proposed in this report in relation to the *Surrogacy Bill 2011*.

Appendix A: Submissions and documents received and taken into evidence

No.	*Description*	*Date*
1	Prof Jenni Millbank	11/07/11
2	Mr Stephen Page, Harrington Lawyers	11/07/11
3	Dr Maged Peter Mansour	11/07/11
4	Women's Legal Service Tasmania	25/07/11
5	Catholic Women's League of Tasmania	26/07/11
6	Greg Donnelly MLC*	30/08/11
7	Ms Aileen Ashford, Commissioner for Children	05/09/11
8	Juanita Barrett	27/09/11

* Supplementary documents provided in addition to major submission.

Appendix B: Witnesses

11/07/11 1.30pm Parliament House, Hobart

- Mr Chris Batt and Ms Ann Owen
  Tasmanian Office of Births Deaths and Marriages
- Professor Jenni Millbank,
  University of Technology Sydney
- Mr Stephen Page
  Harrington Family Lawyers
- Ms Anna Grant
  Butler McIntyre & Butler Lawyers

12/07/11 8.30am Parliament House, Hobart

- Professor Jeff Malpas
  University of Tasmania

01/08/11 1.00pm Parliament House, Hobart

- Mr Andrew Weidmann
  Registrar, Family Court of Australia
- Mr Mark Byrne, Mr Tim Vaatstra and Mr Jeremy Harbottle
  Department of Health and Human Services
- Mr Norman Reaburn
  Director Legal Aid Commission Tasmania
- Mr Bill Watkins
  TASIVF

02/08/11 9.00am Parliament House, Hobart

- Hon Susan Morgan
  Department of Health, Victoria
- Ms Sandra Salcedo and Ms Danielle Krajina
  Office of Births, Deaths and Marriages, ACT
- Mr Colin Wood
  Office of Births, Deaths and Marriages QLD

19/09/11 10.45am Parliament House, Hobart

- Assoc Professor Des Graham and Mr Tim Vaatstra
  Department of Health and Human Services

- Ms Aileen Ashford
  Commissioner for Children, Tasmania

- Ms Julie Field and Ms Georgia Harvey
  Department of Justice, ACT

Note: Additional witnesses gave in-camera evidence to the Committee.

Appendix C: Dissenting Statement – Hon Rosemary Armitage MLC

The statement is attached on the next page of the Report.

HON ROSEMARY ARMITAGE MLC
Member for Launceston

28TH November, 2011.

Hon Ruth Forrest, MLC,
Chair,
Committee A into Surrogacy,
Parliament House,
Hobart. Tas. 7000.

Dear Chair,

Inquiry into Surrogacy Bill 2011 and Surrogacy (Consequential Amendments) Bill 2011

While I acknowledge and commend the work of the Committee and Staff, as well as the number of people who made submissions and appeared before the Committee, as I am fundamentally opposed to the Bill, I must in good conscience dissent from supporting this report.

Yours sincerely,

Rosemary Armitage, MLC
Independent Member for Launceston

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rosemary.armitage@parliament.tas.gov.au

Signed this thirtieth day of November two thousand and eleven.

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Hon. Ruth Forrest MLC
Committee and Inquiry Chair