



# INVESTIGATION INTO ALTRUISTIC SURROGACY COMMITTEE

ISSUES PAPER

MAY 2008

## AIM

The committee has published this paper to inform consideration of the issues regarding altruistic surrogacy in Queensland. The committee invites interested groups and individuals to make public submissions to the investigation based on the questions posed, terms of reference below and any other matters considered relevant. The committee will give consideration to all written submissions when writing its report and formulating its recommendations to Parliament.

## THE PARLIAMENTARY SELECT COMMITTEE

On 14 February 2008, the Legislative Assembly resolved that a select committee to be known as the Investigation into Altruistic Surrogacy Committee be appointed to investigate and report to the Parliament on the possible decriminalisation and regulation of altruistic surrogacy in Queensland. The committee commenced on 26 February 2008.

## TERMS OF REFERENCE

The committee's terms of reference require it to investigate and report on the following matters:

- a. Should altruistic surrogacy be decriminalised in Queensland?
- b. If so:
  - What role should the Queensland Government play in regulating altruistic surrogacy arrangements in Queensland?
  - What criteria, if any, should the commissioning parent/s and/or surrogate have to meet before entering into an altruistic surrogacy arrangement?
  - What role should a genetic relationship between the child and the commissioning parent/s and/or surrogate play in any altruistic surrogacy arrangement?
  - What legal rights and responsibilities should be imposed upon the commissioning parent/s and/or surrogate?
  - What rights should a child born through an altruistic surrogacy arrangement have to access information relating to his or her genetic parentage? Who should hold this information?
  - What, if any, other matters should be considered in the regulation of this issue?

The committee's terms of reference exclude consideration of commercial surrogacy,<sup>1</sup> which is illegal throughout Australia.

The committee is required to report to the Legislative Assembly by 30 September 2008.

## INVESTIGATION PROGRAM

6 May 2008	Issues paper released calling for submissions
13 June 2008	Closing date for submissions
16 June – mid-August	Public consultation
30 September 2008	Report to Parliament

## BACKGROUND

Queensland is the only Australian state in which altruistic surrogacy is a criminal offence. The *Surrogate Parenthood Act 1988* (Qld) makes it an offence to enter into, or offer to enter into, a surrogacy contract, whether commercial or altruistic, and whether or not the offence occurs in Queensland or elsewhere. Offences against the Act can attract a maximum penalty of \$7,500 or 3 years imprisonment.<sup>2</sup>

In all other Australian states and territories altruistic surrogacy is permitted. However, each jurisdiction approaches the regulation of surrogacy in different ways. See Appendix A for a table of comparative legislation across Australian jurisdictions.

The status of surrogacy in Queensland has been examined previously. In February 1983, the Queensland Government appointed a 'special committee' to inquire into laws relating to artificial insemination; in vitro-fertilisation (IVF); and other related matters, including

surrogacy. The special committee, chaired by the Hon Justice Demack, reported in March 1984. It recommended that whilst altruistic surrogacy contracts should be void or legally unenforceable, entering into them should not be a criminal offence.

However, the Queensland Parliament legislated to prohibit all forms of surrogacy in 1988. It was argued that:

- it was dehumanising to use and pay another human being to reproduce;
- babies must not be used as commodities; and
- Queensland should seek to avoid the trauma and legal battles associated with surrogacy in other jurisdictions.<sup>3</sup>

The issue was again canvassed by a Taskforce on Women and the Criminal Code. In its report, released in 2001, the taskforce noted the range of community views on the matter. Although the taskforce was divided on some issues, it took a consensus view that the *Surrogate Parenthood Act 1988* be amended to remove the sanction on altruistic surrogacy as:

*it was generally felt inappropriate and unhelpful to involve the criminal justice system in this intensely private matter between relatives and friends.<sup>4</sup>*

It also recognised that, if surrogacy agreements were to be permitted in Queensland, the extent to which they should be regulated would need to be addressed.<sup>5</sup> The Government did not support the taskforce recommendations regarding surrogacy at that time.

A review of surrogacy laws is currently occurring in a number of Australian jurisdictions.

On 14 February 2008, Hon Anna Bligh MP, Premier of Queensland, tabled a briefing paper outlining a case for reform and stated that “the Queensland Government believes the time has come to decriminalise altruistic surrogacy”.<sup>6</sup> The Premier called for the establishment of this committee to further examine whether altruistic surrogacy should be decriminalised and what regulation might be desirable.

The Victorian, South Australian (SA), Western Australian (WA) and Tasmanian parliaments are currently giving consideration to revising their surrogacy laws:

- The Victorian Law Reform Commission (VLRC) delivered its *Assisted Reproductive Technology and Adoption Final Report* in March 2007;
- The WA Surrogacy Bill 2007 is currently being reviewed by the Legislative Council Standing Committee on Legislation, due to report on 8 May 2008;

- The SA Social Development Committee (‘SA committee’) completed its Inquiry into Gestational Surrogacy in November 2007; and
- The Tasmanian Legislative Council announced a select committee inquiry into surrogacy on 1 April 2008.<sup>7</sup>

Nationally uniform legislation to regulate surrogacy is also under consideration by the Standing Committee of Attorneys-General (SCAG).

There are a number of factors influencing this renewed focus:

- Very few Australian-born children are now available for adoption (only 14 locally born children were adopted in Queensland in 2006-07);<sup>8</sup>
- There has been an increased use and social acceptance of infertility treatment or assisted reproductive technology (ART) over the last decade;<sup>9</sup> and
- There is greater social recognition of the diversity of family types raising children, including extended, nuclear and blended families and families headed by single parents and same-sex couples.

Some of the impetus for reform also appears to have come from those concerned about a lack of legal recognition of parents and children in surrogacy arrangements. It is suggested that this can lead to practical difficulties, for example, in relation to passport applications, medical treatment, eligibility for child support if commissioning parents separate, eligibility for social security and taxation allowances and inheritance.<sup>10</sup>

#### **DEFINING ALTRUISTIC SURROGACY**

For the purposes of this issues paper, surrogacy is defined as a clear agreement whether formal or informal, between a surrogate and commissioning parent/s for the surrogate to bear a child for the commissioning parent/s and permanently transfer the responsibility for the child’s care and upbringing to them after the child’s birth. (Refer to Question 10.)

The surrogate (or surrogate mother) is the woman who bears the child. The commissioning parent/s is the person or couple that asks a woman to act as a surrogate. See Appendix B for a list of terminology used in relation to surrogacy and abbreviations used in this paper.

As distinct from a commercial surrogacy arrangement, a surrogate undertaking an altruistic surrogacy arrangement is not motivated by material gain, but by a desire to help others become parents. In many cases, the surrogate is a close relative or friend of the commissioning parents.

In Queensland, the prohibitions under the *Surrogate Parenthood Act 1988* apply to situations where a woman becomes pregnant pursuant to a (pre-pregnancy)

surrogacy contract and also to cases where a woman is already pregnant and then agrees (pre-birth) to give the child away.

Prior to the passing of the Act, Hon P McKechnie MP stated in his second reading speech of the Surrogate Parenthood Bill that “the purpose of the bill is to make all arrangements relating to surrogacy illegal in Queensland”.<sup>11</sup> Accordingly, the Act attempts to capture every arrangement that resembles a surrogacy contract and prohibit it.

An agreement made during pregnancy to bear the child and permanently transfer responsibility for its care and upbringing to another party may also be considered a private adoption. Private adoptions are also prohibited under the *Adoption of Children Act 1964* (Qld).<sup>12</sup>

### **SHOULD ALTRUISTIC SURROGACY BE DECRIMINALISED?**

The concept of surrogacy is not new. Native Americans, West Africans, Pacific Islanders and Torres Strait Islanders all have customary practices that involve child rearing by parties other than the birth parents.<sup>13</sup>

Queensland is the only Australian jurisdiction where altruistic surrogacy is a criminal offence. Whilst the laws in most jurisdictions (such as Victoria, SA and Tasmania) prohibit commercial surrogacy, they do not consider altruistic surrogacy an offence. Currently, in some Australian jurisdictions (such as New South Wales (NSW), WA and Northern Territory (NT)) there are no specific laws around the practice of surrogacy. However, altruistic surrogacy is regulated by industry standards for fertility clinics and the National Health and Medical Research Council (NHMRC) guidelines.<sup>14</sup> In SA, altruistic surrogacy is decriminalised in the sense that, whilst altruistic surrogacy contracts are illegal, entering into them is not a criminal offence.

The main rationale for sanctioning activities through legislation is the prevention of harm to innocent parties. In its review of research on the outcomes of surrogacy arrangements, particularly regarding the outcomes for the children born of these arrangements, the VLRC concluded there was minimal available research to date to determine whether or not there may be substantial harm to the parties involved over the longer term.<sup>15</sup>

The VLRC report described research undertaken in the United Kingdom that focused on the effects of surrogacy on the commissioning parents, surrogate and infant. This study found that:

- generally the commissioning parents did not consider the experience problematic;

- relationships between the commissioning parents and surrogate were generally good and involved minimal conflict;
- the majority of couples maintained contact with the surrogate after the birth;
- there was greater psychological wellbeing and adaptation to parenthood in commissioning parents than in natural-conception parents; and
- there was no difference to other family types in infant temperament, or child psychological development at three years old.<sup>16</sup>

However, some question remains around whether this study involved a representative sample, so the results should be interpreted with caution.

It is difficult to estimate the extent to which altruistic surrogacy arrangements are occurring in Queensland.<sup>17</sup> The committee has identified five reported court cases for surrogacy since the Act commenced.<sup>18</sup> Additionally, the Taskforce on Women and the Criminal Code received a confidential submission from a Queensland couple seeking a surrogacy arrangement in Canberra.<sup>19</sup> The committee is also aware of a newspaper report indicating that Queenslanders may be travelling interstate to pursue surrogacy arrangements.<sup>20</sup>

It seems that the criminal prohibition of surrogacy in Queensland may have been intended to act as a deterrent rather than a severe punishment of the parties involved in surrogacy. None of the individuals charged under the *Surrogate Parenthood Act* have received severe penalties. In most cases, the charges were dismissed and no conviction was recorded. One woman received a good behaviour bond for her involvement in arranging a surrogacy agreement.<sup>21</sup> A case heard in 1998 by the Family Court in Brisbane dealt with a custody dispute involving a child born through a surrogacy arrangement. In this case, no charges were laid under the *Surrogate Parenthood Act*.<sup>22</sup>

Despite the minimal penalties issued by the courts to date, the criminal prohibition of surrogacy in Queensland still has the potential to draw families into the criminal justice system and severely penalise the parties to altruistic surrogacy agreements.

The committee is seeking community views in weighing up the:

- potential risks and moral issues associated with altruistic surrogacy arrangements;
- potential benefits to people who are otherwise unable to have children;
- impact of stigmatising and criminalising people who seek to have a family through altruistic surrogacy; and

- importance of responding to practical difficulties (such as the legal recognition of commissioning parents) that may be associated with surrogacy arrangements.

**Issues for comment:**

1. Should the legal restrictions and criminal penalties against altruistic surrogacy be removed from the *Surrogate Parenthood Act 1988* (Qld)?

**APPROACHES TO LEGAL AND REGULATORY REFORM**

In examining proposed or recent legal and regulatory reform regarding surrogacy in Australia, it appears that there is a focus on two points of intervention. These are when the parties:

- access ART services; and/or
- seek to transfer legal parentage from the surrogate or birth mother to the commissioning parents after birth.

Where people seeking a surrogacy arrangement require medical assistance, for example, with an embryo transplant or screening procedures, they will inevitably approach a fertility clinic. Governments can require clinics to conform to eligibility criteria and codes of practice as part of their licensing agreement.<sup>23</sup> As is proposed in Victoria, these criteria could be used in surrogacy cases, to require prior clearance from a clinical ethics committee.<sup>24</sup>

Attaching conditions to access to ART services offers an opportunity to limit or guide the surrogacy arrangement before a baby is conceived. However, the limitation with this focus on regulating surrogacy through access to ART is that not all surrogacy cases may require medical assistance. This has led to some jurisdictions only permitting surrogacy when the parties use ART.

In Australia, there is limited capacity within adoption laws to enable the transfer of legal parentage in the case of surrogacy. There is also a commonly held presumption that the birth mother is the legal parent of a child. This has meant that governments in Australia have been encouraged to develop specific provisions for the transfer of legal parentage in the case of surrogacy.

This focus on the need to transfer legal parentage appears to have shaped the development of a regulatory regime that applies after the birth of the baby. In the Australian Capital Territory (ACT) for example, existing parentage laws have been amended, and in WA specific surrogacy legislation is proposed, to give Courts the responsibility to withhold the transfer of legal parentage unless certain eligibility criteria have been met. This might function as an incentive for compliance. However, it may be difficult for parties to retrospectively comply with the criteria if, for example, they did not rely on ART services.

In embarking on any regulatory reform, state and territory governments may consider the role of family law in clarifying parenting arrangements. The Family Court of Australia has been used in surrogacy cases to resolve disputes over a child's residency after birth.<sup>25</sup> Commissioning parents may also access family law parenting orders, which detail, for example, who a child lives with, contact and day-to-day care arrangements and approaches to a child's welfare and development.<sup>26</sup> Parenting orders do not, however, change the legal status of the birth parent or surrogate.

**IF DECRIMINALISED, WHAT IS THE ROLE OF THE GOVERNMENT IN REGULATION OF ALTRUISTIC SURROGACY?**

The committee has been asked to investigate, if altruistic surrogacy is decriminalised, whether and to what extent the Government should play a regulatory role in surrogacy arrangements. A review of approaches in place or being considered in other jurisdictions indicates the emergence of some key principles underpinning the regulation of altruistic surrogacy, as follows:

(i) *The best interests of the child should be the primary consideration.*

It is generally agreed that the child is the most vulnerable person in a surrogacy arrangement. The principle of the best interests of the child underpins both family law and child protection policy and is grounded in international commitments. For example:

- Article 25 (2) of the United Nations Declaration of Human Rights (1948) states:  
*...childhood [is] entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection; and*
- Article 3 of the United Nations Convention on the Rights of the Child (1989) states:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration; and*

*...parties [to the convention] undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his and her parents, legal guardians or other individuals legally responsible for him or her, and to this end, shall take all appropriate legislative and administrative measures.<sup>27</sup>*

The principle of the best interests of the child might include recognition of a child's need for a safe, secure family environment and a sense of clear identity and belonging, and loving, nurturing relationships.

In practice, pursuit of this principle could also mean governments acting to protect a child's right to information about his/her genetic history and the circumstances of their birth.

*(ii) Intrusion into people's private lives is kept to a minimum.*

Decisions to have a baby, to become parents and to raise children are intensely personal. People generally expect that these are matters only to be shared with closest family and friends. In response to this norm, this principle seeks to minimise government intrusion into people's private lives in the regulation of altruistic surrogacy.

*(iii) Health and wellbeing of the surrogate, the commissioning parents and their families is protected and promoted.*

While altruistic surrogacy may have many positive outcomes for commissioning parents, this principle recognises that there are risks to the health and wellbeing of the parties to surrogacy arrangements (i.e. the surrogate or birth mother, her partner and the commissioning parents) and their families (e.g. siblings and grandparents).<sup>28</sup>

Governments can develop policy and laws that help to minimise the potential risks. For example, this principle is consistent with the NHMRC guidelines for ART which take account of the "long-term health and psychosocial welfare of all participants" including children, parents and donors when accepting parties to participate in ART.<sup>29</sup>

*(iv) Conflict between the surrogate and the commissioning parents is prevented and minimised.*

There are many difficult issues which can arise in the course of a surrogacy arrangement for the parties to the agreement and their families. Some of the issues include:

- medical complications during pregnancy and birth and the management of the pregnancy;
- the impact of relinquishment on the surrogate and her family;
- the potential birth of a child with a disability;
- the need to clarify legal parentage;
- ongoing communication between the surrogate and child;
- liability for child support; and
- the child's right to access information about their genetic history and circumstances of birth.

Other jurisdictions believe that governments can play a role in preventing and minimising conflict between the parties in relation to such issues.

In practice, the protection of the parties' health and wellbeing and the minimisation of conflict could include a

requirement for informed consent and mandatory, independent counselling for all parties to an agreement. It could also include the Government making a provision for the transfer of legal parentage from the surrogate to the commissioning parents, with or without certain conditions.

#### **Issues for comment:**

2. Should the Queensland Government play a role in regulating altruistic surrogacy arrangements in Queensland? If so, how can the Government regulate altruistic surrogacy arrangements in a way that:
  - ensures that the best interests of the child are protected;
  - minimises intrusion into people's private lives;
  - protects the health and wellbeing of all parties; and/or
  - ensures that any conflict between the surrogate and the commissioning parents is prevented or minimised?
3. What other issues should be addressed by the Government?

#### **WHAT CRITERIA SHOULD SURROGATES AND COMMISSIONING PARENTS HAVE TO MEET?**

The committee has been asked to consider whether commissioning parents and/or surrogates should have to meet certain criteria in order to enter into a surrogacy arrangement. When identifying such criteria there is a need to give careful consideration to the:

- purpose or benefits of imposing a specific criterion;
- practicality of monitoring and enforcing a criterion; and
- possible unintended consequences of a criterion.

As previously noted, regulatory criteria are often attached as conditions for access to ART services or for the transfer of legal parentage from the surrogate to the commissioning parents.

Some of the criteria for commissioning parents or surrogates being implemented or explored across Australia are detailed below:

#### Specific criteria for commissioning parents

Two commonly held criteria for commissioning parents include:

- infertility, health risk associated with bearing a child, or concern with passing on a genetic condition with serious health impacts;<sup>30</sup> and
- a requirement that they are at least 18 years of age.<sup>31</sup>

There are some differences in approach across jurisdictions in relation to the genetic contribution required and the eligibility of certain family types:

- *Genetic contribution:* In the ACT, at least one commissioning parent must be biologically related to

the child.<sup>32</sup> Other jurisdictions that permit surrogacy do not have this requirement; and

- *Family types:* The ACT requires commissioning parents to be a couple. The Surrogacy Bill 2007 in WA proposes that single women may also be eligible as commissioning parents if they meet ART eligibility requirements. The reports of the VLRC and the SA committee support a non-discriminatory approach, irrespective of relationship, marital status or sexual orientation.<sup>33</sup>

#### Specific criteria for surrogates

There is a clear move in SA, Victoria and WA towards the removal of the current requirement for surrogates to be infertile to access ART.<sup>34</sup> This requirement has limited individuals' access to surrogacy in these states and has forced people to travel interstate to undertake ART procedures.

The VLRC report proposed that the surrogate mother should be at least 25 years of age.<sup>35</sup>

The ACT only allows the transfer of legal parentage from the surrogate to the commissioning parents when the surrogate has conceived through IVF and is not the genetic mother.<sup>36</sup>

Some consideration has also been given to whether surrogates need to have previously given birth or completed their own family.<sup>37</sup> It has also been suggested that choice of a surrogate who is a sister, mother, cousin or long standing friend may help prevent conflict and strengthen existing relationships.

#### Common criteria for commissioning parents and surrogates

Some of the current or proposed criteria for both commissioning parents and surrogates include:

- demonstration of informed consent through specialist counselling and independent legal advice;<sup>38</sup>
- the need for surrogacy arrangements to be agreed pre-conception;<sup>39</sup>
- a requirement that parties are resident in the jurisdiction;<sup>40</sup> and
- the exclusion of parties convicted of sexual or violent offences or subject to a child protection order, without specific assessment and approval.<sup>41</sup>

#### Queensland adoption requirements

Requirements for adoptive parents might also be relevant to the development of criteria for commissioning parents. These requirements include:

- Prospective parents must be heterosexual couples who have been married for at least 2 years;

- At least one of the prospective parents must be an Australian citizen and both must be resident in Queensland;
- They must not have a physical or mental condition, or disability, which would impact on their capacity to provide a high level of stable, long term care for a child;
- They must have no more than one child in their custody; and
- They must be deemed infertile.<sup>42</sup>

#### Assessing criteria

The following is an example of the way criteria might be assessed. Using an age requirement for surrogates, considerations regarding the benefits, monitoring and enforcement and consequences of imposing age restrictions might suggest:

- *Benefits:* Age may be only one factor in indicating health or sufficient maturity to make a decision to enter a surrogacy arrangement. The preparedness of individuals may be better determined through counselling or a medical examination;
- *Monitoring and enforcement:* It may be difficult to monitor and enforce age criteria before becoming surrogates other than when accessing an ART service; and
- *Consequences:* It could be argued that people who fall outside of the age criteria who have had a previous pregnancy, for instance, may be considered more capable of informed consent than people who have not had children. It needs to be considered whether failure to meet an age criteria should preclude the transfer of legal parentage of the child to the commissioning parents.

#### **Issues for comment:**

4. What criteria, if any, should the commissioning parent/s and/or surrogate have to meet before entering into an altruistic surrogacy arrangement?

In responding to this question, please outline:

- the reason for your choice;
- how you believe criteria could be monitored and enforced;
- any consequences or dilemmas you see in adopting the criteria; and
- any suggestions you may have to manage any of the issues identified.

5. Should criteria for commissioning parents be similar to that for adoptive parents?

## WHAT ROLE SHOULD A GENETIC RELATIONSHIP PLAY?

There are a number of genetic relationships that are possible within surrogacy arrangements.

In partial surrogacy, the surrogate is the genetic mother as she contributes her gametes, which may be fertilised by gametes from the commissioning father or a donor.

In gestational (or full) surrogacy, the surrogate mother carries (or gestates) a baby which is not genetically her own. The baby is created by gametes from the commissioning parents or donors.

In a gestational surrogacy arrangement, one or both of the commissioning parents could be the child's genetic parent. In a partial surrogacy arrangement, the commissioning father could be a genetic parent.

Surrogacy arrangements may create very complex family relationships. For instance, if both commissioning parents are infertile, there may be six people involved: two donors, the commissioning parents and surrogate parents.

In considering what role the genetic relationship should play in an altruistic surrogacy arrangement, it may be useful to consider whether gestational surrogacy arrangements have different outcomes from partial surrogacy arrangements and whether the genetic relationship should play a role in the transfer of legal parentage.

### Outcomes of gestational v partial surrogacy arrangements

Research suggests it may be easier for the surrogate mother to relinquish the child when she is not the genetic parent.<sup>43</sup> In this situation, the child is not a genetic sibling of any other child of the surrogate. An Australian study of gestational surrogates indicated that they were able to treat the pregnancy differently to previous pregnancies with their own children. One surrogate explained:

*[The baby is] not part of me...It's their egg, their sperm...Basically I am just growing it, so it's no part of me. I am just helping it grow. I couldn't do it if it wasn't my sister and it was any part of [my partner] and myself.*<sup>44</sup>

The VLRC identified examples of gestational and a partial surrogacy with different outcomes:

**Alice Kirkman:** Alice Kirkman was born in 1988 in Victoria. Alice was conceived from an egg from her 'commissioning' mother (Maggie Kirkman) which was fertilised with a family friend's sperm and carried by Maggie's sister, Linda. A hysterectomy had left Maggie Kirkman unable to bear a child and her husband was infertile. Alice, now an adult, says she has no concerns about surrogacy.<sup>45</sup>

**Evelyn** (name withheld to protect parties): The 1998 Australian Family Law case of *Re Evelyn* involved a partial surrogacy arrangement between close friends. Evelyn was conceived using her surrogate mother's egg and her commissioning father's sperm. Evelyn lived for 12 months in Queensland with her commissioning parents. However, her surrogate (and genetic) mother could not relinquish the baby. The Court found in favour of Evelyn's surrogate mother and awarded custody of Evelyn to her.<sup>46</sup>

The VLRC report did not attribute the different outcomes of these cases to the genetic relationships between the parties. Instead, it concluded that:

*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 if they are unable to contribute their own gametes.*<sup>47</sup>

The VLRC report did not rule out partial surrogacy arrangements.

Some suggest that partial surrogacy can be less complex. Where a commissioning mother is unable to contribute genetically, insisting that the surrogate must not use her gametes adds another person to the conception equation.

### Consideration for transfer of legal parentage

In all Australian jurisdictions, the birth mother is automatically recognised as the legal parent of a child. In the case of surrogacy, this means that the surrogate mother (whether or not she is genetically related) is considered the legal mother and registered as such on the child's birth certificate. Under the *Status of Children Act 1978* (Qld), the surrogate mother and her male partner (if she had one) would be considered the legal parents in a surrogacy arrangement in Queensland.<sup>48</sup>

Australian jurisdictions also provide that:

- Surrogacy arrangements should not be legally enforceable (meaning the surrogate mother cannot be forced to relinquish the baby); and
- The transfer of legal parentage should be conditional on the approval of the surrogate mother and her partner.

In the ACT, the genetic relationship is important when it comes to transferring legal parentage to the commissioning parents. *The Parentage Act 2004* only allows transfer of legal parentage where:

- At least one of the commissioning parents has a genetic connection to the child;<sup>49</sup> and
- The child was conceived using IVF and the surrogate is not the genetic mother.<sup>50</sup>

This is not the approach proposed by the VLRC which recommended provisions to allow for the transfer of legal

parentage in surrogacy arrangements that were not contingent on the genetic contribution of commissioning parents.<sup>51</sup>

The SA committee report on gestational surrogacy recommended that:

*...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.<sup>52</sup>*

This responds to a particular objection from genetic parents to having to adopt their own genetically-related baby.

#### Issues for comment:

6. What role should a genetic relationship between the child and the commissioning parent/s and/or surrogate play in an altruistic surrogacy arrangement?

In responding to this issue, you might wish to consider any evidence or experience relevant to:

- the role genetic relationships may play in the outcomes for the surrogate, commissioning parents and child;
- the impact of genetic relationships on the legal parentage of the child; and
- any other relevant matters.

7. Should at least one of the commissioning parents have a genetic relationship with the child?

8. Should the surrogate be able to use her gametes or should she have no genetic relationship to the child?

#### WHAT LEGAL RIGHTS AND RESPONSIBILITIES SHOULD BE IMPOSED?

Jurisdictional approaches to the legal rights and responsibilities of commissioning parents and surrogates are clearly shaped by principles such as: protecting the best interests of the child; minimising intrusion into people's private lives; promoting the parties' health and wellbeing; and preventing and minimising conflict. Again, consideration of legal rights and responsibilities should take into account not just the benefits or outcomes sought but the possibility for monitoring and enforcement and the consequences for the parties.

Current and proposed legal rights and responsibilities of parties to a surrogacy arrangement in Australia are summarised below under the following categories:

- access to ART services and the transfer of legal parentage;
- reasonable expenses for surrogates;
- monitoring and enforceability of surrogacy agreements; and
- access to advertising and brokerage services.

#### Access to ART services and the transfer of legal parentage

The criteria below shape the rights and responsibilities for parties in accessing ART services and/or seeking to transfer legal parentage in other Australian jurisdictions. As will be seen, there are some differences between jurisdictions in terms of whether or not the criteria should apply at both points of regulation.

##### (i) Fertility and health status:

In Victoria, SA and WA, it is proposed that a prospective surrogate should be eligible for ART services irrespective of her fertility status if she has agreed to bear a child for a commissioning parent who is eligible for such assistance.<sup>53</sup> This is important because the current legislation governing ART in these jurisdictions effectively precludes parties from accessing ART services. Their only choice is to travel interstate to NSW or the ACT to access such services.

The WA Surrogacy Bill 2007 also suggests commissioning parents should demonstrate eligibility for ART services (i.e. be medically infertile or at risk of transmitting a genetic disease) in order to approve the transfer of legal parentage.<sup>54</sup> The VLRC report recommended that transferring legal parentage should require, amongst other criteria, that commissioning parent/s be:

*unlikely to become pregnant, be able to carry a pregnancy or give birth; or a 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.<sup>55</sup>*

##### (ii) Pre-conception agreement:

The WA Surrogacy Bill 2007 suggests that surrogacy arrangements should be agreed pre-conception.<sup>56</sup> This seeks to encourage prior deliberation by the parties to have a baby through surrogacy. In WA, this is a condition proposed for the transfer of legal parentage.<sup>57</sup> In the Queensland context, a requirement for a pre-conception agreement may be useful in differentiating surrogacy from private adoption. The regulatory challenge appears to be where a surrogacy arrangement does not rely on access to ART services.

##### (iii) Genetic contribution:

The ACT requires that transfer of legal parentage only occurs where at least one of the commissioning parents has a genetic contribution and the surrogate mother has none.<sup>58</sup> This encourages parties to surrogacy arrangements to access ART services and meet specific criteria provided in the *Parentage Act 2004*. This is not a requirement proposed in Victoria or WA. Victoria and WA do not propose that commissioning parents should have a

genetic contribution to access ART or transfer legal parentage.

*(iv) Age:*

It is commonly held that commissioning parents and surrogates should be at least 18 years old. As noted, the VLRC report went further and suggested that the surrogate mother should be at least 25 years of age to access ART services and to transfer legal parentage.<sup>59</sup> Some clinics offering gestational surrogacy services have also imposed upper age limits for the commissioning (and genetic) parents (38 years) and the surrogate (40 years).<sup>60</sup>

*(v) Demonstration of informed consent:*

The NHMRC guidelines for ART currently require a clear understanding of the ethical, social and legal implications and counselling to consider the psychosocial significance for the parties and potential child before enabling a surrogacy arrangement to proceed.<sup>61</sup>

The SA committee suggested mandatory counselling according to relevant NHMRC and Australian and New Zealand Infertility Counsellors Association guidelines in order to access ART.<sup>62</sup> Similarly, the VLRC report proposed clearance from a clinical ethics committee based on a counselling report and acknowledgement from all parties that they have received all the required information and advice prior to accessing ART services. It also specified a comprehensive list of issues to be covered in counselling.<sup>63</sup>

The VLRC also suggested a previous pregnancy may be relevant to the assessment of informed consent though it should not be a criterion for becoming a surrogate parent.<sup>64</sup> Some fertility clinics engaged in gestational surrogacy require surrogates to have had at least one child.<sup>65</sup>

For the transfer of legal parentage to be possible:

- the ACT *Parentage Act 2004* requires that both commissioning parents and the surrogate receive “appropriate counselling and assessment from an independent counselling service”;<sup>66</sup> and
- The WA Surrogacy Bill 2007 also recommends independent legal advice in such a case.<sup>67</sup>

The VLRC report, however, did not propose counselling as a requirement for the transfer of legal parentage. A requirement for counselling only applied in relation to access to ART.<sup>68</sup>

*(vi) Non-discriminatory access:*

The VLRC report recommended that people seeking access to ART or the transfer of legal parentage must not be discriminated against on the basis of their sexual orientation, marital status, race or religion.<sup>69</sup>

The SA committee also supported ART and parentage legislation “consistent with State and Commonwealth anti-discrimination legislation”.<sup>70</sup>

The WA Surrogacy Bill 2007 permits the transfer of legal parentage to those commissioning parents eligible for ART. This includes single women or heterosexual couples eligible for ART due to medical infertility or possible transmission of a genetic disease.<sup>71</sup>

The ACT *Parentage Act 2004* only permits the transfer of parentage where parents are couples, but regardless of sexual orientation.<sup>72</sup>

The application of a similar approach to that proposed in WA, SA and Victoria could have implications for other legislation in Queensland. For example, Queensland law does not recognise same sex couples as the legal parents of a child.<sup>73</sup>

*(vii) Exclusion of people at risk of child abuse:*

The VLRC report proposed to exclude both surrogates and commissioning parents from ART without specific assessment and approval where they have been convicted of sexual or violent offences or have a child protection order. Risk of child abuse is also proposed as an exclusionary criterion for the transfer of legal parentage to the commissioning parents in Victoria.<sup>74</sup>

*(viii) Residency:*

The ACT *Parentage Act 2004* requires, and the WA Surrogacy Bill 2007 proposes, that commissioning parents and the surrogate should reside in the jurisdiction.<sup>75</sup> This may be less relevant if a more uniform approach to the regulation of surrogacy is implemented in Australia.

*Specific conditions for the transfer of legal parentage*

Across Australia, other specific conditions applied to, or proposed for, the transfer of legal parentage include:

*(i) Approval of surrogate parents:*

All jurisdictions in Australia recognise the rights of the surrogate to legal parentage at birth irrespective of her genetic connection to the child. They also require prior approval by the surrogate for a transfer of legal parentage to take place. In some jurisdictions, it is proposed that the transfer should also require the approval of the surrogate’s partner or at least consideration of her partner’s views.<sup>76</sup> This position reflects a deep concern to prevent the forced relinquishment of the child.

*(i) Living arrangements:*

It is a commonly agreed requirement that the child must be living with the commissioning parents at the time of the application for a transfer of legal parentage.<sup>77</sup> This is also an indication of the surrogate’s willingness to relinquish the child.

(ii) *Time limit:*

The WA Surrogacy Bill 2007 proposes that an application for transfer of legal parentage should be lodged no earlier than 28 days and no longer than six months after the birth.<sup>78</sup> This was also the position of the VLRC. The ACT has a slight difference with a minimum of six weeks after birth required for receipt of applications.<sup>79</sup> The minimum time period is intended to ensure that the birth mother has time, after the intensity of the birth experience, to reflect on her surrogacy agreement. The upper limit seeks to provide certainty to the parties and minimise disruption to the family.

(iii) *Change of child's name:*

WA proposes that commissioning parents will be able to alter a child's family name upon transfer of legal parentage.<sup>80</sup> This is also provided for in current ACT law.<sup>81</sup>

(iv) *Development of a suitable 'approval plan':*

The WA Surrogacy Bill 2007 also requires an approval plan which includes details of:

- any time that the child is to spend, or communication that the child is to have, with the child's birth parents or any other person; and
- any information that any of the parties are to provide to the other or to any other person.<sup>82</sup>

Reasonable expenses for surrogates

While a surrogate should not materially benefit from her role in an altruistic surrogacy arrangement, it may be unreasonable to expect her to lose money through the expenses associated with the pregnancy and birth. However, it may be difficult to determine the limit of those expenses, without the arrangement becoming a commercial one. Such expenses might include:

- out of pocket health costs associated with conception, pregnancy and birth, including health insurance;
- any costs associated with assessment and expert advice such as counselling and legal advice; and
- income protection, disability and life insurance and lost earnings.

Monitoring and enforceability of surrogacy agreements

Surrogacy agreements are not legally binding on parties in any Australian jurisdiction. Once again, this reflects the commonly held presumption that the birth mother has the right to keep the child irrespective of her intent in any prior agreement. A surrogacy contract cannot be enforced the same way as a commercial contract as children are not commodities to be bought or sold.

In recent reviews there has been some discussion that surrogates should be able to enforce the part of the

agreement relating to payment of agreed 'reasonable' expenses.<sup>83</sup>

Access to advertising and brokerage services

Advertising and brokerage services can facilitate the bringing together of prospective parties to a surrogacy arrangement. In Queensland, the *Surrogate Parenthood Act 1988* prohibits advertising and brokerage arrangements. The WA Surrogacy Bill 2007 proposes that such activities are permissible as long as they are not for financial reward.<sup>84</sup> In contrast, the ACT *Parentage Act 2004* prohibits both the brokering and advertising for surrogacy arrangements.<sup>85</sup>

**Issues for comment:**

9. What legal rights and responsibilities should be imposed upon the commissioning parent/s and/or surrogate?  
  
If relevant, it would be helpful to detail your comments in relation to the following:
  - conditions for access to assisted reproductive technology;
  - conditions for transfer of legal parentage;
  - reasonable expenses for surrogates;
  - monitoring and enforceability of surrogacy agreements; and
  - access to advertising and brokerage services.
10. Should the definition of altruistic surrogacy only include pre-conception agreements in Queensland?
11. If infertility and/or health risk to the mother or child is a criterion for surrogacy, how should these criteria be defined?
12. How well does the transfer of legal parentage in a surrogacy arrangement fit with contemporary approaches in family law and adoption?
13. How important is it for there to be a mechanism for the transfer of legal parentage that is specific to surrogacy arrangements? What would this be?
14. What are the consequences for children born of a surrogacy arrangement in Queensland of maintaining the status quo?
15. Should the surrogate's rights to be automatically recorded as the child's parent on the birth certificate and to approve legal transfer after birth remain if she has no genetic connection to the child?

**WHAT RIGHTS SHOULD A CHILD HAVE TO ACCESS INFORMATION?**

Universally, consideration of the 'best interests of the child' includes a child's right to access information in relation to his/her genetic origins and the circumstances of his/her birth. Article 8 of the United Nations Convention on the Rights of the Child provides that a child has the right to:

...preserve his or her identity, including nationality, name and family relations as recognized by law"; and that:

*Where a child is illegally deprived of some or all of the elements of his or her identity, ..[states].. shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.*<sup>86</sup>

#### Information needs in surrogacy

Depending on the eligibility criteria for commissioning parents and surrogates, a child born of a surrogacy arrangement may have no genetic relationship with his/her commissioning parents. In this case, he/she could be seeking access to information in relation to:

- donors;
- his/her genetic siblings; and
- his/her birth mother and her partner.

The committee has been asked to consider the rights a child born through an altruistic surrogacy arrangement should have to access information relating to his or her genetic parentage and where this information should be held.

#### Birth certificates

The ACT, SA, WA and Victoria have given careful consideration to the need to preserve information in relation to a child's birth parents as part of the process of recording the transfer of legal parentage. One of the arguments in favour of maintaining the birth parents' presumption of parentage is that it creates a record of a child's birth circumstances. The favoured approach in these jurisdictions is for:

- a long form birth certificate recording both the birth parents' and commissioning parents' details; and
- a short form birth certificate recording only the commissioning parents' details. This is considered a practical option to protect the privacy of both the child and the other parties.

There is a precedent in Queensland for this approach in the current arrangements for recording amendments to birth certificates with respect to adoption.<sup>87</sup>

In all Australian jurisdictions, the relevant Registrar of Births, Deaths and Marriages is responsible for recording, updating and releasing birth certificates. A child born from a surrogacy arrangement could be expected to access his/her birth certificate at 18 years of age or earlier with the permission of his/her parents.

#### Queensland adoption process

When a child is adopted, the child assumes the surname of their adoptive parents and an amended birth certificate

is issued. The birth certificate records the adoptive parents as the child's mother and father.<sup>88</sup>

The child's new birth certificate can be purchased by the adoptive parents from the Registry of Birth, Deaths and Marriages. The certificate is evidence of their legal parentage of the child.

The Department of Child Safety holds adoption orders and details of the parties in an adoption register. Once an adopted child is 18 years, the *Adoption of Children Act 1964* provides that the department may:

- release to birth parents and adopted children the full name of the child and the child's adoptive parents at the date of adoption;
- release the full names and dates of birth parents at the time of adoption; and/or
- authorise access to the child's original birth certificate and amended birth entry through the Registry of Births, Deaths and Marriages.<sup>89</sup>

#### Access to donor information

In Queensland, a child's right to access information about donors is currently addressed by an NHMRC guideline, which requires fertility clinics to "Uphold the right to knowledge of genetic parents and siblings". Under this guideline, a person cannot become a donor unless they consent to the release of identifying information to children conceived using their genetic material.<sup>90</sup>

Clinics must collect the following information from donors:

- name, previous name (if any), date of birth, and most recent address;
- details of past medical history, family history, genetic test results; and
- physical characteristics.<sup>91</sup>

In turn, clinics must advise donors that they are ethically responsible to keep the clinic updated with any changes to their details.<sup>92</sup>

At 18 years of age, a child born of ART procedures, is entitled to:

- all information regarding their medical and family history;
- identifying information about the donor and the number and sex of other persons conceived using genetic material from the same donor, the number of families involved and any information that siblings have consented to release.<sup>93</sup>

NHMRC guidelines require that fertility clinics store the information relating to ART procedures indefinitely. This includes the full names and contact details of all participants and the names of children born of ART procedures.<sup>94</sup>

### Responsibility of commissioning parents to communicate with children

There is also recognition of the need to encourage and support commissioning parents and surrogates to inform children of their genetic origins and the circumstances of their birth.

NHMRC guidelines require fertility clinics to encourage commissioning parents and recipients of donor material to tell their children about their origins.<sup>95</sup>

The VLRC also suggested that this should be canvassed as part of initial counselling and there should be ongoing counselling and support to assist with this process.<sup>96</sup>

As noted, WA proposes that a court-endorsed 'approval plan' be considered as a condition of the transfer of legal parentage. It is proposed that this plan would detail parents' commitment to provide the child with information about the child's parentage as he/she develops.<sup>97</sup>

#### Issues for comment:

16. What rights should a child born through an altruistic surrogacy arrangement have to access information relating his or her genetic parentage? Who should hold this information?

#### OTHER MATTERS

The committee would welcome information or advice on any other matters considered relevant to this investigation.

#### Issues for comment:

17. What, if any, other matters should be considered in the regulation of this issue?

Linda Lavarch MP

Chair

#### GUIDELINES FOR MAKING A SUBMISSION

##### Form

- ◆ There is no set form for a submission to the committee. Written submissions may be in the form of a letter, a substantial paper or a short document and they may include appendices. Submissions may contain facts, opinions, arguments and recommendations for action. The committee will accept both written submissions and submissions lodged via their website.
- ◆ **Written submissions** must be signed and dated. Please clearly state your name and address. Those signing a submission on behalf of an organisation should indicate at what level of the organisation the submission has been authorised (eg sub-committee, president, chair, state branch, etc.). A return address and contact number should also be provided. Typed text on A4 paper is preferable, though legible hand-written submissions are acceptable.

- ◆ Public officers may make submissions as private individuals. However, if reference is made in a submission to their official position, it should also be made clear that the submission is made in a private capacity.
- ◆ **Electronic submissions** may be lodged via the committee's web pages at [www.parliament.qld.gov.au/surrogacy](http://www.parliament.qld.gov.au/surrogacy). Please contact the committee secretariat if you require any assistance.

##### Content and relevance

- ◆ A submission should be relevant to the committee's inquiry, otherwise the committee may decide not to accept it. The committee will inform you of its decision to accept your submission or otherwise.

##### Confidentiality

- ◆ If you want your submission, or part of it, to be treated confidentially, then you should clearly write '**confidential**' on each page and, in a brief covering letter, explain why your submission should be treated confidentially. The committee will then consider your request for confidentiality.

##### Unauthorised Release

- ◆ A submission made to the committee should not be published or disclosed to any other person in that form without the committee's written permission.
- ◆ Submissions published without the committee's permission are not protected by parliamentary privilege. The publishers of these submissions may also be in contempt of Parliament.

All written submissions should be sent to:

*The Research Director  
Investigation into Altruistic Surrogacy Committee  
Parliament House, George Street  
BRISBANE QLD 4000*

#### Submissions close on 13 June 2008

Extensions to the closing date may be given. If you need more time to make a submission, or for further information about the inquiry, contact the committee secretariat:

Telephone: (07) 3406 7310

Freecall: 1800 025 598

Fax: (07) 3406 7070

Email: [surrogacy.committee@parliament.qld.gov.au](mailto:surrogacy.committee@parliament.qld.gov.au)

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**INQUIRY INTO ALTRUISTIC SURROGACY - TABLE OF COMPARATIVE LEGISLATION IN AUSTRALIA**

The following table is adapted from the Victorian Law Reform Commission’s report, *Assisted reproductive technology & adoption: Final Report (2007)*; Report 26, South Australia Parliament, Social Development Committee, *Inquiry into Gestational Surrogacy (2007)* and the relevant legislation.

	QLD	ACT	Vic#	SA	TAS	WA	NSW*
	<i>Surrogate Parenthood Act 1988</i>	<i>Parentage Act 2004</i>	<i>Infertility Treatment Act 1995</i>	Statutes Amendment Surrogacy Bill 2008**	<i>Surrogacy Contracts Act 1993</i>	Surrogacy Bill 2007	<i>Assisted Reproductive Technology Act 2007</i>
Altruistic surrogacy prohibited/ illegal	✓	No - IVF gestational surrogacy permitted; one commissioning parent must be a biological parent; surrogate is not genetically related	Technically no, but difficult in practice as surrogate mother must be assessed as infertile and unlikely to transfer genetic illness to child	No - commissioning parents must be married and one must be biological parent (unless not possible), surrogate must be a relative	No	No – must be eligible for assisted reproductive technology	No
Commercial surrogacy prohibited/ illegal	✓	✓	✓	✓	✓	✓	✓
Arranging surrogacy service prohibited	✓	✓	(if commercial)	✓	No	(if commercial)	(legislation silent)
Entering into a surrogacy contract prohibited	✓	(if commercial)	(if commercial)	✓	✓	(if commercial)	(legislation silent)
Advertising for surrogacy services prohibited	✓	✓	✓	✓	✓	(if commercial)	(if commercial)
Receiving payment prohibited	✓	Payment of expenses reasonably incurred allowed	✓	Payment of expenses reasonably incurred allowed	✓	Payment of expenses reasonably incurred allowed (including lost earnings)	(legislation silent)
Surrogacy agreement is void or not enforceable (eg if surrogate mother changes her mind and will not relinquish the child)	✓	✓	✓	✓	✓	✓	✓
Provision of technical/ professional services illegal	No	(if commercial)	No	No	✓	(if commercial)	(legislation silent)
Legal parentage	Woman who carries and gives birth to child and her male partner, married or de-facto (if any)	Woman who carries and gives birth to child and her male or female partner, married or de-facto (if any and if consents)	Woman who carries and gives birth to child and her male partner, married or de-facto (if any)	Woman who carries and gives birth to child and her male partner, married or de-facto (if any)	Woman who carries and gives birth to child and her male partner, married or de-facto (if any)	Woman who carries and gives birth to child and her male or female partner, married or de-facto (if any)	Woman who carries and gives birth to child and her male partner, married or de-facto (if any and if consents)
Transfer of legal parentage to commissioning parents possible	No	By Supreme Court order (commissioning parents must live in ACT and fertilisation must occur in ACT)	May apply to the Family Court for a parenting order (limited parental status), or adopt the child+	Can apply to Youth Court for legal parenting status	May apply to the Family Court for a parenting order (limited parental status), or adopt the child+	Family Court judge can transfer legal parentage (conditional on receipt of counselling and legal advice)	May apply to the Family Court for a parenting order (limited parental status), or adopt the child+

# VLRC report recommendations accepted by Vic Parliament for further consultation – fertility criteria to apply to commissioning parents (not surrogate), payment of reasonably incurred expenses, relax marital status & sexual orientation criteria, transfer of legal parentage to commissioning parents by Court decision on best interests of child.

\* NSW legislation only partially regulates surrogacy. In NSW and the NT, ethical guidelines of the NHMRC apply to altruistic surrogacy arrangements. NSW Assisted Reproductive Technology Bill 2007, currently under consideration.

+ possibility of adoption limited

\*\* Private Members Bill brought by Hon J Dawkins MP.

### Terminology

**Altruistic surrogacy** - An arrangement in which the surrogate mother receives no financial or material gain except, perhaps, for reimbursement of pregnancy and birth related expenses.

**Assisted reproductive technology (ART)** - Medical procedures that are used to help a person conceive a child when conception through natural means is impossible, difficult, or carries risks. These could include insemination with donor sperm (sometimes referred to as artificial or assisted insemination); gamete intra-fallopian transfer (GIFT); intracytoplasmic sperm injection (ICSI); or in-vitro fertilisation (IVF).

**Commercial surrogacy** - An arrangement where the surrogate mother, and/or a broker, receives a fee or material gain from acting as the surrogate, or arranging surrogacy.

**Commissioning person, couple or parent/s (also known as substitute parents, arranged parents, social parents)** - The person or couple that asks a woman to act as a surrogate.

**Gametes** – Reproductive cells, such as mature eggs or sperm, capable of fusing with a gamete of the opposite sex to produce a fertilised egg.

**Genetic (or biological) parent** - A person whose sperm or egg is used to conceive the child to be born through a surrogacy arrangement. The genetic (or biological) parents could be one or both of the commissioning parents, the surrogate mother or a donor.

**Gestational surrogacy** - The implantation of an embryo created with the egg from another woman (either the commissioning mother or a donor) and the commissioning father's or a donor's sperm. (The surrogate is not the genetic mother of the child.)

**In vitro-fertilisation (IVF)** – A form of assisted reproductive technology in which a woman's egg and a man's sperm are mixed in a laboratory and a successful embryo is transferred to a woman's uterus.

**Partial surrogacy** - The use of the surrogate's egg in conception of the child. (The surrogate is genetically related to the child.)

**Surrogacy** - A clear agreement (whether pre-conception or pre-birth) whether formal or informal, between a surrogate and commissioning parent/s for the surrogate to bear a child for the commissioning parent/s and permanently transfer the responsibility for the child's care and upbringing to them after the child's birth.

**Surrogacy agreement or arrangement** - The agreement, arrangement, or contract made between the surrogate mother, possibly her partner, and the commissioning couple or person.

**Surrogate, surrogate mother or birth mother** - The woman who agrees to bear the child in a surrogacy arrangement then permanently transfer responsibility for the child's care and upbringing to the commissioning person or couple.

### Abbreviations

ACT	Australian Capital Territory
ANZICA	The Australian and New Zealand Infertility Counsellors Association Inc
ART	Assisted reproductive technology
NHMRC	National Health and Medical Research Council
NSW	New South Wales
NT	Northern Territory
RTAC	Reproductive Technology Accreditation Committee
SA	South Australia
SA committee	South Australia Parliament's Social Development Committee
SCAG	Standing Committee of Attorneys-General
UN	United Nations
VLRC	Victorian Law Reform Commission
WA	Western Australia

1 Commercial surrogacy may be defined as an arrangement where the surrogate mother and/or a broker receives a fee or material gain from acting as the surrogate, or arranging a surrogacy. For the purposes of this issues paper, any unqualified reference to 'surrogacy' will denote altruistic surrogacy only.

2 s3, *Surrogate Parenthood Act 1988* (Qld).

3 Hon P McKechnie MP 1988, 'Surrogate Parenthood Bill, Second Reading', *Hansard*, Queensland Parliament, 23 March.

4 Recommendation 82, Queensland Government 2000, *Report of the Taskforce on Women and the Criminal Code*, Brisbane, p 385.

5 L Willmott 2002, 'Surrogacy: Ill-conceived rights', *Journal of Law and Medicine*, vol 10, p 198-220.

6 Hon Anna Bligh MP, Premier of Queensland 2008, *Altruistic Surrogacy in Queensland: Background Paper*, tabled 14 February, Queensland Parliament, p 4.

7 Parliament of Tasmania Legislative Council Select Committee 2008, *Surrogacy Terms of Reference*, 1 April. <http://www.parliament.tas.gov.au/ctee/TermsofRefsurrogacy.pdf>

8 This figure does not include inter-country adoptions. It also does not include relative or step-parent adoptions. Department of Child Safety 2004-08, *Adopting a child from Queensland*, website accessed 11 April 2008. <http://www.childsafety.qld.gov.au/adoption/queensland/index.html>

9 Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 28.

10 Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 185.

11 Hon P McKechnie MP 1988, 'Surrogate Parenthood Bill, Second Reading', *Hansard*, Queensland Parliament, 23 March.

12 s46(1), *Adoption of Children Act 1964* (Qld).

13 Queensland Government 2000, *Report of the Taskforce on Women and the Criminal Code*, Brisbane, p 373.

14 Reproductive Technology Accreditation Committee 2005, *Code of practice for assisted reproductive technology units*, Fertility Society of Australia, pp 28-29.; National Health and Medical Research Council 2007, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, Australian Government, p 57.

15 Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, pp 161-163.

16 S Golombok, C Murray, J Vasanti, F MacCallum and E Lycett 2004, 'Families created through surrogacy arrangements: Parent-child relationships in the 1st year of life', *Developmental Psychology*, vol 40, no 3, pp 400-411; cited in Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 161.

17 A Western Australia Department of Health official recently indicated that it was estimated that there would be up to 10 permissible surrogacy cases per annum under the terms of the Surrogacy Bill 2007 (WA). Standing Committee on Legislation 2008, *Committee Hearing Transcript of Evidence*, Parliament of Western Australia, 14 February, p 27.

18 1991, Brisbane Magistrates Court (name withheld); 1993 Ipswich District Court (name withheld); 1993 Mossman Magistrates Court (R v White); 1998, Brisbane Family Court (Re Evelyn); 2001 Rockhampton Magistrates Court (Standen).

19 Queensland Government 2000, *Report of the Taskforce on Women and the Criminal Code*, Brisbane, p 383.

20 S Maher 1996, 'Sisters to have surrogate babe', *The Sunday Mail*, 11 August, p 2.

21 1993 Mossman Magistrates Court (R v White).

22 1998, Brisbane Family Court (Re Evelyn).

23 Some states and territories have specific ART legislation. Queensland regulation of fertility clinics relies on existing legislation covering the licensing of private health facilities. Fertility clinics must conform to the Reproductive Technology Accreditation Committee *Code of practice for assisted reproductive technology units* (2005) and the National Health and Medical Research Council *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (2007) to be accredited and licensed. The RTAC code of practice is produced by the Fertility Society of Australia as an industry standard.

24 Recommendations 108-111, Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 15.

25 L Willmott 2002, 'Surrogacy: Ill-conceived rights', *Journal of Law and Medicine*, vol 10, pp 198-220.

26 Family Court of Australia 2007, *Application for Consent Orders (Do it yourself kit)*, p 3. [www.familycourt.gov.au](http://www.familycourt.gov.au)

27 United Nations 1989, *Convention on the rights of the child*, Office of the High Commissioner for Human Rights, November. <http://www.unhcr.ch/html/menu3/b/k2crc.htm>

As an example, a Victorian Law Reform Commission consultation paper noted the importance of considering the interests of a child's genetic siblings in a partial surrogacy arrangement, or a surrogacy arrangement using donor gametes of parties other than the commissioning parent/s. 2004, *Assisted Reproductive Technology and Adoption: Consultation Paper*, Melbourne, p 118.

29 Principle 5.1, Respect for all participants. National Health and Medical Research Council 2007, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, Australian Government, p 21.

30 s15(2), Surrogacy Bill 2007 (WA) (Transfer of child's parentage - Circumstances for seeking a parentage order); Social Development Committee 2007, *Inquiry into Gestational Surrogacy*, Report 26, Parliament of South Australia, 13 November, p 64; Recommendation 99, Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 14.

31 s26(3)(b), *Parentage Act 2004* (ACT).

32 s24(d), *Parentage Act 2004* (ACT).

33 Recommendation 13, Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 14; Recommendation 4, Social Development Committee 2007, *Inquiry into Gestational Surrogacy*, Report 26, Parliament of South Australia, 13 November p 65; s24c, *Parentage Act 2004* (ACT); s3, Surrogacy Bill 2007(WA).

34 Recommendation 3(a), Social Development Committee 2007, *Inquiry into Gestational Surrogacy*, Report 26, Parliament of South Australia, 13 November p 6; Recommendation 13, Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 112; s46, WA Surrogacy Bill 2007.

35 Recommendation 114, Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 15.

36 s24(a& b), *Parentage Act 2004* (ACT).

37 Recommendation 115, Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 15; Parliament of Western Australia, 2007, *Human Reproductive Council, Directions on surrogacy: Given by the Chief Executive Officer of the Department of Health to set the standards of practice for surrogacy under the Human Reproductive Technology Act 1991 on the advice of the WA Reproductive Technology Council*, tabled paper, 30 August, p 8.

38 Guideline 13.2, National Health and Medical Research Council 2007, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, Australian Government, p 57; s26(3)(e), *Parentage Act 2004* (ACT); s17(2), Surrogacy Bill 2007(WA); Recommendation 2(b), Social Development Committee 2007, *Inquiry into Gestational Surrogacy*, Report 26, Parliament of South Australia, 13 November.

39 Part 1, s3, Surrogacy Bill 2007(WA).

40 s24, *Parentage Act 2004* (ACT).

41 Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 172.

42 Department of Child Safety 2004-08, *General children's adoption program information booklet*, website accessed 11 April 2008. <http://www.childsafety.qld.gov.au/adoption/documents/adopt-eoi-kit-general.pdf>

43 O van den Akker 2007, 'Psychosocial Aspects of Surrogate Motherhood', *Life & Health Sciences*, Vol 13, No.1 Aston University, Birmingham, UK pp 53-62.

44 G Noble cited in Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 178.

45 Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 162; CK Lay 1991, 'Surrogacy and mother come under attack', *The Australian*, 25 February p 3; J Males 2007, 'Born to be a supporter of IVF', *Couriermail.com.au*, November.

46 Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 162; L Willmott 2002, 'Surrogacy: Ill-conceived rights', *Journal of Law and Medicine*, vol 10, pp 198-220.

47 Recommendation 118, Victorian Law Reform Commission 2007, *Assisted reproductive technology & adoption: Final report*, March, Melbourne, p 15.

48 s18A

49 s24(d), *Parentage Act 2004* (ACT)

50 s24(a&b), *Parentage Act 2004* (ACT)

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