

PROPOSED TASMANIAN SURROGACY BILL

EXPOSURE BILL

A draft *Surrogacy Bill* has been prepared for community consultation. The *Surrogacy Bill* will open a way to assist people to realise their dreams of making a family. Even with recent medical advances in the use of assisted reproductive treatment for infertility, there are people in Tasmania who are unable to conceive. The current law in Tasmania prevents these people from using surrogacy as a last resort option to create a family.

The *Surrogacy Bill 2010* is a new approach to the regulation of surrogacy in Tasmania. Currently surrogacy arrangements are void and unenforceable in Tasmania and, like other States and Territories have already done, this Bill will decriminalise altruistic surrogacy in Tasmania.

At present a child born through surrogacy is in a form of limbo in terms of their status. This Bill will provide a legal mechanism for the parentage of a child born as a result of a surrogacy arrangement to be transferred from the birth mother to the intended parent or parents.

This new approach to surrogacy is guided by and implements much of the report of the Legislative Council Select Committee on Surrogacy established in 2008 to investigate surrogacy in Tasmania.

The Bill is also consistent with model law developed by the Standing Committee of Attorneys-General which was intended as a guide for jurisdictions. The Australian Capital Territory, Victoria, New South Wales, South Australia, Queensland and Western Australia have all passed legislation in recent years to allow and regulate surrogacy and to provide a legal mechanism for the transfer of the parentage of the child from the birth mother to the intended parents.

The Bill is underpinned by the main principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and the rest of his or her life, are paramount.

Under the Bill, a surrogacy arrangement is where a woman—the birth mother—agrees to become pregnant and to relinquish the child to another person or persons—the intended parents—who will be the child’s legal parent or parents. The government does not consider it appropriate to impose restrictions based on marital status, gender or sexual orientation. Same-sex couples and single persons are not excluded from entering into a surrogacy arrangement and becoming intended parents.

However, to ensure that the wellbeing and best interests of the child are protected and that parties to a surrogacy arrangement understand all the implications of the arrangement, various safeguards are included.

These safeguards are built into the court processes when a court is dealing with an application to transfer the parentage of the child to the intended parents. Before a parentage order can be made, the Children’s Court must be satisfied of certain requirements.

These safeguards include

- a) the court having to be satisfied that the parties to the surrogacy arrangement obtained independent legal advice before entering into the arrangement;
- b) the court being satisfied that the parties to the surrogacy arrangement obtained counselling from an approved counsellor about the social and psychological implications of the surrogacy arrangement prior to entering into the arrangement;
- c) counselling by an approved counsellor must also occur post birth and prior to the application for a parentage order being made to the court;
- d) the informed and voluntary consent of the birth mother (and her spouse if necessary) has been given;

e) and finally the Court is to treat the child's best interests as paramount.

If it is in the best interests of the child to do so the court is given a discretion which will enable it to waive some pre-conditions when making a parentage order.

Under the Bill one precondition that cannot be waived is that of consent. Orders would not be made to enforce a surrogacy contract if the birth mother decided not to consent to the child becoming the child of the intended parents. However, the Court can grant orders where the consent of the birth parents is unable, in limited circumstances, to be obtained – this is at section 14(4) - and it is in the child's best interests for the order to be made.

The consent of the birth mother to the transfer of the child to the new parents is a factor of the legislation in all the other Australian jurisdictions. There is however one Act where the consent of the birth mother can be waived and that is in Western Australia. In Western Australia, where the child does not carry any of the genes of the birth mother but carries the genes of the intended mother and/or father the Court may make the parentage order despite the lack of consent by the birth mother. Even in that case the Court must be satisfied that the order will be in the best interests of the child.

Once a parentage order is made by the court a new birth certificate will be created showing the intended parents as the child's parents.

The current prohibitions against commercial surrogacy are maintained, however the birth mother who agrees to relinquish the child can be reimbursed for, and enforce payment of, reasonable costs she has incurred as a result of participating in a surrogacy arrangement. Any other payments under a surrogacy arrangement are unenforceable.

The Bill will also enable the making of retrospective parentage orders in limited circumstances. This recognises the fact that, although surrogacy

has been illegal in Tasmania, there will have been surrogacy arrangements entered into in the past. Where it is in the best interests of children born as a result of these arrangements to be able to be legally recognised as the child of the intended parents, then a parentage order will be able to be made and the status of the child can be made clearer. Once the intended parents gain legal recognition, they will be able to more easily make decisions in relation to the child, for example medical and schooling.

It is proposed to table the Bill in Parliament for debate in the Autumn Session 2011 and comments are sought on the Bill. In particular comment is sought on the way in which Western Australia has dealt with the issue of consent where the intended parent/s egg or sperm are used to impregnate the birth mother.

Links to the legislation in the other States and Territories have been included on the Department of Justice website. The other legislation varies in content but generally permits altruistic surrogacy, prohibits commercial surrogacy and makes the best interests of the child a paramount consideration in the decision to transfer parentage to the intended parents.

The Bill has been posted on the Department of Justice website and copies can be either downloaded from the website or obtained by emailing a request to legislation.development@justice.tas.gov.au or phoning 03 6233 3798.