

Chapter 16

Surrogacy



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Altruistic surrogacy is when the surrogate mother receives no payment or is only reimbursed for reasonable expenses associated with pregnancy.

This section of the report addresses specific aspects of the law governing surrogacy. Surrogacy is a practice where a woman who is, or is to become, pregnant agrees to permanently surrender the child to another person or couple who will be the child's parent or parents. We describe the woman who bears the child as the surrogate or surrogate mother and those to whom the child will be surrendered as the commissioning person or couple.

Our terms of reference covering surrogacy are more limited than those for access and parentage discussed in the previous chapters. 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 assisted reproductive technology (ART) procedures in altruistic surrogacy arrangements
- payments in the context of altruistic surrogacy arrangements
- the legal status of children born of such arrangements.

Altruistic surrogacy is currently permitted in Victoria. The recommendations set out in this part of the report proceed on the assumption that this will continue to be the case. 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.

TYPES OF SURROGACY

Early surrogacy arrangements commonly 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's sperm (self-insemination) or being inseminated by a doctor with the commissioning father's or donor's sperm (assisted insemination).

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 donated sperm, or using the surrogate mother's own eggs fertilised with the commissioning father's or donated sperm.

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.

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

- A woman may wish to have a child, but be unable to become pregnant or to carry a child to term for medical reasons.
- A man may want to have a child but not have a female partner.
- A homosexual couple may want to have a child, conceived using their sperm.
- A couple who are involved in an IVF treatment program may have embryos in storage. If the woman dies, her partner may want to commission a surrogate to carry and give birth to the child.¹

A woman may be unable to become pregnant, unable to carry a baby to term or be at risk of a dangerous pregnancy for a range of medical reasons. She may have had a hysterectomy or lack part of her uterus, uterine lining, ovaries or other parts of the genital tract. The commission received several personal stories from women who had considered and/or pursued surrogacy after suffering from medical conditions that prevented them from carrying a pregnancy themselves. Two women had had hysterectomies after complications during childbirth:²

Our daughter passed away five days after birth due to a rare complication during delivery called vasa previa. Because of this complication at birth I was given an emergency caesarean where an even rarer complication called placenta accreta resulted in a hysterectomy with conservation of my ovaries. I am therefore physically unable to get pregnant. We have always wanted several children and now find ourselves looking at other ways to achieve our dreams.³

One woman had had 14 unsuccessful IVF treatments,⁴ and other women had had cancer resulting in removal of their ovaries.⁵ For one woman, pregnancy was possible but dangerous because she had been treated for a hormone-receptor-positive breast cancer. She was advised by her doctor not to become pregnant for fear that the hormones associated with the pregnancy could trigger or accelerate a recurrence of the cancer.⁶

The commission also received submissions from homosexual couples 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.⁷

Because gay men are unable to bear children themselves, the possible availability of surrogacy offers hope to gay men who desire to become parents. Currently, most gay men are unable to pursue this route as overseas surrogacy arrangements are often prohibitively expensive.⁸

I have been in a committed same sex relationship for over four years. When my partner and I were ready to start our own family, we turned to ART to have children of our own. Through the help of egg donation, IVF and commercial surrogacy, we are delighted to be expecting twins to be born in the USA in the next few months⁹

SURROGACY OUTCOMES

There is limited empirical research available on outcomes of surrogacy arrangements, particularly in relation to outcomes for children.

One Australian study evaluated the experiences of women who agree to act as surrogates.¹⁰ The study considered how the surrogates viewed the outcome of the arrangement, irrespective of whether a pregnancy resulted. Five of the 13 women interviewed carried a child or children to full term. Six women withdrew from the arrangement without conceiving a child. The reasons for withdrawal included a decision by the commissioning parents to withdraw after unsuccessful attempts at pregnancy, emotional

and financial stresses, and a decision by the surrogate that she was too old for a viable pregnancy.¹¹ While a child's birth was regarded by the surrogates as a successful outcome, some of those who did not give birth to a child were also satisfied with their involvement.¹² This study did not consider the outcomes of the arrangement for the commissioning parents or any children born.

Overall, the study found that the surrogates did not feel they had been coerced or victimised as a result of the arrangement, but rather that the surrogacy process had strengthened existing relationships with the commissioning parents. All surrogates 'cognitively adapted' to think of the child they were gestating as the child of the commissioning parents. The study concluded that people who decide to participate in surrogacy arrangements have special qualities that enable them to manage the experience.¹³

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

The first study, consisting of 42 heterosexual couples who had children through surrogacy, concluded that 'the commissioning parents had not generally found the experience of surrogacy to be problematic'.¹⁴ 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, and their relationships with the commissioning parents were not adversely affected.¹⁵ The third study focused on the parent-child relationship in the first year of the child's life, reporting that:

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

- 1 We discuss posthumous use of embryos in Chapter 9.
- 2 Submissions CP 253 (Lee Holmes), CP 254 (Katrina Harrison).
- 3 Submission CP 254 (Katrina Harrison).
- 4 Submission CP 243 (Nicole Poustie).
- 5 Submission PP3 60 (Anonymous).
- 6 Submission CP 236 (Anonymous).
- 7 Submissions CP 248 (Peter Usher and Dax Purvis), CP 250 (John), CP 251 (Lee Matthews).
- 8 Submissions CP 244 (Tony Wood), CP 245 (Jeremy Sayers), CP 246 (David Johnston-Bell), CP 247 (Adrian Tuazon), CP 248 (Peter Usher and Dax Purvis).
- 9 Submission PP3 45 (Anonymous).
- 10 Gina Goble, *Carrying Someone Else's Baby: A Qualitative Study of the Psychological and Social Experiences of Women who Undertake Gestational Surrogacy* (Unpublished Master in Psychology (Counselling Psychology) Thesis, Swinburne University of Technology, 2005).
- 11 *Ibid* 47.
- 12 *Ibid* 51.
- 13 *Ibid* 117.
- 14 Fiona MacCallum et al, 'Surrogacy: The Experience of Commissioning Couples' (2003) 18(6) *Human Reproduction* 1334, 1340.
- 15 Vasanti Jadva et al, 'Surrogacy: The Experiences of Surrogate Mothers' (2003) 18(6) *Human Reproduction* 2196, 2203.
- 16 Susan Golombok et al, 'Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life' (2004) 40(3) *Developmental Psychology* 400, 408.

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Chapter 16

Surrogacy

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.

*overinvolvement.*¹⁶

There were no differences in infant temperament between the different family types included in the study.¹⁷ The most recently published study, conducted when the children were three years old, reported no differences in child psychological development between families formed through surrogacy arrangements and other family types included in the study.¹⁸ However, one difference identified in this study was that:

*couples who had become parents through a surrogacy arrangement were much more likely to have been open with their child about the circumstances of their birth than were couples whose children had been conceived by gamete donation.*¹⁹

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.²⁰

The Kirkman case in Victoria has also provided us with an insight into the experience of Australia's first child born through a gestational surrogacy arrangement.²¹ In 1995, when only seven years old, Alice Kirkman first published her thoughts on her surrogate 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 ...*²²

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.*²³

In contrast to the Kirkman case and the positive results reported in the studies conducted in the United Kingdom, there have been cases in which significant difficulties have arisen in the course of the arrangement.²⁴

Problems can occur if the surrogate decides she does not want to relinquish the child, if the commissioning parents decide 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.

The case of *Re Evelyn* illustrates the conflict that may arise between commissioning parents and a surrogate mother.²⁵ 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 the child. Mrs S travelled to Queensland and removed Evelyn from the Qs' care and both of them returned to South Australia, where they lived. 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'.²⁶ 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.

Some surrogacy arrangements in the United States have illustrated the possibility of conflict between surrogate mothers and commissioning parents. In *The Matter of Baby M*, the surrogate used her own egg in the conception of the child. After the birth of the child she found she could no longer agree to relinquish it. The commissioning father sued for enforcement of the surrogacy contract, which was found to be invalid.²⁷ Other disputes have arisen over the

'enforcement' of surrogacy contracts in both gestational and partial surrogacy arrangements.²⁸ In another case legal custody of triplets was initially granted to a gestational surrogate, but was later granted to the commissioning father after many years of litigation.²⁹

As with all pregnancies, surrogacy arrangements involve some risk to the woman who gives birth to the child, as well as risk to the baby. Women may find it difficult to enjoy their pregnancy because of the prospect of relinquishing the child born. Some women acting as surrogates have reported difficult pregnancies and labours. In one case, a British surrogate died from a heart attack 90 minutes after giving birth to the child she had carried on behalf of a commissioning couple. The surrogate had been inseminated with the sperm of the commissioning father. The surrogacy agreement between the parties had required the commissioning parents to take out a life insurance policy for the surrogate, which after her death was paid to her family and two children. The child born as a result of the surrogacy was handed over to the commissioning couple one week after the birth, although the surrogate's mother subsequently announced she would challenge their custody of the child.³⁰

The problems that can arise in the course of a surrogacy arrangement have been carefully considered by the commission. In this chapter we outline our approach to the regulation of surrogacy in light of these complexities.

APPROACHES TO REGULATION

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 substantial number of Australian government inquiries and reports.³¹

Regulation to control surrogacy arrangements is controversial in two respects. It can be seen as official endorsement of a practice which some people in the community see as objectionable. The commission received submissions from some people who argued that surrogacy should not be permitted or facilitated in Victoria in any way because, they argue:

- surrogacy is not in the best interests of the child³²
- surrogacy is exploitative of women's reproductive capacity³³

17 Ibid.

18 Susan Golombok et al, 'Non-Genetic and Non-Gestational Parenthood: Consequences for Parent-Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3' (2006) 21(7) *Human Reproduction* 1918, 1921.

19 Ibid 1923.

20 MacCallum et al (2003), above n 14, 1341.

21 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.

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

23 Alice Kirkman, 'And here's one we prepared earlier ... the biotech baby fourteen years on' in Heather Grace Jones and Maggie Kirkman (eds), *Sperm Wars: The Rights and Wrongs of Reproduction* (2005) 181, 182.

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

25 *Re Evelyn* (1998) 23 Fam LR 53.

26 *Re Evelyn* (Unreported, Family Court of Australia, Jordan J, 19th December 1997) 10.

27 *In the Matter of Baby M*, 537 A.2d 1227 (Supreme Court of New Jersey, 1988).

28 *Johnson v Calvert*, 19 Cal Rptr 2d 494 (1993).

29 *JF v DB* 897 A.2d 1261 (PA, 2006).

30 BioNews, 'Legal battle over dead surrogate's baby' (7 February 2005) available at <www.bionews.org.uk>.

31 Australia Family Law Council, *Creating Children: A Uniform Approach to the Law and Practice or Reproductive Technology in Australia: Report of the Family Law Council, Incorporating and Adopting the Report of the Asche Committee on Issues Relating to AID, IVF, Embryo Transfer and Related Matters* (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); NSW Law Reform Commission, *Artificial Conception: Surrogate Motherhood*, Discussion Paper 18 (1988); New South Wales Law Reform Commission, *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); Legislative Council of the South Australian Parliament, *Report of the Select Committee of the Legislative Council 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 Fertilization, *Report on the Disposition of Embryos Produced by In Vitro Fertilization*, (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).

32 Submissions PP3 6 (Caroline Chisholm Centre for Health Ethics Inc), PP3 11 (Judith Bond), PP3 8 (VANISH), PP3 17 (David Perrin), PP3 29 (Victorian Standing Committee on Adoption & Alternative Families), PP3 32 (Anonymous), PP3 36 (Bill Muehlenberg), PP3 50 (Peter Phillips), PP3 54 (Adoption Information Services Forum), PP3 58 (Hannah Spanswick).

33 Submissions PP3 20 (Dr John Gill), PP3 37 (Julia Mangan), PP3 38 (Atala Ladd).

34 Submission PP3 22 (Dr D Clarnette).

35 Submissions PP3 26 (Pat Healy), PP3 40 (Anonymous), PP3 49 (Salt Shakers), PP3 53 (Rev Geoff Harvey).



- surrogacy is consumerist and selfish³⁴
- surrogacy degrades the family unit.³⁵

Regulation of surrogacy may also be perceived as an unwarranted intrusion by the state into the reproductive choices of individuals.³⁶ Because our terms of reference about surrogacy are limited, we do not discuss debates on these questions. However, we do believe that regulation of surrogacy can play an important role in minimising the potential for disputes and in protecting all parties, including the child, from possible harm.³⁷

In their comparative review of surrogacy legislation in Australia, the United Kingdom, Canada and the United States, 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.*³⁸

AUSTRALIA

In Australia, most jurisdictions permit 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,³⁹ but its recommendations were not accepted by Australian health and welfare ministers at the time.⁴⁰

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:

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

Table 1: Surrogacy Legislation in Australia

	VICTORIA	QUEENSLAND	TASMANIA	SOUTH AUSTRALIA*	ACT
Infertility 1988	Surrogate Treatment Act 1993	Surrogacy Parenthood Act 1975	Family Contracts Act	Parentage Act Relationships	2004/1995
<i>Altruistic surrogacy prohibited/illegal</i>	-	4	-	(But no penalty) 4	-
<i>Commercial surrogacy prohibited/illegal</i>	4	4	4	4	4
<i>Arranging surrogacy service prohibited</i>	<i>Commercial agreements only</i>	4	-	4	<i>Except by a party to the agreement</i>
<i>Entering into a surrogacy contract prohibited</i>	<i>Commercial agreements only</i>	4	4	4	<i>Commercial agreements only</i>
<i>Advertising surrogacy services prohibited</i>	4	4	4	4	4
<i>Receiving payment is prohibited</i>	4	4	4	-	<i>Payment of expenses reasonably incurred is allowed</i>
<i>Surrogacy agreement is void or not enforceable</i>	4	4	4	4	4
<i>Provision of technical/professional services is illegal</i>	-	-	4	-	<i>Commercial agreements only</i>

* On 27 September 2006, a proposed amendment to permit altruistic surrogacy in South Australia was referred to the Legislative Council Social Development Committee: see Statutes Amendment (Surrogacy) Bill 2006 (SA).

These five jurisdictions 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.⁴¹ The criteria for participating in a surrogacy agreement are overseen by clinical ethics committees, which approve or reject applications for surrogacy.⁴² 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.

- 36 Helen Szoke, 'Surrogacy: All the Features of a Relationship that Could Go Wrong?' (2001-02) 28 *Melbourne Journal of Politics: The Politics of Technology Special* 56, 60-2.
- 37 For further discussion of this point, see Imogen Goold, 'Surrogacy: Is There a Case for Legal Prohibition?' (2004) 12 *Journal of Law and Medicine* 205.
- 38 John Seymour and Sonia Magri, *ART, Surrogacy and Legal Parentage: A Comparative Legislative Review* (2004), 49-50.
- 39 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 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).
- 40 Szoke (2001-02) above n 36, 58; Goold (2004) above n 37, 206.
- 41 *Parentage Act 2004* (ACT). See Chapter 19 for details of the conditions that must be met before a parentage order may be made for a child born of a surrogacy arrangement.
- 42 Canberra Fertility Centre, *Surrogacy Information Pack* (September 2004); Sydney IVF, *Surrogacy at Sydney IVF* (September 2005).

In NSW, Western Australia and the Northern Territory, there is no legislation about surrogacy but the practice is regulated by ethical guidelines.⁴³ In these jurisdictions altruistic 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 the arrangement; and*
- *have undertaken counselling to consider the social and psychosocial significance for the person born as a result of the arrangements, and for themselves.*⁴⁴

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'.⁴⁵

A recent surrogacy case drew attention to the divergent legislative approaches in Australian jurisdictions. Media reports revealed that a Victorian-based couple had travelled interstate to pursue a surrogacy arrangement because of the restrictions that exist in Victoria.⁴⁶ Apparently in response to this case, in November 2006, federal Attorney-General Philip Ruddock announced that the Standing Committee of Attorneys General (SCAG) had agreed to consider drafting uniform laws for surrogacy across all states and territories.⁴⁷ Mr Ruddock expressed concerns that some couples had been forced to go interstate to seek out suitable arrangements:

*In a federation like Australia, it is not satisfactory that people are forced to effectively forum-shop for the best deal ... This can be distressing for people who have already faced difficulties starting a family.*⁴⁸

UNITED KINGDOM, CANADA AND UNITED STATES

The United Kingdom (UK), Canada, New Zealand and numerous states in the United States (US) have enacted legislation dealing with surrogacy.⁴⁹ Virtually every jurisdiction disapproves of commercial surrogacy, but they adopt different approaches to altruistic surrogacy.⁵⁰ 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 that: 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.⁵¹ Some US states permit courts to scrutinise and approve surrogacy agreements before the arrangement commences.⁵² In New Zealand the commissioning parents must adopt the child.⁵³

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,⁵⁴ and in the UK payment of reasonable expenses is allowed. In New Zealand payment is permitted for expenses related to pregnancy and childbirth but not in lieu of employment.⁵⁵

VICTORIAN LAW

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 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.

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 surrogacy arrangements be illegal and called for the intention to be made clear in the Act.⁵⁶

In 1993 the Victorian government proposed amending the *Infertility (Medical Procedures) Act 1984*⁵⁷ to allow fertile women to participate in the IVF program as part of ‘voluntary’ surrogacy arrangements.⁵⁸ 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.⁵⁹

The subsequent Infertility Treatment Act prohibits commercial surrogacy arrangements but remains silent on altruistic surrogacy. Altruistic surrogacy is therefore not prohibited under criminal law, however altruistic surrogacy agreements have no status under the civil law because they are unenforceable.

There is no legislation in Victoria which prohibits

a woman self-inseminating with sperm from a commissioning parent or with donated sperm and then allowing the commissioning couple to care for the child. However, the law does not recognise the commissioning person or couple as the parents of the child. Nevertheless, they could apply for a parenting order in the Family Court to confirm living arrangements and ensure that they have responsibility for caring for the child.

The Infertility Treatment Act makes it almost impossible for surrogacy arrangements to proceed in Victoria if 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.⁶⁰

Under the Act, a potential surrogate mother must herself be assessed as being unlikely 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.⁶¹ The likelihood of finding a woman who meets these criteria and who is also willing to act as a surrogate is extremely low.

This makes it virtually impossible for people to make surrogacy arrangements using eggs from a commissioning mother or a donor. Because of these legal complexities, no clinic in Victoria is offering surrogacy services.⁶² The Infertility Treatment Authority (ITA) conditions of licence require clinics to prospectively notify the ITA where a surrogacy arrangement is to be undertaken. To date, no notifications have been received.⁶³

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 the following chapters.

It is clear to the commission that reform of the law concerning surrogacy is necessary. As one submission noted,

*the laws regarding surrogacy in Victoria are nearly twenty years old and with current knowledge, advancements in technology, better medical outcomes for women and children and carefully regulated screening, successful outcomes would be achieved.*⁶⁴

43 As expressed in the National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research*, (2004). On 1 March 2007 the Surrogacy Bill 2007 was introduced into the West Australian Parliament by the Hon J McGinty.

44 Ibid, para 13.2.

45 Ibid, para 13.1.

46 Matthew Franklin and Patricia Karvelas, ‘Conroy Plight Shows Laws Out of Step’, *The Australian* (Sydney), 8 November 2006, 2.

47 Attorney-General Phillip Ruddock, ‘Nationally Consistent Surrogacy Laws a Step Closer’ (Media Release 210/2006, 10 November 2006).

48 Ibid.

49 See Seymour and Magri (2004) above n 38, Chapter 3.

50 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, *Surrogacy Laws: State by State* <www.hrc.org> at 8 February 2007.

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

52 Eg, New Hampshire, Virginia, Florida and Texas: see Seymour and Magri (2004) above n 38, 36–42.

53 National Ethics Committee on Human Assisted Reproduction, *Guidelines on IVF Surrogacy* (2005) 4.

54 *Assisted Human Reproduction Act 2004* (Can) s 12.

55 National Ethics Committee on Human Assisted Reproduction, *Guidelines on IVF Surrogacy* (2005), above n 53, 4.

56 Standing Review and Advisory Committee on Infertility, *Annual Report 1996*.

57 This is the Act that preceded the current *Infertility Treatment Act 1995*.

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

59 Penne Watson Janu, ‘Surrogacy Arrangements in Australia: Analysis of the Legal Framework’ (1995) 9 *Australian Journal of Family Law* 201, 206.

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

61 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.

62 Information provided by Dr Gordon Baker, Melbourne IVF, 20 November 2006.

63 Information provided by the Infertility Treatment Authority, 31 July 2006.

64 Submission PP3 60 (Anonymous).

COMMISSION'S APPROACH

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. The processes we have recommended may require review in the future as knowledge of surrogacy outcomes develops.

We will examine the problems we have identified with the relevant provisions of the Infertility Treatment Act in the following chapters on eligibility, expenses 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 mother 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 mother's medical and other expenses in altruistic arrangements.
- The current law is inadequate to deal with parental relationships arising from surrogacy.

If the government decides that the present law permitting altruistic surrogacy should remain unchanged, the commission believes the following should 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 mother 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.

The commission is also in favour of pursuing nationally consistent or uniform legislation to regulate surrogacy, which may reduce the need for people to travel to other jurisdictions to access treatment for surrogacy if they cannot do so in their home state.

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.