Parliament of South Australia

Inquiry
into
Gestational Surrogacy

TWENTY-SIXTH REPORT
OF THE
SOCIAL DEVELOPMENT COMMITTEE

Laid on the Table of the Legislative Council, and ordered to be printed 13 November 2007

SECOND SESSION FIFTY-FIRST PARLIAMENT

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PART TWO

ESTABLISHMENT AND COMPOSITION OF THE COMMITTEE

The Social Development Committee is established pursuant to Sections 13, 14 and 15 of the *Parliamentary Committees Act 1991.* Its six Members are drawn equally from the Legislative Council and the House of Assembly:

Hon Ian Hunter MLC (*Presiding Member)*

Hon Dennis Hood MLC

Hon Stephen Wade MLC

Mr Adrian Pederick MP

Ms Lindsay Simmons MP

Hon Trish White MP

The Committee is assisted by:

Ms Robyn Schutte (.8) and Ms Kristina Willis-Arnold (.2) (Committee Secretaries)

Ms Sue Markotić (Research Officer)

Ms Cynthia Gray (.3) (Administrative Officer)

FUNCTIONS OF THE COMMITTEE

The functions of the Social Development Committee are laid out in section 15 of the *Parliamentary Committees Act 1991* and charge the Committee —

(a) to inquire into, consider and report on such of the following matters as are referred to it under this Act:

  (i) any matter concerned with the health, welfare or education of the people of the State;

  (ii) any matter concerned with occupational safety or industrial relations;

  (iii) any matter concerned with the arts, recreation or sport or the cultural or physical development of the people of the State;

  (iv) any matter concerned with the quality of life of communities, families or individuals in the State or how that quality of life might be improved

(b) to perform such other functions as are imposed on the Committee under this or any other Act or by resolution of both Houses.

TERMS OF REFERENCE

The Statutes Amendment (Surrogacy) Bill was introduced into the Legislative Council by the Honourable John Dawkins MLC on 21 June 2006. On 27 September 2006, on motion of the Honourable Ian Hunter MLC, the Bill was withdrawn and referred to the Social Development Committee to inquire into and report on the issue of gestational surrogacy and, in particular, to consider —

(i) the ways in which South Australian statutes might be amended to better deal with matters pertaining to surrogacy and related matters;

(ii) what complexities might arise from the consideration of such changes;

(iii) the efficacy of surrogacy legislation in other Australian jurisdictions, and the status of children born through surrogacy interstate and now living in South Australia;

(iv) the interplay between existing State and Federal legislation as it affects all individuals involved in, and affected by, gestational surrogacy; and

(v) any related matters.

EXECUTIVE SUMMARY

On 21 June 2006, the Honourable John Dawkins MLC introduced the Statutes Amendment (Surrogacy) Bill 2006. The aim of the Bill was to address problems related to gestational surrogacy in South Australia. On 27 September 2006, on motion of the Honourable Ian Hunter MLC, the Bill was withdrawn and referred to the Social Development Committee for its consideration as part of a formal Inquiry.

A small but significant number of South Australians are infertile; that is, they are unable to conceive or sustain a pregnancy. Over the past twenty years, medical and scientific advances in reproductive technology have made it possible for an infertile person to access a broader range of fertility treatments than was previously available. While this development has been welcomed by some, it has brought with it a number of social, ethical and legal challenges.

Gestational surrogacy—where a woman carries and bears a child not directly related to her for another person or couple—is a relatively recent development involving the use of in-vitro fertilization. It can be used by women who are unable to conceive due to the absence of a uterus, women who suffer from uterine abnormalities or for whom carrying a child would present a serious risk to their own health.

For the most part, the opinions expressed about gestational surrogacy during this Inquiry were either decisively for, or firmly against, its practice in South Australia. Those who support the use of surrogacy arrangements argue that reproductive technology is safe and allows childless couples to have children who otherwise, due to medical reasons, would not be able to do so. Opponents of surrogacy argue that the practice treats a child as a mere commodity and devalues the surrogate mother. The significant divide between these two standpoints makes it difficult to reach any type of consensus position.

Surrogacy laws vary significantly across Australian jurisdictions. While some jurisdictions permit surrogacy others prohibit its practice. This legislative diversity has been described as fragmented and illogical. The Committee considers that the existing situation is unfair and that it undermines the effectiveness of South Australian law: South Australians will travel to another jurisdiction if its laws better suit their plans. Witnesses to the Inquiry—including health professionals and persons who had participated in surrogacy arrangements—highlighted a maze of confusing, ambiguous and, at times, conflicting surrogacy laws and associated regulations. In South Australia, while surrogacy is not illegal *per se*, the stringent criteria that surround it, coupled with legislative ambiguity, make it all but impossible for reproductive clinics to legally practise. The Inquiry heard from a number of South Australians who had travelled interstate to undergo gestational surrogacy procedures.

Across Australian society, the use of gestational surrogacy continues to be a controversial issue. Not surprisingly, formal examinations of its current practice, social implications and legislative framework engender highly emotive debate. In conducting its Inquiry, the Committee has been mindful of the need, wherever possible, to take a practical approach.

Two main concerns have been at the forefront of the Committee's deliberations.

Firstly, the Committee was determined to give primacy to the needs of children born of gestational surrogacy arrangements. In this context, the Committee has had to consider the status of children already born to South Australian parents as a result of gestational surrogacy procedures performed beyond South Australia. As the South Australian law currently stands, the surrogate mother—the woman who gives birth—is listed as the mother on the child's birth certificate and, if she is married[1], her husband is listed as the child's father. In South Australia the only way for commissioning parents to have legal parental status of their biological child is by adoption.

Secondly, and equally as importantly, the Committee has been required to consider how the issue of gestational surrogacy should be dealt with in the longer-term. This is a complex and challenging matter and one that the Committee has found difficult to resolve.

The issue of gestational surrogacy attracted interest from a range of individuals and organisations. In general, submissions emphasised the importance of ensuring that the best interests of the child remain paramount. However, defining what is actually meant by 'in the best interests of the child' was the subject of significant debate.

The Committee considers that the State has a responsibility to ensure that children born through gestational surrogacy arrangements, within South Australia or beyond, are afforded the full protection of the law. Having examined all of the evidence relating to legal parentage, the Committee has concluded that the current situation is untenable and that there is an urgent need for legislation to be enacted to ensure a better process is in place for commissioning parents to be legally recognised as the parents of their biological child.

The Statutes Amendment (Surrogacy) Bill 2006 has been the catalyst for bringing these matters to the attention of the Parliament. Notwithstanding its significance in that regard, the Committee considers that the model contained within the original Bill is not the best way to fully recognise the rights of all affected parties and, if passed, may contravene anti-discrimination legislation.

After careful consideration of the evidence received, the Committee has resolved to recommend that the Government prepare and introduce a Bill to allow gestational surrogacy to take place in South Australia in certain circumstances and with appropriate safeguards. In putting forward this and other recommendations, the Committee has chosen to avoid being too prescriptive. The Committee considers the Government is best placed to develop an appropriate and effective response to the complex issue of gestational surrogacy in keeping with the recommendations contained in this report.

The Inquiry into gestational surrogacy is timely. At a national level, the Standing Committee of Attorneys-General (SCAG) has agreed to consider the possibility of

[1] Under *The Family Relationships Act 1975*, the term 'married' includes a situation in which a woman is living with a man as his wife on a genuine domestic basis. See www.legislation.sa.gov.au/LZ/C/A/FAMILY%20RELATIONSHIPS%20ACT%201975/CURRENT/1975.115.UN.PDF

introducing consistent surrogacy laws across all Australian states and territories. The Committee supports the work of SCAG and would like to see consistency in gestational surrogacy legislation across all Australian jurisdictions.

The Committee commends the Honourable John Dawkins MLC for bringing this issue before the South Australian Parliament. The Committee also wishes to thank the many people who provided evidence to this Inquiry. In particular, it acknowledges and thanks those witnesses who spoke out of their own experience of infertility. Their intensely personal accounts significantly deepened the Committee's understanding of the issues before it.

Recommendations

Parenthood and Birth Certificates for Children born through Surrogacy

1. That the State Government introduce, as soon as possible, a bill to amend the *Family Relationships Act 1975* and other relevant legislation to recognise the rights of children born through gestational surrogacy arrangements. The bill should, among other things, ensure that:

    a) all parties involved in the surrogacy arrangement, especially the surrogate mother, are fully informed about the personal and legal implications of the transfer of parenthood and freely consent to this transfer taking place;

    b) a process is developed to allow the legal transfer of parenthood to occur without the need for commissioning parents to adopt their own genetic child;

    c) in transferring the legal parentage from the surrogate mother to the commissioning parents, the best interests of the child should be paramount considerations;

    d) an appropriate time-frame is established during which the transfer of parenthood may occur;

    e) persons born through surrogacy arrangements have access to their genetic history and are provided with information about the circumstances of their birth;

    f) once the transfer of parentage has occurred, birth certificates be amended to appropriately reflect this transfer. The provisions contained in the Australian Capital Territory *Births, Deaths and Marriages Registration Act* 1997 should serve as a suitable example of the type of process that could be applied;

    g) an abridged birth certificate is issued for general use that records the commissioning parents as the parents of the child born through gestational surrogacy;

    h) a detailed birth certificate is issued and made available to the child upon request listing the commissioning parents, the surrogate mother and, if applicable, the use of donor material;

    i) the legislation is drafted so that it applies to children already born through surrogacy arrangements; and

    j) appropriate training on the proposed operation of the Act is provided to all relevant individuals and agencies responsible for its administration.

The Future of Surrogacy in South Australia

2. That the State Government introduce a bill allowing the use of non-commercial, medically-indicated[2], gestational surrogacy[3] in South Australia. In doing so, the bill should:

    a) provide for a set of clear standards, processes and principles to underpin the legislation and support the safety and wellbeing of all parties involved in the process;

    b) ensure that counselling, consistent with Australian and New Zealand Infertility Counsellors Association (ANZICA) and National Health and Medical Research Council (NHMRC) guidelines, is mandatory for all parties involved in a surrogacy arrangement;

    c) clarify the forms of surrogacy covered by the legislation and ensure those responsible for administering it are appropriately trained; and

    d) ensure that reproductive technology specialists and appropriate experts are consulted and the views of all major stakeholders and interested parties are taken into consideration.

3. As part of the development of a bill pertaining to gestational surrogacy, the State Government should initiate a review of the *Reproductive Technology (Clinical Practices) Act 1988* and other relevant legislation, to, among other things:

    a) amend current eligibility criteria to allow a fertile woman wishing to act as a gestational surrogate mother access to reproductive technology;

    b) examine whether regulatory reform is needed to enable individuals or couples who require assistance with fertility treatment, but prefer to remain outside the medical system, access to screening procedures for disease and counselling through accredited reproductive units;

    c) ensure that people conceived through donor conception have access to information about their genetic parentage should they request it; and

    d) wherever possible, incorporate all legislation pertaining to gestational surrogacy into one Act.

4. That the State Government ensure that it enacts legislation that is consistent with State and Commonwealth anti-discrimination legislation.

5. That the State Government work closely with the Commonwealth and other States and Territories to ensure consistency of surrogacy laws across all Australian jurisdictions.

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[2] Refer to Part One: Medical indications for gestational surrogacy.

[3] I.e. the surrogate's ova are not used.

6. That the State Government encourage the Commonwealth to review Medicare arrangements to ensure that rebates are available to a fertile woman who is acting as a gestational surrogate mother and is consistent with any amendments made to South Australian legislation pertaining to gestational surrogacy.

Dissenting statement of the Hon Dennis Hood MLC

I do not support gestational surrogacy and oppose any legislation allowing its use in South Australia. I therefore do not agree with the recommendations contained in this report.

BACKGROUND

On 27 September 2006, following the introduction of the Statutes Amendment (Surrogacy) Bill 2006 by the Honourable John Dawkins MLC, the Social Development Committee received Terms of Reference to inquire into and report on gestational surrogacy. The Statutes Amendment (Surrogacy) Bill 2006 aimed to address inadequacies in current South Australian legislation pertaining to surrogacy and resolve the problems encountered by children born through surrogacy and their parents. The Honourable John Dawkins raised the matter of surrogacy because he was moved by the experience of two couples. In introducing the Bill to the Legislative Council on 21 June 2006, he provided the following background:

> For many months I have been working with two female constituents who are unable to carry children, although they are capable of falling pregnant. One now has a son, due to the willingness of her cousin to be a surrogate mother for a child who has the genetics of both the constituent and her husband. This surrogacy was carried out interstate; as such practices are illegal in South Australia. In the other case…the woman's aunt is carrying the child.[4]

METHODOLOGY

On 3 February 2007 notices were placed in *The Advertiser* and *The Australian* to inform the public of the Terms of Reference for the Inquiry and to invite submissions. In addition, the Committee wrote to a number of individuals and organisations with an interest in the Inquiry inviting them to provide oral evidence or make a written submission.

The Committee commenced hearing public evidence on 5 March 2007 and completed its hearings on 18 June 2007.

In total, 40 submissions were received, consisting of 22 written submissions and 18 oral presentations. Submissions came from many areas including medical and allied health professionals, lobby groups, research organisations, religious groups, bioethics organisations, as well as private individuals who had first-hand experience of surrogacy arrangements. The Inquiry heard from a number of private individuals who have established, or are hoping to establish, their families through gestational surrogacy. Direct evidence was heard from: three couples who had children born as a result of gestational surrogacy; a woman who, along with her husband, is wishing to pursue a gestational surrogacy arrangement; a couple who had a child born through a traditional surrogacy arrangement; and two women who had acted as surrogate mothers.

The Committee acknowledges the contribution of Ms Dianne Gray of the Attorney-General's Department who, with the agreement of the Attorney-General, provided advice on legal issues and presented valuable information on gestational surrogacy both in South Australia and across other Australian jurisdictions. The Social Development Committee, however, assumes full responsibility for this report and its recommendations.

[4] Hon. John Dawkins, Legislative Council, Hansard, 21 June 2006.

A list of submissions including the names of those witnesses who gave oral evidence is provided at the end of the report.

SCOPE

This Inquiry examined the issue of gestational surrogacy in accordance with the Terms of Reference. While the focus of the Inquiry has been primarily to examine gestational surrogacy, a number of submissions discussed surrogacy more broadly. The Committee resolved that the subject of gestational surrogacy could not be reasonably separated from an examination of traditional surrogacy. That noted, the report does not purport to discuss in any depth the array of reproductive technologies presently available in Australia.

The scope of this Inquiry includes an overview of surrogacy legislation in other Australian jurisdictions. The status of children born through gestational surrogacy and now living in South Australia is also a focus.

The report draws on a wide range of sources including health professionals, lobby groups, religious organisations, government agencies and individuals. Not all of the submissions received addressed all of the Terms of Reference. Where necessary, additional literature was sourced to assist the Committee in its deliberations and facilitate the formulation of appropriate recommendations. The Committee expresses its gratitude to those witnesses who provided or referred the Committee to useful articles, reports, resources and other relevant documentation.

STRUCTURE

This report is divided into two parts with the Inquiry's Terms of Reference addressed throughout both parts.

Part One consists of three sections relating to context and background, including the legal difficulties faced by children born as a result of interstate gestational surrogacy procedures and their families:

> Section One provides an overview of the subject of surrogacy and defines both gestational and traditional surrogacy. It includes a brief discussion of the medical indications of surrogacy as well as its occurrence in Australia.
>
> Section Two highlights the regulation and efficacy of surrogacy laws across Australian jurisdictions. It also considers the interplay between existing State and Federal legislation.
>
> Section Three focuses on South Australian surrogacy legislation and considers issues relating to legal parentage and the status of children born through surrogacy interstate and now residing in South Australia.

Part Two consists of two sections that summarise the evidence presented to the Inquiry and focuses on how surrogacy should be dealt with in the future:

Section Four examines the Statutes Amendment (Surrogacy) Bill 2006, particularly in light of the evidence received. This section also reports on the arguments for and against gestational surrogacy brought before the Committee in the course of the Inquiry.

Section Five considers some additional matters of concern related to the issue of surrogacy including eligibility, the use of third-party donor reproductive material, access to information, traditional surrogacy in the private domain, and the need for consistency in Australian legislation.

Interspersed throughout this report are a number of case studies drawn from the personal experiences of individuals and couples who pursued surrogacy arrangements and gave evidence to the Inquiry. These case studies are presented throughout the report to provide an important personal perspective to the difficulties confronting individuals and couples who are unable to have children. While in some of the case studies certain information—including names—has been amended to protect the privacy of the persons involved, others quote directly from the submissions received.

Recommendations appear throughout the report and are listed in full as part of the Executive Summary.

PART ONE

SECTION ONE: INTRODUCTION

WHAT IS MEANT BY SURROGACY?

In the context of a child's conception and birth, surrogacy refers to an arrangement in which a woman agrees to carry and bear a child for another woman (or couple) and relinquishes the child at, or shortly after, birth. The woman who gives birth to the child as part of a surrogacy arrangement, irrespective of whether her own reproductive material is used, is known as the surrogate. The couple that arrange for a woman to carry a child on their behalf and to whom care of the child is relinquished are referred to as the 'commissioning couple'.[5] Two types of surrogacy arrangements exist: traditional and gestational.

Traditional surrogacy

Traditional surrogacy[6] refers to a situation in which a woman not only carries the foetus for another woman or couple but also provides the ova to create the pregnancy. In other words, the surrogate mother is genetically related to the child. Upon birth, the child born through this arrangement is relinquished to the commissioning father (the sperm donor) and his partner. This type of surrogacy may, but does not necessarily, require the use of IVF technology. More often traditional surrogacy happens in private either by the use of artificial insemination—a procedure involving the placing of sperm into the female genital tract—or through sexual intercourse. It has been said of traditional surrogacy that: '[for] all its social complications, surrogacy is technologically the simplest of the various alternative reproductive techniques in use today [and] when it relies upon natural sexual intercourse between surrogate-to-be and the man who desires a child, it uses no technology at all'.[7]

Case Study 1 is based on evidence presented to the Inquiry by a husband whose wife is unable to have children because of severe health problems. The couple, who had been living in the United Kingdom at the time, had a child through a traditional surrogacy arrangement.

[5] The literature also uses the terms 'genetic couple' and 'intending couple' to describe this arrangement.

[6] Traditional surrogacy is also referred to in the literature as partial surrogacy, straight surrogacy, genetic and reproductive surrogacy.

[7] Field, M A. Surrogate Motherhood: The Legal and Human Issues (expanded edition). Harvard University Press, USA 1990.

Case Study 1: Cathy and Paul

Some years ago, Cathy was diagnosed with a serious autoimmune illness. After the illness affected her kidneys, she was given medication to assist her condition. One of the side effects of the medication was to destroy all her eggs and render her infertile. The next few years were very difficult for Cathy and her husband Paul who were keen to have a family and felt that this choice had been taken away from them. After discovering an organisation in Britain that could assist them to find a suitable surrogate, Cathy and Paul eventually made contact with a woman who, having already had a child, was willing to be a surrogate mother. As Cathy was unable to provide any eggs, the surrogate offered to use her own reproductive material. All parties received counselling and Paul's sperm was screened before the surrogate inseminated herself at home. During the pregnancy, Paul and Cathy visited the surrogate regularly and supported her throughout; attending ultrasounds, doctors' appointments, and health visitors' appointments. Shortly after birth, the surrogate mother relinquished the baby to the commissioning parents.

Gestational Surrogacy

Gestational surrogacy[8] refers to a situation in which a woman carries one or more foeti for another woman or couple but does not provide the ova to create the pregnancy. In other words, the surrogate mother carries the child and gives birth. Gestational surrogacy is used when a woman is incapable of carrying a child to full-term. It requires the use of IVF technology for the collection of eggs and sperm from the commissioning mother and commissioning father. From this procedure, a number of embryos are created, one or more of which are then implanted into the surrogate mother's uterus for gestation. If either (or both) of the commissioning parents are not able to provide reproductive material, donor eggs and sperm can be used. In gestational surrogacy, reproductive material can come from:

- both the commissioning parents, or
- one of the commissioning parents and a third-party donor (donor egg or donor sperm), or
- neither of the commissioning parents (donor egg and donor sperm).

In other words, in cases of gestational surrogacy, the child may be biologically related to both commissioning parents, one of them, or neither of them.

While it is the case that in this type of surrogacy, the surrogate mother does not provide the reproductive material, she may still have a familial connection and genetic similarity to the child if she is a close relative of one of the commissioning parents [or

[8] Gestational surrogacy is also referred to in the literature as full surrogacy, host surrogacy and IVF surrogacy.

of one of the donors]. Case Study 2 is based on evidence presented to the Inquiry. It provides an example of gestational surrogacy.

Case Study 2: Tracy and George

Tracy and George tried unsuccessfully to have their own children for four years before contemplating adoption. After being rejected for adoption because George did not meet the current age eligibility criteria, they contacted a fertility clinic in South Australia. Although Tracy was not able to carry a pregnancy as a result of polycystic ovarian disease her eggs were still healthy. An embryo was created using Tracy's egg and George's sperm. Their embryo was then implanted into Tracy's cousin, Judy, who already had three children, and was willing to be a surrogate mother. Judy subsequently gave birth to Tracy and George's son, Jack, and handed over his care to them.

Medical Indications for Gestational Surrogacy

The Committee heard that there are a number of medical reasons which may lead an individual or couple to consider entering into a surrogacy arrangement. These include situations where:

- a woman does not have a uterus;
- a woman has Ascherman's Syndrome[9], a damaged uterus, or major uterine abnormalities;
- a woman has a condition that would make pregnancy life-threatening, such as a major heart condition or a renal condition requiring dialysis; or
- repeated IVF cycles have not resulted in a pregnancy and the uterus is indicated as the likely cause.[10]

In his evidence, Professor Norman, Director, Research Centre for Reproductive Health, University of Adelaide, expanded upon this point:

> Significant uterine damage can occur from a variety of medical conditions, or a medical condition that contraindicates pregnancy in the genetic mother. For instance, I have had women who are on kidney dialysis who just cannot carry a pregnancy. There are other women with significant heart disease whom we have given a 40 per cent chance of dying if they become pregnant. I think these are legitimate reasons for surrogacy.[11]

During the course of the Inquiry, the Committee received written submissions and took evidence from women who, due to surgical complications or an antecedent medical condition, were unable to carry a pregnancy to term.

[9] Synechiae [adhesions] within the endometrial cavity, often causing amenorrhea [no menstrual periods] and infertility. Stedman's Medical Dictionary, 26th edition, 1995.

[10] Department of Health, Surrogacy Information Paper, 2006, page 1.

[11] Professor Rob Norman, oral evidence, Hansard, 2007, page 14.

Incidence of Surrogacy

The Committee tried to obtain data on the number of South Australians who have entered into a surrogacy arrangement. The Committee was told that it is hard to obtain statistical information on the incidence of surrogacy because no systematic data is collected. Moreover, it is difficult to estimate the number of surrogacy arrangements because some arrangements—such as those that rely on self-insemination—are carried out at home or in non-clinical settings.

In her written submission, Ms Miranda Montrone, a psychologist who specialises in infertility and assisted reproduction counselling, informed the Committee that over a 10-year period, she had been involved with 47 Australian surrogacy cases, 45 of which were gestational surrogacy proposals and the remaining two were traditional surrogacy arrangements using the eggs of the surrogate.[12]

In her evidence to the Inquiry, Ms Julie Redman, Legal Practitioner, indicated that she deals with around 'a dozen clients a year who actively want to understand the limits of the law in South Australia to use surrogacy'.[13]

In New Zealand, the National Ethics Committee on Assisted Human Reproduction (NECAHR) considers applications for surrogacy on a case-by-case basis. Over a six-year period – from 1997 to 2003 – NECAHR received a total of 30 applications for surrogacy of which 24 were approved. Not all approved surrogacy applications resulted in live births; to 2005, five births have resulted from surrogacy arrangements in New Zealand.[14]

In the United Kingdom, around 35 IVF surrogacy procedures are performed each year.[15]

The Committee was also keen to understand the potential number of people who might pursue surrogacy arrangements if South Australian laws were changed in support of such arrangements. In response to this, Professor Rob Norman, confirmed that it is 'extremely difficult' to determine the actual numbers of individuals who may seek to enter surrogacy arrangements. Nevertheless, as an estimate, he suggested that around five people per year may seek this form of intervention.[16]

While there are significant difficulties in ascertaining precise information on the number of people seeking surrogacy, from the information it has received the Committee understands that gestational surrogacy is not a commonly used medical procedure.

The Department of Health provided the Committee with the following statistics on some of the medical indications for surrogacy:

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[12] Ms Miranda Montrone, written submission 2007 page 1.

[13] Ms Julie Redman, oral evidence, Hansard 2007 page 100.

[14] National Ethics Committee on Assisted Human reproduction. Guidelines on IVF Surrogacy, April 2005. Accessed online 21 May 2007 at www.newhealth.govt.nz/acart/documents/ivf-surrogacy.pdf

[15] Information accessed on 22 May 2007 at www.ivf-infertility.com/surrogacy/index.php

[16] Professor Rob Norman, oral evidence, Hansard 2006, page 16.

- the congenital absence of a uterus occurs in 1 in 2000 to 1 in 5000 women;
- Ascherman's syndrome (to the point of inability to carry a baby) occurs in 1 in 2000 to 1 in 5000 women;
- where a woman has a damaged uterus such as through uterine cancer and is of child bearing age, (but having ovaries preserved) occurs in 1 in 10 000 women; and
- where a woman has a medical condition that would make pregnancy life threatening (such as a major heart condition or a renal disorder requiring dialysis). Given that many such conditions can now be treated and women can be better assisted through a pregnancy, one in 10 000 women may be in this situation.[17]

Is Surrogacy New?

> Surrogacy is a practice that has been with us for centuries, and one that is acceptable and practised within many cultures.[18]

Artificial insemination—where sperm is placed into a woman's genital tract by a non-coital method—is 'neither new nor high tech'. Research suggests it has been practised for well over a century and 'can be performed without medical assistance using a simple turkey baster'.[19] The Inquiry heard that these types of private surrogacy arrangements will continue to take place and that the State has little or no capacity to regulate them.

The Committee was told that such surrogacy arrangements are not a new phenomenon. Dr Christine Kirby, Clinical Director, Repromed, told the Committee about her experience of working with Polynesian women in New Zealand in the mid 1980s. In that situation, it was not uncommon for one sister to act as a surrogate mother and bear a child for another sister who was infertile.[20] According to Dr Kirby:

> They would come to antenatal clinics together, they would do everything together, they would deliver together, and that baby at point of delivery was handed over. It was really fabulous and beautiful to observe, because these people had worked out over the years how they could solve the problem of infertility in families.[21]

Although the concept of surrogacy is not new, medical and technological advances have made—and may continue to make—other forms of surrogacy possible. Gestational surrogacy is relatively new. The first reported case of gestational surrogacy in

[17] Professor Michael Chapman (Chair of the IVF Directors Group, Professor of Obstetrics and Gynaecology and a Director of IVF Australia) as cited by the Department of Health, Supplementary Questions: Response Paper, 2007.

[18] Willmott, L. Surrogacy: ART's Forgotten Child. UNSW Law Journal 2006 pp. 227-231, page 231.

[19] Ciccarelli J and Beckman L. Navigating rough waters: An overview of psychological aspects of surrogacy. *Journal of Social Issues*, Vol. 61, No.1 2005 pp 21-43 page 21.

[20] Dr Christine Kirby, oral evidence, Hansard 2007 page 57.

[21] Dr Christine Kirby, oral evidence, Hansard 2007 page 57.

Australia occurred nearly 30 years ago. In 1988, Alice Kirkman was conceived using her mother's egg and donor sperm, and gestated by her aunt.[22]

The Committee heard that reproductive technological advances have significantly improved the capacity to transfer embryos and the resultant pregnancy success rate.[23]

Previous Inquiries into Surrogacy

This is not the first time the issue of surrogacy has been examined in Australia. Over the past twenty years, numerous inquiries have been undertaken examining the issue of surrogacy and reproductive technology.[24] Conclusions drawn from those inquiries varied with some opposing surrogacy, some reflecting ambivalence towards the practice and some, more recently, recommending support for its regulation. While not an exhaustive list, past inquiries include:

- *Creating Children: A Uniform Approach to the Law and Practice of Reproductive Technology in Australia*, 1985**,** Family Law Council of Australia.[25] This report contended that surrogacy arrangements were not in the best interests of the child. The Council recommended that commercial surrogacy be prohibited, that existing surrogacy contracts be deemed null and void, and that there should be consistency in laws across all Australian jurisdictions.

- *Select Committee on Artificial Insemination by Donor, In-Vitro Fertilization and Embryo Transfer procedures and related matters in South Australia*, 1987, Legislative Council, Parliament of South Australia. This report only included a cursory look at the issue of surrogacy. It concluded that 'surrogacy be opposed on principle'.[26]

- *Surrogate Motherhood*, 1988, Report No. 60, New South Wales Law Reform Commission. This report recommended that 'the practice of surrogate motherhood should be discouraged by all practicable legal and social means'.[27]

- *Surrogacy Report 1*, 1990, National Bioethics Consultative Committee, Commonwealth of Australia. This report recommended that 'surrogacy should not

[22] Access, Australia's National infertility Network. IVF Surrogacy: A Personal Perspective. Accessed online 18 July 2007 at www.access.org.au/resources/library/ivf_surrogacy

[23] Dr Christine Kirby, oral evidence, Hansard 2007 page 50.

[24] Stuhmcke, A. For Love or Money: The Legal Regulation of Surrogate Motherhood. Murdoch University Electronic Journal of Law, Vol 2, No. 3 December 1995 no pages numbered. Accessed online 30 March 2007 at www.murdoch.edu.au/elaw/issues/v2n3/stuhmcke23.txt

[25] Family Law Council, Creating Children: A Uniform Approach to the Law and Practice of Reproductive Technology in Australia, AGPS, Canberra, 1985.

[26] South Australia, Parliament. Legislative Council. Select Committee of the Legislative Council on Artificial Insemination by Donor, In-Vitro Fertilization and Embryo Transfer procedures and related matters in South Australia. Report, April 1987 page 10.

[27] New South Wales Law Reform Commission, Surrogate Motherhood, Report No. 60, NSW Government Printer, 1988 accessed online 26 June 2007 at www.lawlink.nsw.gov.au/lrc.nsf/pages/R60REC

be totally prohibited' nor should it be 'freely allowed'. It called for uniform legislation and stricter control of surrogacy practice.[28]

- *Select Committee on the Human Reproductive Technology Act 1991*, 1999. Legislative Assembly, Parliament of Western Australia. The majority of the Select Committee agreed that surrogacy should be permitted in Western Australia where the reproductive material used for the surrogate pregnancy is from the commissioning parents. It should be allowed for medical reasons after other options have been exhausted and therefore as a last resort. The majority also agreed that surrogacy arrangements should be non-commercial, include mandatory counselling for all parties including the surrogate's partner and children, and ensure potential surrogates are carefully assessed against strict selection criteria.[29]

- *Assisted Reproductive Technology & Adoption: Final Report*, 2007, Victorian Law Reform Commission. The Victorian Law Reform Commission established by the Victorian Government to consider ways in which laws in that State can be improved, commenced an extensive consultation process on assisted reproductive technology in 2004. As part of the consultation process, roundtable discussions and forums were held as well as the publication of three position papers covering key areas related to access to assisted reproductive technology and how surrogacy arrangements should be regulated. On 7 June 2007, the Commission released its final report containing a total of 130 recommendations, 32 of which relate to surrogacy.[30] The Commission supports the regulation of surrogacy arguing that it 'can play an important role in minimising the potential for disputes and in protecting all parties, including the child, from possible harm'.[31] For a full list of the Commission's recommendations relating to surrogacy, refer to Appendix 1.

[28] The National Bioethics Consultative Committee, Surrogacy Report 1, Commonwealth of Australia, April 1990.

[29] Legislative Assembly, Parliament of Western Australia. 1999. *Select Committee on the Human Reproductive Technology Act 1991*, 22 April 1999 page xx.

[30] The Victorian Law Reform Commission. Assisted Reproductive Technology & Adoption: Final Report can be accessed online www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Assisted_Reproductive_Technology_and_Adoption/$file/ART%20&%20Adoption%20Report%20FINAL.pdf

[31] The Victorian Law Reform Commission. Assisted Reproductive Technology & Adoption: Final Report, 2007 page 164.

SECTION TWO: REGULATION OF SURROGACY IN AUSTRALIA

In Australia, five jurisdictions have legislation regulating surrogacy: Victoria, South Australia, Queensland, Tasmania and the Australian Capital Territory.[32] Surrogacy arrangements in each of the five jurisdictions are not legally enforceable. In other words, no part of a surrogacy contract is legally binding. It is unlikely therefore, that the courts would force a surrogate mother to relinquish a child to the commissioning parents solely because this was agreed as part of a surrogacy arrangement. In all of these jurisdictions commercial surrogacy arrangements are expressly prohibited.

In most Australian jurisdictions the legal parentage[33] of the child born through surrogacy arrangements rests with the surrogate mother and her partner[34]. However, the Australian Capital Territory is the only jurisdiction that allows for the transfer of legal parentage from the surrogate mother to the commissioning parents through a legal mechanism as part of the court process.[35]

In cases where there is no state legislation governing surrogacy, such as New South Wales, the practice is regulated by the National Health and Medical Research Council's *Ethical guidelines* on *the use of assisted reproductive technology in clinical practice and research 2004*.[36]

The National Health and Medical Research Council guidelines represent nationally accepted ethical standards and prohibit commercial surrogacy arrangements.[37] They do, however, allow reproductive medicine units to undertake non-commercial surrogacy so long as:

> every effort has been made to ensure that participants have a clear understanding of the ethical, social and legal implications of the arrangement, and have undertaken counselling to consider the social and psychological significance for the person born as a result of the arrangements, and for themselves.[38]

Except where noted, the following information regarding national surrogacy legislation is drawn from a briefing paper provided to the Committee by the Department of Health.[39]

SURROGACY LEGISLATION IN AUSTRALIAN JURISDICTIONS

In the five jurisdictions that have legislation regulating surrogacy, the legislative provisions include:

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[32] Department of Health, written submission 2007.

[33] Refer to Appendix 3 for a summary of parentage provisions in Australian jurisdictions.

[34] The Victorian Law Reform Commission. Assisted Reproductive Technology & Adoption: Final Report, 2007 page 186.

[35] The Victorian Law Reform Commission. Assisted Reproductive Technology & Adoption: Final Report, 2007 page 186.

[36] The Victorian Law Reform Commission. Assisted Reproductive Technology & Adoption: Final Report, 2007 page 166.

[37] Department of Health, Information paper 2007 pages 5 and 6.

[38] National Health and Medical Research Council, Ethical guidelines on the use of assisted reproductive technology in clinical practice and research 2004 accessed online 2 May 2007 at www.nhmrc.gov.au/publications/synopses/_files/e56.pdf page 42.

[39] Department of Health, Information Paper, 2007.

- a prohibition on making or receiving payments in surrogacy arrangements;
- a prohibition on advertising in surrogacy arrangements;
- a prohibition on entering into a surrogacy agreement;
- a prohibition on procuring surrogacy arrangements and/or arranging surrogacy services;
- a prohibition on the provision of technical or professional services in surrogacy arrangements; the making of surrogacy agreements void or unenforceable; and
- a process for recognising the commissioning couple as the legal parents of the child (Australian Capital Territory only).

Table 1 provides an overview of the current legislation[40] pertaining to surrogacy in place in Australia.

Table 1: Surrogacy Legislation in Australian Jurisdictions[41]

	South Australia	Victoria	Queensland	Tasmania	ACT	Western Australia
Practices	*Family Relationships Act 1975*	*Infertility Treatment Act 1995*	*Surrogate parenthood Act 1988*	*Surrogacy Contracts Act 1993*	*Parentage Act 2004*	Surrogacy Bill 2007
Is altruistic surrogacy illegal?	Yes (but no penalty)	No	Yes	No	No	No
Is commercial surrogacy illegal?	Yes	Yes	Yes	Yes	Yes	Yes
Is arranging a surrogacy service prohibited?	Yes	Yes if commercial	Yes	Yes	Yes	Yes if commercial
Is entering into a surrogacy contract prohibited?	Yes	Yes if commercial	Yes	No	Yes if commercial	Yes if commercial
Is advertising surrogacy services prohibited?	Yes	Yes	Yes	Yes	Yes	Yes if commercial
Are surrogacy agreements enforceable?	No	No	No	No	No	No
Is provision of technical professional services illegal?	No	No	No	Yes	Yes if commercial	Yes if commercial

[40] It should be noted that Western Australian introduced its Surrogacy Bill in March 2007. At the time of writing this report, the Bill was still before the Western Australian Parliament.

[41] Table adapted from the Victorian Law Reform Commission Report, Assisted Reproductive Technology and Adoption Position Paper Three: Surrogacy, November 2005 page 8 with additional information on the Western Australian Surrogacy Bill provided by Ms Dianne Gray, Attorney General's Department SA 2007.

Australian Capital Territory

While commercial surrogacy is prohibited in the Australian Capital Territory, altruistic surrogacy is allowed. Although this means that entering into a non-commercial surrogacy arrangement is not a criminal offence, the agreement itself is legally void and unenforceable. In other words, a surrogate mother can not be compelled to relinquish the child she has birthed. There is no specific legislation on assisted reproductive technology and as such, there is no criteria requiring that a person must be infertile to access treatment.[42]

Victoria

Under the *Infertility Treatment Act 1995*, commercial surrogacy arrangements are prohibited in Victoria. While it is an offence to give or receive payment under a surrogacy agreement, altruistic surrogacy is allowed. Nevertheless, while altruistic surrogacy is technically legal in Victoria, it is only permitted in instances where the surrogate is infertile. While technically possible, it is highly unlikely that an infertile woman would offer to act as a surrogate. This legal requirement, therefore, significantly impedes the practice of surrogacy and, for the most part, makes it virtually impossible to carry out.

New South Wales

There is no specific legislation in New South Wales governing surrogacy. In the absence of legislation, surrogacy is entirely regulated by the National Health and Medical Research Council Guidelines.

Western Australia

On 1 March 2007, a bill dealing with surrogacy was introduced into Western Australian Parliament. The Surrogacy Bill 2007 takes into account many of the recommendations of the 1999 Select Committee report on the *Human Reproductive Technology Act 1991*. Under the proposed Western Australian legislation, surrogacy would be allowed in situations where a woman has agreed to bear a child for a woman or couple who would be eligible for IVF treatment. The Bill requires amendments to the *Human Reproductive Technology Act 1991* to allow IVF procedures to be used for surrogacy in instances where the commissioning parents (rather than the birth parents) meet the existing eligibility criteria for IVF. In other words, the Bill extends the current IVF procedures that are available in Western Australia by allowing a fertile woman to use IVF to carry a child for someone else.[43]

The Bill also requires all parties to undertake thorough preparation including counselling and psychological assessments to ensure that they have carefully considered all aspects of the arrangement before entering into a surrogacy agreement.

[42]Ms Dianne Gray, Attorney General's Department SA 2007.

[43] Western Australian Reproductive Technology Council, written submission 2007 pages 1 and 2.

Under the proposed legislation, commercial surrogacy would be specifically prohibited.[44]

Queensland

In Queensland, surrogacy is prohibited. Under the *Surrogate Parenthood Act 1988*, all surrogacy arrangements, whether altruistic or commercial, are illegal.

South Australia

In South Australia, the *Family Relationships Act 1975*[45] addresses matters related to surrogacy contracts and differentiates between a procuration contract and a surrogacy contract.

Section 10F of the Act provides interpretations for three key terms:

> *procuration contract* means a contract under which—
>
> a) a person agrees to negotiate, arrange, or obtain the benefit of, a surrogacy contract on behalf of another; or
>
> b) a person agrees to introduce prospective parties to a surrogacy contract;
>
> *surrogacy contract* means a contract under which—
>
> a) a person agrees—
>
> (i) to become pregnant or to seek to become pregnant; and
>
> (ii) to surrender custody of, or rights in relation to, a child born as a result of the pregnancy; or
>
> (b) a person who is already pregnant agrees to surrender custody of, or rights in relation to, a child born as a result of the pregnancy;
>
> *valuable consideration*, in relation to a contract, means consideration consisting of money or any other kind of property that has a monetary value.

Under Section 10G of the Act:

> (1) A surrogacy contract is illegal and void.
>
> (2) A procuration contract is illegal and void.

Section 10H of the Act specifies:

> A person who—
>
> (a) receives valuable consideration under a procuration contract, or enters into such a contract in the expectation of receiving valuable consideration; or

[44] Western Australian Reproductive Technology Council, written submission 2007 pages 1 and 2.

[45] Refer to www.legislation.sa.gov.au

(b) induces another to enter into a surrogacy contract, having received or in the expectation of receiving valuable consideration from a third person who seeks the benefit of that contract; or

(c) publishes an advertisement or causes an advertisement to be published to the effect—

(i) that a person is or may be willing to enter into a surrogacy contract; or

(ii) that a person is seeking a person willing to enter into a surrogacy contract; or

(iii) that a person is willing to negotiate, arrange or obtain the benefit of a surrogacy contract on behalf of another,

is guilty of an offence.

In addition to the *Family Relationships Act 1975,* assisted reproduction in South Australia, including surrogacy, is regulated by:

- *Reproductive Technology (Clinical Practices) Act 1988*; and
- Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995.

The *Reproductive Technology (Clinical Practices) Act 1988* sets eligibility and access criteria by only allowing licensees [assisted reproductive technology clinics] to provide treatment to married couples:

- where the husband or wife or both appear to be medically infertile; or
- where there is a risk that a genetic defect will be transmitted to a child conceived naturally.[46]

While various South Australian legislation regulates surrogacy, the National Health and Medical Research Council (NHMRC) set of ethical guidelines on the use of assisted reproductive technology in clinical practice and research also apply.[47]

THE EFFICACY OF SURROGACY LEGISLATION IN AUSTRALIA

As part of its Terms of Reference, the Committee was required to assess the efficacy of existing surrogacy legislation in other Australian jurisdictions. Surrogacy laws in Australia have been described as "fragmented, illogical and dysfunctional".[48]

In an area of socio-medical legislation of such significance to affected individuals the diversity of laws undermines fair implementation – people will travel to where the laws best suit their plans, often at significant cost, inconvenience and increased medical risk to the mother and child.

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[46] The Reproductive Technology (Clinical Practices) Act 1988 accessed online 2 May 2007 at www.legislation.sa.gov.au/LZ/C/A/REPRODUCTIVE%20TECHNOLOGY%20(CLINICAL%20PRACTICES)%20ACT%201988/CURRENT/1988.10.UN.PDF

[47] NHMRC. Ethical guidelines on the use of assisted reproductive technology in clinical practice and research. September 2004. Accessed online 23 May 2007 at www.nhmrc.gov.au/publications/synopses/_files/e56.pdf

[48] Willmott L. Surrogacy: ART's Forgotten Child. UNSW Law Journal Volume 29 (2) pp 227 -232 page 229.

The unfair nature of the current legal situation is perhaps best illustrated by the first-hand experiences of a number of the Inquiry's witnesses, including that of a woman who offered to act as a surrogate:

Case Study 3: A Surrogate's Story

I visited Repromed in South Australia to obtain the necessary facts and information and was informed that, because of the current status of the law in South Australia, my family and I would not be able to use their services. We were, instead, referred to either Sydney or Canberra. A counselling session was organised with Sydney IVF, where I was counselled by one of their social workers. My daughter and her husband had already been through this process as had my husband who was also counselled by phone. One of Sydney IVF's requirements was that we undertake counselling with an approved counsellor in South Australia and all parties, including my husband, attended. We went through a series of psychological tests and these reports were sent to Sydney. Medical tests were also conducted with my gynaecologist and a heart specialist. I had a physical check-up as well as a stress test to determine whether there might be problems during childbirth. All the results were forwarded to Sydney IVF.

During this time Sydney IVF continually monitored my blood levels. Repromed in South Australia provided the services and the results were then sent to Sydney. I found this process to be quite frustrating, as I would not get the results of a test I did in the morning until late in the afternoon either because of delays in faxing the information to Sydney (as the matter was not a priority for Repromed in South Australia) or because the medical officer in Sydney was not available to discuss it when I phoned. The delays in notification were very stressful and caused a great deal of anxiety for my daughter, and me, which was not helpful at a time when I was endeavouring to become pregnant. Clearly, it would have been more helpful for all concerned if the law permitted surrogacy and related services to be undertaken in South Australia.

Another witness told the Inquiry:

> [My] whole IVF procedure was done in Adelaide for my surrogacy in Canberra. This surrogacy arrangement was done through Canberra, but they authorised Adelaide to do all my ultrasounds and blood tests, and to time me and to organise and schedule my dosages.[49]

One South Australian resident told the Inquiry that she was technically a New South Wales patient:

[49] Mrs Kerry Faggotter, oral evidence, Hansard 2007 page 130.

> I had my blood tests taken [at Repromed] and they would fax the details off to Sydney IVF. They also organised the scans, so I had scans at Repromed here in South Australia and the results would be faxed through to Sydney.[50]

Yet another witness wrote:

> A very basic procedure that can take place at Repromed [some 20 minutes from our home], must be pursued through multiple trips to Canberra, some 1200km away. However, as bizarre as this seems the complexities of the whole procedure and the demands placed on all involved only increases.[51]

In his evidence to the Inquiry, the Honourable John Dawkins MLC, discussed some of the additional problems which couples face when they go interstate to undertake gestational surrogacy procedures. Given that many of the procedures related to gestational surrogacy occur in South Australia, the Honourable John Dawkins expressed concern that South Australian couples going interstate will lose the continuity of care and familiarity with the professionals with whom they have been dealing.[52]

In her evidence, Dr Christine Kirby used the term 'medicine by postcode', to describe the current inconsistency in legislation across Australian jurisdictions which, depending on where you live will determine whether you can access a particular medical service. According to Dr Kirby, 'medicine by postcode' seems totally out of place in Australian society.[53]

INTERPLAY BETWEEN EXISTING STATE AND COMMONWEALTH LEGISLATION

As part of the Inquiry, the Committee was required to consider the interplay between existing state and federal legislation as it relates to gestational surrogacy. While not an extensive examination, the following section outlines some of the potential difficulties that may arise in the application of state and federal laws and policies.

The Inquiry heard about the financial burden placed on couples having to travel interstate to undergo surrogacy procedures. This financial burden is compounded because both the commissioning couple and surrogate mother are excluded from Medicare funding.[54]

The Inquiry heard that the financial cost experienced by couples seeking surrogacy arrangements is significant:

> Surrogacy is an expensive process. There are no Medicare rebates, with all expenses being out of our own pocket. [There] are so many couples in South Australia for whom this would be totally out of reach, especially with the recurrent expenses of flights and accommodation interstate. [55]

When asked by the Committee to estimate the expense of pursuing a surrogacy arrangement, including interstate travel, one couple told the Inquiry 'we stopped keeping

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[50] In-camera evidence, name withheld, Hansard 2007.

[51] Ms Kirsty Fairbank, written submission 2007 pages unnumbered.

[52] Hon John Dawkins, oral evidence, Hansard 2007 page 184.

[53] Dr Christine Kirby, oral evidence, Hansard 2007 page 51.

[54] Dr Enzo Lombardi, oral evidence, Hansard 2007.

[55] Oral evidence, name withheld.

tabs at about $40,000'.[56] Another witness estimated that the total cost 'was well over $50,000'.[57]

The potential liability of surrogate parents for child support payments is another issue. Under current law given that the birth mother and, if married, her husband are deemed to be the legal parents of a child born through a surrogate arrangement, they could potentially be liable to support a child raised by the commissioning parents. This problem could be obviated if a mechanism was put in place at the State level – and recognised by the Commonwealth – to transfer the legal parentage from surrogate to the commissioning parent(s).[58]

The Inquiry also heard that there may be potential problems with child support in the event that commissioning parents separate before they are legally recognised as the parents of a surrogate child. Evidence provided to the Inquiry indicates that in a situation such as this, the commissioning parents would not be entitled to an administrative assessment of child support and there may be an inability for a court to order the payment of maintenance to a child born as a result of a surrogacy arrangement.[59]

Furthermore, the Inquiry was told that commissioning parents may not be entitled to receive social security parenting payments unless they are legally recognised as the parents of the child.

The Committee recognises that in working towards the development of consistent surrogacy laws, many issues regarding the interface between State and Commonwealth laws will need to be addressed. More information relating to the possible interplay between existing State and Commonwealth legislation can be found in Appendix 2.

[56] Mrs Robyn Shakes, oral evidence, Hansard 2007 page 142.

[57] In-camera evidence, name withheld, Hansard 2007.

[58] Di Gray, Information regarding Commonwealth issues that may impact on surrogacy 2007.

[59] Di Gray, Information regarding Commonwealth issues that may impact on surrogacy 2007.

SECTION THREE: SOUTH AUSTRALIAN SURROGACY LEGISLATION

AMBIGUITY OF SOUTH AUSTRALIAN SURROGACY LAW

The Inquiry heard that South Australian laws relating to surrogacy arrangements are ambiguous. In providing an example of the current legal ambiguity surrounding surrogacy arrangements Ms Helen Van Eyk, Manager, Research Policy and Ethics, Department of Health, told the Inquiry that because the *Reproductive Technology Act 1988* requires that one of the couple receiving reproductive technology must be medically infertile, there is a lack of clarity about the status of a surrogate mother, given that it is unlikely she would be medically infertile. [60]

> [Clinics] were advised that there was some ambiguity about that and also about the legal status of the child that would come out of a surrogate arrangement and, as a result, no clinics in South Australia currently provide surrogacy procedures.[61]

The vagueness of the current law was further illustrated by evidence provided to the Inquiry by Dr Peter Woolcock, Chairperson, South Australian Council on Reproductive Technology. He advised the Committee that while it may be that medical infertility was not necessarily a criterion that needed to be met by the woman acting as a surrogate, recent opinion from Crown Law emphasised that the primary factor in surrogacy procedures being prohibited was due to a lack of certainty about whose interests were being served by the procedure. Dr Woolcock told the Committee that:

> We took that to the Crown Law Office and their advice was that it was not a problem that the surrogate mother did not have to be infertile herself. However, they then advised us that, the way that they read the Act, the artificial fertilisation procedure has to be for the benefit of the person producing the baby. As it is actually for the benefit of the commissioned couple, then they say that the current Act rules that out.[62]

In his evidence, Professor Rob Norman, appealed for clarity on this issue:

> This State needs to know one way or the other whether surrogacy can be practised or not. We have lived in limbo for too long. We, as clinicians, are constantly being approached by patients about surrogacy, and we have not been sure whether it is legal or illegal to take part in surrogacy. This is an extremely invidious position to be in, when you cannot tell a patient yes, it is okay to do it or no, it is not okay to do it… the current situation is untenable for everyone.[63]

In grappling with the current legislative framework, Dr Christine Kirby noted that over the past eight years, three working parties had been formed to examine the legality or otherwise of surrogacy.[64] According to Dr Kirby, the working parties concluded that altruistic surrogacy (or non-commercial surrogacy) in South Australia is 'not banned *per se*'; however, the way in which the law is written makes its occurrence virtually

[60] Ms Helen Van Eyk, oral evidence, Hansard 2006, page 3.

[61] Ms Helen Van Eyk, oral evidence, Hansard 2006, page 3.

[62] Dr Peter Woolcock, oral evidence, Hansard 2007 page 98.

[63] Professor Rob Norman, oral evidence, Hansard 2006, pages 12 and 24.

[64] Dr Christine Kirby, oral evidence, Hansard 2007 page 51.

impossible.[65] Dr Kirby told the Inquiry that because under current legislation the legal status of a child born of a surrogate arrangement is unclear, reproductive clinics have erred on the side of caution and determined not to provide surrogacy procedures in South Australia:

> The difficulty is that, if we were to proceed with surrogacy, the child subsequently born by virtue of the *Family Relationships Act 1975* is considered to be a child of the surrogate and not of the commissioning parents. Therefore, one must ask the question: if you proceed with it, is surrogacy in the child's best interest? That seems to be the sticking point from all the advice we have had at this time.[66]

Importantly, Dr Kirby told the Inquiry that at the time South Australian legislation relating to reproductive technology was introduced; surrogacy was not generally viewed as a realistic option; '[at] the time, no-one really thought about surrogacy as being an option that couples could consider with any real sense to help them achieve conception'.[67] In Dr Kirby's, view the current Act is 'basically silent on surrogacy'.[68]

In considering South Australian surrogacy legislation, Ms Julie Redman informed the Inquiry that the question of whether altruistic surrogacy is illegal under the Act is open to interpretation. According to written information provided by Ms Redman, some lawyers may argue that altruistic surrogacy is in fact illegal and void due to the provisions contained in Section 10 of the *Family Relationships Act 1975.*[69] However, Ms Redman states that it is possible to contend that 'an altruistic surrogacy arrangement does not constitute a contract but an understanding between two persons, often close friends or relatives…'[70] Thus the illegality of altruistic surrogacy is also questionable.

Furthermore, the *Family Relationships Act 1975*, makes it an offence for a person to negotiate, arrange, or obtain the benefit of, a surrogacy contract on behalf of another or publish an advertisement to that effect.[71] The Inquiry was told that there is some concern amongst those working in the medical profession that if they provide services – for which a payment is received – to facilitate a surrogacy arrangement they may be in breach of the *Family Relationships Act 1975* and risk losing their Artificial Reproductive Technology licence.[72]

THE STATUS OF CHILDREN BORN THROUGH SURROGACY INTERSTATE AND NOW LIVING IN SOUTH AUSTRALIA

As part of its Terms of Reference, the Inquiry was charged with examining the status of those children who were born interstate through surrogacy arrangements and who now reside in South Australia. One of the recurring themes to emerge during the

[65] Dr Christine Kirby, oral evidence, Hansard 2007 page 51.

[66] Dr Christine Kirby, oral evidence, Hansard 2007 page 51.

[67] Dr Christine Kirby, oral evidence, Hansard 2007 page 50.

[68] Dr Christine Kirby, oral evidence, Hansard 2007 page 50.

[69] Ms Julie Redman, written submission – client letter, 2007 page 2.

[70] Ms Julie Redman, written submission – client letter, 2007 page 2.

[71] Family Relationships Act 1975 Part 2B Sections 10F and 10H.

[72] Information provided by Di Gray 2007.

Inquiry relates to inadequacies in current legislation in that it fails to recognise the commissioning parents as the child's legal parents.

The Inquiry heard from several South Australian couples who had travelled interstate to undertake surrogacy procedures. Upon their return to South Australia, they found themselves in a precarious legal position in which neither they nor the child are afforded the full protection of the law. Under current South Australian law they are not considered to be the legal parents of the child born of surrogacy and are therefore unable to make important decisions on behalf of their child in such areas as medical treatment, school or child care enrolment, and air travel without the consent of the surrogate parent(s).[73]

In South Australia, the legal status of children born through surrogacy is regulated by the *Family Relationships Act 1975* and the *Adoption Act 1988.*

Sections 10C, 10D and 10E of the *Family Relationships Act 1975*[74] expressly state:

> A woman who gives birth to a child is, for the purposes of the law of the State, the mother of the child, notwithstanding that the child was conceived by the fertilisation of an ovum taken from some other woman.

In other words, the woman who gives birth to a child is considered its legal mother even if she is genetically unrelated to it. In relation to paternity the following rules apply:

> (1) Where a married woman undergoes, with the consent of her husband, a fertilisation procedure in consequence of which she becomes pregnant, then, for the purposes of the law of the State, the husband—
> (a) shall be conclusively presumed to have caused the pregnancy; and
> (b) is the father of any child born as a result of the pregnancy.
>
> (2) In every case in which it is necessary to determine whether a husband consented to his wife undergoing a fertilisation procedure, that consent shall be presumed, but the presumption is rebuttable.

In relation to donor genetic material, Section 10E of the Act states where:

> (a) a woman becomes pregnant in consequence of a fertilisation procedure; and
> (b) the ovum used for the purposes of the procedure was taken from some other woman,
>
> then, for the purposes of the law of the State, the woman from whom the ovum was taken is not the mother of any child born as a result of the pregnancy.

In situations where:

[73] Department of Health, written submission 2007 page 6.

[74] The *Family Relationships Act 1975* (SA) accessed online 7 June 2007 at www.legislation.sa.gov.au/index.aspx

(a) a woman becomes pregnant in consequence of a fertilisation procedure; and
(b) a man, (not being the woman's husband) produced sperm used for the purposes of the procedure,

then, for the purposes of the law of the State, the man referred to in paragraph (b)—

(c) shall be conclusively presumed not to have caused the pregnancy; and
(d) is not the father of any child born as a result of the pregnancy.

In addition, the Committee was told that Section 4 of the *South Australian Adoption Act 1988* defines what is meant by 'birth parents'. Under the Act, the birth mother is identified as the woman who gave birth to the child. In the case of the birth father's identification, this is established in one of two ways; either the man who acknowledges the paternity of the child is listed as the father or, in situations where the man does not acknowledge paternity, this may be established by a court.[75] Therefore as the law currently stands, the surrogate mother – the woman who gives birth – is listed as the mother on the birth certificate and, if applicable, her husband is listed as the father (See Figure 1).

Figure 1: Surrogacy and Registration of parentage[76]

If surrogate is married	If surrogate is single
Birth certificate will either record: Mother: Surrogate Father: Surrogate's husband or Mother: Surrogate Father: Not recorded	Birth certificate will either record: Mother: Surrogate Father: Not recorded

The Committee understands that there were valid reasons for legal parentage to be determined in this way when the legislation was first enacted. However, advances in reproductive technology have rendered the legislation out-of-date and resulted in a number of unintended consequences.

According to the Department of Health, the parentage provisions of the *Family Relationships Act 1975* were designed to ensure that a couple treated for infertility who used donor reproductive material would be considered the legal parents of the child. Conversely, under those provisions it was intended that individuals who had donated reproductive material would not be legally recognised as the parents of any

[75] *Adoptions Act 1988* accessed online 4 June 2007 at www.legislation.sa.gov.au/index.aspx

[76] Figure 1 provided by Adoption and Family Information Service, Powerpoint presentation, 2007.

child born of their donated reproductive material. In other words, the legislation intended to protect the interests of the couple seeking infertility treatment as well as the interests of donor(s) who had provided the reproductive material.

However, it is evident that such provisions are not effective in dealing with cases of gestational surrogacy. In such situations the commissioning parents—who intend to take responsibility for raising the child and from whom the reproductive material has been sourced—are denied parental rights by legislation which was designed to avoid putting parental responsibilities on donors who normally want to limit their involvement to the donation of genetic material.

The Inquiry was told that the only way for commissioning parents to have legal parental status of their biological child is by adoption.[77] In South Australia, adoption orders are made by the Youth Court. The Inquiry was informed that there has been one order for adoption of a child born as a result of an altruistic surrogacy arrangement in favour of the commissioning parents.[78] According to evidence presented, more adoption applications by commissioning parents are likely to be made in the future.[79] Mr Andrew Stanley told the Committee that this option is generally considered 'unnecessarily cumbersome' and, for the most part, 'unreasonable' since it requires individuals to adopt 'what is in effect their own genetic child'.[80]

In its submission to the Inquiry, the Adoptions and Family Information Service, Department for Families and Communities, reminded the Committee that 'there is nothing in the Adoption Act that specifies children born of surrogacy arrangements; it was not even thought about when the Adoption Act was drafted'.[81]

In explaining the differences between the system of birth registrations relating to 'ordinary' births, adoptive births and surrogacy births, Ms Val Edyvean, Registrar of Births, Deaths and Marriages, Attorney-General's Department, provided the Committee with the following information:

> [In] an ordinary birth that does not involve adoption both mother and father have to sign the birth registration statement, and it does not matter whether or not they are married, they are both required to sign. We pursue who the father is if there is no father's signature. In the case of an adoption, the same would normally apply that both parents would be required to sign the certificate, and it would be the partner or the husband of the birth mother. In the case where a child is the result of a surrogate birth, the most recent advice we have from Crown Law is that, even though the birth mother says, 'My husband is not the father and this chap over here is the father', they cannot legally fill in the registration form that way because of provisions in the *Family Relationships Act 1975* which specify that a donor is not a parent.[82]

[77] Mr Andrew Stanley, oral evidence, Hansard 2006, page 2.

[78] Di Gray, written information, 2007.

[79] Di Gray, written information, 2007.

[80] Mr Andrew Stanley, oral evidence, Hansard 2006, page 2.

[81] Ms Cynthia Beare, Adoption and Family Information Service, Department for Families and Communities, oral evidence, Hansard 2007 page 34.

[82] Ms Val Edyvean, oral evidence, Hansard 2007 pages 33 and 34.

The following case study, (Case Study 4), taken from evidence heard during the Inquiry,[83] elucidates the current legal anomalies surrounding the problems associated with surrogacy and legal parentage.

Case Study 4: Mary and John

Following a surgical complication at the age of 18, Mary was told that she would have significant difficulty in carrying a pregnancy to full term. At age 25, Mary met and married her husband John, and while both were keen to start a family, Mary's medical history made this virtually impossible. During the next few years, Mary completed university studies and established a successful career. Her desire to have children, however, remained a significant issue. Recognising that reproductive technology may be able to assist, Mary's auntie Joan, offered to act as a surrogate mother. The family spent a significant period of time travelling to and from Sydney to undergo the necessary tests and procedures. An embryo was created using the ovum and sperm of Mary and John and was then implanted into Joan's uterus. Joan gestated Mary and John's genetic child and at birth relinquished its care to them.

While overjoyed at having a child, Mary and John worry that if any medical problem was to arise for their daughter current SA legislation means that the medical profession would be looking at the family history of Mary's aunty and uncle and not that of her husband and her. Because Mary and John's names do not appear on their daughter's birth certificate, they are unable to enrol her at school, open a bank account, approve medical treatment or obtain a passport.

Mary and John are considering pursuing an adoption process to enable them to have legal parentage of their child.

As described above, even though Mary and John provided the genetic material and their child is therefore genetically related to them, their names do not appear on the birth certificate. In other words, even though they are the child's biological parents they have no parental rights.

In his evidence, Dr Peter Woolcock discussed some of the more practical problems that this situation has presented particularly in relation to school, travel and medical decisions. In his view parents who are not registered on birth certificates as the legal parents of their child are seriously hindered in the ability to make important medical decisions on behalf of their child.[84]

[83] The case study is presented here to provide an important human dimension to the difficulties confronting individuals and couples who are unable to have children. Some of the information, including names, has been amended to protect the privacy of the individuals concerned.

[84] Dr Peter Woolcock, oral evidence, Hansard 2007 page 93.

The Inquiry heard that there may be situations in which the surrogate mother has assumed the identity of the commissioning mother, using her name and other personal details, thereby enabling the child to be recorded in the commissioning mother's name. In some instances the surrogate mother may have changed her name by deed poll so that when the child is born the name appearing on the birth certificate is that of the commissioning mother.[85]

It is apparent that the current legal uncertainty surrounding presumptions of parentage is unsatisfactory. Dr Christine Kirby provided the following assessment:

> For many years, South Australia led the way in excellent legislation to care for persons with infertility, but now lags behind… It is clear that many South Australians are proceeding with surrogacy interstate and overseas, but that children born from this treatment are not adequately legally protected at the current time in relation to their genetic parents [the commissioning couple].[86]

As a way of addressing this situation the Inquiry was provided with a number of options. In a joint written submission from the Ethics Centre of South Australia, and the International Network on Feminist Approaches to Bioethics, it was suggested that the difficulty around birth certificates for children born through surrogacy arrangements could be overcome by issuing a birth certificate that lists a number of parents: the birth mother—whether she is a gestational or traditional surrogate—and the commissioning parents. If donor sperm or egg is used, then this should be listed on a donor register so that the child is able to access relevant information about the donor at a later stage. According to the Ethics Centre of South Australia by listing a number of parents on the birth certificate, the rights of the child are protected and it would allow them to obtain information about their biological parentage, while also allowing the commissioning parents to be recognised as the legal parents.[87]

In its evidence to the Inquiry, the Let's Get Equal Campaign argued that there should be better recognition of the social nature of families rather than placing emphasis on them as biological entities. On this point, Associate Professor Tony Liddicoat, Let's Get Equal Campaign, told the Inquiry that birth certificates should reflect 'what the family itself understands the family to be'.[88] While recognising that in cases of gestational surrogacy a child has a right to know their genetic heritage, Associate Professor Liddicoat questioned whether a birth certificate was the most appropriate place for this type of medical information to be disclosed. Expanding upon this point, Dr Tim Curnow, Let's Get Equal Campaign, said:

> The ideal position, from our point of view, would be that there is a space on the birth certificate that says 'parents' where you can list one or two or three people who may or may not have a genetic relationship to the child. Then, if you wish, somewhere else there is a medical record of (if you like) genetic material—but not as parents and not necessarily on the birth certificate.[89]

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[85] Dr Christine Kirby, oral evidence, Hansard 2007 page 51.

[86] Dr Christine Kirby, additional written information, 2007 page 1.

[87] Ethics Centre of South Australia, written submission, 2007 page 3.

[88] Associate Professor Liddicoat, oral evidence, Hansard 2007 page 174.

[89] Dr Curnow, oral evidence, Hansard 2007 page 176.

The Committee seeks to give primacy to the best interests of the child. The Committee is particularly mindful that children should not be denied access to information regarding their genetic history or the circumstances of their birth. Likewise, the Committee considers that the privacy of children born through gestational surrogacy arrangements should be protected and they should not have to disclose their surrogate birth status each time their birth certificate is presented.

LEGAL PARENTAGE PROVISIONS IN AUSTRALIAN JURISDICTIONS

In attempting to deal with the issue of birth certificates for children born of surrogacy arrangements, the Committee considered the legal parentage provisions across a number of Australian jurisdictions. It is apparent that the problems associated with legal parentage in surrogacy arrangements are not unique to South Australia. In most Australian jurisdictions, the surrogate [birth] mother and her partner are regarded as the legal birth parents of the child.[90] The Inquiry heard that the Australian Capital Territory is presently the only jurisdiction in which the transfer of legal parentage from a surrogate to the commissioning parents occurs via a legal mechanism through the court process. The following section provides an overview of some of the present legal parentage provisions in Australia.[91]

Victoria

In relation to legal parental status, the *Status of Children Act 1974* determines how legal parentage is defined in situations in which a child is born through the use of donated sperm and eggs. It does not, however, adequately address legal parentage of children born of surrogacy arrangements. In most situations:

- the commissioning parents have no legal relationship with the child; and
- the surrogate and her partner (if any) are regarded as the child's parents.

If the commissioning person or couple wish to be recognised as the legal parents of the child they can:

- apply for a parenting order from the Family Court of Australia but these do not confer full parental status on a person but rather a range of powers and responsibilities in relation to the child; or
- adopt the child. However, privately arranged adoptions are not permitted in Victoria, except where one of the adopting parents is a relative of the child, which would only be possible where the surrogate is a relative of one of the commissioning parents.

Even if the commissioning couple were to be recognised as the legal parents of the child under state law, the surrogate could still apply for orders for the child.

[90] Victorian Law Reform Commission. Assisted Reproductive Technology & Adoption: Final Report, 2007 page 186.

[91] Unless otherwise noted, the information contained in this section is drawn directly from a briefing paper provided to the Committee by the Department of Health.

New South Wales

While altruistic surrogacy is permissible, legal parentage remains unclear. If surrogacy is undertaken, the birth parents are considered to be the legal parents. There is a possible mechanism for relative surrogacy adoptions (Adoptions Act) but these are not allowed until the child reaches five years of age.

Western Australia

The Western Australian Surrogacy Bill seeks to address concerns about birth certificates issued to children born through surrogacy arrangements. The intention of the Bill is to allow the transfer of the legal parentage of a child from the birth parents to the commissioning parents.

Australian Capital Territory

In terms of legal parentage, the approach followed in the Australian Capital Territory is broadly as follows:

- Legal parentage is transferred from the surrogate to the commissioning parents under the *Births, Deaths and Marriages Registration Act* 1997 (A.C.T.).
- Automatic transfer of parentage is affected after a specified period through a court order.
- Legislation does not directly regulate who is eligible to enter into surrogacy arrangements.
- Legal intervention follows the birth of the child.
- The court is empowered to transfer legal parentage from the surrogate/partner to commissioning parents on a number of conditions:
    - the surrogate/partner are not the genetic parents;
    - either one of the commissioning parents is a genetic parent of the child;
    - it is in the best interests of the child; and
    - the surrogate/partner, freely with full understanding, agrees to the making of the order.
- A parentage order is given the same legal effect as an adoption order.

The Committee looked closely at the A.C.T. legislation. Sections 16A and 16B of the *Births, Deaths and Marriages Registration Act* 1997 (A.C.T.) include provisions for birth certificates to be amended after the granting of a parentage order. The Births, Deaths and Marriages Registrar must register a parentage order and keep an index of parentage orders. Once the parentage order is approved, the birth certificate is amended to record information about the genetic parents who are deemed to be the

legal parents of the child. If the birth has been previously registered[92] under the Australian Capital Territory Act, the Registrar must re-register the birth by entering specified particulars, including particulars of the commissioning parent or parents.

The original full copy of the birth certificate will contain the details of the birth mother. The amended version will only record the legal parents (i.e. the genetic parents). The child can apply for a copy of the original birth certificate indicating the details of the birth mother.

Summary

The Committee understands that the intention of the provisions relating to presumption of parentage contained within the current South Australian legislation are intended to specifically exclude sperm and egg donors from having legal parentage of a child born through the use of assisted reproductive technology. While this may have been appropriate at the time this legislation was enacted, it is apparent that it has not kept pace with changing reproductive technologies. In the case of gestational surrogacy, the commissioning couple whose genetic material is used to create an embryo are deemed to be donors and therefore are excluded from having legal parentage of their genetic child.

In the absence of any legislation surrounding this aspect of gestational surrogacy arrangements, the Committee understands the reasons as to why the adoption process has been used to transfer parenthood to the commissioning parents but considers this to be an unacceptable solution. However, there are clear differences between the two processes: in the case of adoption, a family is sought for an existing child – the parenting arrangements are not known before conception. In the case of gestational surrogacy, the child has been planned and the surrogate mother has agreed to gestate the child for another couple with a clear intent of that couple taking parental responsibility.[93] Moreover, in most adoption cases it is highly unlikely for adoptive parents to have a genetic link to their adopted child whereas in surrogacy cases a genetic connection is likely.

The Committee is of the view that the adoption process is not the appropriate way of dealing with surrogacy arrangements and transferring parenthood to the commissioning parents. It was never intended for that purpose.

The Committee considers that the State Government should, as soon as possible, introduce a process that recognises the rights of commissioning parents and transfers the parentage of children born through surrogacy arrangements to them without requiring them to adopt their own genetic child. The transfer would require the consent of the surrogate and should provide an opportunity for a court to review a case where there was doubt as to whether it was in the best interests of the child. The Committee further recommends that an appropriate time-frame be determined in which this transfer of parenthood could occur. Birth certificates should then be amended to reflect this transfer. Evidence presented to the Inquiry indicates that the number of children already born through surrogacy arrangements and residing in South Australia is very

[92] Under the Births, Deaths and Marriages Registration Act 1997, parents must register the birth of their child within 60 days.

[93] Access Infertility Network, written submission 2007 page 4.

low. Given this is the case; the Committee considers that any amendments to resolve this situation should be applied retrospectively.

The Inquiry heard of the many emotional and physical difficulties experienced by couples that have used, or are planning to use, gestational surrogacy to have children. These difficulties are compounded by the current legal uncertainty surrounding surrogacy arrangements in South Australia particularly as they relate to the issue of birth certificates. It is clear that current birth certificates are unable to accommodate the range of information that may be required as a result of surrogacy arrangements. The Committee considers that parents of children born through gestational surrogacy should not be subjected to legal ambiguity about their parental status. Equally, the Committee considers proper safeguards need to be put in place to ensure that children born through surrogacy arrangements and now living in South Australia are legally protected and have access to their full birth records.

A mechanism for the intending parents and the surrogate to apply to the Supreme Court for a Parenting Order would be desirable, as the Australian Capital Territory law provides. This would remove the need for the intending parents to adopt their own biological child.

Recommendation:

1. That the State Government introduce, as soon as possible, a bill to amend the *Family Relationships Act 1975* and other relevant legislation to recognise the rights of children born through gestational surrogacy arrangements. The bill should, among other things, ensure that:

    a) all parties involved in the surrogacy arrangement, especially the surrogate mother, are fully informed about the personal and legal implications of the transfer of parenthood and freely consent to this transfer taking place;

    b) a process is developed to allow the legal transfer of parenthood to occur without the need for commissioning parents to adopt their own genetic child;

    c) in transferring the legal parentage from the surrogate mother to the commissioning parents, the best interests of the child should be paramount considerations;

    d) an appropriate time-frame is established during which the transfer of parenthood may occur;

    e) persons born through surrogacy arrangements have access to their genetic history and are provided with information about the circumstances of their birth;

    f) once the transfer of parentage has occurred, birth certificates be amended to appropriately reflect this transfer. The provisions contained in the Australian Capital Territory *Births, Deaths and Marriages Registration*

Act 1997 should serve as a suitable example of the type of process that could be applied;

g) an abridged birth certificate is issued for general use that records the commissioning parents as the parents of the child born through gestational surrogacy;

h) a detailed birth certificate is issued and made available to the child upon request listing the commissioning parents, the surrogate mother and, if applicable, the use of donor material;

i) the legislation is drafted so that it applies to children already born through surrogacy arrangements; and

j) appropriate training on the proposed operation of the Act is provided to all relevant individuals and agencies responsible for its administration.

PART TWO

SECTION FOUR: SUMMARY OF THE EVIDENCE

STATUTES AMENDMENT (SURROGACY) BILL 2006

The Honourable John Dawkins MLC introduced the Statutes Amendment (Surrogacy) Bill 2006 in the Legislative Council of the South Australian Parliament on 21 June 2006. It was withdrawn on a motion by the Honourable Ian Hunter MLC, on Wednesday 27 September 2006 and referred to the Social Development Committee for its investigation.

Objectives of the Bill

The main objectives of the Statutes Amendment (Surrogacy) Bill were outlined by the Honourable John Dawkins in his second reading speech.[94] Essentially, the Bill sought to amend the *Reproductive Technology (Clinical Practices) Act 1988* and the *Family Relationships Act 1975* to permit non-commercial medically-indicated gestational surrogacy for married heterosexual couples.[95]

In his speech, the Honourable John Dawkins stated that the Bill required the nominated surrogate to be a close relative of the commissioning couple. The Bill sought to recognise the commissioning parents as the legal birth parent of a child born through a surrogacy arrangement.

Section 10HA (2) (b) of the Statutes Amendment (Surrogacy) Bill states, *inter alia* that:

- all parties to the surrogacy agreement are at least 18 years old;
- the surrogate mother has already given birth to a child (being a child who was alive at birth);
- the commissioning parents have cohabited continuously together in a marriage relationship for a period of five years immediately preceding the date of agreement;
- the commissioning parents reside in this State;
- the surrogate mother is a prescribed relative of at least one of the commissioning parents, or has a certificate issued by the Minister in relation to the proposal that she act as the surrogate mother for the commissioning parents; and
- no money can be exchanged (apart from costs associated with the pregnancy).

[94] Hon John Dawkins MLC, Hansard, Legislative Council, 21 June 2006.

[95] Refer to Appendix 4 for a copy of the Statutes Amendment (Surrogacy) Bill.

An Assessment of the Statutes Amendment (Surrogacy) Bill

For the most part, the submissions to the Inquiry that argued against the Bill opposed all forms of gestational surrogacy. Some supporters of gestational surrogacy, however, also argued against the Bill because they believed it had some significant weaknesses.

While the South Australian Reproductive Technology Council recommended legalising non-commercial gestational surrogacy, it expressed a number of reservations about the proposed Statutes Amendment (Surrogacy) Bill. In its written submission, the Council questioned why the Bill included a requirement for continuous cohabitation in a marriage relationship for a period of five years.

According to the Council this requirement is not only inconsistent with the *Reproductive Technology Act 1988*; it also contravenes the *Commonwealth Sex Discrimination Act 1984*. If the intention of the cohabitation requirement is an attempt to deal with concerns about the family environment into which a child is born, the South Australian Reproductive Technology Council argues that the current principle that underpins the *Reproductive Technology Act 1988* stipulating that the best interests of the child born as a consequence of an artificial fertilisation procedure must be treated as paramount, is adequate for this purpose.

Furthermore, the Council argued that because those who participate in reproductive technology treatment need to undergo a mandated counselling process and sign a statutory declaration in relation to any past criminal behaviour such as sexual offences, this serves to further demonstrate the likelihood of a positive outcome more so than a requirement regarding continuous cohabitation of five years.[96]

In his written submission, Dr Robert Pollnitz, paediatrician and Chair, Commission on Social and Bioethical Questions, Lutheran Church of Australia, expressed concern that, although the Statutes Amendment (Surrogacy) Bill restricted gestational surrogacy to married heterosexual couples, adoption of the Bill may lead to homosexual couples gaining access to this technology. Citing the Pearce decision of 1996—where a single woman gained access to reproductive technology by claiming the law discriminated on the grounds of marital status—Dr Pollnitz argued that "[it] is not difficult to foresee homosexual singles or couples claiming access to surrogacy on a similar basis."[97]

In its written submission, the Department of Health stated that the Statutes Amendment Surrogacy Bill did not adequately take into account the many legal, ethical and social complexities of surrogacy. It argued that altruistic gestational surrogacy should be considered in the light of similarly regulated methods of family formation such as adoptions and donor conception. Moreover the Bill appears to favour the rights of the commissioning parents at the expense of those of the child and the surrogate.[98]

[96] The South Australian Reproductive Technology Council, written submission 2007 page 12.

[97] Dr Rob Pollnitz, written submission 2007 page 3.

[98] Department of Health, supplementary written material, 2007 page 4.

The Statutes Amendment (Surrogacy) Bill requires a surrogate mother to have given birth to at least one previous child. A number of submissions argue that this has the potential to create psychological difficulties for the existing child of the surrogate mother who, once the surrogate child is relinquished, may wonder why their mother has given away a child she carried and birthed.[99] On this point, Dr Robert Pollnitz, stated:

> In my work as a specialist paediatrician I find that young children are unable to understand the "loss" of a baby and can experience lasting emotional distress. "Mummy gave our baby away...when will mummy give me away?" [I] believe that counselling young children cannot begin to deal with issues like this.[100]

In his evidence, Mr Paul Russell, Senior Officer, the Office of Family and Life, Catholic Archdiocese of Adelaide, posed the following question:

> How can the fact that mum was obviously pregnant and nursed an infant for at least six weeks before the child 'disappears' from the family home, be easily explained to a sibling?[101]

The Statutes Amendment (Surrogacy) Bill stated that the surrogate mother should be a 'prescribed relative' of one of the commissioning parents. In its submission, the Australian Family Association argued that because the Bill requires that the surrogate mother be a close relative of one of the commissioning parents this increases the risk of health problems in the child and could be deemed 'gestational incest'. Similarly, in criticising the Bill, Dr Gregory Pike, Director Southern Cross Bioethics Institute made the following statement:

> [Because the] male's sperm could be used under this legislation to inseminate his mother (a prescribed relative) [that] would constitute what could be termed 'gestational incest' and, in fact, it would be contrary to the National Health and Medical Research Council's guidelines on reproductive technology by which all bodies carrying out assisted reproductive technology have to abide.[102]

In its written submission, the Southern Cross Bioethics Institute put forward a number of reasons why it is opposed to the Statutes Amendments (Surrogacy) Bill 2006. The Institute argues that it is virtually impossible for a potential surrogate mother to give informed consent to enter into a surrogacy arrangement. This is due largely to the likelihood of emotional coercion, especially in situations in which the surrogate is a relative of the commissioning couple.[103]

Nevertheless, the Committee was informed that the majority of surrogacy arrangements involving SA couples have not involved a close relative.[104] In her written submission Dr Christine Kirby argued that the surrogate mother need not necessarily be related to the commissioning couple, but 'may be a woman known to either party,

[99] For example, WFA, written submission, 2007 page 1 and Dr Robert Pollnitz, written submission, 2007 page 2.

[100] Dr Robert Pollnitz, written submission, 2007 page 2.

[101] Paul Russell, Catholic Archdiocese of Adelaide, written submission 2007 page 7.

[102] Dr Gregory Pike, oral evidence, Hansard 2007 page 74.

[103] The Southern Cross Bioethics Institute, written submission, 2007 page 3.

[104] For example, the South Australian Council on Reproductive Technology.

who is assessed as a suitable surrogate by established counselling and psychological assessment guidelines'.[105]

Summary

Since the introduction of the Statutes Amendments (Surrogacy) Bill 2006, a number of significant developments—such as the introduction of the Western Australian Surrogacy Bill as well as the push for nationally consistent surrogacy laws—have occurred. At a State level, the Committee was informed that staff from the Department of Health, the Department for Families and Communities, and the Attorney-General's Department have commenced discussions regarding surrogacy in South Australia.[106]

A number of the criticisms of the Bill put forward by a range of witnesses were persuasive, adding further weight to the Committee's decision not to recommend that Parliament proceed with the Bill in its current form.

ARGUMENTS AGAINST AND IN SUPPORT OF SURROGACY

It has been concluded that such is the divide between those who support surrogacy and those who oppose it that depending upon one's view the practice of surrogacy is considered to be either a 'solution to an important social problem characterised by love and self-sacrifice or [a] threat to society's moral fabric embodying exploitation and commodification'.[107]

During the Inquiry, the Committee heard an array of ethical arguments from those in support of the legalisation of surrogacy and those against it. The following section provides an overview of the main arguments presented to the Committee.

Arguments Against Surrogacy

> How do you critique Australia's latest surrogacy case without looking heartless?[108]

Many of the submissions received by the Committee opposing gestational surrogacy arrangements expressed sympathy and compassion towards women who want to have

[105] Dr Christine Kirby, additional written material, 2007 page 1.

[106] Department of Health, written submission, 2007 page 6.

[107] Stuhmcke A. For Love or Money: The Legal Regulation of Surrogate Motherhood. Murdoch University Electronic Journal of Law, Volume 3, Number 1, May 1996 page 15. Accessed on 30 March 2007 at www.murdoch.edu.au/elaw/issues/v3n1/stuhmck1.html

[108] Tankard Reist M. Motherhood deals risk deeper anguish, 2006. The 'latest surrogacy case' to which Tankard Reist is referring is that of Labor Senator Stephen Conroy and his wife who, in 2006, travelled from Victoria to New South Wales to have a baby using a surrogate mother. Their child was conceived using a donor egg (extracted from a friend) which was fertilised by the commissioning father's sperm (i.e. Stephen Conroy) and then implanted into another woman who carried the baby to term. Tankard Reist's article was provided as a supporting document to the Women's Forum Australia, written submission, 2007.

children of their own but for medical reasons are unable to become pregnant or sustain a full term pregnancy.

The Office of Family and Life Catholic Archdiocese of Adelaide stated that the development of technologies to overcome infertility in and of itself, are neither a sufficient nor compelling reason to apply this knowledge to create children. In its written submission, the Archdiocese argued that, 'just because we can, does not mean we should'.[109]

The Inquiry was told that key questions arise as to whose interests are being served and who benefits most from surrogacy arrangements: are the interests of the child being served, or those of the commissioning couple, or possibly those of the surrogate? What about the broader interests of the community?[110]

> Surrogacy involves far bigger issues than simply the autonomous choices of a commissioning couple. It can be argued that the state has an interest, in its promotion of the common good, not only to prevent harm to children, but also to promote practices, which assist all to flourish. In recognition of the fact that the primary goal of a surrogacy arrangement is to fulfil the autonomous choices of the commissioning couple at the potential expense of the welfare of the child, the state has a responsibility to act on behalf of the more vulnerable party in the first instance.[111]

Potential Harm

In their evidence to the Inquiry, opponents of gestational surrogacy argued that the practice causes significant harm to both mother and child. The Inquiry heard that because surrogacy requires that the birth mother relinquish the child, this irrevocably severs the natural bonding that occurs between mother and child. In this way, surrogacy symbolises the 'most extreme example of the intentional fracturing of motherhood'.[112] Moreover, the Inquiry heard that this lessens the importance of the gestation period in establishing the maternal/infant bond.[113]

> It is not in the best interests of children that we should raise what is essentially a social ill (the separation of a child from its birth mother) to the level of a social virtue.[114]

According to the Festival of Light:

> Surrogacy primarily serves the wishes of the commissioning parents to procure a child by any means. In surrogacy, the child who does not yet exist becomes a commodity – the subject of a legal contract. Surrogacy undermines the natural right of birth parents – especially the woman who carries a child, but also her husband – to be the legal parents of any child born to them unless they freely decide to relinquish the child. It subordinates, to the interests of the commissioning couple,

[109] Family and Life Catholic Archdiocese, written submission, 2007 page 5.

[110] Southern Cross Bioethics Institute, written submission 2007 page 7.

[111] Southern Cross Bioethics Institute, written submission 2007 page 7.

[112] Southern Cross Bioethics Institue, Powerpoint presentation, 2007.

[113] Southern Cross Bioethics Institute, written submission 2007 page 2.

[114] Family and Life Catholic Archdiocese, written submission 2007 page 12.

> the best interest of the child by ignoring the natural bonding of a child to the birth mother during pregnancy and potentially, his or her sense of identity, family and belonging.[115]

A Complex Issue

During the Inquiry, many hypothetical questions were posed concerning the possible legal and ethical complications that may arise in surrogacy arrangements. The following list of questions, while not exhaustive, is a representative sample of some of the questions posed by the Committee in the course of the Inquiry:

- What are the legal rights of a commissioning couple? Who has legal rights to the child if the couple dies?
- What would be the legal implications if a commissioning couple were to separate just prior to the birth of their child?
- What if the surrogate woman chooses to abort the child she is carrying? What are the potential legal issues that may ensue? Can the commissioning couple sue her?
- What happens if a woman who has acted as a gestational surrogate does not want to relinquish the child?
- What if the commissioning couple does not want to take responsibility for the child? (For instance, if the child was born with a disfigurement or disability).
- What if a genetic abnormality was detected during first or second trimester screening (i.e. downs syndrome) and the commissioning couple wanted to have the pregnancy terminated but the surrogate did not?
- Who decides whether tests for genetic abnormalities should take place?
- Does the law require that a child born through gestational surrogacy be told about their origin?
- Who is potentially liable for child support payments?
- In the event that a surrogate has a pregnancy loss, what are the financial/legal implications for the commissioning couple?
- Is there a potential for the commissioning parents to sue the surrogate for 'lack of care' during the pregnancy?

The broad range of questions posed during the Inquiry – covering ethical, legal, and social as well as administrative considerations - amply demonstrates the complexity of the issue.

[115] Festival of Light, written submission 2007 page 2.

In the Best Interests of the Child

One of the central themes to emerge in submissions during the Inquiry was concern about the welfare of children born through surrogacy arrangements. The Committee considers that surrogacy arrangements must at all times give primacy to the welfare of the child. It does, however, also recognise that defining what is meant by this underlying principle is not an easy task. History suggests that this principle is not immutable; it can and does change. Moreover, it cannot be easily separated from the broader social and political context.

In outlining a number of social, ethical and legal reasons opposing surrogacy arrangements, the Australian Family Association stated:

> The plight of childless couples must not lead legislators into a rash decision to treat children as property.[116]

The purpose of gestational surrogacy is to enable couples to use their genetic material to have children when they are unable to do so due to medical reasons. The Australian Family Association argued that, 'compassionate though the process might seem, it comes loaded with problems, many of which could have far-reaching social consequences'.[117] During the Inquiry, the Committee was told that surrogacy is essentially an 'experiment on human beings' and not enough is known about its long term social and psychological effects, particularly on the child and the surrogate.[118]

The Australian Family Association argued that the social, ethical and legal problems associated with legalising gestational surrogacy are far too complex to allow for its legalisation.

Children as commodities

One of the most trenchant criticisms of surrogacy is that it is harmful to children. Opponents of surrogacy argue that the surrogacy process reduces the child to a mere commodity. In its written submission, the Australian Family Association states that while 'no one has the right to a child', the very nature of surrogacy means that children are treated as a consumer product to be ordered, produced and then distributed. [119]

Similarly, in its written submission the Office of Family and Life, Catholic Archdiocese of Adelaide, states that surrogacy is an 'offence against human dignity' because it treats the child as a commodity:

> The child is effectively purchased by the commissioning parents by their payment of the expenses incurred over the first nine months to a year of the child's existence.[120]

[116] Australian Family Association (SA Branch), written submission, 2007 page 4.

[117] Australian Family Association (SA Branch), written submission, 2007 page 3.

[118] Dr Greg Pike, oral evidence, Hansard 2007 page 72.

[119] Australian Family Association (SA Branch), written submission, 2007 page 4.

[120] The Office of Family and Life, Catholic Archdiocese of Adelaide, written submission, 2007 page 8.

Exploitation of women

Those who oppose surrogacy frequently argue that women who agree to act as surrogates are often coerced, whether overtly or covertly, into doing so. According to the Southern Cross Bioethics Institute, this is particularly the case for women with low self-esteem who may be more susceptible to enter into a surrogacy arrangement to obtain the approval and acceptance of others and gain a sense of self-worth.[121]

According to the Institute 'surrogacy objectifies and exploits women'.[122] It believes that a woman who acts as a surrogate effectively becomes 'an incubator for another couple.'[123] In its presentation to the Inquiry, the Institute posed the question: 'can a close relative or friend really make an autonomous decision to act as a surrogate that is free from coercion, particularly in complex family contexts?'[124] Implicit in this question is the view that surrogacy exploits women and treats them as little more than an 'incubator', a 'disposable uterus', a 'container' or 'public utility for someone else's babies'.[125] According to this evidence, any suggestion that surrogacy can be considered altruistic is a misnomer.

In its written submission, Women's Forum Australia[126] expressed opposition to the use of surrogacy and therefore its proposed legalisation as outlined in the Statutes Amendment (Surrogacy) Bill. According to the Forum, surrogacy does not take into account the best interests of women and children and by its very nature 'requires a fracturing of the gestational bond between mother and child'.[127] Moreover it degrades a surrogate mother to such an extent that she is little more than 'an incubator'.[128]

Women's Forum Australia argued that because surrogacy arrangements can only be brought about through IVF procedures – requiring the use of hyperovulation processes – this poses significant risks to the health of women. Children too, are at risk from surrogacy because; the use of IVF technology can result in an increased risk of premature births, lower birth rates and disability in the child.[129] Women's Forum Australia states, 'in our view, most women are not fully informed of the risks of these reproductive technologies'.[130]

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[121] Southern Cross Bioethics Institute, written submission 2007 page 3.

[122] Southern Cross Bioethics Institute, written submission 2007 page 2.

[123] Southern Cross Bioethics Institute, written submission 2007 page 2.

[124] The Southern Cross Bioethics Institute, Powerpoint presentation, 2007. Please note, the wording of this question has been slightly amended from that presented.

[125] Tankard Reist M. Motherhood deals risk deeper anguish, 2006 page 1.

[126] In its written submission WFA describes itself as "an independent women's think tank that undertakes research, education and public policy development about social, economic, health and cultural issues affecting women."

[127] WFA, written submission, 2007 page 1.

[128] WFA, written submission, 2007 page 1.

[129] WFA, written submission, 2007 page 1.

[130] WFA, written submission, 2007 page 1.

Psychological Implications

The Committee heard that the potential psychological harm caused by surrogacy is not restricted to the surrogate mother or the child born through the arrangement. Opponents argued that its harmful effects often extend to the surrogate mother's partner and any existing children.

Some submissions argued that there is a paucity of literature regarding any long-term effects of surrogacy on all parties concerned and this should be reason enough to prohibit this type of medical intervention. The Inquiry heard that long term psychological effects on the surrogate mother also do not appear to have been thoroughly examined or well documented.

In most cases, surrogacy involves IVF treatment, which according to the Southern Cross Bioethics Institute 'carries significant health risks to both the child and the surrogate'.[131]

> In a surrogacy arrangement the welfare of the child is subordinate to the desire of an infertile couple to have a child. This involves objectification of the child. Additionally, studies reveal that the motivation behind the alleged altruism of surrogates is questionable. There is also the probability that the child will suffer from "genealogical bewilderment" by attempting to reconcile the unique circumstances within their family structure, which could lead to long-term psychological and behavioural problems. At this stage the empirical evidence about the long-term effects on the child are inconclusive but with significant grounds for the likelihood of seriously harmful consequences. Hence legislating to permit surrogacy amounts to an experiment with the child's life and with all those involved.[132]

Legal Issues

In its written submission to the Inquiry, the Australian Family Association outlined a number of legal concerns related to surrogacy. These include:

- the conditions which might be placed on a surrogate mother by the commissioning parents regarding lifestyle, diet, travelling, medical treatment and monitoring. Would breach of these conditions invalidate a surrogacy agreement and excuse the commissioning parents from covering expenses?
- any decisions made by the commissioning parents both during and after the pregnancy to refrain from covering expenses thereby potentially placing the surrogate mother/parents in crisis;
- the fact that legal remedies are likely to be ineffective during the course of the pregnancy given the timeframes involved for both pregnancy and court processes;
- the rejection of the child by the commissioning parents - there is high likelihood of emotional problems for both surrogate parents and child as they are forced to raise and care for an unwanted child;

[131] Southern Cross Bioethics Institute, written submission 2007 page 2.

[132] Southern Cross Bioethics Institute, written submission 2007 page 2.

- the refusal of the surrogate parents to relinquish the child; and
- rejection by both the surrogate mother and the commissioning parents in the event that a child is born with birth defects or serious health issues.

In emphasising the complex legal problems that may ensue, the Family and Life Catholic Archdiocese provided the Inquiry with a list of some legal custody disputes in relation to children born in surrogacy arrangements including the Australian case known as Baby Evelyn. Born as a result of a traditional surrogacy agreement in which the birth mother also provided the egg, Baby Evelyn was relinquished to the commissioning couple. Subsequent to this relinquishment, the surrogate mother applied to the courts for the child to be returned to her.

According to the Australian Family Association the concerns outlined provide 'more than enough reasons to keep the Pandora's Box of surrogacy closed'.[133]

Arguments in Support of Surrogacy

The following section outlines the key arguments put forward by proponents of gestational surrogacy. Among the most compelling arguments put forward by those who support gestational surrogacy is that it create families.

One couple who sought surrogacy interstate because of its prohibition in South Australia asked: 'Why should we be made to feel like criminals simply because we want children?'[134]

In response to criticisms espoused by opponents of gestational surrogacy that it treats children as a commodity, one witness told the Inquiry:

> As a woman envying children and wanting children all my life, I cannot explain to you how much it controls you. You notice every pram, every pregnant woman, every baby, and every [baby] capsule. You pull up at traffic lights and look at every car seat, you notice every 'child on board' sign in every car and think, 'Why not me?'[135]

Another witness described his feelings after his daughter was born through a surrogacy arrangement:

> As soon as our daughter was born we were invited to see her, to hold her and, basically, to fall all over our surrogate with thanks. It was just an incredible feeling and one that cannot really be described …. We waited for the health visitor to come along to make sure that everything was fine with the baby, and then we drove home. It was an awful trip home, because there was thick fog on the motorway, so we had to go really slow, with the most precious cargo that we had ever had in the back seat, where my wife was … watching her all the time. We got home through that thick fog, and I cannot express the joy I felt. I never have been able to adequately express

[133] Australian Family Association, written submission 2007 page 6.

[134] Starfield, E & B, written submission 2007 page 1.

[135] Mrs Kerry Faggotter, oral evidence, Hansard 2007 page 128.

> it; I do not think words exist to adequately express it. It has been just a joyful experience ever since.[136]

No Harm is Caused

To the Child

In response to concern at the possible harm that a child may experience from a surrogacy arrangement, the Committee was advised that the risk of a child experiencing 'genetic bewilderment' is not insurmountable. Dr Christine Kirby told the Inquiry that the term is 'overused'. In her view, the critical issue related to openness and honesty in the information provided to children. Dr Kirby told the Inquiry that this is another area where the South Australian Reproductive Technology Act has to be brought into compliance with NHMRC guidelines[137] – which state that children born from assisted reproductive technology procedures 'are entitled to know their genetic parents' – because 'we still have an act that allows for secrecy, and that has to change'.[138]

In its written submission, Access, Australia's National Infertility Network emphasised the importance of children knowing their genetic origins citing the words of Maggie Kirkman[139] whose child Alice was one of the first children conceived through gestational surrogacy:

> Because she has a continuing relationship with the woman who gestated her, Alice knows that she was not merely given away; the context within which her birth was possible is obvious. She will not need to go searching for her birth mother. Similarly, Linda was not left wondering what became of the baby she bore: she is not grieving over a lost child. These factors have helped to ensure that our tale will have a happy ending.[140]

To the Surrogate

Dr Christine Kirby discussed the medical and scientific improvements that have occurred in reproductive technology, particularly IVF to assist couples achieve pregnancies. She told the Committee that whereas previously four embryos were transferred, now it is three embryos, and in patients less than 38 years of age, around 80% have a single embryo transferred. In this latter group of patients, the conception rate is 43 per cent per cycle with a single embryo.[141]

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[136] Oral evidence, Hansard, name withheld.

[137] Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research, 2004 s 6.1, Australian Health Ethics Committee, National Health and Medical Research Council.

[138] Dr Christine Kirby, oral evidence, Hansard 2007 page 63.

[139] Maggie had her eggs fertilised by a donor's sperm and the resultant embryo was then implanted into Maggie's sister, Linda. Linda, who was already the mother of two children, gave birth to Alice and then handed her care to her sister Maggie.

[140] Kirkman M, as cited by Access, Australia's National Infertility Network, written submission 2006, page 3.

[141] Dr Christine Kirby, oral evidence, Hansard 2007 page 50.

In its written submission, Access Infertility Network supported the use of gestational surrogacy arrangements arguing that 'in a controlled environment, [surrogacy] can provide a successful option for women who for medical reasons are unable to carry a pregnancy safely'.[142]

The Committee heard evidence about the usefulness of requiring a prospective surrogate and a commissioning couple to undergo proper psychological assessment to determine their suitability (or otherwise) for surrogacy. The Committee heard evidence from representatives of the Australian and New Zealand Infertility Counsellors' Association (ANZICA). The Association comprises professional infertility counsellors who have formal qualifications in disciplines such as social work, psychology or counselling. In Australia, all clinics offering assisted reproductive technology need to ensure that they have an ANZICA qualified counsellor available to provide support and counselling for individuals and couples affected by infertility issues.[143]

In his presentation to the Inquiry, Dr Enzo Lombardi, Acting Medical Director, Flinders Reproductive Medicine, explained that while Flinders Reproductive Medicine supports in principle the concept of surrogacy arrangements being made available in South Australia it believes that any assisted reproductive technology clinics offering surrogacy would need to have the necessary medical expertise and resources to provide this intricate and complex form of treatment. If these safeguards were put in place, any potential harm would be minimised. Dr Lombardi also stated that clinical psychology and counselling services should be provided both within and outside of assisted reproductive technology clinics, and all parties involved in a surrogacy arrangement would need to participate in a comprehensive assessment process.[144]

While much media attention surrounding the issue of surrogacy has concentrated on cases that have involved legal action, some supporters of surrogacy provided the Inquiry with studies showing positive outcomes. A 2003 study undertaken in the United Kingdom examined the motivations and experiences of 34 women who had given birth to a surrogate child in the previous year. The study concluded that '[overall] surrogacy appears to be a positive experience for surrogate mothers' who, in most cases, reported feelings of 'self-worth'.[145]

A similar study examined the experiences of 42 commissioning couples with a one-year old child born through a surrogacy arrangement. It found that, in the main, commissioning couples believed their surrogacy arrangement to be 'a positive experience' with most maintaining some level of contact with the surrogate mother after the birth of the child.[146]

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[142] Access Infertility Network, written submission 2007 page 2.

[143] Information obtained from ANZICA website on 10 July 2007 at http://www.anzica.org/rtac.html

[144] Dr Enzo Lombardi, oral evidence, Hansard, 2007 page 46.

[145] Vasanti J, Murray C, Lycett E, MacCallum F and Golombok S. Surrogacy: the experiences of surrogate mothers. *Human Reproduction* Vol. 18, No. 10 pages 2196-2204, 2003 pages 2203-2204.

[146] MacCallum F, Lycett E, Murray C, Vasanti J and Golombok S. Surrogacy: The experience of commissioning couples. *Human Reproduction* Vol. 18, No. 6 pages 1334-1342, 2003 page 1341.

While acknowledging these positive findings, the authors recognise that the children in these studies are still in their infancy and follow up studies are needed to ensure the long term effects of surrogacy arrangements are properly explored and fully understood.[147]

An Important Treatment Option

Proponents of surrogacy argue that the practice provides an important and valuable option to women who, for medical reasons, are unable to carry a child. Some witnesses to the Inquiry maintained that surrogacy is just one option available in the wide field of assisted reproductive technology and should be viewed simply as an additional medical intervention to treat infertility.

In advocating for gestational surrogacy to be permitted, one witness to the Inquiry, who had a child through a gestational surrogacy arrangement, told the Committee:

> [Today] we have the opportunity, through reproductive technologies, to have children who are genetically our own. Surrogacy is just another way in which infertile couples can have a child that is biologically their own, and I do not believe it is just for that possibility to be taken away from them by the State and by the law. I agree that the procedure should include a strict and mandatory counselling process before any green light is given for a surrogate to have a child for an infertile couple and that only at this point should the desire for a surrogate child be overturned—that is, if it is not in the best interests of any of the involved members—the child to be born, the surrogate's family or even the commissioning couple.[148]

In providing his evidence in support of gestational surrogacy, Professor Rob Norman told the Inquiry:

> All the medical background for doing surrogacy exists in South Australia. We have among the highest pregnancy rates in the world. We practise single embryo transfer. We have extremely high quality management systems and a very good legislative and ethical background.[149]

Another witness who supported surrogacy as an important treatment option for infertile couples reminded the Inquiry that his decision to enter into a surrogacy arrangement due to his wife's illness was not done lightly nor was it done without due consideration of the emotional difficulties:

> Surrogacy is not easy: it is hard. It is not for people who are nervous, selfish, aggressive or weak. It takes trust, confidence, generosity, honesty and the most absolute good faith. These are non-negotiable and, of course, they are required on both sides of the arrangement.[150]

While Professor Norman supported legislation in favour of surrogacy, he told the Inquiry it should be underpinned by clear guidelines for practitioners and patients, and with an

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[147] MacCallum F, Lycett E, Murray C, Vasanti J and Golombok S. Surrogacy: The experience of commissioning couples. *Human Reproduction* Vol. 18, No. 6 pages 1334-1342, 2003 page 1341.

[148] In-camera evidence, name withheld, Hansard 2007.

[149] Professor Rob Norman, oral evidence, Hansard 2006, page 12.

[150] Oral evidence, Hansard, name withheld.

appropriate audit process. As part of this Professor Norman told the Inquiry that the *Reproductive Technology Act 1988* is 'severely out of date' and should be reviewed.[151] Professor Norman concluded his written evidence by stating:

> Surrogacy is a legitimate intervention in reproductive medicine provided social, psychological, legal and medical preparation has occurred well before-hand. It should be used rarely and not frequently and should not be abused for trivial reasons.[152]

The Principle of Autonomy

Those who support surrogacy disagree with the proposition that women are coerced into entering surrogacy arrangements due to feelings of guilt or family pressure arguing instead that women are autonomous beings who are generally able to fully and freely consent to this process.

In providing a counter argument to criticism about the exploitation of surrogate mothers, the Inquiry heard direct evidence from two women who had agreed to act as surrogate mothers. Both told the Inquiry that their decision was their own; made without coercion or guilt.

One woman who gave evidence to the Inquiry successfully gestated a pregnancy for a couple to whom she was related. Her evidence provided further insight into the motivations of some women who choose to become surrogates. When asked by the Committee if she felt coerced or exploited in any way she responded:

> I am a very strong woman. I am very determined…there was never any pressure…I had the support of my husband, children, extended family and friends, and this influenced my decision. I just wanted to help.[153]

Another woman who offered to be a surrogate for her daughter, but due to medical complications was unable to do so told the Inquiry about her experience:

[151] Professor Rob Norman, oral evidence, Hansard 2007 page 14.

[152] Professor Rob Norman, written summary of presentation, 2007 page 2.

[153] In-camera evidence, name withheld, oral evidence, Hansard 2007.

Case Study 5: A Surrogate Mother's Experience

As I was post-menopausal I underwent hormone treatment to enable me to be able to carry my daughter and her husband's embryo. I had to take hormone tablets daily and insert pessaries morning and night 12 hours apart, laying down for an hour on each occasion. I had to do this before and after work each day. My blood levels were also taken twice weekly and monitored by IVF in Sydney.

Over an 18 month period I had three attempts to become pregnant through IVF using my daughter and her husband's embryos. On each occasion the process was unsuccessful. After each IVF treatment I continued the hormone treatment to prepare my uterus for the next implantation. Sadness and dejection followed such unsuccessful pregnancy attempts—especially the third effort, which was positive but which was discovered (following an ultrasound scan) to be an ectopic pregnancy. The disappointment was felt not just by my daughter and me but also by all members of our family.

Leading up to my third attempt I was referred to another gynaecologist here in South Australia who undertook to work closely with Sydney IVF. He monitored my progress through the Women's and Children's Hospital and discovered that I had an ectopic pregnancy. I was required to have methotrexate treatment to stop the embryo from growing and reduce the risks of severe abdominal complications occurring. This procedure is not used without a great deal of consideration, as it is a treatment more commonly reserved for cancer patients. I had numerous blood tests to monitor my levels as well as several scans to assess whether the embryo was shrinking. My gynaecologist was a great support for me during this difficult period, making himself available at any time that I required assistance, and I will always be indebted to him. Likewise, my entire family, who were aware of my plight, were most supportive. Given all the complications and difficulties I encountered as I attempted surrogacy for my daughter, I believe it is essential that altruistic surrogacy be legalised so that South Australian families can have access locally to all the services and supports required.

After the third attempt my daughter and I decided it was best to give my body a break. Personally, I thought after three unsuccessful attempts that maybe if was not meant to happen to me and I was concerned about utilising the remaining embryos.

It is apparent that agreeing to act as a surrogate can be a physically and emotionally difficult experience and one that does not always result in the creation of a child. The Inquiry heard that for this reason, the decision to become a surrogate should not be taken without comprehensive psychological and medical support and tests. Similarly, the decision to be a surrogate should not be done without the full practical and emotional support of family members.

SECTION FIVE: FUTURE OF SURROGACY IN SOUTH AUSTRALIA

In its written submission, the Australian Family Association, (SA Branch)[154] asks the Committee to look beyond the ways in which current South Australian laws might be amended to better address surrogacy arrangements and instead examine the more fundamental question: 'is gestational surrogacy a good idea or not?'[155]

In considering how current South Australian laws could be amended to better deal with matters relating to surrogacy, the Committee has been required to consider the fundamental question of whether surrogacy should be prohibited or regulated in some way. The task has been difficult and challenging and has required the Committee to carefully and thoroughly examine the evidence put before it.

The Committee has been presented with conflicting views. In assessing the information before it, the Committee has been mindful of the need to take account of what is now happening and what is likely to happen in South Australia.

From the evidence presented it is clear that both gestational and traditional surrogacy occur. Because of a number of legal complexities in existing South Australian surrogacy legislation, couples seeking gestational surrogacy arrangements have had to travel interstate. In the case of traditional surrogacy arrangements, the Inquiry heard that this does occur in South Australia and often falls outside the public domain. While the Inquiry heard direct evidence from couples who had positive surrogacy outcomes, the Committee accepts that surrogacy arrangements are not always successful. The following section records some of the additional issues raised during the course of the Inquiry.

TRADITIONAL SURROGACY IN PRIVATE SETTINGS

So far this report has mostly concentrated on gestational surrogacy situations in which individuals or couples have dealt directly with licensed fertility clinics.[156]

Even though there are clear differences between gestational surrogacy and traditional surrogacy—the former requiring the use of IVF technology while the latter not necessarily requiring any medical intervention—the intended outcome that a child be cared for by someone other than her/his birth mother, is the same in both situations.

The Inquiry heard that, overall, the State does not have the capacity to control private practices that people may enter into that result in the conception and birth of children using traditional surrogacy arrangements as they do not require the intervention or use

[154] According to its written submission (2007 page 1), the Australian Family Association is Australia's leading family organisation, active on a range of issues at federal, state and local level. It was founded over 25 years ago to engage vital issues and defend such institutions as marriage and the traditional family.

[155] Australian Family Association (SA Branch), written submission 2007 page 3.

[156] Licensed reproductive technology clinics are accredited by the Reproductive Technology Accreditation Committee (RTAC) of the Fertility Society of Australia, which requires that all clinics comply with the Ethical Guidelines on Assisted Reproductive Technology in Clinical Practice and Research. See www.nhmrc.gov.au/publications/synopses/e56syn.htm

of assisted reproductive technologies.[157] Nor, under current law, can it prevent couples from travelling interstate or overseas and conceiving a child through surrogacy arrangements and then returning to live in South Australia.[158]

The Inquiry was advised that private self-insemination arrangements or sexual intercourse in connection with surrogacy arrangements present more challenging issues for regulatory reform as it is virtually impossible to monitor the use of self-insemination or sexual intercourse as methods of conception in surrogacy arrangements.[159]

In cases involving traditional surrogacy in private settings—i.e. those cases in which IVF treatment is not required—there are no legal, medical or psychological assessment processes in place to protect all the parties. According to evidence presented to the Inquiry this potentially exposes the participants to risk because of:

- the use of sperm that has not been properly screened for diseases that may be passed on to the surrogate mother or child; and

- the increased possibility of dispute between the parties.[160]

In its written submission, the South Australian Council on Reproductive Technology argued against supporting traditional surrogacy in which the surrogate's ova is used because it has the potential to create more conflict between the surrogate mother and the commissioning parents compared to gestational surrogacy.[161]

The Committee recognises the reality that some individuals seeking surrogacy arrangements will rely on informal methods which lie outside the domain of medical fertility clinics. While gestational surrogacy arrangements require the involvement of qualified medical practitioners and counsellors, traditional surrogacy arrangements require no such speciality supervision. It is concerned that individuals involved in private traditional surrogacy arrangements may not be fully informed about the implications of their decision before proceeding with the arrangement. The Committee is concerned that there is a risk that infectious diseases such as HIV or Hepatitis C may be transmitted to the surrogate due to inadequate screening procedures. Similarly, the surrogate mother may also be at risk of passing on genetically transmittable diseases to the child in the absence of proper medical screening procedures.

ALTRUISTIC OR COMMERCIAL

The Inquiry heard that surrogacy arrangements are either altruistic—in which no money is paid to the surrogate—or commercial—in which the surrogate is financially compensated for her services. The issue of whether surrogacy, if permitted, should be provided without financial compensation to the surrogate mother generated much debate during the Inquiry. According to the Family and Life Catholic Archdiocese

[157] Mr Andrew Stanley, oral evidence, Hansard 2006, page 2.

[158] Mr Andrew Stanley, oral evidence, Hansard 2006, page 2.

[159] Department of Health, written submission 2007 page 6.

[160] Department of Health, written submission 2007 page 6.

[161] The South Australian Reproductive Technology Council, written submission 2007 page 3.

'there is no effective difference between commercial and altruistic surrogacy in so much as a child is produced for the commissioning parents at a financial cost'. In its view, prohibiting financial payment will not prevent the possibility of some payment—whether in cash or in kind—being made.[162]

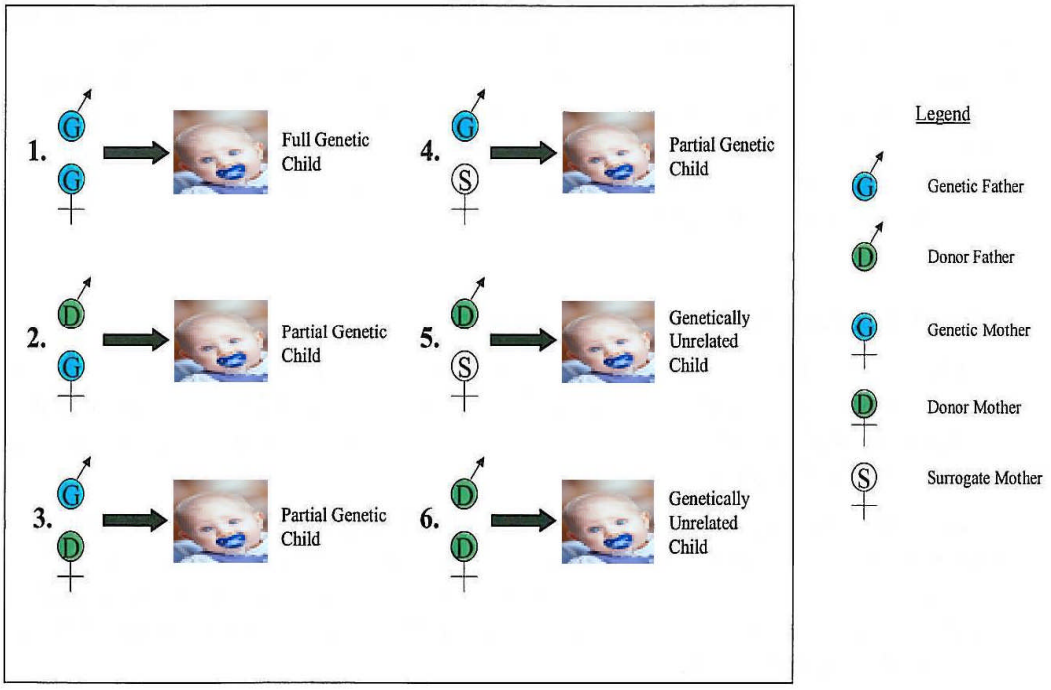
The Statutes Amendment (Surrogacy) Bill sought to address this issue by requiring that other than for expenses connected with the pregnancy no payment should be made.

Given that present South Australian surrogacy legislation means that women who act as surrogate mothers need to travel interstate to undertake the necessary treatment, the South Australian Council on Reproductive Technology considers that such travel expenses are legitimate costs associated with the pregnancy procedure and should be remunerable.[163]

THE USE OF DONOR GENETIC MATERIAL

One of the other issues raised in evidence focussed on whether surrogacy arrangements should allow the use of donor reproductive material. The Committee was told of the various surrogacy combinations that exist and how the use of donor material can add to the complexity of these combinations. Figure 2 presents six possible permutations of surrogacy arrangements.

Figure 2: Possible Permutations of Surrogacy Arrangements[164]



As can be seen in Figure 2, surrogacy arrangement 1 uses the genetic material of both the commissioning mother and father. In arrangement 2, the surrogate woman carries

[162] The Family and Life Catholic Diocese, written submission, 2007 page 10.

[163] SACRT written submission, 2007 page 5.

[164] Graphic adapted from that provided by the Southern Cross Bioethics Institute, in its PowerPoint presentation, 2007.

an embryo created from donor sperm and the commissioning mother's ova. In Arrangement 3, the surrogate woman carries an embryo created from donor egg and the commissioning father's sperm. Arrangement 4 represents a traditional surrogacy arrangement in which the surrogate's egg is used and fertilised by the commissioning father's sperm. At the other end of the spectrum, in surrogacy arrangements 5 and 6, the genetic material of the commissioning couple is not used. As illustrated, it is possible for a child to be conceived without having any genetic relationship to the commissioning couple.

On the issue of whether donor sperm should be used, there was a great divergence of opinion. The Statutes Amendment (Surrogacy) Bill states that at least one of the commissioning parents should provide human reproductive material in relation to creating an embryo for the purposes of a surrogate pregnancy, unless there is a medical reason why it would be preferable not to use human reproductive material provided by the prospective commissioning parents.

In his evidence, Professor Rob Norman argued that donor sperm or donor egg should not be used.[165] According to Professor Norman, 'when you take a controversial area such as surrogacy and then you throw in other parties—donor eggs, donor sperm—it becomes very murky'. He told the Inquiry that although he did not have any philosophical objections to the use of donor reproductive material in the long term he believed that, as a starting point at least, it would be useful to 'get the basics sorted out where you have clearly defined genetic parents and a woman who agrees to carry those embryos, but to have other parties involved through donor gametes would be unwise'.[166]

Conversely, the South Australian Council on Reproductive Technology supported the use of donor reproductive material arguing that 'there appears no reason for such an arrangement to be prohibited'.[167]

Similarly, in her evidence, Dr Christine Kirby argues that the use of donor eggs and/or donor sperm by the commissioning couple should be permitted. While Dr Kirby acknowledges that this 'has the potential to complicate the genetic lineage for the resulting child' she believes that precluding the use of donor reproductive material would be discriminatory and 'would create another very small subgroup of patients who would be denied access'.[168] Furthermore, Dr Kirby argues that the use of donor reproductive material is accepted in all other areas of infertility care and this adds further weight for its use in surrogacy arrangements.[169]

In its recent report, the Victorian Law Reform Commission recommended that a genetic connection between the child and the commissioning parents is preferred but does not need to be absolute.[170]

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[165] Professor Rob Norman, written submission 2007 page 1.

[166] Professor Rob Norman, oral evidence, Hansard 2007 page 13.

[167] South Australian Council on Reproductive Technology, written submission 2007 page 11.

[168] Dr Christine Kirby, Additional written material, 2007 page 1.

[169] Dr Christine Kirby, Additional written material, 2007.

[170] Victorian Law Reform Commission. Final Report, 2007 page 178.

The issue of whether donor reproductive material should be used in gestational surrogacy is complex. Using the reproductive material of the commissioning parents in gestational surrogacy procedures establishes a biological link between them and their child. The Inquiry heard that a genetic link between the commissioning parents and child may minimise the risk of any legal complications.

The Inquiry also heard that imposing a requirement for at least one commissioning parent to provide reproductive material will still provide for a genetic link but will allow greater flexibility in the types of gestational arrangements that could be considered. Should it not be medically possible for either the commissioning mother or father to provide reproductive material for a surrogacy procedure, the South Australian Council on Reproductive Technology suggests that in such situations it 'may be more appropriate for the commissioning couple to adopt a child'.[171] Nevertheless, the Council argues that because unused embryos created through IVF procedures can be donated; there is no reason why they should not be used in gestational surrogacy arrangements.[172]

A CHILD'S RIGHT TO KNOW

The Inquiry heard that South Australia is one of the few jurisdictions that does not have a process in place to allow children born through assisted reproductive technology to know their genetic heritage.[173] Mr Andrew Stanley, Director, Strategic Planning, Policy and Research, Department of Health, confirmed that the lack of knowledge about genetic origin and family history is already an issue for children created through assisted reproductive technology using donor reproductive material.[174]

The Committee considers that a child has a right to know about their genetic history and the circumstances of their birth. In the context of the primacy of the interests of the child the Committee considers that commissioning couples should be encouraged and supported to tell their child about her/his gestational origins and the circumstances of their birth. One commissioning couple who gave evidence to the Inquiry told the Committee that when their son was two years old they began to describe the surrogate mother involved in his birth as his 'tummy mummy'. According to the couple, this was the type of language that their son could readily understand and will serve as the first step towards allowing him to fully understand the circumstances of his birth which they 'do not believe should be hidden from him'.[175]

WHO SHOULD HAVE ACCESS TO SURROGACY?

In conducting its Inquiry, the Committee was also required to examine issues relating to access and equity.

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[171] South Australian Council on Reproductive Technology, written submission, 2007 page 3.

[172] South Australian Council on Reproductive Technology, written submission, 2007.

[173] Mr Andrew Stanley, oral evidence, Hansard 2006, page 3.

[174] Mr Andrew Stanley, oral evidence, Hansard 2006, page 3.

[175] Mrs Kerry Faggotter, oral evidence, Hansard 2007 pages 135 and 139.

Some of the witnesses to the Inquiry who have had a child born through gestational surrogacy arrangements believed that this type of reproductive technology should be restricted to married heterosexual couples. Conversely, the Inquiry heard that there should be no such restriction, particularly given that the State does not interfere in the fertility rights of other people who procreate naturally and do not require access to reproductive technology to have children.

In its written submission the Department of Health referred to the 1996 Pearce decision in which the Full Court of the Supreme Court of South Australia found that the South Australian Reproductive Technology Act 1988 which restricted access to married women was inconsistent with the *Commonwealth Sex Discrimination 1984*.[176] Since then, marital status has not been a criterion on which reproductive medicine units can determine eligibility for treatment. Similarly, in the McBain decision (*McBain v State Of Victoria*) the Federal Court ruled that Victorian state-based legislation prohibiting single women from gaining access to assisted reproductive technology was contrary to the *Commonwealth Sex Discrimination 1984*.[177]

In its evidence, the South Australian Council on Reproductive Technology stated that surrogacy should only be allowed in instances where the commissioning parents need access to assisted reproductive technology because of medical indications. According to the Council, eligibility should also be based on a thorough assessment of the child's best interests. For example, commissioning parents would be ineligible if either partner had been found guilty of a sexual offence involving a child or had a child permanently removed from their guardianship (other than by adoption).[178] Furthermore, the South Australian Council on Reproductive Technology believes that fertility clinic counsellors are best equipped to evaluate prospective clients based on the welfare of the child principle. It also advocates for the establishment of an eligibility assessment panel comprised of appropriate professionals to manage cases where any uncertainty exists.[179]

CONSISTENCY ACROSS AUSTRALIAN JURISDICTIONS

The Inquiry was repeatedly told of the need for consistent surrogacy laws to be introduced across Australian jurisdictions.

The lack of consistency in laws relating to surrogacy across Australian jurisdictions was a recurring theme in the evidence. At its meeting in November 2006, the Standing Committee of Attorneys-General (SCAG)[180] resolved to consider working towards nationally consistent surrogacy laws. As a step towards this process, a discussion paper examining surrogacy arrangements, parental rights and access to donor information has been prepared by a government working group comprised of both State and Commonwealth officers.

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[176] Department of Health, written submission, 2007 page 6.

[177] As discussed in the Victorian Law Reform Commission. Assisted Reproductive Technology & Adoption: Final Report, 2007 page 52.

[178] The South Australian Council on Reproductive Technology, written submission 2007 page 5.

[179] The South Australian Council on Reproductive Technology, written submission 2007 page 5.

[180] SCAG is a national ministerial council comprised of Attorney's General from all Australian jurisdictions and New Zealand responsible for discussing and progressing law-related matters of shared concern.

According to the Australian Medical Association (SA), the lack of legislative consistency on surrogacy across jurisdictions 'makes work within the field exceedingly difficult'.[181] Moreover, the Association stated that it is 'wary of any legislative reform on surrogacy which is not clearly complementary to that found in other jurisdictions'.[182]

According to Mr Andrew Stanley, Director Strategic Planning and Research, Department of Health, having a national system would help to ensure that all potential participants involved in surrogacy arrangements would have access to appropriate counselling to reduce the likelihood of any future legal disputes. In addition, nationally consistent legislation would ensure that those women acting as surrogate mothers would receive appropriate antenatal and postnatal support services.[183]

Mr Stanley told the Committee:

> [It] would be highly desirable if there were nationally consistent legislative and administrative arrangements in relation to [gestational surrogacy] because…. people do cross state borders and go overseas for these arrangements [and] subsequently move to South Australia.[184]

In summarising the need for consistent laws on surrogacy, Mr Andrew Stanley, told the Inquiry it would allow the birth mother to receive appropriate antenatal and postnatal support services, and would clarify eligibility for financial support and access to a range of child and family support services. Moreover, it would ensure that the child's parentage and legal status were clear and would ensure the child could have access to information about their genetic heritage.[185]

Summary

The Committee is concerned about the ambiguity and uncertainty of the current legislation pertaining to surrogacy in South Australia. The Committee considers that the current legal situation in which some Australian jurisdictions allow surrogacy to occur while others prohibit its use is unsustainable. Evidence presented to the Inquiry indicates that in states where surrogacy is not permitted, couples travel to other jurisdictions to undertake the procedure.

It is clear from the evidence presented that as things stand couples have and will continue to travel interstate to pursue gestational surrogacy arrangements. The Committee considers that this situation is untenable and strengthens the case for legislative reform.

The Committee considers that medically-indicated altruistic gestational surrogacy should be permitted in South Australia. Taking into account the criticisms it has heard in relation to the Statutes Amendment (Surrogacy) Bill the Committee is of the firm view

[181] AMA (SA) written submission 2007 page 1.

[182] AMA (SA) written submission 2007 page 1.

[183] Mr Andrew Stanley, oral evidence, Hansard 2006, page 2.

[184] Mr Andrew Stanley, oral evidence, Hansard 2006, page 2.

[185] Mr Andrew Stanley, oral evidence, Hansard 2006, page 2.

that a new Bill should be introduced to address surrogacy. While the Committee does not support commercial surrogacy arrangements it considers that women who act as surrogate mothers should not be out of pocket for expenses incurred as a result of a surrogacy arrangement.

The Committee heard that it is not possible to prevent those individuals who do not require reproductive technology to enter into private surrogate arrangements outside of licensed fertility clinics. However, the Committee does not consider that this is sufficient enough reason to exclude the practice of traditional surrogacy in new legislation. By doing so, the Committee considers it will encourage couples to access proper screening and counselling services.

Given the importance that genetics play in both health and disease, the Committee considers that legislation must ensure that children born of surrogacy arrangements have access to information about their genetic history.

The Committee considers that some constraints, particularly those related to the best interests of the child and medical indications, should be put in place to ensure the most appropriate and responsible outcome. The Committee considers that the best interests of the child must be paramount and proper safeguards must be in place to establish whether those seeking surrogacy arrangements, including the surrogate mother and her family, are capable of dealing with the psychological, social and legal implications of such an arrangement.

The Committee has heard no evidence to suggest that either marital status or sexual preference can predict whether or not an individual will be a good parent. The Committee does not support the restriction of surrogacy based on discriminatory criteria. As noted, both South Australian and Victorian legislation restricting access to assisted reproductive technology to married women has been deemed discriminatory.

Evidence presented to the Inquiry suggests that the number of people seeking surrogacy arrangements will be limited. The Committee considers thorough assessment and counselling must be put in place to address such issues as the motivation and attitudes of the commissioning parents and surrogate mother, the potential for risk and side-effects of the treatment, and the possibility that the commissioning couple or surrogate mother may change their minds. Counselling must also support the child's right to know their genetic origins and circumstances of their birth as well as the role the surrogate mother will have, if any, once the child has been relinquished to the commissioning couple.

Recommendations:

2. That the State Government introduce a bill allowing the use of non-commercial, medically-indicated[186], gestational surrogacy[187] in South Australia. In doing so, the bill should:

[186] Refer to Part One: Medical indications for gestational surrogacy.

[187] I.e. the surrogate's ova are not used.

a) provide for a set of clear standards, processes and principles to underpin the legislation and support the safety and wellbeing of all parties involved in the process;

b) ensure that counselling, consistent with Australian and New Zealand Infertility Counsellors Association (ANZICA) and National Health and Medical Research Council (NHMRC) guidelines, is mandatory for all parties involved in a surrogacy arrangement;

c) clarify the forms of surrogacy covered by the legislation and ensure those responsible for administering it are appropriately trained; and

d) ensure that reproductive technology specialists and appropriate experts are consulted and the views of all major stakeholders and interested parties are taken into consideration.

3. As part of the development of a bill pertaining to gestational surrogacy, the State Government should initiate a review of the *Reproductive Technology (Clinical Practices) Act 1988* and other relevant legislation, to, among other things:

    a) amend current eligibility criteria to allow a fertile woman wishing to act as a gestational surrogate mother access to reproductive technology;

    b) examine whether regulatory reform is needed to enable individuals or couples who require assistance with fertility treatment, but prefer to remain outside the medical system, access to screening procedures for disease and counselling through accredited reproductive units;

    c) ensure that people conceived through donor conception have access to information about their genetic parentage should they request it; and

    d) wherever possible, incorporate all legislation pertaining to gestational surrogacy into one Act.

4. That the State Government ensure that it enacts legislation that is consistent with State and Commonwealth anti-discrimination legislation.

5. That the State Government work closely with the Commonwealth and other States and Territories to ensure consistency of surrogacy laws across all Australian jurisdictions.

6. That the State Government encourage the Commonwealth to review Medicare arrangements to ensure that rebates are available to a fertile woman who is acting as a gestational surrogate mother and is consistent with any amendments made to South Australian legislation pertaining to gestational surrogacy.

CONCLUSION

The Committee received a broad range of evidence from divergent perspectives. While some witnesses argued that gestational surrogacy ought to be prohibited, others argued that it should be permitted.

The rapid pace at which some medical advances occur means that some of the more challenging social, legal and ethical questions about their application and suitability will continue to cause significant contention. From the evidence gathered during this Inquiry, there is no doubt that the issue of gestational surrogacy is one in which public opinion is, and will continue to be, polarised.

The Inquiry heard that there are significant difficulties in ascertaining precise information on the number of people seeking surrogacy because this information is not collected in any formal or systematic way. This makes it impossible to know the total number of cases. Nevertheless, from the evidence presented to the Inquiry, it appears that the number is low. The Committee considers therefore, that it is important that this issue is kept in perspective to ensure that any debate around its practice is not out of proportion with its incidence.

While much of the research brought to the Committee's attention shows little to no deleterious effects, the Committee acknowledges the need for further research to validate the findings, gain a long-term picture and also seek to improve the practice of surrogacy. Equally, the Committee is mindful that given the emergence and rapid expansion of reproductive technologies any legislation pertaining to this area must continue to evolve to ensure it remains relevant.

At present, South Australian assisted reproductive technology legislation considers a surrogate mother and her husband to be the legal parents of the child. While this may have been appropriate at the time that this legislation was enacted to protect donors from being recognised as the legal parents of a child born from their donated reproductive material, in the context of gestational surrogacy the current law is no longer sufficient. The Committee considers that legislative reform should be implemented, as a matter of urgency, to provide children born of surrogacy arrangements the full protection of the law. In putting forward its recommendations the Committee is mindful that it does not needlessly or inadvertently pose further legislative problems. For example, in recognising the need for changes to be made to birth certificates for children born of surrogacy arrangements, the Committee deliberately chose not to be prescriptive about how these changes ought to look but rather state the need for any amendments to appropriately reflect the genetic and gestational origins of the child.

Noting both the Pearce and McBain cases in which South Australian and Victorian legislation restricting assisted reproductive technology to married couples was rendered invalid, the Committee does not support the restriction of gestational surrogacy based on discriminatory criteria. The Committee considers that the best interests of the child must be paramount and that an objective capacity to be a good parent as well as a commitment to love and nurture a child should override other criteria. It has called for proper

safeguards to be put in place and would like to see consistency in surrogacy legislation across all Australian jurisdictions.

The Committee is well aware that the success or otherwise of gestational surrogacy arrangements will largely depend on the thoroughness of the social, medical and psychological processes undertaken as well as trust, clear information and mutual respect and understanding from all parties involved in the process.

The Committee recognises that any type of legislative reform around gestational surrogacy will invariably present numerous challenges not least because it involves finding common ground against a number of competing and at times conflicting interests. These interests include the welfare and best interests of the child, and the needs of both the commissioning parents and the surrogate mother.

Notwithstanding the challenges outlined, the Committee considers that the Government has a responsibility to ensure adequate laws are put in place to provide clear parameters for all parties involved in surrogacy procedures.

Hon Ian Hunter MLC
Presiding Member

APPENDICES

APPENDIX 1: VICTORIAN LAW REFORM COMMISSION: RECOMMENDATIONS RELATING TO SURROGACY

ELIGIBILITY FOR SURROGACY

ELIGIBILITY

99. If a person or couple wishes to commission a woman to carry a child on their behalf, a doctor must be satisfied that:
    - they are in the circumstances in which they find themselves, unlikely to become pregnant, be able to carry a pregnancy or give birth or
    - the commissioning woman is likely to place her life or health, or that of the baby, at risk if she becomes pregnant, carries a pregnancy or gives birth.

100. If, before a person or couple commission a woman to carry a child on their behalf, a doctor or counsellor believes that any child that might be born as a result of the arrangement may be at risk of abuse or neglect, he or she should seek advice about whether or not to proceed with treatment from the clinical ethics committee operating within the licensed clinic.

101. Where a clinical ethics committee decides that a person or couple should not be able to commission a surrogacy, or the surrogate mother and her partner (if any) should not be able to participate in a surrogacy arrangement:

    (a) the person concerned may apply to the Infertility Treatment Authority review panel to have the decision reviewed
    (b) a clinic must not take any steps in relation to the surrogacy unless the committee's decision is reviewed by the Infertility Treatment Authority review panel and the panel decides that there is no barrier to treatment or that, subject to compliance with certain conditions, there is no barrier to treatment.

102. A licensed clinic should not assist in a surrogacy arrangement without the approval of the Infertility Treatment Authority review panel where the person or couple commissioning the surrogacy, or the surrogate mother and/or her partner (if any):
    (a) has had charges proven against them for a sexual offence as defined in clause 1 of Schedule 2 to the ***Sentencing Act*** 1991 or
    (b) has been convicted of a violent offence as defined in clause 2, Schedule 1 to the ***Sentencing Act 1991*** or
    (c) has had a child protection order (but not an interim order) made in respect of one or more children in their care under a child welfare law of Victoria, any equivalent law of the Commonwealth or any place outside Victoria (whether or not in Australia).

103. A person or couple should be able to commission a surrogacy arrangement regardless of relationship or marital status or sexual orientation.

COUNSELLING AND LEGAL ADVICE

104. Before entering into a surrogacy arrangement the person or couple commissioning the surrogacy and the woman intending to act as the surrogate mother and her partner (if any) should receive:

    - counselling about the social and psychological implications of entering into the arrangement
    - advice and information about the legal consequences of entering into a surrogacy arrangement.

105. The regulations should specify the following matters to be addressed during counselling:
- the implications of surrogacy for relationships between members of a commissioning couple and between the surrogate mother and any partner
- the implications of surrogacy for the relationship between commissioning parent(s) and the surrogate mother
- the implications of surrogacy for any existing children of the surrogate mother and/or the commissioning parent(s)
- the possibility of medical complications
- the possibility that any of the parties may change their mind
- refusal of the surrogate mother to relinquish the child refusal of the commissioning parent(s) to accept the child
- the motivation and attitudes of the surrogate mother
- attitudes of all parties towards the conduct of the pregnancy
- attitudes of the commissioning parent(s) to the possibility that the child may have a disability
- attitudes of all parties to investigation of a genetic abnormality, the possibility of termination of pregnancy or other complications
- a process for the resolution of disputes
- the commissioning parent(s)' intentions for custody of the child, if one of them should die
- possible grief reactions on the part of the surrogate mother and/or her partner
- ways of telling the child about the surrogacy
- attitudes to an ongoing relationship between the surrogate mother and the child
- access to support networks.

106. The Infertility Treatment Authority should develop guidelines about the application of these regulations, in consultation with clinics, and should evaluate and monitor their effectiveness over time.

107. If the counsellor considers it appropriate, independent psychological testing (in accordance with accepted professional standards) or a home study should be permitted.

APPROVAL

108. In each surrogacy arrangement, the clinical ethics committee at the licensed clinic where treatment is proposed to be carried out must decide whether treatment can proceed.

109. In making a decision about whether the surrogacy can proceed, the clinical ethics committee must be satisfied that the parties:
- are aware of and understand the personal and legal consequences of the surrogacy arrangement
- are prepared for the consequences of the arrangement if it does not proceed in accordance with the parties' original intentions
- are able to make informed decisions about proceeding with the arrangement.

110. The clinical ethics committee's decision should be based on a report from a counsellor and an acknowledgement from the parties that they have received all the required and relevant information and advice.

111. A decision made by the clinical ethics committee about whether the surrogacy can proceed should be reviewable by a review panel.

SURROGATE MOTHERS

112. A woman intending to act as a surrogate mother should not be subject to the requirement that she is unlikely to become pregnant other than by a treatment procedure.

113. Apart from the above recommendation, a woman intending to act as a surrogate mother should be subject to the same criteria that apply to all women undergoing assisted reproductive technology services.

114. A woman intending to act as a surrogate mother should be at least 25 years old.

115. In assessing whether a woman is able to give informed consent to act as a surrogate mother, consideration should be given to whether she has already experienced pregnancy and childbirth, however this should not be a prerequisite.

GENETIC CONNECTION

116. Partial surrogacy should be permitted. That is, it should be possible for the surrogate mother's egg to be used in the conception of the child.

117. If the surrogate mother's egg is used in the conception of the child, counselling must address the implications of this for:
- the relinquishment of the child
- the relationship between the surrogate mother and the child once it is born.

The clinical ethics committee should confirm these matters have been the subject of counselling.

118. A genetic connection between the child and the commissioning parent(s) is to be preferred, but people should not be excluded from commissioning a surrogacy arrangement if they are unable to contribute their own gametes.

SURROGACY EXPENSES

119. A woman must not receive any material benefit or advantage as the result of an arrangement to act as a surrogate mother.

120. Consistent with the principle that a woman should not receive any material benefit or advantage for acting as a surrogate mother, reimbursement of prescribed payments actually incurred should be permitted.

121. Prescribed payments should be limited to:

- any reasonable medical expenses associated with the pregnancy which are not otherwise provided for through Medicare, private health insurance or any other benefit
- in the absence of any entitlement to paid maternity or other leave, lost earnings up to a maximum period of two months
- any additional lost earnings or medical expenses incurred as a result of special circumstances arising during pregnancy or immediately after birth, for example, where the surrogate mother has been advised by her doctor that she should stop working earlier than anticipated
- any reasonable legal expenses associated with the surrogacy arrangement.

122. Surrogacy agreements should continue to be void. However, where parties to a surrogacy arrangement have agreed to the reimbursement of prescribed payments, that part of the agreement should be enforceable.

SURROGACY AND PARENTAGE

LEGAL PROCESS

123. The ***Status of Children Act 1974*** should be amended to empower the County Court to make substitute parentage orders in favour of a person or couple who have commissioned a surrogacy arrangement (the applicant(s)), subject to the conditions that:
- the court is satisfied that the order would be in the best interests of the child
- the application was made no earlier than 28 days and no later than six months after the birth of the child
- at the time of the application, the child's home is with the applicant(s)
- the applicants have met the eligibility criteria for entering into a surrogacy arrangement
- the surrogate mother and/or her partner (if she has one) has not received any material advantage from the arrangement save for reimbursement of expenses permitted by the legislation
- the surrogate mother freely consents to the making of the order.

124. In deciding whether to make a substitute parentage order, the court should also take into consideration whether the surrogate's partner (if she has one) consents to the making of the order.

125. If the application is made by a person whose partner consented to the arrangement before the child was conceived but has not consented to the application for a substitute parentage order, there should be a presumption that that person will also become a legal parent of the child.

126. A substitute parentage order should have the same status and effect as an adoption order made under the ***Adoption Act 1984.***

COMPLETED SURROGACY ARRANGEMENTS

127. The court should have discretion to make substitute parentage orders in favour of people who have already had children through surrogacy. In exercising its discretion, the court should be satisfied that:
- the order would be in the best interests of the child
- the child's home is with the applicants
- the applicants have to the extent possible met the eligibility criteria for entering into a surrogacy arrangement
- the surrogate mother and/or her partner (if she has one) has not received any material advantage from the arrangement, save for reimbursement of expenses permitted by the legislation
- the surrogate mother freely consents to the making of the order.

BIRTH CERTIFICATES

128. Once a substitute parentage order has been made, the birth register should be amended to record the commissioning parent(s) as the parents of the child and a new birth certificate should be issued.

PROVIDING INFORMATION

129. The central register maintained under the Infertility Treatment Act should be expanded to allow identifying information about a surrogate mother and commissioning parent(s) to be registered and released to the child in the same way as information about donors is registered and released.

130. The commissioning parent(s) and the surrogate mother should be counselled about the importance of informing children of their genetic origins and the circumstances of their birth. They should be provided with ongoing counselling and support to enable them to inform children about their origins.

APPENDIX 2: INTERPLAY BETWEEN COMMONWEALTH & STATE LEGISLATION

Maternity Payment *A New Tax System (Family Assistance) Act 1999* *A New Tax System (Family Assistance) (Administration) Act 1999*	Any decision about eligibility for this payment is determined under the family assistance law by Centrelink. Eligibility for this payment requires actual care of the child. The Maternity payment can be apportioned between two eligible parties. Commissioning parents who assume actual care of the child immediately after its birth will have sole claim to the payment. A birth mother may be eligible for all or a percentage of the maternity payment if she has actual care of the child for a period after the birth.
Maternity Immunisation Allowance *A New Tax System (Family Assistance) Act 1999* *A New Tax System (Family Assistance) (Administration) Act 1999*	Like the Family Tax Benefit, Child Care Benefit and Maternity Payment, the Maternity Immunisation Allowance is assessed under the A New Tax System (Family Assistance) Act. Claims are made under the A New Tax System (Family Assistance) (Administration) Act.
Parenting Payment *Social Security Act 1991*	Parenting payment is available to principal carers including parents, grandparents or foster carers. Commissioning parents may not be entitled unless they are legally recognised as parents of the child.
Tax exemption for Superannuation Death Benefits *A New Tax System (Family Assistance) Act 1999* *Superannuation Act 1976*	A child in a dependent relationship to a commissioning parent may be eligible for a tax exemption on superannuation death benefit paid in respect of the death of a commissioning parent.
Entry into Australia following an international surrogacy arrangement	Citizenship by descent is only available where there is a direct biological link between an Australian citizen parent and the surrogate child. The laws of the country where a surrogacy has been commissioned denotes what is filled in on a birth certificate. In cases where a decision-maker suspects a child has been born of surrogacy arrangements, it is possible to request the child and parent show evidence of that biological link. There is currently no option under migration provisions which cater for surrogacy arrangements. At present, surrogate arrangements are considered under the expatriate adoption provisions, which require (among other things) that the adoptive parent(s) were residing overseas for 12 months prior to the adoption, for reasons other than to adopt a child.

APPENDIX 3: PARENTAGE PROVISIONS

Parentage provisions where ART procedures used

State/Territory Legislation	Parentage provisions
ACT *Parentage Act 2004*	11(2), (3) – Any woman who gives birth is the mother and ovum donor is not the mother 11(3) – Any consenting domestic partner is a parent 11(4) – A sperm donor who is not a consenting domestic partner is not the father
New South Wales *Status of Children Act 1996*	14(1) Married woman who gives birth and her consenting husband are both parents 14(2) Regardless of marital status of the woman who gives birth a sperm donor who is not the husband is not the father 14(3) Regardless of the marital status of the woman who gives birth an ova donor is not the mother Married includes heterosexual defacto relationship
Northern Territory *Status of Children Act*	5C The woman who gives birth is the mother for all purposes 5D(1) Married woman who gives birth and husband consented to procedure – husband is father 5E Ovum donor is not the mother 5F Semen donor where woman is not married or where husband did not consent to procedure has no rights and incurs no liability in respect of the child unless at any time he become the husband of the mother Married includes heterosexual defacto relationship
Queensland *Status of Children Act* 1978	15(2)&16(2)&17(2) Married woman who gives birth and husband consented to procedure – husband is the father, sperm donor is not the father 17(2) Married woman who gives birth and husband consented to procedure – woman is the mother, ovum donor is not the mother, 18(1) woman who is not married, or does not have consent of husband – sperm donor has no rights or liabilities unless at any time he becomes the husband of the mother Married includes heterosexual defacto relationship
South Australia *Family Relationships Act 1975*	10c The woman who gives birth is the mother 10d If husband of married woman consented to procedure resulting in his wife giving birth to a child - husband is the father (but birth father is defined differently under the *Adoption Act 1988 (SA)*) 10e In all cases - ovum donor is not the mother, sperm donor is not the father (unless he is the consenting husband of the birth mother) Married includes heterosexual defacto relationship
Tasmania *Status of Children Act 1974*	10C(1) Married woman or woman in a significant relationship with a man who gives birth and husband/partner consented to procedure - husband to be treated as the father 10C(2) Any woman – sperm donor (who is not the husband/partner) to be treated as not being the father 10C(3) Married woman or woman in a significant relationship who gives birth and husband/partner consented to procedure – birth mother to be treated as the mother 10C(4) Any woman – ovum donor to be treated as not being the mother
Victoria *Status of Children Act 1974*	10D(2) Married woman who gives birth and husband consents to procedure – husband is the father, sperm donor is not the father 10E(2) Married woman who gives birth and husband consented to procedure – woman is the mother, ovum donor is not the mother, 10F artificial insemination of woman who is not married, or does not have consent of husband – sperm donor has no rights or liabilities unless at any time he becomes the husband of the mother Married includes heterosexual defacto relationship
Western Australia *Artificial Conception Act 1985*	5 Any woman who gives birth is the mother 6(1) Married woman who gives birth and husband consents – husband is the father 6A(1) Woman who is a same-sex relationship and partner consents – partner is a parent 7(1), (2) Donor of ovum is not mother 7(2) Donor of sperm other than consenting husband is not the father Married includes heterosexual defacto relationship

Importation of human tissue (sperm, eggs or embryo) for use in surrogacy *Quarantine Proclamation 1998, Section 27 (table 11, Item 15)*	Human semen, embryos and ova intended only for human therapeutic use, or use for artificial insemination or in an in-vitro fertilisation program do not require an import permit.
Availability of Medicare benefits for IVF treatment	Further consultation is required.
Registration of child for Medicare benefits	Further consultation is required.
Access to and protection for personal information *Privacy Act 1988* *Freedom of Information Act 1982*	There are issues relating to the right of an individual born as a result of a surrogacy arrangement to access information about their parentage. The harmonisation of laws regulating surrogacy would require consideration of the balance between the need to protect personal information of individuals and the right of persons born as a result of ART to know their identity.

APPENDIX 4: STATUTES AMENDMENT (SURROGACY) BILL

Legislative Council—No 31
As introduced and read a first time, 21 June 2006

South Australia

Statutes Amendment (Surrogacy) Bill 2006

A BILL FOR

An Act to amend the *Family Relationships Act 1975* and the *Reproductive Technology (Clinical Practices) Act 1988*.

Contents

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Statutes Amendment (Surrogacy) Act 2006*.

2—Commencement

This Act comes into operation 3 months after assent.

3—Amendment provisions

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

Part 2—Amendment of *Family Relationships Act 1975*

4—Amendment of section 5—Interpretation

Section 5, after the definition of ***father*** insert:

fertilisation procedure means—

(a) artificial insemination; or

(b) the procedure of fertilising a human ovum outside the body and transferring the fertilised ovum into the body; or

(c) the procedure of transferring an unfertilised human ovum into the body for the purposes of fertilisation within the body;

5—Amendment of section 10—Saving provision

Section 10—after paragraph (c) insert:

or

(d) the consequences at law or in equity of an order under Part 2B Division 3 of this Act.

6—Amendment of section 10A—Interpretation

Section 10A(1), definition of ***fertilization procedure***—delete the definition

7—Amendment of section 10B—Application of Part

Section 10B—after subsection (3) insert:

(4) Nothing in this Part prevents a person becoming the mother or father of a child by virtue of the operation of any other law of the State (including by virtue of an order under section 10HB).

8—Insertion of heading

Before section 10F insert:

Division 1—Interpretation

9—Amendment of section 10F—Interpretation

Section 10F—after the definition of ***procuration contract*** insert:

recognised surrogacy agreement—see section 10HA;

10—Insertion of heading

After section 10F insert:

Division 2—Certain contracts and activities relating to surrogacy illegal

11—Amendment of section 10G—Illegality of surrogacy and procuration contracts

Section 10G—after subsection (3) insert:

(4) This section does not apply in relation to a recognised surrogacy agreement.

12—Insertion of new Division

After section 10H insert:

Division 3—Lawful surrogacy under recognised agreements

10HA—Recognised surrogacy agreements

(1) In this section, unless the contrary intention appears—

human reproductive material means—

(a) human semen; or

(b) a human ovum;

husband has the same meaning as under Part 2A;

lawyer means a person who is admitted as a barrister and solicitor of the Supreme Court and holds a current practising certificate;

lawyer's certificate means a certificate signed by a lawyer, and endorsed on an agreement, certifying that—

(a) the lawyer explained the legal implications of the agreement to a party to the agreement named in the certificate; and

(b) the party gave the lawyer apparently credible assurances that the party was not acting under coercion or undue influence; and

(c) the party signed the agreement in the lawyer's presence;

marriage relationship means the relationship between 2 persons cohabitating as husband and wife or *de facto* husband and wife;

married woman has the same meaning as under Part 2A;

medical practitioner means a legally qualified medical practitioner;

Minister means the Minister for Families and Communities;

prescribed relative means a mother, sister, step-sister or first-cousin.

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

(a) under which a woman (the ***surrogate mother***) agrees—

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

(ii) to surrender custody of, or rights in relation to, a child born as a result of the pregnancy to 2 other persons (the ***commissioning parents***); and

(b) in relation to which the following conditions are satisfied:

(i) the parties to the agreement are—

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

(B) the commissioning parents,

and no other person;

(ii) all parties to the agreement are at least 18 years old;

(iii) the surrogate mother has already given birth to a child (being a child who was alive at birth);

(iv) the commissioning parents have cohabited continuously together in a marriage relationship for the period of 5 years immediately preceding the date of the agreement;

(v) the commissioning parents are domiciled in this State;

(vi) the surrogate mother is a prescribed relative of at least 1 of the commissioning parents, or has a certificate issued under subsection (3) in relation to the proposal that she act as a surrogate mother for the commissioning parents;

(vii) the surrogate mother and both commissioning parents each have a certificate issued by a counselling service that complies with the requirements of subsection (4) (being, as between the surrogate mother on the one hand and the commissioning parents on the other hand, different counselling services);

(viii) the agreement states that the parties intend—

(A) that the pregnancy is to be achieved by the use of a fertilisation procedure carried out in this State; and

(B) that at least 1 of the commissioning parents will provide human reproductive material with respect to creating an embryo for the purposes of the pregnancy, unless the commissioning parents have a certificate issued under subsection (5);

(ix) the agreement states that no valuable consideration is payable under, or in respect of, the agreement, other than for expenses connected with—

(A) a pregnancy (including any attempt to become pregnant) that is the subject of the agreement; or

(B) the birth or care of a child born as a result of that pregnancy; or

(C) counselling or medical services provided in connection with the agreement (including after the birth of a child); or

(D) legal services provided in connection with the agreement (including after the birth of a child); or

(E) any other matter prescribed by the regulations for the purposes of this provision;

(x) the agreement states that the parties intend that the commissioning parents will apply for an order under section 10HB after the child is born.

(3) For the purposes of subsection (2)(b)(vi), the Minister may, on application by a person who is contemplating entering into an agreement that is intended to be a recognised surrogacy agreement under this section, issue a certificate under this subsection that will enable the person to act as a surrogate mother under such an agreement even though she is not a prescribed relative of the persons who would be the commissioning parents under that agreement if the Minister is satisfied—

(a) that the person applying for the certificate has a relationship with the prospective commissioning parents that appears to indicate that the surrogacy arrangements under such an agreement have a reasonable prospect of success; and

(b) that, in the circumstances as the Minister knows them, there is no reason that should prevent the Minister from issuing the certificate.

(4) For the purposes of subsection (2)(b)(vii), a certificate complies with the requirements of this subsection if—

(a) the certificate is issued by a counselling service—

(i) that is independent of a person who holds a licence under Part 3 of the *Reproductive Technology (Clinical Practices) Act 1988*; and

(ii) that satisfies any requirements prescribed by the regulations for the purposes of this provision; and

(b) the certificate states that the person to whom it relates has received counselling about personal and psychological issues that may arise in connection with a surrogacy arrangement.

(5) For the purposes of subsection (2)(b)(viii)(B), a certificate issued under this subsection—

(a) must be issued by a medical practitioner; and

(b) must relate to the persons who are seeking to be commissioning parents under the relevant agreement; and

(c) must state that, in the opinion of the medical practitioner—

(i) both prospective commissioning parents appear to be infertile; or

(ii) there is a medical reason why it would be preferable not to use human reproductive material provided by the prospective commissioning parents to create an embryo for the purposes of achieving a pregnancy.

(6) In addition, in order for an agreement to be taken to be a recognised surrogacy agreement—

(a) the relevant terms of the agreement (as envisaged by subsection (1)) must be set out in a written agreement; and

(b) the written agreement must be signed by each party to the agreement; and

(c) the signatures of each party must be attested by a lawyer's certificate and the certificate with respect to the surrogate mother (and, if relevant, her husband) must be given by a lawyer who is independent of a lawyer who gives a certificate with respect to either or both of the commissioning parents.

(7) An agreement under this section must comply with any other requirement prescribed by the regulations.

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

(1) In this section—

birth parent, of a child, means—

(a) the woman who gave birth to the child; or

(b) a man (if any) who is the father of the child under another Part of this Act;

birth sibling, of a child, means a brother or sister of the child who is born as a result of the same pregnancy as the child;

commissioning parents means the commissioning parents under a recognised surrogacy agreement;

Court means the *Youth Court of South Australia* constituted of a Judge.

(2) This section applies to a child if—

(a) the child was born under the terms of a recognised surrogacy agreement; and

(b) the commissioning parents under the surrogacy agreement are domiciled in this State; and

(c) the child was conceived as a result of a fertilisation procedure carried out in this State.

(3) An application may be made to the Court for an order under this section in relation to a child.

(4) The application may be made by either or both of the commissioning parents.

(5) The application may only be made when the child is between the ages of 6 weeks and 6 months.

(6) In deciding an application under this section, the welfare of the child must be regarded as the paramount consideration.

(7) In addition to being satisfied as to the matters referred to above (including as to the validity of the relevant agreement as a recognised surrogacy agreement), the Court must not make an order under this section unless it is satisfied that both birth parents freely, and with a full understanding of what is involved, agree to the making of the order.

(8) However, the Court may dispense with the requirement under subsection (7) in relation to a birth parent if satisfied—

(a) that the birth parent is dead or incapacitated; or

(b) that the applicants cannot contact the birth parent after making reasonable inquiries.

(9) In deciding whether to make an order under this section, the Court must also take into account the following, if relevant:

(a) whether the child's home is, and was at the time of the application, with both commissioning parents;

(b) if only 1 of the commissioning parents has applied for the order, and the other commissioning parent is alive at the time of the application, whether—

(i) the other commissioning parent freely, and with a full understanding of what is involved, agrees to the making of an order in favour of the applicant commissioning parent; or

(ii) the applicant commissioning parent cannot after making reasonable inquiries contact the other commissioning parent to obtain his or her agreement under subparagraph (i);

(c) whether valuable consideration (other than for expenses of the kind allowed under section 10HA(2)(b)(ix)) has been given or received by either of the commissioning parents, or either of the child's birth parents, for or in consideration of—

(i) the making of the order; or

(ii) the handing over of the child to the commissioning parents; or

(iii) the making of any arrangements with a view to the making of the order.

(10) The Court must also decide whether, in the opinion of the Court, the commissioning parents are fit and proper persons to assume the role of parents of the child.

(11) The Court may take into account anything else it considers relevant.

(12) The Court may, before deciding whether to make an order under this section, require any party to the proceedings to provide an assessment from a counselling service (obtained at the expense of the commissioning parents) in relation to the matter.

(13) If the Court makes an order under this section, the order will have the effect of an adoption order made by the Court under the *Adoption Act 1988*—

(a) so that, for the purposes of any other Act or law, the child has been adopted by a commissioning parent or commissioning parents (according to the terms of the order); and

(b) so that the child becomes, in contemplation of law, the child of a commissioning parent or commissioning parents (according to the terms of the order) and ceases to be the child of any birth parents; and

(c) so that the rights of the child with respect to a commissioning parent or commissioning parents (according to the terms of the order) will be the same as an adopted child.

(14) Without limiting the operation of subsection (13) but subject to a succeeding subsection, any provision of the *Adoption Act 1988* prescribed by the regulations will apply in relation to the child, the commissioning parents or the order, with such modifications or exclusions as the regulations may provide.

(15) In the making of an order under this section in relation to a child—

(a) the child has as his or her surname—

(i) if the order is made in favour of both commissioning parents and they are both known by the same surname—that surname; or

(ii) in any other case—a name the Court, on the application of either or both of the commissioning parents, approves in the order; and

(b) the child has as his or her given name or names a name or names the Court, on the application of either or both of the commissioning parents, approves in the order.

(16) Subsection (15) does not prevent a name of a child being later changed in accordance with another law of the State.

(17) Subject to subsection (18), the Registrar of Births, Deaths and Marriages must, on receipt of notice of the making an order under this section in relation to a child—

(a) endorse any entry made in the register of births relating to the child with a note recording the fact of the order; and

(b) add a fresh entry of the name or names of the commissioning parent or parents who are in contemplation of law the parents of the child under the terms of the order.

(18) If a birth parent applies to the Court to be removed from the register of births as the parent of a child who is within the terms of an order under this section—

(a) the Court must make an order to give effect to the application; and

(b) the Registrar of Births, Deaths and Marriages must, on receipt of the relevant order, alter the register of births to give effect to the order.

(19) Subject to the operation of subsections (17) and (18), access to any information contained in the register of births in relation to a child who is within the terms of an order under this section will be restricted or regulated in the same way as information relating to a child who has been adopted under the *Adoption Act 1988*.

(20) Except as authorised by the Court, the records of proceedings for an order under this section will not be open to inspection.

(21) If a child in relation to whom an application for an order has been made under this section has a living birth sibling—

(a) the application will be taken to relate to the child and the birth sibling; and

(b) the Court may only make an order about the child if it makes a comparable order (in all respects apart from any given name or names) about the birth sibling; and

(c) this section will apply to the birth sibling in the same way as it applies to the child.

10HC—Power of court to cure irregularities

(1) In this section—

Court means the *Youth Court of South Australia* constituted of a Judge.

(2) If the Court, on application under this section, is satisfied—

(a) that—

(i) there has been a failure to comply with a requirement under this Division with respect to any matter associated with an agreement intended to be a recognised surrogacy agreement; or

(ii) there is a matter arising under this Division that a person cannot reasonably satisfy or achieve; and

(b) that in the circumstances of the particular case it would be a just and appropriate course of action for the Court to exercise the powers conferred by this section,

the Court may excuse the failure or excuse compliance with the matter by ordering that, subject to such conditions as may be stipulated by the Court, the requirement or the matter (as the case requires) be dispensed with (to the necessary extent).

(3) An order under subsection (2) may have effect for the purposes of any Act or law that may be connected to the status or operation of recognised surrogacy agreements or to the operation of this Division.

10HD—Ministerial power of delegation

(1) The Minister may delegate to a person (including a person for the time being holding or acting in a specified office or position) a function or power of the Minister under this Division.

(2) A delegation under this section—

(a) must be by instrument in writing; and

(b) may be absolute or conditional; and

(c) does not derogate from the ability of the Minister to act in any matter; and

(d) is revocable at will.

13—Insertion of heading

Before section 10I insert:

Division 4—Interaction with other laws

14—Amendment of section 13—Confidentiality of proceedings

(1) Section 13(1)—delete "the Court" and substitute:

a court

(2) Section 13(2)—delete "the Court" and substitute:

a court

15—Amendment of section 14—Claim under this Act may be brought in the course of other proceedings

(1) Section 14(1)(a)—delete "the Court" and substitute:

a court

(2) Section 14(2)—delete "the Court" and substitute:

a court

Part 3—Amendment of *Reproductive Technology (Clinical Practices) Act 1988*

16—Amendment of section 3—Interpretation

Section 3—after the definition of ***in vitro fertilisation procedure*** insert:

recognised surrogacy agreement means a recognised surrogacy agreement under section 10HA of the *Family Relationships Act 1975*;

17—Amendment of section 10—Functions of Council

Section 10—after subsection (5) insert:

(6) The code of ethical practice should (insofar as may be relevant) deal with the issue of the use of artificial fertilisation procedures to give effect to recognised surrogacy agreements on its merits and without drawing unnecessary or unreasonable distinctions between circumstances that arise under such agreements and circumstances that arise in other cases that are within the ambit of the operation of this Act.

18—Section 13—Licence required for artificial fertilisation procedures

Section 13(3)(b)—after subparagraph (ii) insert:

, or except for the purposes of a recognised surrogacy agreement

Schedule 1—Transitional provision

1—Transitional provision

Section 20(4) of the *Reproductive Technology (Clinical Practices) Act 1988* does not apply with respect to a regulation made under that Act on or before the commencement of this Act that is expressed to come into operation on the day on which this Act comes into operation.

GLOSSARY

Unless otherwise noted, the following definitions are taken from written information provided by the Department of Health.

Commercial surrogacy
Commercial surrogacy involves benefit to the surrogate mother beyond reasonable expenses.

Commissioning parent(s)
The person or persons who arrange for a woman to carry a child and to whom the child is to be transferred at or shortly after the child's birth.

Gametes
Male sperm and/or female eggs (ova)

Gestational surrogacy
Gestational surrogacy describes the form of surrogacy in which the surrogate mother is not the source of the ova or embryo. In gestational surrogacy, the reproductive material used for the surrogate pregnancy is from the commissioning parent(s) and/or from a donor third party. The surrogate mother is not genetically related to the child.

Infertility
Diminished or absent ability to produce offspring; in either the male or the female, not as irreversible as sterility.[188]

IVF
a process whereby (usually multiple) ova are placed in a medium to which sperm are added for fertilization, the zygote thus produced then being introduced into the uterus and allowed to develop to term.[189]

Surrogate mother
The woman who gives birth to a child as part of a surrogacy arrangement.

Surrogate parents
The woman who gives birth to a child as part of a surrogacy arrangement and her consenting husband or de facto partner.

Traditional (Reproductive) surrogacy
Reproductive surrogacy describes the form of surrogacy in which the surrogate mother provides reproductive material for the surrogate child. The surrogate mother may artificially inseminate herself with semen from the commissioning father, or from a sperm donor, or the child may be conceived naturally by the surrogate mother and a male partner. In reproductive surrogacy, the surrogate mother is also the genetic mother.

[188] Stedman's Medical Dictionary, viewed online 9 July 2007 at www.stedmans.com/

[189] Stedman's Medical Dictionary.

LIST OF WITNESSES

The following individuals and organisations provided oral submissions to the inquiry. All oral submissions were heard during 2007. Some evidence was heard *in camera*. The names of these witnesses are not listed.

5 March Department of Health
Mr Andrew Stanley, Director, Strategic Planning, Policy and Research
Ms Helen Van Eyk, Manager, Research, Policy and Ethics,

20 March Research Centre for Reproductive Health, University of Adelaide
Professor Rob Norman, Director, Research Centre for Reproductive Health

2 April Adoption and Family Information Service, Department for Families and Communities
Ms Cynthia Beare, Manager
Ms Jeanie Lucas, Senior Project Officer

Office of Consumer and Business Affairs
Ms Val Edyvean, Registrar of Births, Deaths and Marriages

Flinders Reproductive Medicine
Dr Enzo Lombardi, Acting Director

16 April Repromed
Dr Christine Kirby, Clinical Director

Southern Cross Bioethics Institute
Dr Gregory Pike, Director
Mr Matthew Tieu, Research Officer

23 April South Australian Council on Reproductive Technology
Dr Peter Woolcock, Chairman

Ms Julie Redman, Legal Practitioner

30 April Mrs Kerry Faggoter
Mr Clive Faggoter

Mrs Robyn Shakes
Mr Chris Shakes

Mr Allan Robins

4 June	Ms Emma Starfield
	Let's Get Equal Campaign Assoc Prof Tony Liddicoat Dr Tim Curnow
18 June	Honourable JSL Dawkins MLC
	Catholic Archdiocese of Adelaide Mr Paul Russell, Senior Officer, the Office of Family & Life
9 July	Australia New Zealand Infertility Counsellors Association Ms Anne Graham, President Ms Julie Potts, Secretary

LIST OF SUBMISSIONS

The following individuals and organisations provided a written submission to the inquiry.

Individuals

Ms Amasha Bailey

Mr Daniel Balacco

Ms Janice Chambers

Mrs Kerry Faggoter

Ms Kirsty Fairbank & Mr Christopher Geue

Ms Miranda Montrone

Ms Julie Redman

One additional submission was received but was granted anonymity at the request of the writer.

Organisations

Australia's National Infertility Network

Australian Family Association (SA Branch)

Australian Medical Association

Catholic Archdiocese of Adelaide

Festival of Light

Let's Get Equal Campaign

Lutheran Church of Australia

Repromed

SA Council on Reproductive Technology

Southern Cross Bioethics Institute

The Ethics Centre of South Australia

The Fertility Society of Australia

Women's Forum Australia

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