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Ms Julie Conway
Research Director
Investigation into Altruistic Surrogacy Committee
Parliament House
George Street
Brisbane
Qld 4000

Dear Ms Conway,

Re: Written submission to the Investigation into Altruistic Surrogacy Committee

Please accept this letter as a written submission to the Investigation into Altruistic Surrogacy Committee. I am a full-time PhD student at the Queensland University of Technology in the Faculty of Law. Some of the points raised by the Issues Paper go beyond the scope of my doctorate research, which focuses on the regulation of assisted reproductive technologies (ART) in Australia and the UK. However, I would like to address some specific issues which have been raised in the paper.

Criteria for surrogates and commissioning parents

At pages 5 and 6, the Issues Paper considers the criteria that should be met by surrogates and commissioning parents for entering into a surrogacy arrangement. The practice of surrogacy in many cases will require the use of ART techniques and therefore, the regulation of assisted reproduction is also relevant. It is noted in the Issues Paper that currently throughout Australia there are a number of jurisdictions that require those seeking access to ART to be either medically infertile or at risk of passing on a genetic disease or disorder (whether for general IVF treatments or for the purposes of entering a surrogacy arrangement). In Victoria, South Australia and Western Australia, the provision of ART was originally limited to married or heterosexual *de facto* couples. However, that requirement was challenged on the basis that it was inconsistent with Commonwealth legislation under section 109 of the

Constitution.[1] Thus, it is likely that any legislation formed in Queensland which prohibits access to ART treatments on the grounds of marital status or sexual orientation will be unlawful to the extent that it would be inconsistent with the *Sex Discrimination Act 1984* (Cth).

However, despite the fact that it would not be possible for the legislature to limit access to ART on the grounds of marital status or sexual orientation on the face of any legislation, if Queensland implements eligibility criteria in relation to surrogacy arrangements similar to the criteria existing in other jurisdictions, those members of the community will still be the subject of discrimination. The inability to become pregnant stems from the very fact that a woman is not engaging in heterosexual intercourse *because* of her marital status or sexual orientation and the requirement of *medical* infertility remains as an indirect way of discriminating against such individuals.

Currently, medical practitioners who limit the availability of ART services to those who have a medical need for the treatment (that is, those who have not achieved a pregnancy after engaging in heterosexual intercourse over a 12-month period) are apparently not discriminating against individuals on the grounds of sexual orientation or marital status. Furthermore, because there are no eligibility criteria imposed under current professional and ethical guidelines,[2] different clinics operating within Queensland are able to impose different requirements relating to eligibility for accessing ART. Furthermore, following a decision by the Queensland Court of Appeal, and an amendment to the *Anti-Discrimination Act 1991* (Qld), clinicians will not be in breach of the law for limiting the treatments in such a way.[3] Kerry Petersen and Martin H Johnson comment:

> If an ART statute excludes women on the grounds of marital status, discrimination laws can be invoked to strike down these provisions. However, if gate-keeping is left to clinics and medical practitioners, it can be difficult to obtain the evidence necessary to challenge medical decisions to refuse treatment on discrimination grounds.[4]

This point is exemplified by the position in Queensland which permits discrimination (albeit, disguised under the veil of requiring a 'medical' need for ART services). Despite this ability for discrimination to remain, it should also be acknowledged that it is possible that some practitioners will diagnose a single or lesbian woman as infertile after she has attempted to achieve a pregnancy through a period of self insemination with no success. Whilst some may argue that the requirement for medical infertility is not discriminatory because it applies equally to all women, the effect of the law is that those who lack a male partner due to their marital status or sexual orientation will be exposed to a higher risk of harm due to the current legal

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[1] *McBain v The State of Victoria & Ors* (2000) 99 FCR 116; *Pearce v South Australian Health Commission and Others* (1996) 66 SASR 486

[2] See the Reproductive Technology Accreditation Committee, Fertility Society of Australia, *Code of Practice for Assisted Reproductive Technology Units*, (4th revision, February 2005) 8; National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2004)

[3] See *JM v QFG* [2000] 1 Qd R 373

[4] K Petersen, and M H Johnson, 'SmARTest regulation? Comparing the regulatory structures for ART in the UK and Australia' (2007) 15 *Reproductive BioMedicine Online* at 284-5

situation. The higher risk of harm arises from the fact that self insemination carries with it a number of risks that could be avoided if such women were permitted access to ART services in accredited clinics. Thus, accredited clinics are required to follow a number of professional standards to protect the safety and interests of those undergoing treatments. Donated sperm used in fertility clinics is screened for infectious diseases. Women who seek to achieve a pregnancy and have no choice but to self-inseminate are being deprived of the safer option of undergoing insemination techniques in accredited clinics. Furthermore, children born as a result of self-insemination procedures may be denied the ability to gain information about their genetic origins which would be available to them if the parents of such children were permitted access to safer, registered services.

It is important to bear in mind that not only does the current legal situation in Queensland expose some women to higher risk of harm by leaving them no option but to attempt to achieve a pregnancy by self insemination, it also imposes ideals as to the type of people that are suitable or capable of being parents. The implication in this context is that single parents and same sex couples should not be assisted in becoming parents. When reviewing the law in New South Wales, New South Wales Health commented:

> ... The role of the legislature has not been to make rules regarding classes of persons who may or may not become parents (as this is not necessarily a predictor of harm) but to make rules to safeguard the rights of individual children whose welfare has been compromised.[5]

Whilst it is acknowledged that the issues raised in this submission may go beyond the scope of the Committee's enquiry, there are valid points that apply equally to those seeking access to ART for general purposes and those seeking access for surrogacy. It would not make sense to impose eligibility requirements for those seeking to undergo surrogacy arrangements but not those using IVF generally. Both purposes have essentially the same outcome (although there are arguably a number of further factors to be considered in the surrogacy context). Furthermore, because there are no eligibility requirements imposed under the system of regulation that currently exists in Queensland, some clinics may be offering ART services to single and lesbian women. If eligibility requirements were imposed as a result of the Committee's investigation into surrogacy, what would be the implication for ART treatments generally and would it prevent clinics form offering general treatments to single and lesbian women? These are significant questions that should be considered before imposing requirements for those seeking to use ART for the purposes of surrogacy.

What rights should a child have to access information?

The right of donor conceived children to access identifying information about their genetic parents is strongly recognised in the field of ART. Such right applies regardless of whether the child is created as a result of a surrogacy arrangement or as a result of general ART treatments. In the UK, the removal of donor anonymity has occurred due to the recognition that the child's right to access such information

[5] New South Wales Department of Health, 'Consultation Draft, Assisted Reproductive Technology Bill 2003, Information Guide, November 2003, 3.1 <http://www.health.nsw.gov.au/legal/pdf/Informationguide.pdf> at 4.3

outweighs the donor's right to remain anonymous (although the law has not acted retrospectively to that effect). Similarly, as is acknowledged in the Issues Paper the same applies in Australia and the NHMRC guidelines uphold the right of knowledge of genetic parents and siblings. However, in Queensland there is no *central* donor register containing such information. In Victoria, the implementation of a central register is now of significant importance as the children on that register begin to reach the age of majority. Similarly, in New South Wales the recent legislation that was introduced implements a *central* donor register to protect the right of donor conceived children (whether born as a result of surrogacy or otherwise). It is suggested that a central donor register for children born as a result of surrogacy arrangements should also be implemented in Queensland. Ideally, the register would go beyond the issue of surrogacy and include donor conceived children born as a result of general ART treatments. Again, this is an issue that is probably beyond the scope of the terms of reference for the Committee. However, it can be argued that the same issues equally apply to surrogacy and general ART regulation.

One important factor that will need to be addressed if Queensland implements a central donor register is the ability of the donor to seek contact with the child created from his donated gametes. Whilst the establishment of a central register would be aimed at securing the rights of donor-conceived children in enabling them to discover their genetic origins, this issue needs full consideration. In New South Wales for example, it is not clear whether the legislation enables the Director-General to contact a donor conceived child to gain consent to the disclosure of information *to* the donor, in cases where the child's parents have not informed the child of the way he or she was conceived. The latter issue has arisen in context of the Victorian legislation and has received criticism:

> By allowing donors to set in train processes that will reveal to a child that he or she is donor-conceived, the State Government has asserted what it believes is in a child's best interests, and forced the hand of parents of donor-conceived children in the direction of telling.[6]

In Victoria, the Infertility Treatment Authority launched a campaign to urge parents of donor-conceived children to inform their offspring of the way they were conceived.[7] Although there is no *requirement* that parents inform children of the fact that they were conceived with donor gametes, there is a risk that the child could be contacted and informed of this fact once they reach the age of majority to enable the donor to make contact with the child. This latter method of informing a child of the way he or she was conceived is not an appropriate way of dealing with such a sensitive issue. If regulation must allow the donor to seek contact with a child born from donated gametes, some kind of safeguard could be introduced to ensure that the parents are aware of this fact prior to any direct contact being made. For example, the person in charge of maintaining the central register could make contact with the parents of a donor conceived child to enquire whether they have told their child about the nature of his or her conception. These issues would apply equally in the context of maintaining a central record of surrogacy arrangements in Queensland.

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[6] Cannold L, 'Opinion: Time to break the news to your children', *The Age (Melbourne)*, 11 May 2006, 17

[7] See L Johnson and H Kane, 'Regulation of donor conception and the "time to tell" campaign' (2007) 15 JLM 117-27

Overlap with the regulation of ART

My final point is only a brief one. Whilst the Committee has been asked to consider whether the practice of altruistic surrogacy should be de-criminalised in Queensland, the issues that will be faced under the scope of your investigation go far beyond the immediate implications of the practice of surrogacy. Many of the issues that you will face in your deliberations will relate to the regulation of ART generally and this is probably an obvious point given that many surrogacy arrangements will require the use of ART techniques. Therefore, I believe that there is a need to consider the regulation of ART in Queensland more generally in order to deal with the regulation of surrogacy comprehensively.

I hope you find the issues I have raised in this submission informative, and I am happy to discuss in further detail should you require any further information or clarification.

Yours sincerely,

Malcolm Smith
PhD Candidate