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Mrs Maddison Evans
Committee Clerk
Standing Committee on Legislation
Legislative Council

By email – lclc@parliament.wa.gov.au

Dear Mrs Evans

Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2019

I am writing to the Committee to indicate my support of this Bill. I urge the Committee to look favourably upon this Bill.

Who am I?

My name is Stephen Page. I am a partner of Page Provan, family and fertility lawyers in Brisbane. I was admitted as a solicitor of the Supreme Court of Queensland in 1987. I was admitted as a solicitor of the High Court of Australia in 1989. I was admitted as a barrister and solicitor of the Supreme Court of South Australia in 2013.

I have been a Queensland Law Society accredited family law specialist since 1996.

I have represented a very large number of clients who have undertaken surrogacy. I would estimate that the number of surrogacy clients (who have come from every State and Territory of Australia) including Western Australia, and at last count 30 countries overseas, at between 1,500 and 3,000. The reason for the disparity is that each new client is counted as one, although most new surrogacy clients are couples, not singles.

My first surrogacy case was in 1988.

I am a Fellow of the International Academy of Family Lawyers, which is the most elite group of family lawyers in the world, comprising approximately 800 family lawyers in 57 countries. I am a member of its surrogacy parentage and LGBT committees. I am a Fellow of the Academy of Adoption and Assisted Reproduction Attorneys.

I am an international representative on the Assisted Reproductive Technologies Committee of the

American Bar Association. In that role, although I am not an American, I co-wrote and was a principal advocate of a policy by that 400,000 attorney member organisation about a proposed Hague Surrogacy Convention.

In 2012, my submissions on behalf of the surrogate were accepted by Judge Clare QC in Brisbane in what was the world's first ruling as to what was the conception of a child.

I have presented at conferences concerning surrogacy in England, Canada, the United States, South Africa and Hong Kong, as well as in Western Australia, Queensland, New South Wales, Victoria, the ACT and South Australia.

I am the only lawyer to have appeared in courts in four States in Australia in obtaining surrogacy parentage orders – namely Queensland, New South Wales, Victoria and South Australia.

I have written for various organisations about surrogacy and assisted reproductive treatment including:

- International Bar Association;
- American Bar Association;
- American Society of Reproductive Medicine;
- Royal Australian and New Zealand College of Obstetricians and Gynaecologists;
- Fertility Society of Australia;
- Family Law Section, Law Council of Australia.

I am also a member of the Family Law Section of the Law Council Australia, the Family Law Practitioners Association of Queensland and the Queensland Law Society.

I note that in 2015 I was part of a panel for the Family Law Practitioners Association of Western Australia at its annual conference, along with then Chief Justice Bryant and then Justice Crisford.

I wrote to the Deputy Premier and Minister for Health in 2017 seeking changes to the *Human Reproductive Technology Act 1991* (WA) and the *Surrogacy Act 2008* (WA), which have been incorporated in this Bill.

Scope of this Bill

Professor Sonia Allen has prepared a very long report concerning assisted reproductive treatment and surrogacy regulation in Western Australia.

This Bill does not respond to that report. This Bill deals, aside from some minor technical amendments, with one issue only – which is to allow single men and gay male couples access to surrogacy in Western Australia.

I note that Professor Allen writes in support of the Bill. For the sake of completeness, I **attach** Chapter 3 of Part 2 of her report.

Relevant history of the *Surrogacy Act*

The *Surrogacy Act* was enacted following the Select Committee report on the *Human Reproductive Technology Act 1991* (1999).

The Committee stated at page 51:

> *"The NHMRC's Australian Health Ethics Committee acknowledges that restrictions to accessed ART programs may conflict with provisions in the [Sex Discrimination Act]. ART programs which may be in breach of the SDA may seek exemption from this act by application to the Human Rights and Equal Opportunity Commission".*
>
> *A number of submissions highlighted the contradictions between the HRT Act and the SDA and called for changes to the HRT Act. However, others have argued that the State Government should ask the Federal Government to amend the SDA to exempt adoption and human reproduction technology from its requirements."*

The Committee was informed on page 52:

> *"According to NSW Health, as a result of decisions in South Australia and Victoria, it would appear that provisions that seek to restrict access to ART on the grounds of marital status "are likely to be vulnerable to a challenge to their validity, pending any amendment of the Commonwealth Sex Discrimination Act, or any granting of an exception under that Act in relation to ART". NSW Health added that it was likely that:*
>
> > *this would apply to other relationship criteria apart from marriage, that is, any requirement that the woman be in a relationship of any sort (be a heterosexual or homosexual de facto relationship)."*

I note that that report referred to research undertaken by Professor Susan Golombok, who is at the world leading centre for family research at the University of Cambridge. Further research undertaken by Professor Golombok and others in the subsequent 20 years has demonstrated that there is no difference in outcome for children conceived by heterosexual couples and those raised by homosexual couples – for example:

- Golombok et al (1997) Children raised in fatherless families through infancy: Family relationships and associated-emotional development of children in lesbian and single heterosexual mothers, Journal of Child Psychology and Psychiatry, 38, No. 7, 783-792;

- Golombok et al - Does father absence influence children's gender development? Findings from a general population study of pre-school children. Parenting: Signs & Practice, 2, No. 1, 49-62;

- Golombok et al (2004) Families created through surrogacy arrangements: Parent-child relationships in the first year of life. Developmental psychology, 40, 400-411;

- Golombok et al (2011) Secrecy, openness and everything in between: Decisions of parents of children conceived by donor insemination, egg donation and surrogacy, reproductive biomedicine online, 22(5), 485-495;

- Golombok et al (2011) Families created through surrogacy: Mother-child relationships and children's psychological adjustment at age 7. Developmental psychology, 47, No. 6, 1578-1579;

- Golombok et al (2012) Surrogacy families ten years' on: Relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins. Human reproduction, 27, 3008-3014;

- Golombok et al (2014) Parents psychological adjustment, donor conception and disclosure, a follow-up over 10 years. Human reproduction, 11, 2487-2496;

- Golombok et al (2016) Gay fathers through surrogacy: Relationships with surrogates and egg donors and parental disclosure of children's origins. Fertility & sterility, 106, 1503-1509;

- Golombok et al (2017) Wellbeing of gay fathers with children born through surrogacy: A comparison with lesbian-mother families and heterosexual IVF parent families. Human reproduction;

- Golombok et al (2007 **enclosed)** Transition to parenthood and quality of parenting of gay, lesbian and heterosexual couples who conceive through assisted reproduction. Journal of family studies;

- Golombok et al (2017) Gay fathers' motivations for and feelings about surrogacy as a path to parenthood. Human reproduction, 32(4), 860-867;

- Golombok et al (2017) Parenting and the adjustment of children born to gay fathers through surrogacy. Child development, 89(4), 1223-1233.

Effect of section 19 *Surrogacy Act 2008*

The relevant effect of section 19 is to:

- enable the following people access to surrogacy in Western Australia:
    - heterosexual married or de facto couples;
    - single women;
    - lesbian couples;

- deny the following people access to surrogacy in Western Australia:
    - single men;
    - gay male couples.

There seems no rhyme nor reason as to why single women should have access to surrogacy in Western Australia, but single men not (other than ensuring at the time of passage as to compliance with the *Sex Discrimination Act 1984* (Cth)). There seems no rhyme nor reason as to why lesbian couples should have access to surrogacy in Western Australia, but gay male couples not. Lest it be thought that lesbian couples will never access surrogacy, I have acted in several cases where lesbian couples have become parents through surrogacy. They too can be affected by infertility.

Removal of the Commonwealth exemptions

As highlighted by NSW Health 20 years ago, there was an evident problem with Western Australian law potentially breaching the *Sex Discrimination Act*. There have been two cases on point, referred to by NSW Health in that submission where South Australian and Victorian laws were overturned, reliant on section 22 of the *Sex Discrimination Act*. Section 22 of that Act is plain. It provides:

"(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other

person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

(2) This section binds the Crown in right of a State."

Pearce v. South Australia (1996) 66 SASR 486

Mrs Pearce had separated from her husband. She lived in South Australia. She wanted to have IVF at the Queen Elizabeth Hospital. The then South Australian *Reproduction Technology Act* prevented her from doing so as artificial fertilisation procedures were denied except for the benefit of certain classes of married couples who were either married or had cohabited as man and wife within the timeframe specified under that Act. Section 22 of the *Sex Discrimination Act* was more restrictive back then. It then provided:

"(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground that the other person's sex, marital status or pregnancy:

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

(b) in the terms or conditions in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person;

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

(2) This section binds the Crown in right of a State."

The Full Court of the Supreme Court of South Australia said at [18]:

> *"When the provisions of the Sex Discrimination Act and the Reproductive Technology Act are examined side by side it is immediately apparent that there is direct inconsistency between the two sets of legislation."*

Not surprisingly, section 22 of the *Sex Discrimination Act* prevailed, given section 109 of the *Commonwealth Constitution.*

McBain v. Victoria [2000] FCA 1009

Section 22 of the *Sex Discrimination Act* had the same form then as that decided in *Pearce*. The

then Victorian *Infertility Treatment Act* provided that to be eligible to undergo infertility treatment, a woman must 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 wished to provide infertility treatment to Ms Meldrum, a patient of his, who was a single woman not living in a de facto relationship.

The court held that infertility treatment was a *service* within section 22 of the *Commonwealth Act* and that Dr McBain was precluded by the State Act from providing this service to Ms Meldrum because of her marital status. Accordingly, the State Act was inconsistent with the Commonwealth Act and the court declared that by force of the Constitution, the State Act was invalid to the extent of the inconsistency.

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

Whilst McBain ultimately found its way to the High Court, this finding was not disturbed.

Comment about the cases

The *Surrogacy Act 2008* when enacted specifically took up these provisions so that it did not run foul of section 22 of the *Sex Discrimination Act* as it then provided.

Sex Discrimination Act amendments

The *Sex Discrimination Act* was amended by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). Rather than just a focus on sex, marital status or pregnancy was now a focus on *"sexual orientation, gender identity, intersex status, marital or relationship status"*. *Gender identity* is defined in section 4 as meaning:

> *"...the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to a person's designated sex at birth."*

Intersex status has been defined as meaning:

> *"...the status of any physical, hormonal or genetic features that are:*
>
> *(a) neither wholly female nor wholly male; or*
> *(b) a combination of female and male; or*
> *(c) neither female nor male."*

It might be noted that if someone with a gender identity as defined or intersex status as defined is not perceived either to be a single woman or in a heterosexual relationship within section 19(2) of the *Surrogacy Act*, that person will be refused treatment in Western Australia, unable to obtain Reproductive Technology Council approval and unable to obtain an order.

Sexual orientation is defined as meaning:

> *"A person's sexual orientation towards:*

(a) persons of the same sex; or
(b) persons of a different sex; or
(c) persons of the same sex and persons of a different sex."

New sections have been added, namely 5A, 5B and 5C to the Act dealing specifically with discrimination on the ground of sexual orientation, gender identity and intersex status.

Significantly, section 22(1) was amended to omit *"marital status"* and instead substitute *"sexual orientation, gender identity, intersex status, marital relationship status"*.

Therefore, on the face of section 22 of the Act, consistent with *Pearce* and *McBain,* if a clinic in Western Australia were to refuse to provide treatment to a person for an upcoming surrogacy matter because ultimately that person was not part of an eligible couple as defined in section 19(2) of the *Surrogacy Act* but that person fell within s.22 (for example, because it was a single man), then that clinic would be acting unlawfully under section 22 of the *Sex Discrimination Act.*

This would then put at risk that clinic, the Reproductive Technology Council and the State of Western Australia to a court case in which the clinic, the Reproductive Technology Council and the State of Western Australia would probably lose.

The Commonwealth exempted surrogacy and ART

The Commonwealth, by a series of regulations, exempted surrogacy and ART from these amendments to the *Sex Discrimination Act.* It did this for a year at first under the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Regulation 2013.* When that exemption was due to expire on 31 July 2014, it was extended by a year to 31 July 2015 by the *Sex Discrimination Amendment (Exemptions) Regulation 2014.* When that was due to expire, again on 31 July 2015, that was extended until 31 July 2016 by the *Sex Discrimination Amendment (Exemptions) Regulation 2015.*

The Commonwealth committed Australia at the United Nations Human Rights Committee in Geneva to removing all discrimination against LGBTI people in assisted reproductive treatment and surrogacy laws in Australia by removing the exemptions by 1 August 2016.

The Commonwealth then did so (except Western Australia) so that on 1 August 2016 it was unlawful throughout Australia in effect for an IVF doctor not to provide treatment for surrogacy to anyone who was otherwise prevented from doing so who fell within the scope of section 22 of the *Sex Discrimination Act.*

Western Australia, alone, was given a further exemption by the *Sex Discrimination Amendment (Exemptions) Regulation 2016* (Cth) until 31 July 2017. I do not know why Western Australia was given an extra year over the rest of the country. Regulation 5 provided:

*"5. **Exemption for things done in direct compliance with prescribed laws***

(1) For the purposes of subsection 40(2B) of the Act, the following laws are prescribed:

(a) The Human Reproductive Technology Act 1991 (WA);
(b) The Surrogacy Act 2008 (WA).

Note: subsection 40(2B) provides for an exemption, in relation to anything done by a person in direct compliance with a prescribed law, from Divisions 1 and 2 of Part II (Prohibition of Discrimination) of the Act, as applying by reference to:

(a) section 5A (sexual orientation); or
(b) section 5B (gender identity); or
(c) section 5C (intersex status).

(2) This regulation is repealed at the start of 1 August 2017."

It is apparent therefore that the view of the Commonwealth by that regulation is that refusal to provide a service, i.e. treatment because someone does not fall within the definition of *eligible couple* under section 19(2) of the *Surrogacy Act* by virtue of sexual orientation, gender identity or intersex status would be a breach of section 22 of the *Sex Discrimination Act.*

Interstate comparisons

Queensland

The *Surrogacy Act 2010* (Qld) does not discriminate. Indeed, the first reported case of a surrogacy in Queensland of *BLH v. SJW* [2010] QChC1 concerned intended parents who were a gay male couple. A parentage order was made in their favour, the court finding that it was in the best interests of the child to do so.

Section 45A of the *Anti-Discrimination Act 1991* (Qld) purports to allow for discrimination in the provision of ART services on the basis of relationship status or sexuality.

I am not aware of any IVF clinic invoking the section to refuse treatment.

The section is likely a dead letter because it is inconsistent with s.22 of the *Sex Discrimination Act.*

New South Wales

The *Surrogacy Act 2010* (NSW) does not discriminate.

Australian Capital Territory

It is a requirement under the *Parentage Act 2004* (ACT) that there be a couple. The legislation does not discriminate on the basis of sexuality but against single intended parents and against single surrogates.

Victoria

Neither the *Assisted Reproductive Treatment Act 2008* (Vic) nor the *Status of Children Act 1974* (Vic), the two pieces of legislation that govern surrogacy in Victoria, discriminates.

Tasmania

The *Surrogacy Act 2012* (Tas) does not discriminate.

South Australia

Following the removal of the exemption in 2016, the South Australian Health Department wrote to all IVF clinics in that State advising them of the removal of the exemption under the *Sex*

Discrimination Act and suggesting that they get their own legal advice, in light of the differences between licence conditions under the *Assisted Reproductive Treatment Act 1988* (SA) and section 22 of the *Sex Discrimination Act.*

Until 2017, the *Family Relationships Act 1975* (SA) discriminated in surrogacy matters against same-sex couples and single intended parents as commissioning parents.

The South Australian Law Reform Institute was asked by the Weatherill Government to report about the impact of South Australian laws on LGBTI people. The Institute recommended that the discrimination concerning surrogacy against same-sex couples and single intended parents be removed.

A bill to achieve this was amended, the amendments removing the discrimination against same-sex couples, but retaining the discrimination against single intended parents. Licence holders are entitled to refuse treatment on the basis of conscience, provided that they are on a public register and refer those patients to someone else.

Subsequent to the 2017 amendments, the Weatherill Government instructed SALRI to undertake a review of that State's surrogacy laws. Following the election, the Marshall Government decided to continue with and support that review.

The subsequent SALRI report recommended a removal of discrimination against single intended parents in South Australia, as part of a suite of recommendations.

Currently before that Parliament, there is a draft Bill put forward by the Attorney-General Ms Vickie Chapman which includes a removal of that discrimination.

Northern Territory

The Northern Territory has no laws concerning surrogacy. The only IVF clinic in the Northern Territory, Repromed, will not undertake surrogacy there because the Territory has no laws to transfer parentage.

Territory residents typically go overseas to access surrogacy.

Commonwealth

The Commonwealth is yet to act (other than a brief response) following the report of the House of Representatives Standing Committee on Social Policy and Legal Affairs, Surrogacy Matters (2016), chaired by George Christensen MP. The Committee called for a model national law that facilitate altruistic surrogacy in Australia and *"...the need for State and Territory laws to be non-discriminatory"*.

The Committee said at [1.2]:

> *"The desire to be a parent is an instinct that is shared by many people from different backgrounds, however some may not find themselves in a position to form a family in the conventional way. Society now recognises many different forms of blended and adoptive families that are not based solely on genetic connections, expanding the models of family formation and familiar relationships."*

The Committee said at [1.12]:

> *"The disparity in legislative regimes around Australia causes a range of inequities for those choosing to pursue domestic altruistic surrogacy. These include minimal requirements on counselling and background checks in some jurisdictions. Many enquiry participants also highlighted a number of discriminatory provisions that exist in relation to gender, marital status and sexual orientation."*

Further, following what was seen by the Select Committee in 1999, it noted at [1.13]:

> *"...Evidence to the committee points to some Australians choosing to access surrogacy arrangements in States and Territories that are more favourable than those in their home jurisdiction."*

The Committee noted at [1.14]:

> *"For many Australians, family formation can be a difficult and emotional journey. The desire to have a family can be complicated by many issues including age, infertility, being single or in a same-sex relationship."*

Trying to prevent people going overseas

Intended parents from Western Australia go overseas for surrogacy if they are unable to access surrogacy at home. The disparity between those who go overseas and those who access surrogacy in Western Australia is large. Australians generally would rather undertake surrogacy at home than abroad, given the high quality of IVF clinics we have, the high quality of our laws that help protect human rights, that it is cheaper to do so at home and that they have support networks at home.

Some who go overseas end up in developing countries where there is the possibility of exploitation of all involved (other than the doctor and the promoter or surrogacy there). Some who go overseas from Western Australia go to low risk countries such as the United States and Canada. For example, Mr and Mrs Piccolo (which was a pseudonym) underwent surrogacy in Canada: *Piccolo and Piccolo* [2017] FCWA 167.

In some overseas countries, the law or practice is that egg donors must be anonymous. Western Australian children conceived through such an arrangement may never know where they came from.

Single men and gay couples, with the innate desire to become parents, and faced with the law refusing to allow them to be so are in effect given three choices:

1. Do not become parents.

2. Change jobs, move away from friends and families, and undertake surrogacy at home.

3. Stay at home and undertake surrogacy overseas.

Not surprisingly, the last choice seems the road most travelled.

It is our moral imperative to try and do everything in our power to encourage Australian intended parents to undertake surrogacy at home and not do so abroad. As the House of Representatives Committee said at [1.77]:

> *"Finally, some Australian jurisdictions prohibit same-sex attracted individuals or couples from engaging in domestic surrogacy. Offshore commercial surrogacy is often the only family formation option available to people affected by this prohibition."*

The inference from that statement is clear – if discrimination is removed, then those who were discriminated against, which in Western Australia are single men, gay male couples and potentially transgender and intersex people – will be much more likely to undertake surrogacy at home (as their counterparts do interstate) than either:

(a) uprooting their lives and moving interstate (as evidenced in the House of Representatives' inquiry); or

(b) undertaking commercial surrogacy overseas, potentially in a developing country.

Sir David Attenborough

The words of Sir David Attenborough from The Trials of Life (1990) aptly describe the innate desire of people to become parents:

> *"If you watch animals objectively for any length of time, you're driven to the conclusion that their main aim in life is to pass on their genes to the next generation. Most do so directly, by breeding. In the few examples that don't do so by design, they do it indirectly, by helping a relative with whom they share a great number of their genes. And in as much as the legacy that human beings pass on to the next generation is not only genetic but to a unique degree cultural, we do the same. So animals and ourselves, to continue the line, will endure all kinds of hardship, overcome all kinds of difficulties, and eventually the next generation appears."*

Evidence

I am willing to give evidence to the Committee if called upon. Due to logistics, that evidence will probably be given by telephone.

Yours faithfully

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