UTS Speaks

Associate Professor Anita Stuhmcke

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Contact: anita.stuhmcke@uts.edu.au

The recent media and legal interest in surrogacy coincides with the 2006 birth of a child to a Federal Senator – Stephen Conroy – and his wife who was infertile due to ovarian cancer. The couple travelled from Victoria to engage in IVF surrogacy in NSW due to the illegality of the procedure under Victorian laws. The procedure involved a donated egg and a surrogate mother – so four adult parties. This is an example of medical surrogacy – where IVF a form of assisted reproductive technology is used together with surrogacy to produce a child.

The birth of the Conroy's child Isabella highlights the lack of legal protections for children born as a result of surrogacy arrangements. Under existing law the birth mother and her partner if she had one, was the only one of the four adults who had legal rights with respect to Isabella following her birth. The donor relinquished her rights at the time of embryo creation; Senator Conroy, the biological father could not be recognized legally and similarly his wife had no legal standing. The Conroy's returned to Victoria and applied to the Family Court of Australia for parenting orders[1] which were granted 12 months later in 2007 - Senator Conroy was also granted legal recognition as Isabella's father. The estimated cost of this to the Conroy's was between $40 -50 000.[2]

Since 2006 there has been a flurry of legal review. In November 2006 SCAG – the Standing Committee of Attorneys-General resolved to consider working towards national uniform legislation to regulate altruistic surrogacy. The terms of reference are:

- commercial surrogacy remain illegal

[1] Any person concerned with the care, welfare and development of a child can apply to the Family Court for residence, contact or parental responsibility, this can be done by consent with the birth mother, or in contested proceedings without her consent in the case of a dispute.

[2] Tasmanian Legislative Select Committee on Surrogacy, 1 July 2008, Witness Senator Stephen Conroy, http://www.parliament.tas.gov.au/ctee/Transcripts/1%20July%2008%20-%20Conroy.pdf , 15 October 2008. The financial burden for IVF surrogacy is compounded because the intending parents and birth mother are excluded from Medicare funding.

- altruistic surrogacy arrangements be legal but unenforceable
- informed consent be required from all parties
- there should be mandatory specialist counseling
- court orders should enable the intended parents to be recognized as the legal parents if all legal prerequisites met and it is in the best interests of the child

Also since 2006 five state jurisdictions have completed or commenced law reform inquiries into surrogacy – NSW, Tasmania, SA, WA and Queensland - with multiple recommendations for legal reform being made – some of which echo those of SCAG.

Tonight's message is that while this current law reform is very much a positive and welcome step I predict that the practice of surrogacy will remain a recurring legal dilemma and that the suggested reforms will fail to prevent the dilemma of surrogacy regulation recurring.

My basis for the argument that the current raft of proposed legal reform will fail is because it does not:

1. offer a national holistic approach: Australians are entitled to reproductive equality regardless of where they live, it is doubtful not only that there will be a national response but also unlikely that the suggested reforms will address all areas of law which surrogacy impacts - such as provision of donor gametes and the operation of ART regimes and areas of Commonwealth Law such as immigration law and payments of family benefits;

and

2. it does not tackle the practical issues presented by this method of family formation: the focus of law reform remains on the needs of adults and reinforcing the norms of society instead of being aimed at providing the same legal protections to children born through surrogacy arrangements as other children.

My talk tonight is therefore divided into two parts:

The first part examines why surrogacy may currently be labeled as a dilemma and the second part examines why it is a recurring dilemma.

Current legal approach

The practice of surrogacy has a long history - there is a biblical reference to surrogacy in Genesis; the private diaries of Winston Churchill's wife Clementine revealed that she offered to give the couple's fourth child to Lady Jean Hamilton, a close family friend, unable to conceive;[3] there are records of a NSW family using the practice since the late 1800s. Surrogacy is also based upon Western cultural assumptions: for example, Torres Strait Islanders have campaigned over the last twenty years for recognition of their customary adoption practices which may from a Western perspective be labeled as surrogacy.

Surrogacy is not the same concept as adoption. In surrogacy arrangements a child is created with the express intention of giving it up to identified parents. It is this important difference together with the surrogacy being combined with medical innovations in assisted reproductive technologies such as IVF which result in surrogacy being a legal dilemma.

The fact that law is unable to effectively regulate the complexity of surrogacy is reflected in the existing inconsistencies in national legal regulation. The national regulatory approach may at best be said to be fragmented and at worst it may be described as shameful.

[3] Szoke H, 'Surrogacy: All the Features of a Relationship That Could Go Wrong? (2001) 28 *Melbourne Journal of Politics*

To illustrate this point let us use the jurisdictions on the north eastern seaboard - NSW, the ACT and Queensland - as points of comparison.

In NSW if using traditional surrogacy where the surrogate mother uses her egg and the semen of the intending father - you may advertise for a surrogate and may pay her. In the ACT you can't advertise for nor pay a surrogate. In both NSW and the ACT you may be able to use a private IVF service for a surrogacy arrangement, although it would probably not be compensable through Medicare and therefore be fully self-funded. Once the child is born, if you are in the ACT you can apply to have parental status transferred from the birth mother to the commissioning parents. If you live in NSW you can attempt to apply for parental orders by consent from the Family Court – but there is no guarantee they will be granted. On the other hand if you are from Queensland all forms of surrogacy are illegal and those entering into any of the arrangements just described – including those who facilitate them such as doctors - may currently be prosecuted and imprisoned.

It is therefore unsurprising that the current legal regulation of surrogacy across Australia has been described as "medicine by postcode".[4] Depending upon where you live and what relationship you are in you may or may not be able to form a family through medical surrogacy.

There is however one overriding legal certainty[5] - Australian courts will not enforce a surrogacy arrangement as a contract. If a birth mother decided to keep the child and refused to give her or him up to the intending parents the issue of custody would be determined as a family law dispute and the best interests of the child test used to determine whom the child should be placed with.

In 2008 this legal point may seem obvious and universal, however go back just over twenty years and the 1985 American courts in the case named *Baby M* wrestled with this

[4] Dr Christine Kirby, Oral evidence to South Australia, Inquiry into Gestational Surrogacy, Social Development Committee, Report 26, Adelaide, Parliament of South Australia, 2007, 27
[5] Although this has not been legally tested in any Australian jurisdiction.

very point. In that case a professional couple Bill and Betsy Stern decided not to risk the dangers of child bearing when they learnt that Betsy was suffering from multiple sclerosis – determined to have a 'child of their own' they paid Mary Beth Whitehead $10 000 in exchange for the conception and birth of the child – who was genetically, through artificial insemination, the product of Mary Beth Whitehead and Bill Stern. Four days after the birth Mary Beth Whitehead disappeared with the baby girl allegedly saying 'I signed on an egg. I didn't sign on a baby girl.'[6] Eventually the Stern's won custody of the child but not before the US courts had decided that at first instance the contract between the Stern's and Mary Beth was actually valid and enforceable meaning that because Mrs Whitehead had signed a legal document which stated that upon birth she would give the child away to the Stern's that this contract was to be given full effect by the courts. This finding was rejected ultimately in favour of the legal determination being made on the equivalent to our best interests of the child test.

Update 20 years and the child born of the agreement, Melissa Stern turned 18 in March 2004 and formally terminated Mary Beth Whitehead's parental rights and formalized Elizabeth Stern's maternity through adoption proceedings. As of March 2007 Melissa was a junior at George Washington University majoring in religious studies – she hopes to become a minister - has not ruled out having children of her own and states that it was strange to study the Baby M Case in her bioethics class at the university.[7]

It is important then to note that family law tests and not contractual principles will apply to any disagreement following the birth of a child through surrogacy. This is the case as existing specific legal Australian regulation on surrogacy generally focuses upon whether to allow or disallow commercial surrogacy such as what the Sterns and Mrs Whitehead engaged in rather than concerning itself with issues such as what happens to the child after the birth.

[6] Deborah L Spar, 'For love and money: the political economy of commercial surrogacy' (2005) 12 (2) *Review of International Political Economy* at 288
[7] 'Now It's Melissa's Time' *New Jersey Monthly* (2007).

Currently, five Australian jurisdictions have surrogacy legislation: Victoria, South Australia, Tasmania, Queensland and the Australian Capital Territory.[8] There is no legislation in Western Australia, the Northern Territory and New South Wales[9] resulting in existing arrangements in these jurisdictions being regulated by a hotch-potch of laws not created with surrogacy in mind[10] and also by NHMRC (National Health and Medical Research Council) ethical guidelines and the Reproductive Technology Accreditation Committee (RTAC).

In all Australian jurisdictions there are significant legal similarities:

- A disapproval of commercial arrangements with advertising
- All legislation extends to pre-conception or post conception arrangements
- All surrogacy contracts are void and unenforceable – this is also probably the case in jurisdictions such as NSW which do not currently have such legislation in force
- A cultural homogeneity is assumed – for example in Queensland[11]

[8] Victoria: Infertility Treatment Act 1995 (renders commercial surrogacy an offence)
Queensland: Surrogate Parenthood Act 1988 (arrangements relating to surrogacy illegal and imposes criminal penalties on all parties)
South Australia: Family Relationships Act 1975 (offence to receive valuable consideration for a surrogacy arrangement – contracts illegal and void)
Tasmania: Surrogacy Contracts Act 1993 (an offence to make or receive a payment or reward in relation to a surrogacy arrangement - all surrogacy contracts are void and unenforceable)
ACT: Parentage Act 2004 (refers to a substitute parent agreement, it is an offence to enter into a commercial agreement but allows a surrogacy arrangement to the extent that the legislation facilitates the ability of the intending parents to become the legal parents of a child and to be registered as such)

[9] In NSW the Assisted Reproductive Technology Act 2007 has passed both Houses of Parliament but has not yet been proclaimed. The effect of that Act would be to render surrogacy agreements void; commercial surrogacy illegal and the actions of third parties who facilitate such agreements illegal.

[10] Despite not having legislation in NT and NSW and WA all jurisdictions are covered by the National Health and Medical Research Council Guidelines on ART together with the Code of Practice for Assisted Reproductive Technology Units developed by the Reproductive Technology Accreditation Committee. The guidelines state that it is 'ethically unacceptable' to undertake surrogacy for commercial purposes and that parties should undergo counselling

[11] The Torres Strait islander community wants legal recognition of their tradition of altruistic surrogacy and inter-family adoption – an objective which the Kupai Omasker Working Group has been campaigning for over 20 years. Eddie Mabo is perhaps the most 'famous product' of such traditional adoption arrangements.

- In most Australian jurisdictions the birth mother and her male partner (if any) are regarded as the legal birth parents of the child

The result of the current regulation for Australians is:

Firstly, jurisdiction shopping.

Secondly, a legal vacuum for intending parents following the birth of the child as the ACT is the only regime which allows the transfer of legal parentage from a surrogate to the intending parents via a special purpose legal mechanism by way of Court order.

Thirdly, the uncertain interplay between Commonwealth and state laws particularly with respect to payments for example:[12]

- the baby bonus:[13] decision about eligibility is determined by Centrelink, eligibility is determined by care for the child but may be split between two parties. Intending parents who assume actual care immediately after the birth will have sole claim to the payment.
- Parenting payments:[14] payment is available to principal carers however intending parents may not be entitled unless they are legally recognized as parents of the child
- Entry into Australia following surrogate birth overseas: there is no option under migration provisions for surrogacy they are currently considered under expatriate provisions which require (amongst 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.

[12] South Australia, Inquiry into Gestational Surrogacy, Social Development Committee, Report 26, Adelaide, Parliament of South Australia, 2007, Appendix 2.
[13] A New Tax System (Family Assistance) Act 1999 (Cth); A New Tax System (Family Assistance) (Administration) Act 1999 (Cth).
[14] Social Security Act 1991 (Cth).

Most simply the explanation for the fragmented current regulation of surrogacy is due to the Federal Constitution not specifically allowing federal laws.

Of course the states could hand over control of this area to the Commonwealth or else echo Commonwealth legislation as has been done with cloning.[15] This to my knowledge is not a conversation which has happened between the Commonwealth and the States and the historical record as to state and federal cooperation on surrogacy is also not promising. Almost twenty years ago now in 1990 the then National Bioethics Consultative Committee recommended a national approach and found that state-approved agencies should be introduced nationally to supervise the practice of surrogacy – these agencies would be required to provide counseling and establish standards of practice for public accountability of third parties such as social workers and health practitioners. Agencies would be required to maintain records on children's origins and legislation was drafted to determine legal parentage. The NBCC also recommended that:[16]

* Surrogacy should not be totally prohibited;
* Surrogacy should not be freely allowed
* Surrogacy practice should be strictly controlled by uniform legislation and
* Uniform legislation should render all surrogacy arrangements unenforceable and include controlling mechanisms for agencies and advertising controls.

Following this a 1991 joint meeting of the Australian Health and Social Welfare Ministers agreed to support national legislation to control surrogate motherhood.

As we have seen the Australian legal response that has resulted is far from uniform.

[15] This is however clearly not an avenue that the various jurisdictions have been willing to pursue. In 1991 the Australian Health and Social Welfare Ministers recommended a holistic approach to surrogacy through legislation – the result is the hotch potch we now have.

[16] There were two dissents to this view: National Bioethics Consultative Committee, Discussion Paper on Surrogacy 2 – Implementation, October 1990

Given then that there is unlikely to be national legislation passed it is important to ask whether it is possible for states to agree on this area of family formation. There are clearly a number of potent obstacles which go some way to explaining the differential jurisdictional response.

The most important obstacle is that surrogacy is an ethically and morally divisive practice – it may be humanized or be sensationalized or demonized – due to the simplicity, diversity and complexity the practice offers.

This can be highlighted through four judicial decisions – the first three are Australian and the last is from the US:

The first *Application of A and B* [2000]:

In New South Wales the birth mother offered to be a surrogate mother for her sister. Her sister had been married since 1979 and had no children. The birth mother was inseminated with the sperm of her sister's husband and gave birth to a child in 1997. The case concerned an application for an adoption order by the sister and her husband. The application was not contested. The NSW court approved the adoption order.[17]

The second *Re Evelyn* (1998):

In South Australia Mrs S married with 3 children offered to be a surrogate for her friends Mr and Mrs Q who lived in Queesland. The child was born in 1996. Mrs S found it difficult to cope with the relinquishment of the child to Mr and Mrs Q and travelled from South Australia to Queensland and removed the child from Mr and Mrs Q. Custody was contested and the final decision was made by the Full Court of the Family Court of Australia that Mrs S be given custody of the child.[18]

The third *Re Mark*:

[17] Bryson J *Application of A and B* [2000] NSWSC 640
[18] *Re Evelyn* (1998) 23 FamLR 53

In 2002 Mark was born through a commercial surrogacy arrangement in the United States using a donor egg and the sperm of Mr X. Mr X is in a partnership with Mr Y. Mr X and Mr Y live in Victoria and applied to the Australian Family Court for parental responsibility. The Court declared that parental responsibility for Mark vests in Mr. X and Mr. Y. They alone have the duties, powers, responsibilities and authority which, by law, parents have in relation to children.[19]

The fourth *Buzzanca*:

In the United States Baby Jaycee was born to the intended parents by a gestational surrogate using an anonymous egg donor and an anonymous sperm donor. One month before the expected birth of the child, the intended parents separated and petitioned for divorce. The intended father argued that he was not liable for support payments as the child was not the "child of the marriage". The Court disagreed and found that it was enough that the Intended Mother had made a sufficient showing that the Intended Father would be declared the child's legal father by a court at some future date and therefore ordered the family law court to determine an appropriate child support order.[20]

The case examples reflect the diversity and complexity of surrogacy and show the difficulty of regulating all the complexities of surrogacy. As we can see these cases are not unique to Australia – as we speak there is uncertainty over the parentage of a child born through commercial surrogacy in India[21] who has three mothers – a donor egg; a birth mother and an intended mother but whose parents divorced during the pregnancy meaning that Indian laws will now not allow the Japanese father to take the child out of India.

[19] *Re Mark: An application relating to parental responsibilities* [2003] Fam CA 822
[20] *Buzzanca v. Buzzanca* 61 Cal. App. 4th 1410; 1998 Cal. App. Lexis 180: 72 Cal. Rptr. 2d 280,
[21] Surrogacy costs around $12 000 in India compared to $70 000 in the US (see http://www.thewip.net/contributors/2008/10/reproductive_tourism_soars_in.html.)

Such cases which sensationalise surrogacy highlight that it is a moral or political or ethical response to surrogacy which drives the existing legal regulation of surrogacy across Australia. Surrogacy throws at law the clash of norms:

The assumption that a child has two parents

The assumption that a child should be biologically related

The assumption that heterosexuals should create families

The assumption that nature should predetermine family formation

The assumption that motherhood and fatherhood should not be splintered.

It poses questions society has not previously had to address. In terms of our own moral compass: would we help out a family member who could not conceive – if we did so would we expect compensation for lost earnings or a card to thank us – what will happen to family if we allow people to be paid to bear children? What exactly is the gift relationship and understanding of engaging in a process of bearing a child for another?

The issue is whether it is the best response to ban a practice because it conflicts with normative assumptions. Indeed, it has been suggested that in a liberal democracy governments should not prohibit private activity such as surrogacy arrangements unless the activity does harm to others.[22] Writing in 2006 an Australian academic author in this area, Willmott states "Despite speculation that surrogacy arrangements exploit the surrogate mother and are potentially harmful to the child, the available empirical research does not support this position. Indeed, the relatively limited amount of research that has been conducted suggests that surrogacy arrangements are, on the whole, successful.'[23]

[22] Willmott L, 'Surrogacy: ART's Forgotten Child' (2006) 227 *University of New South Wales Law Journal* 227 at 230
[23] Willmott L, 'Surrogacy: ART's Forgotten Child' (2006) 227 *University of New South Wales Law Journal* 227 at 230

Harm is of course a difficult concept to evaluate. A dilemma for law makers is the lack of empirical research as to either the extent of the practice or the impact of the practice on children; birth mothers; intending parents and third parties such as counselors.

In Australia such research is non-existent what we must rely upon is international research.

In terms of the birth mother United States quantitative and qualitative studies of surrogates over the past twenty years, mostly from a psychological or social work perspective, confirms that the majority of surrogates are satisfied with their surrogacy experience, do not experience "bonding" with the child they birth, and feel positively about surrogacy even a decade after the birth.[24]

In terms of intending parents United Kingdom research explored 42 intending parents and 34 birth mothers and found that the experiences of intending parents were positive and that relationships between commissioning parents and birth mothers were generally good.[25]

There is less research focus upon children born of the arrangements – the first of its kind was a study released in July this year by scientists from the Centre for Family Research at Britain's Cambridge University carried out interviews and psychology tests among 39 surrogacy families, 43 donor insemination families and 46 egg donation families.[26] The children are now seven years old. For comparison, they made the same investigation among 70 families where the children had been conceived naturally. They also asked the

[24] Teman, Elly. 2008. "The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood," Social Science & Medicine. Volume 67, Issue 7, October , Pages 1104-1112

[25] MacCallum F, Lycett E, Murray C, Vasanti J & Golombok S, 'Surrogacy: The Experience of Commissioning Couples' (2003) 18(6) *Human Reproduction* 1334, 1334

[26] Casey P, Readings J, Blake L, Jadva V and Golombok S 'Child development and parent-child relationships in surrogacy, egg donation and donor insemination families at age 7' (2008) Centre for Family research, University of Cambridge, UK

children's teachers, in order to get an independent assessment of the child's wellbeing. The conclusion of the study was that children born to a surrogate mother or conceived through donated sperm or a donated egg do just as well psychologically as counterparts who are naturally conceived.

As we do not have empirical evidence as to the harm of the practice the answer as to the fragmentation of existing Australian law must lie in palatable politics and moral norms and ethical principles. It also of course must encompass religious, economic and other dominant social forces.

In terms of moral judgment the practice of surrogacy evokes a strong emotional response – on the one hand it confronts our westernized cultural norms by splitting parenthood – particularly motherhood into different categories of biological, gestational and social.
- on the other hand it has been viewed as "the greatest gift that can be given – the gift of life".

With respect to the legal regulation of biomedical development a response based upon a lack of empirical evidence or morality or political opinion is arguably not enough – it may also not be enough to apply ethical principles. These also may be contradictory and confusing. For example in surrogacy principles of personal autonomy clash with those of paternalism – on the one hand a woman can do with her reproductive capacity as she pleases – on the other can a woman ever truly give full consent beforehand to give away a child she gives birth to?[27]

Another example is the regulatory difference applied to commercial and altruistic surrogacy. This must be based upon the practices being different – that love and altruism is more acceptable than commerce and industry in family formations. Some of the ethical principles which have been argued as supporting such a distinction include:

[27] Current regulation in Australia answers this ethical dilemma by rendering agreements void and unenforceable meaning that a birth mother cannot be forced to relinquish her child.

- the child is commodified in commercial surrogacy: surrogacy is baby-selling and promotes product quality, it is an exercise in positive eugenics and that surrogacy focuses upon the needs of the adult rather than the child;
- parenting is commodified in surrogacy – that poor women may be exploited in commercial surrogacy or that weaker family members may be emotionally exploited in altruistic surrogacy.

These ethical arguments are difficult – some are unanswerable and some, due to the nature and now relatively long history of the practice of surrogacy, may be answered with sensational examples to support a disparity of views. For example – take altruistic surrogacy and the emotional exploitation argument:

- on the one hand we have the example of Alejandra Munoz, a poor illiterate Mexican woman, who was brought illegally to the US on the understanding that when she became pregnant for her infertile cousin the embryo would be flushed out and transferred to this cousin. On threatening to have an abortion when told she was obliged to continue the pregnancy, her relatives kept her under house confinement, threatening to expose her as an illegal alien.[28]
- On the other – if we dare to compare - we have the example of Australia's first IVF surrogacy birth mother – Linda Kirkman who states "Why did I do it? There were those who suggested I was seeking approval, or was the downtrodden bullied and coerced little sister. The latter description is so wrong that it is risible. I am a confident, outgoing woman, and the final decision was mine. Gestating a baby was something I could do that Maggie could not. My children wanted siblings whom they were not going to get. I loved giving birth and wanted to do it again, without the hassle of then caring for another baby. It was the right thing for me to do."[29]

[28] M Stainsby, 'The Surrogacy Debate Again: What about altruistic surrogacy?' (1993) 11(2) *St. Vincent's Bioethics Centre Newsletter* 5 at 6
[29] Linda Kirkman, 'Altruistic Surrogacy: New Twist to and old practice' (2008).

Proposed law reform

Against this background of ethical uncertainty, political middle-ground and moral division we have had recent law reform committees in Queensland, Western Australia, South Australia and Tasmania making welcome recommendations for legal change. In New South Wales we are currently in the process of a Legislative Council inquiry conducted by the Law and Justice Committee into surrogacy reform with submissions apparently still being accepted and recommendations projected into next year. [30]

Importantly the current round of law reform acknowledges that surrogacy is a means of family formation. As the 2008 Tasmanian inquiry wrote '…the Committee has found that surrogacy is a fact of life in Tasmania' (2008). Of course surrogacy can most simply be achieved through sexual intercourse or self insemination – indeed there are anecdotal reports of women giving birth to children under a swapped Medicare card - as such arrangements are informal there is no way of being sure of frequency. [31] Surrogacy is not a commonly performed medical procedure.[32] The reform reports also acknowledge that surrogacy is a global practice. That Australians engage in what has been glibly termed 'reproductive tourism' – most prominently in California and India where there is now

[30] Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland, Report, Queensland Parliament, October 2008 p 5:
In Victoria the Assisted Reproductive Technology Treatment Bill 2008 proposes access to assisted reproductive technology services or ART services on a non-discriminatory basis for altruistic surrogacy and specifically provides for the transfer of legal parentage;
In Western Australia the Surrogacy Bill 2007 provides a framework for altruistic surrogacy including access to ART services and provision for the transfer of legal parentage.
In South Australia a private members bill, the Surrogacy Bill has passed the lower house in June 2008 and has to be debated in the upper house – it supports gestational surrogacy through fertility clinics along with provision of transfer of legal parentage.
In Tasmania a report finalized in August 2008 by the Legislative Select Committee titled 'Report on Surrogacy' recommended that the current Tasmanian legislation preventing access to services for altruistic surrogacy be repealed and that couples seeking lawful surrogacy agreements in other states be able to access legal and psychological services within Tasmania.
In NSW an inquiry into altruistic surrogacy was commenced in August 2008 and is due to report in March 2009.

[31] We may be able to assume that due to the legal and practical and financial obstacles surrogacy is not at the forefront of many peoples minds when attempting to plan a child.

[32] Parliament of Tasmania, Legislative Council Select Committee Report on Surrogacy, 2008 at 10

what is referred to as a commercial surrogate industry which is accessed by Australians unable to find an alternative in Australia.

The law reform reports also generally assume that most people enter into these arrangements because they are infertile or because surrogacy offers them a means to have a child at least partially genetically related to them.[33] If we keep on with these general assumptions it follows that as rates of infertility are increasing[34] and the availability of children for adoption in Australia is declining,[35] more and more Australians will consider surrogacy as a possible path toward having children.[36]

These points have lead recent reform inquiries to make comments such as "surrogacy is an unstoppable tide".

The Victorian Law Reform Commission suggests that the current sentiment in law reform indicates a position of ambivalence towards the practice of altruistic surrogacy.[37] This is reflected in comments recorded by the Tasmanian inquiry such as "you want quality assurance; you don't want cowboys running it…we can simply say that we know

[33] However it has also been suggested that women may prefer to employ a birth mother for cosmetic reasons such as to avoid varicose veins or for convenience such as avoiding the interruption a pregnancy may bring to her work: P Singer & D Wells, *The Reproduction Revolution: New Ways of Making Babies* (Oxford University Press, London, 1984) 113.

[34] See Australian Institute of Family Studies, *'It's Not for Lack of Wanting Kids': A Report on the Fertility Decision Making Project* (2004). ACCESS estimates that one in six Australian couples are infertile – these figures of course relate to heterosexual couples and do not take into account single people or homosexual couples who may wish to pursue surrogacy.

[35] In NSW there were 84 inter-country adoptions and 9 local adoptions in 2005: DOCS *e-newsletter January 2007*. The total number of adoptions in Australia is 5% of what it was 30 years ago: House of Representatives, Standing Committee on Family and Human Services, *Overseas Adoption in Australian: Report on the Inquiry into Adoption of Children from Overseas* (2005), at 1-2.Moreover, the Report argues that there is an 'anti-adoption' culture in some state departments and that intercountry adoption is far less accessible in Australia than in other adoption 'receiving' countries..

[36] Not all of these people are able to access ART procedures – medical reasons such as a woman not having a uterus or a medical condition which makes pregnancy life threatening may mean that surrogacy is the only available option for them.

[37] Victorian Law Reform Commission, Á.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review' 2004 at [3.5.6].

something is going on. We know about things in the community that we don't agree with but we still say it is better to regulate them."[38]

In effect if legislation is introduced as a result of the reforms the emphasis across most Australian jurisdictions will be to allow, perhaps not encourage, but allow the legal mechanisms for transfer of parentage following altruistic surrogacy arrangements to take place in Australia.

Overall much of the proposed law reform discussion accepts that the genetic connection should not be treated differently for the purposes of regulating the practice, and entrenches concepts of altruistic surrogacy versus commercial surrogacy.

An important and essential step forward is that many of the recommendations focus upon the transfer of legal parentage – a milestone with respect to protecting children born of these arrangements.

Why is surrogacy a recurring dilemma?

This law reform is positive. Indeed the recent flurry of activity leaves the impression that something will be done nationally and that this will be an appropriate community response as surrogacy is a new technological dilemma posing novel and complex issues. I have some difficulty with this picture.

One difficulty is that the response of Australian legislatures is fragmented and therefore inequitable. I suggest that it is unlikely given the history of surrogacy regulation that this will change. There is a need for a holistic Australian approach to span parentage/gamete donation/immigration etc – the current response does not come close to doing this.

[38] Parliament of Tasmania, Legislative Council Select Committee Report on Surrogacy, 2008 at 31

A further difficulty is that surrogacy is like any other area of rapid biomedical development where the practice is at first greeted by community condemnation and outrage which turns into a slow acceptance and then gradually into approval. We have seen this happen in other areas of non-traditional family formation such as IVF and we can find evidence for it in surrogacy. One indication that this is occurring in surrgacy is the change in use of terminology over the last twenty years.

Firstly, we now refer to the birth mother rather than surrogate mother - surrogate mother implies that she is to some degree a substitute mother. This shift is apparent in existing legislation – for example introduced in 1988 the Queensland legislation is titled the *Surrogate Parenthood Act*; fast forward to 1994 and the Australian Capital Territory named its legislation the *Substitute Parent Agreements Act* and since 2004 this is now titled its *Parentage Act*.

Secondly, we now refer to intending parents rather than commissioning parents which implies that there is a legally enforceable commercial agreement

Thirdly, the arrangement is not now referred to as an agreement – as the implication of agreement being there is a contractual legality to the practice

Fourthly, language often refers to gestational versus traditional surrogacy arrangements – where traditional arrangements signal the use of the birth mother's own genetic material as opposed to gestational where the child she carries is formed through a medical procedure such as IVF and is not genetically related to her. The current law reform is moving away from this distinction being necessary for legal regulation.

This shift in terminology arguably reflects a shift towards increasing acceptance in the reaction of the society to surrogacy.[39] The definition of surrogacy could now be:

The practice of surrogacy is where a formal or informal agreement exists for a birth mother to bear a child for the intending parents and to permanently transfer the responsibility for the child's care and upbringing to them after the child's birth.[40]

As can be seen such a definition removes many of the now objectionable terms – it captures what is different about surrogacy and adoption – the birth of a child for a specific set of parents.

Indeed perhaps the remaining true dilemma in terminology for Australian law makers rests with the final distinction between altruistic and commercial surrogacy. This is the last term left standing – altruistic being where a birth mother receives no material reward for the arrangement as opposed to commercial where she may. This is the final difficulty - current law reform seems more concerned with not questioning the distinction between commercial and altruistic surrogacy than with ensuring that children born have legal protection.

Of course this point is debatable – it may be argued that current law reform should not even begin from the premise that altruistic surrogacy is allowable and open for regulation. This is a debate of force put particularly forcefully by some feminist groups such as FINNRAGE and some religious organizations.

I think that the debate has moved on from this point and for tonight I am more interested in the fact that most of the inquiries, particularly the most recent in Queensland and New South Wales, begin from the premise that the current prohibition on commercial

[39] There has been longitudinal research done on increasing acceptance of assisted reproductive technologies see: Gabor T Kovacs, Gary Morgan, E Carl Wood, Catherine Forbes and Donna Howlett, 'Community attitudes to assisted reproductive technology: a 20-year trend' (2003) 179 (10) MJA 536-538.
[40] Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland, Report, Queensland Parliament, October 2008 p 3.

surrogacy is one that should not be explored.[41] The implication being that altruistic surrogacy is more acceptable than commercial surrogacy.

Of course this makes sense as at first glance altruistic surrogacy accords more with cultural norms of love and family whereas commercial surrogacy sends out the message of commerce and market and payment for gestating a child.[42] Indeed, the debate around commercial surrogacy – allowing a birth mother to make money from her pregnancy has been subject to much debate concerning issues of commodification and self-ownership,[43] Market alienability has it that surrogacy ought to be freely marketable due to property interests each of us holds in our reproductive capacity while to the contrary, it has been argued that surrogacy devalues women's personhood and commodifies women's bodies and identities[44] and the creation of a market in babies where the price of babies may be equated to the price of soybeans[45] with the result that the market may distinguish between "first quality" and "second quality" children.[46]

At least for the present, by not even opening the question, law reformers have chosen not to address these commodification arguments. This leaves altruism as the regulatory device of choice for surrogacy.

The most important question therefore becomes what is altruism?

[41] For example the inquiries in Queensland and New South Wales were set up only to deal with altruistic surrogacy and with sentiments such as 'community values within Australia are rightly set against the commodification of children and the exploitation of socially and economically disadvantaged women.
[42] Zehr JL, 'Using Gestational and Pre-Implantation Genetic Diagnosis: Are Intended Parents Now Manufacturing the Idyllic Infant? (2008) Loyola Consumer Law Review 294 at 301-302

[43] Halewood P, 'On Commodification and Self-Ownership' (2008) 20 Yale J.L. & Human. 131 at 159-161
[44] Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957
[45] Elisabeth M. Landes & Richard A. Posner, The Economics of the Baby Shortage, 7 J. Legal Stud. 323, 344 (1978)
[46] Robert Pritchard, A Market For Babies?, 34 U. Toronto L.J. 341 (1984).

The spectrum of views is that altruism means no reimbursement at all – or allows some recognition of financial payment[47] or that altruism could include reimbursement to the surrogate mother for:[48]

Maternity clothing
Legal fees
Counseling fees
Life and disability insurance
Travelling to and from hospital
Medical expenses
Ovulation and pregnancy test
Overnight accommodation
AI or IVF if required
Child care to attend hospital etc
Vitamins
Loss or earnings

The definition of altruism which is applied is critical. As it is here, in creating a division between the protection of a child born through altruistic surrogacy and the protection of a child born through commercial surrogacy, which I predict will cause surrogacy to return to us at a future point as a recurring dilemma as:

….if we continue to witness a thriving market in infertility through the provision of assisted conception services in clinics, but pretend that this commercial aspect does not exist and cannot apply to surrogacy because we have condoned the practice in domestic legislation then we may increase the chances for exploitation to occur abroad and domestically. Indeed there is a growing social phenomenon of individuals interacting in

[47] In the UK altruistic surrogacy allows for payments to a birth mother for her expenses of between 10 000 and 15 000 pounds.
[48] Submission by Commission for children and young people and young people to Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland, Report, Queensland Parliament, 20 June 2008 at 9

the global public marketplace such as through the internet for the chance to parent a child.[49]

Perhaps to turn the argument around for a moment - the success of the current proposed reforms which use altruism as the regulatory tool to either protect or not protect children relies upon adults completing the very difficult. In the past altruism alone has not met the demand for children through surrogacy and likely will not in the future. Altruism means that persons who wish to pursue surrogacy will need to find a family member or a known person of the right age and willingness to carry a child – or a stranger through advertisement. Past experience shows us that if people cannot pursue a family due to these obstacles they will turn elsewhere – the fact that there are alternatives available in an international marketplace demonstrate the limits of altruism as the choice of regulatory tool.

It is not my intention to come across as arguing for a surrogacy industry on the same scale as we see in India and some states in the US. As was noted in the flyer tonight I have been interested as a legal academic in the practice of surrogacy since the late 1980's. I have written and taught in this area for almost two decades. Throughout almost all of that time I have always been able to answer my students question as to what I thought about the practice as "I honestly do not know" - I could say I did not know as I had no personal compass to go on – my interest in the area was not driven because I knew someone going the process. Instead it was the mirror that surrogacy reflected of our society which interested me as the practice throws many of our cultural and familial normative assumptions into sharp relief – highlighting the reticence society feels to condone anything it perceives as not normal.

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[49] Goodwin M, 'Altruism's Limits: Law, Capacity and Organ Commodification' (2004) 56 Rutgers L. Rev. 305 at 320

Now 17 years on for me personally, my answer to that question has changed – I now do know what I would do to regulate surrogacy which is perhaps why I feel the current round of law reform will leave us with a recurring dilemma.

My answer is that I would put the children first. The true measure of putting the legal protections of the child first will be when the law can ignore judgment calls on the means of creation of the child and provide the same protections to children born of surrogacy as other children. It is not whether commercial surrogacy should be banned or whether what form altruistic surrogacy should take – this is an important and necessary debate however it overlooks the immediate need that all Australian legislatures put in place mechanisms for transfer of parentage of children and other mechanisms of legal protection such as accurate birth certificates.

It is not the adult needs nor the perceived norms of society which need regulatory support in this area – indeed adults will pursue the practice regardless of its legality and regardless of its emotional or financial cost. My suggestion is to move away from the limitations of terminology and the constraints of thinking about surrogacy as an alternate means of family formation to focus upon the fact that children born of such arrangements need and deserve legal certainty and social support. I think the legal regulation of surrogacy fails currently to address the underlying systemic issue that children deserve protection regardless of whether they are born for someone's profit or someone's altruism.

The current round of law reform is positive – it moves the community in the right direction towards clarifying issues of protection for children such as clarifying legal parentage. My concern is that it will not go far enough. Modern bioethics is a global phenomenon – it is very difficult to impose one universal parameter on differing private needs of individuals – as Linda Kirkman – arguably Australia's most famous surrogate mother states:

"Everyone is different. Some women are horrified by the idea of relinquishing a baby. Not all people want to become parents, yet for others it is a consuming passion."

Conclusion

Surrogacy is a dilemma – it will be a recurring dilemma. It need not be so if we act altruistically by putting the children born of such arrangements first. In order that surrogacy not to return to the legal reform agendas of Australian parliaments any time soon it is necessary that there be:

1. a national coordinated Australian approach
2. monitoring, evaluation and research into the impact of the practice
3. legal protection of the rights of children born through surrogacy:

- without referencing those rights through adult choices as to types of surrogacy
- without distinction between persons who enter into surrogacy

4. creation of time limits for application to transfer legal parentage; a national accurate birth certificate; central donor register; commonwealth payments clarified.

Thank you.