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The Honourable Jarrod Bleijie MP
Attorney-General and Minister for Justice
State Law Building
50 Ann Street
Brisbane Qld 4000

By email: attorney@ministerial.qld.gov.au

Dear Mr Bleijie

Proposed Changes to the Surrogacy Act 2010

I am writing to you because of your published remarks to the House about changes to the Surrogacy Act, both to reflect my concerns and those of intended parents and surrogates, but also because of my unique legal position.

I urge the Government to reconsider its decision to amend the Surrogacy Act 2010 to criminalise same sex couples, singles and heterosexual de facto couples of less than two years standing from seeking to have children; and to not recognise lesbian co-mothers as "parents".

I want to make plain that I hold no animus towards the Government. After all, it was I who managed to obtain the attendance of the then Lord Mayor now Premier, Mr Newman as a guest speaker at the Brisbane Gay and Lesbian Business Network. The premier and I also have a long shared view of opposition to violence by men towards women.

My Unique Position

I undertake more surrogacy work than I believe any other lawyer in Australia. Uniquely, I have surrogacy clients from throughout Australia, and internationally. I am recognised as being expert on Australia's surrogacy laws.

I have an extensive surrogacy practice. This has arisen in part because for the last 20 years I have acted for LGBTI clients as part of my family law practice.

Sometimes the assumption is made that those who seek surrogacy must be primarily gay men. That assumption is not accurate. Most of my surrogacy clients have been married couples and heterosexual de facto couples, but I have also acted for gay couples, single men, single women and lesbian couples, all of whom have sought to become parents. Although each of their stories is, inevitably, unique, the common feature of each story is that they have come to the realisation that surrogacy, as the option of last resort, may be available to them to achieve the dream of

becoming parents, a matter the rest of us take too often for granted.

All of them are well aware that adoption is in effect not available to them. As you are aware, the *Adoption Act 2009* discriminates against singles and same sex couples. In recent years the number of children available for adoption has been very low, so low that married couples have given up hope and sought surrogacy instead.

As might be expected I have also advised surrogates.

In addition to my other memberships, I am:

- A member of the Fertility Society of Australia;
- An associate of the American Bar Association in particular the Assisted Reproductive Treatment Committee, namely the committee that deals with surrogacy matters. (I cannot be a full member as I am not a US citizen. I have been asked, along with two US members, to draft the American Bar's position as to a proposed Hague convention on international surrogacy.

I am not writing this on behalf of any of my professional associations, as the opinions in this letter are mine.

I have spoken and presented about surrogacy extensively. Last year, for example, I presented:

- City Fertility Centre national training
- Life Fertility Clinic training
- World Congress on Reproductive Medicine
- Queensland Law Society/Family Law Practitioners Association of Queensland family law residential
- American Bar Association, world's first conference on international surrogacy
- LexisNexis family law summit
- Fertility Nurses of Australasia conference
- Surrogacy Australia seminar
- Tasmanian Parliament Upper House inquiry into that State's Surrogacy Bills

I and a colleague last year wrote a published article about a State by State guide to Australia's surrogacy laws.

This year I have presented about surrogacy to:

- City Fertility Centre
- Surrogacy Australia inaugural national conference
- LexisNexis family law summit

Further presentations to be undertaken are:

- NSW Branch of ANZICA (Australian and New Zealand Infertility Counsellors Association)
- World Congress on medical law
- Hunter Valley Family Law Practitioners Association conference

My first surrogacy client was a women who came and saw me in 1989 and told me that she had been paid to have a child for a couple, that she had had the child and that she had kept both the

child and the money. My then client was keenly aware that as all forms of surrogacy were illegal in Queensland by virtue of the then recently passed *Surrogate Parenthood Act 1988*, that in reality there was little that the intended parents could do as they risked prosecution by agitating for the child to come into their care and the arrangement being void, they could not sue for the recovery of the money.

That Act, seen nationally as a regressive approach to surrogacy, was a reaction by the Queensland Parliament to the notorious New Jersey Baby M case. However, the legislative solution to criminalise surrogacy merely meant that surrogacy was driven underground. As the Lavarch Committee inquiry made plain, surrogacy continued in Queensland despite the threat of prosecution under the *Surrogate Parenthood Act 1988*.

What was made plain to me from that first surrogacy client was that desperate intended parents will ignore criminality to ensure that they achieve parenthood. That case also made plain that unscrupulous people can take advantage of the desperation of people who want to achieve parenthood.

This desperation was also seen in the case of *Re Evelyn (1998)*. In that case, a South Australian couple offered to have a child for a Queensland couple. Following the child's birth, and handing over to the Queensland couple, the South Australian birth mother took the child back, resulting in bitter Family Court proceedings. The significance of the case from this point of view is that surrogacy was not legal then in South Australia, and was a criminal offence in Queensland, but such was the desperation of the Queensland couple to proceed, they did so.

My Concerns About the Proposed Changes

The first concern that I want to raise is that the Premier, as Opposition Leader, told the Queensland electorate ahead of the last election that there would be no change to the *Surrogacy Act*. No other member of the LNP, including you, told the electorate otherwise. The first that the electorate was aware that it was anything different was last week. I note that I specifically checked the LNP's website several times before the election to see under Mr Newman's vision for Queensland whether there was any reference to surrogacy. There was not.

My Concerns About Eligible Surrogacy Arrangements

When you spoke to the House last week, you said that the Government's proposal was to adopt the previous Bill by Mr Springborg. In my view, this Bill was objectionable as a matter of public policy for seeking to exclude and to criminalise intended parents who are same sex couples, singles or those living in heterosexual de facto relationships of less than two years.

Why I say it is objectionable from a public policy point of view is for six reasons:

1. **For the first time ever, Parliament granted a certain class of people rights, and will be removing those rights.**

2. **The desire to have children does not change despite differences in relationships or sexuality.**

   No doubt you, as well as me, have always known that you wanted to be a parent. What has become apparent to me in having seen so many clients who wish to achieve parenthood that there is no difference in the desire of my various clients to have children,

whether they are gay, straight or lesbian, married, de facto or single.

One of the most painful tasks that I have ever had to engage in, and I hope that you never have to do so, is to crush someone's hopes and dreams of being a parent by telling them that to do so is to commit a criminal offence. The pain is excruciating.

3. The proposed changes are not likely to be effective.

Put simply, the desire of intended parents is so strong that they will avoid or evade criminalisation. This will happen either by their moving State, and engaging in surrogacy there legally, or they will undertake traditional surrogacy in Queensland and not come to the attention of authorities. They can go, for example, to NSW or Victoria and undertake surrogacy there without discrimination.

It ought to be said that the research has indicated that traditional surrogacy, in which the surrogate is the genetic mother of the child (and in which case a clinic is unlikely to be involved), is more problematic than gestational surrogacy (when there is no genetic link). It is perceived that there is a higher chance of disputes regarding the child with traditional surrogacy than with gestational surrogacy.

4. The proposed changes appear to be in breach of the *Sex Discrimination Act.*

That Act prohibits discrimination in the provision of a service based on marital status. Quite clearly, a clinic would be unable to provide services related to surrogacy when the intended parents were single, a same sex couple, or a heterosexual de facto couple of less than 2 years. This inability to provide a service based on marital status means that the clinic is in breach of the *Sex Discrimination Act.*

Section 109 of the Commonwealth Constitution provides:

> *"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."*

As cases in the South Australian Full Court and the Federal Court have demonstrated, with similar legislation in South Australia and Victoria, it seems quite clear that because of section 109 of the Commonwealth Constitution, the relevant State restriction will be overridden.

One must then wonder why there needs to be such a restriction, if it is not going to be effective law.

In the Victorian case, *McBain v Victoria* (2000), the proceeding related to the Victorian *Infertility Treatment Act* and the Commonwealth *Sex Discrimination Act.* Section 8(1) of the Victorian Act provided that to be eligible to undergo infertility treatment a woman must either be married and living with her husband on a genuine domestic basis or be living with a man in a de facto relationship. Dr McBain wanted to treat a single woman, Ms Meldrum.

Section 22 of the Commonwealth Act made (and makes) it unlawful for a person to refuse to provide services to another person on the ground of the other person's marital status.

The Court said in an explanatory statement:

The infertility treatment is a "service" within s 22 of the Commonwealth Act. Dr McBain is precluded by the State Act from providing the service to Ms Meldrum because of her marital status. The State Act is accordingly inconsistent with the Commonwealth Act, and the Court declares that by force of the Constitution, the State Act is invalid to the extent of the inconsistency.

This means that women are not required to be married or in a de facto relationship in order to be eligible for infertility treatment, and Dr McBain is at liberty to provide that treatment to Ms Meldrum.

In the South Australian case, Pearce v SA Health Commission (1996), Ms Pearce sought IVF treatment. She had separated from her husband. The relevant South Australian law provided:

"... a person must not carry out an artificial fertilization procedure except in pursuance of
a licence granted by the Commission.

(3) A licence will be subject to-
(a) ...
(b) a condition preventing the application of artificial fertilization procedures except for the benefit of married couples in the following circumstances;
(i) husband or wife (or both) appear to be infertile; or
(ii) there appears to be a risk that a genetic defect would be transmitted
to a child conceived naturally;
...

(4) In subsection (3)-"married couple" includes two people who are not married but who are cohabiting as husband and wife and who-
(a) have cohabited continuously as husband and wife for the immediately preceding five years;or
(b) have, during the immediately preceding six years, cohabited as husband and wife, for periods aggregating at least five years."

The South Australian Full Court made a declaration as to inconsistency, thereby allowing Ms Pearce to have treatment.

5. The proposed changes are in breach of Australia's international human rights obligations.

I endorse the words of the then President of the Queensland Law Society, and now Deputy Speaker Ian Berry, in a letter to Premier Bligh in 2009:

"...same sex couples should be able to become legal parents of a child. I believe that limiting access to surrogacy arrangements based on the sexual preferences of the parties is highly undesirable. More specifically, it would offend:

- *The Family Law Act 1975(Cth) which recognises the parentage of children of*

same sex relationships;

- *The Same-Sex Relationships (Equal Treatment in Commonwealth Laws- General Law Reform) Act 2008 (Cth) which was enacted to address discrimination against same-sex couplesand their children in Commonwealth laws, and for other purposes; and*
- *Australia's human rights obligations under the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.*

Therefore I strongly urge Queensland to reconsider the current discriminatory practice of denying same sex couples the opportunity to become the legal parents of a child."

6. The proposed changes target an already vulnerable group.

Research has shown that LGBTI people, who consider that they are often marginalised, will suffer worse mental health outcomes, than those of the broader community, in part because the LGBTI people will feel that they have been targeted because they are perceived by the wider community as being different.

The proposed changes to lesbian co-mothers

Again I endorse the words of Mr Berry.

There has been a lesbian baby boom in Queensland, as has happened elsewhere. As Justice Crisford stated in the Family Court of Western Australia in 2009:

> *In recent years the use of artificial insemination procedures has risen dramatically, both here and overseas. They were once procedures of last resort for infertile heterosexual married couples. They have now become a mainstream solution for various reproductive challenges including absence of a heterosexual partner. New groups such as single women seeking to raise a child alone, same sex couples and gay men who have arranged for a mother to carry their child have used these procedures.*
>
> *Whilst technology has grown and the ambit of artificial insemination procedures has expanded the legal system lags behind. This can lead to complicated child custody disputes between the parties.*

It has been empowering to my lesbian clients to have their role, as the other parent, recognised for the first time by being named as "parent" on the birth certificate.

I note that what is proposed, aside from being inconsistent with the approach say in NSW, will mean that Queensland lesbian co-mothers will not be recognised as "parents" under Queensland law at a time of joy, i.e., at the birth of the child, but will be recognised under Federal law, as Mr Berry stated, including at times of pain, under the *Family Law Act.*

Since Sir Joh Bjelke-Petersen was instrumental in enacting the *Status of Children Act* in 1978, as part of a co-operative scheme between the States and the Commonwealth under the Family Law Act, both Queensland and the Commonwealth have recognised new families and have sought to have a co-operative scheme involving the *Status of Children Act* and the *Family Law Act.*

It would be an odd outcome, contrary to Sir Joh's legacy, that Queensland would not recognise lesbian co-mothers as parents under the *Status of Children Act*, but that they would be recognised

under the *Family Law Act.*

Form of Bill/Retrospectivity

I ask that any Bill is properly put out to community consultation first, with the ability of MP's to listen to constituents first. I also ask that adequate time be given to consider the changes.

I ask that any changes not be retrospective. I have been asked if clients who have participated in surrogacy arrangements but not yet sought parentage orders will now be criminalised. I have also been asked if women who are now named on birth certificates as "parents" will now be removed. I have been asked if the changes will be retrospective.

I cannot answer any of these questions because, aside from a brief unattributed news article, I simply do not know. It would be good to be able to give clear advice on these points.

Further consultation

I seek to meet you as soon as possible to discuss these matters further. I would also seek that if I were to meet you that a member of Surrogacy Australia, which represents intended parents nationwide, also be able to attend.

Yours faithfully

Stephen Page
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