



Victorian
Law Reform
Commission

Assisted Reproductive Technology & Adoption
Position Paper Three: Surrogacy

Call for Submissions

It is important to us that all members of the community have the opportunity to express their views on this important area of the law. The Victorian Law Reform Commission therefore invites your comments about the interim recommendations made in this Position Paper, and seeks your responses to the questions that are raised before we write our final report to the government. The ways in which you can tell us your views are set out below. If you would like a copy of the commission's *Assisted Reproductive Technology & Adoption: Consultation Paper*, or any of our other publications, please contact the commission on (03) 8619 8619. All commission publications are also available on our website: <www.lawreform.vic.gov.au>.

HOW TO MAKE A SUBMISSION

A submission may be made in writing or by phone or in person.

You may choose to comment on all of the interim recommendations or alternatively only those in which you have a specific interest. There is no particular form or format you need to follow.

Written submissions may be forwarded:

- by mail—Victorian Law Reform Commission, GPO Box 4637, Melbourne Vic 3001;
- email—law.reform@lawreform.vic.gov.au; or
- fax—8619 8600.

CONFIDENTIALITY

Submissions are public documents and so may be accessed by any member of the public. If you wish to retain confidentiality you must clearly advise us whether:

- you wish your submission to be quoted or sourced but your name not to be disclosed (anonymous); or
- you do not wish your submission to be quoted or sourced to you in a commission publication (confidential).

DEADLINE FOR SUBMISSIONS

9 January 2006

Contributors

Reference Team

Sonia Magri
Mary Polis
Professor Marcia Neave

Editor

Alison Hetherington

Victorian Law Reform Commission

Chairperson

Professor Marcia Neave AO*

Full-time Commissioner

Judith Peirce

Part-time Commissioners

Paris Aristotle AM*
Her Honour Judge Jennifer Coate
The Honourable Justice David Harper
Her Honour Judge Felicity Hampel*
Professor Sam Ricketson*
The Honourable Vice-President Iain Ross AO
The Honourable Justice Tim Smith

Chief Executive Officer

Padma Raman

Operations Manager

Kathy Karlevski

Policy and Research Team Leaders

Angela Langan
Mary Polis

Policy and Research Officers

Samantha Burchell
Joanna Carr
Claire Downey
Daniel Evans
Siobhan McCann
Dr Zoë Morrison
Priya SaratChandran
Alison Hetherington
Trish Luker
Simone Marrocco
Julie Bransden
Vicki Christou
Lorraine Pitman
Failelei Siatua

Communications Officers

Project Officer

Librarian

Administrative Officers

*ART Division, constituted under section 13 of the *Victorian Law Reform Commission Act 2000*.

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Terms of Reference

The Victorian Law Reform Commission has nine members: the Chairperson Professor Marcia Neave, the Honourable Justice Tim Smith, the Honourable Justice David Harper, the Honourable Vice-President Iain Ross, her Honour Judge Jennifer Coate, her Honour Judge Felicity Hampel, Professor Sam Ricketson, Ms Judith Peirce and Mr Paris Aristotle. The commission advises the Attorney-General on areas of law that he refers to us.

On 11 October 2002 the Attorney-General, the Honourable Rob Hulls MP, gave the commission a reference on the following terms:

1. The Victorian Law Reform Commission is to enquire into and report on the desirability and feasibility of changes to the *Infertility Treatment Act 1995* and the *Adoption Act 1984* to expand eligibility criteria in respect of all or any forms of assisted reproduction and adoption; and make recommendations for any consequential amendments which should be made to the:
 - *Status of Children Act 1974*;
 - *Births Deaths and Marriages Registration Act 1996*;
 - *Human Tissue Act 1982*;
 - *Equal Opportunity Act 1995*;
 - any other relevant Victorian legislation.
2. In making its enquiry and report, the VLRC is to take into account, to the extent it decides is necessary or desirable:
 - (i) social, ethical and legal issues related to assisted reproduction and adoption, with particular regard to the rights and best interests of children;
 - (ii) the public interest and the interests of parents, single people and people in same-sex relationships, infertile people and donors of gametes;
 - (iii) the nature of, and issues raised by, arrangements and agreements relating to methods of conception other than sexual intercourse and other assisted reproduction in places licensed under the *Infertility Treatment Act 1995*;
 - (iv) the penalties applicable to persons, including medical and other personnel, involved in the provision of assisted reproduction (whether through a licensed clinic or otherwise); and
 - (v) the laws relating to eligibility criteria for assisted reproduction and adoption and other related matters which apply in other states or countries and any evidence on the impact of such laws on the rights and best interests of children and the interests of parents, single people, people in same-sex relationships, infertile people and donors of gametes.
3. In addition, the VLRC is to consider:
 - Whether changes should be made to the Act to reflect rapidly changing technology in the area of assisted reproduction.
 - The meaning and efficacy of sections 8, 20 and 59 in relation to altruistic surrogacy, and clarification of the legal status of any child born of such an arrangement.

On making its report the VLRC is to consider the relationship between changes to Victorian legislation and any relevant commonwealth legislation, including the *Family Law Act 1975* and the *Sex Discrimination Act 1984*, as well as any international conventions and instruments to which Australia is a signatory.

Abbreviations

ACT	Australian Capital Territory
Ark Code Ann	Arkansas statutes
ART	assisted reproductive technologies
C	Canada
Cth	Commonwealth
DHS	Department of Human Services
div	division
ed	edition/editor
eg	example
et al	and others
Fam LR	Family Law Reports
ibid	in the same place (as the previous footnote)
ie	that is
ITA	Infertility Treatment Authority
IVF	in-vitro fertilisation
n	footnote
NHMRC	National Health and Medical Research Council
para(s)	paragraph(s)
s	section (ss pl)
QC	Queen's Counsel
UK	United Kingdom
US	United States
Vic	Victoria
VLRC	Victorian Law Reform Commission

Terminology

Commissioning person or couple

A person or couple who ask a woman (the surrogate mother) to conceive and carry a child and then to permanently surrender custody or guardianship of that child to them.

Surrogate mother

A woman who agrees to carry a child and then permanently surrender custody or guardianship to the commissioning person or couple.

Surrogacy agreement

The agreement made between the surrogate mother and the commissioning couple or person.

Partial surrogacy

A surrogacy agreement in which the surrogate mother's own egg is fertilised with sperm from the commissioning father or a donor—this can be done by the man having intercourse with the surrogate mother or through artificial insemination.

Gestational surrogacy

A surrogacy agreement in which the eggs are extracted from the commissioning mother (or donor) and are fertilised with the commissioning father's sperm (or donor sperm). The resulting embryo is then transferred to the womb of the surrogate mother.

Altruistic surrogacy

A surrogacy arrangement in which the surrogate mother receives no material gain for acting as a surrogate.

Commercial surrogacy

A surrogacy arrangement in which the surrogate mother is paid a fee or reward for acting as a surrogate.

Gametes

Sperm and/or women's eggs (ova).

Chapter 1

Our Process

INTRODUCTION

1.1 This is the third in a series of position papers published by the Victorian Law Reform Commission in its reference on assisted reproductive technologies (ART) and adoption. The first Position Paper contained the commission's interim recommendations on access to infertility treatment.¹ Those recommendations proposed, among other things, the expansion of eligibility criteria for ART to allow women without male partners to access all forms of treatment. The second Position Paper contained the commission's interim recommendations on who should be recognised as the legal parents of children born as a result of the use of donated sperm and eggs (in particular, of children born to women without male partners), the rights of donor-conceived children to information about their genetic origins, and who should be eligible to adopt children.²

1.2 This paper addresses specific aspects of the law governing surrogacy. As we explained in our Consultation Paper, our terms of reference on surrogacy are more limited than those which apply to the topics addressed in the first two position papers.³ As we explain in Chapter 3, because altruistic surrogacy is not prohibited by legislation it is legally permitted in Victoria. However, because a woman cannot be treated in a clinic unless she is 'unlikely to become pregnant' or is at risk of having a child with a disease or genetic abnormality, the circumstances in which a woman can act as a surrogate mother are very limited.

1.3 We have not been asked to report on the threshold question of whether or not surrogacy should be permitted, facilitated or prohibited. Instead, we have been asked to consider the meaning and efficacy of the current law in relation to:

- eligibility criteria for ART procedures in altruistic surrogacy arrangements;
- payments in the context of altruistic surrogacy arrangements;
- the clarification of the legal status of children born of such arrangements.

Because our terms of reference are limited in this way, we have not addressed the threshold question of whether the law should permit altruistic surrogacy, which remains a matter for the government to decide.

1.4 The recommendations and suggestions set out in this paper proceed on the assumption that altruistic surrogacy is currently and will continue to be permitted in Victoria. We have taken this approach because it reflects the current state of the law, and because our terms of reference have asked us to consider some of the legal consequences of permitting surrogacy arrangements to proceed. If, however, the decision is made not to permit altruistic surrogacy in Victoria, the law should be amended to prohibit all forms of surrogacy, and the recommendations made in this paper would become redundant.

1 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Position Paper One: Access* (May 2005).

2 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Position Paper Two: Parentage* (July 2005).

3 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Consultation Paper* (2003) paras 6.4–6.6.

WHAT IS COVERED IN THIS POSITION PAPER

1.5 The views expressed in this paper are intended to indicate the direction of the commission's thinking. The paper is not intended to be a comprehensive report on the findings of our review of the law in this area. It includes:

- an explanation of our consultation process;
- a discussion of the issues relevant to the regulation of surrogacy;
- a summary of the considerations and arguments that have led the commission to the interim recommendations made in this paper;
- a set of interim recommendations developed by the commission on the assumption that altruistic surrogacy is to be permitted in Victoria.

1.6 In particular, the paper includes the commission's views about:

- what eligibility criteria should apply to the surrogate mother and the person or couple commissioning the surrogacy;
- whether any form of payment should be permitted in altruistic surrogacy arrangements;
- how the legal parentage of children born through such arrangements should be determined;
- how to ensure that children born through such arrangements have access to information about their genetic heritage and/or their mode of conception.

1.7 The paper also seeks your feedback on the commission's suggested approaches to the aspects of surrogacy under review. Details of how to make a submission in response to the paper are at the front of this paper.

THE PROCESS

CONSULTATION PAPER

1.8 In December 2003, the commission published *Assisted Reproductive Technology & Adoption: Consultation Paper*.⁴ The Consultation Paper was published to inform people of the scope and nature of our inquiry, invite public comment and provide people with the necessary background to make informed submissions. It also raised questions which the commission identified as being important to the inquiry. It sought information about the effects of current laws and practices governing assisted reproduction and people's opinions on the range of issues we have been asked to consider.

SUBMISSIONS

1.9 Public interest in this project has been intense and has involved people from all sectors of society. The commission received 254 submissions in response to its Consultation Paper. Of these submissions, 65 addressed the question of surrogacy. All the issues raised in these submissions were carefully considered and weighed, and taken into account in decisions about the interim recommendations in this Position Paper.

1.10 The majority of the 254 submissions emphasised the importance of considering the health and wellbeing of children born as a result of ART. This has been the central focus of the interim recommendations made in earlier position papers on access to ART and legal parentage and is again the focus for surrogacy.

4 Victorian Law Reform Commission (2003), above n 3.

1.11 All submissions, including those in response to this paper, will be considered in making the final recommendations to government, which will be published in our Final Report.

OCCASIONAL PAPERS

1.12 The three position papers take account of information in three occasional papers published by the commission. These papers considered outcomes for children born of ART in a diverse range of families,⁵ the *Convention on the Rights of the Child* for children conceived through ART,⁶ and regulatory models in Australia, Canada, the United Kingdom (UK), and the United States (US).⁷ These papers were launched on 8 September 2004 at a public forum. The forum was advertised widely and was attended by over 150 people who made many valuable comments.

1.13 More information about these papers, and/or copies of them, may be obtained from the commission's website, or by contacting us on (03) 8619 8619. The papers are also freely available at all university and legal libraries.

FINAL REPORT

1.14 The recommendations made in the Final Report are made by the commissioners, who take account of the views expressed in our public consultations and submissions. The complexity of the issues considered in this paper and the wide variety of views which people hold about them has made it particularly important to give people opportunities to have their say. The commission will consider your responses and comments on the position papers when deciding what should be included in the Final Report to the government.

1.15 The Final Report will contain full details of our consultation process and research findings, a complete list of submissions received and a comprehensive discussion of the broad range of arguments and beliefs about the regulation of assisted reproduction. We are planning to complete the Final Report in 2006. It will then be tabled in parliament by the Attorney-General.

5 Dr Ruth McNair, *Outcomes for Children Born of A.R.T. in a Diverse Range of Families* (2004).

6 John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (2004).

7 Adjunct Professor John Seymour and Sonia Magri, *A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review* (2004).

Chapter 2

Background

INTRODUCTION

2.1 Surrogacy is a practice under which a woman who is, or is to become, pregnant agrees to permanently surrender the child to another person or couple who will be the parent or parents of the child. In this paper we describe the woman who bears the child as the surrogate mother and the person or people to whom the child is surrendered as the commissioning parent or parents.

2.2 A child who is born to a surrogate mother may or may not be her genetic child. If the surrogate's egg is used to conceive the child, it is known as 'partial surrogacy'. If the surrogate mother is implanted with an embryo created with an egg from another woman (either the commissioning mother or a donor) it is known as 'gestational surrogacy'. Surrogacy arrangements may be 'altruistic' (where the surrogate mother receives no payment or only reimbursement of reasonable expenses associated with the pregnancy) or 'commercial' (where the mother is paid a fee for conceiving or carrying the child). In altruistic surrogacy arrangements it is not uncommon for the surrogate to be a relative of one of the members of the commissioning couple, for example a sister.

2.3 Early surrogacy arrangements involved sexual intercourse between the surrogate mother and the commissioning father. They have also involved the surrogate inseminating herself with the commissioning father's or donor sperm (self-insemination) or being inseminated by a doctor with the commissioning father's or donor sperm (artificial insemination).

2.4 Today, surrogacy arrangements may involve the use of other forms of ART, where an embryo is formed in a laboratory and is then transferred to the surrogate's uterus. In such cases the embryo may be created with the commissioning mother's or donated eggs and fertilised with the commissioning father's or donor's sperm, or using the surrogate mother's own eggs fertilised with the commissioning father's or donor's sperm.

2.5 There are several situations in which a person or couple may wish to commission a surrogacy arrangement:

- A woman may be unable to become pregnant because she has had a hysterectomy or lacks part of her uterus, uterine lining, ovaries or other parts of the genital tract. She may be unable to carry a baby to term or she may have a health condition which makes pregnancy dangerous.⁸ She and her partner (if any) may need a surrogate to bear a child on her/their behalf. We received submissions from women in this situation, including two women who had had hysterectomies with conservation of their ovaries after complications during childbirth,⁹ a woman who had had 14 unsuccessful IVF treatments,¹⁰ and a woman for whom pregnancy was possible but dangerous because she had been treated for a hormone-receptor-positive breast cancer and was advised by her doctor not to become pregnant for fear that the

8 Information provided by Dr Kate Stern, Melbourne IVF, 5 September 2004.

9 Submissions 253, 254.

10 Submission 243.

hormones associated with the pregnancy could trigger or accelerate a recurrence of the cancer.¹¹

- A man may want to have a child but have no partner.
- A male same-sex couple may want to conceive a child using their sperm. The commission received submissions from men in this situation who have either pursued surrogacy arrangements overseas or would like to be able to have a child with the help of a surrogate in the future.¹²
- A man and woman who are involved in a treatment program have embryos in storage. If the woman dies, her partner may want to commission a surrogate to carry and give birth to the child.¹³

SURROGACY OUTCOMES

2.6 Empirical research on outcomes in surrogacy arrangements is limited and there is little information on outcomes for children born through surrogacy.¹⁴

2.7 An ongoing research project about surrogacy arrangements in the UK has begun to examine the effects of surrogacy on commissioning parents, the surrogate and the child and three studies have been reported so far.

2.8 The first study of 42 heterosexual families who have had children through surrogacy concluded that ‘the commissioning parents had not generally found the experience of surrogacy to be problematic’.¹⁵ It also found the relationships between the commissioning couple and the surrogate mother to be generally good, involving minimal conflict. A large majority of the couples interviewed maintained contact with the surrogate after the birth of the child. The second study found that the 34 surrogates did not appear to experience psychological problems as a result of handing over the baby or the reactions of those around them.¹⁶ The third study focused on the parent–child relationship in the first year of the child’s life:

the differences that were identified between the surrogacy families and the other family types indicated greater psychological wellbeing and adaptation to parenthood by mothers and fathers of children born through surrogacy arrangements than by the comparison group of natural-conception families, with the exception of emotional overinvolvement.¹⁷

There were no differences in infant temperament between the different family types included in the study.¹⁸

2.9 It should be emphasised that these studies have been conducted while the children were infants. Further research will be necessary to examine the psychological development of the children as they grow up and are able to understand the circumstances of their birth.¹⁹

11 Submission 236.

12 Submissions 248, 250, 251.

13 Posthumous use of embryos is discussed in Position Paper One (Chapter 5).

14 McNair (2004) above n 6, p 46.

15 Fiona MacCallum et al, ‘Surrogacy: The experience of commissioning couples’ (2003) 18(6) *Human Reproduction* 1334, 1340.

16 Vasanti Jadva et al, ‘Surrogacy: the experiences of surrogate mothers’ (2003) 18(10) *Human Reproduction* 2196.

17 Golombok et al, ‘Families Created Through Surrogacy Arrangements: Parent–Child Relationships in the 1st Year of Life’ (2004) 40(3) *Developmental Psychology* 400, 408.

18 Ibid 408.

19 MacCallum et al (2003) above n 15, 1341.

2.10 The Kirkman case in Victoria has also provided us with an insight into the thoughts and experiences of Australia's first child born through a gestational surrogacy arrangement.²⁰ In 1995 Alice Kirkman gave her first written thoughts to the world about her birth:

I am seven years old and it is amazing I was born. It is amazing that my Mum and Dad even thought of having a child this way. It is amazing that Linda said 'Yes'. She gave birth to me. Linda is really my aunt because it was Mum's egg and because it was my parents who wanted to bring me up and not Linda, and even because Linda didn't want another child. I am her niece ... My family is the best family ever, but my Mum and Dad are the best. In my family, there's Linda and Jim, Cynthia and Bruce, Heather, Will, Andrew, Chris, Mark and Grandma (usually called Vonnie). There's also Dad's family, but I'm only talking about the Kirkmans. Grandpa had a good life but died last year. He was very proud of me ...²¹

2.11 At 14, Alice Kirkman reflected further on her conception:

Do I feel like something that's been manufactured? No, I don't. All I feel is that my parents couldn't make their own bundle of expense (aka bundle of joy), so they got scientists to do it for them. The genetics matter less than the relationships when it comes to mum, dad and child. Being born by donor insemination (DI) and IVF surrogacy causes much less trauma than being adopted, I think ... I knew that both my parents did want me, and that Linda, my aunt, was just helping them.²²

2.12 In contrast to the Kirkman case and the positive results reported in the UK studies, there have been cases in which significant difficulties have arisen in the course of the arrangement.²³ Problems can occur if the surrogate decides she does not want to relinquish the child, if the commissioning couple decides they do not want the child because, for example, he or she is born with a disability, or if the parties have different views about how the pregnancy and childbirth should be managed. Another risk is that the surrogate has been coerced into carrying the child on behalf of a family member or friend and is not acting autonomously.

2.13 The case of *Re Evelyn* illustrates the conflict that may arise between the commissioning parents and a surrogate mother. In this case, Mr and Mrs S offered to bear a child for Mr and Mrs Q, who were unable to have children because Mrs Q had had a full hysterectomy. The child, 'Evelyn', was conceived with Mrs S's egg and Mr Q's sperm. Evelyn lived with the Qs in Queensland for a short period after her birth. Friction developed shortly after Evelyn was born, until Mrs S came to the realisation that she could no longer abide by the agreement and relinquish her. Mrs S travelled to Queensland and removed Evelyn from the Qs' care and both of them returned to South Australia. The Family Court ordered that Evelyn reside with the Ss, with the Qs to have contact, and dismissed an appeal by the Qs against this decision. Each couple wanted to raise Evelyn, and as Justice Jordan noted in the original case, each couple had 'the capacity to provide a very high standard of care'. All of the adults loved Evelyn and were committed to her welfare. The court's decision to order that Evelyn live with the Ss was based on an assessment of what would be in Evelyn's best interests.

20 For an account of the Kirkman case, see Maggie Kirkman and Alice Kirkman, 'Sister-to-sister gestational "surrogacy" 13 years on: a narrative of parenthood' (2002) 20(3) *Journal of Reproductive and Infant Psychology* 135.

21 Alice Kirkman, 'Amazing!' (1995) 2(7) *ACCESS National Newsletter* 2, 5.

22 Alice Kirkman, 'Take One Egg' *Good Weekend* (Melbourne) 5 March 2005, 47–48.

23 Eg, *Re Evelyn* (1998) 23 Fam LR 53; *In the Matter of Baby M*, 537 A. 2d 1227 (Supreme Court of New Jersey, 1988).

REGULATION OF SURROGACY

2.14 The practice of surrogacy challenges social norms and opinions about family formation. The question of whether it should be prohibited, or permitted and regulated, has been considered in a number of Australian government inquiries and reports.²⁴

2.15 Regulation to control surrogacy arrangements is controversial in two respects: it can be seen as an official endorsement of a practice which some people in the community see as objectionable, and it may be perceived as an unwarranted intrusion by the State into the reproductive choices of individuals.²⁵ However, regulation of surrogacy may play an important role in minimising the potential for disputes and in protecting all parties, including the child, from potential harm.²⁶ Because our terms of reference are limited, we do not discuss debates on these questions.

2.16 In their comparative review of surrogacy legislation in Australia, the UK, Canada and the US, Adjunct Professor John Seymour and Sonia Magri described the range of legislative approaches to surrogacy as a spectrum:

At one end of the spectrum are the Acts prohibiting all types of surrogacy arrangements; the prohibition may be reinforced by provisions imposing criminal penalties on those entering into such an arrangement. Alternatively, the prohibition may apply only to arrangements of a commercial character. Midway along the spectrum are the Acts which, while not prohibiting surrogacy contracts, declare them to be void and unenforceable. At the other end of the spectrum are laws which recognise the legitimacy of altruistic surrogacy contracts. These statutes accept the parties' intentions should be realised, provided certain conditions are fulfilled.²⁷

AUSTRALIA

2.17 In Australia most jurisdictions allow altruistic surrogacy and some regulate it. Commercial surrogacy arrangements are generally illegal. In the 1990s the National Bioethics Consultative Committee recommended the facilitation of altruistic surrogacy subject to various controls,²⁸ but its recommendations were not accepted by Australian health and welfare ministers at the time.²⁹

24 Family Law Council, *Creating Children: A Uniform Approach to the Law and Practice of Reproductive Technology in Australia* (1985); National Bioethics Consultative Committee, *Surrogacy: Report 1* (April 1990); National Bioethics Consultative Committee, *Discussion Paper—Surrogacy 2: Implementation* (October 1990); Attorney-General [ACT], *Discussion Paper: Surrogacy Agreements in the ACT* (October 1993); New South Wales Law Reform Commission, *Artificial Conception—Surrogate motherhood: Australian public opinion*, Research Report 2 (1987); New South Wales Law Reform Commission, *Artificial Conception: Surrogate Motherhood*, Discussion Paper 18 (1988); New South Wales Law Reform Commission, *Artificial Conception: Surrogate Motherhood*, Report 60 (1988); Special Committee Appointed by the Queensland Government to Enquire into the Laws relating to Artificial insemination, In Vitro Fertilisation and other related matters, *Report* (1984); Select Committee of the South Australian Legislative Council, *Report on Artificial Insemination by Donor, In Vitro Fertilisation and Embryo Transfer Procedures and Related Matters in South Australia* (1987); Committee to Investigate Artificial Conception and Related Matters, *Final Report* (June 1985); Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation, *Report on the Disposition of Embryos Produced by In Vitro Fertilisation* (August 1984); Committee of Inquiry, *Report of the Committee Appointed by the Western Australian Government to Enquire into the Social Legal and Ethical Issues Relating to In Vitro Fertilisation and its Supervision* (October 1986); Health Department of Western Australia: Reproductive Technology Working Party, *Report to the Minister for Health for Western Australia* (1988).

25 Helen Szoke, 'Surrogacy: All the features of a relationship that could go wrong?' (2001–2002) 28 *Melbourne Journal of Politics* 56.

26 Imogen Goold 'Surrogacy: Is there a case for legal prohibition?' (2004) 12 *Journal of Law and Medicine* 205.

27 Seymour and Magri (2004) above n 8, 49–50.

28 National Bioethics Consultative Committee, *Surrogacy: Report 1* (April 1990); National Bioethics Consultative Committee, *Discussion Paper—surrogacy 2: Implementation* (October 1990). The Western Australian Select Committee on the Human

2.18 Five jurisdictions in Australia have legislation regulating surrogacy: Victoria, South Australia, Queensland, Tasmania, and the Australian Capital Territory (ACT). Table 1 sets out the types of provisions that are contained in that legislation. Such provisions include:

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

2.19 All five states prohibit commercial surrogacy. Queensland prohibits altruistic surrogacy and South Australia makes all surrogacy contracts illegal and void. The ACT expressly facilitates altruistic surrogacy subject to a range of conditions.³⁰ In Tasmania altruistic surrogacy is not prohibited, although providing technical or professional services to achieve a pregnancy that is the subject of a surrogacy contract is an offence, and surrogacy contracts are void. In Victoria the legislation is silent on whether altruistic surrogacy is permitted, although surrogacy agreements are void.

TABLE 1: SURROGACY LEGISLATION IN AUSTRALIAN JURISDICTIONS

	Victoria	Queensland	Tasmania	South Australia	ACT
Practices	<i>Infertility Treatment Act 1995</i>	<i>Surrogate Parenthood Act 1988</i>	<i>Surrogacy Contracts Act 1993</i>	<i>Family Relationships Act 1975 (Part IIB)</i>	<i>Parentage Act 2004</i>
Altruistic surrogacy prohibited/illegal	✗	✓	✗	✓ (But no penalty)	✗
Commercial surrogacy prohibited/illegal	✓	✓	✓	✓	✓
Arranging surrogacy service prohibited	Commercial agreements only	✓	✓	✓	Except by a party to the agreement
Entering into a surrogacy contract prohibited	Commercial agreements only	✓	✗	✓	Commercial agreements only
Advertising surrogacy services prohibited	✓	✓	✓	✓	✓
Receiving payment is prohibited	✓	✓	✓	✗	Payment of expenses reasonably incurred is allowed
Surrogacy agreement is void or not enforceable	✓	✓	✓	✓	✓
Provision of technical/professional services is illegal	✗	✗	✓	✗	Commercial agreements only

2.20 In New South Wales, Western Australia and the Northern Territory, there is no legislation about surrogacy but the practice is regulated by ethical guidelines.³¹ In these jurisdictions altruistic

Reproductive Technology Act 1991 also recommended that legislation be enacted to facilitate altruistic surrogacy: Legislative Assembly of Western Australia Select Committee on the *Human Reproductive Technology Act 1991, Report* (1999).

29 Szoke (2001–2002) above n 28, 58; Goold (2004) above n 29, 209–210.

30 *Parentage Act 2004* (ACT). See discussion at paras 5.24–5.26 for details of the conditions that must be met before a parentage order may be made for a child born of a surrogacy arrangement.

31 As expressed in the NHMRC, *Ethical Guidelines for the clinical practice of ART* (2004).

surrogacy is permitted, however the National Health and Medical Research Council (NHMRC) guidelines state that:

noncommercial surrogacy (whether partial surrogacy or full surrogacy) is a controversial subject ... clinics must not facilitate surrogacy arrangements unless every effort has been made to ensure that participants:

- have a clear understanding of the ethical, social and legal implications of such arrangements; and
- have undertaken counselling to consider the social and psychosocial significance for the person born as a result of the arrangements, and for themselves.³²

Clinics in these jurisdictions are precluded from providing services to people pursuing commercial surrogacy arrangements under the NHMRC guidelines. The guidelines state that it is 'ethically unacceptable to undertake or facilitate surrogate pregnancy for commercial purposes. Clinics must not undertake or facilitate commercial surrogacy arrangements'.³³

UNITED KINGDOM, CANADA AND UNITED STATES

2.21 The UK, Canada and numerous US states have enacted legislation dealing with surrogacy.³⁴ Virtually every jurisdiction disapproves of commercial surrogacy, but they adopt different approaches to altruistic surrogacy.³⁵ In the UK and various US states, procedures have been established to enable the commissioning couple to be recognised as the legal parents of the child provided certain conditions are met. For example, in the UK, under the *Human Fertilisation and Embryology Act 1990*, a court may order that the commissioning couple be treated as the parents of the child if it is satisfied they are married, the gametes of at least one of them have been used to conceive the child, the child is living with the couple, and no money or other benefit (other than for expenses reasonably incurred) has been given or received under the surrogacy agreement.³⁶ Some US states permit courts to scrutinise and approve surrogacy agreements before the arrangement commences.³⁷

2.22 In some of these jurisdictions it is permissible for the surrogate to receive payment to reimburse her for expenses she incurs during and as a result of the pregnancy. In Canada the *Assisted Human Reproduction Act 2004* permits the surrogate to be reimbursed for expenditure and loss of income incurred in relation to the surrogacy,³⁸ and in the UK payment of reasonable expenses is allowed.

LAW IN VICTORIA

2.23 The *Infertility Treatment Act 1995* governs the use and provision of assisted reproductive technology in Victoria. Part 6 of the Act addresses surrogate motherhood. The relevant sections of the Act are as follows:

- section 3 defines 'surrogacy agreement' as an agreement, arrangement or understanding, whether formal or informal, under which a woman agrees (whether or not for payment or

32 Ibid para 13.2.

33 Ibid para 13.1.

34 See Seymour and Magri (2004) above n 8, Chapter 3.

35 In several US states commercial surrogacy is permitted, either because there are no laws dealing with surrogacy (eg California), or, if the law expressly permits surrogacy arrangements, there is no prohibition on paying the surrogate (eg Arkansas: Ark Code Ann § 9-10-201). For information on the surrogacy laws in each US state, see Human Rights Campaign Foundation, *What's Happening in Your State & in Your Community* <www.hrc.org> at 16 November 2005.

36 *Human Fertilisation and Embryology Act 1990* (UK) s 30.

37 Eg, New Hampshire, Virginia, Florida and Texas: see Seymour and Magri (2004) above n 8, 36–42.

38 *Assisted Human Reproduction Act 2004* (C) s 12.

reward) to become pregnant with the intention (or a pregnant woman agrees) that any child born as a result of the pregnancy is to be treated as the child not of her but of another person or persons;

- section 59 makes it an offence for a person to ‘make, give or receive or agree to make, give or receive a payment or reward in relation to or under a surrogacy agreement’;
- section 60 makes it an offence for people to advertise their willingness to enter into a surrogacy agreement;
- section 61 makes all surrogacy agreements void. This means that no surrogacy agreements can be enforced in a court.

2.24 Apart from the provisions discussed above, the existing legislation does not deal with altruistic surrogacy. This appears to reflect differences of view among the members of the advisory body—the Standing Review and Advisory Committee on Infertility—that existed at the time the Infertility Treatment Act was implemented. In a report to the then Health Minister, Maureen Lyster, four members of the committee did not support prohibition of certain kinds of legal and medical assistance for surrogate mothers, while the other four members believed that parliament originally intended that all surrogate arrangements be illegal and called for the intention to be made clear in the Act.³⁹ In 1993 the Victorian Government proposed amending the *Infertility (Medical Procedures) Act 1984*⁴⁰ to allow fertile women to participate in the IVF program as part of ‘voluntary’ surrogacy arrangements.⁴¹ The government reversed its decision in the face of concerns raised by members of the community and some backbenchers, and the amendments did not eventuate.⁴² The subsequent Infertility Treatment Act prohibited commercial surrogacy arrangements but remained silent on altruistic surrogacy. Altruistic surrogacy is therefore not prohibited by the criminal law, although altruistic surrogacy agreements have no status under the civil law because such agreements are unenforceable.

2.25 There is no legislation in Victoria which prohibits a woman self-inseminating with semen from a commissioning parent or with donated semen and then allowing the commissioning couple to care for the child. The law does not recognise the commissioning person or couple as the parents of the child. However, they could apply for a parenting order in the Family Court to confirm living arrangements and ensure they had responsibility to care for the child.

2.26 The Infertility Treatment Act operates in such a way as to make it almost impossible for surrogacy arrangements to proceed in Victoria where treatment in a clinic is required. This is because the provisions in the Act which regulate who may undergo ART treatment procedures apply to prospective surrogate mothers in the same way as they apply to all women seeking ART.⁴³ A potential surrogate must be assessed as being unable to become pregnant or likely to pass on a disease or genetic abnormality to meet the eligibility criteria for treatment. If the treatment is to involve an embryo transfer using donated eggs and sperm, both the surrogate *and* her partner must be infertile.⁴⁴ The probability of finding a woman who meets these criteria and is willing to act as a surrogate is extremely low. This makes it virtually impossible for people to make surrogate

39 Standing Review and Advisory Committee on Infertility, *Annual Report* (1996) 47.

40 The Act that preceded the current *Infertility Treatment Act 1995*.

41 W Weeks, ‘Will Victoria Also “Proceed with Care” in Relation to Reproductive Technology?’ (1994) 38 *Health Issues* (Vic) 35.

42 Penne Watson Janu, ‘Surrogacy Arrangements in Australia: Analysis of the Legal Framework’ (1995) 9 *Australian Journal of Family Law* 200, 205–206.

43 *Infertility Treatment Act 1995* ss 8, 20.

44 Sections 8 and 20 as interpreted by the ITA based upon the opinion by Gavan Griffith QC, 16 May 2002. Copy provided to the commission by the ITA.

arrangements using eggs from a commissioning mother or a donor. Because of these legal complexities, no clinic in Victoria is offering surrogacy services.

2.27 The law is also problematic in other respects. There are no criteria for determining who should be able to commission a surrogacy. The provisions in the Infertility Treatment Act that ban payment or reward do not clearly define what these terms mean. Further, the *Status of Children Act 1974*—the Act that determines how legal parentage is defined where a child is born through the use of donated sperm and eggs—does not adequately address legal parentage of a child born of a surrogacy arrangement. These problems are discussed in more detail in chapters 3, 4 and 5.

COMMISSION'S APPROACH

2.28 The commission's view is that if the government decides the law should continue to permit altruistic surrogacy, it should be regulated with great care. The outcomes for children and surrogate mothers have not been researched in enough detail to justify allowing surrogacy arrangements to occur without careful scrutiny. Safeguards are necessary to protect surrogates, commissioning parents and children.

2.29 We will examine the problems we have identified with the relevant provisions of the Infertility Treatment Act in the following chapters on eligibility, payment and legal parentage in surrogacy arrangements. In summary, the commission has concluded that:

- it is anomalous to apply the eligibility criteria in sections 8 and 20 to the surrogate rather than the commissioning couple;
- it is unclear whether the ban on payment and reward in section 59 applies to the making of gifts or the payment of the surrogate's medical and other expenses in altruistic arrangements;
- the current law is inadequate to deal with parental relationships arising from surrogacy.

2.30 If the government decides that the present law permitting altruistic surrogacy should remain unchanged, the commission believes the following ought to occur:

- the anomalies in the application of the current eligibility criteria should be corrected, and new provisions should be introduced to protect the parties involved;
- payment of expenses incurred by the surrogate as a result of the pregnancy should be allowed, but the law should make it clear that a surrogate should not obtain any material advantage as a result of the arrangement;
- the law should provide a mechanism for the commissioning person or couple to be recognised as the child's legal parents, and children born through surrogacy should have a right to access information about their genetic heritage.

2.31 Alternatively, if the government's position is that it does not accept any form of surrogacy arrangement, the Infertility Treatment Act should be amended to prohibit all surrogacy arrangements, whether or not made for reward.

Chapter 3

Eligibility

CURRENT LAW

3.1 As discussed in Chapter 2, altruistic surrogacy is legally permitted in Victoria, but the criteria which determine who is eligible for ART services in a licensed clinic mean the circumstances in which a woman may act as a surrogate mother are extremely limited.

3.2 If an embryo formed with the commissioning mother's eggs and the commissioning father's sperm is to be used, or if the surrogate's own eggs need to be fertilised using ART, it will be necessary for the surrogate to undergo treatment in a clinic.

3.3 The Infertility Treatment Act sets out the requirements that must be met before a woman may undergo artificial insemination or a fertilisation procedure at a licensed clinic. We examined these requirements in detail in Position Paper One. If a woman is married, or in a heterosexual de facto relationship⁴⁵ she must be unlikely to become pregnant with her own egg or her partner's sperm, other than by a treatment procedure;⁴⁶ or be at risk of having a child with a disease or genetic abnormality.⁴⁷ Her partner must consent to her being treated.⁴⁸

3.4 An embryo created with an egg and sperm produced by people other than the woman undergoing treatment and her partner can only be used in a treatment procedure if the woman undergoing treatment is unlikely to become pregnant from her own egg and her partner's sperm.⁴⁹

3.5 If the woman does not have a male partner she is only eligible for treatment if she has been assessed as clinically infertile⁵⁰ or is likely to transmit a disease or genetic abnormality to a child.

3.6 These conditions apply to a potential surrogate mother in the same way as they apply to a woman wanting to become pregnant with her own child. The fact that the commissioning person or couple may meet these conditions is of no relevance under the Act. The failure of the Act to distinguish between a woman who is seeking treatment to overcome her own inability to become pregnant and a woman who is seeking treatment for a surrogacy arrangement has the following consequences:

- If a surrogate is to receive clinic treatment involving the use of her egg (partial surrogacy) she must be:
 - unlikely to become pregnant or likely to transmit a disease or genetic abnormality to the child other than by a treatment procedure (if married or in a de facto heterosexual relationship); or

45 *Infertility Treatment Act 1995* s 8(1).

46 *Infertility Treatment Act 1995* s 8(3)(a).

47 *Infertility Treatment Act 1995* s 8(3)(b).

48 *Infertility Treatment Act 1995* s 8(2).

49 *Infertility Treatment Act 1995* s 20(3).

50 Interpretation of section 8 of the *Infertility Treatment Act 1995* according to opinion of Gavan Griffith QC, 4 August 2000. Copy provided to the Victorian Law Reform Commission by the Infertility Treatment Authority.

- clinically infertile or likely to transmit a disease or genetic abnormality to the child (if she does not have a male partner).
- If a surrogate is to receive clinic treatment involving implantation of an embryo created using eggs from another woman (gestational surrogacy) she must be:
 - unlikely to become pregnant or likely to transmit a disease or genetic abnormality to a child other than by a treatment procedure (if married or in a de facto heterosexual relationship); or
 - clinically infertile or likely to transmit a disease or genetic abnormality to a child born as a result of the pregnancy (if she does not have a male partner).

In either of these situations if the treatment also involves the commissioning father's sperm and the surrogate has a male partner, the partner also has to be infertile.⁵¹

3.7 There are very few situations in which a woman who is willing and able to act as a surrogate mother will meet the statutory criteria. The law therefore creates a significant barrier to altruistic surrogacy even though it is not prohibited under the Act.

PROBLEMS WITH THE CURRENT LAW

3.8 We do not know how frequently surrogacy arrangements involving self-insemination occur in Victoria. No treatment procedures involving surrogates are being carried out in clinics in Victoria because of the eligibility requirements imposed by the present law. As a result, some people may decide not to continue their efforts to have a child, while others will travel interstate and overseas to pursue surrogacy arrangements.

3.9 Some people seek treatment in the ACT but receive counselling and other medical support in Victoria. In some cases, the surrogate will give birth to the child in Victoria. The commission has been told that when the parties return to Victoria after treatment interstate, they often conceal the circumstances of the child's conception and birth. Sometimes the surrogate does not disclose to medical staff that she is carrying the child on behalf of someone else and introduces the commissioning couple simply as close friends. We have also been told that a surrogate may assume the identity of the commissioning mother while in hospital so that the child is recorded as having been born to the commissioning mother and not the surrogate.⁵² The true nature of the arrangement may not become apparent to medical staff unless the child needs medical treatment after birth. This could result in conflict between the commissioning parents and the surrogate at a time when critical medical decisions have to be made.

3.10 Excluding people from the Victorian clinic system means that they and the child will not be protected by the safeguards offered by Victorian law. For example, the child may not have the right to access information about his or her genetic origins where donated gametes have been used.

3.11 The commission also received submissions from people who have pursued, or are considering pursuing, surrogacy arrangements in the US because they are unable to access treatment in Victoria or any other Australian jurisdiction. These arrangements involve substantial expense. In some of these cases the parties travel to jurisdictions where commercial surrogacy is permitted. Commercial surrogacy arrangements are clearly contrary to public policy in all Australian jurisdictions.

51 Interpretation of section 20 of the *Infertility Treatment Act 1995* according to opinion by Gavan Griffith QC, 16 May 2002. Copy provided to the Victorian Law Reform Commission by the Infertility Treatment Authority.

52 Surrogacy Roundtable Discussion, 20 October 2004.

3.12 If the government continues to permit altruistic surrogacy in Victoria, the commission believes the anomalies in the application of the Infertility Treatment Act eligibility criteria should be corrected to remove the barriers that currently exist for surrogacy arrangements. It makes no sense to prevent fertile women from acting as surrogates.

3.13 If the statutory barrier to treatment is removed, a decision needs to be made about what criteria should be implemented to regulate access to surrogacy services:

- Should people entering into surrogacy arrangements be subject to the same requirements as people seeking other forms of ART? Or should they have to meet other requirements?
- What criteria should apply to the commissioning person or couple?
- What criteria should apply to the surrogate?
- Should eligibility criteria be set out in legislation, or should they take the form of clinical guidelines?

3.14 The commission's consideration of these questions has been assisted by submissions made by members of the public, our consultation with people who have experience in the practice of surrogacy and the legal frameworks governing it, and our research on approaches adopted in other jurisdictions. The commission's broad position about the criteria that should apply to people entering into surrogacy arrangements is as follows:

- any eligibility criteria based on fertility or the likelihood of passing on a genetic abnormality or disease should apply to the commissioning couple or person and not to the surrogate mother;
- women wishing to act as surrogate mothers and their partners (if any) should be required to undergo medical and psychological assessment to establish that they are capable of being a surrogate;
- there should be a legislative requirement that the commissioning couple or person also be assessed and counselled;
- if there is a concern that a child to be born will be at risk of harm from either the surrogate and her partner (if any) or the commissioning person or couple there should be a process for assessing that concern.

SURROGACY: A SPECIAL CASE

3.15 In Position Paper One the commission made interim recommendations for eligibility criteria that should apply to people seeking ART. These criteria would supplement the existing requirements that people seeking treatment give informed consent and receive counselling and information about the implications of the treatment procedure. In summary, the commission's recommendations for additional eligibility criteria were:

- If a doctor or counsellor believes that any child that might be born as a result of a treatment procedure may be at risk of abuse or neglect, the doctor or counsellor must seek advice from a clinical ethics committee about whether to proceed with the treatment procedure. The decision of the ethics committee should be able to be reviewed by the ITA review panel.⁵³
- A clinic should not be able to treat a person, without approval of the ITA review panel, where the woman seeking treatment and/or her partner has had charges proved against them for a serious sexual offence, has been declared a serious violent offender under the *Crimes Act*

1958, or has had a child protection order made for one or more children in their care under a child welfare law.⁵⁴

- The requirement that a woman undergoing treatment be married or in a heterosexual de facto relationship should no longer apply,⁵⁵ and if a woman does not have a male partner that should be sufficient to satisfy a doctor that she is unable to become pregnant.⁵⁶

3.16 The commission has considered whether these criteria, assuming they were implemented, would be sufficient for surrogacy cases, or whether additional criteria should apply.

3.17 The commission's assessment of surrogacy is that it is sufficiently different from other forms of ART to warrant a cautious regulatory approach, and an additional set of requirements for access to treatment services. Our view is that the eligibility criteria that apply to surrogacy should address the risks associated with surrogacy arrangements that do not arise in other forms of ART. Surrogacy involves another party (the surrogate) in the conception and birth who carries the child throughout pregnancy but will be asked to relinquish that child upon birth.

3.18 Because surrogacy involves the relinquishment of a baby by the woman who gives birth to it, the commission views surrogacy as having important similarities to adoption. As a community, we have learnt that in the past the adoption of children has caused significant grief and distress, both for the women who have relinquished their babies and for the children who have struggled with the emotional consequences of adoption. The commission recognises the differences between surrogacy and adoption, but does not want to ignore the lessons of the adoption experience in the context of surrogacy. The protection of children and surrogate mothers must be the primary concern of any law regulating surrogacy.

3.19 Our cautious approach is also informed by the lack of detailed and longitudinal research on the potential impacts of surrogacy on children and surrogate mothers. Although recent research conducted in the UK suggests the outcomes are generally positive, we do not yet have any data on the long-term consequences for children.

3.20 In addition, the commission has been reminded that surrogacy arrangements can and do go wrong, which can be painful and damaging for all involved.⁵⁷ The commission accepts this and notes that although only 4–5% of surrogates refuse to hand over the child in countries where altruistic surrogacy is permitted, the harm caused in these cases can be profound.⁵⁸ Any conflict about the child has the potential to be very damaging for all parties involved. The commissioning person or couple may feel deprived of 'their' child, the surrogate and her family (if any) will find themselves responsible for a child not originally intended to be theirs, and the child, whose infancy may be the subject of protracted legal proceedings and conflict, may suffer as a result.⁵⁹ Such factors cannot be ignored.

COMMISSIONING COUPLE OR PERSON

3.21 The commission believes it is appropriate to require the person or couple seeking to commission a surrogacy arrangement to meet the eligibility criteria that apply to all people seeking ART. Accordingly, the commission would recommend that the commissioning person or couple be

54 Ibid Interim Recommendation 4.

55 Ibid Interim Recommendation 11.

56 Ibid Interim Recommendation 14.

57 Surrogacy Roundtable Discussion, 20 October 2004.

58 Department of Health [UK], *Surrogacy Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* (1998) 26.

59 Ibid.

subject to the criteria proposed in Position Paper One, as well as all counselling, consent and information provisions contained in the Infertility Treatment Act. The relevant provisions would need to be modified to apply to the circumstances of surrogacy arrangements.

3.22 The commission does not believe it is justified to require people who are commissioning a surrogacy arrangement to be married or in a heterosexual de facto relationship. This reflects the commission's conclusion that a person's marital status or sexuality are not factors that are considered by child welfare authorities or experts to be predictors of harm to children.⁶⁰ As noted, excluding people from access to ART services may result in them seeking treatment elsewhere in Australia or overseas. This may increase the potential for negative outcomes for children, for example, by depriving them of the capacity to obtain information about their genetic origins or the circumstances of their birth.

3.23 In addition to these general criteria, the commission suggests that the commissioning person or couple:

- undergo psychological assessment aimed at determining whether they will be able to cope successfully with all stages of the surrogacy;
- be provided with counselling and information which specifically address the psychological, emotional, social and legal consequences of entering into a surrogacy arrangement.

3.24 The suggestion that a commissioning couple be required to undergo an assessment is based on the commission's view that should altruistic surrogacy arrangements be allowed to proceed, a cautious approach must be taken to ensure the health and wellbeing of the resulting child. It is suggested that the assessment include a home study similar to the process that applies to applicants for adoption. Such assessment usually requires a social worker to interview the prospective parents in their home and prepare an assessment report about their abilities as potential parents. Such a report should be a thorough and detailed assessment that considers such things as the family's ability to meet the needs of a child born through surrogacy, the impact on existing children (if any), and the family's capacity to provide a stable emotional and physical environment for the child.

3.25 The commissioning person or couple should also be provided with additional counselling and specific information about the surrogacy arrangement. They should be counselled about the possible ramifications of their decision and ability to cope with the arrangement. The couple should receive information about the legal rights and status of all parties at each stage of the arrangement. In Chapter 5 we will examine the process for recognising the commissioning person or couple as the legal parents of the child. An important feature of the process we propose is that the surrogate should have the opportunity to decide not to relinquish the child after birth. This should clearly be explained to the couple.

3.26 The commission also wishes to explore the possibility of including a further requirement that the gametes of at least one of the people commissioning the surrogacy be used to create the embryo (unless they are likely to transmit a disease or genetic abnormality to a child conceived if their gametes are used) and/or that the surrogate's own eggs not be used in the conception of the child. This approach is taken in the ACT. Under the *Parentage Act 2004* (ACT), the

60 See the discussion in Victorian Law Reform Commission (May 2005) above n 1, 19–20. Marital status and sexuality are not included in the list of parental characteristics tracked by DHS, nor are they grounds for initiating child protection proceedings. See: Community Care Division, Department of Human Services [Victoria], *An Integrated Strategy for Child Protection and Placement Services* (September 2002), The Allen Consulting Group, *Protecting Children: The Child Protection Outcomes Project: Final Report for the Victorian Department of Human Services* (September 2003), and Magistrate Peter Power, *Family Division—General, Child Protection—Overview*, Children's Court of Victoria <www.childrencourt.vic.gov.au> at 14 November 2005.

commissioning couple can only be recognised as the parents of the child if the surrogate and her partner are not the genetic parents of the child, and at least one of the commissioning couple is a genetic parent of the child.⁶¹

3.27 The ACT approach is consistent with the view of some commentators that only gestational surrogacy should be permitted because the surrogate is less likely to experience difficulty in giving up a child who is not conceived using her own eggs.⁶² The surrogate may find it easier to regard the commissioning couple as the child's parents if their gametes have been used in the conception of the child. Also, a child born as a result of a gestational surrogacy arrangement is not the sibling of the surrogate mother's other children.

3.28 Other commentators argue that partial surrogacy should also be permitted because it is less likely to expose the surrogate to medical hazards. Conception can normally be achieved by artificial insemination and the surrogate does not have to take medication to induce ovulation. The woman can keep track of her own menstrual cycle and ensure that insemination occurs when she is most likely to be ovulating. In some cases, however, the surrogate may take fertility drugs to finetune the timing of ovulation or increase the chances of twins. Artificial insemination is also significantly less expensive than other forms of ART.

3.29 Those who argue that the law should not differentiate between gestational and partial surrogacy suggest that even if the surrogate is not genetically related to the child, she may still have difficulties in handing the child over to the commissioning parents.⁶³ For this reason, public policy should not differentiate between the two types of surrogacy. Further, the distinction between gestational and partial surrogacy does not take account of cases where the surrogate is a relative of one of the people commissioning the surrogacy, for example a sister. In such cases the child will have a genetic connection with the surrogate, whether or not the surrogate's eggs were used to conceive the child.

3.30 If surrogacy is to be permitted at all, both gestational and partial surrogacy should be carefully regulated. We would welcome submissions on whether only gestational surrogacy should be permitted in Victoria.

→ Should there be a requirement that:

- the eggs of the surrogate not be used in the conception of the child; and/or
- the gametes of at least one of the commissioning couple must be used in the conception of the child?

3.31 The commission's view is that even if the law permits gestational but not partial surrogacy, the surrogate should retain the right to refuse to relinquish the child upon birth. In all cases it should be recognised that a surrogate mother without any genetic connection to the child may still feel a responsibility towards, and a close connection to, the child she has carried.

61 *Parentage Act 2004* (ACT) s 24.

62 Surrogacy Roundtable Discussion, 20 October 2004.

63 The study by Jadvá et al (2003) above n 18, 2203 concluded that '[a]lthough it may be assumed that genetic surrogate mothers would be more likely to feel a special bond towards the child, this was not found to be the case. Genetically related surrogate mothers were, however, more likely than genetically unrelated surrogate mothers to wish the child to be told about the surrogacy arrangement'.

SURROGATE

3.32 As discussed, it does not make sense to require a potential surrogate to have reduced fertility. Accordingly, the commission recommends that all criteria relating to a woman's inability to become pregnant should not have any application to the surrogate. Further, the fertility of the surrogate's partner should be of no relevance to the decision to provide ART to the surrogate.

3.33 The surrogate should also be required to meet other criteria before the commencement of the arrangement. In Position Paper One the commission recommended that where there is a concern that a prospective child will be at risk of harm from one or both of his or her parents, treatment should be refused (with a right of review). Because the surrogate remains the legal parent of the child under the commission's proposed approach, unless and until she freely and autonomously relinquishes the child, we believe it is prudent for these provisions to apply to the surrogate and her partner as it is possible they may remain the primary carers of the child. The provisions should also apply to the commissioning person or couple.

3.34 The commission also suggests that additional criteria be considered in deciding whether a potential surrogate should proceed with treatment:

- in addition to any other checks that a woman wishing to access ART must undergo, the surrogate must be assessed by an obstetrician specialising in ART and counsellor or psychologist as physically and mentally capable of acting as a surrogate;
- she must have already experienced pregnancy and childbirth;
- she and her partner (if any) must consent to all aspects of the arrangement, including the use of ART;
- she and her partner (if any) must receive counselling and information which specifically address the psychological, emotional, social and legal consequences of entering into a surrogacy arrangement.

3.35 The first of these suggestions is intended to assist in determining whether or not acting as a surrogate would impose any physical or psychological risks to the woman's health and wellbeing, other than those usually associated with pregnancy and treatment procedures. If it would, it is the commission's view that the woman should not be permitted to act as a surrogate.

3.36 The suggestion that a woman should have already experienced pregnancy was raised in our consultation on surrogacy. A psychologist experienced in assessing prospective surrogates informed us that surrogate mothers who have had their own children see and cope with the surrogacy arrangements differently to women who have not had previous pregnancies.⁶⁴ Women who have no experience of pregnancy may experience greater difficulties throughout the arrangement. In Virginia and Texas, where the court can authorise a surrogacy contract before conception, the court must be satisfied that the surrogate has experienced pregnancy and childbirth.⁶⁵ The commission notes, however, that this requirement should be balanced against the possible effects that acting as a surrogate may have on the woman's other children. We again stress a cautious approach and suggest that these issues be explored in counselling.

3.37 It is imperative that a woman's decision to be a surrogate is made freely and without any form of coercion or pressure. This is particularly important when the surrogate is related to or a friend of the person or couple commissioning the surrogacy. One of the principal purposes of counselling should be to ascertain whether the surrogate is acting autonomously and to ensure her consent is fully informed.

64 Surrogacy Roundtable Discussion, 20 October 2004.

65 Va Code Ann § 20-160, *Uniform Parentage Act* (Texas) § 160.756.

3.38 Counselling should also address the ethical, social and psychological issues the surrogate may face. It should explore her ability to cope with all stages of the surrogacy, from planning the arrangement, through to conception, pregnancy, childbirth, handing over the child and managing any contact or relationship with the child after birth.

3.39 The law should require that the surrogate receive proper advice and information about the legal consequences of acting as a surrogate and, in particular, about her legal status in respect of the child. She should be informed about her legal position should she decide not to relinquish the child; the consequences of relinquishing a child including (but not limited to) her and her partner's capacity to maintain contact with the child; and the child's right to information about his or her birth and genetic heritage.

3.40 The surrogate's partner (if any) must also be required to give all necessary consent, attend counselling, and receive all relevant information, given that the pregnancy is likely to have an impact on that person's life.

3.41 In addition to the above suggestions, the commission also wishes to explore the possibility of requiring the surrogate to be a certain age, for example that she be over 25. It has been suggested to the commission that an age requirement might assist in establishing that the surrogate mother has reached a level of maturity that ensures she is acting autonomously and understands the implications of the arrangement.⁶⁶ The commission would welcome feedback on this issue.

→ Should a woman acting as a surrogate be over 25 years of age?

IMPLEMENTATION OF RECOMMENDATIONS

3.42 The proposals developed in this chapter rely on the implementation of the interim recommendations made in Position Paper One. This makes it necessary to consider the approach which should be taken if that does not occur. If those recommendations are not implemented, the anomalies within the current legislation concerning altruistic surrogacy would still need to be addressed. Should the government decide to continue to allow altruistic surrogacy, but not to implement the recommendations made in Position Paper One, the commission would recommend that a provision be inserted into the Infertility Treatment Act stating that sections 8 and 20 do not apply to a surrogate and/or her partner (if any).

3.43 The commission has received a large number of submissions in response to the interim recommendations made in Position Paper One. We are currently considering whether the interim recommendations should be modified in light of concerns expressed by members of the public. If any modifications are made to the Position Paper One recommendations, which have been restated in this paper, they would also have to be taken into account in the commission's final recommendations on eligibility criteria for surrogacy.

Chapter 4

Payment

LAW IN VICTORIA

4.1 Our terms of reference ask us to consider the meaning and efficacy of section 59 of the Infertility Treatment Act in relation to altruistic surrogacy. Section 59 states:

A person must not make, give or receive or agree to make, give or receive a payment or reward in relation to or under a surrogacy agreement or an arrangement to act as a surrogate mother.

Penalty: 240 penalty units or 2 years imprisonment or both.

4.2 Section 59 makes it plain that commercial surrogacy arrangements are prohibited. The prohibition on commercial surrogacy is consistent with the recommended guiding principle in Position Paper One that ‘at no time should the use of reproductive technologies be for the purpose of exploiting (in trade or otherwise) either the reproductive capabilities of men and women or the children resulting from the use of ART’.

4.3 The section does not clearly define the terms payment or reward. As a consequence, there is some uncertainty about whether the ban extends to making gifts to the surrogate or reimbursing her for expenses she incurs during the pregnancy. The Infertility Treatment Authority’s *Conditions for Licence: Applications for Licences by Hospitals and Day Procedure Centres*, for example, states that ‘on balance, it is likely that the payment of fees for ordinary medical and related services provided as part of an altruistic surrogacy treatment is not a breach of [section 59]’.⁶⁷ In this chapter we discuss whether payments or reward of this nature should be permitted.

SHOULD PAYMENT IN ALTRUISTIC SURROGACY ARRANGEMENTS BE PERMITTED?

4.4 The commission has received very few written submissions directly addressing the issue of whether gifts or payment in altruistic surrogacy arrangements should be permitted and they have been equally divided on the issue. In some submissions there was support for payment of ‘reasonable’ expenses. These submissions generally stated that such expenses should be limited to specified categories.⁶⁸ Others argued that allowing any payment could slip very quickly into the realm of commercial surrogacy and for this reason should not be allowed.⁶⁹ The commission has considered each submission carefully and sought further clarification on this issue through research and consultation.

4.5 Interestingly, the *Adoption Act 1984* permits the adoptive parents of a child to make payment ‘in respect of the hospital and medical expenses reasonably incurred in connexion with the birth of the child or the ante-natal or post-natal care and treatment of the mother of the child or of

67 Infertility Treatment Authority, *Conditions for Licence: Applications for Licences by Hospitals and Day Procedure Centres* (5th ed, January 2004) 39.

68 Eg, submissions 19 (Anita Stuhmcke), 71 (Simon and Adam), 132 (Australian Infertility Support Group), 156 (Law Institute of Victoria), 182 (Anonymous).

69 Eg, submissions 81 (Suryan Chandrasegaran), 89 (Ministerial Advisory Committee on Gay and Lesbian Health), 145 (Caroline Chisholm Centre for Health Ethics), 159 (Association of Relinquishing Mothers (Vic)), 169 (Social Questions Committee—CWL Victoria and Wagga Wagga).

the child', as long as the payment has been approved by the Secretary to the Department of Human Services, or the court.⁷⁰ Payment of legal expenses is permitted, and the secretary and court are empowered to authorise other payments or reward.⁷¹ The *Adoption and Permanent Care Procedures Manual* does not mention this provision, which suggests it may not have any relevance to current adoption practice.⁷²

4.6 Our view is that if altruistic surrogacy arrangements continue to be permitted in Victoria, the commissioning parents should be able to pay for or reimburse the expenses the surrogate incurs as a result of the pregnancy. However, it would be unacceptable for the surrogate to obtain any material advantage as a result of carrying and giving birth to the child. The possibility of deriving a financial benefit should not influence a woman's decision to become a surrogate mother. For this reason, we believe that payment should be limited to specified categories, namely medical and associated expenses, and should not cover any loss of earnings incurred by the surrogate.

4.7 Accordingly, the commission recommends the Infertility Treatment Act be amended to clarify that:

- a person must not receive any material benefit or advantage from a surrogacy agreement or arrangement to act as a surrogate mother, other than payment of the surrogate's reasonable medical and associated expenses;
- payment of any loss of earnings incurred by the surrogate should not be permitted.

4.8 In Chapter 5 we propose a mechanism for scrutinising whether the parties to a surrogacy arrangement have complied with these restrictions. In that chapter we recommend a process for enabling the transfer of legal parentage from the surrogate and her partner to the commissioning person or couple. This process would require the court to be satisfied that the surrogate has not received any material advantage as a result of her role in the surrogacy arrangement.

70 *Adoption Act 1984* s 119(2).

71 *Adoption Act 1984* s 119(2).

72 Department of Human Services, *Adoption and Permanent Care Procedures Manual* (August 2004).

Chapter 5

Legal Parentage

INTRODUCTION

5.1 Under a surrogacy arrangement, it is intended that the person or couple who commission the arrangement, and not the surrogate, will care for and be the parent or parents of the child, regardless of whether they are genetically related to the child. Our terms of reference ask us to consider the clarification of the legal status of any child born as the result of a surrogacy arrangement.

5.2 In this chapter we explain the current law that determines the parentage of children born of surrogacy arrangements. We examine alternative ways in which parentage status could be clarified to protect the interests of all parties, in particular the child, if the government continues to permit altruistic surrogacy.

CURRENT LAW

5.3 The participants in a surrogacy arrangement cannot decide between themselves who will be regarded as the parents of any child born. The Infertility Treatment Act makes all surrogacy agreements void.⁷³ This means that agreements will have no legal effect and cannot be enforced in a court, including agreements:

- for the child to be the child of the commissioning person or couple (whether by adoption, agreement or otherwise) and not the child of the surrogate mother;
- to transfer guardianship of the child to the commissioning person or couple;
- to surrender permanently the right to care for the child to the commissioning person or couple.⁷⁴

5.4 Instead, the legal parentage of the child will be determined according to the Status of Children Act. The parental status of each of the parties involved will differ according to whether the surrogate has a male partner and whether donated sperm or eggs (either from the commissioning person or couple or from third parties) have been used to conceive the child.

5.5 If the child is conceived through sexual intercourse between the surrogate and the commissioning man, the surrogate is the mother of the child and the man is the father of the child.⁷⁵

5.6 If the child is conceived from a treatment procedure using donated gametes and the surrogate is married or in a de facto relationship and her partner has consented to the conception procedure:

73 *Infertility Treatment Act 1995* s 61.

74 *Infertility Treatment Act 1995* s 3 (definition of 'surrogacy agreement').

75 Generally, if a woman who is married or in a de facto relationship with a man gives birth to a child, her partner is presumed to be the father of the child: *Status of Children Act 1974* s 5; *Family Law Act 1975* (Cth) ss 69P, 69Q. The presumption can be rebutted by evidence that a man other than the woman's partner is the father of the child: see HA Finlay, Rebecca Bailey-Harris and Margaret FA Otlowski, *Family Law in Australia* (5th ed, 1997) para 7.7.

- the surrogate is the mother of the child and her partner is the father;⁷⁶
- the commissioning couple are not the parents of the child even if the sperm and/or eggs have been provided by the commissioning couple;⁷⁷
- if a third person donated the sperm or eggs used to conceive the child, that person is presumed not to be a parent of the child.⁷⁸

5.7 If the surrogate is single, in a same-sex relationship, or does not have the consent of her male partner to the treatment procedure, the man who donated the sperm used to conceive the child has no rights and incurs no liabilities for the child.⁷⁹ This provision would apply to the commissioning father who ‘donated’ his sperm for the purpose of conception.

5.8 The Status of Children Act does not say that a donor to a woman in this situation is not the father of the child. In Position Paper Two we recommended that the donor should be presumed not to be the parent of the child in these circumstances, in the same way as he is not the parent of a child born to a married woman.⁸⁰ The donor may be regarded as the parent of the child for the purposes of the *Family Law Act 1975* (Cth).⁸¹ In *Re Mark*, Justice Brown of the Family Court found that for the purposes of the Family Law Act, the man who commissioned a surrogacy arrangement in the US using his sperm was the legal parent of the child born of that arrangement.⁸²

5.9 The surrogate is the mother if her own egg is used to conceive the child. However, the Act is silent about whether the surrogate is the mother of a child conceived with a donated egg if she does not have a male partner.

5.10 In most situations, the commissioning parents who provided the gametes used to create a child have no legal relationship with the child and the surrogate and her partner (if any) are regarded as the child’s parents. If the commissioning person or couple wish to be recognised as the legal parents of the child their only options are to:

- apply for a parenting order from the Family Court of Australia, however, as discussed in Position Paper Two, the effect of parenting orders is limited because they do not confer full parental status on a person but rather a range of powers and responsibilities in relation to the child;
- adopt the child, however, privately arranged adoptions are not permitted in Victoria, except where one of the adopting parents is a relative of the child⁸³—this means that adoption is only possible where the surrogate is a relative of one of the commissioning parents, as in the Kirkman case where the surrogate was the sister of the commissioning mother and therefore the aunt of the child.

5.11 No matter who is recognised as the legal parents of the child, it is important to understand that the Family Court retains the power to make residence and contact orders in favour of any

76 *Status of Children Act 1974* ss 10C, 10D, 10E.

77 *Status of Children Act 1974* ss 10D, 10E.

78 *Status of Children Act 1974* ss 10C, 10D, 10E.

79 *Status of Children Act 1974* s 10F.

80 Victorian Law Reform Commission (July 2005) above n 2, 28–31.

81 *Re Mark* (2003) 179 FLR 248.

82 There are conflicting decisions on this point (*Re Patrick* (2002) 28 Fam LR 579; *Re Mark* (2003) 179 FLR 248): see discussion in Victorian Law Reform Commission (July 2005) above n 2, 26–28.

83 *Adoption Act 1984* s 122. ‘Relative’ is defined in s 4. In New South Wales, where the same restriction applies, there have been reported cases in which the court has made an adoption order in favour of the commissioning couple where the surrogate was the sister of the commissioning mother: *Re A and B* (2000) 26 Fam LR 317; *Re D and E* (2000) 26 Fam LR 310. In each case the court was satisfied that an adoption order would be in the best interests of the child. See also *W: Re Adoption* (1998) 23 Fam LR 538.

person concerned with the care, welfare and development of the child if the court considers it to be in the best interests of the child.⁸⁴ This means that even if the commissioning couple were to be recognised as the legal parents of the child under state law, the surrogate may still apply for orders for the child. Alternatively, if the surrogate and her partner are recognised as the legal parents of the child (as is currently the case under the Status of Children Act), the commissioning couple may apply for parenting orders from the Family Court.

5.12 In most jurisdictions in Australia the law about parentage in surrogacy arrangements is similar to that in Victoria, that is, the surrogate mother and her partner remain the legal parents of the child. The ACT is a notable exception and is discussed below.

PROBLEMS WITH THE CURRENT LAW

5.13 During our consultations we heard of people who had made surrogacy arrangements and were caring for the child but who were unable to be recognised as the child's parents. The current law does not recognise the intentions of commissioning parents and surrogates about parentage of the child.

5.14 In Position Paper Two we explained why legal parentage is important. Inability to be recognised as a parent means that the people who care for the child do not have legal responsibility and lack many of the powers necessary to make decisions for the benefit of the child. If the commissioning couple separates, the person who no longer has the day-to-day care of the child will not be eligible to pay child support, and if one parent dies without naming the child in his or her will, the child will have no automatic right to a share of the estate.

5.15 The commission received a submission describing the predicament of one family created through surrogacy.⁸⁵ The commissioning woman was physically unable to carry a pregnancy to term, so she and her husband arranged for a surrogate. The surrogate gave birth to twins using sperm and eggs provided by the commissioning couple. The surrogate and her husband appear as the mother and father of the twins on their birth certificates. As a consequence, each time parental permission is required for school or medical purposes, the commissioning couple have to approach the surrogate and her husband to provide their permission to the relevant agency. The commissioning couple find this both inconvenient and belittling.

5.16 It is possible for the commissioning couple to obtain parenting orders from the Family Court which will provide them with the necessary parental responsibility and powers to care for the child. However, parenting orders are not equivalent to full legal parental status and only last until the child reaches the age of 18. They do not extinguish the parental status of the surrogate and her partner (if any). This means that the surrogate and her partner may be technically liable to pay child support and if one of them dies without making a will, the child will be entitled to a share of their estate along with the surrogate's own children.

5.17 The commission has also been informed that some people who enter surrogacy arrangements have agreements drawn up by lawyers prior to conception to clarify each party's intentions about the arrangement. Even though such an agreement will not determine who the legal parents of the child are, and cannot be enforced, it can provide a framework which assists the parties to clarify their intentions and may help to reduce disputes about surrogacy arrangements.⁸⁶

84 *Family Law Act* 1975 (Cth) ss 64B, 65C, 65E.

85 Submission 195 (Tammy Lobato MP, Member for Gembrook). It was unclear from this submission how the surrogate became pregnant, or whether she had had to travel interstate to undergo a treatment procedure.

86 Surrogacy Roundtable, 20 October 2004.

OPTIONS

5.18 The commission has identified and considered three broad options for determining the parentage of children born of surrogacy, if altruistic surrogacy continues to be permitted in Victoria. The following policy issues must be assessed in determining which model would be the most appropriate:

- Should the commissioning person or couple be recognised as the legal parents of the child? If so should this occur at conception or only after the child is born?
- What should happen if the surrogate wants the child to live with her rather than with the commissioning parents?
- Should the commissioning person or couple be required to undergo any form of assessment of their fitness to parent?
- Should it be necessary to obtain a court order for the transfer of legal parentage?

OPTION 1: COMMISSIONING COUPLE DEEMED TO BE PARENTS

5.19 The Status of Children Act could be amended to provide that the person or couple who commission a surrogacy arrangement are deemed to be the child's legal parents from birth, and that the surrogate is not a parent of the child. Such a presumption would recognise the intention of the parties before the birth of the child. It would have automatic effect and would not require the commissioning couple to take any steps or undergo any process to be recognised as the child's parents. It would be necessary to clarify that the existing presumptions in the Status of Children Act that apply to donors (ie that donors are not the parents of a child, or have no rights and incur no responsibilities for a child born using their gametes) do not apply to commissioning parents who donate gametes as part of a surrogacy arrangement.

5.20 Under this model, the commissioning couple would be recorded as the parents on the child's birth certificate. If the surrogate decided not to relinquish the child after birth, the matter would need to be resolved by the Family Court. If the court found that it was in the best interests of the child to remain with the surrogate, it could make a parenting order in her favour but she would not be recognised as a legal parent of the child.

OPTION 2: COURT ORDER BEFORE BIRTH

5.21 A new process could be implemented to enable the commissioning person or couple and the surrogate to apply to the court before the child is born for an order approving the arrangement and declaring the commissioning parents to be the legal parents of the child to be born. The court would be able to consider the surrogacy arrangement, though this would not be determinative. Legislation would require the court to make a decision based on the best interests of the child and could specify other matters which the court should consider in deciding whether the order should be made. When the child is born, the commissioning couple would automatically be the child's legal parents.⁸⁷

OPTION 3: TRANSFER OF PARENTAL STATUS AFTER BIRTH

5.22 The law could provide a mechanism for the transfer of legal parentage from the surrogate to the commissioning couple after the birth of the child. The surrogate would remain the mother of

87 The New Zealand Law Commission has recommended a process that involves a pre-birth interim order, which would become final 21 days after birth provided certain matters have been proved and no aspect of the agreement is in dispute: Law Commission [New Zealand], *New Issues in Legal Parenthood*, Report 88 (April 2005) 93–97.

the child unless and until legal parental status was transferred to the commissioning couple. Transfer of parental status could be effected automatically after a specified period after birth through an administrative step such as birth registration, or by obtaining a court order after the birth of the child. The Adoption Act could be amended to enable the court to make an adoption order transferring legal parental status to the commissioning couple.

5.23 This is broadly the approach adopted in the ACT and the UK. In these jurisdictions legislation does not directly regulate who is eligible to enter into a surrogacy arrangement or what conditions should be met before such an arrangement may proceed. Instead, the point of legal intervention is after the birth of the child, when the court is empowered to transfer the legal parentage of the child from the surrogate and her partner to the commissioning couple, provided a number of conditions have been met.

5.24 In the ACT, the Supreme Court may make a parentage order in favour of the commissioning couple (called the ‘substitute parents’) in limited circumstances. The following conditions must be met for an order to be made:

- neither the surrogate nor her partner is a genetic parent of the child;
- there are two substitute parents, at least one of whom is a genetic parent of the child;
- the court is satisfied that the making of the order is in the best interests of the child;
- both the surrogate and her partner (if any) freely, and with a full understanding of what is involved, agree to the making of the order.⁸⁸

5.25 The court is to take a number of matters into consideration, including:

- whether the child’s home is with both substitute parents;
- whether both substitute parents are aged at least 18;
- whether payment or reward (other than for expenses reasonably incurred) has been given or received for or in consideration of any aspect of the surrogacy arrangement;
- whether the surrogate and her partner (if any) and substitute parents have received appropriate counselling and assessment from an independent counselling service;
- anything else the court considers relevant.⁸⁹

5.26 A parentage order is given substantially the same legal effect as an adoption order.⁹⁰ The provisions of the *Adoption Act 1993* (ACT) that enable adopted people to obtain information identifying their birth parents apply to children for whom parentage orders have been made. This means that children born through recognised surrogacy arrangements in the ACT have the right to obtain identifying information about surrogate mothers once they turn 18, or earlier if they have the consent of the surrogate and their parents.⁹¹

5.27 A similar process applies in the UK.⁹² In the absence of any order to the contrary, the surrogate and her partner are treated as the legal parents of the child.⁹³ The commissioning couple may apply to the court for a parental order in their favour provided the following conditions are met:

- the commissioning couple are married and aged at least 18;

88 *Parentage Act 2004* (ACT) ss 24(1), 26(1).

89 *Parentage Act 2004* (ACT) s 26(3).

90 *Parentage Act 2004* (ACT) s 29.

91 *Adoption Act 1993* (ACT) ss 66, 68.

92 *Human Fertilisation and Embryology Act 1990* (UK) s 30.

93 *Human Fertilisation and Embryology Act 1990* (UK) ss 27, 28.

- the gametes of the husband or the wife, or both, were used to create the embryo;
- the application to the court is made within six months of the birth of the child;
- at the time of the application the child's home is with the commissioning couple;
- no money or other benefit (other than for expenses reasonably incurred) has been given or received in respect of the surrogacy agreement.

COMMISSION'S PREFERRED APPROACH

5.28 If surrogacy arrangements are to be permitted and facilitated in Victoria, the law that deals with parental relationships arising from such arrangements should be clarified. Failing to recognise the parental role of the people who make the decision to have a child, who are caring for the child and who are regarded in every other sense as the parents of the child cannot be in the best interests of children born, particularly where the surrogate and her partner (if any) never intended to act as the parents. The law's inability to recognise the relationship between the commissioning person or couple and the child could have serious consequences for children.

5.29 However, there are sufficient complexities in surrogacy arrangements to justify a cautious approach in dealing with parentage. The welfare of the child must be the paramount consideration and the interests of both the commissioning parents and the surrogate must be protected. For this reason, the commission has concluded that the transfer of legal parentage from the surrogate to the commissioning couple should not be automatic. Instead, it should involve a process which treats the surrogate as the parent of the child and requires the commissioning couple to meet certain specified criteria before legal parentage can be transferred.

PROTECTION OF SURROGATE

5.30 At the roundtable discussion on surrogacy convened by the commission, all participants were of the view that the surrogate should be protected against pressure to hand over the child to the commissioning parents. As discussed in Chapter 3, the lessons learnt from the experience of relinquishing mothers in adoption cannot be ignored. The commission agrees that the law should not compel the surrogate to hand over the baby to the commissioning couple if she decides that she cannot bring herself to do so. The surrogate should be recognised as the parent of the child unless she consents to the making of a court order transferring parentage to the commissioning parents after the child is born. Before an order can be made, the child must have lived with the commissioning parents for a specified period. This principle should apply whether or not the surrogate is genetically related to the child.

5.31 It should be noted that state law cannot exclude the jurisdiction of the Family Court. If a dispute arises about where the child should reside, the Family Court will retain jurisdiction to hear and determine the dispute, regardless of the legal parental status of the surrogate and/or the commissioning parents. The dispute would be determined in accordance with section 65E of the Family Law Act, which requires the court to regard the best interests of the child as the paramount consideration when deciding whether to make a particular parenting order for a child.

LEGAL PROCESS

5.32 Adoption would be an appropriate means of enabling the transfer of legal parental status to the commissioning person or couple. Some may argue that commissioning parents should not be required to go through an adoption process. However, we consider that there are sufficient similarities between surrogacy and adoption to justify this approach. Adoption law is founded on

the principle that the welfare and interests of the child are paramount⁹⁴ and includes safeguards to ensure that the child's birth parents freely consent to the relinquishment of the child.⁹⁵ In the case of surrogacy, this would require consent of the surrogate and her partner (if any).

5.33 Adoption orders also have the advantage of being recognised under all relevant Victorian laws, under federal law, in other Australian jurisdictions and internationally. Currently, the Adoption Act does not allow people to arrange adoptions privately, except where the child and the adopting person are related.⁹⁶ The adoption legislation and procedures would need to be modified in several respects if adoption were to be used as the mechanism to transfer legal parentage in surrogacy cases. Such amendments could include:

- permitting the applicants to apply to adopt a specified child who is not a 'relative' as defined in the Adoption Act;
- tailoring the assessment process to the specific features of a surrogacy arrangement, for example, the assessment process could take into account the counselling and assessment that took place before the surrogacy;
- expanding eligibility criteria to enable the court to make adoption orders in favour of same-sex couples.⁹⁷

5.34 In addition to requiring the commissioning person or couple to meet the standard adoption criteria, the following conditions could apply to adoption orders in surrogacy cases:

- the application should be made within six months of the birth of the child;
- the child's home should be with the commissioning person or couple;
- the commissioning person or couple should satisfy the relevant eligibility criteria;
- the court should be satisfied that the surrogate and/or her partner (if any) has not obtained any material advantage from the arrangement;
- the court should be satisfied that both members of the commissioning couple and the surrogate and her partner (if any) agree to the making of the order.

RECORDING OF AND ACCESS TO INFORMATION

5.35 In Position Paper Two we discussed the importance of children being informed of their genetic origins and having the option to discover the identity of the person who donated the gametes used in their conception. It is equally important for children born through surrogacy arrangements to be told about their birth and to be able to identify the surrogate. If altruistic surrogacy is facilitated in Victoria, the commission recommends that identifying information about the surrogate be registered and released to the child in the same way as information about donors is recorded and released.

5.36 The counselling provided before the surrogacy will clearly play an important role in assisting parents to appreciate the importance of informing children of their origins. However, the commission also believes that commissioning parents should be provided with ongoing counselling and support after the birth of their children to equip them to inform the children about their origins.

94 *Adoption Act 1984* s 9.

95 *Adoption Act 1984* div 3.

96 *Adoption Act 1984* s 122.

97 For further discussion, see Victorian Law Reform Commission (July 2005) above n 2, Chapter 6.

Chapter 6

Interim Recommendations

6.1 If the government decides that altruistic surrogacy should continue to be permitted in Victoria, the commission recommends that the following measures be implemented. These recommendations are intended to protect the health, wellbeing and interests of the child to be born, the surrogate mother and her family, and the commissioning person or couple.

ELIGIBILITY CRITERIA

!	INTERIM RECOMMENDATION(S)
	<ol style="list-style-type: none"> 1. If a person or couple wish to commission a woman to carry a child on their behalf, a doctor must be satisfied that they are: <ul style="list-style-type: none"> • in the circumstances in which they find themselves, unlikely to become pregnant, to be able to carry a pregnancy or to give birth; or • likely to transmit a genetic abnormality or a disease to the child if they conceive a pregnancy; or • likely to place their life or health at risk if they become pregnant, carry a pregnancy or give birth. 2. The criteria in Interim Recommendation 1 should not apply to a woman intending to act as a surrogate. 3. It should not be necessary for a person who wishes to commission a woman to carry a child on his or her behalf to be married, to be in a relationship with a person of the opposite sex, or to be in a relationship with another person. 4. If, before a person or couple commission a woman to carry a child on their behalf, a doctor or counsellor believes that any child that might be born as a result of the arrangement may be at risk of physical abuse, sexual abuse, emotional or psychological abuse, or neglect because of: <ol style="list-style-type: none"> (a) an ongoing problem concerning the physical or mental health of the person or couple commissioning the surrogacy, or of the surrogate and/or her partner (if any); or (b) some other concern the doctor or counsellor has about the person or couple commissioning the surrogacy, or the surrogate and/or her partner (if any); <p>the doctor or counsellor must seek advice about whether or not to proceed with a treatment procedure from a clinical ethics committee within a relevant hospital, which must include a child development expert, a psychologist or psychiatrist with expertise in the prediction of risk of harm to children and a doctor with experience in ART.</p>

! INTERIM RECOMMENDATION(S)

5. Where a clinical ethics committee decides that a person or couple should not be able to commission a surrogacy, or the surrogate and her partner (if any) should not be able to participate in a surrogacy arrangement:
 - (a) the person concerned may apply to the Infertility Treatment Authority (ITA) review panel to have the decision reviewed;
 - (b) a clinic must not take any steps in relation to the surrogacy unless the committee's decision is reviewed by the ITA review panel and the panel decides there is no barrier to treatment, or decides that subject to compliance with certain conditions there is no barrier to treatment.
6. A licensee should not assist in a surrogacy arrangement without the approval of the ITA review panel where the person or couple commissioning the surrogacy, or the surrogate and/or her partner (if any):
 - (a) has had charges proven against them in Victoria or elsewhere for a serious sexual offence; or
 - (b) has been declared a serious violent offender under the *Crimes Act 1958* or any equivalent law of the Commonwealth or any place outside Victoria (whether or not in Australia); or
 - (c) has had a child protection order (but not an interim protection order) made for one or more children in their care under a child welfare law of Victoria or any equivalent law of the Commonwealth or any place outside Victoria (whether or not in Australia).
7. A person or couple who wish to commission a woman to carry a child on their behalf, must:
 - be assessed as fit and proper people to enter into a surrogacy arrangement;
 - receive counselling about the social and psychological implications of entering into a surrogacy arrangement;
 - receive advice and information about the legal consequences of entering into a surrogacy arrangement.
8. A woman intending to be a surrogate mother must:
 - be assessed by an obstetrician specialising in ART and counsellor or psychologist as physically and mentally capable of acting as a surrogate;
 - consent to all aspects of the arrangement, including the use of ART;
 - have already experienced pregnancy and childbirth;
 - receive counselling about the social and psychological implications of entering into a surrogacy arrangement;
 - receive advice and information about the legal consequences of entering into a surrogacy arrangement.

PAYMENT

! INTERIM RECOMMENDATION(S)

9. Section 59 of the *Infertility Treatment Act 1995* should be amended to clarify that:
- a person must not receive any material benefit or advantage from a surrogacy agreement or arrangement to act as a surrogate mother, other than payment of the surrogate's reasonable medical and associated expenses; and
 - payment of any loss of earnings incurred by the surrogate should not be permitted.

PARENTAGE

! INTERIM RECOMMENDATION(S)

10. The *Adoption Act 1984* should be amended to permit an adoption order to be made in favour of a person or couple who have commissioned a surrogacy arrangement, subject to the following conditions:
- the application for the order should be made within six months of the birth of the child;
 - at the time the application is made the child's home should be with the commissioning person or couple;
 - the commissioning couple should have met the relevant eligibility criteria;
 - the court should be satisfied that the surrogate and/or her partner (if any) has not received any material advantage for her role in the arrangement;
 - the court should be satisfied that both members of the commissioning couple, and the surrogate and her partner (if any) agree to the making of the order.

ACCESS TO INFORMATION

! INTERIM RECOMMENDATION(S)

11. The central register maintained under the *Infertility Treatment Act 1995* should be expanded to allow identifying information about the surrogate to be registered and released to the child in the same way as information about donors is registered and released.
12. The commissioning person or couple should be counselled about the importance of informing children of their genetic origins and circumstances of their birth. They should be provided with ongoing counselling and support to enable them to inform children about their origins.

Other VLRC Publications

Disputes Between Co-owners: Discussion Paper (June 2001)

Privacy Law Options for Reform: Information Paper (July 2001)

Sexual Offences Law and Procedure: Discussion Paper (September 2001) (outline also available)

Failure to Appear in Court in Response to Bail: Draft Recommendation Paper (January 2002)

Disputes Between Co-owners: Report (March 2002)

Criminal Liability for Workplace Death and Serious Injury in the Public Sector: Report (May 2002)

Failure to Appear in Court in Response to Bail: Report (June 2002)

People with Intellectual Disabilities at Risk, A Legal Framework for Compulsory Care: Discussion Paper (June 2002)

What Should the Law Say About People with Intellectual Disabilities Who are at Risk of Hurting Themselves or Other People? Discussion Paper in Easy English (June 2002)

Defences to Homicide: Issues Paper (June 2002)

Who Kills Whom and Why: Looking Beyond Legal Categories by Associate Professor Jenny Morgan (June 2002)

Workplace Privacy: Issues Paper (October 2002)

Defining Privacy: Occasional Paper (October 2002)

Sexual Offences: Interim Report (June 2003)

Defences to Homicide: Options Paper (September 2003)

People with Intellectual Disabilities at Risk, A Legal Framework for Compulsory Care: Report (November 2003)

Assisted Reproductive Technology & Adoption, Should the Current Eligibility Criteria in Victoria be Changed? Consultation Paper (December 2003)

People with Intellectual Disabilities at Risk, A Legal Framework for Compulsory Care: Report in Easy English (July 2004)

Sexual Offences: Final Report (August 2004)

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