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Commissioner for Children tasmania

Your Ref:
Our Ref:331

1 September 2011

Hon Ruth Forrest MLC
Chair
Legislative Council Sessional Committee
Government Administration A
Parliament House
Hobart TAS 7000

Dear Ms Forrest

Surrogacy Bill 2011

I wish to make a submission to the Committee on matters arising in relation to the Surrogacy Bill 2011.

I therefore enclose a copy of my January 2011 submission to the Attorney-General's Department on the draft Surrogacy Bill 2010, on the basis that the matters I raise are equally applicable to the Bill in its current form.

I look forward to appearing before the Committee at 11.45am on 19 September 2011.

Yours sincerely,

Aileen Ashford
Commissioner for Children

Encl

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FOR CHILDREN
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COPY

Your Ref:
Our Ref:37#3

E-MAILED
19 January 2011

19 January 2011

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

Email : legislation.development@justice.tas.gov.au

Dear Office of Legislation Development and Review

Draft Surrogacy Bill

I refer to the draft Surrogacy Bill 2010 which has been released for public comment.

As Commissioner for Children the major focus of my role is to promote the rights and well being of children and young people as well as providing advice to the portfolio Minister on policy, practice and services provided for children and young people in Tasmania. This also includes any laws affecting the well being and protection of children.

Consequently, my comments on the draft Bill focus on issues of particular concern to children and young people and are guided by consideration of principles contained in the United Nations *Convention on the Rights of the Child* (UNCROC).

1. FORM OF SURROGACY ARRANGEMENT

Subclause (6) of Clause 4 of the draft Bill provides that a surrogacy arrangement "may be made orally or in writing".

I am of the opinion that a surrogacy arrangement should be in writing.[1]

This will promote the best interests of the child by ensuring at a very early stage that all interested or relevant parties are clear about what is intended. It should also assist parties to understand the obligations and preconditions for obtaining a parentage order, particularly the requirements for obtaining independent legal advice and counselling in Clause 14 of the draft Bill.

I accept that there may be circumstances in which it would be contrary to the best interests of a child to refuse an application for a parentage order simply because the surrogacy arrangement was made orally (for example, between family members). However this situation could be resolved by empowering the Court to dispense with the requirement for an arrangement to be in writing in appropriate cases.

2. BEST INTERESTS OF THE CHILD

Clause 20 of the draft Bill provides as follows:

> **Presumption as to best interests of child**
>
> It is presumed, in the absence of evidence to the contrary, that, if all parties to a surrogacy arrangement in relation to a child consent, it is in the best interests of the child for the child to become the child of an intended parent or intended parents, as the case may be, who have made an application for a parentage order under this Act.

I do not agree with this weighting of what is in the best interests of a child towards the intended parents. Ultimately the Court should be bound to consider what is in the best interests of a child by taking all relevant factors into account. If a consideration of other factors relevant to the best interests of the child points in the direction of not making an order in favour of the intended parents, evidence will need to be adduced to rebut the presumption set out in Clause 20. This has the potential to operate in a manner that is undermining of the best interests principle.

Furthermore, the Draft Bill does not appear to be predicated on the presumption that the best interests of the child are paramount, as is the case in other jurisdictions such as Queensland and New South Wales.

---

[1] See for example s34(1) of the *Surrogacy Act 2010* (NSW)

Section 6 of the Queensland *Surrogacy Act 2010* is as follows:

> 6 Guiding principles
> (1) This Act is to be administered according to the principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and for the rest of his or her life, are paramount.

Similarly, s22 of the NSW *Surrogacy Act 2010* endorses the paramountcy of the child's best interests:

> 22 Best interests of child are paramount
>
> (1) The Court must be satisfied that the making of the parentage order is in the best interests of the child.
> (2) This precondition is a mandatory precondition to the making of a parentage order.

3. CHILD'S RIGHT TO KNOW THEIR GENETIC PARENTAGE

The draft Bill is not at all clear about the circumstances in which a child may access information about their parentage.

Clause 43 makes provision for a child (and other named persons) to make application to the Court for approval to access a record in proceedings under the Act.

There is no right in the child to receive their original birth certificate nor is it clear under what circumstances a child aged less than 18 years may apply for that and other information.

Section 55 of the NSW *Surrogacy Act 2010* is, in my opinion, and after suitable modification to reflect the Tasmanian situation, worthy of inclusion in the draft Bill. It is extracted in full below.

> **55 Child's right to registered birth information**
>
> (1) A person who is the child of a surrogacy arrangement and in respect of whom a parentage order is made is entitled to receive, if the person is 18 years of age or older:
> (a) the person's original birth certificate, and
> (b) the person's full birth record.
> (2) If the person is less than 18 years of age, the person is not entitled to receive his or her original birth certificate or full birth record except with the consent of the person or persons who have parental responsibility for the person.
> (3) This section does not affect the discretion conferred on the Registrar of Births, Deaths and Marriages by section 46 of the *Births, Deaths and Marriages Registration Act 1995*.
> **Note.** Section 46 of the *Births, Deaths and Marriages Registration Act 1995* gives the Registrar discretion to provide a person with

information extracted from the Register of Births, Deaths and Marriages if satisfied the person has adequate reason for wanting information from the Register.

(4) In this section, a reference to a parentage order includes a reference to an Interstate parentage order.

4. CRIMINAL RECORDS AND OTHER CHECKS

The Victorian *Reproductive Treatment Act 2008* appears to impose a condition on parties to a surrogacy arrangement that they undergo a criminal record check and a child protection check. The draft SCAG Principles do not appear to require such safeguards.

I am mindful of the complexities inherent in including criminal record and child protection checks as preconditions for parties to a surrogacy arrangement. However, on balance, I recommend that consideration be given to inclusion of such checks and of the consequences for intended parents of them receiving a negative result from such checks. I do not believe it is appropriate to require a birth mother to comply with any condition involving child protection and criminal record checks.

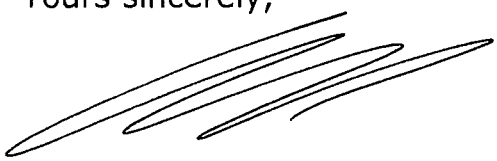
5. CONCLUSION

I strongly agree with the need to introduce legislation such as the draft Bill to regulate altruistic surrogacy and thereby formalise arrangements with a focus on promoting the best interests of the child concerned.

Ultimately it cannot be in the best interests of those children subject to surrogacy arrangements for there to be an absence of legal and other mechanisms designed to facilitate acknowledgement of their new legal identity and their right to information about their genetic parentage.

I hope that my comments are of assistance.

Yours sincerely,



Aileen Ashford
Commissioner for Children