LEGISLATIVE COUNCIL

The Honourable Greg Donnelly MLC

7th February 2011

The Director
Office of Legislation Development and Review
Department of Justice
GPO Box 825
Hobart TAS 7001

Dear Sir/Madam,

RE: Draft Surrogacy Bill 2010 Consultation

Thank you for granting me a short extension with respect to the community consultation associated with the Draft Surrogacy Bill 2010. I have had the opportunity to review the various documents on the Department of Justice web site listed under the headings: Explanatory Material, Resources and Other Jurisdictions.

Detailed below are some specific comments that I wish to make.

1. Commercial Surrogacy

I agree completely with the following comments of the Tasmanian Legislative Council Select Committee on Surrogacy, found on page 32 of their 2008 report:

> "The Committee supports the current legislative status quo regarding the prohibition of commercial surrogacy. Community values within Australia are rightly set against the commodification of children, and the exploitation of socially and economically disadvantaged women (Ferguson 2008, 3), (Lambropoulos 2005), (Overton 2008), (Tatman 2008), (TGLRG 2008) and (Willmott 2006, 228)."

To prevent the circumvention of this very important underlying principle the New South Wales Parliament, when considering its own surrogacy legislation last year, incorporated a provision that applies the prohibition on commercial surrogacy beyond the state to jurisdictions outside New South Wales. The provision simply ensures a consistent standard: commercial surrogacy is not supported in New South Wales, therefore citizens in New South Wales should not be able to circumvent the law by engaging in commercial surrogacy arrangements overseas.

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The relevant provision in the New South Wales legislation, designed to stop the undermining of the prohibition of the commercial surrogacy principle is as follows:

> **"11 Geographical nexus for offences**
>
> (1) This section applies for the purposes of, and without limiting, Part 1A of the *Crimes Act 1900.*
>
> (2) The necessary geographical nexus exists between the State and an offence against this Division if the offence is committed by a person ordinarily resident or domiciled in the State.
>
> Note. Section 10C of the *Crimes Act 1900* also provides that a geographical nexus exists between the State and an offence if the offence is committed wholly or partly in the State or has an effect in the State."

I respectfully suggest that the Tasmanian Parliament may consider incorporating a similar provision in its surrogacy act to assist fortifying a key principle that underpins the legislation.

2. Age Limit

Given the profound nature of surrogacy, particularly with respect to the woman carrying and bearing the child, some other jurisdictions including New South Wales have legislated that the birth mother must at least be 25 years old when she enters into the surrogacy arrangement. This requirement in New South Wales is subject to the following:

> **"29 Maturity of younger intended parent must be demonstrated**
>
> (1) If an intended parent was under 25 years of age when the surrogacy arrangement was entered into, the Court must be satisfied that the intended parent is of sufficient maturity to understand the social and psychological implications of the making of a parentage order.
>
> (2) An intended parent who was under 25 years of age when the surrogacy arrangement was entered into must provide evidence to the satisfaction of the Court:
>
> (a) that he or she received counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications before entering into the surrogacy arrangement, and
>
> (b) that the counsellor was satisfied that he or she was of sufficient maturity to understand the surrogacy arrangement and its social and psychological implications.
>
> (3) This precondition is a mandatory precondition to the making of a parentage order.
>
> (4) This precondition does not apply to a pre-commencement surrogacy arrangement.
>
> (5) If the Court grants leave to an intended parent to make a sole application in respect of a surrogacy arrangement that involves 2 intended parents, it is not

necessary to establish that the intended parent who is not a party to the application meets this precondition."

Once again I respectfully suggest that the 25 year minimum age limit with the proviso outlined above would be worth incorporating into the proposed Tasmanian legislation in lieu of the 21 year minimum contained in the draft bill.

3. Non- Primigravida Surrogate

The Select Committee on Surrogacy made the following comments and recommendation on page 36 of its 2008 report:

> "The Committee notes that the ethically responsible practice adopted in other jurisdictions is to require all prospective surrogate women to have carried at least one previous child to term before being eligible to undertake the relevant ART program.
>
> For this reason the Committee makes the following recommendation:
>
> **RECOMMENDATION 7**
>
> The Committee recommends that all prospective surrogate women to have carried at least one previous child to term before being eligible to enter into a pre-conception altruistic surrogacy agreement."

Such a requirement should, in my respectful submission, be a provision incorporated into the proposed surrogacy legislation in Tasmania.

4. Birth Mother's Surrogacy Costs

Clause 7 of the Draft Surrogacy Bill 2010 is particularly brief and in my respectful submission short on detail. In my view this would likely lead to unnecessary litigation in the future between individuals who are party to surrogacy arrangements.

5. Advertising Surrogacy Arrangements

Clause 39 of the Draft Surrogacy Bill 2010 refers to the prohibition of advertising in the title of the clause. However, reference to the word advertising does not appear elsewhere in the clause. This is a matter that I believe should be clarified to put the intention of the clause beyond doubt.

6. Counselling

Clause 14(2)(c) of the Draft Surrogacy Bill 2010 places a requirement on the parties to the surrogacy arrangement to receive counselling. In my respectful submission, I believe that it should be clear that the parties receive "independent counselling." The independence is important to prevent both real and perceived conflicts of interest.

The New South Wales surrogacy legislation contains the following definition of independent councillors in Clause 17(7):

> "For the purposes of this section, an ***independent counsellor*** is a qualified counsellor who:
>
> (a) is not the counsellor who counselled the birth mother, the birth mother's partner (if any) or an intended parent about the surrogacy arrangement, to meet a precondition to the making of a parentage order, and
>
> (b) is not, and is not connected with, a medical practitioner who carried out a procedure that resulted in the conception or birth of the child."

7. Surrogacy Arrangements

Clause 4(6) of the Draft Surrogacy Bill 2010 provides that a surrogacy arrangement may be made orally or in writing. With respect, leaving such a complex and potentially highly emotional arrangement between a birth mother, her partner (if any) and the applicant or applicants to some oral understanding between the parties is fraught with danger. Surrogate arrangements should be in the form of an agreement in writing.

8. Age of Intended Parents

The Draft Surrogacy Bill 2010 does not appear to incorporate a minimum age limit requirement for the intending parents. If this is the case, it would be a major oversight. There is a strong argument that the intended parents should be 25 years of age or certainly no less than 21 years of age.

9. Central Register

In New South Wales there is a central register maintained under the *Assisted Reproductive Technology Act 2007*. All information about surrogacy arrangements that is registrable under the legislation must be submitted for entry onto the central register. Subject to the legislation, a child born via a surrogacy arrangement may access certain information when he/she turns 18 years of age.

I am not sure if Tasmania has a similar framework if not, I respectfully suggest that it be considered. "Genealogical bewilderment" is a well documented condition experienced by children born using artificial reproductive technology methods, including surrogacy. It should be accepted as a fundamental human right that such people must be able to access the full

details of their biological heritage, thus enabling them to appreciate and understand their complete identity.

10. Right of Appeal

The Draft Surrogacy Bill 2010 does not appear to contain an explicit right of appeal provision from the decision of the court. It is also noted that "court" means Magistrates Court (Children's Division). A strong argument can be made that the appropriate Court to deal with such matters is the Supreme Court (or equivalent) with an explicit provision outlining the appeal process.

11. Conscientious Objection

The assisted reproductive technology industry in Tasmania, as I understand, operates under the NHMRC *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research*. Those guidelines contain a strong conscientious objection provision. Such a provision that provides explicit conscientious objection rights should be guaranteed for medical, nursing and allied health workers in the artificial reproductive technology industry in Tasmania through the new state legislation.

I hope that the information provided will be of assistance. If you would like to discuss them further or require further details, please call me on (02) 9230 2280.

Yours sincerely,

Greg Donnelly MLC