

Legislative Council—No 173A

As reported with amendments, report adopted, Standing Orders suspended and passed remaining stages, 7 December 2016

South Australia

**Statutes Amendment (Surrogacy Eligibility)
Bill 2016**

A BILL FOR

An Act to amend the *Assisted Reproductive Treatment Act 1988*; the *Equal Opportunity Act 1984*; and the *Family Relationships Act 1975*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Statutes Amendment (Surrogacy Eligibility) Act 2016*.

5 2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

10 Part 2—Amendment of *Assisted Reproductive Treatment Act 1988*

3A—Amendment of section 3—Interpretation

Section 3—after the definition of *recognised surrogacy agreement* insert:
registered objector—see section 8(3).

3B—Amendment of section 6—Eligibility for registration

Section 6—after its present contents (now to be designated as subsection (1)) insert:

- 5 (2) The fact that an applicant for registration has a religious objection to the provision of assisted reproductive treatment to another on the basis of the other's sexual orientation or gender identity, or marital status is not, of itself, grounds for finding that a person is not fit and proper to be registered.

3C—Amendment of section 8—Registration

(1) Section 8(2)—after paragraph (b) insert:

- 10 (ab) if the person notifies the Minister that the person has a religious objection to the provision of assisted reproductive treatment to another on the basis of the other's sexual orientation or gender identity, or marital status—that fact; and

(2) Section 8—after subsection (2) insert:

- 15 (3) A person referred to in subsection (2)(ab) may, for the purposes of this or any other Act, be referred to as a *registered objector*.
- (4) The Minister must publish the Register on a website maintained by the Minister for the purpose.

4—Amendment of section 9—Conditions of registration

20 (1) Section 9(1)—after paragraph (b) insert:

- (ba) subject to subsection (1a), a condition prohibiting the person from refusing to provide assisted reproductive treatment to another on the basis only of the other's sexual orientation or gender identity, marital status, or religious beliefs;

25 (2) Section 9(1)(c)(i) and (ii)—delete subparagraphs (i) and (ii) and substitute:

- (i) if it appears to be unlikely that, in the person's circumstances, the person will become pregnant other than by an assisted reproductive treatment;

 (3) Section 9(1)(c)(iv)(C)—delete "his" and substitute:

30 the donor's

(4) Section 9—after subsection (1) insert:

- 35 (1a) Section 9(1)(ba) does not apply to a registered objector but, in that case, it is instead a condition of the registered objector's registration that the registered objector take steps to refer the person seeking assisted reproductive treatment to another person who is registered under this Part.

Part 3—Amendment of *Equal Opportunity Act 1984*

5—Amendment of section 5—Interpretation

Section 5(2)—delete subsection (2) and substitute:

5 (2) After the commencement of this subsection, the provision of assisted
insemination or assisted reproductive treatment (both within the
meaning of the *Assisted Reproductive Treatment Act 1988*) will be
the provision of a service to which this Act applies; however, to
avoid doubt, the provision of any such service before the
10 commencement of this subsection is not (and will be taken never to
have been) a service to which this Act or the repealed *Sex
Discrimination Act 1975* applied.

15 (2a) Despite subsection (2), the refusal by a person who is a registered
objector within the meaning of the *Assisted Reproductive Treatment
Act 1988* to provide assisted reproductive treatment to another on the
basis of the other's sexual orientation or gender identity, or marital
status will not be taken to be refusal of a service to which this Act
applies.

Part 4—Amendment of *Family Relationships Act 1975*

6—Amendment of section 10A—Interpretation

20 Section 10A(1), definition of *qualifying relationship*—delete the definition and
substitute:

qualifying relationship means a marriage-like relationship between 2 people
who are partners (irrespective of their sex or gender identity);

7—Amendment of section 10C—Rules relating to parentage

25 Section 10C(3a)(a)—delete "(whether they are of the same or opposite sex)" and
substitute:

(irrespective of their sex or gender identity)

8—Amendment of section 10F—Interpretation

Section 10F—after the definition of *recognised surrogacy agreement* insert:

30 *registered relationship* means a relationship that is registered under the
Relationships Register Act 2016, and includes a corresponding law registered
relationship under that Act;

9—Amendment of section 10HA—Recognised surrogacy agreements

(1) Section 10HA(2)—delete subsection (2) and substitute:

35 (2) A *recognised surrogacy agreement* is an agreement—

(a) under which a surrogate mother agrees—

(i) to become pregnant or to seek to become pregnant;
and

(ii) to surrender custody of, and rights in relation to, a child born as a result of the pregnancy to another party to the agreement; and

(b) which complies with the conditions set out below.

5 (2a) For the purposes of subsection (2)(b), the conditions with which a recognised surrogacy agreement must comply are as follows:

(a) the only parties to the agreement are—

(i) the surrogate mother (and, if she is a married woman, her husband); and

10 (ii) the commissioning parents;

(b) each of the parties to the agreement must be at least 18 years old;

(c) both of the commissioning parents must be domiciled in this State;

15 (d) the commissioning parents—

(i) must be legally married or in a registered relationship; or

20 (ii) must have lived together continuously in a marriage-like relationship (irrespective of their sex or gender identity)—

(A) for the period of 3 years immediately preceding the date of the agreement; or

25 (B) for periods aggregating not less than 3 years during the period of 4 years immediately preceding the date of the agreement;

(e) either—

30 (i) it appears to be unlikely in the circumstances that a commissioning parent would become pregnant, or be able to carry a pregnancy or give birth (whether because of infertility, other medical reasons, risk to an unborn child or for some other reason); or

35 (ii) there appears to be a risk that a serious genetic defect, serious disease or serious illness would be transmitted to a child born to a commissioning parent; or

40 (iii) there appears to be a risk that becoming pregnant or giving birth to a child would result in physical harm to a female commissioning parent (being harm of a kind, or of a severity, unlikely to be suffered by females becoming pregnant or giving birth generally);

- (f) the surrogate mother must have been assessed by and approved as a surrogate by a counselling service—
- (i) that is accredited for the purposes of this paragraph in accordance with the regulations; and
 - (ii) in accordance with any relevant guidelines published by the National Health and Medical Research Council; and
 - (iii) in accordance with any other requirement that may be prescribed by the regulations for the purposes of this paragraph;
- (g) each of the following persons must be issued with a certificate by a counselling service that complies with the requirements of subsection (3):
- (i) the surrogate mother and her husband or partner (if any);
 - (ii) the commissioning parents;
- (h) the agreement must state that the parties intend that—
- (i) the pregnancy is to be achieved by the use of a fertilisation procedure carried out in this State; and
 - (ii) subject to the issue of a certificate under subsection (5)—human reproductive material with respect to creating an embryo for the purposes of the pregnancy will be provided by at least 1 of the commissioning parents;
- (i) the agreement must state that no valuable consideration is payable under, or in respect of, the agreement, other than for expenses connected with or consisting of—
- (i) a pregnancy (including any attempt to become pregnant) that is the subject of the agreement; or
 - (ii) the birth or care of a child born as a result of that pregnancy; or
 - (iii) counselling or medical services provided in connection with the agreement (including after the birth of a child); or
 - (iv) legal services provided in connection with the agreement (including after the birth of a child); or
 - (v) reasonable out of pocket expenses incurred by the surrogate mother in respect of the agreement; or
 - (vi) any other matter prescribed by the regulations for the purposes of this provision;
- (j) the agreement must state that the parties intend that the commissioning parents will apply for an order under section 10HB after the child is born;

(k) the agreement must state that the commissioning parents will, in accordance with any requirements in the *State Framework for Altruistic Surrogacy*, take reasonable steps to ensure that the surrogate mother and her husband or partner (if any) are offered counselling (at no cost to the surrogate mother or her husband or partner) after the birth of a child to which the agreement relates (including, to avoid doubt, a still-birth).

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(2) Section 10HA(3)—delete "subsection (2)(b)(vii)" and substitute:

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paragraph (g) of subsection (2a)

(3) Section 10HA(3)(ab)—delete "subparagraph" and substitute:

paragraph

(4) Section 10HA(5)—delete "subsection (2)(b)(viii)(B)" and substitute:

subsection (2a)(h)(ii)

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(5) Section 10HA(6)(a)—delete "subsection (1)" and substitute:

the preceding subsections

(6) Section 10HA(6)(c)—after "husband" insert:

or partner

10—Amendment of section 10HB—Orders as to parents of child born under recognised surrogacy arrangements

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Section 10HB(9)(c)—delete "section 10HA(2)(b)(ix)" and substitute:

section 10HA(2a)(i)