INVESTIGATION INTO ALTRUISTIC SURROGACY COMMITTEE

REPORT

October 2008
Queensland Parliament
Investigation into Altruistic Surrogacy Committee

52nd Parliament

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This report is available on the committee website: http://www.parliament.qld.gov.au

Investigation into Altruistic Surrogacy Committee
Parliament House
George Street
BRISBANE QLD 4000
FOREWORD

This investigation into the decriminalisation and regulation of altruistic surrogacy in Queensland has presented each member of the committee with significant philosophical and moral challenges. It has caused us to collectively reflect on the role of government in people’s lives. It has reminded us all of our responsibility as legislators in this State. The committee is agreed that the Queensland Government’s role should be to develop a legislative and regulatory framework which balances the protection of vulnerable people from harm with the promotion of the liberty of consenting adults. The committee acknowledges its deliberations on these important matters have been aided by the advice received from a number of people with expertise in ethics and philosophy.

The committee is aware that not all Queenslanders may choose altruistic surrogacy for themselves or approve of it for others. However, for some people in Queensland society, altruistic surrogacy provides the only realistic opportunity to create a family. Over the last decade, on average, only eighteen children born in Queensland have been available annually for adoption. As trends in adoption, deferred family formation and infertility appear persistent, it seems sensible for the Government to create an environment that maximises the possibility for success and happiness for families created through altruistic surrogacy.

The investigation was enriched by the stories of many individuals whose life choices in Queensland have been currently limited by the Surrogate Parenthood Act 1988. The committee would particularly like to acknowledge the courage and generosity of all those who shared their very personal stories whether through preparing submissions or appearing as witnesses. These testimonies enhanced our understanding of the issues. They brought an intensely human face to the investigation and highlighted the diversity of individual circumstances which can lead couples to contemplate or embark upon altruistic surrogacy.

The unanimous decision of the committee to support the decriminalisation of altruistic surrogacy in Queensland should not be interpreted as an encouragement of altruistic surrogacy. The committee recognises the significant risks associated with the practice. Again, the committee is appreciative of the contribution to its investigation of both those opposing surrogacy and those supporting decriminalisation in highlighting in particular the risks to potential and existing children, the birth mother and intending parents. These concerns have not gone unheeded. Readers will note that the committee proposes advertising and brokerage should not be permitted and all surrogacy arrangements should remain unenforceable.

The committee’s focus on informed consent through the careful preparation of the parties and the prevention of forced relinquishment aims to address identified risks whilst respecting the liberty of freely consenting adults. In developing its proposed regulatory approach, the committee has benefited from the work of previous inquiries in Victoria, South Australia, Western Australia and Tasmania. We have also learnt much from the policy approach outlined in the Australian Capital Territory (ACT) Parentage Act 2004 and the procedures developed by the two fertility clinics, Canberra Fertility Centre and Sydney IVF, which have pioneered IVF surrogacy over the last decade in Australia. The development of the committee’s regulatory approach has also been enhanced by the information, advice and insights provided by a range of medical specialists, infertility counsellors, legal experts, researchers and policy officers in Queensland and interstate.

The committee has concluded that whilst prohibition may have dissuaded some, it has not prevented altruistic surrogacy occurring in Queensland. The committee is again grateful to those who shared their stories with us about the impact of the lack of legal protection for children born of altruistic surrogacy in the state. The legal uncertainty experienced by Torres Strait Islander traditional ‘adoptees’ in relation to inheritance rights illustrates the difficulties for altruistic surrogacy arrangements in the absence of further regulatory reform.

The committee believes a legislative and regulatory framework for altruistic surrogacy should also be driven by a commitment of the Government to parity in its policy approach. This is expressed in the committee’s proposed policy principle:

Every child enjoys the same status and legal protection irrespective of the circumstance of their birth or the status of their parents.

To promote the best interests of the child, the committee wants to ensure that children born of altruistic surrogacy are not stigmatised by the manner of their conception and not disadvantaged by the lack of legal recognition of their intending parents, for example, in terms of child support or inheritance. The committee’s proposal for a specific mechanism to enable the transfer of legal parentage is an expression of this principle.

The committee’s approach to the rights of the child for information on genetic parentage has been informed by the excellent work of the Victorian Infertility Treatment Authority: in particular, the promotion of its
mandatory and voluntary donor registers; its research on barriers to ‘telling’; and its service approach to support individuals and families in relation to ‘telling’ and information exchange. There appear many lessons for altruistic surrogacy to be drawn from the experience of donor conception and adoption in relation to access to information and ‘telling’. We thank those organisations supporting people impacted by adoption and donor conception for their valuable insights and advice.

The committee would also like to record its appreciation for the assistance provided by the secretariat and all of the Parliamentary Service staff who have provided support for the committee’s work throughout its investigation.

Finally, I wish to thank the other members of the committee of the 52nd Parliament for their commitment, cooperation and support in undertaking this challenging investigation on the sensitive and important issue of altruistic surrogacy.

Linda Lavarch MP
Chair
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RECOMMENDATIONS

RECOMMENDATION 1: RESPONSIBLE MINISTERS TO REPORT ANNUALLY TO PARLIAMENT

The committee recommends that the responsible Minister/s report annually to parliament on the implementation by their departments of the adopted recommendations in this report.

RECOMMENDATION 2: SIGNIFICANCE OF LANGUAGE

The committee recommends that the Queensland Government, when formulating legislation, guidelines and policy, uses the terms:
- ‘Birth mother’ to describe the surrogate mother;
- ‘Intending parents’ rather than ‘commissioning parents’ to avoid the use of perceived dehumanised or commercialised language; and
- Altruistic surrogacy ‘arrangement’ rather than ‘agreement’ to emphasise the altruistic nature of the endeavour.

RECOMMENDATION 3: DECRIMINALISATION SUPPORTED WITH APPROPRIATE LEGISLATION AND REGULATION

The committee recommends that the Queensland Government decriminalises altruistic surrogacy supported with an appropriate legislative and regulatory framework as described in later recommendations.

RECOMMENDATION 4: DEFINING GOVERNMENT’S ROLE

The committee recommends that with the decriminalisation of altruistic surrogacy, the role of the Queensland Government is to develop and maintain an adequate legislative and regulatory framework which:
- Balances the prevention of harm and the protection of personal liberty in the creation of families through altruistic surrogacy; and
- Seeks parity in policy development for families created through altruistic surrogacy with other families created through assisted reproductive technology (ART) or natural conception.

In the current Queensland regulatory context, the committee believes the Government’s key responsibilities should be as follows:
- Policy direction by defining altruistic surrogacy, guiding principles and outcomes for regulation and operational policy for acceptable altruistic surrogacy arrangements;
- Implementation of specific legislative or regulatory reform as required with a current focus on: strengthening ART regulation and providing a specific mechanism to transfer legal parentage for altruistic surrogacy;
- Direct service provision in terms of collection, maintenance and provision of access to birth and related information; and
- Ongoing monitoring and review of the implementation and effectiveness of legislation and regulation including research on client outcomes.

RECOMMENDATION 5: DEFINING ALTRUISTIC SURROGACY

The committee recommends that the Queensland Government defines altruistic surrogacy in the Surrogate Parenthood Act 1988 as: a clear arrangement, whether formal or informal, agreed pre-conception between consenting adults for the birth mother to bear a child for the intending parent/s and to permanently transfer the responsibility for the child’s care and upbringing to the intending parent/s after the child’s birth.

RECOMMENDATION 6: FURTHER EXAMINATION OF TRADITIONAL TORRES STRAIT ISLANDER ‘ADOPTIONS’

The committee recommends that the Queensland Government considers options for the recognition of traditional Torres Strait Islander ‘adoptions’ (also refer to Recommendation 24).
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The committee recommends that the Queensland Government ensures the appropriate legislation and/or relevant regulation:
- Permits reasonable expenses for altruistic surrogacy as long as there is no material gain for the birth mother;
- Defines categories of permitted expenses as follows: medical, legal, counselling, travel/accommodation, childcare and insurance costs and lost earnings which are directly attributable to the altruistic surrogacy arrangement and not covered by existing entitlements or benefits. Paid maternity leave will be limited to a maximum of two months associated with the birth and additional leave during pregnancy where medically indicated; and
- Clarifies that payment of reasonable expenses is not enforceable as part of altruistic surrogacy arrangements.

RECOMMENDATION 8: PROHIBITION OF ADVERTISING AND BROKERAGE ................. 38
The committee recommends that the Queensland Government prohibits advertising and brokerage for altruistic surrogacy.

RECOMMENDATION 9: ARTICULATING POLICY PRINCIPLES...................................... 42
The committee recommends that the Queensland Government articulates five key policy principles supported by specific outcome statements in legislation to guide the regulation of altruistic surrogacy in Queensland. The best interests of the child are articulated under the committee’s first three proposed principles. The five principles are as follows:
- Every child is nurtured, loved and supported;
- Every child has access to his/her identity;
- Every child enjoys the same status and legal protection irrespective of the circumstances of his/her birth or the status of their parents;
- The long-term health and wellbeing of the parties to a surrogacy arrangement and their families is promoted; and
- The autonomy of consenting adults in their private lives is respected.

RECOMMENDATION 10: GENETIC CONNECTION WITH INTENDING PARENTS AND BIRTH MOTHER ..................................................................................................... 55
The committee concludes that it is desirable to pursue gestational surrogacy and it is desirable for at least one intending parent to contribute their gametes where possible. However, given the difficulties of accounting for people’s differing capacities and beliefs in relation to genetic connection, the committee recommends that the Queensland Government:
- Avoids a prescriptive approach on genetic connection; and
- Permits the use of the birth mother’s egg, donor gametes and donated embryos when accessing ART if endorsed by the Surrogacy Review Panel on expert advice that (a) surrogacy is needed and (b) the parties are prepared for possible risks. (See Recommendation 12 for more detail in relation to the panel.)

RECOMMENDATION 11: GENETIC RELATIONSHIP AND TRANSFER OF LEGAL PARENITAGE ...... 56
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RECOMMENDATION 12: ENHANCING EXISTING ART ASSESSMENT AND SUPPORT PROCESSES... ................................................................................................. 62
The committee recommends to the Minister for Health that Queensland Health enhance existing standards for assessment and support for altruistic surrogacy in ART services with provision for:
- Psychosocial assessment which is independent from psychosocial support;
- Further specification of the content and amount of independent psychosocial assessment and counselling;
• Provision of opportunities for counselling during pregnancy and after birth for the birth mother, her partner and the intending parents;
• Independent medical assessments for the birth mother and intending parents to assess health risks, need for surrogacy and any issues impacting on their capacity for long-term care of the child;
• Specialist, independent legal advice by a qualified lawyer provided separately for the birth parents and intending parents;
• A legislatively based Surrogacy Review Panel appointed by Queensland Health including members with relevant expertise in medicine, family law, ethics, psychosocial health and child development and a community representative to approve all applications for altruistic surrogacy and to inform the development and evaluation of ART standards in relation to altruistic surrogacy; and
• A three month cooling off period after approval by the Surrogacy Review Panel before proceeding with treatment.

The committee also recommends that the panel be sufficiently resourced to operate in a timely way and provide easy access to applicants across Queensland.

RECOMMENDATION 13: SUPPORT FOR THE IMPLEMENTATION OF NEW STANDARDS ............... 62
The committee recommends to the Minister for Health that Queensland Health support the implementation of enhanced standards for altruistic surrogacy in the ART services by ensuring the agency:
• Has relevant policy research expertise in relation to altruistic surrogacy; and
• Supports relevant training and professional development opportunities for infertility counsellors, nurses and clinicians, members of the Surrogacy Review Panel and family law specialists in collaboration with the ANZICA, fertility clinics, the Fertility Society of Australia and other experts.

RECOMMENDATION 14: MONITORING, EVALUATION AND RESEARCH ............................................. 63
The committee recommends that the Queensland Government:
• Develops an annual data collection system for ART services to monitor demand for and the extent of service provision for altruistic surrogacy, the nature of surrogacy arrangements and service outcomes;
• Explores possibilities for ongoing research on outcomes for children and parties and their ongoing support needs in consultation with other jurisdictions, industry and professional bodies and existing researchers; and
• Evaluates the effectiveness of ART standards for altruistic surrogacy and the quality of client outcomes for people pursuing altruistic surrogacy through ART in consultation with stakeholders. This evaluation should occur two years after the implementation of the new standards.

RECOMMENDATION 15: PARLIAMENTARY REVIEW ................................................................. 63
The committee recommends that the Queensland Parliament ensures that, following its release, the report from the evaluation outlined in recommendation 14 is reviewed by a parliamentary committee.

RECOMMENDATION 16: CRITERIA FOR INTENDING PARENTS AND BIRTH MOTHERS .......... 68
The committee recommends to the Minister for Health that additional standards be developed under the Private Health Facilities Act 1999 to include criteria for intending parents and birth mothers seeking assistance from ART. The committee proposes:
• The intending parents and the birth mother and her partner have the capacity to enter an arrangement; have participated in independent psychosocial and medical assessment; and have obtained separate legal advice from a qualified lawyer;
• Intending parents demonstrate a need for surrogacy (due to medical infertility or an inability to carry a child or identified health risk) and at least one intending parent is an Australian resident; and
• The proposed pregnancy poses no significant health risk to the birth mother and she has experienced a previous successful pregnancy.
RECOMMENDATION 17: RIGHTS OF BIRTH MOTHERS TO MANAGE THEIR PREGNANCY AND BIRTH .......................................................................................................................................................... 69

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RECOMMENDATION 18: UNENFORCEABILITY OF SURROGACY ARRANGEMENTS ......................... 72

The committee recommends that the Queensland Government ensures altruistic surrogacy arrangements remain unenforceable under State law.

RECOMMENDATION 19: MECHANISM FOR TRANSFER OF LEGAL PARENTAGE SPECIFIC TO ALTRUISTIC SURROGACY .......................................................................................................................................................... 77

The committee recommends to the Queensland Government that it:

• Provides for the transfer of legal parentage for altruistic surrogacy under the Surrogate Parenthood Act 1988, the Status of Children Act 1978 or other suitable Act with the following conditions:
  – The arrangement falls within the proposed legislative definition of acceptable altruistic surrogacy arrangements (i.e. it is non-commercial, made pre-conception and parties have reached legal adulthood);
  – Intending parents demonstrate a need for surrogacy based on advice from the Surrogacy Review Panel or a medical specialist or, in the case of traditional Torres Strait Islander ‘adoptions’, customary practice is verified using a similar process to that used in the Family Law Court;
  – The parties meet informed consent requirements including:
    • The birth parent/s consent to the transfer of legal parentage;
    • The child is resident with the intending parents;
    • Birth parents and intending parents have received separate legal advice from a qualified lawyer; and
    • All parties have undertaken post-birth counselling as evidenced by a report from an ANZICA counsellor or a suitably qualified psychologist, social worker or psychiatrist focusing on quality of informed consent, child’s right to information and ongoing communication between the parties;
  – At least one of the intending parents is an Australian resident;
  – The approval of transfer is made no sooner than four weeks after birth and an application for transfer is made no later than six months after birth; and
  – The transfer is considered in the best interests of the child;

• Provides for the transfer of legal parentage for any existing altruistic surrogacy cases which fall outside the six month criteria for a two year period following the decriminalisation of altruistic surrogacy providing they meet all of the other conditions detailed above; and

• Ensures that applications for the transfer of legal parentage come under the jurisdiction of the Supreme Court.

RECOMMENDATION 20: LEGAL PROTECTION FOR CHILDREN BORN OF ALTRUISTIC SURROGACY ARRANGEMENTS WITH SAME-SEX PARENTS .............................................................. 79

The committee notes the broader issue of recognition of same-sex parents and recommends to the Queensland Government that it conduct a review of the legal status for children being cared for by same-sex parents with particular to the operation of the Status of Children Act 1978.

RECOMMENDATION 21: BIRTH CERTIFICATES .......................................................................................... 87

The committee recommends that the Queensland Government:

• Provides for the re-registration of births after approval of the transfer of legal parentage in altruistic surrogacy cases with the issue of a new birth certificate recording the names of intending parents as the child’s legal parents;

• Ensures that when children born of altruistic surrogacy with a re-registered birth certificate turn 18 years they can access their original birth certificates; and
Investigation into Altruistic Surrogacy

- Engages stakeholders including children born of altruistic surrogacy and/or ART and adoptees in considering other options to support children’s identity rights including:
  - The production of a public birth certificate outlining legal parentage and a private birth certificate detailing genetic relationships and type of surrogacy (i.e. gestational or traditional);
  - The use of annotations on birth certificates to alert people to the existence of other information held elsewhere.

RECOMMENDATION 22: REGISTER OF GENETIC INFORMATION .......................................................... 91
The committee recommends that the Queensland Government:
- Develops a central register to protect information on a child’s genetic parentage and circumstances of birth in relation to altruistic surrogacy, having regard for the possible benefits of such a service for other children born of donor gametes;
- Considers the relative merits of the placement of the register, having regard to the possible synergies with ART regulation, within Queensland Health or with birth registration within the Register of Births, Deaths and Marriages; and
- Supports the development of a national best practice approach to the operation of registers and birth certificates.

RECOMMENDATION 23: ONGOING SUPPORT TO TELL FOR INTENDING PARENTS .................. 93
The committee recommends that the Queensland Government develops a strategy to:
- Support parents of children born of altruistic surrogacy or gamete donation of all ages to ‘tell’ them about their genetic parentage and circumstances of birth;
- Promote the role of the register as proposed in Recommendation 22 and provide easy access to a child’s information; and
- Facilitate the exchange of information between parties.

RECOMMENDATION 24: ADVOCATING FOR MEDICARE FUNDING ................................. 96
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RECOMMENDATION 25: DEVELOPING OPTIONS FOR RECOGNISING TRADITIONAL TORRES STRAIT ISLANDER ‘ADOPTIONS’ ................................................................. 99
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- Considers options in consultation with the Torres Strait Islander community, having an appreciation of parenting roles, extended family and child rearing practices in Torres Strait Islander culture;
- Considers options which protect the existing legal right of the birth mother/parents not to relinquish the child and promote the rights of the child to information on his/her genetic parentage;
- Considers the relevance of the model proposed for transfer of legal parentage in altruistic surrogacy in the wider community along with lessons from the operation of the Family Law Court Kupai Omasker parenting orders;
- Ensures that the model is accessible to Torres Strait Islanders throughout the State; and
- Develops a culturally appropriate community education program to support the implementation of such a provision.

RECOMMENDATION 26: TELLING AND TRADITIONAL ADOPTION PRACTICE .................. 101
The committee recommends that the Queensland Government provides an opportunity for further dialogue with the Torres Strait Islander community on the issues of telling and traditional ‘adoption’ practice and a child’s right to information. This dialogue should offer the opportunity to fully explain the evidence base for the Department of Child Safety’s current policy around telling. It should also encourage and support community based research and engagement initiatives which seek to foster discussion within the community and with the Government on the issue.
## LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACT</td>
<td>Australian Capital Territory</td>
</tr>
<tr>
<td>ANZICA</td>
<td>Australian and New Zealand Infertility Counsellors Association</td>
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<tr>
<td>ART</td>
<td>Assisted reproductive technology</td>
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<tr>
<td>FSA</td>
<td>Fertility Society Australia</td>
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<tr>
<td>NHMRC</td>
<td>National Health and Medical Research Council</td>
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<tr>
<td>NSW</td>
<td>New South Wales</td>
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<tr>
<td>RTAC</td>
<td>Reproductive Technology Accreditation Committee</td>
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<tr>
<td>SCAG</td>
<td>Standing Committee of Attorneys-General</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>US</td>
<td>United States (of America)</td>
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<tr>
<td>VLRC</td>
<td>Victorian Law Reform Commission</td>
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<td><strong>TERMINOLOGY</strong></td>
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<tr>
<td><strong>Altruistic Surrogacy</strong></td>
<td>An arrangement in which the birth mother receives no financial or material gain except, perhaps, for reimbursement of pregnancy and birth-related expenses.</td>
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<td><strong>Assisted Reproductive Technology (ART)</strong></td>
<td>Medical procedures that are used to help a person conceive a child when conception through natural means is impossible, difficult, or carries risks. These could include insemination with donor sperm (sometimes referred to as artificial or assisted insemination); gamete intra-fallopian transfer (GIFT); intracytoplasmic sperm injection (ICSI); or in-vitro fertilisation (IVF).</td>
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<tr>
<td><strong>Birth mother</strong></td>
<td>The woman who agrees to bear the child in a surrogacy arrangement then permanently transfer responsibility for the child's care and upbringing to the intending parent/s.</td>
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<tr>
<td><strong>Commercial Surrogacy</strong></td>
<td>A surrogacy arrangement where the birth mother, and/or a broker, receives a fee or material gain from acting as the birth mother, or arranging surrogacy.</td>
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<tr>
<td><strong>Consanguinity</strong></td>
<td>A close relationship by blood or by decent from a common ancestor.</td>
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<td><strong>Gametes</strong></td>
<td>Reproductive cells, such as mature eggs or sperm, capable of fusing with a gamete of the opposite sex to produce a fertilised egg.</td>
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<td><strong>Genetic (or biological) parent</strong></td>
<td>A person whose sperm or egg is used to conceive a child. The genetic (or biological) parent/s could be one or both of the intending parents, the birth mother, or a donor.</td>
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<tr>
<td><strong>Gestational surrogacy</strong></td>
<td>The implantation of an embryo created with the egg from another woman (either the intending mother or a donor) and the intending father/s or a donor's sperm. (The birth mother is not the genetic mother of the child.)</td>
</tr>
<tr>
<td><strong>In vitro-fertilisation (IVF)</strong></td>
<td>A form of assisted reproductive technology in which a woman's egg and a man's sperm are mixed in a laboratory and a successful embryo is transferred to a woman's uterus.</td>
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<tr>
<td><strong>Intending parent/s</strong></td>
<td>The person or couple that asks a woman to act as a birth mother in a surrogacy arrangement.</td>
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<tr>
<td><strong>Oocyte</strong></td>
<td>A female gamete or reproductive cell that develops during the menstrual cycle into an ovum.</td>
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<td><strong>Psychosocial</strong></td>
<td>Psychosocial focuses on people's psychological and emotional health and wellbeing; their level of social support; and their capacity to participate in activities of daily life.</td>
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<tr>
<td><strong>Telling</strong></td>
<td>Telling in this report refers to the act of informing a child that he/she was conceived through donor gametes or born by a surrogacy arrangement.</td>
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<tr>
<td><strong>Traditional surrogacy</strong></td>
<td>The use of the birth mother's egg in the conception of the child. (The birth mother is genetically related to the child.)</td>
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<tr>
<td><strong>Surrogacy arrangement</strong></td>
<td>The agreement, arrangement, or contract made between the birth mother, possibly her partner, and the intending couple or person.</td>
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CHAPTER 1: INTRODUCTION

AIM OF REPORT
The aim of the report is to outline and explain the findings of the Investigation into Altruistic Surrogacy Committee.

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

TERMS OF REFERENCE
The committee’s terms of reference require it to investigate and report on the following matters:
(a) Should altruistic surrogacy be decriminalised in Queensland?
(b) If so:
- What role should the Queensland Government play in regulating altruistic surrogacy arrangements in Queensland?
- What criteria, if any, should the commissioning parent/s and/or surrogate have to meet before entering into an altruistic surrogacy arrangement?
- What role should a genetic relationship between the child and the commissioning parent/s and/or surrogate play in any altruistic surrogacy arrangement?
- What legal rights and responsibilities should be imposed upon the commissioning parent/s and/or surrogate?
- What rights should a child born through an altruistic surrogacy arrangement have to access information relating to his or her genetic parentage? Who should hold this information?
- What, if any, other matters should be considered in the regulation of this issue?

The committee’s terms of reference exclude consideration of commercial surrogacy, which is illegal throughout Australia.

RESPONSIBILITY OF MINISTERS
Section 107 of the Parliament of Queensland Act 2001 requires the responsible Minister/s to respond to recommendations contained in committee reports within three to six months of the report being tabled. A copy of this section of the Act is at Attachment A.

The committee also believes that due to the sensitive nature of the matters contained in this report and the significant changes to legislation and public policy recommended, the progress towards implementation of these recommendations requires continual monitoring by the parliament. Therefore, the committee recommends that the responsible Minister/s report regularly to the parliament on their progress in implementing any agreed recommendations.

RECOMMENDATION 1: RESPONSIBLE MINISTERS TO REPORT ANNUALLY TO PARLIAMENT
The committee recommends that the responsible Minister/s report annually to parliament on the implementation by their departments of the adopted recommendations in this report.

1 Commercial surrogacy may be defined as an arrangement where the birth mother and/or a broker receives a fee or material gain from acting as the birth mother, or arranging a surrogacy. For the purposes of this report, any unqualified reference to ‘surrogacy’ will denote altruistic surrogacy only.
RESEARCH METHODOLOGY AND LIMITATIONS

The report primarily draws on:

- A literature review of regulatory reform initiatives in Australia;
- 130 submissions developed in response to the release of the committee’s issues paper. A list of submissions is provided in Attachment D;
- Evidence presented at public hearings held on 7 and 8 July 2008. Witnesses included people with direct personal or professional experience of surrogacy issues, representatives of Church and community groups, as well as other individuals with concern or interest in the inquiry. All witnesses are listed in Attachment F; and
- Interviews and meetings with key informants and stakeholders as listed in Attachment G.

The committee’s research and analysis was constrained in a number of ways:

- Some submissions were received in different formats and not all submitters responded to all questions posed. Some submitters commented they were not able to answer all questions.
- There was a lack of availability of longitudinal data on outcomes for children born of surrogacy arrangements as well as the long term wellbeing of birth mothers and other parties; and
- There was a strong reliance on secondary analysis in particular the work of existing inquiries in Victoria, South Australia and Western Australia.

It is also noted that the committee secretariat received briefings and written responses to the committee’s questions from the Department of Child Safety, Queensland Health, the Department of Justice and Attorney-General and the Department of Communities. Given the committee’s own resource and time constraints and the timing of agency responses, it is acknowledged that the analysis has been undertaken and the recommendations have been prepared with limited input from relevant Queensland Government agencies.

SIGNIFICANCE OF LANGUAGE

From its research and discussions, the committee understands some of the language used in relation to surrogacy is considered offensive. For some, the term ‘commissioning parents’ implies a commercial arrangement and, therefore, does not accurately describe the parties’ role in altruistic surrogacy. It signifies a contractual arrangement wherein the child appears to be a commissioned product. The committee believes that the term ‘intending parents’ more accurately describes the role and intentions of the so-called commissioning parents in an altruistic surrogacy arrangement.

During the investigation, the committee noted a strong objection to the implication that the surrogate was a substitute. Dr Sarah Ferber, School of History, Philosophy, Religion and Classics, University of Queensland suggested:

… some term [should be] coined which does not use the words ‘surrogate’ or ‘surrogacy’. Both imply that the birth mother is in some sense the means to an end, a substitute for the ‘real’ mother. The birth mother is … not a substitute for anyone….

Expressing similar objections to the term ‘surrogate’, Linda Kirkman, who gestated a baby for her sister Maggie some 20 years ago in Australia’s first IVF surrogacy case, suggested the use of ‘gestational mother’.

The committee is sympathetic to these objections. Whilst it did not find a satisfactory alternative to ‘surrogacy,’ the committee prefers the term ‘birth mother’ to ‘surrogate’ given its broader acceptance and accurate description of her legal status under the Status of Children Act 1978. The committee recommends that the terms ‘intending parents’ and ‘birth mother’ be used in future legislation, guidelines, or policy documents in Queensland.

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2 Dr Sarah Ferber, Senior Lecturer, School of History, Philosophy, Religion and Classics, University of Queensland, Submission no 113.
3 Investigation into Altruistic Surrogacy Committee 2008a, p. 15.
In addition, the committee prefers the term altruistic surrogacy ‘arrangement’ rather than ‘agreement’. The committee is concerned that ‘agreement’ can be seen as a legal term with similar implications to ‘contract’. As the committee believes altruistic surrogacy arrangements should remain unenforceable, the term ‘agreement’ is avoided in this report.

**RECOMMENDATION 2: SIGNIFICANCE OF LANGUAGE**

The committee recommends that the Queensland Government, when formulating legislation, guidelines and policy, uses the terms:
- ‘Birth mother’ to describe the surrogate mother;
- ‘Intending parents’ rather than ‘commissioning parents’ to avoid the use of perceived dehumanised or commercialised language; and
- Altruistic surrogacy ‘arrangement’ rather than ‘agreement’ to emphasise the altruistic nature of the endeavour.

**CURRENT QUEENSLAND LEGAL POSITION**

Queensland prohibits both commercial and altruistic surrogacy.

Under the *Surrogate Parenthood Act 1988* surrogacy is defined as a formal or informal agreement between a birth mother and intending parent/s for the birth mother to bear a child for the intending parent/s and permanently transfer the responsibility for the child’s care and upbringing to them after the child’s birth.

The birth mother is the woman who bears the child. The intending parent/s is the person or couple that asks a woman to act as a birth mother. As distinct from a commercial surrogacy arrangement, a birth mother undertaking an altruistic surrogacy arrangement receives no material benefit.

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

In Queensland, the prohibitions under the *Surrogate Parenthood Act 1988* apply to both pre and post-conception surrogacy arrangements.

Prior to the passing of the Act, Hon P McKechnie MP stated in his second reading speech of the Surrogate Parenthood Bill that “the purpose [was] to make all arrangements relating to surrogacy illegal in Queensland”. Accordingly, the Act attempts to capture and prohibit all possible types of surrogacy arrangements.

**PREVIOUS EXAMINATION IN QUEENSLAND**

**Surrogacy**

The status of surrogacy in Queensland has been examined previously. In February 1983, the Queensland Government appointed a ‘special committee’ to inquire into laws relating to artificial insemination; in vitro-fertilisation (IVF); and other related matters, including surrogacy. The special committee, chaired by the Hon Justice Demack, reported in March 1984. It recommended that whilst altruistic surrogacy arrangements should be void or legally unenforceable, entering into them should not be a criminal offence.  

However, the Queensland Parliament legislated to prohibit all forms of surrogacy in 1988. It was argued that:
- It was dehumanising to use and pay another human being to reproduce;

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4 s3 *Surrogate Parenthood Act 1988* (Qld).
5 Hon P McKechnie MP 1988.
Investigation into Altruistic Surrogacy

- Babies must not be used as commodities; and
- Queensland should seek to avoid the trauma and legal battles associated with surrogacy in other jurisdictions.7

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

…it was generally felt inappropriate and unhelpful to involve the criminal justice system in this intensely private matter between relatives and friends.8

It also recognised that, if surrogacy arrangements were to be permitted in Queensland, the extent to which they should be regulated would need to be addressed.9 The Government did not support the taskforce recommendations regarding surrogacy at that time.

Traditional Torres Strait Islander ‘adoptions’

In addition, Queensland Government agencies have deliberated since 1993 on the issue of the legal recognition of the traditional Torres Strait Islander child rearing practice which involves the ‘giving’ of a child within the extended family network. This practice conflicts with the Surrogate Parenthood Act 1988 and the Adoption of Children Act 1964 where it is seen akin to private adoption:

- In 1993, the Department of Family Services and Aboriginal and Islander Affairs funded the Report to Queensland Government on Legal Recognition of Torres Strait Islander Customary Adoption which explored the possibility of registering customary arrangements, consulting with elders to verify practice and a process for altering birth certificates;
- In 1997, the Office of Aboriginal and Torres Strait Islander Affairs and the Department of Youth and Community Care produced the Report of the Legal Recognition of Torres Strait Islander Traditional Adoption. The report again articulated a community call for legislative recognition of traditional 'adoptions'; and
- In 2000, the Department of Aboriginal and Torres Strait Islander Policy and Development released a discussion paper which outlined a proposal to modify mainstream adoption policy and procedure to provide for the transfer of legal parentage in recognition of customary practice.

The push for legal recognition has been led by a community group, the Kupai Omasker Working Group since the early 1990s. The working group formed after the Queensland Government ceased approving such ‘adoptions’ in 1985.10 The working group has argued the practice is integral to Torres Strait Islander identity and culture. Some members of the working group are ‘adopted’ or ‘given’ or have traditional ‘adoptions’ in their families. The working group is drawn from across different Torres Strait Islander language groups.

There were two other policy developments at a national level in the 1990s relevant to recognition of traditional Torres Strait Islander ‘adoption’:

- In 1992, the High Court of Australia delivered its landmark Mabo judgment which supported the recognition of Indigenous cultural practice.11 As explained in evidence to the committee, Eddie Mabo was traditionally ‘adopted’ to inherit the land:

  [Eddie] was adopted out because Grandad Benny and Grandma Maija did not have any children to bring up to inherit the land.12

- In 1993, the Kupai Omasker Working Group approached the Family Law Court on the issue. Chief Justice, Alistair Nicholson agreed to customise existing parenting order procedures to recognise the

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7 Hon P McKechnie MP 1988.
10 The name of the working group, Kupai Omasker, is made up of two separate Torres Strait Islander words from the western islands and eastern islands – Kupai meaning umbilical cord and Omasker meaning children. Different language groups have different names for their practice.
11 Department of Families, Youth and Community Care 2000.
12 Investigation into Altruistic Surrogacy Committee 2008a, p. 4. (Francis Tapim)
parenting rights and responsibilities of ‘adoptive’ or ‘receiving’ parents. Whilst they provided a means to deal with many practical day-to-day matters, the orders did not change legal parentage or birth certificates and did not address inheritance rights.

LEGAL REFORM INITIATIVES

A review of surrogacy laws is currently occurring in a number of Australian jurisdictions. Five state governments are currently giving consideration to revising their surrogacy laws:

- **Victoria**: The Victorian Law Reform Commission (VLRC) delivered its *Assisted Reproductive Technology and Adoption Final Report* in March 2007 and the Victorian Government delivered a legislative response to the Commission’s recommendations on 9 September 2008. The Assisted Reproductive Treatment Bill 2008 proposes access to assistive reproductive technology (ART) services on a non-discriminatory basis for altruistic surrogacy and a specific provision for the transfer of legal parentage;

- **Western Australia**: The Western Australia Surrogacy Bill 2007 was passed by the Legislative Assembly. The Bill was then reviewed by the Legislative Council Standing Committee on Legislation and has been passed with amendments by the Legislative Council. The Bill provides a comprehensive policy framework for altruistic surrogacy including regulation of access to ART services and provision for the transfer of legal parentage. Whilst awaiting concurrence of the Legislative Assembly, Western Australia has had a change of government. Premier Barnett has been reported as suggesting the reintroduction of surrogacy laws is a legislative priority for the new government;\(^ {13} \)

- **South Australia**: In 2007, the South Australian Legislative Council referred a private member’s bill on altruistic surrogacy to the Parliamentary Social Development Committee. The committee’s report supported gestational surrogacy through fertility clinics along with provision for transfer of legal parentage for altruistic surrogacy.\(^ {14} \) A revised version of the Surrogacy Bill was presented to the Legislative Council in February 2008 and passed with minor amendments following a conscience vote in June 2008. It is yet to be debated in the House of Assembly;

- **Tasmania**: The Tasmanian Legislative Council Select Committee *Report on Surrogacy* was finalised in August 2008. The committee found that the “present patchwork of regulation regarding surrogacy in Australia is both unwieldy and pernicious.”\(^ {15} \) It recommended that the Tasmanian *Surrogacy Contracts Act 1993* which prevents access to professional and technical services for altruistic surrogacy in Tasmania be repealed and replaced once nationally consistent legislation is agreed. Whilst awaiting confirmation of a national approach, it recommended that couples seeking lawful surrogacy arrangements in other states be able to access legal and psychological services within Tasmania;\(^ {16} \) and

- **New South Wales (NSW)**: The NSW Legislative Council Standing Committee on Law and Justice also commenced an inquiry into altruistic surrogacy on 4 August 2008 at the request of the NSW Attorney-General. The committee is due to report in March 2009 and has similar terms of reference to the Queensland investigation. It also has a specific requirement to look at the legal status of children; the efficacy of legislation in other jurisdictions; the possibility of nationally consistent legislation; and the interplay of state and federal legislation.\(^ {17} \)

Nationally uniform legislation to regulate altruistic surrogacy is also under consideration by the Standing Committee of Attorneys-General (SCAG), which is planning to release a consultation paper in the near future to canvas views on a possible nationally consistent approach.

IMPELTUS FOR CHANGE

There are a number of factors influencing this renewed policy focus on altruistic surrogacy. These factors include adoption trends; greater acceptance of ART treatment; increased diversity of family types; and the impact of the lack of recognition of intending parents as legal parents.

\(^ {14} \) Gestational surrogacy is where the birth mother does not contribute her egg.
\(^ {15} \) Legislative Council Select Committee 2008b, p. 4.
\(^ {16} \) Legislative Council Select Committee 2008a.
\(^ {17} \) Standing Committee on Law and Justice 2008.
Adoption trends

Very few Australian-born children are now available for adoption. Over the last 10 years in Queensland, adoption orders for locally born children average 18 children per annum. Meanwhile, inter-country adoption orders have averaged 53 children per year in the same period. These figures are in stark relief to the some 6,000 children adopted in Queensland in the 1960s.

The drop in adoption practice reflects the availability of reliable contraception, the introduction of income support for single parents, greater recognition of fathers’ rights and responsibilities as parents; and greater social acceptance of single parents.18

The committee heard from many submitters acknowledging the limited opportunities for adoption. One submitter wrote as follows:

_We attended an adoption seminar in Brisbane on July 8, 2006, and were blown away when we came together with at least 60 other couples, all faced with the same issues. This was just one seminar, there were 16 seminars spread throughout Queensland over 12 months._ 19

Greater acceptance of ART treatment

There has been an increased use and social acceptance of infertility treatment or ART over the last decade. It is estimated that 15 percent of the population of child bearing age are affected by infertility.20 In 2006, there were 10,485 people in Australia and New Zealand accessing ART treatment, representing a 30 percent increase in four years.21 In 2006, 8,999 children were born through ART, a 62 percent increase since 2002 and a 261 percent increase since 1997.22

Increased diversity of family types

There is greater social recognition of the diversity of family types raising children, including extended, nuclear and blended families and families headed by single parents and same-sex couples. More than a quarter of children born between 1976 and 1983 spent some time living in a single parent household by the time they were 18 years. The number of heterosexual couples cohabiting without marrying has increased. Blended families represent 10 percent of all couple based families with children under 18 years.23 An estimated 4,386 children live in same-sex families nationally, while 20 percent of lesbian women and 10 percent of gay men are parents.24 The Action Reform Change Queensland submission reported on a study of young lesbians which indicated that 42 percent intended to have children.25

Impact of lack of legal recognition

Some of the impetus for reform also appears to have come from those concerned about a lack of legal recognition of parents and children in surrogacy arrangements. It is suggested that this can lead to practical difficulties, for example, in relation to eligibility for child support if intending parents separate and rights to inherit.26 It also requires intending parents to seek clarification of parental rights and responsibilities for dealing with day to day matters such as medical appointments, school enrolments and passport applications through Family Law Court parenting orders. Whilst intending parents and birth parents can clarify inheritance in their wills, the lack of transfer of legal parentage means some uncertainty remains as the child is still entitled under the Queensland Succession Act 1981 to claim on his/her legal parents’ estate.

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18 This figure does not include inter-country adoptions. It also does not include relative or step-parent adoptions: Department of Child Safety 2008a; Hon M Keech MP, Minister for Child Safety and Minister for Women, Correspondence received, 20 August 2008.
19 Jody Robinson, Submission no 93.
22 Australian Institute of Health and Welfare 2008; pp. 43 & 44.
24 Action Reform Change Queensland, Submission no 73, p. 2.
25 Action Reform Change Queensland, Submission no 73, p. 2.
Advice from the Queensland Department of Child Safety indicates that relative adoption provisions have not been used in Queensland since 1995. The advice illustrates why relative adoption provisions are considered not appropriate to deal with legal parentage arrangements in surrogacy:

The Council of (Australian) Social Welfare Ministers endorsed the National Minimum Principles in Adoption in June 1993 to guide the development of policy and legislation in Australian jurisdictions. Principle 11 states that rather than allowing relatives and step parents to adopt a relative or stepchild “Custody/guardianship orders through the Family Court that do not interfere with the biological relationship to birth parents (and siblings) should be generally sought.”

Evidence presented to the committee and inquiries in other jurisdictions also highlights that intending parents particularly object to the concept of adopting their child when he/she is genetically related to one or both them. In some states, the legal advice is to wait five years before intending parents seek formal adoption. It is argued that the birth mother and her partner need legal certainty and peace of mind that they will not be liable for income support or other parental responsibilities. It is also argued that just as the Queensland Status of Children Act 1978 was altered to exclude donors as legal parents according to the donors’ intentions, parentage law needs to provide for the intentions of the parties in the case of altruistic surrogacy arrangements. It is argued that children born of surrogacy should enjoy the same legal certainty and protection as other children.

27 Hon M Keech MP, Minister for Child Safety and Minister for Women, Correspondence received, 20 August 2008.
CHAPTER 2: THE QUESTION OF DECRIMINALISATION

TERM OF REFERENCE

This chapter seeks to respond to the question posed in the investigation’s first term of reference:

• Should the legal restrictions and criminal penalties against altruistic surrogacy be removed from the Surrogate Parenthood Act 1988?

OVERVIEW OF LEGAL STATUS

It is useful to begin an examination of this question by surveying the relative legislative approaches to altruistic surrogacy in Australia and other culturally comparable jurisdictions.

Queensland

As noted, Queensland is the only Australian jurisdiction where altruistic surrogacy is a criminal offence with the maximum penalty $7,500 or three years jail. Under the Queensland Criminal Code, surrogacy matters are classified as simple offences, which mean they are dealt with by the Magistrates Court. 28

A review of five reported prosecutions indicates none of the individuals charged under the Surrogate Parenthood Act 1988 have received severe penalties. In most cases, the charges were dismissed and no conviction was recorded. One woman received a good behaviour bond for her involvement in arranging a surrogacy. 29 A case heard in 1998 by the Family Court in Brisbane dealt with a custody dispute involving a child born through a surrogacy arrangement. In this case, no charges were laid under the Surrogate Parenthood Act 1988. 30

Other Australian jurisdictions

Whilst the laws in all Australian jurisdictions prohibit commercial surrogacy, altruistic surrogacy is not considered an offence in any other Australian jurisdictions apart from Queensland. However, only NSW and the ACT currently have altruistic surrogacy occurring through fertility clinics. In Victoria, South Australia and Western Australia, ART legislation requires that the birth mother be infertile to access ART. In Tasmania, it is illegal for professionals to assist in an altruistic surrogacy arrangement. This means that, whilst legally permissible, in these states, surrogacy can only be pursued by travelling interstate or overseas to access fertility clinics or by undertaking traditional surrogacy without medical assistance. In the latter case, the birth mother contributes her egg and she conceives by natural means or by self insemination. (See attachment J-M for tables comparing legislation and regulation across jurisdictions).

Comprehensive surrogacy legislation has now been presented and debated in Western Australia, South Australia and Victoria. 31 The proposed reforms seek to address the issue of access to ART for purposes of altruistic surrogacy as a way of addressing risks to the child and mitigating potential harm including health risks to the parties. They also seek to provide legal certainty for the child as well as the intending parents and birth parents.

The ACT is currently the Australian jurisdiction with the most comprehensive legislative framework for the regulation of altruistic surrogacy. The Parentage Act 2004 (ACT) provides for what it terms “substitute parent agreements”. Apart from prohibiting commercial surrogacy, the Act prohibits advertising and brokerage in altruistic surrogacy. It has a specific provision to transfer legal parentage for altruistic surrogacy provided certain conditions are met including a requirement that the parties have used ART. The ACT legislation reflects a philosophy of harm minimisation and equity in legal protection for families created through surrogacy. Regulation of ART in the ACT is currently based on industry standards known as the RTAC code of practice and National Health and Medical Research Council (NHMRC) guidelines.

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28 Under the Queensland Criminal Code, there are three categories of offences: crimes such as murder, misdemeanours such as unlawful carnal knowledge and simple offences. Surrogacy matters are classified in Queensland as simple offences: J M Herlihy and R G Kenny 1990, p. 24.
29 1993, R v White.
30 1998, Re Evelyn.
31 Surrogacy Bill 2007 (WA); Statutes Amendment (Surrogacy) Bill 2008 (SA); Assisted Reproductive Treatment Bill 2008 (Vic),
Canberra Fertility Centre, which has pioneered the provision of ART services for altruistic surrogacy in Australia, has operated under this regulatory regime.

In NSW, the Assisted Reproductive Technology Act 2007 governs altruistic surrogacy in a limited way by ensuring that surrogacy arrangements are unenforceable. NSW also relies on the RTAC code of practice and NHMRC guidelines for the regulation of surrogacy arrangements. Sydney IVF has provided altruistic surrogacy services over the last decade under this regulatory arrangement. Unlike the ACT, there is no specific provision in NSW for the transfer of legal parentage for altruistic surrogacy. This is one of the matters under consideration in the NSW Legislative Council’s inquiry.

Other countries

Altruistic surrogacy is permitted in countries such as New Zealand, Canada, the United Kingdom (UK), Netherlands and Belgium and parts of the United States (US). It is not permitted in some European countries such as Germany and France, although it is currently a matter undergoing review in the French Senate.

Current and potential practice in Queensland

Although it is difficult to estimate the extent of current and potential practice, it is clear surrogacy has occurred and is occurring in Queensland despite the current prohibition.

Traditional Torres Strait Islander 'adoptions'

The investigation heard evidence and reviewed literature which indicated that the customary ‘adoption’ of children within the Torres Strait Islander community is an ancient, well known and continuing practice.

The Cambridge Anthropological Expedition provided the first written record of the practice when undertaking an exhaustive study of the people of the Torres Strait from 1901-1935. There are reports of two anthropologists who studied adoption practice in modern times. Beckett’s unpublished doctoral study examined the practice in Badu, Murray and Saibai Island, whilst McDonald published a study of practice in the north western area of the Torres Strait in 1980. Both anthropologists emphasised the importance of ‘adoption’ in strengthening kinship.

As noted, this customary Torres Strait Islander practice was recognised as ‘adoptions’ up until the mid 1980s and is prohibited under the Surrogate Parenthood Act 1988. The Department of Child Safety advises that, up until the 1980s, 10-15 traditional ‘adoptions’ were registered annually in the Torres Strait under relative adoption provisions of the Adoption for Children Act 1964.

Torres Strait Islander practice is not unusual in the context of world cultures: Native Americans, West Africans and Pacific Islanders all have customary practices that involve child rearing by parties other than the birth parents.

There are no exact estimates of the number of traditional Torres Strait Islander ‘adoptions’. However, evidence given by the Kupai Omasker Working Group suggests that, while surrogacy is a minority practice in the general Queensland population, traditional ‘adoption’ is a widespread practice in the Torres Strait Islander community both on the mainland and in the Torres Strait. McRose Elu said in evidence:

This is a custom that no-one can take away from us. It is an everyday thing. Every second family in the Torres Strait that you come across practises the child rearing practices of the Torres Strait.

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33 Research is outlined in P Ban 1998.

34 Hon M Keech MP, Minister for Child Safety and Minister for Women, Correspondence received, 20 August 2008.

Alistair Nicholson, former Chief Justice of the Family Law Court, also gave evidence that he presided over the granting of parenting orders in recognition of traditional 'adoptions':

*I would have made probably 100 or more of these orders, and other judges did the same. They are still being made... there are a number of cases waiting to be heard... where people want to obtain orders. It has not been confined to the Torres Strait; there have been orders made in Brisbane, Townsville, Cairns, Darwin and so on, as you would expect.*

Josephine Akee, former Indigenous Family Liaison Officer in the Family Law Court in Cairns, reported that all of the Kupai Omasker parenting orders she has assisted over the last decade have been arrangements agreed post-conception. The Kupai Omasker Working Group indicated that arrangements can also be made pre-conception.

**Court cases**

As noted in the committee’s issues paper, in addition to the surrogacy case which resulted in a residency dispute known as the *Re Evelyn* case involving a couple who lived in Queensland, the committee has identified five reported prosecutions for surrogacy since the Act commenced.

**Queenslanders travelling interstate**

In 1999, the Taskforce on Women and the Criminal Code received a confidential submission from a Queensland couple seeking a surrogacy arrangement in Canberra.

The committee is also aware of a newspaper report in 1996 indicating that Queenslanders may be travelling interstate to pursue surrogacy arrangements. It also received a submission from a woman who lives interstate and had a child over seven years ago using IVF surrogacy. Her sister, the birth mother, lived in Queensland at the time.

Canberra Fertility Centre reports that to date there have been 35 Queensland patients enquiring and meeting the centre’s strict guidelines for gestational surrogacy with a full genetic connection with both intending parents. The centre reported that nine couples “dropped out because of difficulties accessing help/blood and ultrasound services in Queensland” and five “Queensland patients stay[ed] in the ACT for the entire duration of treatment cycles”.

**Same-sex fathers**

The committee received a submission from a gay couple living in regional Queensland who had a child through surrogacy in the US some years ago describing themselves as follows:

*My partner and I went through the surrogacy process and now have a wonderful, bright, and happy child. We are a family, just as any other, and are accepted by friends, neighbours, and others, without a single negative experience.*

Dean Murphy, a researcher at the University of NSW, illustrated the desire of gay and lesbian Queenslanders to become parents. He reported that in 2007, 37 people from Queensland advertised on a popular Australian gay and lesbian website for donors, co-parents or birth mothers.

**Difficulties in estimation**

One of the difficulties of estimating the extent and potential interest in surrogacy in Queensland is that people with financial resources can and do travel overseas. Not all surrogacy requires medical assistance and there is considerable opportunity for people to make arrangements using informal networks or websites offering information and referral, discussion forums and linking opportunities. Journalist, Jill...
Singer, gave a number of case examples in Australia which she identified through such websites. One case in Perth involved two couples who met online. The birth mother contributed her egg and no medical assistance was sought with the artificial insemination process.\textsuperscript{46}

A report prepared on surrogacy in 1998 in the UK also highlighted the difficulties of estimating and regulating surrogacy. Although it did not explain its methodology, the report stated:

\begin{quote}
\textit{…on the evidence available to us, it appears that at least two thirds of all conceptions arising from surrogacy arrangements take place outside licensed clinics.}\textsuperscript{17}
\end{quote}

Information on the extent of and potential for surrogacy in other states is piecemeal:

- \textit{Fertility industry data:} In 2005, based on data from accredited fertility clinics there were six live born babies to “surrogacy carriers” in Australia and New Zealand representing a 15.4 percent success rate for 39 “surrogacy carrier cycle” treatments.\textsuperscript{48} Comparable data for 2006, reported a significant increase treatment for and numbers of babies born of altruistic surrogacy. There were 29 live born babies representing a success rate of 31.7 percent for 97 surrogacy treatment cycles.\textsuperscript{49} Within this data, Sydney IVF, one of the two IVF clinics providing IVF surrogacy services reports elsewhere to undertake an average of 12 cases annually.\textsuperscript{50}

- \textit{Success rate:} Associate Professor Roger Cook, Swinburne University of Technology, Melbourne, also cautioned that only a quarter of the 44 surrogacy cases he has reviewed in 12 years have resulted in live births. A/Professor Cook has provided independent psychological assessments for clinics undertaking IVF surrogacy;\textsuperscript{51}

- \textit{South Australia:} The South Australian Parliamentary Social Development Committee, \textit{Inquiry into gestational surrogacy}, suggested that it would expect no more than five gestational surrogacy cases annually in South Australia;\textsuperscript{52}

- \textit{Western Australia:} Infertility counsellor, Suzanne Midford suggested in recent evidence before the Western Australian Legislative Council \textit{Inquiry in relation to the Surrogacy Bill 2007} that some 6-12 surrogacy arrangements were expected annually in that State under the proposed new legislative framework.\textsuperscript{53}

\begin{quote}
\textit{Miranda Montrone, clinical psychologist who has assessed 50 cases, NSW:}

\textit{Most surrogacy cases involve people of Anglo-Celtic background but there have been a lot of other groups and I will mention them: Indian; eastern European; a number; Chinese; a number; Vietnamese; a few; Filipinos; Slovenian; Maltese, several; Lebanese; Italian; and Portuguese. Most of the people in the surrogacy assessments have been of Christian background religions including Anglican, Uniting and a number of Catholics…also Jewish, Buddhists, Hindu and Muslim. Mostly people have been from New South Wales – metropolitan and country – but also from other states and New Zealand.}\textsuperscript{54}
\end{quote}

At its public hearing on 7 July 2008, the committee heard evidence about potential numbers of people who may seek altruistic surrogacy in Queensland relating to three key medical categories:

- \textit{Women in the ART services system:} Keith Harrison representing Queensland Fertility Group estimated there would be about 20 women who presented annually to ART services who may have medical

\begin{thebibliography}{99}
\bibitem{46} J Singer 2005.
\bibitem{47} M Brazier, A Campbell and S Golombok 1998, p. 52.
\bibitem{48} Australian Institute of Health and Welfare 2007, p. 39.
\bibitem{49} Australian Institute of Health and Welfare 2007, p. 40.
\bibitem{50} D F Lok 2008 indicated that Sydney IVF had undertaken 60 altruistic surrogacy cases since 2002: 32 percent medical conditions, 40 percent hysterectomies; 17 percent congenital; and 12 percent uterine damage. It is noted that, of the 60 cases, 17 percent carried by sister; 28 percent by sister in law; 12 percent by mother; 2 percent mother in law; 23 percent friends; 12 percent other relations; 7 percent commercial surrogate. Also, 18 couples withdrew, 12 had live babies; 13 percent failed; 1 is an ongoing pregnancy, and 7 are in current cycles.
\bibitem{51} A/Professor Roger Cook, Counselling and Clinical Psychologist, Swinburne University of Technology, Melbourne, Information provided, 2 May 2008.
\bibitem{52} Social Development Committee 2007, p. 16. This information is based on evidence provided by Professor Rob Norman, who also said it is difficult to determine the potential number of people who would seek to enter surrogacy arrangements.
\bibitem{53} Standing Committee on Legislation 2008a, p. 17.
\bibitem{54} Investigation into Altruistic Surrogacy Committee 2008a, p. 25.
\end{thebibliography}
conditions that would lead them to consider surrogacy. This estimate was an extrapolation of information from an informal poll within Queensland Fertility Group, which provides approximately 50 percent of fertility services in Queensland;\textsuperscript{55}

- **Women without a uterus not accessing ART:** Keith Harrison also indicated that his figure did not include a likely small group of “patients who have no uterus and are quite aware of that. They do not have to go near an ART clinic to find out that they are untreatable; we do not see them”;\textsuperscript{56}

- **Women with high risk medical conditions:** Dr Adam Morton, obstetrician, Diabetes Centre, Mater Hospital, Brisbane estimated that there could be up to 30 women a year in Queensland with medical conditions which result in pregnancy related health risk justifying surrogacy:

> To those six to a dozen women a year that I might see in this situation, I do mention altruistic surrogacy. …I would say that there are probably five or six people in Queensland who are practising obstetric medicine the way I practise it. Perhaps that number [of potential surrogacy cases each year] would then become 25 or 30, something of that number.\textsuperscript{57}

**OVERVIEW OF ARGUMENTS**

In reviewing the arguments in relation to decriminalisation, the committee came to the realisation that it is difficult to easily categorise arguments for and against the decriminalisation of altruistic surrogacy:

- There was a diversity of positions amongst opponents of surrogacy. Not all opponents of surrogacy sought to maintain criminal sanctions on families engaged in altruistic surrogacy, although they sought measures to discourage the practice;

- There was also a range of arguments amongst supporters of decriminalisation. Whilst some people took a libertarian view, others supported decriminalisation of altruistic surrogacy on strict conditions. Decriminalisation was seen not as an endorsement of altruistic surrogacy, but as a way of mitigating risks and preventing or minimising potential harm;

- It was apparent that many people opposing and supporting decriminalisation shared concerns about the risks for parties associated with altruistic surrogacy;

- Some people saw a quantum of difference between commercial and altruistic surrogacy whilst others had similar concerns about all surrogacy or saw the endorsement of altruistic surrogacy as representing “…a slippery slope to commercial surrogacy”;\textsuperscript{58}

- The common appeal to the prevention of harm was one of the most distinctive features of arguments for and against decriminalisation of altruistic surrogacy;\textsuperscript{59} and

- Frequently, there was agreement that the best interests of the child should be paramount and that the birth mother should be protected. What was also clear was that the analysis was based on differing beliefs about marriage, family and women and differing views about the perceived broader societal impacts of altruistic surrogacy.

It is significant to note that supporters and opponents of decriminalisation alike expressed a great deal of sympathy for those who struggled with the problem of infertility and an inability to have children.

The committee attempts to summarise the views of submitters and witnesses below as follows:

- Arguments opposing surrogacy;
- Opponents’ differing views on decriminalisation; and
- Arguments supporting decriminalisation.

**Arguments opposing surrogacy**

Key arguments against altruistic surrogacy in Queensland related to its threat to the paradigm of the traditional family and risks to the child and birth mother. These are arguments are detailed below.

\textsuperscript{55} Investigation into Altruistic Surrogacy Committee 2008a, p. 37.  
\textsuperscript{56} Investigation into Altruistic Surrogacy Committee 2008a, p. 34.  
\textsuperscript{57} Investigation into Altruistic Surrogacy Committee 2008a, pp. 40-41.  
\textsuperscript{58} Australian Christian Lobby, Submission no 85, p. 4.  
\textsuperscript{59} ACCESS, Submission no 110, p. 14.
**Undermining the traditional paradigm of family**

Opponents of altruistic surrogacy argued that the prohibition on all forms of surrogacy protected the integrity of the family.

As one example of this position, Queensland Bioethics Centre defined family as the “exclusive and permanent union of a heterosexual couple.” This Judaeo-Christian tradition of family formed the “fundamental unit of society” where “citizens were formed and nourished” and should be protected.60

The Salvation Army had a similar perspective “…children should be born into the exclusive context of the mutual intimacy of a husband and wife.”61

Associate Professor Nicolas Tonti-Filippini, John Paul II Institute, Melbourne, also emphasised the importance of reinforcing the traditional paradigm of the family. He acknowledged that:

> …the traditional paradigm of family…has never been the only way that families exist, but it has been the paradigm that provided a model of what is best for the nurturing of children by both a mother and a father secured by the parents’ loving commitment to each other and thus to the child.62

Some considered that permitting altruistic surrogacy would open up the possibility of child rearing to single people and same-sex couples which was also contrary, in their view, to the interests of the child.63

**Risk to the child**

Opponents of all forms of surrogacy believed that the practice was counter to the best interests of the child. Particular concerns about surrogacy for the child related to:

- The rupturing of the unborn child’s bond with the gestational mother which “…affects the child [as well as the birth mother] biologically and psychologically” and was also seen as a “violation of a child’s natural rights”;64
- The resulting “genetic bewilderment”65 or “blurred family relationships and disruption to relationship links between marriage, conception, gestation, birth and motherhood, which were important to human identity”.66 Associate Professor Nicolas Tonti-Filipini considered:

> These are matters that are of fundamental concern for the right of a child to identity and family relations, the right to know and be cared for by both his or her father and mother, and the right to maintain personal relations and direct contact with both parents on a regular basis.67

- Concerns about the potential rejection of a child born with a disability or a multiple birth or the ‘wrong sex’.68 The case of Baby Doe was cited as an example. The case involved a child born with microcephaly in 1983 in Michigan, USA, who was rejected by both the intending parents and birth mother;69
- Concerns for the potential grief and anxiety experienced by the birth mother’s existing children who may “helplessly watch as their baby brother or sister disappears from the family”;70 and
- The likely legal uncertainty for the child as illustrated in the residency dispute involving a Queensland couple in 1998 known as the Re Evelyn case.71

Many opponents felt that surrogacy was predicated on a misguided ‘right’ of adults to have children. Queensland Right to Life’s submission illustrated this position:

> It is adults’ interests that are firstly served through surrogacy, not those of the child.72

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60 Queensland Bioethics Centre, Catholic Archdiocese of Queensland, Submission no 72, pp. 3-4.
61 Salvation Army, Submission no 66, Positional Statement, Surrogacy.
62 A/Professor Nicholas Tonti-Filippini, Submission no 116, p. 2.
63 Australian Christian Lobby, Submission no 85, p. 8.
64 Southern Cross Bioethics Institute, Submission no 105, p. 2.
65 Australian Christian Lobby, Submission no 85, p. 5.
66 Australian Christian Lobby, Submission no 85, p. 3.
67 A/Professor Nicholas Tonti-Filipini, Submission no 116, p. 1.
68 Presbyterian Church of Queensland, Submission no 81, p. 1.
69 Australian Christian Lobby, Submission no 85, p. 6.
70 Festival of Light, Submission no 75, p. 3; Salvation Army, Submission no 66, Positional Statement, Surrogacy.
71 Festival of Light, Submission no 75, p. 2.
Similarly, Queensland Bioethics Centre argued:

> In a surrogacy agreement, whether it is commercial or not, the child is the object of an arrangement aimed at fulfilling the needs of the commissioning parents.\(^\text{73}\)

It was not so much that a child’s right to life was disputed, but the child’s pre-conception right to be born into an optimal family situation. A/Professor Nicholas Tonti-Filippini illustrated the common concern about what was seen as the implied right to a child. He said:

> A right to a child…is not an accepted concept within the context of the rights of children because it implies the commodification of children. A child can only be the subject of rights. No child should be the object of someone else’s rights.\(^\text{74}\)

Queensland Bioethics Centre described surrogacy as “a social experiment” without long term research on the outcomes for children. The centre concluded:

> Our Prime Minister has just recently apologised to a generation of indigenous people. It is hoped that in thirty years time that some other politician does not have to apologise to another generation of children whose rights to be raised within their natural family were ignored.\(^\text{75}\)

**Risks to the birth mother**

Opponents of surrogacy were concerned to protect the birth mother from coercion, exploitation and physical and psychological harm.

Women’s Forum Australia expressed concern about:

> …an unacceptably high risk of long term emotional harm. In particular, altruistic surrogacy agreements expose women to risks of very grave violations of their reproductive autonomy.\(^\text{76}\)

The Salvation Army expressed concern for the potential self-denial of the birth mother: “…it can be difficult, even in the closest relationships…to distinguish between an act of surrogacy out of love and one out of guilt.”\(^\text{77}\) The Australian Christian Lobby suggested family dynamics could work to ensure altruistic surrogacy was more exploitative than commercial surrogacy.\(^\text{78}\)

Southern Cross Bioethics Institute believed that all surrogacy objectified women, viewing their bodies as incubators, and exposed women to significant health risks.\(^\text{79}\)

The Festival of Light cited *Re Evelyn* to illustrate its concern about the difficulty of relinquishment:

> …Mrs S [the birth mother] was struggling with the task of coming to grips with her decision to hand the child to the Qs. She attended grief counselling and had contact with a relinquishing Mothers Group. She says she came to the realisation that she could no longer abide by the arrangements. She says she was suffering emotionally as a result of the separation from her daughter and that, after much agonising, she concluded that it was better for herself, the child Evelyn and for her other children for Evelyn to be returned to her.\(^\text{80}\)

Underlying this concern about the difficulty of relinquishment was a deeply held belief about the power of the gestational relationship and maternal instincts. This was view was described by Victoria Lambropoulos, Faculty of Law, Deakin University as follows:

> A woman who gives a child away after giving birth, irrespective of whether the child is genetically related to her, is challenging this view about women…it is a deeply held value and moral which surrogacy offends.\(^\text{81}\)

\(^{72}\) Queensland Right to Life, Submission no 50, p. 3.

\(^{73}\) Queensland Bioethics Centre, Catholic Archdiocese of Queensland, Submission no 72, p. 5.

\(^{74}\) A/Professor Nicholas Tonti-Filippini, Submission no 116, p. 1.

\(^{75}\) Queensland Bioethics Centre, Catholic Archdiocese of Queensland, Submission no 72, p. 7.

\(^{76}\) Women’s Forum Australia, Submission no 103, p. 2.

\(^{77}\) Salvation Army, Submission no 66, *Positional Statement, Surrogacy*.

\(^{78}\) Australian Christian Lobby, Submission no 85, p. 11.

\(^{79}\) Southern Cross Bioethics Institute, Submission no 105, p. 3.

\(^{80}\) Southern Cross Bioethics Institute, Submission no 105, p. 3.

\(^{81}\) V Lambropoulos 2004, p. 12
A/Professor Nicholas Tonti-Filippini reflected these concerns, concluding:

Surrogate motherhood represents an objective failure to meet the obligations of maternal love and responsible motherhood; it offends the dignity and the right of the child to be conceived, carried in the womb, brought into the world and brought up by his or her own parents. It sets up, to the detriment of families, a division between the physical, psychological and moral elements which constitute those families. It involves the use of a woman as a mere incubator. It also creates a new confusion as to the identity of the child’s mother.\(^{82}\)

Opponents’ differing views on decriminalisation

Some submissions opposing surrogacy explicitly wanted the law to remain unchanged. The current law was seen as a means of deterrence and a way of avoiding the kind of risks to children and birth mothers outlined above. In its issues paper, the committee posed the question: Should the legal restrictions and criminal penalties against altruistic surrogacy be removed from the Surrogate Parenthood Act 1988? Some examples of responses from submitters opposing decriminalisation are outlined below:

We strongly believe that the legal restrictions and criminal penalties against altruistic surrogacy should NOT be removed from the Act because of the potential negative impacts on the children involved – including significant legal, emotional and relational problems...No child should be placed in such a situation.\(^{83}\)

No, it is very important that the bond between mother and child is protected, and the breaking of this bond is not aided by the legal challenges as to who is the parent.\(^{84}\)

Decriminalisation is likely to increase the numbers of cases of surrogacy, thereby also increasing the numbers of women facing these risks [of emotional harm].\(^{85}\)

The surrogacy legal restrictions and criminal penalties, should remain as is and not be removed in any manner...Make the right decision and do not allow any change to this act.\(^{86}\)

We wish to voice our concern about the proposal to decriminalise altruistic surrogacy in the Qld parliament. In our view to do so would be to open a ‘can of worms’. ... We think the short term benefits to the parents are greatly overwhelmed by the subsequent life long issues raised for children of such procedures and also the potential for compensation claims against the State i.e. the taxpayer, by such children who feel that they have been discriminated against in some form, is substantial. In short we are against any moves to change the existing legislation.\(^{87}\)

Meanwhile, other people opposing surrogacy did not wish to impose criminal sanctions on families engaged in altruistic surrogacy. Instead, they sought the maintenance of penalties for advertising and promoting surrogacy arrangements or providing professional services to assist surrogacy. Queensland Bioethics Centre illustrated this stance in its submission:

…not all behaviour is appropriately regulated by the Law. The criminal law is not always the best instrument for protecting and promoting human values. Sometimes making something a crime may lead to greater harm. This is possibly the case regarding surrogacy.

We agree that surrogacy should be decriminalised as regards the surrogate mother and the commissioning parents, but in the interests of the child and the common good the government should do what it reasonably can in order to discourage all forms of surrogacy.

Hence we recommend that the criminal penalties against surrogate mothers and commissioning parents in the Surrogate Parenthood Act 1998 (Qld) should be removed. However decriminalising altruistic [surrogacy] to this extent does not mean that the government should become involved in ‘regulating’ ‘altruistic’ surrogacy. For the government to seek to facilitate surrogacy by further

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\(^{82}\) A/Professor Nicholas Tonti-Filippini, Submission no 116, p. 4.

\(^{83}\) Anonymous, Submission no 48, p. 1.

\(^{84}\) Brett Eddie, Submission no 16, p. 1.

\(^{85}\) Women’s Forum Australia, Submission no 103, p. 2.

\(^{86}\) Anonymous, Submission no 25, p. 1.

\(^{87}\) Peter and Lyn Horn, Submission no 32, p. 1.
Investigation into Altruistic Surrogacy

regulations would be seen by the community as condoning surrogacy and facilitating a form of family formation which is against the best interests of the child. …

Hence we recommend that surrogacy “contracts” should remain …unenforceable. Furthermore the government should seek to discourage surrogacy by making it an offence to:

- Advertise or promote surrogacy arrangements;
- Receive a fee in connection with professional services to assist surrogacy (this would include IVF procedures);
- Medicare should not fund medical procedures involving surrogacy arrangements
- In the event that surrogacy occurs the woman who gives birth should be recognised as the mother of the child.  

A/Professor Nicolas Tonti-Filippini advocated a similar approach from a Victorian context:

The law should discourage the involvement of medical, legal and other professional in fostering the practice by making it an offence to:

a) advertise or promote surrogacy arrangements or

b) receive a fee in connection with professional services to assist surrogacy.

Women’s Forum Australia also recommended that:

- Surrogacy should remain illegal.
- The surrogate mother and the commissioning parents should not receive criminal penalties (jail terms, fines or records).
- ART clinics that carry out procedures related to surrogacy should receive criminal penalties (substantial fines).
- Surrogacy contracts should remain null and void…

In addition, the Festival of Light stated in its submission that:

Queensland’s current law, which provides criminal penalties as a strong disincentive for entering into any surrogacy arrangement, including a non-commercial arrangement, is good law and should be retained.

However, in discussion with the committee, Richard Egan, National Policy Officer, Festival of Light, also indicated a willingness to remove criminal sanctions as long as other deterrence measures were in place:

We are not committed to retaining the retention of criminal sanctions, particularly including imprisonment, for altruistic surrogacy arrangements but we are conscious that whenever there is a move to decriminalise something, even if that is all one is intending to do, it is very hard not to at the same time give a signal to the public that you are actually now approving of the action. So we would not be opposed to removing the criminal sanctions for altruistic surrogacy but only in the context of other things being said and done by the parliament that make it clear that altruistic surrogacy arrangements remain completely void, unenforceable and that no provision should be put in place for giving validity to them. In that context we would not be opposed to removing the criminal sanctions.

Arguments supporting decriminalisation

Those supporting the decriminalisation of surrogacy argued in terms of:

- Personal liberty of consenting adults;
- The importance of providing a last resort for some people to have a child;
- Positive outcomes demonstrated by available research studies;

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88 Queensland Bioethics Centre, Submission no 72, p. 11.
89 A/Professor Nicholas Tonti-Filippini, Submission no 116, p. 4.
90 Women’s Forum Australia, Submission no 103, p.1.
91 Festival of Light, Submission no 75, p. 1.
92 Investigation into Altruistic Surrogacy Committee 2008b, pp. 12-13. (Richard Egan)
• Respecting different cultural values;
• The capacity of the existing regulatory system to manage risks;
• The negative impact of prohibition; and
• Unintended negative consequences of prohibition.

These arguments are detailed below.

**Personal liberty**

Supporters of decriminalisation argued that prohibition offended the perceived right of adults to make their own reproductive choices freely and without undue interference from government.

A woman keen to embark on a surrogacy arrangement with close friends argued:

_We have the right to choose to remain childless if we want to and ...I think that we should have the right to choose whether or not surrogacy is right for us. At the moment in Queensland that choice is taken away from us._ 93

The Hon Dean Wells MP also emphasised the personal liberty argument:

_It is a fundamental principle of a free democracy that the government does not seek to regulate the private lives of its citizens except to protect society from harm. The existing legislative ban on altruistic surrogacy violates this fundamental principle. To bring a child into the world is the antithesis of harming society: it is providing the means of its perpetuation. Further, a decision to proceed with procreation by way of altruistic surrogacy harms no individual, and is nobody’s else’s business except those who are involved by their own free consent and voluntary participation._ 94

**Option for infertile couples**

Prohibition was seen by many supporters as denying perhaps the only option otherwise available for some people to have children. As noted in Chapter 1, over the last decade in Queensland, very few children have been available for adoption. 95

The committee heard evidence and received submissions outlining a wide range of personal circumstances. A sample of the testimonies is outlined below.

A woman who wanted to carry a child for her sister explained:

_My motives are purely altruistic, as I have witnessed [my sister’s] pain and just want to help her achieve her dream of a child. ...Had the laws in Queensland been different, my sister and brother-in-law may now be parents._ 96

Another woman experiencing infertility invited decision makers “to put themselves in the shoes of people who are unable to have children”. She explained:

_In my instance I have fertilised embryos...I already have a family member prepared to carry my child. All I need is for you to say that my doctor can thaw my embryos ...My sister in law and her husband have already had their children and don’t want anymore (he has had a vasectomy). She tried for a long time to fall pregnant and knows how much I want to be a mum....If this law does not change while I am trying to have babies....I will be happy I have helped someone else._ 97

Another woman explained in her submission that she was not infertile, but was unable to carry a child:

_I was born without a uterus .... I believe altruistic surrogacy should be made legal in order to provide an option for women such as myself;_ 98 and further in evidence

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93 Investigation into Altruistic Surrogacy Committee 2008b, p. 55. (Trea Burger)
94 Hon Dean Wells MP, Submission no 10, p. 1.
95 Hon M Keech MP, Minister for Child Safety and Minister for Women, Correspondence received, 20 August 2008. In addition, in 2006-07, there were 12 local born children available for adoption and 63 inter-country adoptions in Queensland: Australian Institute of Health and Welfare 2008, p. 19.
96 Ms Julie Christensen, Submission no 63, p. 2.
97 Ms Melanie Douglas, Submission no 43, p. 2.
98 Ms Bianca Upton, Submission no 82, p. 1.
I would love to have a child...[if the laws remain the same] I see myself probably moving back to Victoria where a close family friend is willing to be a surrogate mother.\textsuperscript{99}

Another woman who drove four hours to attend the committee’s public hearing to explain her hope for a child with her husband after a hysterectomy in her 20s:

\textit{We will be the genetic parents to a healthy child if we are allowed to have a baby. Both sides of our families are very supportive of us. My... sister and [my husband’s] sister have both offered, currently arguing over who would like to do it.}\textsuperscript{100}

Another woman who had a partial hysterectomy after suffering uterine fibroids explained how she:

\ldots managed to keep her ovaries. Therefore, the idea of surrogacy, if it was decriminalised in Queensland, would be of great benefit to myself and my husband as it would allow both of us to have genetically related children, which obviously is not a possibility at this point in time.\textsuperscript{101}

One woman had exhausted IVF options, applied for inter-country adoption and been offered a gestational surrogacy arrangement by long term friends. She explained:

\textit{If we are given the opportunity to have a child through surrogacy before our [adoption] file is ready to go to Thailand that is something that we would like to do. Then we would go back to the adoption to complete the rest of our family. That is what being infertile means. You have to look at every other option. Infertility makes you realise that giving birth does not define you as a parent and becoming a parent is more important than becoming pregnant. This is something we have learnt over the years.}\textsuperscript{102}

A professional child carer, who saw the relevance of surrogacy for herself, spoke about her appreciation of the joys of parenting and her sense of loss:

\textit{I [have] worked in child care since 1988, since I was 17 ...I [see] Mums and Dads drop off and pick up their children ...and I see the special bonds more now...and I fear that I may never get to experience that.}\textsuperscript{103}

\textbf{Outcomes}

Whilst the committee found there to be a lack of research on outcomes for adults born of surrogacy, some proponents of decriminalisation point to studies based on children now, 7 years old, which indicated good outcomes for children, intending parents and birth mothers.\textsuperscript{104}

\textbf{Respect for cultural values}

The Kupai Omasker Working Group argued prohibition did not respect customary Torres Strait Islander law. As noted, the practice is considered part of Torres Strait Islander cultural integrity. Whilst Western concepts of family may view surrogacy as a threat to the primacy of the nuclear family, in Torres Strait Islander culture the practice is seen as crucial to strengthening the extended family.

The working group members explained to the committee as follows:

\textit{We do not want to read [about] it in history books, we want to be able to maintain it. And part of maintaining it is...giving it the proper recognition it deserves...The system we practise is not...}

\begin{itemize}
  \item Generally the intending parents did not consider the experience problematic;
  \item The majority of couples maintained contact with the birth mother after the birth;
  \item There was greater psychological wellbeing and adaptation to parenthood in intending parents than in natural-conception parents; and
  \item There was no difference to other family types in infant temperament, or child psychological development at three years old.
\end{itemize}


\begin{itemize}
  \item \textsuperscript{99} Investigation into Altruistic Surrogacy Committee 2008b, p. 40. (Bianca Upton)
  \item \textsuperscript{100} Investigation into Altruistic Surrogacy Committee 2008b, p. 43. (Tiffany Loader)
  \item \textsuperscript{101} Investigation into Altruistic Surrogacy Committee 2008b, p. 56. (Nicole Seath)
  \item \textsuperscript{102} Investigation into Altruistic Surrogacy Committee 2008b, p. 54. (Trea Burger)
  \item \textsuperscript{103} Ms Jodie Robinson, Submission no 93.
  \item \textsuperscript{104} In reviewing current research the Victorian Law Reform Commission found that studies indicated that:
\end{itemize}
adoption. The word we use is ‘giving’…It strengthens the family. It is the bonding process for families, extended families.\textsuperscript{105}

Our people have practised this and will continue to practise this …because it is part of our life. This [is] part of our way, part of our custom and part of our practices. There is a sacredness to this thing. Children are so precious to us in our culture. We are made of extended family kinship… How do we interpret this to the people [?]… Our only word is ‘love’. We share children for love.\textsuperscript{106}

We have two laws. We want your law to legally recognise our law and our practices. …We want you…to work with us to legally recognise our traditional child-rearing practices law because the highest court has already recognised that and we want Queensland now to recognise it.\textsuperscript{107}

Confidence in the ART system’s risk management approach

Supporters of decriminalisation also believed that prohibition did not recognise the careful approach of fertility clinics in Australia in undertaking IVF surrogacy.

Miranda Montrone, a psychologist who has assessed 50 surrogacy cases over the last decade reported confidence in the ART system managing risks in relation to altruistic surrogacy. She argued that the two main Australian fertility clinics which have been undertaking surrogacy for over a decade, have taken a cautious approach. Ms Montrone reported the clinics “slow people down” in their consideration. The clinics ensure risks are carefully considered with independent psychological assessment of prospective birth parents and intending parents over a six hour period; independent medical assessments; and professional legal advice. An ethics committee or an expert review panel considers recommendations from these professional assessments before a clinician proceeds with treatment.\textsuperscript{108}

ACCESS, Australia’s National Infertility Network, reported “There have been no legal battles associated with managed (i.e. conducted in accredited ART clinics) surrogacy cases in Australia.”\textsuperscript{109}

Stigma of prohibition

Supporters of decriminalisation were adamant that prohibition had the negative impact of stigmatising people who sought to have a family through altruistic surrogacy.

A capacity for openness and honesty were seen as important for optimum outcomes for children and parents in surrogacy arrangements. Alice Kirkman, Australia’s first child born of IVF surrogacy, now 20 years of age, explained:

\begin{quote}
My parents went about it in a perfect way. It was never looked on as something to be ashamed of. Everybody knew everything and because they never acted as though it should be kept a secret I felt normal.
\end{quote}\textsuperscript{110}

It was argued that prohibition was likely to promote secrecy and shame. A Brisbane couple with twins born of surrogacy described their decision to move suburbs when they came home with their babies. They disliked having to keep the birth circumstances a secret from all but family and select friends.\textsuperscript{111}

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

One woman explained:

\begin{quote}
I have a sister who has said she would be my surrogate if she could….I have thought hard about breaking the law and risking a severe penalty just for the chance of being a mother.
\end{quote}

\begin{flushright}
\textsuperscript{105}Investigation into Altruistic Surrogacy Committee 2008a, pp. 5-6. (Ivy Trevallion) \\
\textsuperscript{106}Investigation into Altruistic Surrogacy Committee 2008a, p. 3. (McRose Elu) \\
\textsuperscript{107}Investigation into Altruistic Surrogacy Committee 2008a, p. 4. (Francis Tapim) Francis was referring to the Mabo decision recognising native title. \\
\textsuperscript{108}Miranda Montrone, Independent assessor, Interview. \\
\textsuperscript{109}ACCESS, Submission no 110, p. 2. \\
\textsuperscript{110}Kay Dibben 2008. \\
\textsuperscript{111}Kay Dibben 2008.
\end{flushright}
My husband and I even considered moving to another state, but all my possible surrogates live in Queensland.

There has been no way around it. This law has been the dictator of our whole future... [if] we acted upon my strong desire for a family, we – that is, myself, my husband, my sister and her husband – would all now be considered criminals. Isn’t a criminal someone who is harmful to society in some way? Whom would we be hurting? Certainly not the child who would be brought up in my home, a very loving, secure, stable environment. Why make it all so difficult? Why not allow my sister to give me the gift she is happy to give me?¹¹²

Cairns Community Legal Service highlighted the emotional and financial impact of even minimal criminal penalties:

...the very process of being charged and going through the court processes and systems can be both very draining for those concerned in terms of both time and energy as well as financially. These financial and non financial resources may be better applied... in caring for the child....[and]

The effects of stigmatisation and criminalisation has an impact on the way the community treats...people often marginalising them [in] obtaining employment [and effecting] people’s ability to maintain debts, set up a home and other essential living standards. The financial implications....can therefore be destructive to families. This in turn has an adverse impact on the needs of innocent children.¹¹³

Unintended consequences

Others also argued that the unintended consequences of the criminal penalties attached to surrogacy in Queensland had the potential to force people to go overseas, interstate, and underground, which could lead to exploitation of and unnecessary health risks for those involved.

Professor Jenni Millbank and Associate Professor Anita Stuhmcke, Faculty of Law, University of Technology, Sydney saw:

The benefit in decriminalising the practice will be to remove the stigma of the law from such arrangements and to allow for greater transparency and ethical or regulatory safeguards, and to prevent jurisdiction-hopping or black market practices.¹¹⁴

The Australian Social Workers Association (Queensland) supported:

...the removal of legal restrictions and criminal penalties against altruistic surrogacy...believing that a path of regulation and education would better service the interests of all [parties involved]...most especially those of any children born as a result of this practice.¹¹⁵

Greta Brennan, Director, Wide Bay Women’s Health Centre supported decriminalisation with safeguards:

.....to take account of the rights of all parties, the couple, the surrogate, and most important of all, the child who has no say in the matter and to discourage the pursuit of commercial arrangements overseas.¹¹⁶

In addition, the negative impact of the lack of legal certainty for children and parties was highlighted. Some argued that this arrangement was not in the best interest of the child and it discriminated on the basis of circumstance of birth or the parents’ lack of capacity to have children.

The committee also heard from an intending mother who lost her uterus in her early 20s due to cancer. The woman is currently going through a surrogacy arrangement and outlined the impacts of the current laws for her:

I got cancer in 2003. We were planning on moving to Queensland when my husband finished uni, which was at the end of 2003... As soon as that [the cancer] happened and it became a possibility that I might not be able to have children and that the adoption wait list was so long, we were sort

¹¹² Investigation into Altruistic Surrogacy Committee 2008b, p. 41. (Carolyn Gaul)
¹¹³ Cairns Community Legal Centre, Submission no 80, p. 2.
¹¹⁴ Professor Jenni Millbank and Associate Professor Anita Stuhmcke, Faculty of Law, University of Technology, Sydney, Submission no 12, pp. 6-7.
¹¹⁵ Australian Association of Social Workers Ltd, Submission no 77, p. 5.
¹¹⁶ Wide Bay Women’s Health Centre Inc, Submission no 79, p. 2.
of held hostage from moving because we were not going to break the law even though people do. You have to be realistic that people are breaking the law. But we were not comfortable doing that. So we chose to stay in New South Wales. As much as I would love to move to Queensland - I really do - I cannot risk my future family and break the law until the legislation changes. So it has had a big impact on my family.\textsuperscript{117}

**CONCLUSION**

Following careful assessment of the arguments for and against decriminalisation in Queensland, the committee concludes that decriminalisation of altruistic surrogacy should be supported along with the implementation of an appropriate legislative and regulatory framework. The committee considers that decriminalisation of altruistic surrogacy alone may remove some of the unintended consequences such as the potential stigmatisation of families and the pursuit of commercial arrangements overseas. However, the committee believes that further measures are required to prevent harm and ensure parity with other families. For the committee, this entails the development of a legislative and regulatory approach which strengthens existing regulation to better manage identified risks for the child and the parties through ART. It also requires legislation which addresses issues of legal uncertainty for the child and the parties through the provision of a specific provision to transfer legal parentage. The committee's position also reflects its judgement about the role of government in a liberal democracy and pluralist society.

In summary, its position is shaped by five key considerations outlined below.

*The existence of different cultural understandings*

One of the starkest reminders of a need for a pluralist approach was illustrated in evidence given at the public hearing in relation to traditional Torres Strait Islander ‘adoptions’. The committee understands from evidence received that the practice has persisted in spite of its prohibition under the *Surrogate Parenthood Act 1988* and the cessation of formal approval of adoption by the Queensland Government in the mid 1980s. Torres Strait Islanders also appear to support both this practice and their Christian beliefs.

*Respect for the liberty of consenting adults to conceive a child and to parent*

The committee acknowledges that people in our society are free to decide to conceive a child and to take on the rights and responsibilities of parenthood. It believes that this liberty should be extended to the maximum extent possible to consenting adults who are unable to conceive or carry a child themselves provided the birth mother's consent is informed and freely given.

*Concern for parity in approach and just outcomes*

The committee believes that the current position is punitive for children and parents. Children and parents should have the same legal protections as enjoyed by other families created through ART or natural conception.

*The duty of care expected of health care providers*

Where medical assistance is required to conceive a child, the committee acknowledges that the autonomy of intending parents and the birth mother may be impacted by obligations of health care professionals to exercise their duty of care for the health and wellbeing of the parties, any existing children and the potential child.\textsuperscript{118} A duty of care includes access to professional information, advice and counselling before embarking on a surrogacy arrangement. The committee believes that a duty of care approach also supports decriminalisation of altruistic surrogacy as the current prohibition is arguably discouraging access to health screening services and other professional services.

*Protection of vulnerable individuals from harm*

The committee recognises the validity of many of the concerns expressed about altruistic surrogacy. The lack of research on long term outcomes for children and parties involved highlights a need for a cautious approach. However, the committee believes decriminalisation with an appropriate regulatory framework

\textsuperscript{117} Investigation into Altruistic Surrogacy Committee 2008b, p. 35. (Susan Mobbs)

\textsuperscript{118} D M Evans 2000, p. 169.
offers the opportunity to address some of these risks in a way which reflects the duty of care expected of health care professionals and the Government as regulator of existing health care services.

The committee recognises that for a small group of people in Queensland society altruistic surrogacy provides the only realistic opportunity to create family. As the trends in adoption, deferred family formation and infertility appear persistent, it seems sensible for the Government to create an environment that maximises the possibility for success and happiness for people who create their families through altruistic surrogacy arrangements rather than disadvantages or stigmatises them.119

**RECOMMENDATION 3: DECRIMINALISATION SUPPORTED WITH APPROPRIATE LEGISLATION AND REGULATION**

The committee recommends that the Queensland Government decriminalises altruistic surrogacy supported with an appropriate legislative and regulatory framework as described in later recommendations.

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CHAPTER 3: THE ROLE OF GOVERNMENT

TERM OF REFERENCE

This chapter addresses the question in the following terms of reference, if decriminalisation of altruistic surrogacy was to be supported:

- What role should the Queensland Government play in regulating altruistic surrogacy arrangements in Queensland?

OVERVIEW OF CURRENT LEGISLATIVE AND REGULATORY ARRANGEMENTS

It is useful to commence this examination of the role of the Government with a brief overview of current legislative and regulatory arrangements in Queensland with respect to altruistic surrogacy. Without any other changes, the decriminalisation of altruistic surrogacy in Queensland would mean:

- Regulatory responsibilities would rest with three key agencies: Queensland Health, the Department of Child Safety and the Department of Justice and Attorney-General;
- The *Surrogate Parenthood Act 1988*, currently administered by the Department of Child Safety, would continue to operate to prohibit commercial surrogacy; ensure all surrogacy contracts are unenforceable; and prevent advertising for all forms of surrogacy;
- The current regulatory arrangements for ART services in Queensland would continue to operate under the *Private Health Facilities Act 1999*. The Act empowers the Queensland Chief Health Officer to “make standards for the protection of the health and wellbeing of patients receiving health services at private health facilities”. The Chief Health Officer licenses fertility clinics under the Act if they maintain accreditation under the Code of Practice for Assisted Reproductive Technology Units which has been developed by the Reproductive Technology Accreditation Committee of the ART industry body, the Fertility Society of Australia. These standards are referred throughout the report as the ‘RTAC code of practice’.

The 2005 RTAC code of practice for the assessment and support of altruistic surrogacy requires: mandatory counselling prior to treatment by accredited psychologists, psychiatrists or social workers for potential birth mothers and their partners, intending parents, donors and donor partners. Such counselling covers the implications of treatment and the potential surrogacy and the preparedness of parties.121

Currently eligibility for ART services in Queensland is a matter for determination by individual health professionals. Under existing arrangements, if altruistic surrogacy is decriminalised, potential intending parents and birth mothers could seek and receive assistance from agreeable practitioners at Queensland fertility clinics.

Queensland Health through its requirement to conform to the RTAC code of practice also requires fertility clinics to meet the NHMRC *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*. These guidelines exclude commercial surrogacy and require “every effort” is made to counsel parties in the case of altruistic surrogacy. The guidelines require clinics to ensure parties have a clear understanding of the social, ethical and legal implications of entering into an altruistic surrogacy arrangement. The guidelines also state that clinicians must not advertise a service to provide or facilitate surrogacy arrangements or receive a fee for brokering surrogacy arrangements;122

- The Health Quality and Complaints Commission would provide an appeal option for matters relating to the quality of health care and unsuccessful applicants for IVF surrogacy would be free to seek a second opinion;
- The *Status of Children Act 1978* would ensure the birth mother and her male partner (if she has one) remained the legal parents at birth. The *Births, Deaths and Marriages Act 2003* would continue to

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120 Hon S Robertson MP, Minister for Health, Correspondence received, 15 August 2008.
121 Reproductive Technology Accreditation Committee 2005, Code 1.3, p. 80.
122 National Health and Medical Research Council 2007, Guideline 13.2.1, p. 57.
place the onus on the birth mother to complete the application for registering the birth within 60 days with her name and that of her male partner (if she has one) as the legal parents of the child. The Registrar of Births, Deaths and Marriages would continue to have responsibility for collecting, maintaining and providing access to birth certificates under its Act;

- The Adoption of Children Act 1964 and the Status of Children Act 1978 in their current form would not facilitate the transfer of legal parentage, leaving children, intending parents and birth parents with legal uncertainty in relation to child support and inheritance issues;
- The Adoption of Children Act 1964 would continue to prohibit private adoptions. All legal adoptions would need to be assessed and approved by the Department of Child Safety;
- The Commonwealth Family Law Act 1975 would have an ongoing role in resolving residency disputes and, in the absence of a specific state mechanism for legal transfer, parenting orders would remain the only option to clarify day to day parental rights and responsibilities such as access to health care and school enrolments. These would not ensure inheritance rights nor guarantee child support in case of family breakdown; and
- Under the current Surrogate Parenthood Act 1988, surrogacy would include pre-conception and pre-birth arrangements.

**DEFINING GOVERNMENT’S ROLE**

In developing its position on the role of the Government, the committee has also reviewed approaches in other Australian jurisdictions and examined the advice provided by submitters.

An overview of jurisdictional legislative and regulatory approaches and key messages from submitters is detailed below.

**Review of approaches in Australian jurisdictions**

In March 2008, the Standing Committee of Attorneys-General (SCAG) pledged a commitment to a nationally consistent legislative and regulatory approach for altruistic surrogacy. SCAG announced at that time it had:

(a) Agreed to develop a unified framework for the legal recognition of parentage achieved by surrogacy arrangements, based on the following principles:
- The rationale for the legislation is to ensure the best interests of the child are the paramount consideration in recognising surrogacy arrangements;
- The model regime should aim to minimise scope for dispute between the surrogate mother and the intended parents.
- The model should aim for minimal intervention in people’s lives.

(b) Agreed in principle that a unified framework should contain the following key features:
- Non-commercial surrogacy arrangements will be lawful but agreements will be unenforceable;
- Informed consent of all parties is essential;
- Mandatory specialist counselling;
- Court orders will be available recognising the intended parents as the legal parents where the surrogacy arrangement meets legal requirements and is in the best interest of the child.\(^\text{123}\)

The Standing Committee of Attorneys-General reflects a concern to minimise harm whilst protecting liberty. It also reflects the existing roles and expectations of government in defining acceptable parameters for altruistic surrogacy; reviewing and monitoring regulation of ART; registering births; and clarifying legal rights and responsibilities in relation to parentage.

Proposed policy reform in Victoria and the recent legislative approaches in South Australia and Western Australia focus on resolving a perceived problem in relation to birth registration and legal parentage - the legal uncertainty created by the lack of provision to enable a transfer of legal parentage for altruistic surrogacy arrangements. The same issue came to the attention of the ACT Government in 2000 with an

\(^{123}\) Standing Committee of Attorneys General 2008, p. 4.
application for the transfer of legal parentage in a surrogacy case before the ACT Supreme Court. The case involved, intending parents Debra and Shane Ryan, who had a child, Hamish, through a surrogacy arrangement with Shane’s sister-in-law, using Debra’s egg and Shane’s sperm. At the time the case was heard, Hamish was then 2 years of age. Resolution of the case required legislative reform and led to a specific provision for altruistic surrogacy in the ACT Parentage Act 2004.124

Victorian and Western Australian proposed reform approaches also reflect a perceived need to strengthen ART regulation beyond that currently required by existing industry standards for mandatory counselling. Their proposed approaches around assessment and support within ART services mirror a number of the policies and procedures developed by Canberra Fertility Centre and Sydney IVF, the two Australian clinics which have provided altruistic surrogacy services over the last decade. These clinics have developed informed consent policies and procedures above existing industry standards.

**Submissions**

Submitters agreed on the need for the Government to define acceptable parameters for altruistic surrogacy. They also agreed on a need for the Government to ensure surrogacy is not commercial and to define policy on enforceability of arrangements; reasonable expenses; timing of arrangements; advertising and brokerage; the transfer of legal parentage; birth registration; and the maintenance of children’s information on genetic parentage and circumstances of birth.

Family lawyer, Linda Wright, typified many submitters’ views on the importance of the Government’s role in addressing the lack of capacity to transfer legal parentage where a birth mother wishes to relinquish a child:

*If…decriminalised …statutory regulation should follow particularly to provide a mechanism for transfer of parentage so that the child is not left in legal limbo as currently occurs in New South Wales.*125

Submitters, who expressed a view on the matter, believed that it was an existing role and specific responsibility of the Government to register births and to collect, secure, and provide access to records in perpetuity.

The key difference in submitters’ views related to the level of government regulation of surrogacy arrangements. A prospective intending parent considered the Government should have a role in registering all altruistic surrogacy arrangements. This was seen as desirable to assist with her preferred policy of enforceable agreements.126 The Queensland Law Society and the Commission for Children and Young People and Child Guardian also supported such a role for the Government. The commission sought the creation of a specialist regulatory body or unit separate from adoption or ART regulatory processes which:

*…should be responsible for processing all surrogacy applications and guiding the conduct of approved surrogacy arrangements.*127

The commission was concerned an “impartial body” was needed as fertility clinics were focussed on the needs of infertile couples rather than the best interests of the child.128 The commission suggested that the responsibilities of the proposed regulatory body could include:

- *[Approving] proposed surrogacy arrangements according to standard eligibility criteria…*  
- *[Providing] advice to parties on what would constitute ‘reasonable expenses’ of surrogate mothers, the level of such expenses and possibly approve payments for same*  
- *[Registering] agencies (including counsellors and legal practitioners) involved in assisting surrogacy arrangements…*129

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125 Linda Wright, DGB Lawyers, Submission no 84, p. 2.  
126 Nicole Seath, Submission no 101.  
127 Commission for Children and Young People and Child Guardian, Submission no. 98, p. 3.  
128 Commission for Children and Young People and Child Guardian, Submission no. 98, p. 5.  
129 Commission for Children and Young People and Child Guardian, Submission no. 98, p. 3.
Another prospective intending parent also wanted the Government to develop a register to assist prospective intending parents and birth mothers to make suitable surrogacy arrangements. She saw that this register would be best supported by government subsidised “surrogacy coordinators”, possibly trained social workers, who would help guide parties through the process.\textsuperscript{130}

Others considered the Government should not have any involvement in the development of individual surrogacy arrangements or directly assessing the suitability of parties. It was suggested that the RTAC code of practice and NHMRC guidelines which require mandatory counselling for altruistic surrogacy were either sufficient protection in their current form or were a robust enough system that could be further strengthened in line with this view. Fertility clinics were seen as best equipped to judge the preparedness of parties for surrogacy on a case-by-case basis.

An intending mother from NSW who has been through the altruistic surrogacy assessment process at Sydney IVF believed that:

\textit{The government should be responsible for setting up legislation and guidelines. Clinics should be responsible for assessing suitability of parties.} \textsuperscript{131}

An experienced surrogate from NSW put forward a similar view:

\textit{I don’t want the government to be standing over me while I discuss with the IP’s [intending parents] all the ins and outs, but if we could go to a counsellor and them say, “Have you considered this?” this would ensure we had thought about almost everything. All the ‘what ifs’ need to be covered…} \textsuperscript{132}

ACCESS, which describes itself as a consumer controlled organisation providing support to women, men and families experiencing difficulty conceiving, expressed confidence in the capacity of the fertility clinics to manage the assessment of surrogacy arrangements:

\textit{Surrogacy should be provided in ART clinics accredited by the Reproductive Technology [Accreditation] Committee (RTAC). RTAC is recognised in Commonwealth legislation and provides an existing mechanism for comprehensive implications counselling for those considering gamete donation or surrogacy…}

\textit{Successful surrogacy is dependent on the maturity, responsibility and bona fides of the parties involved. Qualified, experienced professionals working in RTAC accredited clinics can best assess these qualities and assist all parties involved to come to the best decision for their circumstances. This includes, in addition, a qualified psychologist … providing expert advice for all parties considering surrogacy.} \textsuperscript{133}

A submission from the Director of Aussie Egg Donors, herself an egg donor and potential birth mother, saw that clinics should be responsible for counselling and health assessments and government’s role was to ensure legislation and regulation was “adhered to”.\textsuperscript{134}

Queensland Fertility Group sought government intervention to ensure agreements were “contractual and enforceable” but saw the Queensland Government could:

\textit{…utilise existing national [ART] frameworks though which altruistic surrogacy could be introduced, regulated and audited. This has many advantages and minimises the regulatory role of government in individual surrogacy cases…ART clinics have established multi-disciplinary teams with experience in providing the medical, counselling and support services necessary to maximise safety and preparation for all parties in a surrogacy arrangement.} \textsuperscript{135}

The Australian Medical Association (Queensland) endorsed Queensland Fertility Group’s approach to minimise government regulation in individual surrogacy arrangements and utilise existing regulatory arrangements described above.\textsuperscript{136}

\textsuperscript{130} Nicole Seath, Submission no 101.
\textsuperscript{131} Susan Mobbs, Submission no 96, p. 1.
\textsuperscript{132} Kelly, Submission no 83.
\textsuperscript{133} ACCESS, Submission no 110, p. 5.
\textsuperscript{134} Rachel Kunde, Co-Director, Aussie Egg Donors, Submission no 65, p. 1.
\textsuperscript{135} Queensland Fertility Group, Submission no 91, p. 1.
\textsuperscript{136} Australian Medical Association Queensland, Submission no 117, p. 1.
As noted, many of the submitters who expressed support for the efficacy of current industry regulation also endorsed the strengthening of existing industry standards with respect to altruistic surrogacy. Antonia Clissa, former Executive Officer, Western Australian Reproductive Technology Council exemplified this position. She sought to strengthen informed consent processes through “psychosocial preparation and psychometric testing of the participants” and the separation of support counselling from assessment, use of an expert review panel and a mandatory cooling off period.  

PROPOSED ROLE FOR GOVERNMENT IN REGULATING ALTRUISTIC SURROGACY

In the context of the decriminalisation of altruistic surrogacy, the committee considers the Government’s role is to develop an adequate legislative and regulatory framework which:

- Aims to balance the promotion of liberty for consenting adults wanting to create families through altruistic surrogacy arrangements with the protection of vulnerable people from harm; and
- Seeks parity in its policy development for families created through altruistic surrogacy arrangements with other families created through ART or natural conception.

Within its broader role, the committee has identified four key tasks as follows:

**Policy direction**

The first recommended task for the Government is to provide policy direction. In this chapter, the committee outlines proposed policy approaches in relation to:

- Definitions of altruistic surrogacy and reasonable expenses;
- Advertising and brokerage; and
- Principles and outcome statements to guide legislative and regulatory reform.

The remainder of this report then outlines proposed policy direction in relation to the questions posed in the committee’s terms of reference covering: the role of the genetic connection; criteria for intending parents and birth mothers; legal rights and responsibilities; and children’s rights to information on genetic parenthood.

**Implementation of reform**

The second recommended task for the Government is to design and implement a number of reforms as proposed in this report. Key reforms include:

- **Strengthening ART regulation:** The committee has two proposed initiatives to strengthen ART regulation.
  
  The first relates to informed consent and decision making processes in relation to altruistic surrogacy arrangements. For example, the committee supports independent psychosocial and medical assessment of the parties, professional legal advice and a cooling off period before proceeding with treatment. It also proposes that approval for access to ART for altruistic surrogacy across Queensland should rest with a multidisciplinary body called the Surrogacy Review Panel. Unlike existing ethics committees, the panel would sit separately to fertility clinics. This arrangement acknowledges the potential risks involved; the benefit of a multi-disciplinary approach to decision making; the opportunity to develop specialist knowledge; and the benefit of distancing clinicians from the decision to approve treatment. These processes are discussed further in Chapter 5 in tandem with consideration of criteria for intending parents and birth mothers.

  The second initiative relates to a proposed central register to enhance collection and security of and access to a child’s information on genetic parenthood. This proposal is described in detail in Chapter 8 in response to the terms of reference relating to a child’s right to information.

- **Developing a provision for the transfer of legal parenthood:** This initiative covers a specific provision to address the need for transfer of legal parenthood in the case of pre-conception altruistic surrogacy arrangements where a child already resides with his/her intending parents and the birth mother

137 Antonia Clissa, Submission no 102, p. 2.
138 A regulatory framework defines the aims and scope of regulation, roles and responsibilities in regulation, regulatory mechanisms including specific policies and procedures.
consents to the transfer. This proposal is described in detail in Chapter 6 in response to the term of reference in relation to legal rights and responsibilities of the parties to a surrogacy arrangement.

**Direct provision**

The third recommended task or responsibility of the Government is to collect, secure and provide access to children’s information on genetic parentage and circumstances of birth. It entails updating birth certificates as required and establishing a combined central register for altruistic surrogacy and gamete donor information. This task reflects the Government's current responsibilities under the *Births, Deaths and Marriages Act 2003* to register births and provide access to birth certificates. It also reflects an interpretation of governmental responsibilities under the United Nations (UN) *Convention of the Rights of the Child*. As Tobin puts it, governments “must not only create but also maintain records critical to establishing a child’s identity”. 139

The committee does not support the proposal by some submitters that the Government takes a direct role in the assessment or registration or facilitation of surrogacy arrangements. The committee believes that the Government should build on and strengthen the existing regulatory arrangements in Queensland covering ART. It believes that the Government is not best placed to assess the suitability of parties for surrogacy arrangements. However, the committee believes that these are also matters best decided in the case of altruistic surrogacy independent of treating clinicians. The proposed panel represents an independent multidisciplinary group of relevant professionals who would approve an application for ART treatment following appropriate medical and psychosocial assessment and professional legal advice.

**Ongoing monitoring and review**

The fourth recommended task of the Government is to provide an ongoing monitoring, research and evaluation function which examines the implementation and effectiveness of its legislation and regulation. The committee outlines a proposal for the evaluation of the proposed regulation of fertility clinics and research on client outcomes in Chapter 5.

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**RECOMMENDATION 4: DEFINING GOVERNMENT’S ROLE**

The committee recommends that with the decriminalisation of altruistic surrogacy, the role of the Queensland Government is to develop and maintain an adequate legislative and regulatory framework which:

- Balances the prevention of harm and the protection of personal liberty in the creation of families through altruistic surrogacy; and
- Seeks parity in policy development for families created through altruistic surrogacy with other families created through assisted reproductive technology (ART) or natural conception.

In the current Queensland regulatory context, the committee believes the Government’s key responsibilities should be as follows:

- Policy direction by defining altruistic surrogacy, guiding principles and outcomes for regulation and operational policy for acceptable altruistic surrogacy arrangements;
- Implementation of specific legislative or regulatory reform as required with a current focus on: strengthening ART regulation and providing a specific mechanism to transfer legal parentage for altruistic surrogacy;
- Direct service provision in terms of collection, maintenance and provision of access to birth and related information; and
- Ongoing monitoring and review of the implementation and effectiveness of legislation and regulation including research on client outcomes.

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139 J Tobin 2004, p. 32.
DEFINING ALTRUISTIC SURROGACY

For the purpose of the regulation of altruistic surrogacy in Queensland, the committee proposes changes to the Surrogate Parenthood Act 1988 to define altruistic surrogacy as:

A clear arrangement whether formal or informal agreed pre-conception, between consenting adults for the birth mother to bear a child for the intending parent/s and to permanently transfer the responsibility for the child’s care and upbringing to the intending parent/s after the child’s birth.

The committee supports the notion of ‘pre-conception’ arrangements. It believes that such arrangements reduce the risk of coercion of the birth mother and provide more opportunity for due consideration between the parties prior to embarking on a pregnancy. This approach is in line with that in operation in the ACT and that proposed in Western Australia and South Australia.

The committee recognises that defining altruistic surrogacy as a pre-conception arrangement means all arrangements made during pregnancy would be regarded as private adoptions which are prohibited under the Adoption of Children Act 1964 and which currently face a maximum penalty of 6 months jail.

Only eight submitters expressed a view on the issue of the pre-conception arrangements. Three of these submitters opposed pre-conception arrangements. However, two submitters opposing pre-conception arrangements also opposed all forms of surrogacy. The third opposing submitter was the Australian Association of Social Workers (Queensland). The organisation considered pre-conception arrangements should be encouraged but it was more concerned to protect the rights of all children born regardless of the process the adults followed:

Reducing the definition of altruistic surrogacy to include only pre-conception agreements is not recommended … as such a narrow definition would not afford protection to those who chose to proceed with a surrogacy arrangement without a pre-conception agreement.\textsuperscript{140}

Four submitters believed that surrogacy arrangements should be negotiated before a child was conceived. An intending father suggested this was to avoid “baby buying”.\textsuperscript{141} Aussie Egg Donors and the Festival of Light suggested it was useful to differentiate surrogacy from private adoption.\textsuperscript{142} The Commission for Children and Young People and Child Guardian considered agreements should occur pre-birth, but suggested that post-conception surrogacy agreements could still be approved where they met eligibility criteria.\textsuperscript{143}

Zoe Rathus, former coordinator of the Women’s Legal Service, member of the Taskforce on Women and the Criminal Code and family law practice specialist at Griffith University, also supported the definition of altruistic surrogacy as a pre-conception arrangement but suggested a need for a review of the policy approach to private adoptions.\textsuperscript{144} The committee did not develop a view on private adoptions as it was outside the scope of the investigation.

Implications for traditional Torres Strait Islander ‘adoptions’

As noted, the committee was advised by both the Kupai Omasker Working Group and the Department of Child Safety that traditional Torres Strait Islander ‘adoptions’ might be agreed pre-birth as well as pre-conception.\textsuperscript{145} However, as noted, Josephine Akee, former Indigenous Family Liaison Officer, in the Family Law Court in Cairns, reported that all the Kupai Omasker parenting orders she had assisted with over the last decade had been arrangements agreed post-conception.\textsuperscript{146}

The committee notes that traditional Torres Strait Islander ‘adoptions’ which fall within the above definition of altruistic surrogacy would also be permitted under the Surrogate Parenthood Act 1988. However, if Ms

\textsuperscript{140} Australian Association of Social Workers Ltd, Submission no 77, p. 13.
\textsuperscript{141} Mark Newton, Submission no 27.
\textsuperscript{142} Rachel Kunde, Co-Director, Aussie Egg Donors, Submission no 65; Festival of Light Australia, Submission no 75.
\textsuperscript{143} Commission for Children and Young People and Child Guardian, Submission no 98, p. 2.
\textsuperscript{144} Zoe Rathus, Director of Legal Clinic, Griffith University Law School, Interview.
\textsuperscript{145} Kupai Omasker Working Group, Information provided; Hon M Keech MP, Minister for Child Safety and Minister for Women, Correspondence received, 20 August 2008.
\textsuperscript{146} Josephine Akee, former Indigenous Family Liaison Officer, the Family Law Courts, Cairns, Interview.
Akee’s experience is representative of much of the broader practice, this would mean that most traditional ‘adoptions’ would remain prohibited as private adoptions under the Adoption of Children Act 1964.

The committee is aware from evidence that traditional ‘adoptions’ continue in spite of prohibitions under both the Surrogate Parenthood Act 1988 and the Adoption of Children Act 1964. It also acknowledges the frustration expressed by the Kupai Omasker Working Group and Josephine Akee that traditional ‘adoptions’ do not fit neatly with existing concepts of surrogacy or adoption.

The Department of Child Safety was also of the view that traditional ‘adoptions’ did not fit well with the purpose, principles and procedures of mainstream adoption. Advice to the committee suggested traditional adoptions “[could not] be reconciled under regular adoption laws”.

Hon Margaret Keech MP, Minister for Department of Child Safety further explained the agency position:

Under Torres Strait tradition, birth parents and community Elders make a decision [rather than the Department undertaking a] formal assessment of the suitability of prospective parents based on objective criteria;

…the Adoption of Children Act 1964 requires a specific order to be in the best interests of a particular child, not merely that adoptions in certain circumstances serve the interests of communities and children generally.

Traditional ‘adoptions’ are regarded as private matters…the arrangements are usually kept secret from…adopted children…or are told when they reach adulthood. This contradicts current legislation and practice.

Traditional ‘adoptions’ result from an oral agreement between two families…usually made prior to the birth of the child or even before the child is conceived. The Hague Convention stipulates that consent must be given freely and …must not be before the birth of the child.

In 1985, it was determined that [the use of relative adoption provisions] did not comply with the Act because, in many cases, legal requirements in the Act were not being met (valid consents were not obtained; the suitability of the adoptive parents was not assessed; adoptive parents did not fall within the definition of ‘relative’ under the Act; and the Department was not considering whether the adoption was in the child’s best interests).147

The committee notes that some of the distinctions made in relation to traditional ‘adoptions’ and mainstream adoption also apply to surrogacy. This might suggest that if legal recognition of traditional ‘adoptions’ is to be satisfactorily achieved it needs its own specific provisions outside either surrogacy or adoption legislation or regulation. If the current review of adoption law maintains this position in relation to traditional ‘adoption,’ the committee believes the Queensland Government should consider the development of a specific provision for traditional Torres Strait Islander ‘adoptions’.148

The committee believes it is important to provide the same legal protection for children and parents for traditional Torres Strait Islander ‘adoptions’ as enjoyed under mainstream adoption or as proposed for altruistic surrogacy. This specific provision might be appropriate under the Status of Children Act 1978 or a new Act.

The committee has outlined a possible approach to the development of a mechanism for the transfer of legal parentage in the case of traditional ‘adoptions’ based on evidence collected in relation to the practice and possibly relevant lessons from the development of its policy approach in relation to altruistic surrogacy. These views are outlined at the end of the report in Chapter 9.

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147 Hon M Keech MP, Minister for Child Safety and Minister for Women, Correspondence received, 20 August 2008.
148 Department of Child Safety 2008c. The paper outlines policy directions for adoption in Queensland. In relation to Indigenous communities, it states: “Adoption is an unknown concept in Aboriginal customary law.” It then states: *Island custom includes a customary child rearing practice that is similar to adoption in that parental responsibility for a child is permanently transferred to someone other than a child’s parents. This practice is sometimes referred to as either “customary adoption” or “traditional adoption”. It then concludes: *New adoption laws for Queensland will respect Aboriginal tradition and Island custom and will not promote adoption as an appropriate option for the long term care of an Aboriginal or a Torres Strait Islander child.*
RECOMMENDATION 5: DEFINING ALTRUISTIC SURROGACY

The committee recommends that the Queensland Government defines altruistic surrogacy in the Surrogate Parenthood Act 1988 as: a clear arrangement, whether formal or informal, agreed pre-conception between consenting adults for the birth mother to bear a child for the intending parent/s and to permanently transfer the responsibility for the child’s care and upbringing to the intending parent/s after the child’s birth.

RECOMMENDATION 6: FURTHER EXAMINATION OF TRADITIONAL TORRES STRAIT ISLANDER ‘ADOPTIONS’

The committee recommends that the Queensland Government considers options for the recognition of traditional Torres Strait Islander ‘adoptions’ (also refer to Recommendation 24).

REASONABLE EXPENSES FOR BIRTH MOTHERS

The committee believes that it is important to consider the issue of reasonable expenses alongside its definition of altruistic surrogacy. The permission of reasonable expenses is an important policy issue in distinguishing altruistic surrogacy from commercial surrogacy.

Should reasonable expenses be permitted?

The committee considers the reimbursement or payment of ‘reasonable’ expenses is consistent with a prohibition on commercial surrogacy and is consistent with the concept of ‘altruistic’ surrogacy. It believes such expenses should be allowed in Queensland as part of the proposed move to decriminalise altruistic surrogacy. This approach is in keeping with the current practice in the ACT and proposed policy approaches across Australia.149

The committee heard argument opposing reasonable expenses such as that outlined by Dr Trevor Jordan, Senior Lecturer in Applied Ethics, Humanities Program, Queensland University of Technology, who wrote: I believe this altruism ought to be complete; that is, although some costs might be shared, there is no right to reimbursement and the relinquishment of the child is ultimately entirely the surrogate’s decision. A surrogate mother should set out being willing to bear the full costs of pregnancy. Any exchange of costs or gift-giving can involve obligations which could subvert altruism and open both parties to potential exploitation.150

However, the vast majority of the 22 submitters who commented on the issue supported the concept of reasonable expenses. Many of these submitters also recognised the challenge in so doing of preventing surrogacy from becoming commercial.

Reasonable expenses are also allowed in altruistic surrogacy arrangements in the UK, New Zealand and Canada.151

How should reasonable expenses be judged?

Submitters provided the following advice on how to determine reasonable expenses:

- The ANZICA suggested reasonable expenses were any expenses that would be incurred by the intending parents should they not have to use surrogacy:

  As a method of calculating reasonable expenses it may be appropriate to consider what expenses would be incurred by the couple to undertake the same treatment, if they were not required to use a surrogate.152

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149 Proposed by VLRC, WA and SA and currently as operates in the ACT.
150 Dr T Jordan, Submission no 87, p. 3.
151 s14, Human Assisted Reproductive Technology Act 2004 (NZ); s12, Assisted Human Reproduction Act 2004 (Canada); s30, Human Fertilisation and Embryology Act 1990 (UK).
152 Australian and New Zealand Infertility Counsellors’ Association, Submission no 68, p. 4.
• One confidential submission suggested reasonable expenses were a payment of the cost of all the expenses related to the surrogacy agreement.\textsuperscript{153}
• Festival of Light suggested reasonable expenses must be rigorously limited to actual out-of-pocket expenses relating to the pregnancy.\textsuperscript{154}

Current and suggested jurisdictional approaches across Australia to the definition of reasonable expenses emphasise the principle of no material gain and the reimbursement relating to the costs associated with preparing for and undertaking an altruistic surrogacy arrangement:

• The Victorian Law Reform Commission report stated:
  \begin{quote}
  In determining the scope of the prescribed payments, the commission has been guided by the principle that a woman should not receive any material benefit or advantage for her role in a surrogacy arrangement. As such, any reimbursement of expenses should only apply to an actual loss incurred.\textsuperscript{155}
  \end{quote}

• The Western Australian Surrogacy Bill 2007 allows reasonable expenses which relate to pregnancy or birth or assessment and expert advice. Payment outside these categories is not permitted.\textsuperscript{156}
• The ACT \textit{Parentage Act 2004} prohibits any “payment or reward” other than “expenses connected with a pregnancy or the birth or care of a child born as a result of the pregnancy” in an altruistic surrogacy arrangement.\textsuperscript{157}

The committee recommends that the Queensland Government permits reasonable expenses for altruistic surrogacy on the proviso that there is no material gain for the birth mother. The committee believes these expenses need to be defined in legislation or regulation as occurs in New Zealand and Canada and as proposed in Victoria, South Australia and Western Australia. The committee considers these expenses can be paid directly by the intending parents or paid to the birth mother as reimbursement of expenses incurred. The committee suggests the parties keep a record of their expenses.

The issue of the ‘baby bonus’ was raised in evidence to the committee. Assuming the birth mother has relinquished the baby, the committee concurs with the advice provided by Linda Wright, DGB Lawyers, Wollongong, an experienced legal practitioner in relation to surrogacy:

  \begin{quote}
  In all matters in which I have given advice, the surrogate parents have indicated their intention to give the bonus (when received) to the commissioning parents. If in fact that did not occur then the retention of the bonus by the surrogate parents may be seen as giving them a commercial advantage and thereby bring the arrangement into the realm of commercial surrogacy.\textsuperscript{158}
  \end{quote}

\textbf{What should be included in reasonable expenses?}

Common categories suggested for reasonable expenses include:

• **Medical costs**: Costs associated with required pre-conception medical assessment, conception, pregnancy, birth and care of the child which are not covered by Medicare, health insurance or any other benefit. It is noted that medical costs could also include the cost of additional health insurance incurred due to the surrogacy;\textsuperscript{159}

• **Counselling costs**: Costs associated with psychosocial assessment and counselling required pre-conception, during and after birth. This is allowable by the South Australian Statutes Amendment (Surrogacy) Bill 2008 and the Western Australian Surrogacy Bill 2007. The ANZICA also suggested:
  \begin{quote}
  These costs may include payment of any necessary postnatal mental health expenses for the surrogate for up to one year.\textsuperscript{160}
  \end{quote}

• **Legal costs**: Costs associated with legal advice including pre-conception and post-birth advice; birth registration; and transfer of legal parentage.\textsuperscript{161} These costs are considered permissible in the Victorian

\begin{footnotes}
\item[153] Confidential, Submission no 78.
\item[154] Festival of Light Australia, Submission no 75.
\item[156] s6, Surrogacy Bill 2007 (WA).
\item[157] s40.
\item[158] Linda Wright, DGB Lawyers, Submission no 84, p. 5.
\item[159] Victorian Law Reform Commission 2007, Recommendation 121.
\item[160] Australian and New Zealand Infertility Counsellor’s Association, Submission no 68, p. 5.
\end{footnotes}
Investigation into Altruistic Surrogacy

Law Reform Commission report and the South Australian Statues Amendment (Surrogacy) Bill 2008 but not in the Western Australian Surrogacy Bill 2007; and

- **Income replacement and protection costs:** Costs associated with income protection, disability and life insurance and lost earnings. The Western Australian Surrogacy Bill 2007 and the Victorian Law Reform Commission report support the payment of lost earnings up to a maximum of two months during the birth period.\(^{162}\) In addition, Western Australia supports the payment of additional time off if medically indicated.

**Commission for Children and Young People and Child Guardian:**

*If the surrogate mother is employed when she enters into the surrogacy arrangement and has to take time off work in connection with the pregnancy or birth her actual loss of earnings should be reimbursed. The time taken off work should be in accordance with medical advice and statutory guidelines and documentary proof of the actual loss of earnings should be provided.*\(^{163}\)

The committee also reviewed advice from submitters that reasonable expenses should include travel, accommodation and childcare expenses. Given the physical size of Queensland and the possibility of parties still choosing to seek treatment interstate, the committee believes such expenses are also reasonable.

The committee believes that permitted expenses should be defined in legislation or regulation and should cover the following categories: medical, legal, counselling, travel/accommodation, childcare and insurance costs and lost earnings which are directly attributable to the surrogacy and not covered by existing entitlements or benefits.

The committee discussed whether it was fair on employers for birth mothers to use sick leave or parental leave entitlements for altruistic surrogacy. It could be argued that parental leave was provided specifically to support employees to create their own families. The question was raised whether it was equitable for employers to bear this cost for surrogacy. However, the committee noted it was the practice in the case of organ donation for donors to use their sick leave entitlements to prepare for or undertake any required medical procedures for donation.\(^{164}\)

The committee believes paid maternity leave should be limited to a maximum of two months associated with the birth with additional leave during pregnancy payable where medically indicated.

**Should payment of reasonable expenses be enforceable?**

Whilst it opposes altruistic surrogacy arrangements being enforceable, the Victorian Law Reform Commission report supports the enforceability of ‘prescribed payments’.\(^{165}\) This approach was also supported by the recent inquiry by the Western Australian Legislative Council Standing Committee on Legislation in relation to the Surrogacy Bill 2007.\(^{166}\)

However, this committee does not support the enforceability of payment of reasonable expenses as part of surrogacy arrangements in Queensland. The committee considers that the basis of effective altruistic surrogacy arrangements is: altruism, trust and good communication. The parties need to accept personal responsibility for the risks involved in surrogacy and examine all issues relating to payment of reasonable expenses as part of pre-conception preparation and assessment processes.

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\(^{161}\) Victorian Law Reform Commission 2007, Recommendation 121.

\(^{162}\) Victorian Law Reform Commission 2007, Recommendation 121.


\(^{164}\) Based on advice from the secretariat for the Review of Organ and Tissue Donation Procedures Select Committee 2008, Queensland Parliament.


\(^{166}\) Standing Committee on Legislation 2008a, p. 3.
How will reasonable expenses be monitored?

The committee acknowledges the challenges of monitoring the payment of reasonable expenses. However, it does not believe this is a reason for disallowing expenses. In fact, it believes there is more likelihood of compliance if reasonable expenses are allowed.

As outlined in Chapter 5, under proposed new ART regulations, parties should discuss reasonable expense obligations in the course of legal advice and psychosocial assessment for ART services. As is discussed in Chapter 7, under the proposed new provision for the transfer of legal parentage, parties will be required to provide a statutory declaration that they have complied with the reasonable expenses requirements. The latter is the approach recommended by the Victorian Law Reform Commission report. In the UK, Courts also examine reasonable expenses as part of the transfer of legal parentage provisions.167

RECOMMENDATION 7: REASONABLE EXPENSES

The committee recommends that the Queensland Government ensures the appropriate legislation and/or relevant regulation:

- Permits reasonable expenses for altruistic surrogacy as long as there is no material gain for the birth mother;
- Defines categories of permitted expenses as follows: medical, legal, counselling, travel/accommodation, childcare and insurance costs and lost earnings which are directly attributable to the altruistic surrogacy arrangement and not covered by existing entitlements or benefits. Paid maternity leave will be limited to a maximum of two months associated with the birth and additional leave during pregnancy where medically indicated; and
- Clarifies that payment of reasonable expenses is not enforceable as part of altruistic surrogacy arrangements.

ACCESS TO ADVERTISING AND BROKERAGE SERVICES

The Surrogate Parenthood Act 1988 currently prohibits advertising for all surrogacy arrangements in Queensland.

In the absence of the Surrogate Parenthood Act 1988, the prohibition on advertising for fertility clinics would still persist in Queensland under the NHMRC’s guideline which states:

Clinicians should not advertise a service to provide or facilitate surrogacy arrangements, nor receive a fee for services to facilitate surrogacy arrangements.168

It is interesting to note that 11 of the 14 submitters who responded to the issue supported advertising in altruistic surrogacy arrangements. However, the 14 submitters responding to the issue were evenly divided in allowing or prohibiting brokerage for altruistic surrogacy.

Arguments in favour of advertising and brokerage169

The Western Australian Bill takes the approach that if altruistic surrogacy is decriminalised, brokerage and advertising should be permitted as long as the facilitator and potential birth mother receives no financial reward.170 Proposed codes of practice for altruistic surrogacy in Western Australia suggest:

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167 30, Human Fertilisation and Embryology Act 1990 (UK): “The Court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or the wife for or in consideration of (a) the making of the order”: J Seymour & S Magri 2004, p. 44.

168 National Health and Medical Research Council 2007, Guideline 13.2.1, p. 57.

169 It is noted that some submitters supported advertising for intending parents only and one submitter, Rachel Kunde, Co-Director, Aussie Egg Donors (Submission no 65) suggested that Queensland might consider a similar approach to that in Victoria in relation to government approval to advertise for egg donation: To control the advertising of surrogates the commissioning parents could be made to apply to the Attorney General to gain approval to advertise as is done in Victoria for couples who wish to advertise for egg or sperm donors.

170 Part 2, Div 2, Surrogacy Bill 2007 (WA).
The licensee may introduce a potential birth mother to arranged parents, but should not actively recruit women who may be willing to undertake a surrogacy arrangement for arranged parents and must not derive any financial benefit for introducing the participants in a surrogacy arrangement.\textsuperscript{171}

Another argument in favour of permitting advertising and brokerage was put forward by a potential intending parent. She argued it could place undue pressure on family and friends to offer to act as birth mothers. Some people may not have family or friends in a position to offer. In addition, depending on the nature of relationships, some people may not want to pursue a surrogacy arrangement within their family:

\textit{Commissioning parents should be able to advertise or use a brokerage service if they have no one willing to [act as a] surrogate for them.}\textsuperscript{172}

A third argument was one of equity with gamete donors, where advertising for sperm and egg donors is currently allowed:

\textit{A commissioning parent should be able to advertise for a surrogate in the same way that infertile couples advertise for a sperm or egg donor.}\textsuperscript{173}

The fourth argument supporting advertising and brokerage was the practical difficulty of prohibition. This was particularly the case in relation to websites which facilitate information exchange and networking in relation to surrogacy without much opportunity for public scrutiny.

\textbf{Arguments opposing advertising and brokerage}

In contrast, the ACT \textit{Parentage Act 2004} which provides for altruistic surrogacy arrangements prohibits both brokering and advertising for surrogacy arrangements.\textsuperscript{174}

There are two key arguments opposing advertising and brokerage for altruistic surrogacy:

\begin{itemize}
  \item It is one way which can help prevent the commercialisation of surrogacy; and
  \item It supports the development of altruistic surrogacy arrangements where intending parents have an existing relationship with the birth mother.
\end{itemize}

\begin{quote}
\textbf{Linda Wright, lawyer providing advice on altruistic surrogacy, NSW:}

\textit{I would support a prohibition on brokering and advertising. Given my view that one of the criteria for surrogacy arrangements should be that the surrogate is either related to or has a long term friendship with the commissioning parents then such services should not be necessary in any event.}\textsuperscript{175}
\end{quote}

\begin{quote}
\textbf{Miranda Montrone, clinical psychologist and assessor, NSW:}

\textit{I think it is a bit like I would say to people who are looking for donor eggs. ‘You need to be very open about what you need and then you wait for somebody to make the offer.’ … that is the long answer to say I do not agree [with advertising], even though I know it is hard for people who do not have someone offering. I really understand that, but I think that is the line where we have to stop towards commercialisation.}\textsuperscript{176}
\end{quote}

\textbf{Preferred position}

The committee recommends that the Queensland Government prohibits advertising and brokerage for altruistic surrogacy under the \textit{Surrogate Parenthood Act 1988}.

This position reflects the committee’s desire to avoid commercial surrogacy and its preference for arrangements between family networks and close friends which have an opportunity for ongoing contact between the child and birth mother.

\textsuperscript{171} Human Reproductive Council 2007, Guideline 4.6: Role of the clinic in introducing arranged parents and birth mothers.
\textsuperscript{172} Confidential, Submission no 56.
\textsuperscript{173} Rachel Kunde, Co-Director, Aussie Egg Donors, Submission no 65, p. 1.
\textsuperscript{174} Part 4, s42-44, \textit{Parentage Act 2004} (ACT).
\textsuperscript{175} Linda Wright, DGB Lawyers, Submission no 84, p. 5.
\textsuperscript{176} Investigation into Altruistic Surrogacy Committee 2008a, p. 28.
The committee recognises that it may not be possible to prevent people resident in Queensland from accessing advertising and brokerage services, particularly those available online. However, to the maximum extent possible Queensland based advertising and brokerage should be discouraged.

**RECOMMENDATION 8: PROHIBITION OF ADVERTISING AND BROKAGE**

The committee recommends that the Queensland Government prohibits advertising and brokerage for altruistic surrogacy.

**KEY CONSIDERATIONS IN DEVELOPING POLICY PRINCIPLES**

In its analysis of submissions and its literature review, the committee identified a number of key considerations for the Government in articulating policy principles as part of a legislative and regulatory framework for altruistic surrogacy. These key considerations are detailed below.

*Balancing clarity of intent with a flexibility to respond to individual circumstances*

One of the critiques of the use of the ‘best interests of the child’ principle was that it was not clearly interpreted by policy makers. As noted, a review of the arguments for and against surrogacy suggested different interpretations of the principle. It is suggested that if the ‘best interests of the child’ principle is used, the Government needs to provide more direction to clarify the intent of the principle for the parties involved in a surrogacy arrangement, for service providers, professionals and the broader community. In addition, given the difficulty of foreseeing all the possible individual circumstances which might arise, it is suggested the principle needs to provide flexibility to respond to individual cases.

Alistair Nicholson, former Chief Justice of the Family Law Court, suggested specifying “factors that might go into the determination of best interests [of a child].” He also expressed:

> ... grave reservations about the approach that the health and well being of the child is paramount and leaving it to the clinics to work it out for themselves.

John Tobin, a legal expert on the UN Convention on the Rights of the Child, from the University of Melbourne, advocated the use of the Convention in determining the best interests of the child in relation to the provision of ART services including surrogacy:

> …the criticism [is] often made that the best interest principle…is indeterminate and subjective. In the context of the Convention, however, such criticisms are unwarranted. While the principle remains fluid and flexible concept, it is not unfettered or entirely subject to the personal whims of a decision maker. Rather, it is informed and constrained by the rights and principles provided for under the Convention. Put simply. A proposed outcome for a child cannot be said to be in his or her best interests where it conflicts which the provisions of the Convention.

*Articulating the best interest of the child in the absence of a specific child*

In the Family Law Court, judges are asked to determine what is in the best interests of a specific child. In terms of a desire to regulate surrogacy before conception, the focus is on a potential child. However, the committee believes that this does not mean that the best interest of the child should or cannot be pursued. Policy makers can identify and draw on best practice approaches and research findings.

The Family Law Act 1975 states primary considerations in determining the child’s best interests include:

- The benefit of the child having a meaningful relationship with [its] parents; and
- The need to protect the child from physical or psychological harm from being subject to, or exposed to, abuse, neglect or family violence.

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180 s60C (1) & (2)
The UN *Convention on the Rights of the Child* also provided policy guidance. Tobin also suggested that policy makers should provide for the fact that, once born, a child is entitled to all the protections afforded under the UN *Convention on the Rights of the Child*.  

In addition, research from adoptees and children born of donor conception highlighted the identity issues and rights to information on genetic parentage.

**Julie Harcourt, Director, Strategic Policy and Research, Commission for Children and Young People and Child Guardian:**

…it is about a child having loving parents, being wanted from the start, no confusion, no secrets, access to all the information and no tug of war.

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**Interrelated interests**

Alistair Nicholson also highlighted the inter-relatedness of parties’ interests with that of the child. He quoted Justice Kirby in the context of a family law case:

*As stated in this Court…the best interests of the child are to be treated as paramount. However, they are not elevated to the sole factor for consideration. The economic, cultural and psychological welfare of the parents is also to be considered, because they are human beings and citizens too and because it is accepted that their welfare impacts upon the welfare of the child. The general quality of life of both the parents and the child is relevant.*

**The need to conform to existing anti-discrimination law**

Advice from the Human Rights and Equal Opportunity Commission and a review of cases brought under the *Commonwealth Sex Discrimination Act 1984* highlighted the need for state governments to develop ART legislation and regulation which complies with such law. State law and regulation must not restrict access to services or discriminate on the basis of marital status, sexuality, race or religion.

Tobin suggested that the effective enjoyment of the child’s right to birth registration in the UN *Convention on the Rights of the Child*:

*… requires that the law recognise the actual nature of a child’s family environment and include information about the identity of those persons who have accepted parental responsibility for the child.*

A review of research outcomes for children born of same-sex couples also indicated children were not disadvantaged by their family type. Outcomes were dependent on the quality of family relationships and the quality of nurturing.

**The ongoing needs of parties and monitoring outcomes from surrogacy**

Jigsaw Queensland argued that altruistic surrogacy, like adoption, has life long impacts for all those involved. Whilst families formed through altruistic surrogacy are likely to experience similar needs to other families, they may have specific issues which arise from their particular experience and these needs may change over time. The committee believes it is important for the Government to monitor the outcomes of surrogacy arrangements and the proposed legislative and regulatory framework over time.

**The difficulty of regulating private behaviour**

Finally, there was a common recognition of the difficulties and limits of regulating private behaviour. As articulated, the Government needs to balance the protection of liberty with the prevention of harm. The Torres Strait Islander customary practice and the informal web-based networking on surrogacy illustrate

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181 J Tobin 2004, p. 3.  
182 Investigation into Altruistic Surrogacy Committee 2008b, p. 48.  
183 Hon A Nicholson AO RFD QC 2006, p. 3.  
186 Jigsaw Queensland, Submission no 114.
the difficulties of enforcing Queensland’s current prohibition model. Not everyone pursuing altruistic surrogacy requires access to medical assistance.

**ARTICULATING POLICY PRINCIPLES AND OUTCOMES**

Drawing on the key considerations outlined above, the committee proposes five key policy principles to guide a legislative and regulatory framework for altruistic surrogacy in Queensland.

The committee takes as a given that the welfare of children who may be born as a result of ART is paramount. This is already required in the NHMRC guideline 2.5.187 In its first three principles, the committee seeks to articulate the best interests of the child in the context of regulating altruistic surrogacy. These three principles are detailed below and cover: a child’s rights to survival and development, a child’s right to identity and a child’s right to enjoyment of the same status and legal protection as other children. The three principles draw on the paper by Tobin, titled: *The Convention on the Rights of the Child: the rights and best interests of children conceived through assisted reproduction*. The fourth principle is the promotion of the health and wellbeing of parties to a surrogacy arrangement. This principle draws on existing national policy and proposed approaches elsewhere.188 The fifth principle seeks to respect the autonomy of parties to a surrogacy arrangement. This reflects the NHMRC guideline 2.6.189 Against these principles, the committee has articulated the outcomes it seeks.

The principles also demonstrate how the committee seeks to balance the promotion of liberty of people in their private lives and parity with other families with the protection from harm and the required duty of care of professionals. The table below seeks to summarise and illustrate how these principles and considerations drive the recommended legislative and regulatory framework detailed in this report.

The *Surrogate Parenthood Act 1988* does not articulate policy principles or outcomes sought to guide the regulation of altruistic surrogacy. The committee believes that the proposed policy principles and statements of outcomes sought could usefully be included in legislation to guide the development of other regulatory initiatives described below.

<table>
<thead>
<tr>
<th>Principles and Outcomes</th>
<th>Policy implications</th>
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<tbody>
<tr>
<td><strong>Principle 1:</strong></td>
<td></td>
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<tr>
<td>• Every child is nurtured, loved and supported.</td>
<td>Prevention of harm/duty of care:</td>
</tr>
<tr>
<td><strong>Outcomes Sought:</strong></td>
<td>• Mandatory counselling of the intending parents and birth parents.</td>
</tr>
<tr>
<td>• A child has a stable, living environment free from abuse, neglect and violence.</td>
<td>• Evidence of informed consent by intending parents and birth parents.</td>
</tr>
<tr>
<td>• A child’s health is protected.</td>
<td>• Independent assessment of intending parents’ and birth mother’s health status; risks to the child, and intending parents’ capacity to provide long term care.</td>
</tr>
<tr>
<td>• Parents have the capacity to provide long term care for the child.</td>
<td>• Access to ART to reduce health risks for birth mother and child.</td>
</tr>
<tr>
<td>• Siblings’ health and wellbeing is protected.</td>
<td>• Transfer of legal parentage occurs within six months after birth to assist bonding.</td>
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<tr>
<td></td>
<td>• Ongoing monitoring and research of outcomes for children.</td>
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</table>

189 National Health and Medical Research Council 2007, Guideline 2.6, p. 10.
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<thead>
<tr>
<th>Principle 2:</th>
<th>Prevention of harm/duty of care:</th>
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<tbody>
<tr>
<td>Every child has access to his/her identity.</td>
<td>Intending parents, birth parents and donors are educated on the child’s right to identity and research findings on early telling and the potential benefits to the child of developing and maintaining ongoing relationships from birth.</td>
</tr>
<tr>
<td>Outcomes Sought:</td>
<td>Intending parents, birth mothers, donors and children have access to support as required to address identity related issues.</td>
</tr>
<tr>
<td>• A child’s records on his/her genetic parentage and circumstances of birth are created, maintained and accessible.</td>
<td>• Only known or identified birth mothers or donors are used.</td>
</tr>
<tr>
<td>• The child has a right as an adult, to seek to develop a relationship with his/her birth parents, siblings and/or donor.</td>
<td>• Government develops and actively promotes a central register to better secure identifying data in the long term and provide an opportunity for voluntary exchange of information between parties.</td>
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<tr>
<th>Protection of liberty/parity with other families:</th>
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<td>• Intending parents, birth parents and donors are educated on the child’s right to identity and research findings on early telling and the potential benefits to the child of developing and maintaining ongoing relationships from birth.</td>
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<thead>
<tr>
<th>Principle 3:</th>
<th>Protection of liberty/parity with other families:</th>
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<tbody>
<tr>
<td>Every child enjoys the same status and legal protection irrespective of the circumstances of their birth or the status of their parents.</td>
<td>• Parents cannot be forced to tell or maintain relationships with birth mothers and donors.</td>
</tr>
<tr>
<td>Outcomes Sought:</td>
<td>• All children have the same rights to information under the UN Convention on the Rights of the Child.</td>
</tr>
<tr>
<td>• A child is not stigmatised by the manner of his/her conception.</td>
<td>• Government maintains a central register for surrogacy information like adoptions information.</td>
</tr>
<tr>
<td>• A child is not disadvantaged by the lack of recognition of intending parents as legal parents, for example in terms of child support or inheritance.</td>
<td>• Children have access to their original birth certificates and information on the register when they turn 18 years.</td>
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<tr>
<th>Principle 4:</th>
<th>Protection of liberty/parity with other families:</th>
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<tbody>
<tr>
<td>The long term health and wellbeing of the parties to a altruistic surrogacy arrangement and their families is promoted.</td>
<td>Access to altruistic surrogacy is an option irrespective of marital status, sexuality, race or religion.</td>
</tr>
<tr>
<td>Outcomes Sought:</td>
<td>• The transfer of legal parentage is undertaken with the consent of the birth parents.</td>
</tr>
<tr>
<td>• Intending parents and birth parents enter agreements based on trust and altruism.</td>
<td>Government develops a mechanism to provide legal certainty enjoyed by other children.</td>
</tr>
<tr>
<td>• Conflict between the birth mother and intending parents is prevented as far as possible.</td>
<td>• Access is available to existing appeal processes and second opinions.</td>
</tr>
<tr>
<td>• Parties are not exploited, commodified or coerced.</td>
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<tr>
<td>• Parties do not feel stigmatised.</td>
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<td>• Intending parents have the peace of mind which comes with legal recognition.</td>
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<table>
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<th>Prevention of harm/duty of care:</th>
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<tr>
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<tr>
<td>• Evidence of informed consent by intending parents and birth parents.</td>
</tr>
<tr>
<td>• Expenses are limited to defined categories of costs and lost earnings and advertising and brokerage are prohibited.</td>
</tr>
<tr>
<td>• Arrangements are unenforceable and transfer of legal parentage only occurs after a cooling off period after birth and with consent of birth parents.</td>
</tr>
<tr>
<td>• Intending parents and birth mothers’ ongoing support needs are identified and addressed.</td>
</tr>
<tr>
<td>• Ongoing monitoring and research of outcomes for parties.</td>
</tr>
</tbody>
</table>
Principle 5:
- The autonomy of consenting adults in their private lives is respected.

Outcomes Sought:
- Intrusion is minimised.
- Privacy is protected.
- Birth mothers in a surrogacy arrangement have the same rights and autonomy as other pregnant women and birth mothers.

Prevention of harm/duty of care:
- Arrangements are unenforceable and transfer of legal parentage only occurs after a cooling off period after birth and with the consent of the birth parents.

Protection of liberty/parity with other families:
- Intending parents should be compared with other parents who conceive through ART or naturally.
- Decisions on the management of pregnancy or birth process are ultimately matters for the birth mother and her medical advisors.
- The transfer of legal parentage is undertaken with the consent of the birth parents.
- Access is available to existing appeal processes and second opinions.

RECOMMENDATION 9: ARTICULATING POLICY PRINCIPLES

The committee recommends that the Queensland Government articulates five key policy principles supported by specific outcome statements in legislation to guide the regulation of altruistic surrogacy in Queensland. The best interests of the child are articulated under the committee’s first three proposed principles. The five principles are as follows:
- Every child is nurtured, loved and supported;
- Every child has access to his/her identity;
- Every child enjoys the same status and legal protection irrespective of the circumstances of his/her birth or the status of their parents;
- The long-term health and wellbeing of the parties to a surrogacy arrangement and their families is promoted; and
- The autonomy of consenting adults in their private lives is respected.
CHAPTER 4: GENETIC CONNECTIONS

TERM OF REFERENCE
This chapter addresses the following term of reference:

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

The committee considered two key questions to frame its analysis and response in relation to this term of reference:

• Do gestational surrogacy arrangements have different outcomes (for birth mothers and children) to traditional or partial surrogacy arrangements?
• How important is a genetic connection with one or both intending parents?

In this chapter, the committee explores these questions and outlines the implications for legislation and regulation in relation to altruistic surrogacy.

POSSIBLE SCENARIOS

There are many genetic relationships possible within surrogacy arrangements. Children may be conceived through donor sperm, eggs or embryos resulting in full, partial, or no genetic connection to either or both of their intending parents.

In traditional or partial surrogacy, the birth mother contributes her gametes, which may be fertilised by gametes from the intending father or a donor. This type of surrogacy could take place in a fertility clinic, or in private without the assistance of medical practitioners. In this arrangement, the birth mother is the genetic mother of the child and either the intending father, or another donor, could be a genetic parent.

In gestational surrogacy, the birth mother carries or gestates the foetus, which is not genetically her own. The embryo is created using the gametes of the intending parents or donors. The embryo is then transferred, with medical assistance, to the birth mother. In a gestational surrogacy arrangement, one or both of the intending parents could be the child’s genetic parent, or the child could be genetically related to one or two other donors.

As noted, one of the key concerns is that surrogacy may create very complex family relationships. For instance, if both intending parents are infertile, there may be six adults involved: two donors, the intending parents and the birth mother and her partner. 190

OUTCOMES OF GESTATIONAL V TRADITIONAL SURROGACY ARRANGEMENTS

Identified risks

There was a strong assumption in the literature reviewed that gestational surrogacy is a less risky proposition. This view was also a clear theme in submissions received. It was believed to be easier emotionally on the birth mother and to reduce the risk of the birth mother refusing to relinquish the child. It was seen as simpler for the child and easier for any of his/her siblings as traditional surrogacy may result in half-siblings.

Singer and Wells highlighted the potential issues arising for children:

The children of [traditional] surrogacy know that … they cannot distance their present self from the [birth mother] who carried them, because they will always carry the characteristics they have inherited from the [birth mother]. In this respect the children of [traditional] surrogacy may experience some of the anxiety about their genetic mothers that the children of artificial insemination may have about their genetic fathers. 191

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190 O van den Akker 2006, p. 54.
191 P Singer & D Wells 1984, p. 129.
There are two court cases which illustrate the perceived risks with traditional surrogacy: the Baby M case in the US and the Re Evelyn case in Australia. The landmark cases resulted from a situation where the birth mother "suffered intense grief after relinquishing her baby and reneged on the surrogacy agreement." The cases also illustrate traditional surrogacy arrangements are not legally secure.\footnote{D Cooper 2001.}

\begin{table}[h]
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\hline
\textbf{CASE STUDIES} \\
\hline

Baby M: In 1986, the genetic mother gave birth to Baby M after being artificially inseminated with the intending father’s sperm. Within 24 hours of transferring custody, the birth mother returned to ask for the baby back, threatening suicide. The birth mother then refused to return the baby and left the state, taking the infant with her. After a lengthy legal battle, the intending father was awarded custody and the birth mother was awarded visitation rights. When she turned 18 years of age, Baby M arranged to be legally adopted by her intending mother.

Re Evelyn: The 1998 Australian Family Law case of Re Evelyn involved a traditional surrogacy arrangement between close friends. Evelyn was conceived using her birth mother’s egg and her intending father’s sperm. Evelyn lived for 12 months in Queensland with her intending parents. However, her birth mother could not relinquish the baby. The Court found in favour of Evelyn’s birth mother and awarded custody of Evelyn to her.\footnote{Victorian Law Reform Commission 2007, p. 162; L Willmott 2002, pp. 198-220.}

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Review of case law

A review of case law in Australia, the UK and the US in 2007 concluded:

\begin{quote}
…there may be an increased likelihood of failure to relinquish when the surrogate and the child are directly related…and legislation dealing with surrogacy should discourage surrogacy arrangements where the surrogate’s gametes are used in the creation of an embryo. Use of a surrogate mother’s eggs should only be considered in extenuating circumstances.\footnote{P Trowse 2007, p. 1.}
\end{quote}

Of the cases examined where the birth mother failed to relinquish the child:

- Two of seven in the US involved a gestational surrogacy arrangement;
- One of five in the UK involved a gestational surrogacy arrangement; and
- The only Australian case identified (Re Evelyn) involved a traditional surrogacy arrangement.\footnote{P Trowse 2007, pp. 23-26.}

The review identified that:

\begin{quote}
… the usual reason given by surrogates who failed to relinquish the child related to concerns about the parenting capacity of the commissioning parents …[i]t often followed a period whereby relations had deteriorated between the parties. It is difficult to know whether the deterioration in relationships followed perceived parenting inadequacies or whether perceived parenting inadequacies caused the relationship breakdown. It is also difficult to know whether surrogates who are genetically linked to the child are more sensitive to these issues.\footnote{P Trowse 2007, p. 26.}
\end{quote}

Trend toward gestational surrogacy

Although it is very difficult to estimate the full extent of surrogacy given the lack of data for surrogacy outside ART services, there appears to be a trend towards gestational surrogacy within ART services. This is because of the legal uncertainty attached to traditional surrogacy, identified risks to birth mothers and children and the availability of embryo transfer technology.
The following observations have been made about surrogacy trends in the UK, US and Australia:

**United Kingdom**

Van den Akker identified a change in surrogacy in the UK in the ten years to 2005 and explained:

...although this shift in type of surrogacy used suggests a change in the availability of IVF surrogacy, it must be born in mind that... all women explained that they opted for the gestational route because they could use their gametes.\(^{197}\)

Based on research in the UK, van den Akker reported that most people who undertook traditional surrogacy or used donated gametes did so because they could not use their gametes.

**United States**

Dean Murphy, a doctoral researcher in the area of same-sex fathers’ kinship arrangements in the US and Australia, reported that trends in commercial surrogacy in the US indicate that “most surrogacy arrangements are now gestational rather than traditional”. He explained that:

This trend seems to reflect a desire to separate genetic motherhood from gestational motherhood. It is perceived that this will in turn reduce the risk of non-relinquishment of the child after birth.\(^{198}\)

**Australia**

Miranda Montrone, a clinical psychologist in NSW, reported that, 48 of the 50 surrogacy cases she assessed over the past 10 years were gestational.\(^{199}\) These cases were referred to her for psychosocial assessment by Sydney IVF and Canberra Fertility Centre, the two key fertility clinics providing services for altruistic surrogacy in Australia. Both clinics have policies requiring gestational surrogacy.

**Significance of gestational relationship**

Many of the opponents of altruistic surrogacy pointed to the significance of the gestational relationship and its importance in influencing the outcomes for the parties to the arrangement. Professor Tom Frame, Director of St Mark’s National Theological Centre, Canberra, who has also expressed his grave reservations about surrogacy in a recent book, Children on Demand: the Ethics of Defying Nature, illustrated this view. He stated:

Experience makes plain that there is an essential link between them [gestation and parenthood]. The woman who gives birth to a child is that child’s mother for a period of nine months. There is no other means of describing surrogacy than motherhood. The surrogate mother’s whole being is oriented towards a child that will be born only to be relinquished. ...However much we might try, the biological cannot be separated from the relational.\(^{200}\)

Professor Frame also highlighted the uncertain impact of the gestational relationship:

No two women experience pregnancy in quite the same way and the same woman can experience different pregnancies differently...Thus, how can a woman give fully informed consent to part with a child she will have felt growing and developing inside her, that she will have given form to through her body, before she knows the feelings these experiences will have produced?\(^{201}\)

Professor Frame was a member of John James Hospital Ethics Committee in Canberra which prepared ethical guidelines for surrogacy at the Canberra Fertility Centre. This committee only allowed gestational surrogacy and required a genetic connection to both intending parents.

In the US, a New Jersey Court also noted the significance of the gestational relationship. In response to legal argument which sought to differentiate a gestational surrogacy case from the Baby M traditional surrogacy case, the Court stated:

A bond is created between the gestational mother and the baby she carries in her womb for nine months. During the pregnancy, the foetus relies on the gestational mother for a myriad of

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\(^{197}\) O van den Akker, 2006, p. 57.

\(^{198}\) Dean Murphy, Submission no 104, p. 3.

\(^{199}\) T Frame 2008, pp. 10-11.

\(^{200}\) T Frame 2003, pp. 37 & 41; T Frame, 2008, p. 152.

\(^{201}\) S Dodds and K Jones, philosophers working in feminism and bioethics at Wollongong University, in T Frame 2008, p. 152.
The gestational mother contributes an endocrine cascade that determines how the child will grow, when its cells will divide and differentiate in the womb, and how the child will appear and function for the rest of its life.

The Kirkmans, the first family created by IVF surrogacy, expressed a need to take account of the possible impact of the gestational relationship. For this reason, they did not support enforceable contracts:

…no woman should ever be forced to relinquish a baby who’s grown inside her body, regardless of the baby’s genetic origins…the family favours a four week period of grace after the birth during which a gestational mother can ascertain her feelings and be supported in her decision to relinquish or not. Once that month’s up, the child must be allowed to develop a stable relationship with whoever is then considered to be the mother. There’s no going back.

Many of the supporters of altruistic surrogacy, particularly intending parents and would-be birth mothers, typically conceptualised the birth mother in her functional rather than relational role. Such terms as ‘incubator’, ‘oven’ and ‘baby sitter’ were used in a number of submissions. Kay Oke, former senior social worker with over 30 years experience in working with families who have been through ART services, identified this as a possible response from intending parents and would-be birth parents due to the pain of infertility and the deep desire to help others. She nominated the impact of the gestational relationship on the birth mother as one of two key risks to deal with in the counselling process.

Developmental psychologist, Professor Heather Mohay, School of Psychology and Counselling, QUT offered the following opinion in correspondence to the committee:

*It is certainly true many parents start to form an attachment to the infant before it is born…Likewise babies begins to learn in utero…It does however take several months before the infant has formed a clear preferential attachment to its primary caretakers.*

She also acknowledged in evidence:

*I think surrogate mothers may be able to detach…and treat it more intellectually and not form that attachment.*

### Capacity to relinquish

Many submitters believed that a genetic relationship between the child and surrogate would carry an increased risk for not relinquishing the baby. This view was also supported by the review of case law summarised above.

Meanwhile, a 2005 UK study by van den Akker found that most gestational birth mothers had no trouble relinquishing the baby. Similarly, an Australian study of 13 gestational birth mothers by Goble and Cook indicated that they were able to treat the pregnancy differently to previous pregnancies with their own children. One birth mother explained:

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

Associate Professor Roger Cook, Swinburne University, explained the distinction between gestational and traditional surrogacy was “critical” to the women in the Australian study. He said:

*The most important finding was that all of the women were able to make a strong cognitive distinction between the baby that they might have for another woman and those that they had already had to form their own families. They were able to state unequivocally that the*

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204 The other risk is the impact of the arrangement on any existing children of the birth mother. Kay Oke, Melbourne IVF, Interview.
205 Professor Heather Mohay, Developmental Psychologist, Psychology and Counselling, Faculty of Health, Queensland University of Technology, Correspondence received, 30 July 2008.
206 Investigation into Altruistic Surrogacy Committee 2008b, p. 31.
208 O van den Akker 2007, p. 56.
commissioning couples were the true parents and that the role of a surrogate mother was to help another woman by carrying the baby through a pregnancy. This cognitive adaptation enabled them to develop effective emotional detachment and consequently there were no reports in our group of any relinquishment difficulties.\textsuperscript{209}

A/Professor Cook also saw the women who carry a baby in a surrogacy arrangement as a special group. He said:

\ldots[those] who for whatever reason do not think that they could relinquish a child with which they had been pregnant, will of course not volunteer for this altruistic program.\textsuperscript{210}

The consumer infertility support group, ACCESS, suggested that fear of relinquishment difficulties were exaggerated. Sandra Dill, Chief Executive Officer, ACCESS pointed to her survey research of parties to 28 surrogacy arrangements in Australia. The research found 23 percent of intending fathers and 33 percent of intending mothers were concerned about the birth mother’s capacity to relinquish, whilst no birth mothers interviewed expressed such concerns.\textsuperscript{211}

Submitters’ views on the prohibition of traditional surrogacy

Four submitters clearly sought a prohibition on traditional surrogacy:

- Antonia Clissa, former Executive Officer, Western Australian Reproductive Technology Council argued:
  \textit{In order to minimise potential harm for the birth mother and her family I would recommend only permitting gestational surrogacy which requires IVF}.\textsuperscript{212}

- The ANZICA said:
  \textit{It is inappropriate for the surrogate to also be an egg donor. In the instance of a commissioning mother being unable to use her eggs, a third party should be sourced to act as the egg donor}.\textsuperscript{213}

- The South Australian Council on Reproductive Technology suggested that only: “medically indicated, non-commercial gestational surrogacy should be permitted”.\textsuperscript{214}

- Professor Lindy Willmott, Faculty of Law, QUT, wrote:
  \ldots[a surrogate should be prohibited from providing gametes. (The case law indicates that there is less likely to be separation issues if there is not a genetic connection between the surrogate and the child).].\textsuperscript{215}

Australian Medical Association (Queensland) and the Queensland Fertility Group believed traditional surrogacy should be limited to situations where the birth mother was either a sister or a mother of the intending parents. They also sought to separate the concepts and acts of gestation and egg donation in traditional surrogacy. They suggested:

\ldots[traditional] surrogacy should be limited to the surrogate having a first degree genetic relationship with one of the commissioning parents. This situation maintains a genetic link and may decrease the likelihood of conflict. In partial surrogacy where there is not a genetic relationship between commissioning parents and gestational parent, the gestational carrier has a legitimate and complicating genetic claim on the child after delivery. This type of surrogacy agreement is less likely to be in the best interest of any resultant children particularly if the agreement is contested.

\textit{IVF procedures must be used to collect eggs in any of the above, rather than utilization of artificial insemination procedures. This will then clearly define family related surrogacy as two separate acts, one being oocyte [egg] donation and the other being gestational carrier.}

\textit{Donor oocytes may be utilised if necessary in altruistic surrogacy arrangements but ideally these should be sourced from a third party not the gestational carrier}.\textsuperscript{216}

\begin{footnotesize}
\begin{itemize}
  \item\textsuperscript{209} A/Professor Roger Cook, Swinburne University of Technology, Victoria, Submission no 99, p. 2.
  \item\textsuperscript{210} A/Professor Roger Cook, Swinburne University of Technology, Victoria, Submission no 99, p. 2
  \item\textsuperscript{211} ACCESS, Submission no 110, p. 7.
  \item\textsuperscript{212} Antonia Clissa, Submission no 102, p. 1.
  \item\textsuperscript{213} ANZICA, Submission no 68, pp. 4-5.
  \item\textsuperscript{214} South Australian Council on Reproductive Technology, Submission no 100, p. 3.
  \item\textsuperscript{215} Professor Lindy Willmott, Faculty of Law, Queensland University of Technology, Submission no 59, p. 2.
  \item\textsuperscript{216} Professor Lindy Willmott, Faculty of Law, Queensland University of Technology, Submission no 59, p. 2.
\end{itemize}
\end{footnotesize}
Rachel Kunde, Director, Aussie Egg Donors, expressed concern for the birth mother in relation to the above proposal, especially in cases where she was willing and deemed emotionally able to contribute her egg, as egg donation required a much more invasive medical procedure than artificial insemination.\textsuperscript{217}

ACCESS advocated that, “a decision for a surrogate to use her own eggs in a surrogacy arrangement should be taken in rare circumstances”. However, ACCESS did not recommend prohibition, relying instead on “existing counselling services in RTAC accredited ART clinics [which] are equipped to prepare candidates about the implications of undertaking surrogacy.”\textsuperscript{218}

The committee noted that A/Professor Roger Cook did not conclude from his research on gestational surrogacy that only gestational surrogacy should be permitted. His submission clearly stated a willingness to permit gestational and traditional surrogacy with adequate counselling and informed consent processes.\textsuperscript{219}

Another submitter put it: “I don’t think it [a requirement for gestational surrogacy] should be written into the law because it can’t possibly cover all situations”.\textsuperscript{220}

A former birth mother wrote:

\textit{Personal choice. Some women feel they can, some don’t. She should be 100 per cent before conception. 99 per cent is not enough. For me, I was comfortable with no genetic link. It was baby sitting. Yes 24/7, but still baby sitting. I have known cases of traditional surrogacy. They feel it’s similar to egg donation but with an extra step. My opinion is gestational surrogacy is more medical but less emotional and traditional is the reverse.}\textsuperscript{221}

\section*{Importance of Genetic Relationship with Intending Parents}

Sydney IVF and Canberra Fertility Centre, the two key Australian fertility clinics currently undertaking IVF surrogacy in Australia, both emphasise the importance of a genetic connection with intending parents. In the case of the Canberra clinic, it requires both parents to contribute their gametes. Sydney IVF does not have a prescriptive policy on the issue, although to date all surrogacy cases approved for treatment by the clinic’s review panel have had a genetic connection to intending parents.

The consensus amongst the 33 submitters who responded to the question regarding the importance of a genetic relationship believed that it was desirable to have at least one (and where possible both) intending parent/s contribute their gametes. Eleven of these submitters considered altruistic surrogacy should be prohibited if they were unable to contribute genetically. These submitters included:

\begin{itemize}
  \item The Medical Director of Canberra Fertility Centre;
  \item A former birth mother who considered arrangements without a genetic link to be private adoptions;\textsuperscript{222}
  \item Two would-be intending parents, one of whom wrote: “…it gets too complicated for the child if one or both parents aren’t genetically related”;\textsuperscript{223}
  \item The former Executive Officer, Western Australian Reproductive Technology Council, who had researched surrogacy and had worked as an infertility counsellor, who wrote:
    \begin{quote}
    \textit{In advocating that the best interests of the child be of primary consideration in undertaking surrogacy arrangements I would strongly endorse that there is a genetic relationship with at least one commissioning parent. Even though currently embryo donation is permitted, in ART clinics, the added complexity of surrogacy where a child could potentially be related to 4 sets of parents (arranged parents, birth mother, egg donor and sperm donor) I would not consider to be in the best interests of the child;}\textsuperscript{224} and
    \end{quote}
\end{itemize}
- ANZICA which wrote:
  
  At least 1 [intending] parent should have a biological relationship to the child. The complexity of
  the familial arrangements should be minimised while attempting to ensure a link between the child
  and the family in which they are raised.\(^\text{225}\)

 Twenty-one of the submitters who responded to this question were not inclined to insist on a genetic
connection between the intending parents and the child. This was because they considered it unfair to
insist where people were unable to contribute their gametes. This view also was based on a belief that
people would want to contribute where they could. Would-be intending parents and their families also
expressed this view.

Rachel Kunde, Co-Director, Aussie Egg Donors, Submitter:

In some cases both of the commissioning parents have fertility issues and it is not fair to exclude them
from becoming parents through surrogacy because of this fact.\(^\text{226}\)

Susan Mobbs, Intending Parent, Submitter:

If possible yes, but if there is a medical reason why they can’t produce gametes then exceptions should
apply.\(^\text{227}\)

Confidential submitter, representing a group of women experiencing infertility:

The best case scenario would be yes, but not necessary. If donor eggs and sperm are required, there
should not be any discrimination for this.\(^\text{228}\)

The Australian Association of Social Workers (Queensland) argued on the basis of individuals’ right to
determine their own reproductive choices that “legislation should not prescribe any conditions on genetic
relationships within a surrogacy arrangement.”\(^\text{229}\)

The view was also expressed that gamete and embryo donation already occur. ACCESS illustrated this
position:

A genetic relationship with at least one of the intending parents would be preferable and indeed
likely in most circumstances. However, should there be a situation where both intending parents
need to use donated gametes, in addition to a surrogate, this should not be excluded.

Again, ACCESS considers that this is a matter which could be examined and assessed as part of
the counselling process for ART.\(^\text{230}\)

Queensland Fertility Group argued:

…it is not necessary for one of the [intending] parents to have a genetic relationship with the child.
Genetic conditions or loss of fertility due to oocyte [egg] or sperm difficulties are treated by the use
of donated gametes or embryos.

The NHMRC ethical guidelines on the use of ART in clinical practice endorsed embryo donation
as an ethical option in the treatment of infertility. In this instance neither the birth mother nor the
social father of the person born is the genetic parent.\(^\text{231}\)

Privileging genetic connection for transfer of legal parentage

Another theme from the submissions, particularly from intending parents, was the desire to be legally
recognised as the parents of the child born of their gametes. Commonly, it was argued that genetic
parents should be automatically recognised as the parents, or at the very least, not have to adopt their

\(^{225}\) ANZICA, Submission no 68, p. 4.

\(^{226}\) Rachel Kunde, Co-Director, Aussie Egg Donors, Submission no 65, p. 2.

\(^{227}\) Susan Mobbs, Submission no 96, p. 1

\(^{228}\) Confidential, Submission no 78.

\(^{229}\) Australian Association of Social Workers Ltd, Submission no 77, p. 10.

\(^{230}\) ACCESS, Submission no 110, p. 9.

\(^{231}\) Queensland Fertility Group, Submission no 91, p. 5.
own biological child. As will be seen below in an overview of jurisdictional approaches, some legislative approaches do privilege the intending parents’ genetic connection in determining legal parentage.

One would-be intending parent argued that "...at least one of the intending parents should have a genetic relationship with the child to guide legal parentage." 232

Wide Bay Women’s Health Centre argued, as part of protecting the best interests of the child, legislation should enshrine the requirement that:

*The genetic parents of surrogate children should be legally recognised as their child’s parents and listed on the original birth certificate.* 233

**Meaning of genetics**

In her UK research, van den Akker noted the importance an intending mother placed on having a genetic connection to her child varied with her ability to provide one. If a woman was able to use her gametes she reported it was important, however, if not able, the importance placed on a genetic connection diminished. 234

In addition, Dr Maggie Kirkman, Research Fellow and Lecturer, Key Centre for Women’s Health in Society, University of Melbourne, highlighted that genetic connection meant different things to different people. 235 This was based on her in-depth interviews with 87 people aged 7-59 years including donors, recipients and children born of donor gametes in Australia. Some people struggled to accommodate a lack of genetic connection within their concept of family. Others emphasised the value of relationships. The relative meaning of genes and relationships varied for each individual at different times across a lifetime. Dr Kirkman’s research suggested an “interpretation of family” which “encompasses both relationships and genes” with “optimum outcomes combining the significance of relationships and genes in dynamic balance”. 236

**PERSONAL STORY**

Alice Kirkman: Alice Kirkman was born in 1988 in Victoria. Alice was conceived from an egg from her intending mother (Maggie Kirkman) which was fertilised with a family friend’s sperm and carried by Maggie’s sister Linda. A hysterectomy had left Maggie Kirkman unable to bear a child and her husband was infertile. Alice now 20 years old says she has no concerns about surrogacy. 237

Again, the Kirkmans’ personal story was instructive. They argued it was wrong to assume that genetic connection was what made the difference. The Kirkmans have another sister, Cynthia, between Maggie and Linda. Cynthia knew that she could not gestate a baby and give it to her sister, but offered to donate eggs if Maggie’s were unsuitable. Linda, on the other hand, couldn’t “give away a baby which looked back at me with my brown eyes”. However, Sev [Maggie’s husband] "couldn’t love his daughter more even if she were his genetic child.” Linda might have become attached to a baby even though it wasn’t her egg; and Maggie would have felt as much a mother to a baby conceived from Cynthia’s egg. They believe “genes and biology are significant but not definitive”. 238 Alice Kirkman reported:

*Their genetic relationship or gestational relationship with me makes no difference on how I see them as my parents. I have always had the strong belief that family are the people who treat you like family — so as long as your parents are nice to you they are your parents.* 239

232 Nicole Seath, Submission no 101, p. 2.
233 Wide Bay Women’s Health Centre Inc, Submission no 79, p. 3.
236 Kirkman 2004, pp. 5 & 16-17.
239 Investigation into Altruistic Surrogacy Committee 2008a, p. 15. (Alice Kirkman)
The committee also heard different views about the importance intending parents placed on genetic relationships. One would-be intending parent expressed the view that she could only enter a surrogacy arrangement where the child was genetically her own. Meanwhile, a biological relationship was seen by other submitters and witnesses to be completely irrelevant for determining intending parents’ desire or capacity to parent.

Would-be intending parent, witness:

…I am 40 and if this law is not changed before too long I may lose my egg quality and may be in need of a donor egg as well as a surrogate. That is a track that I am not sure I am happy to go down. I am not saying that I believe it is not suitable for others, but it is not something that I probably personally would take on.241

Anonymous submitter, intending parent, Queensland:

It is my belief, and becoming a recognised consensus, that biology means very little; parents are the people who love, nurture, discipline, teach, and care for a child.242

Outcomes for children

Professor Heather Mohay highlighted the need to focus on outcomes for children in relation to surrogacy and genetic connection:

…when we consider the best interests of the child, whether the child is living in a happy, supportive, loving and caring environment should be our first consideration no matter who the people are who are caring for the child in terms of their genetic relationship with that child.243

The committee was able to confirm with Alice Kirkman her positive experience as a child born of surrogacy some 20 years ago. She explained: "Because I knew who did what and who is who in my family it's never been an issue for me".244

However, one of the challenges for policy makers is the limited research on long-term outcomes from surrogacy arrangements. The Commission for Children and Young People and Child Guardian and other submitters recognised the need for further research including research on the impact of genetic connection and gestational relationship.

Recently, the media reported the outcomes of a longitudinal study in the UK which followed up on 39 surrogacy families, 43 donor insemination families, 46 egg donation families and 70 families where children had been naturally conceived. The study examined differences in the psychological wellbeing of the parents, the quality of parent-child relationships, and the psychological adjustment of the children who were now 7 years old. The study based on half the sample, found all families functioned well, with no significant difference between ART or surrogacy families and families with naturally conceived children.245

However, the researchers also emphasised the limitations of their research:

Some people interviewed in relation to our study… have expressed concern that it may be too soon to draw positive conclusions for donor conception and surrogacy children, who at seven years old are not yet old enough to fully understand the implications of the genetic or gestational link missing with their parent. We entirely appreciate these concerns, and would not claim that our results show anything more than good family functioning at age seven. It is for future stages of this project to tell us about the outcomes for children as they get older. For those children who have been told about their conception, it is reasonable to suppose that as they grow older, and in

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240 Investigation into Altruistic Surrogacy Committee 2008b, p. 42. (Carolyn Gaul)
242 Anonymous, Submission no 27.
243 Investigation into Altruistic Surrogacy Committee 2008b, p. 30. (Professor Heather Mohay)
244 (author unknown) 2008, ‘Mother urges legalisation of surrogacy’, AAP, 7th July.
245 Commission for Children and Young People and Child Guardian, Submission no 98, p. 5.
particular in their teenage years, the information they were told as a young child may come to have a different significance to them than it does currently.\textsuperscript{247}

**JURISDICTIONAL APPROACHES**

The committee also examined jurisdictional approaches to genetic connection in the case of altruistic surrogacy.

**Australia**

*Automatic recognition of birth mother as legal parent*

In all Australian jurisdictions, the birth mother is automatically recognised as the legal parent of a child. In the case of altruistic surrogacy, this means that the birth mother (whether or not she is genetically related) is also considered the legal mother and registered as such on the child’s birth certificate.

Under the Queensland *Status of Children Act 1978*, the birth mother and her male partner (if she has one) would be considered the legal parents in an altruistic surrogacy arrangement in Queensland.\textsuperscript{248}

Whilst still presuming the birth mother to be the legal parent until a Court approved transfer of legal parenthood, an amendment to the Western Australian Surrogacy Bill 2007 reflected a shift from the general Australian approach. The 37th Western Australian Legislative Assembly’s amendment presumed that it was “in the best interests of the child for the [intending parents] to be the parents of the child, unless there [was] evidence to the contrary.”\textsuperscript{249}

*No forced relinquishment*

Australian jurisdictions also provide that surrogacy arrangements should not be legally enforceable which seeks to ensure that the birth mother cannot be forced to relinquish the baby. However, the WA Surrogacy Bill allows a Court to transfer legal parentage to intending parents without a birth mother’s consent in gestational cases where the intending parents have a genetic connection to the child.\textsuperscript{250}

*Requirement for genetic connection*

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

- At least one of the intending parents has a genetic connection to the child;\textsuperscript{251} and
- The child is conceived using ART and the birth mother is not the genetic mother.\textsuperscript{252}

This encourages parties to surrogacy arrangements to access ART services and meet specific criteria provided in the *Parentage Act 2004*.

Reforms proposed by the Victorian Law Reform Commission in 2007 did not require that intending parents have a genetic contribution to access ART or to transfer legal parentage. The commission report also sought to permit traditional surrogacy, finding:

> A genetic connection between the child and the intended parent(s) is ... preferred, but people should not be excluded from commissioning surrogacy if they are unable to contribute their own gametes.\textsuperscript{253}

The Western Australian Surrogacy Bill 2007 permits traditional and gestational surrogacy. It also has a clause which allows a Court to dispense with a birth mother’s consent in gestational surrogacy when at least one intending parent contributing genetically.\textsuperscript{254}

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\textsuperscript{247} J Readings 2008.
\textsuperscript{248} s18A
\textsuperscript{249} s13(2), Western Australian Surrogacy Bill 2007.
\textsuperscript{250} s17 (3)
\textsuperscript{251} s24(d), *Parentage Act 2004* (ACT).
\textsuperscript{252} s24(a) & (b), *Parentage Act 2004* (ACT).
\textsuperscript{253} Victorian Law Reform Commission 2007, Recommendation 118, p. 15.
\textsuperscript{254} s17(4) & (8) Surrogacy Bill 2007 (WA).
South Australia technically allows gestational and traditional altruistic surrogacy but does not currently provide any access to ART for surrogacy. A private member’s Bill, the States Amendment (Surrogacy) Bill 2008 aims to provide for access to ART and transfer of legal parentage for altruistic surrogacy. There is no privileging of genetic connection in the proposed provision for the transfer of legal parentage. Whilst requiring proof of inability to contribute genetically, there is no requirement for a genetic contribution from intending parents. Nor is there a prohibition of a genetic contribution from the birth mother.

Meanwhile, NSW ART legislation passed in 2007 is silent on any genetic requirements. The RTAC code of practice and NHMRC guidelines are also silent on any genetic requirements and there appear no genetic requirements in a proposed uniform legislative approach for Australia.

**United Kingdom**

In the UK, at least one intending parent seeking transfer of legal parentage must be genetically linked to the child. The law allows both gestational and traditional surrogacy.255

**New Zealand**

In New Zealand, fertility clinics can only undertake altruistic surrogacy where at least one of the intending parents is genetically related to the child.256

**United States**

In 2000, the US National Conference of Commissioners on Uniform State Laws developed a *Uniform Parentage Act 2000* incorporating provisions for gestational surrogacy. There are no genetic requirements for intending parents in these provisions.257

However, in 2007, Trowse reported that, like Australia, the US still did not have uniform surrogacy laws. In a survey of US legislative approaches, she referred to a number of theoretical approaches including: intent based theory; genetic contribution theory; gestational mother preference theory; and the best interest of the child test.258 These approaches are illustrated in the examples outlined below:

- **Intent based theory:** Arkansas law recognises the intending parents as the legal parents irrespective of genetic connection;
- **Genetic contribution theory:** Ohio law provides for birth certificates consistent with genetic testing in all disputes involving parentage. Case law suggests parentage in surrogacy is also determined by genetic relationship;
- **Gestational mother preference:** New Jersey law gives the birth mother the primary decision making capacity regarding maternity of the child; and
- **Child’s best interests:** Washington law includes both gestational and traditional surrogacy within its surrogate parentage contracts. Genetics is not a matter considered relevant in determining parentage. The Courts focus on the child’s best interests.

**Canada**

National legislation governing ART permits both gestational and traditional surrogacy. However, some states such as Alberta and Nova Scotia allow for the transfer of legal parentage providing the child is genetically connected to one of the intending parents.259

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255 s30 Human Fertilisation and Embryology Act 1990 (UK).
256 Human Assisted Reproductive Technology Act 2004 (NZ).
257 In the USA, a uniform act or “uniform law” is a proposed state law drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Established in 1892, the NCCUSL is a body of lawyers, both private practitioners and government attorneys; judges; both state and federal; and law professors, typically appointed by the governor of each state. NCCUSL drafts laws on a variety of subjects and proposes them for enactment by each state, the District of Columbia, the Virgin Islands and Puerto Rico. The NCCUSL does not have any legislative power itself. Uniform acts become laws only to the extent that they are enacted into law by state legislatures: D Cooper 2001.
PREFERRED APPROACH

Genetic connection with birth mother and intending parents

The committee believes the legal definition of surrogacy should not specify requirements for genetic connection with either the birth mother or intending parents.

Intending parents

The committee’s position on intending parents reflects a need to respect and protect their liberty to reproduce and a concern for parity with other prospective parents.

The paramount concern for children’s best interests leads the committee to require intending parents to contribute their gametes unless this is impossible or not medically recommended. It is recognised that an altruistic surrogacy arrangement with full genetic connection to the intending parents has the least potential risk for children, the birth mother and intending parents. However, the committee believes that it is inequitable to limit surrogacy to individuals who have the capacity to provide their own genetic material, given:

- Donor conception, including embryo donation, is already occurring;
- Evidence from studies into donor conception shows that a genetic connection is not a strong determinant of the capacity to be a good parent;\(^\text{260}\)
- The outcomes for children born from donor insemination and their families have been shown to be largely positive;\(^\text{261}\) and
- Many different types of families, with and without genetic connections, already exist in the community.

It is the committee’s view that identified need for surrogacy rather than genetic connection should shape requirements for access to ART and transfer of legal parentage in altruistic surrogacy.

Birth mother

The committee’s prime concern in relation to a genetic connection with the birth mother is to assess and address risks to the child and the birth mother, whilst respecting her capacity as an adult to consent to contribute her egg.

The committee is extremely mindful of the literature on gestational versus traditional surrogacy and would prefer to avoid traditional surrogacy wherever possible. However, it does not wish to prohibit traditional surrogacy.

The committee believes prohibition would drive traditional surrogacy underground, which could have detrimental effects on the parties involved. The committee also notes the alternative argument put to the Western Australian Legislative Council, Legislation Committee Inquiry in relation to the Surrogacy Bill 2007 in February 2008 that traditional surrogacy can be less complex. Where an intending mother is unable to contribute genetically, insisting that the birth mother must not use her gametes adds another person to the conception equation.\(^\text{262}\)

In cases where the birth mother’s egg is used, the committee believes that a close relationship or, as suggested by Queensland Fertility Group, a genetic connection between the intending parents and birth mother would be preferable. Of course, there would need to be regard for the level of consanguinity (or closeness of blood relationship) between the parties.

In the context of ART, the committee believes the birth mother should not contribute her egg unless a genetic contribution from the intending parents is impossible or inadvisable due to health risk.

It is clear to the committee that genetic connection means different things to different people. Consequently, the committee supports psychosocial assessment and mandatory counselling for parties accessing ART. This assessment and counselling should address the impacts of genetic connection for

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\(^{260}\) Victorian Law Reform Commission 2007, p. 36.

\(^{261}\) Victorian Law Reform Commission 2007, p. 36.

\(^{262}\) Standing Committee on Legislation 2008b, p. 3. (Andersen)
intending parents, birth parents, their extended families and any existing children, along with the issues and needs which may arise over time for those affected.

RECOMMENDATION 10: GENETIC CONNECTION WITH INTENDING PARENTS AND BIRTH MOTHER

The committee concludes that it is desirable to pursue gestational surrogacy and it is desirable for at least one intending parent to contribute their gametes where possible. However, given the difficulties of accounting for people’s differing capacities and beliefs in relation to genetic connection, the committee recommends that the Queensland Government:

• Avoids a prescriptive approach on genetic connection; and
• Permits the use of the birth mother’s egg, donor gametes and donated embryos when accessing ART if endorsed by the Surrogacy Review Panel on expert advice that (a) surrogacy is needed and (b) the parties are prepared for possible risks. (See Recommendation 12 for more detail in relation to the panel.)

Legal recognition of birth mothers

The committee does not support any change to the automatic recognition of the birth mother as the legal parent irrespective of her or the intending parents’ genetic relationship with the child. The committee believes that this position reflects a cautionary approach which seeks to protect the birth mother and prevent forced relinquishment. Although there is considerable evidence of birth mothers relinquishing, the committee takes the view that the gestational relationship is an uncertain one.

The committee’s approach in relation to transfer of legal parentage is conditional on the birth mother consenting after birth. In forming its view, the committee paid heed to the evidence from the Kirkman family and the infertility support group ACCESS in relation to this issue:

• Dr Maggie Kirkman explained how she and her husband, Sev, always held the view that her sister, Linda:
  …was giving them an extraordinary opportunity, but if she felt unable to proceed or couldn’t relinquish the baby it would not be a loss. Their relationship with Linda and Linda’s well being was paramount. This was fundamental to ensuring Linda had choices without duress…The whole extended family was committed to Linda’s wellbeing, and if this meant that Maggie and Sev remained an aunt and uncle and not a mother and father, so be it.263

Dr Kirkman provided the following advice to VLRC based on her research and personal experience:

….. Some women will be able to gestate a child for another person only if they have no genetic connection (through their own eggs) whereas it will have no significance to other women. Enshrining in law the need to ensure that the gestational mother has no genetic connection with the child would elevate genetic connection to the position of greater significance than the connection through gestation which, to many women, is crucial. It would also imply that a woman’s connection with a child she is gestating is less if her egg is not used, weakening her right to refuse to relinquish the child…I therefore do not think that a ruling should be made about the source of the egg.264

• ACCESS recognised the desire of many intending parents for automatic recognition of their parentage but opted for a cautious approach which allowed for transfer of legal parentage after birth, with the birth mother’s consent. ACCESS CEO, Sandra Dill, quoted a birth mother’s sense of empowerment by remaining the legal parent at birth:

If I had no real choice about keeping or handing over the baby it would have been much more difficult. It would have felt powerless. Within that powerlessness there might have been a
temptation to try to hang on to the baby, not because I wanted a baby, but because I wanted a sense of control.\textsuperscript{265}

RECOMMENDATION 11: GENETIC RELATIONSHIP AND TRANSFER OF LEGAL PARENTAGE

The committee recommends that the Queensland Government maintains the status quo where the birth mother is automatically recognised as the legal parent irrespective of her or the intending parents’ genetic relationship with the child.

\textsuperscript{265} ACCESS, Submission no 110, p. 7.
CHAPTER 5: CRITERIA AND REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGY

TERM OF REFERENCE
This chapter addresses the following term of reference:

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

As noted in Chapter 3, the committee believes its response to this term of reference needs to be presented in the context of its proposed approach to strengthening ART regulation for altruistic surrogacy.

It is the committee’s view that the more effort expended in initial assessment, support and informed consent processes, the less prescription will be required through the establishment of specific criteria. This approach seeks to encourage parties to a proposed surrogacy arrangement to have fully considered the risks and prepared themselves for the undertaking. The committee also supports health care and other professionals exercising their duty of care where needed. This position reflects the committee’s commitment to balancing the need to prevent harm, protect liberty and seek parity with other families.

As surrogacy can occur without medical assistance, the committee’s interest in developing criteria and ART regulation is to encourage people contemplating altruistic surrogacy to access ART. This approach is considered in the best interests of the child and all parties involved.

ENHANCING EXISTING ART ASSESSMENT AND SUPPORT PROCESSES

In developing its approach to the regulation of ART with respect to altruistic surrogacy, the committee has proceeded from the assumption that the provision of services for altruistic surrogacy would be a very small subset of any ART service provision in Queensland.266 The committee acknowledges that Queensland has a well established, industry-driven accreditation process for ART services. Whilst the committee notes that some submitters expressed reservations about the Queensland regulatory approach to ART services, this is beyond the committee’s terms of reference.267

The committee acknowledges that NHMRC guidelines have specific policies with respect to surrogacy: they prohibit commercial surrogacy and advertising of services “to provide or facilitate surrogacy arrangements” or “receiving a fee for services to facilitate surrogacy arrangements”.268 The 2005 RTAC code of practice and NHMRC guidelines also require informed consent and mandatory counselling for all parties to an altruistic surrogacy arrangement.269

As noted, the committee does not support the proposal by some submitters that the Government should establish a specific regulatory body for altruistic surrogacy separate to the existing ART regulation.

The committee also notes that many of the submitters who expressed support for the efficacy of current industry regulation also endorsed the strengthening of existing industry standards.270 The proposed approaches by the Victorian Law Reform Commission and the Western Australian Government mirror a number of the policies and procedures developed by Canberra Fertility Centre and Sydney IVF, the two clinics which have provided surrogacy services over the last decade. These clinics have developed informed consent guidelines and an independent expert review process beyond existing industry requirements.

266 This was highlighted in advice from Sydney IVF which was that altruistic surrogacy represented on average 12 of a total 2000 treatment “cycles” a year: Dr Mark Bowman, Director Sydney IVF, Interview.
267 Submitters include Queensland Right to Life, Submission no 50; Professor Lindy Willmott, Faculty of Law, Queensland University of Technology, Submission no 59; ANZICA, Submission no 68; Mr Malcolm Smith, PhD Candidate, Faculty of Law, Queensland University of Technology, Submission no 76; Presbyterian Church of Queensland, Submission no 81 and Commission for Children and Young People and Child Guardian, Submission no 98.
268 National Health and Medical Research Council 2007, Guideline 13.2.1, p. 57.
270 Antonia Olissa, Submission no 102.
Additional standards

The committee also believes that the Government should build on and strengthen the existing regulatory arrangements for ART in Queensland. It recommends the enhancement of existing ART regulation for altruistic surrogacy in Queensland with the requirements outlined below.

*Independent psychosocial assessment*

It is proposed that psychosocial assessment should be separate from and in addition to support counselling and be provided by an ANZICA accredited counsellor for the intending parents, birth mother and her partner. Industry standards currently do not separate psychosocial assessment and support counselling.

The standards proposed in Western Australia require independent psychosocial assessments for intending parents, birth mothers and partners and any existing children over 4 years of age. Sydney IVF and Canberra Fertility Centre also require independent psychosocial assessment for the adult parties and Canberra requires assessment for existing children.

Clinical psychologists, Miranda Montrone and A/Professor Roger Cook, both supported this separation of support and assessment. Between them, they have assessed over 90 surrogacy cases in Australia in the last decade and have broader professional experience in infertility counselling. They saw difficulty in the same counsellor being responsible for both assessment and support. The professional body ANZICA also endorsed this approach in its submission.

The committee recognises the need for the parties to be made fully aware of the potential impact of altruistic surrogacy on existing children and prepare children for such an event. However, it has not made it a requirement to assess individual children. Clinical psychologist, Miranda Montrone, who has undertaken such assessments, had reservations about raising children’s expectations of a baby arriving when that prospect was still quite uncertain. ANZICA suggested that counselling could be sought for existing children in special circumstances.

*Content of independent psychosocial assessment and support counselling*

It is proposed that the Government initiates a review to clarify the purpose and content of the psychosocial assessment and support counselling. This review should build on the ANZICA guidelines which are incorporated in the 2005 RTAC code of practice. The committee envisages that ANZICA would be a vital contributor to this review. It is important to acknowledge the expertise and contribution of ANZICA in this review as the 2005 RTAC code of practice counselling requirements were developed by ANZICA.

The committee suggests that this work could fruitfully draw on the Western Australian draft *Directions on Surrogacy*, the experience of key practitioners, available research and the detailed suggestions from submitters including ANZICA and the Commission for Children and Young People and Child Guardian.

The committee considers the work by the Human Fertilisation and Embryology Authority in the UK would also be helpful in distinguishing items for support counselling and identifying risk factors which may be the particular domain of the assessment process.

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**Miranda Montrone, clinical psychologist and assessor, NSW:**

*The people who need surrogacy have been through hell. They are either born with a congenital problem which is significant or they have had major surgery, say for cancer or something, or they have serious health problems such that cannot carry a child. They [have] major health problems...their emotional pain at not being able to have children is really huge. Sometimes a friend who has children and loves these people and cares for them – or a family member – can offer very easily and very quickly to do surrogacy without really thinking it through. Then they can be trapped in it and think ‘Does it involve this?’ or, ‘I have not thought of this issue.’ The whole process of the assessment is to make...*
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room and space for all these issues to have equal validity ...even though the [birth mother’s] needs and the emotional pain may not be as pressing, equality is given to that. That is one of the important things.274

Intending parent, highlighted the relevance of counselling for surrogacy:

The counselling made us discuss issues that we possibly had not thought about before like breastfeeding and how we would feel about that in hospital. It even made us discuss things like the birth issue. My husband just did not want to think about that because it is his sister. And even though it is our child he had not really wanted to delve into the whole birth aspect. It even went to the aspect of how it affects her children and things like that. 275

The committee also notes that the 2005 RTAC code of practice requires a minimum of one interview for “information/treatment implications counselling” and one interview for “psychosocial/surrogacy counselling” for each party to the arrangement.276 It would be useful if guidelines specified the content of both types of counselling and detailed how this related to the independent assessment process. It would also be important to consider whether the minimum number of interviews was adequate for the purpose. The committee understands the assessment process undertaken by Miranda Montrone and A/Professor Roger Cook exceeds minimum standards. This issue should also be considered as part of the review.

The committee suggests that there could be some efficiency in collaborating with other jurisdictions on this task.

For easy reference, the NHMRC guidelines for surrogacy counselling, the ANZICA guidelines adopted as the 2005 RTAC code of practice, the Western Australian draft Directions on Surrogacy and the suggestions from the Commission for Children and Young People and Child Guardian are included in Attachment H.

Independent and ongoing support

Although there is provision for ongoing counselling in NHMRC guidelines, it is proposed that the parties are specifically advised by fertility clinics about the opportunity for counselling to be provided at 20 and 34 weeks gestation and 2 weeks after the birth. The Western Australian draft Directions on Surrogacy mandates this in every surrogacy case.277 The committee believes such counselling is highly desirable. However, it is believed unreasonable in terms of people’s liberty and likely to be impracticable to monitor and enforce as a requirement. The committee recommends that parties should be strongly encouraged to take advantage of this offer in the course of the initial assessment interviews and treatment. In addition, the fertility clinic should coordinate and follow-up on this offer to all birth mothers, their partners and intending parents.

Miranda Montrone advised that she supported such a practice and reported that she had undertaken such counselling for Canberra Fertility Centre. The Canberra clinic encourages counselling at 20-30 weeks during the pregnancy and 4 weeks after birth and post-surrogacy at 6-8 weeks. In Miranda’s experience, couples found it very worthwhile to address issues which arose as the surrogacy unfolded.278

Independent medical assessments

The committee believes the birth mother should have an assessment from an independent specialist obstetrician to assess her health risks before proceeding with treatment. Western Australian draft Directions on Surrogacy and Sydney IVF and Canberra Fertility Centre have such a requirement.

In addition, the committee recommends that intending parents have medical assessments to identify:

• Any condition that may affect their capacity to care for a child long term;
• Whether surrogacy is indicated in terms of medical infertility, inability to carry a child or health risk; and

274 Investigation into Altruistic Surrogacy Committee 2008a, p. 25.
275 Investigation into Altruistic Surrogacy Committee 2008b, p. 36. (Susan Mobbs)
276 Reproductive Technology Accreditation Committee 2005, p. 80.
278 Miranda Montrone, Independent assessor, interview.
Any relevant infectious diseases which pose a risk to the birth mother and child.

**Specialist, independent legal advice**

It is proposed that the birth parents and intending parents should have separate legal advice provided by a qualified lawyer with expertise in family law. There is no requirement for professional legal advice in the 2005 RTAC code of practice although ‘legal implications’ is listed as an area for informed consent in the NHMRC guidelines.279

It is noted that Sydney IVF has a group legal advice session for all parties. Lawyer, Linda Wright explained that the benefit of the group session is that both couples receive the same advice.280

The committee believes that ART standards should also define the areas of legal advice required. For example:

- Adequate provision for the surrogate’s dependants in the event of hospitalisation, illness or death related to the pregnancy;
- Adequate provision of guardianship of embryos or any existing children should either or both of the intending parents die;
- Reasonable expenses permitted;
- Medical intervention rights and who would be permitted to determine medical tests undertaken during pregnancy;
- Legal status at birth of the birth parents and intending parents;
- Implications and options if the parties were in dispute during or after birth;
- Consequences of refusal by the birth mother to surrender the child;
- Consequences of refusal by the intending parent to accept a child;
- Rights of the birth mother to see the child after birth;
- Avenues for the transfer of legal parentage; and
- Statutory rights of access to information.281

**Identifying information**

The committee supports the application of similar requirements for identifying information about the birth mother as is required under NHMRC guidelines in relation to gamete donors. These include: name, date of birth, most recent address, details of medical history, family history, genetic test results and physical characteristics.282 Although desirable, it cannot be assumed that the child and intending parents will have an ongoing relationship with the birth mother. This is discussed further in Chapter 8 in relation to children’s rights to information on genetic parentage and circumstances of birth.

**Independent review processes**

It is proposed that a multi-disciplinary Surrogacy Review Panel be established for Queensland including a relevant medical specialist; a psychologist or social worker with expertise in child development and family work; a family law expert; an ethicist; and a community representative. This review process would recognise that altruistic surrogacy represents a significant risk to the parties. The panel would reinforce the multi-disciplinary assessment process and take a multi-disciplinary approach to the final decision to allow an altruistic surrogacy arrangement to proceed. The panel would be a more specialised review group than existing ethics committees and it is envisaged it would further develop its expertise over time by operating for the whole of the State. It would review surrogacy proposals based on expert assessment and ensure informed consent and other requirements are met. Clinicians would not proceed with treatment until approval from the panel was received.

280 Linda Wright, DGB Lawyers, Interview.
282 National Health and Medical Research Council 2007, pp. 25-32.
The panel could be established either under the *Surrogate Parenthood Act 1988*, the *Private Health Facilities Act 1999* or other appropriate legislation. It could also provide free and frank advice to treating clinicians and regulators and/or the Government.

It is envisaged that the panel could assist in a government evaluation of the ART regulation of altruistic surrogacy after two years. The operation of the panel itself would be part of the evaluation.

To operate effectively, the committee recognises that the panel would need to be adequately resourced and have minimum service standards ensuring timely consideration of applications. It should also enable state-wide access.

**Cooling off period**

It is proposed that there be a three month cooling off period after the approval by the Surrogacy Review Panel before proceeding with treatment. It is noted that this approach is supported in the proposed Western Australian standards and by Queensland Fertility Group in its submission. It also reflects Canberra Fertility Centre requirements.

**Implementation of additional standards**

The committee suggests that these enhanced standards for ART assessment and support could occur in a number of ways.

**State legislation or regulation**

Additional requirements within ART could be specified within legislation or regulation or specific codes of practice required by legislation. The proposed Western Australian draft *Directions on Surrogacy* have been prepared for all surrogacy arrangements involving ART under its *Human Reproductive Technology Act 1991*. The Western Australian Legislative Council Committee inquiry in relation to the Surrogacy Bill 2007 spent considerable effort discerning the relative merits of putting requirements in legislation or in a code of practice. The latter could be altered by the CEO of the Department of Health without further reference to parliament. The Western Australian Legislative Council Committee considered that the “informed consent” requirements should be included in legislation.

The committee believes that in Queensland, additional standards for surrogacy could be developed under the *Private Health Facilities Act 1999*. Fertility clinics undertaking altruistic surrogacy services would then be required to meet these standards in order to be licensed to provide such services.

**RTAC code of practice**

The Fertility Society of Australia could consider its interest in adopting the proposed additional standards as part of its RTAC code of practice. The committee notes that the 2005 RTAC code of practice is currently being updated and a revised version will be released shortly.

**National standards**

Existing NHMRC guidelines for surrogacy which are developed under the direction of Health Ministers could be enhanced. The latest guidelines were reviewed and re-released in 2007.

The committee acknowledges that the inclusion of the proposed additional standards within the RTAC code of practice or the NHMRC guidelines has the benefit of developing a uniform approach for the regulation of altruistic surrogacy across Australia.

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284 Queensland Fertility Group, Submission no 91, p. 2.

285 Standing Committee on Legislation 2008a, p. 53.

RECOMMENDATION 12: ENHANCING EXISTING ART ASSESSMENT AND SUPPORT PROCESSES

The committee recommends to the Minister for Health that Queensland Health enhance existing standards for assessment and support for altruistic surrogacy in ART services with provision for:

- Psychosocial assessment which is independent from psychosocial support;
- Further specification of the content and amount of independent psychosocial assessment and counselling;
- Provision of opportunities for counselling during pregnancy and after birth for the birth mother, her partner and the intending parents;
- Independent medical assessments for the birth mother and intending parents to assess health risks, need for surrogacy and any issues impacting on their capacity for long-term care of the child;
- Specialist, independent legal advice by a qualified lawyer provided separately for the birth parents and intending parents;
- A legislatively based Surrogacy Review Panel appointed by Queensland Health including members with relevant expertise in medicine, family law, ethics, psychosocial health and child development and a community representative to approve all applications for altruistic surrogacy and to inform the development and evaluation of ART standards in relation to altruistic surrogacy; and
- A three month cooling off period after approval by the Surrogacy Review Panel before proceeding with treatment.

The committee also recommends that the panel be sufficiently resourced to operate in a timely way and provide easy access to applicants across Queensland.

Development of expertise – agency and industry level

The committee suggests Queensland Health ensures it has relevant policy research expertise in the area of altruistic surrogacy to support the development, implementation, monitoring and evaluation of the new standards.

It is also apparent to the committee from evidence given that the implementation of the new standards and the commencement of service provision for altruistic surrogacy need to be supported by adequate training and development at an industry level.

RECOMMENDATION 13: SUPPORT FOR THE IMPLEMENTATION OF NEW STANDARDS

The committee recommends to the Minister for Health that Queensland Health support the implementation of enhanced standards for altruistic surrogacy in the ART services by ensuring the agency:

- Has relevant policy research expertise in relation to altruistic surrogacy; and
- Supports relevant training and professional development opportunities for infertility counsellors, nurses and clinicians, members of the Surrogacy Review Panel and family law specialists in collaboration with the ANZICA, fertility clinics, the Fertility Society of Australia and other experts.

Monitoring, evaluation and research

It is proposed that Queensland Health closely monitors the effectiveness of these new ART standards and the quality of outcomes for clients and undertakes an evaluation after two years of implementation. The committee envisages that this would entail the development of an evaluation framework in consultation with stakeholders. Such an evaluation would require detailed and regular reporting from clinics and/or the Surrogacy Review Panel.

It may also provide an excellent opportunity to commence data collection for longitudinal research on outcomes for children and parties to altruistic surrogacy arrangements. The committee suggests that the
Government advocate nationally that jurisdictions collaborate to resource longitudinal research, particularly for children born of altruistic surrogacy arrangements, in partnership with industry, professional bodies (such as the Fertility Society of Australia including ANZICA) and researchers.

**RECOMMENDATION 14: MONITORING, EVALUATION AND RESEARCH**

The committee recommends that the Queensland Government:

- Develops an annual data collection system for ART services to monitor demand for and the extent of service provision for altruistic surrogacy, the nature of surrogacy arrangements and service outcomes;
- Explores possibilities for ongoing research on outcomes for children and parties and their ongoing support needs in consultation with other jurisdictions, industry and professional bodies and existing researchers; and
- Evaluates the effectiveness of ART standards for altruistic surrogacy and the quality of client outcomes for people pursuing altruistic surrogacy through ART in consultation with stakeholders. This evaluation should occur two years after the implementation of the new standards.

**RECOMMENDATION 15: PARLIAMENTARY REVIEW**

The committee recommends that the Queensland Parliament ensures that, following its release, the report from the evaluation outlined in recommendation 14 is reviewed by a parliamentary committee.

**DEVELOPMENT OF CRITERIA**

In considering whether intending parents and/or the birth mother should have to meet certain criteria in order to enter into a surrogacy arrangement, the committee has been guided by its policy principles and outcomes sought. The committee also gave careful attention to the impact of imposing specific criteria and the practicality of monitoring and enforcing criteria.

The committee considers that some criteria proposed by submitters should not be implemented as blanket requirements. As an example, in Chapter 4 on genetic connection, the committee recognised serious risks with traditional surrogacy but did not see it as reasonable, in weighing the prevention of harm and the protection of liberty, to create a specific criterion for the birth mother not to contribute her egg if there were adequate safeguards for informed consent. The committee sees genetic connection as a risk to be assessed on a case by case basis. However, the committee’s expectation would be that traditional surrogacy is seldom pursued through ART and only after a very detailed risk assessment.

Given this, the committee considers it useful in the remainder of this chapter to identify areas which are not supported as criteria, but are considered as risks to be assessed on a case-by-case basis. These risks also represent potential grounds on which the Surrogacy Review Panel or medical, psychosocial or legal reports may or may not approve an altruistic surrogacy arrangement to proceed through an ART service. Criteria should be taken as core eligibility requirements for assistance through ART services.

The proposed specification of the content of psychosocial counselling and assessment is intended to provide a comprehensive list of issues and risks to be addressed and would include such matters as:

- Risk of coercion of the birth mother;
- Risk of failure to relinquish;
- Risk of disability and fear of rejection of the child;
- Management of pregnancy and birth;
- The impact on siblings; and
- The extent of personal support and attitudes of the birth mother’s partner and other family and friends.

In the remainder of the chapter, the committee has summarised criteria and identified risks in three categories: those common to intending parents and birth mothers, those specific to intending parents and those specific to birth mothers.
Criteria and risks common to both parties

Preferred criteria

The committee recommends two common criteria for intending parents as well as the birth mother and her partner:

- **Capacity to enter an agreement**: This means the parties are at least 18 years of age and have the capacity to voluntarily enter the surrogacy arrangement.

- **Engagement in independent assessment process**: This means the parties need to be willing to undertake independent medical and psychosocial assessments and obtain professional legal advice as required in the new ART standards.

### STATEMENTS IN SUPPORT OF COUNSELLING REQUIREMENT

**Professor Jenni Millbank and Associate Professor Anita Stuhmcke, Faculty of Law, University of Technology, Sydney:**

The positive impact of counselling … is that it will ensure that parties to a surrogate agreement make informed decisions. It is perhaps the only requirement that will at least ensure the adult parties have thought through the consequences for a child born of the arrangement. Indeed, in altruistic surrogacy where friends or family members may feel pressure to act as a surrogate counselling is a critical requirement. Counselling in these circumstances is the only appropriate mechanism which will aim to ensure personal autonomy in decision making in a complex relationship is preserved.

**Susan Mobbs, Intending parent, NSW:**

We ended up spending six hours in total with the psychologist [in] two three hour appointments. We had to go away and we had to think about the issues … and … come back. I definitely think that is needed for the surrogacy process.

**Sandra Dill, CEO, ACCESS, reporting on her Australian based survey research with 28 families involved in surrogacy arrangements:**

Participants were asked if the counselling required, helped them to understand the emotional challenges they were to face. Sixty eight per cent of responding mothers agreed or strongly agreed, as did 80 per cent of intending fathers and 87 per cent of surrogates.

Identified risks

The committee identified three key risks which need to be addressed in the assessment and counselling process. These include:

- **No history of risk to children**: A number of expert submitters considered that parties should be required to demonstrate they have no history of child abuse or violent or sexual offences before accessing ART treatment. This was also the approach suggested by the Victorian Law Reform Commission and the approach outlined in draft surrogacy regulation in Western Australia and South Australia. Western Australia requires parties to obtain the equivalent of a Queensland ‘blue card’. The South Australian Council for Reproductive Technology also reported in its submission that South Australia currently requires people undertaking ART services to provide a statutory declaration in relation to relevant offender history. However, the council saw this was unreliable and more effectively assessed by a counsellor.

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287 Submission no 12, p. 9.
288 Investigation into Altruistic Surrogacy Committee 2008b, p. 36.
289 ACCESS, Submission no 110, p. 6.
290 ANZICA, Submission no 68; Commission for Children and Young People and Child Guardian, Submission no 98; South Australian Council on Reproductive Technology, Submission no 100; Australian Association of Social Workers, Submission no 77; Queensland Law Society, Submission no 112.
The committee concludes that the potential risk to children should remain as an issue to be addressed in counselling with provision for additional checks if concerns are identified at that stage. The committee believes it arbitrary to automatically exclude parties and there is a need to review each case on its merits.

- **Stability of relationships:** Infertility and surrogacy are likely to be stressful for the parties concerned. Some submitters such as ANZICA, a former birth mother and a prospective intending parent believed that intending parents should be required to be in a stable relationship for at least two years. It was believed that the birth mother was also likely to benefit from a stable and supportive relationship. Rather than stipulating requirements, the committee has identified the stability of intimate relationships and the adequacy of close personal support as a risk to be assessed but not a requirement.

- **Ongoing relationships and involvement:** This risk relates to different expectations of ongoing relationships and involvement after birth. The consumer infertility support group, ACCESS, suggested as a possible criterion:

  > *Intending parents should have an existing relationship with the surrogate and be committed to continuing and open association, even at some distance.*

  Whilst, the committee supports this as an ideal approach, it does not suggest it should be a requirement. It believes, on evidence reviewed, that relinquishment can be eased by a continuing relationship between the birth mother and her family and the intending parents and child. The committee also understands that this is likely to be in the best interests of the child. The issue is therefore identified as a risk to be assessed and an area for counselling of the parties.

### Criteria and risks specific to intending parents

#### Preferred criteria

The committee recommends two specific criteria for intending parents:

- **Identified need for surrogacy:** The committee wants altruistic surrogacy to be seen as a limited option. The poignant evidence from witnesses directly engaged in or considering altruistic surrogacy highlights that they too saw surrogacy as a last resort. There is nothing more that they would wish for but to carry a child themselves.

  The committee believes it is in the best interests of the child to ensure intending parents are able to demonstrate their need for surrogacy due to medical infertility, inability to carry a pregnancy or health risks before proceeding with altruistic surrogacy through an ART service.

  The Commission for Children and Young People and Child Guardian also supported this view:

  > *…surrogacy should be an option … available only where pregnancy is unreasonably dangerous or impossible.*

  The committee notes this criterion was an area of debate amongst members. Some members preferred to see heterosexual couples as intending parents. They believed that the nuclear family headed by a mother and father represented the ideal circumstance in which to raise a child.

- **Residency:** The committee does not support a state residency requirement for access to ART services for altruistic surrogacy, but considers it reasonable to have an Australian residency requirement for at least one of the intending parents.

  Some submitters were concerned about reproductive tourism. However, Susan Mobbs, an intending parent in NSW, highlighted some of the issues which arise with a residency requirement. She explained that her birth mother lived in NSW and had six children and it was unreasonable to expect her to travel to Queensland to fulfil a legislative obligation. She argued that it would minimise intrusion and inconvenience if all parties were free to access ART services interstate. She highlighted that some

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292 ANZICA, Submission no 68; Kelly, Submission no 83; Nicole Seath, Submission no 101.
293 ACCESS, Submission no 110, p. 5.
294 Commission for Children and Young People and Child Guardian, Submission no 98, p. 7; Jean Murray, SA Health advised that medical indications for surrogacy could be described under physiological (e.g. problem with gametes), physical (e.g. absence of a uterus), infective (e.g. HIV infection) or psychological (e.g. inability to have sexual intercourse) categories: Interview.
people may have established relationships with medical specialists interstate and that it was preferable to enable parties to continue to access those specialists.\textsuperscript{295}

**Identified risks**

In addition to the risks identified as common to the birth mother and the intending parents, the committee identified the following risks needing to be assessed by health care professionals during the assessment phase. The committee notes that some submitters wished to see these areas as eligibility criteria:

- **Capacity to provide long-term care:** This risk relates to an assessment that at least one of the intending parents is capable of providing long-term care for the child.

  Queensland Fertility Group was concerned with instances of a "significant medical condition which may significantly decrease the person’s life expectancy."\textsuperscript{296}

  The Commission for Children and Young People and Child Guardian was concerned that intending parents:

  \textit{…must not suffer from a physical or mental condition, or have a physical or mental disability, to an extent that they could not provide a high level of stable, long term care for a child.}\textsuperscript{297}

  The committee notes that Queensland Fertility Group and the Commission for Children and Young People and Child Guardian wanted to see this risk identified as a criterion. As noted in the committee’s discussion of implementing additional standards, the medical and psychosocial assessments and the Surrogacy Review Panel should be designed to assess such risk.

  It is noted that ANZICA and Queensland Fertility Group supported the development of an upper age limit.\textsuperscript{298} Whilst age may impact on a parent’s capacity to provide long-term care for a child, the committee does not consider it fair to establish a maximum age for intending parents. The committee notes that the age criterion has been removed from the Queensland adoption assessment process. Age is an arbitrary factor given some people’s capacity for healthy ageing.\textsuperscript{299}

- **Genetic connection:** The second identified risk for intending parents relates to the genetic connection with the potential child. The committee expects that intending parents should contribute genetically where it is possible and safe to do so. However, the committee does not seek to limit altruistic surrogacy on the basis of intending parents’ genetic contribution. The psychosocial assessment process needs to ensure that parties are aware of, and comfortable with, the impact of their decision in relation to genetic connection with the child.

**Criteria and risks specific to birth mothers**

**Preferred criteria**

The committee recommends two criteria for birth mothers:

- **No identified health risks from proposed pregnancy:** This means the birth mother has been assessed by specialist health care professionals as able to safely carry a child without a significant risk to her physical and emotional health. This would include an examination of the history of any previous pregnancies or births. It also means there should be no evidence of coercion.

  This criterion was supported in submissions from ANZICA, an experienced birth mother, Wide Bay Women’s Health Centre, Queensland Fertility Group, the South Australian Reproductive Technology Council and a prospective intending parent.\textsuperscript{300}

  It is also in line with requirements at Sydney IVF and Canberra Fertility Centre. Sydney IVF acknowledged that the risk of death or injury for the birth mother is not insignificant.\textsuperscript{301}

\textsuperscript{295} Investigation into Altruistic Surrogacy Committee 2008b, Brisbane, p. 34. (Susan Mobbs)

\textsuperscript{296} Queensland Fertility Group, Submission no 91, p. 3.

\textsuperscript{297} Commission for Children and Young People and Child Guardian, Submission no 98, p. 8.

\textsuperscript{298} Queensland Fertility Group, Submission no 91, p. 3; ANZICA, Submission no 68, p. 3.

\textsuperscript{299} Professor Heather Mohay, Developmental Psychologist, Psychology and Counselling, Faculty of Health, Queensland University of Technology, Submission no 71, p. 2.

\textsuperscript{300} See submissions numbered 2, 63, 68, 79, 83, 91, 100 & 101.
• **Existing child**: This means the birth mother is required to have an existing child.

The Western Australian draft standards and Sydney IVF require birth mothers to have at least one child. Some seventeen submitters also indicated that it was very desirable that a birth mother had children and where possible had completed her family. One of these submitters was ACCESS representing consumers of infertility services. Sandra Dill, CEO, wrote:

*A woman acting as a surrogate ideally should have completed her family but at least have had one child of her own.*

The arguments in support of this criterion are that it is an important contributor to informed consent and the assessment of health risk for the birth mother.

In contrast, the Victorian Law Reform Commission report indicated it was preferable that a birth mother has had a child but it should not be a requirement for access to ART. Professor Lindy Willmott, Faculty of Law, QUT, also indicated that she thought this should not be required as not all women wanted children.

The inclusion of this criterion reflects a majority view of the committee. The committee’s decision followed considerable debate amongst members. The committee agreed that clinicians were unlikely to support a surrogacy arrangement for a potential birth mother who had not already successfully carried and given birth to a baby. However, some members of the committee believed there may be exceptional circumstances which may justify a Surrogacy Review Panel accepting a proposed altruistic surrogacy arrangement where a potential birth mother has not had children.

**Identified risks**

The committee believes other suggested criteria in relation to the birth mother should be examined as part of the risk assessment process:

• **Age**: The committee notes that a number of submitters favoured a 25 year minimum age requirement. Sydney IVF has a 21 year minimum age requirement. Canberra Fertility Centre and the Victorian Law Reform Commission favour 25 years. The committee considers that only in exceptional circumstances should a birth mother be less than 25 years. However, it believes age is an indicator but not a clear determinant of maturity or emotional capacity. The committee would rather leave the judgement about age to health care professionals on a case-by-case basis.

• **Genetic contribution**: Again, the committee does not mandate a requirement for gestational surrogacy. However, in recognition of expert opinion and research which identifies the risks, the committee would hope that a decision for a birth mother to use her own eggs would be rare. Such a case would require particular attention in the assessment and review process.

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301 D F Lok 2008, p. 11.
302 ACCESS, Submission no 110, p. 4.
304 Professor Lindy Willmott, Faculty of Law, Queensland University of Technology, Submission no 59, p. 2.
305 ANZICA, Submission no 68; Professor Heather Mohay, Developmental Psychologist, Psychology and Counselling, Faculty of Health, Queensland University of Technology, Submission no 71 and Antonia Clissa, the former Executive Officer of the WA Reproductive Technology Council and Queensland Fertility Group, Submission no 102.
RECOMMENDATION 16: CRITERIA FOR INTENDING PARENTS AND BIRTH MOTHERS

The committee recommends to the Minister for Health that additional standards be developed under the Private Health Facilities Act 1999 to include criteria for intending parents and birth mothers seeking assistance from ART. The committee proposes:

- The intending parents and the birth mother and her partner have the capacity to enter an arrangement; have participated in independent psychosocial and medical assessment; and have obtained separate legal advice from a qualified lawyer;
- Intending parents demonstrate a need for surrogacy (due to medical infertility or an inability to carry a child or identified health risk) and at least one intending parent is an Australian resident; and
- The proposed pregnancy poses no significant health risk to the birth mother and she has experienced a previous successful pregnancy.
CHAPTER 6: LEGAL RIGHTS AND RESPONSIBILITIES

TERM OF REFERENCE

This chapter seeks to respond to the question posed in the following term of reference:

- What legal rights and responsibilities should be imposed upon the commissioning parent/s and/or surrogate?

OVERVIEW

This chapter deals with legal rights and responsibilities of the parties in relation to three issues:

- The management of pregnancy and birth;
- The enforceability of surrogacy arrangements; and
- The transfer of legal parentage for altruistic surrogacy arrangements.

MANAGEMENT OF PREGNANCY AND BIRTH

The committee believes that birth mothers in an altruistic surrogacy arrangement should have the same rights and the same level of autonomy as other pregnant women and birth mothers. The decisions on the management of the pregnancy and birth process are ultimately matters for the birth mother and her medical advisors. The committee has foreshadowed this position under policy principle 5 in Chapter 3. The committee believes it is a matter which should be reflected in legislation.

The committee is supportive of the advice from the Hon Dean Wells MP, Member for Murrumba and the Queensland Law Society in this regard. The Hon Mr Wells wrote:

...once she has commenced gestation her legal rights should be exactly the same as that of every other pregnant woman ...the new law [should not] attempt to regulate her behaviour during gestation. It is entirely appropriate that she should be advised before commencing gestation that it is undesirable to drink, smoke, take drugs and so on. In the rare event that somebody [good] enough to be an altruistic surrogate proves to have insufficient regard for good advice, her legal situation should be exactly the same as that of every other pregnant woman, whatever that might be. ...once gestation commences the surrogate mother must have all the rights of any other pregnant woman in a free and democratic society.

Queensland Law Society argued:

It is...important that the surrogate mother be the sole source of consent with respect to clinical intervention and management of the pregnancy.

The committee also sees the management of pregnancy and birth as matters for discussion in pre-conception counselling. For example, the Western Australian draft Directions on Surrogacy require counselling to cover parties’ expectations, the birth mother’s lifestyle and behaviour during pregnancy, attitudes to prenatal testing and termination, and presence of intending parents at the birth.

RECOMMENDATION 17: RIGHTS OF BIRTH MOTHERS TO MANAGE THEIR PREGNANCY AND BIRTH

The committee recommends that the Queensland Government confirms that birth mothers engaged in an altruistic surrogacy arrangement have the same rights to manage their pregnancy and birth as other pregnant women.

307 Hon Dean Wells MP, Submission no 10, p. 3.
308 Queensland Law Society, Submission no 112, p. 4.
ENFORCEABILITY OF ARRANGEMENTS

Based on submissions received, the committee found views were fairly evenly balanced between those supporting and opposing enforceability of altruistic surrogacy arrangements. The key arguments are detailed below.

Arguments for enforceability

Key supporters for legally binding, enforceable contracts included the Queensland Fertility Group, the Queensland Law Society and a number of prospective intending parents. Their primary argument was that this would provide certainty to the intending parents and the child, including protection for a child born with a disability.

Prospective intending parents often expressed their desire for enforceability in terms of changes in parenting presumptions:

> There are no other arrangements like surrogacy where an arrangement is securely in place before the child is conceived. The child is conceived due to the commissioning parents’ desire for a child. There should be no need for transfer of parentage. The child should be born to the commissioning parents.\(^{\text{310}}\)

> The commissioning parent should have legal rights to the child; the surrogate should not have any legal right to keep the child.\(^{\text{311}}\)

Queensland Law Society argued:

> The legislative framework should include the mechanisms for entering into binding surrogacy agreements with recourse to the Supreme Court or a statutory body where issues surrounding the agreement’s interpretation, variation or enforcement are required.\(^{\text{312}}\)

Queensland Fertility Group believed:

> Altruistic surrogacy arrangements must have enforceable preconception agreements, allowing for adequate preparation including medical, psychological and legal counselling and advice. Agreements must be contractual and enforceable allowing for the greatest moral and legal certainty for all parties.\(^{\text{313}}\)

While the Commission for Children and Young People and Child Guardian did not explicitly describe a position on enforceable contracts, it critiqued the current presumption in favour of automatic recognition of the birth mother as the legal parent:

> Currently, prima facie parentage for a surrogate child would be ascribed to the surrogate mother/couple who theoretically do not intend to keep the child. This does not automatically promote a child’s stability and security when it is intended that the commissioning parents will parent the resulting child.\(^{\text{314}}\)

The commission argued “legal parentage and parental responsibility for surrogate children should be based on ‘intent’ as opposed to a child’s biology”. Concern was expressed for the potential confusion and conflict between parties:

> Parties to surrogacy arrangements need to be clear on their respective legal roles and responsibilities to avoid confusion or conflict when a surrogate child is born. The existing presumption [that the birth mother is the legal parent]...create[s] confusion for parties to surrogacy arrangements as it is contrary to the parties’ intentions and the purpose of surrogacy arrangements, therefore increasing the likelihood of protracted Family Court litigation.\(^{\text{315}}\)

This is in line with the argument by an American bioethicist, J A Robertson, on the importance of intent of the parties to a surrogacy arrangement. Robertson pointed to the precedent created in donor conception:

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\(^{\text{310}}\) Carolyn and Tony Gaul, Submission no 1.  
^{\text{311}}\ Melanie Douglas, Submission no 43.  
^{\text{313}}\ Queensland Fertility Group, Submission no 91, p. 6.  
...the idea of enforcing preconception agreements for collaborative reproduction is already well accepted with donor sperm.\textsuperscript{316}

Queensland Fertility Group also argued its case in terms of the biological rights of intending parents:

\textit{It is unreasonable that a surrogate should enter a well defined prospective agreement to carry a child to whom she has no genetic relationship and then elect to keep the baby. This amounts effectively to theft of a couple’s genetic material.}\textsuperscript{317}

**Arguments against enforceability**

Those opposed to enforceability were concerned about protecting the rights of the birth mother and preventing forced relinquishment. Their key consideration was the uncertain impact of the gestational relationship in spite of pre-conception counselling and assessment.

Submitters both opposed to and supportive of altruistic surrogacy were of this view. Some supporters opposed to enforceability included the Kirkman family and the consumer infertility support organisation, ACCESS. As noted, the Kirkmans’ position was also based on a respect for the gestational relationship. ACCESS also acknowledged automatic legal recognition of the birth mother protected and empowered her.

The Hon Dean Wells MP, Member for Murrumba, argued against enforceable contracts on the basis of the implied commodification of the birth mother:

\textit{... once she has commenced gestation her legal rights should be exactly the same as that of every other pregnant woman. To require that she surrender the baby at birth would be to treat her as though she were a breeding machine rather than a citizen. The law of a free democracy cannot coercively hijack nine months of a woman’s life. She will almost certainly do as agreed, but it will require a certain amount of mind over instinct, and there should be no law that coerces the surrender of the baby once it is born.}\textsuperscript{318}

Linda Wright, a lawyer with experience in providing legal advice in over 40 surrogacy cases, expressed concern that enforceability also represented a commodification of children. She wrote:

\textit{...I would not support such agreement being legally enforceable. A child is not a commodity to be traded and it should be open to the surrogate not to have to agree to transfer parentage to the commissioning parents. This would be particularly important if partial surrogacy was to be permitted.}\textsuperscript{319}

**Preferred approach**

As outlined in Chapter 4, the committee supports the maintenance of the automatic recognition of the birth mother as the legal parent irrespective of her or the intending parents’ genetic connection to the child. Whilst the committee recognises the need for a specific provision for the transfer of legal parentage to ensure certainty for parties and the child, it does not support enforceability of altruistic surrogacy arrangements.

The committee’s position on unenforceability of arrangements reflects its concerns about the prospect of forced relinquishment and commodification of women and children. The committee believes unenforceability reflects some of the inherent risks of surrogacy and if parties have any reservations they should not proceed. Therefore, the committee’s focus is on rigorous pre-conception informed consent and counselling provisions rather than enforcing arrangements. The committee endorses the position reached by the Victorian Law Reform Commission in this regard:

\textit{The commission believes that it is not possible to devise legislation that will guarantee certainty of parentage in a surrogacy arrangement. Although people may enter into an agreement with strong intentions and expectations, these sentiments can change during the pregnancy or at the birth of the child. There is always the risk that a surrogate will decide she wants to keep the child, even if

\textsuperscript{316} J A Robertson 1994, p. 127.
\textsuperscript{317} Queensland Fertility Group, Submission no 91, p. 6.
\textsuperscript{318} Hon Dean Wells MP, Submission no 10, p. 2.
\textsuperscript{319} Linda Wright, Submission no 84, p. 3.
the commissioning parent[s] have been recognised as the child’s legal parent[s]. It is not possible to legislate to eliminate this risk.\textsuperscript{320}

RECOMMENDATION 18: UNENFORCEABILITY OF SURROGACY ARRANGEMENTS

The committee recommends that the Queensland Government ensures altruistic surrogacy arrangements remain unenforceable under State law.

TRANSFER OF LEGAL PARENTAGE

The committee believes that adoption is not an appropriate mechanism for the transfer of legal parentage for altruistic surrogacy.

In Queensland, relative adoption is only theoretically possible in a surrogacy situation where the child is a relative or step-child of the intending parents. The Adoption of Children Act 1964 (Qld) defines “relative” as:

(a) A grandparent, brother, sister, uncle or aunt of the child, whether the relationship is of the whole blood or half blood or by affinity, notwithstanding that the relationship depends upon the adoption of any person; or

(b) The spouse of a parent of the child, whether natural or adoptive.\textsuperscript{321}

The Minister for Child Safety also advised that there was a 71 percent decline in the use of relative adoption provisions in Queensland between 1977-78 and 1996-97. In addition, since 1997, all bar one relative adoption was by step-parents, representing an average of 17 relative adoptions annually. The Minister explained:

The marked decrease in adoption by relatives resulted from recognition of the negative effect it can have on family relationships and on a child’s identity.\textsuperscript{322}

The Minister explained that the department encouraged people to use Family Law Court parenting orders instead of relative adoptions which permanently sever all legal ties to the birth/genetic parent.

Intending parents are unlikely to be able to access step-parent adoption in Queensland. This is because the birth mother and her male partner (if she has one), under the Status of Children Act 1978 (Qld), must be registered as the child’s legal parents.

Meanwhile, prospective intending parents repeatedly stated that adoption was slow and inappropriate to deal with surrogacy:

\textit{It is unfair and unjust to make parents and children go through five years of legal limbo in order to adopt their own child.}\textsuperscript{323}

The committee heard from Fiona Clark, an intending mother and lawyer, who lives interstate. Ms Clark explained that the legal parentage of her seven year old daughter remained with her sister. She was awaiting anticipated law reform in her state rather than attempting adoption. She also explained the limitations of parenting orders:

\ldots “Parenting Orders”… are limited in their effect as they do not extinguish the parental status of the gestational mother and her husband and the records of Births Deaths and Marriages [are] not amended and the gestational parents names appear on the child’s birth certificate.\textsuperscript{324}

While she did not support enforceability of contracts, Antonia Clissa, the former Executive Officer of the Western Australian Reproductive Technology Council, noted the importance of legal certainty for birth mothers. Ms Clissa felt that, similar to donors, birth parents should be provided legal protection from any financial liability for the child.\textsuperscript{325}

\textsuperscript{320} Victorian Law Reform Commission 2007, p. 189.
\textsuperscript{321} s6.
\textsuperscript{322} Hon M Keech MP, Minister for Child Safety and Minister for Women, Correspondence received, 20 August 2008.
\textsuperscript{323} Susan Mobbs, Submission no 96. (Speaking about NSW)
\textsuperscript{324} Fiona Clark, Submission no 52.
\textsuperscript{325} Antonia Clissa, former Executive Officer, Western Australian Reproductive Technology Council, Interview.
The committee acknowledges that in practical terms Family Law Court parenting orders can address day-to-day issues in relation to medical treatment, school enrolments and passport applications. However, it believes a specific mechanism would better address these issues. More importantly, a specific mechanism could provide certainty to children in relation to inheritance in the case of death without a will and the protection of child support obligations in case of relationship breakdown. Parenting orders are not permanent and do not apply when children reach adulthood.

For the consumer infertility support group, ACCESS, transfer of legal parentage was also a matter of:

...humane closure for...parents who may have undergone many years of medical treatment in order to have a child and who have lived with uncertainty from the outset, knowing that their child may be deemed legally theirs only when a court so orders.  

Preferred approach

In terms of duty of care and protection from harm, the Queensland regime is unsatisfactory as it leaves the child, the birth parents and intending parties in a legal limbo. The committee believes that a specific mechanism with similar status and effect as an adoption order is required to address this issue. The committee’s policy principles in Chapter 3 articulate how a specific provision for legal transfer is in the best interests of the child and promotes the wellbeing and protects the liberty of the parties.

Following the proposed approach of building onto existing legislation, this specific provision could be included in the existing Status of Children Act 1978 or the Surrogate Parenthood Act 1988. Taking the Western Australian approach, the provisions could be included in surrogacy specific legislation. Taking the ACT approach, the provisions could be included as one amongst other parentage provisions.

The committee believes that given the significance of the issues involved, applications for transfer of legal parentage should be heard by the Supreme Court.

Specific conditions for the transfer of legal parentage

The committee proposes conditions for the transfer of legal parentage as outlined below.

Meeting the requirements of the legal definition of surrogacy

There are three components to this condition:

- **Non-commercial arrangements**: The parentage order should only be allowed for altruistic surrogacy. It is envisaged that parties would provide a statutory declaration attesting to the fact that reasonable expenses have been within guidelines. It may also be an option, where there is concern, to require parties to detail reasonable expenses paid.

- **Pre-conception arrangements**: The parentage order should require parties to demonstrate or attest to the fact that the arrangement was made pre-conception. This should be easily proven where parties have been through an ART service. In other cases, where altruistic surrogacy has occurred outside an ART service, parties would need to provide statutory declarations about the timing of agreed arrangements.

  *The Parentage Act 2004 (ACT) already has such a requirement. Proposed Western Australian, South Australian and national approaches also support pre-conception arrangements as a criterion.*

  Clinical psychologist, Miranda Montrone, and other submitters argued this criterion would provide an incentive to engage parties in informed consent, assessment and counselling processes through ART services outlined in Chapter 5.

- **Capacity**: Decisions to transfer should only occur between freely consenting adults. Parties need to be at least 18 years of age.

  *Demonstrated need for surrogacy and verified customary practice*

Where traditional Torres Strait Islander ‘adoptions’ fall within the proposed pre-conception legal definition of altruistic surrogacy, applicants will need to verify that their ‘adoption’ is customary practice. It is

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326 ACCESS, Submission 110, p. 10.
327 M Brazier, A Campbell and S Golombok 1998.
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proposed that they do this in a similar manner to that required by Kupai Omasker parenting orders in the Family Law Court. Applicants nominate 'verifiers' who will be interviewed and assessed by culturally competent officers nominated by the court.

All other applicants should demonstrate their need for altruistic surrogacy to create their family with the provision of advice from a medical specialist. Where applicants have been through ART, an approval by a Surrogacy Review Panel would suffice and no further assessment or report would be required. The need for surrogacy would be defined as the proposed criterion for ART: medical infertility, inability to carry a pregnancy or identified health risks.

This is a more liberal approach than currently allowed in the ACT or proposed in South Australia and Victoria, where parentage orders are/would only be available for people who used ART. The Western Australian Surrogacy Bill 2007 also suggests intending parents should demonstrate eligibility for ART services in order to approve the transfer of legal parentage.\(^{328}\)

**Demonstration of informed consent**

Another condition proposed for the transfer of legal parentage is the demonstration of informed consent. The committee proposes a four part process in relation to informed consent whether applicants for parentage orders have been through an ART service or not. The proposed process is as follows:

- **Approval of birth parents**: The approval of birth parents is sought prior to the transfer of legal parentage. This requirement respects the uncertain impact of the gestational relationship and aims to prevent the forced relinquishment of the child. This position is supported by the committee in line with its policy principles outlined in Chapter 3.

  As noted, all jurisdictions in Australia recognise the rights of the birth mother and her male partner (if she has one) to legal parentage at birth irrespective of her genetic connection to the child. The birth mother’s consent is also a requirement in existing legislation in the ACT and proposals in South Australia and Victoria.\(^{329}\) In Victoria, it is proposed that the transfer should also require consideration of views of the birth mother’s partner.\(^{330}\) Lawyer, Linda Wright, went further in evidence to the committee, proposing that:

  \[\text{The approval of both surrogate parents should be necessary (not just the birth mother). Such a requirement would be in line with the Family Law Act which clearly recognises that both parents have joint responsibility in relation to parental responsibility.}\] \(^{331}\)

  The committee considers the latter a sensible and cautious approach reflecting the current legal status of birth parents in a surrogacy arrangement.

- **Living arrangements**: The child must be living with the intending parents at the time of the application for a transfer of legal parentage. The committee believes that this is also an indication of the birth parents’ willingness to relinquish the child and the intending parents’ willingness to accept, look after and care for the child.

  This is a requirement in the current law in the ACT and is proposed in Western Australia, South Australia and Victoria.\(^{332}\) It was also supported by a range of submitters from would-be intending parents to legal experts.\(^{333}\)

- **Separate legal advice**: Evidence of separate legal advice by a qualified lawyer for intending parents and birth parents will be required. Where people have been through ART services, it is proposed that

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\(^{329}\) Recommendation 123, Victorian Law Reform Commission 2007, p. 16; s17(d), Surrogacy Bill 2007 (WA); s10HB (7), Statutes Amendment (surrogacy) Bill (SA)


\(^{331}\) Linda Wright, Submission no 84, p. 4.

\(^{332}\) Div 2, ss17 & 24, Surrogacy Bill 2007 (WA); s10HB (9) (a) Statutes Amendment (Surrogacy) Bill 2008 (SA); Recommendation 127, Victorian Law Reform Commission 2007, p. 16; s26 (3) (a) Parentage Act 2004 (ACT).

\(^{333}\) ACCESS, Submission no 110, p. 10; Professor Jenni Millbank and Associate Professor Anita Stuhmcke, Faculty of Law, University of Technology, Sydney, Submission no 12, p. 12.
parties will simply be able to rely on notification from the fertility clinics or the Surrogacy Review Panel that the requirement for separate, professional legal advice was met.

Given some altruistic surrogacy cases will not occur through ART, such as traditional Torres Strait Islander ‘adoptions’, it is proposed that these parties would have to access separate, professional legal advice before making an application for transfer and that the lawyer would need to provide a statement to this effect.

- **Post-birth psychosocial assessment report:** A report will be required from an ANZICA counsellor or a suitably qualified psychologist, social worker or psychiatrist confirming the birth parents’ consent. The report will also verify that the parties have fully considered the child’s right to information on his/her genetic parentage and circumstances of birth and that they have clarified their arrangements for ongoing communication and involvement with the child.

The concept of a post-birth report was outlined in a proposal put to the committee by lawyer, Linda Wright:

> In terms of evidence that might be required before the transfer of parentage the committee could consider imposing a requirement that a counselling report be obtained detailing issues such as bonding, relationship between commissioning parents and surrogate parents and proposals for ongoing contact and communication. (Such a report would be akin to that required under the Family Law Act where an Order is being made in favour of ‘non parents’). Such a report could be relatively simple but again would ensure that the transfer of parentage is being done voluntarily.  

The committee envisages that the Court would have the option of not granting an order based on a negative report or postponing a transfer until further counselling was undertaken.

The purpose of this post-birth psychosocial report is not to compare the relative capacity of intending parents and birth parents to care for a child. As stated, it is to protect the birth mother from coercion, promote the rights of the child to information and clarify ongoing relationships.

The committee considers that it is appropriate for the Government to insist that intending parents, birth parents and donors are educated about the implications of a child’s right to identity. This should include information on research findings on early telling (or parents telling children about their genetic origins and birth history in early childhood) and the potential benefits to a child of developing and maintaining ongoing relationships with birth mothers and donors. However, the Government cannot force intending parents to tell or maintain relationships with birth mothers or donors. The committee believes this approach balances the Government’s role of preventing harm and protecting liberty.

**Residency**

The committee considers that Australian residency should be required for at least one of the intending parents. Given the support for a uniform national approach and in recognition of population movement within Australia, the committee does not support a state residency requirement for either access to ART or transfer of legal parentage for altruistic surrogacy.

**Time limit**

The committee is of the opinion that approval of parentage orders must not be made until a minimum period of four weeks after the birth and applications for transfer should be made no longer than six months after the birth.

In the ACT, the *Parentage Act 2004* requires that applications be brought a minimum of six weeks after birth and no longer than six months after birth. This approach is adopted by the current South Australian Bill, while the Western Australian Surrogacy Bill 2007 and the Victorian Law Reform Commission propose a minimum period of 28 days after birth.

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334 Linda Wright, DGB Lawyers, Submission no 84, p. 4.
335 s25, Parentage Act 2004 (ACT)
336 s10HB (5) Statutes Amendment (Surrogacy) Bill (SA); Div 2 Surrogacy Bill 2007 (WA); Recommendation 123, Victorian Law Reform Commission 2007, p. 16.
The committee supports the minimum time period to ensure that the birth mother has time, after the intensity of the birth experience, to make her decision. The upper limit is also supported as it seeks to provide certainty to the parties. The committee’s position is in line with its first policy principle which requires a child has a secure and stable living environment to assist with bonding. This is recognised as an important part of his/her developmental needs.

The committee was advised by Professor Heather Mohay, developmental psychologist, Faculty of Health, Queensland University of Technology, about the importance of providing certainty regarding relinquishment and parenting within a six month period. Professor Mohay has extensive experience working with children born prematurely. She explained:

> Infants start to form an attachment to their primary caregivers from birth (or even earlier) and by six months of age show a clear preference for certain people (usually parents) over all others. The formation of this primary attachment is a prototype for all subsequent relationships and can therefore have long term consequences in terms of peer relationships and the formation of intimate relationships in adult life... therefore it is important not to delay the responsibility for the care of the infant, and transfer of parentage to the commissioning parents.\(^\text{337}\)

Rachel Kunde, Co-Director, Aussie Egg Donors:

> Legal parentage should be able to be transferred from the surrogate to the commissioning parents within six weeks of birth provided both parties undergo independent counselling. This gives the surrogate plenty of time to reflect on the process she has just been through.\(^\text{338}\)

Linda Wright, lawyer with expertise in surrogacy:

> Time limits as applicable in the ACT and as proposed by other jurisdictions seem sensible and non-controversial and should be followed. Whether the minimum period is six weeks or four weeks would appear to matter little.\(^\text{339}\)

ACCESS, consumer infertility support group:

> ...at least [six] weeks and no more than [six] months must have elapsed since the birth.\(^\text{340}\)

Linda Kirkman, birth mother:

> I think the month gives the gestational mother long enough to say, ‘This is what is right for me,’ and I think beyond that it is not in the best interests of the child to be passed back and forth.\(^\text{341}\)

**Best interests’ inquiry**

The last condition proposed for the parentage order is a specific provision for a ‘best interest of the child’ inquiry. The committee believes the other conditions are also an expression of this concern. However, this specific inclusion provides some discretion to decision makers to deal with the needs of a particular case.

The committee acknowledges that a number of submitters with particular expertise in this area supported the inclusion of a ‘best interests inquiry’ provision as a condition for transfer of legal parentage.\(^\text{342}\) It is also noted that this is the case in the existing legislation in the ACT and is proposed in Victoria, Western Australia and South Australia. Western Australia has also added a proposed presumption that it is in the best interests of the child to transfer legal parentage.

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337 Professor Heather Mohay, Developmental Psychologist, Psychology and Counselling, Faculty of Health, Queensland University of Technology Submission no 71, p. 3.
338 Rachel Kunde, Co-Director, Aussie Egg Donors, Submission no 65.
339 Linda Wright, DGB Lawyers, Submission no 84, p. 4.
340 ACCESS, Submission no 110, p. 10.
341 Investigation into Altruistic Surrogacy Committee 2008a, Brisbane, p. 19. (Linda Kirkman)
342 Professor Jenni Millbank and Associate Professor Anita Stuhmcke, Faculty of Law, University of Technology, Sydney, Submission no 12; ACCESS, Submission no 110.
Out of time applications

The committee proposes that families who have already undertaken altruistic surrogacy in Queensland or elsewhere should have an amnesty period in which to apply for a parentage order. In such cases, the six month time limit condition would be waived. The Victorian Law Reform Commission also proposed an amnesty period of a year. Given the geography of Queensland, the history of prohibition and the potential relevance to some traditional Torres Strait Islander adoptions, two years grace is proposed.

Review of Legal Aid guidelines

The committee discussed the transfer of legal parentage in the case of altruistic surrogacy as a potential area for Legal Aid assistance. Subject to the usual means test, the committee suggested that the Attorney-General further consider the issue. The committee does not expect that many families undertaking altruistic surrogacy would be financially eligible for assistance; however, there may be occasional cases where legal costs are a barrier to resolving legal parentage.

RECOMMENDATION 19: MECHANISM FOR TRANSFER OF LEGAL PARENTAGE SPECIFIC TO ALTRUISTIC SURROGACY

The committee recommends to the Queensland Government that it:

- Provides for the transfer of legal parentage for altruistic surrogacy under the *Surrogate Parenthood Act 1988*, *the Status of Children Act 1978* or other suitable Act with the following conditions:
  - The arrangement falls within the proposed legislative definition of acceptable altruistic surrogacy arrangements (i.e. it is non-commercial, made pre-conception and parties have reached legal adulthood);
  - Intending parents demonstrate a need for surrogacy based on advice from the Surrogacy Review Panel or a medical specialist or, in the case of traditional Torres Strait Islander ‘adoptions’, customary practice is verified using a similar process to that used in the Family Law Court;
  - The parties meet informed consent requirements including:
    - The birth parent/s consent to the transfer of legal parentage;
    - The child is resident with the intending parents;
    - Birth parents and intending parents have received separate legal advice from a qualified lawyer; and
    - All parties have undertaken post-birth counselling as evidenced by a report from an ANZICA counsellor or a suitably qualified psychologist, social worker or psychiatrist focusing on quality of informed consent, child’s right to information and ongoing communication between the parties;
  - At least one of the intending parents is an Australian resident;
  - The approval of transfer is made no sooner than four weeks after birth and an application for transfer is made no later than six months after birth; and
  - The transfer is considered in the best interests of the child;
- Provides for the transfer of legal parentage for any existing altruistic surrogacy cases which fall outside the six month criteria for a two year period following the decriminalisation of altruistic surrogacy providing they meet all of the other conditions detailed above; and
- Ensures that applications for the transfer of legal parentage come under the jurisdiction of the Supreme Court.

Impact for same-sex couples and their children

The committee is aware that same-sex couples are also seeking legal certainty for themselves and their children born of surrogacy. However, they will not have the benefit of the proposed provision for altruistic surrogacy under current Queensland parenting law. The committee received a detailed submission
outlining the personal impacts of current parenting law on two same-sex fathers currently living in Queensland:

...as a same-sex couple, my partner has no legal rights to his own son under Queensland law because he is not biologically related. In fact, under Queensland law, our surrogate, who did not want anything to do with the child, would be named the mother, and I, as a mere sperm donor, may not even be named as the father. This is ridiculous and undermines a minority of true, loving families.[sic] \(^{343}\)

Dean Murphy, a doctoral student at the University of NSW, explained in his submission that current parenting laws create “significant difficulties and distress” for same-sex couples. Frequently where a surrogacy has been arranged overseas, the non-biological parent is not registered as the legal parent.\(^{344}\)

The gay and lesbian organisation, Action Reform Change Queensland, recommended that:

_The Queensland Government should address the issue of parentage presumption for same-sex de facto couples as a foreground issue to the question of decriminalising and regulating altruistic surrogacy._\(^{345}\)

President of the Human Rights and Equal Opportunity Commission, John Dousa, wrote to the committee to highlight the relevance of the commission’s report: _Same Sex: Same Entitlements_. Mr Dousa expressed concern about the discriminatory impact of adoption law along with the current prohibitions on altruistic surrogacy:

_A combination of restrictions on altruistic surrogacy and restrictions on adoption by gay couples in Queensland law, make it extremely unlikely that a gay couple will be legally recognised as the parents of a child who they bring up._

*I am concerned that situation may result in a breach of the Convention on the Rights of the Child ([CRC]), which requires that the best interests of the child be the paramount consideration in adoption (article 3, article 21). It may also breach the right to non-discrimination contained in the CRC (article 2) and the International Covenant on Civil and Political Rights (articles 2 and 26)._ 

_Further, adoption laws which arbitrarily exclude a couple on the grounds of sexuality will breach these rights because they fail to consider the best interests of the child._

_...I encourage you to consider reform to adoption law at the same time as you are considering reform to laws governing surrogacy._\(^{346}\)

The committee notes that the Australian Government has recently introduced the Family Law (De Facto Financial Matters and Other Measures) Bill 2008. The Bill not only recognises state or territory court orders which transfer legal parentage in the case of altruistic surrogacy but also ensures “opposite sex and same-sex de facto couples can access the federal family law courts on property and spouse maintenance matters on relationship breakdown.” \(^{347}\) This Bill is partly in response to the _Same Sex: Same Entitlements_ report. For children of same-sex couples, the amendment ensures that they have access to child support in the case of separation in the same way as children of opposite sex couples.

The committee is acutely aware that many submitters opposed to (and some submitters supportive of) decriminalising altruistic surrogacy also oppose legal recognition of same-sex families and parents. The committee understands that these views are sincerely held and reflect personal beliefs.

However, the committee believes concerns for the outcomes for children of same-sex parents are not supported by the available research.\(^{348}\) It also believes that it is in the best interests of children to ensure parenting arrangements and legal parentage are clarified. The committee believes the Government should be guided by principle 3 outlined in Chapter 3:

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\(^{343}\) Anonymous, Submission no 27.
\(^{344}\) Dean Murphy, Submission no 104, p. 2.
\(^{345}\) Action Reform Change Queensland (ARCO), Submission no 73, p.1.
\(^{347}\) Hon R McClelland MP 2008.
Every child enjoys the same status and legal protection irrespective of the circumstances of their birth or the status of their parents.

The committee is seeking outcomes for children born of altruistic surrogacy arrangements which prevent potential stigma and disadvantage by the lack of legal recognition of intending parents as legal parents.

This logically also leads the committee to acknowledge the lack of legal certainty for children with same-sex parents born of altruistic surrogacy when compared with other children. This lack of recognition of same-sex couples and their children is clearly a bigger issue than altruistic surrogacy. It extends to adoption law and to existing parenting presumptions for children of lesbian women born through ART. In the latter case, the same-sex partner of a lesbian woman who has conceived a child through ART will not be recognised as the legal parent of the child on his/her birth certificate.

The committee notes the recommendation of the South Australian Social Development Committee Inquiry into Gestational Surrogacy that legislation be “consistent with State and Commonwealth anti-discrimination legislation”.349 It also notes that the ACT Parentage Act 2004 permits the transfer of parentage to couples regardless of sexual orientation.350

The committee recognises that broader changes are required in relation to parenting presumptions in the Status of Children Act 1978 for same-sex couples to be in a position to take up the proposed provision for transfer of legal parentage for altruistic surrogacy.

RECOMMENDATION 20: LEGAL PROTECTION FOR CHILDREN BORN OF ALTRUISTIC SURROGACY ARRANGEMENTS WITH SAME-SEX PARENTS

The committee notes the broader issue of recognition of same-sex parents and recommends to the Queensland Government that it conduct a review of the legal status for children being cared for by same-sex parents with particular to the operation of the Status of Children Act 1978.

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349 Recommendation 4, Social Development Committee 2007, p. 6.
350 s24c, Parentage Act 2004 (ACT).
CHAPTER 7: CHILD’S RIGHT TO INFORMATION

TERM OF REFERENCE

This chapter seeks to respond to the question posed in the following term of reference:
• What rights should a child born through an altruistic surrogacy arrangement have to access information relating to his or her genetic parentage? Who should hold this information?

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

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

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

Where a child is illegally deprived of some or all of the elements of his or her identity,…[states]…shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.351

The committee has detailed its support for children’s identity rights in policy principle 2 and related outcomes statements in Chapter 3. It also notes that expert opinion suggests the convention implies the Government has a responsibility for registration of births and maintenance of birth records.352 The committee acknowledges it is vital that the collection and administration of birth and related records seeks to clarify, rather than obscure, children’s identity and genetic parentage.

IMPORTANCE FOR CHILD

The committee is aware that a child born of an altruistic surrogacy arrangement may have no genetic relationship with his/her intending parents. In this case, he/she could be seeking access to information in relation to donors; genetic siblings; and his/her birth mother and her partner.

The committee believes a child’s right to know how he/she was born and his/her genetic history is just as important in altruistic surrogacy as it is for children conceived in other ways. The importance of the issue for children is well understood in adoption and donor conception. From adoption, it is accepted that:

...all adopted people have a psychological need to know about their origins, about their family… about their genealogy, as well as the circumstances surrounding their birth…Adoptees’ quest for their origins is not a vindictive venture, but an attempt to understand themselves and their situation better. The self-perception of all of us is partly based on what our parents and ancestors have been; going back many generations...no person should be cut off from his origins.353

Young adults born of donor gametes reiterate the experiences and advice of adopted children in earlier generations. There is evidence that the majority of parents, especially heterosexual couples, who have used donor insemination, do not disclose the use of a donor to their children.354 The potential emotional impact of not telling is explained for such children as follows:

The identities of one’s genetic parents are foundation stones in one’s psyche. To lie to a child about her identity is to ensure that those deep foundations are not permanent, but brittle constructions that can collapse with an angry revelation, the discovery of a blood-type anomaly with a parent, an unguarded remark by a friend or relative who knows the truth, or even with a half-formed, half-conscious guess later in life, leading to a speculative letter to … confirm the truth. Furthermore, the child is being lied to by the people she loves and trusts above all others.

351 United Nations 1989, p. 3.
354 ITA, 2006 p.3.
This lie is explicit and implicit, conscious and subconscious, occurring many times a day throughout her life.\footnote{R Rushbrook 2008, p. 1.}

**Lauren, told by her parents at 9 years:**

Can you imagine having a blood test in your adulthood only to discover that your blood group doesn’t match with either of your parents? Or even worse discovering the secret from family friends or in the middle of a heated argument?\footnote{M Kirkman, D Rosenthal and L Johnson 2007, p. 15.}

**Melody, told by her godmother at 33 years:**

I wish my parents’ attitude had been healthy enough that they could have spared me the anguish of having it sprung on me by a third party. I am sure that the ‘secret’ would have surfaced eventually because it turns out that most of my extended family had known about it from the very start. I cannot adequately describe how it feels to discover that everyone except me had known. I realise that they were protecting me (and my mother and dad and perhaps themselves) and that intentions generally were all good.\footnote{M Kirkman, D Rosenthal and L Johnson 2007, p. 15.}

**William, told by his mother at 37 years:**

Most parents fear that the child’s need to search will frustrate him and hurt his self-esteem. Some fear that a search means they have failed as a parent. An adult searches because it is natural to want to know your heritage not because he rejects his parents…\footnote{M Kirkman, D Rosenthal and L Johnson 2007, p. 15.}

There are few adults born of surrogacy available to clarify their particular needs and experience. This is one of the reasons the committee sought evidence from Alice Kirkman, the first child in Australia born of IVF surrogacy, now 20 years old:

As long as the child knows everything that has gone on – who was involved and why and how it worked – the child probably will not really mind and they will just want to get on with things. So as long as the child knows everything I think everything with surrogacy is A-okay.\footnote{Investigation into Altruistic Surrogacy Committee 2008a, p. 15. (Alice Kirkman)}

Alice’s mother, Dr Maggie Kirkman, also explained to the committee:

Alice has known since she was about two, and long before she ever knew what sperm was, that a sperm donor was used. Daddy did not have any seeds and another kind man…provided seed.\footnote{Investigation into Altruistic Surrogacy Committee 2008a, p. 14. (Dr Maggie Kirkman)}

A longitudinal study in the UK indicated that telling may be more likely in the case of surrogacy given the obvious absence of a pregnancy. Findings from this study based on outcomes for families with children now 7 years of age are summarised in the table below:

<table>
<thead>
<tr>
<th>Family progress on telling children how they were conceived, UK, 2008</th>
<th>Intention to tell as reported at 1 year of age (%)</th>
<th>Told at 7 years (%)</th>
<th>Sample size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Donor insemination</td>
<td>46</td>
<td>29</td>
<td>28</td>
</tr>
<tr>
<td>Donor egg</td>
<td>56</td>
<td>39</td>
<td>16</td>
</tr>
<tr>
<td>Surrogacy</td>
<td>100</td>
<td>89</td>
<td>17</td>
</tr>
</tbody>
</table>

Source: Casey et al, 2008

Other evidence to the committee indicates that telling can also be an issue with surrogacy. A perceived reluctance to tell is discussed further in Chapter 9 in relation to traditional Torres Strait Islander ‘adoptions’. As noted in the discussion in Chapter 3, this practice of traditional ‘adoption’ overlaps with the committee’s proposed definition of surrogacy.
In her book on contemporary ART issues, journalist, Jill Singer, provided a case study of a birth mother in Perth, who engaged in a traditional surrogacy arrangement outside a fertility clinic. The birth mother and the intending parents met online and lived in the same street until the birth, at which time the intending parents moved away. Whilst they still live in Perth, the intensity of the communication between the parties has waned. The families get together for Christmas and the child’s birthday. In spite of commitments to tell, at four years of age, the child has still not been told. This worries the birth mother.\footnote{361}

**OVERVIEW OF CURRENT QUEENSLAND ARRANGEMENTS**

The committee notes the policy and practice relating to birth registration, adoption and donor conception. Some children born of surrogacy arrangements will also be born using donor gametes. Current arrangements for adoption and donor conception are relevant to protecting the information rights of children born of surrogacy arrangements.

**Practice with birth registration**

In Queensland, the Registrar of Births, Deaths and Marriages is notified by hospitals within 48 hours of a birth. The birth parents then have 60 days to register the birth. Currently, the *Status of Children Act 1978* presumes that the birth mother and her male partner (where she has one) are the legal parents. Where possible, the birth mother and father are asked to sign the registration. If one is unable to sign, the applicant must provide an explanation. The registry follows up where birth registration is incomplete. However, some birth registrations remain incomplete until parents have a pressing need for a birth certificate, such as at the time of school enrolment.

**Practice with adoption**

When a child is adopted, the child assumes the family name of their adoptive parents and an amended birth certificate is issued. The birth certificate records the adoptive parents as the child’s mother and father.\footnote{362} The child’s new birth certificate is evidence of their legal parentage of the child. The Department of Child Safety holds adoption orders and details of the parties in an adoption register.

Before accessing their original birth certificate, adoptees must be 18 years of age. In all other cases, children can access their current birth certificate at any age if they have suitable identification.

Once an adopted child is 18 years, the *Adoption of Children Act 1964* provides that the department may:

- Release to birth parents the full name of the child at the date of adoption;
- Release to the child the full names and dates of birth of birth parents at the time of adoption; and/or
- Authorise access to the child’s original birth certificate and amended birth entry through the Registry of Births, Deaths and Marriages.\footnote{363}

In the case of adoption, the new birth certificate has a slightly different heading which may alert the reader to the fact that the certificate is a re-registered birth certificate under Section 14 of the *Births, Deaths and Marriages Act 2003*. Compared to an ordinary or original birth certificate, it does not list siblings where there are any.

**Practice with children born of donor conception**

In Queensland, a child’s right to access information about donors is currently addressed by both the 2005 RTAC code of practice and the NHMRC guidelines. As noted, under the *Private Health Facilities Act 1999*, fertility clinics in Queensland are required to meet both these sets of requirements.

**RTAC code of practice**

The 2005 RTAC code of practice requires conception to be facilitated only in circumstances where the child can know his/her genetic parents.\footnote{364} Effectively, the willingness of parents to disclose is a condition of

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\footnotetext{361}{J Singer 2005.}
\footnotetext{362}{Department of Child Safety 2007, p. 36.}
\footnotetext{363}{Department of Child Safety 2007, p. 39.}
\footnotetext{364}{Code 9.13, Reproductive Technology Accreditation Committee 2005, pp. 68-69.}
receipt of genetic material. The ART service must also provide appropriate counselling for recipient families to facilitate this process.

**NHMRC guidelines**

NHMRC guideline 6.1 requires fertility clinics to “Uphold the right to knowledge of genetic parents and siblings”. As with the 2005 RTAC code of practice, this guideline prohibits donation unless a person consents to the release of identifying information to children conceived using their genetic material.\(^{365}\)

Under the NHMRC guideline clinics must collect the following information from donors: name, previous name (if any); date of birth; most recent address; details of past medical history; family history; genetic test results; and physical characteristics.\(^ {366}\) In turn, clinics must also advise donors that they are ethically responsible to keep the clinic updated with any changes to their details.\(^ {367}\)

At 18 years of age, a child born of donor gametes is entitled to:

- Information regarding their medical and family history;
- Identifying information about the donor and the number and sex of other persons conceived using genetic material from the same donor;
- The number of families involved; and
- Any information that siblings have consented to release.\(^ {368}\)

As distinct from adoption, the donor is entitled to only non-identifying information on any child born.

NHMRC guidelines require that fertility clinics store the information relating to ART procedures indefinitely. This includes the full names and contact details of all participants and the names of children born.\(^ {369}\) Clinics are also required to have processes in place to assist donors and recipients to understand the impact of biological relationships on children; and to assist donors and recipients to understand the child’s entitlement to know their genetic parents and siblings; and to encourage parents to tell.\(^ {370}\)

The requirement to only use gametes with identifying data and to maintain registers for this data at a clinic level has only been required in Queensland since 2004. This means Queensland is some 14 years away from having children being able to access donor information without assistance from a guardian.

On 22 June 2008, the *Sunday Mail* reported on the impacts of anonymous sperm donation prior to 2004. The report indicated that there were some 6,000 children born of donor gametes in Queensland and 37,000 children nationally.\(^ {371}\)

In the case of altruistic surrogacy where donated gametes provided through fertility clinics were used to facilitate conception, donor registers would be utilised to record, store and release information to the child when they reached 18 years.

In a surrogacy arrangement, the birth mother, her partner and the birth mother’s existing children would be recorded on the child’s birth certificate. However, there is no provision under the 2005 RTAC code of practice or NHMRC guidelines to maintain a register of information on the birth mother or her family for a child born of surrogacy.

**Preferred approach**

In responding to its terms of reference on a child’s rights to information, the committee addresses three areas: birth certificates, a central register for surrogacy information and support to tell. These are dealt with in turn below.

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\(^{366}\) Guideline 10.3, National Health and Medical Research Council 2007, p. 50.

\(^{367}\) Guideline 10.3, National Health and Medical Research Council 2007, p. 50.

\(^{368}\) Guideline 6.11, National Health and Medical Research Council 2007, p. 29.

\(^{369}\) Guideline 10.2.1, National Health and Medical Research Council 2007, p. 49.


\(^{371}\) Kay Dibben 2008.
Birth certificates

The committee believes the simplest and most immediately practical approach to dealing with birth certificates in altruistic surrogacy arrangements in Queensland is to follow the current adoption model. It is envisaged that the birth mother would be responsible for birth registration and the birth parents would be registered as the legal parents in line with current presumptions under the Status of Children Act 1978. Following the transfer of legal parentage, a new birth certificate would be prepared and the original certificate closed. The intending parents would be named as the legal parents on the new certificate. This new certificate would then be used for all legal purposes. This is consistent with the proposed Western Australian, Victorian and South Australian models and the current arrangements in the ACT.

Access to original birth certificate

The committee recommends that people born of altruistic surrogacy arrangements should have access to their original birth certificate at 18 years, or earlier with their intending parents’ permission. It is suggested that the Register of Births, Deaths and Marriages would also offer people information and referral to counselling and support services when they access their original birth certificates.

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Dr Sarah Ferber School of History Philosophy Religion and Classics University of Queensland:

There is no point in making the birth mother the legal parent on the birth certificate if it [is] not to be legal for the children to contact the person when they are eighteen. This is arguably even more important than the extremely important and under-legislated issues of gamete donation. In all cases children should have the right to know who gave birth to them and whose gametes were used. This is of great emotional, social and medical importance. The government is so far lamentably behind in ensuring these rights for children born through the ARTs.372

Dr Trevor Jordan, Senior Lecturer, Applied Ethics, Humanities Program, QUT:

...every citizen ought to be entitled to a complete and accurate legal account of their parentage, legal and biological. A child ought not to be bought up in a ‘cloud of deception’; not knowing the identity of her or his biological relations. In the past, such family secrecy has been abetted by the ‘legal fiction’ of birth certificates which hide [the] truth about one’s origins.373

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Further consideration of options for birth certificates

The committee recognises that this arrangement has a number of shortcomings. Whilst the committee is opting for a model for birth certificates which ensures they function to clarify legal parentage, the proposed model does not define the precise genetic connection with the intending and birth parents or the type of surrogacy arrangement. It also does not clarify if donor gametes were used and the identity of donors. Unless children born of altruistic surrogacy are told of their origins, they may not know they have an original birth certificate.

The broader issue of the purpose of birth certificates is also raised in these deliberations. The committee is aware that children born of surrogacy are likely to be a very small subset of the children affected by the issue. The committee also understands that there are likely to be wide ranging interests and views on the matter.

The committee encourages further debate and consideration of options for clarifying genetic parentage within birth certificates. Two of these options are outlined below.

In the course of community engagement, the committee emphasises that it would be timely to also hear from adults born of ART and adoptees.

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372 Dr Sarah Ferber, Senior Lecturer, School of History, Philosophy, Religion and Classics, University of Queensland, p. 1.
373 Dr Trevor Jordan, Submission no 87, pp. 1-2.
Option: public and private versions of birth certificates

The committee recognises the merit of providing two versions of birth certificate: a public version outlining legal parentage; and a private version which clarifies genetic relationships with intending parents and birth parents, any other donor(s) and the type of surrogacy. The private version could be available to the child, the birth parents and the intending parents. The committee would like to see this proposal given further consideration by stakeholders.

British Association for Adoption and Fostering:

We would like to propose the following...to address the importance of all people in our society knowing the truth about their genetic identity, whilst protecting their privacy. We suggest that a national system is introduced where people are issued with a certificate of birth showing legal parentage – people who have the parental responsibility – and then also another document/certificate that shows a person’s genetic inheritance, for example whether they are adopted or born as a result of donor conception.374

Donor-conceived adult, told as a young adult:

Why can’t it be an option on the birth certificate to register everyone, including the social father and the donor? They should all be there. It is such a lie. I am also very frightened of cross-breeding issues for my children and the generations after. I should have access to that information and to medical information. I have had medical issues with my children....but we can’t trace where it’s from. It’s a jigsaw of unfitting pieces. This needs to be about fulfilling the needs of the baby, its rights.375

Dr Maggie Kirkman, intending parent, researcher on telling and meaning of genetics:

I would be happy to have all the details – all the people who participated – on a full birth certificate and then have a shortened form available for Alice to use. She does not necessarily want to share this with prospective employers and other people. For the child’s sake if for nobody else’s, all the facts ought to be there and available so that a child will always know genetic origins and birth origins.376

Rupert Rushbrooke, advocating policy change in the UK:

The way birth certification is handled for surrogacy will need to be reformed as well. The term covers at least two quite different procedures: (i) commissioning couple provides egg and sperm, surrogate gives birth to their genetic baby and then gives it to them to bring up, (ii) surrogate gives birth to her own genetic baby, using the commissioning father’s sperm, and then gives it to the commissioning couple to bring up. In addition, a sperm donor can also be used. In all cases, however, the birth certificate should show the identities of both genetic parents and the gestating mother. The legal parents should be on the surrogacy certificate, together with the type of surrogacy used.377

Option: annotation of birth certificates

The committee also notes the option of annotated birth certificates as recommended for further consideration in the UK by the joint Commons and Lords committee reviewing the draft Human Tissues and Embryo Bill in 2007.378 The joint committee’s recommendation stated:

We recognise the force of the argument that the fact of donor conception should be registered on a person’s birth certificate. This would create the incentive for the parent(s) to tell the child of the fact of his or her donor conception and would go some way to address the value of knowledge of genetic history for medical purposes.

Moreover, unlike where children are born through natural conception, assisted conception by its nature involves the authorities and we are deeply concerned about the idea that the authorities may be colluding in a deception.

374 British Association for Adoption and Fostering cited in International Donor Offspring Alliance 2008, p. 8
375 Infertility Treatment Authority Victoria 2006b, p. 7.
376 Investigation into Altruistic Surrogacy Committee 2008a, p. 18. (Dr Maggie Kirkman)
377 R Rushbrooke 2008, p. 5.
378 The Human Tissue and Embryos Bill 2007 is still before the Parliament in the United Kingdom.
However, we also recognise that this is a complicated area involving the important issue of privacy, as well as issues of human rights and data protection. We therefore recommend that, as a matter of urgency, the Government should give this matter further consideration.\textsuperscript{379}

The UK Government stated:

\textit{…it is preferable that parents are educated about the benefits of telling children that they were donor-conceived rather than forcing the issue through the annotation of birth certificates.}\textsuperscript{380}

The committee has some concern about the potential for stigma associated with annotation. The committee considered one solution may be a generic requirement for an annotation on all birth certificates. This could communicate the possibility that, in the case of children born of donated gametes or surrogacy, more information may be held on a register. Information clarifying genetic parentage and type of surrogacy would also be held on that register.

\textbf{Role of original birth certificates in the context of other options to support telling and access to genetic heritage}

The committee believes it is impossible and undesirable to compel parents to tell. However, the committee believes that the Government has a responsibility to ensure parents are educated on the benefits of telling and supported in telling. The 2005 RTAC code of practice for surrogacy and gamete donation requires parties to understand and support a child’s identity rights. The committee has also sought to require all parties to address the issue as a condition of transfer of legal parentage.

The committee believes that adults born of surrogacy have a right to access their original birth certificate when they turn 18 years. The original birth certificate is important in providing information on birth parents and siblings. However, the difficulty is that children may not know there is an original birth certificate and it cannot be assumed that intending/birth parents will remain in contact throughout a child’s life to provide access to information.\textsuperscript{381}

The committee also recognises that original birth certificates will not clarify genetic relationships with the birth parents nor record whether donated gametes were used from the intending parents or others. This leads the committee to two proposals: the importance of a central register for altruistic surrogacy and gamete donation and ongoing support to tell post-birth. These proposals arise from what the committee believes are government responsibilities to support children’s right to know their genetic parentage.

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\textbf{RECOMMENDATION 21: BIRTH CERTIFICATES}  \\
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The committee recommends that the Queensland Government: \\
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- Provides for the re-registration of births after approval of the transfer of legal parentage in altruistic surrogacy cases with the issue of a new birth certificate recording the names of intending parents as the child’s legal parents; \\
- Ensures that when children born of altruistic surrogacy with a re-registered birth certificate turn 18 years they can access their original birth certificates; and \\
- Engages stakeholders including children born of altruistic surrogacy and/or ART and adoptees in considering other options to support children’s identity rights including:  \\
  - The production of a public birth certificate outlining legal parentage and a private birth certificate detailing genetic relationships and type of surrogacy (i.e. gestational or traditional); or \\
  - The use of annotations on birth certificates to alert people to the existence of other information held elsewhere. \\
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\textsuperscript{379} House of Lords, House of Commons Joint Committee on the Human Tissue and Embryos (Draft) Bill 2007, p. 73.
\textsuperscript{380} Department of Health 2007, p. 19.
\textsuperscript{381} In a presentation on gestational surrogacy on 31 March 2008 at the John Kerin Symposium, SA, Dr Lok, a Sydney IVF obstetrician, indicated that of 60 surrogacy cases since 2002, 17 percent were carried by a sister; 28 percent by a sister in law; 12 percent by a mother; 2 percent by a mother in law; 23 percent by friends; 12 percent by other relations; 7 percent by a commercial surrogate: D F Lok 2008. However, according to the South Australian Council on Reproductive Technology, in the majority of surrogacy cases in SA, the birth mother has not been a close relative: Submission no 100, p. 6.
Central register

The committee notes that Victoria, Western Australia and, most recently, NSW have established a state level donor register. The South Australian Council on Reproductive Technology also advised the committee that it “has recommended to the Minister for Health that a state controlled register be established in South Australia.” The committee also supports the development of a central register in Queensland. The committee believes that it is the Government’s role to maintain the security, quality and accessibility of information on donors and children born of donor gametes. The committee believes that this recommendation is necessary in the best interest of the child.

Key arguments for government involvement

There are a number of reasons why the committee believes the Government is in a better position than the fertility clinics to provide such a function. A publicly funded central register could:

- Ensure better data quality, more security and more accessibility of data in the long-term;
- Establish a voluntary register for all people born of surrogacy or donation not covered by the NHMRC guidelines including those born before the introduction of the guidelines and people born through surrogacy and/or donor gametes outside of fertility clinics;
- Develop expertise and processes to improve advice and support to parents, donors, birth mothers, children and siblings in accessing and exchanging their information; and
- Provide better access to data on the outcomes of families created through altruistic surrogacy and/or ART.

A number of submitters expressed greater confidence in the capacity of the Government rather than private clinics to preserve records in the long term. An example was provided in evidence to the committee by Helen Kane, Manager, Donor Services, Infertility Treatment Authority, Victoria:

   …In fact we do have a clinic in Victoria that has ceased to provide treatment. We have had huge issues around the records themselves and the services for the people who have children or who donated or who resulted from treatment within that program.

   …It may be 30 years or more before a donor conceived person makes an application for information about their surrogate and the information must be there.

The committee acknowledges that the concept of a central register was not supported by the two fertility clinics that prepared submissions. However, the concept was strongly supported by a range of submitters including the Donor Conception Support Group of Australia, ANZICA, Australian Association of Social Workers Queensland, Queensland Law Society, the Commission for Children and Young People and Child Guardian, Jigsaw Queensland, Aussie Egg Donors, a number of intending parents and birth mothers and Malcolm Smith, doctoral researcher in ART, Faculty of Law, QUT.

Linking to transfer of parentage

The committee sees that when intending parents seek transfer of parentage they could be further advised on the role and operation of a central register as part of the proposed post-birth psychosocial preparation and reporting process. Evidence could also be sought from the parties as to whether their information is included on the register as part of their application for a parentage order.

Lessons from the Victorian Infertility Treatment Authority

The committee believes that particular attention should be paid to the experience in Victoria. The Victorian register, administered by the Infertility Treatment Authority, is the longest operating central register in the world. It incorporates a community education, counselling and support program to assist parents to tell. It provides access to information and, where required, assists in negotiating and mediating information exchange and contact between the parties.

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382 South Australian Council on Reproductive Technology, Submission no 100, p. 9.
384 Investigation into Altruistic Surrogacy Committee 2008a, p. 22. (Helen Kane)
Recently, the Infertility Treatment Authority received three-year funding to launch the *Time to Tell* campaign which was designed to assist parents to tell their children they were donor-conceived. This campaign was spurred by the fact that in mid-2006, 596 donor-conceived children turned 18 years and could access registry information. There are now 1700 children in their teens on the register.

The register holds information provided by clinics relating to every child born of donated gametes. The Infertility Treatment Authority advises parents at birth that their details, along with their child and donor details are on the register. It provides options for information exchange over time and advice/support for ‘telling’. The Infertility Treatment Authority also has access to a confidential version of the electoral roll to help locate donors in response to requests for information.

In addition to the mandatory register, the Infertility Treatment Authority operates a voluntary register. Parties can lodge information on the voluntary register for access prior to the child turning 18 years. Parties can seek contact, information exchange and details on other children conceived with the same gametes. The Infertility Treatment Authority advised the committee that the voluntary register is in its early days. Some recipient parents have begun to utilise the voluntary register to access more information on the donor to prepare life story books for their children and show their donor is a real person. This narrative approach is also used with adopted children.

From Victorian experience, the key considerations for an effective register appear to be its accessibility and community awareness of its existence.

The Infertility Treatment Authority central registers do not identify surrogacy cases at present. The authority is, however, considering ways to incorporate surrogacy information into its existing register in light of the Victorian Law Reform Commission recommendation that information on parties to surrogacy arrangements should be recorded on the register.

**Bigger issue than surrogacy**

The committee appreciates that such an important regulatory requirement for altruistic surrogacy has far broader implications for the Government and ART services in Queensland. It is illogical, inequitable and impractical to establish a central register for a relatively small population impacted by altruistic surrogacy and meanwhile ignore the reported 6,000 people in Queensland conceived using donor gametes.

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**Leonie Hewitt, Donor Conception Support Group of Australia, NSW, mother of three children born of donated gametes:**

*I am contacted by people who were conceived in Qld clinics wanting to know where do they go to get their information and records. Can someone from this inquiry please inform me … where do I send these people…?*

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The committee envisages that a combined surrogacy/gamete donation central register could hold data:

- Collected by clinics as a mandatory requirement for gamete donation since 2004 under NHMRC guidelines;
- Relating to children born of altruistic surrogacy arrangements through ART based on data which would need to be collected by fertility clinics as part of new regulatory requirements; and
- Provided voluntarily by any parties for children born of altruistic surrogacy arrangements including those conceived outside fertility clinics or children born of gamete donation prior to 2004.

**What information is important to children born of altruistic surrogacy?**

The committee believes that the existing NHMRC guideline requiring information from donors provides a logical starting point for establishing registry information needs for children born of altruistic surrogacy.

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385 The birth mother or her partner needs to be infertile.
386 Kay Dibben 2008.
387 Warren and Leone Hewitt, Submission 121.
According to a submission by Jigsaw Queensland, as much detailed information as possible should be collected for children born of altruistic surrogacy covering medical issues, talents, birth family culture, as well as “how they were born, how they came to be in the family they are in, and who they [are] related to”.\(^{388}\)

Again the experience of adults born of ART is invaluable here. A donor conceived woman, who accessed her information as a young adult after being told by her parents at 9 years said:

> The information which I feel is important to me includes: medical history, racial origins and physical characteristics: whether he and his parents are still alive; and information concerning half siblings born through donated genetic material and through other relationships. In this category, I seek information about: the number of half siblings, their age, gender, and whereabouts…

> For me the link with my donor does not just stop at the time of my conception. Information about the donor’s entire life should be consistently updated until the offspring wish to access the information, and even after that time.\(^{388}\)

**When should children access the register?**

The committee believes that children born of altruistic surrogacy should be able to access the register for information on birth parents, donors and siblings when they turn 18 years. This was supported by most submitters who provided comment.\(^{390}\)

**Where should the register sit?**

The committee has identified two options for the placement of the register at a state level.

The first option is with Queensland Health. Whilst the Department of Child Safety may have relevant experience in terms of its adoption registers, the committee believes the location of the register in Queensland Health with its responsibility for ART regulation presents an opportunity to give voice to the perspective of children and families most impacted by regulation. This is similar to the current model in Victoria where the register is managed by the Infertility Treatment Authority.

In relation to this first option, the committee notes that the Victorian Law Reform Commission supported the separation of the donor register function from ART regulation arguing:

> A child’s access to birth and genetic information should be treated separately from the infertility or treatment needs of his or her parents.\(^{391}\)

However, it appears that the Victorian Infertility Treatment Authority’s direct relationship with people most affected by ART has provided rich insights for policy makers and regulators in the ART field.

The second option is with the Register of Births, Deaths and Marriages in the Department of Justice and Attorney-General. The argument in support of this option appears to be one of expertise and function. The register is expert in keeping records of people’s life events. The co-location of the register with a birth certificate function may also facilitate the transfer of information from the register to birth certificates should this be agreed.

In relation to this second option, the committee also notes that there has been some debate in the UK about whether donor registers should move from the ART regulator to the Government Registry Offices, which are responsible for the registration of births. This is the arrangement in New Zealand.\(^{392}\)

In response to a query about the placement of the register, the New Zealand Department of Internal Affairs advised that:

- BDM [Births Deaths and Marriages] have the expertise in maintaining registers over a long period of time;
• BDM are trusted to administer registers containing other sensitive information (e.g. pre-adoption information),
• There are logical connections between BDM’s role in maintaining [the] register of births that occur in New Zealand with the maintenance of information about donors, donor offspring and their guardians.\textsuperscript{393}

In New Zealand, Births Deaths and Marriages, within the Department of Internal Affairs, operates a voluntary and a mandatory register. There is no counselling service provided as part of the operation of the register. The department also reported:

\begin{quote}
Fertility service providers…are responsible for collecting information about those donors and donor offspring and passing it to BDM, who must keep the information indefinitely. The majority of information relating to a donor will be held solely by the fertility providers for up to 50 years after the birth of any donor offspring. After 50 years (or earlier, if the fertility service providers ceases operation), the rest of the information about the donor is passed to BDM. Therefore, while donors and donor offspring can apply to either the relevant fertility service provider or the Registrar-General, they are more likely to seek information from those providers rather than from the Registrar-General.\textsuperscript{394}
\end{quote}

Although it is perhaps a matter of resourcing and different service models, it strikes the committee that the benefit of the Victorian model over the New Zealand model is one of active engagement and promotion at both an individual and community level.

The committee also notes that there is discussion nationally in the health field of the development of a national register. The Tasmanian Legislative Council Select Committee Report on Surrogacy also recommended a national ‘or otherwise uniform’ birth certificate with a check-box entry option titled “Registered Filial Interests” which if marked would alert children to information held in a separate register. A national register may also enhance data collection and access. A national approach to the birth registration would also strengthen the operation of a national register. The committee certainly sees the benefit of agreeing on a national best practice approach in relation to the operation of registers and birth certificates.

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**RECOMMENDATION 22: REGISTER OF GENETIC INFORMATION** \\
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The committee recommends that the Queensland Government:
\begin{itemize}
\item Develops a central register to protect information on a child’s genetic parentage and circumstances of birth in relation to altruistic surrogacy, having regard for the possible benefits of such a service for other children born of donor gametes;
\item Considers the relative merits of the placement of the register, having regard to the possible synergies with ART regulation, within Queensland Health or with birth registration within the Register of Births, Deaths and Marriages; and
\item Supports the development of a national best practice approach to the operation of registers and birth certificates.
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**Support to tell**

The committee does not support the proposal for a court-endorsed ‘approval plan’ detailing parents’ commitment to provide the child with information about the child’s parentage as he/she develops. In Western Australia, this is suggested as a condition of the transfer of legal parentage.\textsuperscript{395}

The committee believes that this proposal is unenforceable. It believes that it is the decision of parents alone to tell and it is the Government’s role to inform them about the potential risks to children and to

\begin{footnotes}
\item[393] Vaughan Millar, Births, Deaths and Marriages Office, New Zealand Department of Internal Affairs, Email correspondence, 2 September 2008, \texttt{bdm.nz@dia.govt.nz}.
\item[394] Vaughan Millar, Births, Deaths and Marriages Office, New Zealand Department of Internal Affairs, Email correspondence, 2 September 2008, \texttt{bdm.nz@dia.govt.nz}.
\item[395] Part 3, Div 2, Surrogacy Bill 2007 (WA).
\end{footnotes}
support them to tell. The committee believes, in permitting altruistic surrogacy, the Government must accept an ongoing responsibility post-birth to support parents to tell.

**Commission for Children and Young People and Child Guardian:**

* A surrogate child’s legal parents should be required to inform the child of his/her genetic origins and should support the child in exercising his/her rights to access this information...  

**Christine King, supporting decriminalisation:**  
* Parents should have the right to tell the child at a time they see fit...*

### Barriers to telling

The committee acknowledges the importance of understanding the barriers to telling.

Research undertaken by the Victorian Infertility Treatment Authority indicates that parents have good intentions to tell but:

...reasons for keeping … secret include wanting to protect the child from feeling different or from distress if they can’t find their donor; a sense of shame or embarrassment; not knowing what to say; or simply putting it off because the right moment hasn’t come.

Helen Kane, an experienced infertility counsellor and the Manager of Donor Register Services at the Infertility Treatment Authority, explained within the provision of ART services there has often has been a contradictory emphasis and de-emphasis on biological relationship:

...[the] sense of secrecy over the use of donated gametes implies it matters a lot and at the same time there is a message that using donor material is nothing.

These messages add to the emotional complexity of the issue and people may need support to see what the biological relationship means to them as individuals. Other factors influencing openness include the use of known donors, fear of accidental discovery, planning to tell prior to birth and telling others prior to treatment. Stigma around infertility was one reason that influenced the decision not to tell. It is common for people with infertility problems to experience low self-esteem.

### Telling is a process not an event

Often the couple does not consider what it might be like to tell and what they think about the biological relationship issues until the baby arrives. The timing of the information that is available to support them is important. The Infertility Treatment Authority also emphasises that telling is a process rather than an event in which people may explore different issues at different times. This is a message which clearly arises from its research with parents and children. It is also a message reinforced by Jigsaw Queensland in its submission.

### What works?

From the research undertaken by the Infertility Treatment Authority, the committee identified a number of lessons to guide the development of future strategies in Queensland:

- **Evidence-based practice, expertise, resourcing:** Support services need to be resourced, evidenced based and have the capacity to build specialist knowledge and skill in the area. The Infertility Treatment Authority has had experience of both out-sourced to in-house counselling service provision for telling and donor-linking purposes. The authority believes in-house services have meant the development of specialist skills and knowledge in addition to providing an insight into the long-term outcomes for families born of ART.

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397 Submission no 61.  
399 Helen Kane, Manager, Donor Registers Service, Infertility Treatment Authority, Victoria, Interview.  
400 Jigsaw Queensland, Submission no 114.
The authority’s research report *Telling about Donor Assisted Conception* found:

> A few people feel that counselling has failed them, or are aware that counsellors themselves are in the process of learning how best to advise all participants in the experience of donor-assisted conception.\(^{401}\)

- **Personal stories and peer support:** Parents and children can gain a lot of support and insight from hearing the personal experience of others which help in demonstrating how they might tell. Parents and children have reported on the valuable role played by the Donor Conception Support Group of Australia in this regard. As *Telling about Donor Assisted Conception* concluded:

  > Parents feel the burden of responsibility to do the best for their children, including telling them about their donor assisted conception. The best guidance they have found (or wish they had) is the experience of other parents and information from donor conceived people. Many had become involved in the Donor Conception Support Group, and value the information sessions, newsletter stories and the personal contact and advice provided in the group.\(^{402}\)

A young woman told in her teens was quoted as an example of the benefit of peer support:

> …when I spoke to [another donor-conceived person], I felt privileged because his story was exactly how I felt at the time. I was amazed someone in the whole world felt the same way as I did.\(^{403}\)

- **Privacy and accessibility:** Support services need to be accessible and guarantee privacy. Helen Kane, Manager, Donor Registers Service, in Victoria explained the benefits of web-based information and some of the sensitivity in using face-to-face and public engagement processes:

  > We have provided assistance to parents wanting to tell their children of all ages. We realised very early in the campaign that it was difficult to engage people easily face to face, so we placed a strong emphasis on developing information that is available through our website. This information is downloaded at very high rates, particularly the documents which talk about how to approach telling the child. In fact, last month we had over 10 000 hits to that part of our website.\(^{404}\)

### RECOMMENDATION 23: ONGOING SUPPORT TO TELL FOR INTENDING PARENTS

The committee recommends that the Queensland Government develops a strategy to:

- Support parents of children born of altruistic surrogacy or gamete donation of all ages to ‘tell’ them about their genetic parentage and circumstances of birth;
- Promote the role of the register as proposed in Recommendation 22 and provide easy access to a child’s information; and
- Facilitate the exchange of information between parties.

It is suggested this strategy be informed by the work of existing registers, in particular, the Victorian Infertility Treatment Authority Donor Register Services.

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\(^{401}\) Infertility Treatment Authority Victoria 2006b, p. 18.  
\(^{402}\) Infertility Treatment Authority Victoria 2006b, p. 16.  
\(^{403}\) Infertility Treatment Authority Victoria 2006b, p. 22.  
\(^{404}\) Investigation into Altruistic Surrogacy Committee 2008a, p. 20. (Helen Kane)
CHAPTER 8: OTHER MATTERS IN ALTRUISITIC SURROGACY

TERM OF REFERENCE

This chapter seeks to respond to the question posed in the following term of reference:

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

The committee addresses one issue in relation to this term of reference which is outlined below: Medicare funding for altruistic surrogacy.

MEDICARE FUNDING

Although it is a matter for the Australian Government, the committee believes that the Queensland Government should communicate its support for Medicare funding for altruistic surrogacy. Whilst Medicare covers many other infertility treatments, Medicare is not available for altruistic surrogacy.405

The matter was raised in 2007 as an issue for reform by the South Australian Social Development Committee Inquiry into Gestational Surrogacy. The committee recommended:

That the State Government encourage the Commonwealth to review arrangements to ensure that rebates are available to a fertile woman who is acting as a gestational surrogate mother...406

The committee notes a number of submitters opposed to altruistic surrogacy specifically supported the current Medicare policy as a way of dissuading surrogacy:

...there are non-legislative approaches which also discourage surrogacy without criminal penalty, for example:--...Medicare should not be used to fund surrogacy.407

However, it was frequently raised by other submitters supporting decriminalisation as an equity issue.

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Greta Brennan, Director, Wide Bay Women’s Health Centre:

We believe that if [altruistic surrogacy] is available to one part of the population it should be available to all parties in the community, whether rich or poor. Obviously there should be Medicare benefits if that is the case.408

Susan Mobbs, intending parent:

...something needs to be done to consider Medicare funding and how it could be accessible for things like surrogacy. ... Medicare assistance for IVF was done to help infertile people. Under the medical definition I am infertile.... The only way I can have children is by undergoing IVF so that someone could carry a baby for me. Under the current views, it is treating the surrogate as the patient. She is fertile, yes. But to get the embryo from me—I am infertile. So the cost factor is phenomenal. To go through a full cycle at Sydney IVF from start to finish relating to surrogacy is about $11 000.409

Rachel Kunde, egg donor and would-be birth mother:

...IVF is a very expensive process. Even egg donation itself, with my last cycle, was in excess of $8,000 for my commissioning couple. So it is not accessible to all classes. Egg donation and sperm donation is very expensive and I believe that not all classes at the moment can access that because of Medicare funding, unless you have private health insurance. I personally do not have private health insurance, so it cost my commissioning couple a lot more than it would if I did have private health.410

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405 The Associated Notes under the Medical Benefits Schedule for Assisted Reproductive Services (Items 13200-13221) states: “Medicare benefits are not payable for assisted reproductive services rendered in conjunction with surrogacy arrangements...” Department of Health and Ageing 2008.

406 Recommendation 6, Social Development Committee 2007, p. 7.

407 Queensland Right to Life, Submission no 50.

408 Investigation into Altruistic Surrogacy Committee 2008b, p. 28. (Greta Brennan)

409 Investigation into Altruistic Surrogacy Committee 2008b, p. 34.

410 Investigation into Altruistic Surrogacy Committee 2008b, pp. 37-38. (Rachel Kunde)
RECOMMENDATION 24: ADVOCATING FOR MEDICARE FUNDING

The committee recommends that the Queensland Government advocates the Australian Government to provide Medicare funding for altruistic surrogacy.
CHAPTER 9: TRADITIONAL TORRES STRAIT ISLANDER ‘ADOPTIONS’

Traditional Torres Strait Islander ‘adoptions’ are discussed in this report because they are prohibited under the Surrogate Parenthood Act 1988.

The committee has written this additional and final chapter for a number of reasons:

• To summarise its consideration of traditional Torres Strait Islander ‘adoptions’ within the report for those with a particular interest in the issue;
• To clarify the implications of the report recommendations for traditional Torres Strait Islander ‘adoptions’; and
• To outline two recommendations which arise from the committee’s investigation in relation to: recognition of post-conception traditional Torres Strait Islander ‘adoptions;’ and community attitudes to telling children about their genetic parentage and circumstances of birth.

Chapter 1: Introduction

In Chapter 1, the committee detailed the history of policy consideration of traditional Torres Strait Islander ‘adoptions’ since 1993. It outlined the role of the Kupai Omasker Working Group in seeking legal recognition of traditional ‘adoptions’. It also noted that Eddie Mabo was ‘adopted’ to inherit land under customary law. It also noted that the Family Law Court customised its parenting order process to recognise the parenting rights and responsibilities of ‘adoptive’ and ‘receiving’ parents, though it fell short of addressing legal parentage and inheritance issues.

Chapter 2: The question of decriminalisation

In Chapter 2, the committee detailed what it understood about the nature and extent of traditional Torres Strait Islander ‘adoptions’ as part of its overview of surrogacy practice in Queensland as defined under the Surrogate Parenthood Act 1988. It concluded that the customary practice was ongoing in spite of the current prohibitions. In contrast to non-Indigenous Queenslanders, the practice was commonplace in Torres Strait Islander families around Australia. In the mid 1980s, some 10-15 traditional ‘adoptions’ were registered annually in the Torres Strait. The former Chief Justice, Alistair Nicholson advised that he made “100 or more” parenting orders in the case of traditional ‘adoptions’. Cases continue to come before the Family Law Court. Traditional ‘adoptions’ can be agreed both pre and post-conception. However, advice from the Family Law Court indicates that the vast majority of Kupai Omasker parenting orders granted to date has been for post-conception arrangements.

The committee recognised that the continuity of traditional Torres Strait Islander ‘adoptions’ and the cultural significance of the practice formed one of the arguments to decriminalise altruistic surrogacy in Queensland.

Chapter 3: The role of Government

In Chapter 3, the committee confirmed the role of the Government was to balance the prevention of harm and the protection of liberty and to seek parity in policy development for families created through altruistic surrogacy with other families created through ART or natural conception. The committee also proposed a legal definition which confined altruistic surrogacy to pre-conception arrangements. The committee deliberated at length on this matter and made its decision based on the benefits of encouraging parties to fully consider their position before embarking upon a pregnancy. The committee noted the implications of this decision for traditional Torres Strait Islander ‘adoptions’ where they occur post-conception. The committee noted that traditional Torres Strait Islander ‘adoptions’ which occur pre-conception should fall within the legal definition of altruistic surrogacy.

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411 Hon M Keech MP, Minister for Child Safety and Minister for Women, Correspondence received, 20 August 2008.
412 Investigation into Altruistic Surrogacy Committee 2008a, p. 8. (The Hon Alistair Nicholson)
The committee noted the advice from Hon Margaret Keech MP, Minister for Child Safety, that traditional Torres Strait Islander ‘adoptions’ “cannot be reconciled under regular adoption laws.” The committee noted that some of the distinctions made in relation to traditional and mainstream adoption also apply to altruistic surrogacy through ART.

The committee concluded that the Queensland Government should consider developing a specific provision for traditional Torres Strait Islander ‘adoptions’ such as proposed in relation to pre-conception altruistic surrogacy. The committee believes it to be important to provide the same legal protection for children and parents in the case of traditional Torres Strait Islander ‘adoptions’ as enjoyed under mainstream adoption or as proposed for altruistic surrogacy. The committee concluded with a recommendation to the Queensland Government to “examine options for the recognition of traditional Torres Strait Islander ‘adoptions’” (Recommendation 6).

The committee then outlined five policy principles and outcomes sought in regulating altruistic surrogacy. The committee believes these apply equally to traditional Torres Strait Islander ‘adoptions’.

Chapter 4: Genetic connections

In Chapter 4, the committee considered the role of the genetic relationship between the child and intending parents and/or birth mother in any altruistic surrogacy arrangement. The committee concluded that it would avoid a prescriptive approach although it was desirable for intending parents to contribute their gametes and for the birth mother to avoid contributing her egg. The committee’s recommendation could mean that in some cases ART clinics may allow birth mothers to contribute their eggs or allow donated embryos to be used.

The committee acknowledges that traditional Torres Strait Islander ‘adoptions’ were mostly likely to involve the birth mother contributing her egg and the ‘receiving parents’ not contributing their gametes. The committee recognises that traditional Torres Strait Islander ‘adoptions’ occur within extended family. It also acknowledges that the intending parents are likely to be related to the child; possibly a niece, cousin or grandchild. Traditional Torres Strait Islander ‘adoptions’ are not excluded under the committee’s proposed requirements for genetic connection.

The committee also concluded that to protect the birth mother against forced relinquishment, she should remain the legal parent at birth. The committee believes this is equally important in the case of traditional Torres Strait Islander ‘adoptions’. To protect the child’s rights to information on genetic parentage it is also important that the birth mother is recorded, as currently required, on original birth certificates.

Chapter 5: Criteria and ART regulation

In Chapter 5, the committee considered criteria for entering an altruistic surrogacy arrangement. The focus of the discussion related to criteria and assessment for entering ART for the purposes of altruistic surrogacy. These criteria and assessment requirements are designed to address risks and ensure informed consent.

It was recognised that not all people engaging in altruistic surrogacy do or will access ART. The committee notes that traditional Torres Strait Islander ‘adoptions’ do not currently and are unlikely to occur through ART.

However, the committee also acknowledges the importance of informed consent for the ‘giving’ and ‘receiving’ parents in traditional ‘adoptions’. The committee notes that the Family Law Court parenting orders also require proof of birth mothers’ consent and the identification of and evidence from ‘verifiers’ to attest to the fact that the practice is customary. ‘Verifiers’ may be family members or elders who have been party to, or aware of, the deliberation to arrange a traditional Torres Strait Islander ‘adoption’.

Chapter 6: Legal rights and responsibilities

In Chapter 6, the committee confirmed that birth mothers have the same rights to manage their pregnancy and birth as other pregnant women. This equally applies to Torres Strait Islander women.

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413 Correspondence received, 20 August 2008.
414 Josephine Akee, former Indigenous Family Liaison Officer, the Family Law Courts, Cairns, Interview.
The committee’s proposal to maintain the status quo and support unenforceable contracts in altruistic surrogacy, equally applies in Queensland law to Torres Strait Islanders. Traditional arrangements would remain as is currently the case - unenforceable in a Queensland court of law.

The committee’s proposal for a specific provision for the transfer of legal parentage in pre-conception altruistic surrogacy is envisaged as applying to pre-conception traditional Torres Strait Islander ‘adoptions’ if they meet the criteria for other surrogacy arrangements and if they are verified as customary practice.

In light of Recommendation 6 which proposes that the Government examines options for the recognition of traditional Torres Strait Islander ‘adoptions’, and the committee’s proposal for the transfer of legal parentage for altruistic surrogacy, some suggestions are offered to frame the development and consideration of options. This advice is summarised below in recommendation 25.

It is important to clarify that the committee’s recommendation to decriminalise and the proposed regulatory approach should not be taken as an endorsement of altruistic surrogacy per se. The committee reached the view that it should be permissible for people to pursue altruistic surrogacy. The committee also believes people should be able to seek assistance through ART if they meet certain safeguards. These safeguards are designed to prevent and minimise harm. The existence of a provision for transfer of legal parentage is also designed to prevent harm and to deal with the consequences of altruistic surrogacy. Transfers will only be granted where conditions are met. These conditions include the protection of the legal rights of the birth mother and education on a child’s right to information on genetic parentage.

The committee believes that the development of a mechanism for recognition of traditional Torres Strait Islander ‘adoptions’ can be regarded in the same way: prevention of harm, and recognition of the existence of and liberty to pursue cultural practice. Unquestionably, the Government has a duty of care to protect children’s rights to information and ensure birth parents freely consent. It is also important that policy makers seek to understand cultural difference and to appreciate its value. The committee believes the Family Law Court offers a model of working in a ‘best interests of the child’ framework whilst respecting cultural practice and upholding the rights of birth parents. The committee is confident a similar approach can be brought to the development of options to clarify legal parentage in the case of traditional Torres Strait Islander ‘adoptions’.

**RECOMMENDATION 25: DEVELOPING OPTIONS FOR RECOGNISING TRADITIONAL TORRES STRAIT ISLANDER ‘ADOPTIONS’**

The committee recommends that, in developing options for the recognition of traditional Torres Strait Islander ‘adoptions’, the Queensland Government:

- Considers options in consultation with the Torres Strait Islander community, having an appreciation of parenting roles, extended family and child rearing practices in Torres Strait Islander culture;
- Considers options which protect the existing legal right of the birth mother/parents not to relinquish the child and promote the rights of the child to information on his/her genetic parentage;
- Considers the relevance of the model proposed for transfer of legal parentage in altruistic surrogacy in the wider community along with lessons from the operation of the Family Law Court Kupai Omasker parenting orders;
- Ensures that the model is accessible to Torres Strait Islanders throughout the State; and
- Develops a culturally appropriate community education program to support the implementation of such a provision.

Chapter 7: Child’s right to information

In Chapter 7, the committee examined the rights of children born of altruistic surrogacy to have access to information relating to their genetic parentage. The committee commenced by acknowledging children’s rights to identity in the UN *Convention on the Rights of the Child*. It examined the lessons from adoption and donor conception in relation to the importance of telling. The committee reported findings that, despite their best intentions, many parents have difficulty telling their children about their origins. The committee
also referred to “the perceived reluctance to tell … in relation to traditional Torres Strait Islander ‘adoptions’.\(^{415}\)

The committee then proposed that the transfer of legal parentage in altruistic surrogacy follow an adoption-like process which closes the original birth certificate and replaces it with a certificate with the intending parents as the legal parents. The committee confirmed a child’s right to access their original birth certificate when they turn 18 years.

Although the committee explored the options for more detail on birth certificates to inform children of their genetic parentage, it agreed these needed further consideration and debate with particular input from those adult children affected. The committee believes it is also useful to involve Torres Strait Islander ‘adopted’ adults and their parents in this process.

The committee then turned to the issue of a central register for altruistic surrogacy and donor conception. This register would include information on medical issues and genetic parentage. The committee supported the idea that this register would be available to people engaged in altruistic surrogacy arrangements outside of ART. This would be likely to occur on a voluntary basis. Based on the committee’s recommendations, this register would only apply to traditional Torres Strait Islander ‘adoptions’ which fell within the committee’s proposed legal definition (namely pre-conception altruistic surrogacy).

The committee also recognised the importance of ongoing and innovative ways of supporting parents to tell. The committee was advised by the Department of Child Safety that Torres Strait Islanders commonly discouraged telling:

> Traditional ‘adoptions’ are regarded as private matters and it is considered taboo even to discuss the subject. The arrangements are usually kept secret from most people and adopted children are often not told of their adoption at all or are told when they reach adulthood.\(^{416}\)

However, as the committee noted, many parents experienced a difficulty or reluctance to tell. For example, available studies suggested that the majority of parents do not disclose the use of a donor to their children.\(^{417}\) The experience of the Torres Strait Islander community is also a useful reminder that the difficulty of telling may remain an issue for parents in other surrogacy situations and the importance of dealing with the issue in psychosocial preparation before accessing ART and prior to transferring legal parentage.

The committee believes that Torres Strait Islander children have the same rights to their birth certificates as other Queensland children. As confirmed by Hon Kerry Shine MP, Attorney-General and Minister for Justice, any Queensland child can apply for a copy of his/her birth certificate with adequate proof of identity before they turn 18 years.\(^{418}\) Mainstream adoption allows children to access their original birth certificates at 18 years.

The committee believes that the issue of ‘telling’ in the Torres Strait Islander community needs to be considered and addressed in its cultural context: a context where ‘adoption’ is reportedly both an ancient and common practice. It is acknowledged as distinct in this regard from mainstream adoption and donor conception which often occur between strangers. It is also in contrast with Aboriginal people’s experience of the ‘stolen generation’ where children were raised away from family and culture.

The committee considered the analysis and advice provided by Dr Trevor Jordan, an adoptee, President of Jigsaw and an applied ethicist, particularly helpful:

> …within that [Torres Strait Islander] cultural situation people know that that is a possibility because it is a common form of arrangement. So everyone within that culture knows that that sort of secret is a potential secret… it is part of the things that you might take into account about your identity. So that is slightly different than the situation in the non-Indigenous culture where it is not part of what would be the general knowing about your identity… The issue of the impact for the individual is best addressed within that culture… [I] can’t see that anything is gained by imposing...\(^{419}\)

\(^{415}\) Hon M Keech MP, Minister for Child Safety and Minister for Women, Correspondence received, 20 August 2008.

\(^{416}\) Hon M Keech MP, Minister for Child Safety and Minister for Women, Correspondence received, 20 August 2008.

\(^{417}\) ITA, 2006 p.3.

\(^{418}\) Hon K Shine MP, Attorney-General and Minister for Justice, Correspondence received, 30 July 2008.
a non-Indigenous view … but I can see that there is value in opening a process of negotiation so that the best is done within those communities. It is balance between … the freedom of the individual and community.419

The committee is aware that telling is a very sensitive issue in the Torres Strait Islander community. From the committee’s perspective, it would be useful to understand if there are any culturally specific issues or barriers to telling. To date, it has not been able to discern any difference in the reasons for not telling to other population groups.

The committee recommends that the Queensland Government provides opportunities for further dialogue on the issue with the Torres Strait Islander community. It is important to ensure that the community has access to information on the evidence base behind the emphasis placed on telling by the Department of Child Safety.

The committee also believes that, if Torres Strait Islanders express an interest in engaging community in examining current practice and the issue of children’s right to information, resourcing for such an initiative should be sympathetically considered.

**RECOMMENDATION 26: TELLING AND TRADITIONAL ADOPTION PRACTICE**

The committee recommends that the Queensland Government provides an opportunity for further dialogue with the Torres Strait Islander community on the issues of telling and traditional ‘adoption’ practice and a child’s right to information. This dialogue should offer the opportunity to fully explain the evidence base for the Department of Child Safety’s current policy around telling. It should also encourage and support community based research and engagement initiatives which seek to foster discussion within the community and with the Government on the issue.

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419 Investigation into Altruistic Surrogacy Committee 2008a, p. 45. (Dr Trevor Jordan)
s107 Parliament of Queensland Act regarding Ministerial responses

107. Ministerial response to committee report

(1) This section applies if—

(a) a report of a committee, other than the Scrutiny of Legislation Committee, recommends the government or a Minister should take particular action, or not take particular action, about an issue; or

(b) a report of the Members' Ethics and Parliamentary Privileges Committee recommends a motion be moved in the Assembly to implement a recommendation of the committee.

(2) The following Minister must provide the Assembly with a response—

(a) for a report mentioned in subsection (1)(a)—the Minister who is responsible for the issue the subject of the report;

(b) for a report mentioned in subsection (1)(b)—the Premier or a Minister nominated by the Premier.

(3) The response must set out—

(a) any recommendations to be adopted, and the way and time within which they will be carried out; and

(b) any recommendations not to be adopted and the reasons for not adopting them.

(4) The Minister must table the response within 3 months after the report is tabled.

(5) If a Minister can not comply with subsection (4), the Minister must—

(a) within 3 months after the report is tabled, table an interim response and the Minister's reasons for not complying within 3 months; and

(b) within 6 months after the report is tabled, table the response.

(6) If the Assembly is not sitting, the Minister must give the response, or interim response and reasons, to the Clerk.

(7) The response, or interim response and reasons, is taken to have been tabled on the day they are received by the Clerk.

(8) The receipt of the response, or interim response and reasons, by the Clerk, and the day of the receipt, must be recorded in the Assembly's Votes and Proceedings for the next sitting day after the day of receipt.

(9) The response, or interim response and reasons, is a response, or interim response and reasons, tabled in the Assembly.

(10) Subsection (1) does not prevent a Minister providing a response to a recommendation in a report of the Scrutiny of Legislation Committee if it is practicable for the Minister to provide the response having regard to the nature of the recommendation and the time when the report is made.

Example—

If the committee recommends that a Bill be amended because, in the committee’s opinion, it does not have sufficient regard to fundamental legislative principles and the Bill has not been passed by the Assembly, it may be practicable for the Minister to provide a response.

(11) Subsection (6) does not limit the Assembly's power by resolution or order to provide for the tabling of a response, or interim response and reasons, when the Assembly is not sitting.

(12) This section does not apply to an annual report of a committee.
Resolution appointing the Investigation into Altruistic Surrogacy Committee

On 14 February 2008, the Legislative Assembly, on the motion of the Leader of the House, resolved that:

1. A select committee, to be known as the Investigation into Altruistic Surrogacy Committee, be appointed from 26 February 2008 to investigate and report on the following matters in relation to altruistic surrogacy in Queensland:
   a) Should altruistic surrogacy be decriminalised in Queensland?
      b) If so,
         • What role should the Queensland Government play in regulating altruistic surrogacy arrangements in Queensland?
         • What criteria, if any, should the commissioning parent/s and/or surrogate have to meet before entering into an altruistic surrogacy arrangement?
         • What role should a genetic relationship between the child and the commissioning parent/s and/or surrogate play in any altruistic surrogacy arrangement?
         • What legal rights and responsibilities should be imposed upon the commissioning parent/s and/or surrogate?
         • What rights should a child born through an altruistic surrogacy arrangement have to access information relating to his or her genetic parentage? Who should hold this information?
         • What, if any, other matters should be considered in the regulation of this issue?

2. Further, that the committee have power to call for persons, documents and other items.

3. That the committee report to the Legislative Assembly by 30 September 08.

4. That the committee consist of seven Members of the Legislative Assembly: Mrs Lavarch (Chair), with the remaining six Members of the Committee, consisting of three additional Government Members, one Member to be nominated by the National Party, one Member to be nominated by the Liberal party and one Member to be nominated to represent the Independent members, to be appointed.

5. That this resolution has effect not withstanding anything contained in Standing Orders.

On 26 February 2008, the Legislative Assembly, on the motion of the Leader of the House, resolved:—

1. That in addition to the appointment of Mrs Lavarch (Chair), the following six members be appointed to the select committee known as the ‘Investigation into Altruistic Surrogacy Committee’, established by resolution on 14 February 2008 and effective from 26 February 2008:
   • Ms Darling
   • Mr Foley
   • Mrs Menkens
   • Mr Moorhead
   • Mrs Stuckey
   • Mr Wettenhall

2. That this resolution has effect not withstanding anything contained in Sessional or Standing Orders.
Call for Submissions

Investigation into Altruistic Surrogacy in Queensland

The Investigation into Altruistic Surrogacy Committee, a select committee of the Queensland Parliament, is inquiring into the possible decriminalisation and regulation of altruistic surrogacy in Queensland.

The committee invites interested members of the community to make public submissions to its investigation.

Submissions can be lodged via the committee’s website at: www.parliament.qld.gov.au/surrogacy,

by email to: surrogacy.committee@parliament.qld.gov.au, or by post to:

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

Submissions close Friday, 13 June 2008.

An issues paper, which includes issues for consideration and guidelines for making submissions, is available from the secretariat. For further information please call 3406 7310 or 1800 025 598.

Linda Lavarch MP
Chair
## List of submissions received

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<td>Allan and Pauline Mackenzie</td>
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<td>10</td>
<td>The Honourable Dean Wells MP, Member for Murrumba</td>
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<td>Ms Beryl Holmes, WEL - Brisbane (Reproductive Issues Group)</td>
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<td>Professor Jenni Millbank and Associate Professor Anita Stuhmcke, Faculty of Law, University of Technology, Sydney</td>
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<td>Mr Ross Naddei</td>
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<td>Australian Council for Adoption</td>
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43 Ms Melanie Douglas
44 Mr Craig Kirk
45 Mr Greg Strahorn
46 Mr Paul Ban, Consultant to the Kupai Omasker Torres Strait Islander Working Group
47 Ms Denise Peterson
48 Anonymous
49 Confidential
50 Queensland Right to Life
51 Ms Tina Artes
52 Ms Fiona Clark
53 Ms Helen Curtis
54 Ms Jasmine Jones
55 Ms Margaret Maag
56 Confidential
57 Dr Martyn Stafford-Bell, Canberra Fertility Centre
58 Mr Doug Espie
59 Professor Lindy Willmott, Faculty of Law, Queensland University of Technology
60 Infertility Answers Inc
61 Ms Christine King
62 Ms Kate Fitzpatrick
63 Anonymous
64 Ms Carmelo Rubio
65 Ms Rachel Kunde, Co-Director, Aussie Egg Donors
66 Salvation Army
67 Advisory Committee on Assisted Reproductive Technology (ACART), New Zealand
68 Australian and New Zealand Infertility Counsellors’ Association
69 Confidential
70 Anonymous
71 Professor Heather Mohay, Developmental Psychologist, Psychology and Counselling, Faculty of Health, QUT
72 Queensland Bioethics Centre, Catholic Archdiocese of Queensland
73 Action Reform Change Queensland (ARCQ)
74 Ms Angela Steel
75 Festival of Light Australia
76 Mr Malcolm Smith, PhD Candidate, Faculty of Law, QUT
77 Australian Association of Social Workers Ltd
78 Confidential
79 Wide Bay Women’s Health Centre Inc
80 Cairns Community Legal Centre Inc
81 The Presbyterian Church of Queensland
82 Ms Bianca Upton
83 Kelly
84 Ms Linda Wright, DGB Lawyers
85 Australian Christian Lobby
86 Mr Brian Robertson
Dr Trevor Jordan, Senior Lecturer in Applied Ethics, Humanities Program, QUT
Dr Adam Morton
Ms Sue Waller
Human Rights and Equal Opportunity Commission
Queensland Fertility Group
Anonymous
Ms Jody Robinson
Ms Patti Smith
Ms Nina Hughes
Ms Susan Mobbs
National Health and Medical Research Council
Commission for Children and Young People and Child Guardian
Associate Professor Roger Cook, Swinburne University of Technology, Victoria
South Australian Council on Reproductive Technology
Ms Nicole Seath
Ms Antonia Clissa
Women’s Forum Australia
Mr Dean Murphy
Southern Cross Bioethics Institute
Ms Miranda Montrone
Gladstone Presbyterian Church
Boyne Tannum Christian Church
Gladstone Baptist Church
Access Australia
Ms Belinda Kiem
Queensland Law Society
Dr Sarah Ferber, Senior Lecturer, School of History, Philosophy, Religion and Classics, UQ
Jigsaw Queensland Inc
Dr Eliana Miller
Associate Professor Nicholas Tonti-Filippini
Australian Medical Association Queensland
Mr Glen and Ms Tiffany Loader
Ms Roslyn Lee
Donor Conception Support Group of Australia Inc
Warren and Leonie Hewitt
Ms Julie De Ross
Anonymous
Ms Naomi Myerthall
Ms Rachael Dennington
Mrs Kayleen Schwartz
Christine, NSW
Ms Amanda Hills
John H Butterss
Infertility Treatment Authority, Victoria
Invitation to attend Public Hearings

INVESTIGATION INTO ALTRUISTIC SURROGACY IN QUEENSLAND

The Investigation into Altruistic Surrogacy Committee of the Queensland Parliament invites members of the public to attend the public hearings for its investigation into the possible decriminalisation and regulation of altruistic surrogacy in Queensland.

Evidence will be presented by individuals and organisations with an interest in or knowledge of the issues under investigation.

Complimentary morning tea, afternoon tea and a light lunch will be provided.

**DATE:** Monday 7 July and Tuesday 8 July 2008

**TIME:** 9:00am – 5:00pm

**VENUE:** Parliamentary Annexe, Alice Street, Brisbane

**RSVP:** If you would like to attend as an observer, please contact the committee secretariat by calling (during office hours) (07) 3406 7310 or 1800 025 596 **by 3 July 2008** or email surrogacy.committee@parliament.qld.gov.au .


Linda Lavarch MP
Chair
Witnesses at public hearings

Monday, 7 July 2008

Kupai Omasker Working Group – Mrs McRose Elu, Mr Bill Lowah, Mr Steve Mam, Mr Francis Tapim, Mrs Ivy Trevallion, Alistair Nicholson, former Chief Justice of the Family Law Court
Dr Maggie, Ms Linda and Ms Alice Kirkman, First altruistic surrogacy family in Australia
Ms Helen Kane, Manager, Donor Registers Service, Infertility Treatment Authority, Victoria
Ms Miranda Montrone, Psychologist
Ms Linda Wright, Lawyer advising on surrogacy in NSW
Mr Keith Harrison, CEO, Queensland Fertility Group
Dr Adam Morton, Obstetrician, Diabetes Centre, Mater Hospital
Jigsaw – Dr Trevor Jordan and Ms Jenny Watkins

Tuesday, 8 July 2008

Mr Ray Campbell, Director, Queensland Bioethics Centre, Catholic Church
Rev Les Percy, Convenor of Public Questions and Communications, Presbyterian Church
Mr Peter Earle, Queensland State Director, Australian Christian Lobby
Festival of Light Australia – Mr Richard Egan, National Policy Officer and Mr Geoffrey Bullock, State Officer for Queensland
Mrs Patti Smith, Submitter
Mrs Helen Curtis, Submitter
Hon Dean Wells MP, Submitter
Ms Greta Brennan, Director Wide Bay Women’s Health Centre Inc
Professor Heather Mohay, Developmental Psychologist, QUT
Ms Susan Mobbs and Mrs Gwen Hall, Submitters
Ms Rachel Kunde, Submitter
Ms Bianca Upton, Submitter
Ms Carolyn Gaul, Submitter
Mrs Tiffany Loader, Submitter
Commission for Children and Young People and Child Guardian – Ms Julie Harcourt, Director, Strategic Policy and Research and Ms Yvette Norris, Principal Policy Officer
Ms Narelle Bellman, Private Capacity
Mrs Trea Burger, Private Capacity
Melanie Douglas, Submitter
Mrs Nicole Seath, Submitter
List of consultants

1. Josephine Akee, former Indigenous Family Liaison Officer, Family Law Courts, Cairns
2. Paul Ban, social worker, Melbourne
3. Dr Mark Bowman, Director, Sydney IVF, Sydney
4. Ray Campbell, Queensland Bioethics Centre, Brisbane
5. Fiona Clark, solicitor, Melbourne
6. Roger Cook, Associate Professor Psychology, Swinburne University of Technology, Melbourne
7. Antonia Clissa, former Executive Officer, Reproductive Technology Council of Western Australia, Perth
8. Leigh Davis, Queensland Health, Brisbane
9. Louise du Chesne, Action Reform Change Queensland, Brisbane
10. Narelle Dickinson, clinical psychologist, ANZICA, Brisbane
11. McRose Elu, Kupai Omasker Working Group, Brisbane
12. Angela Filippello, Principal Registrar, Family Law Court, Brisbane
13. Professor Tom Frame, Director, St Mark’s National Theological Centre, Canberra
14. Megan Giles, Child Safety Director, Strategic Policy, Department of Justice and Attorney-General, Brisbane
16. John de Groots, De Groots Wills and Estates, Brisbane
17. Leonie Hewitt, Donor Conception Support Group of Australia, Sydney
18. Lorraine Hooper, Office of the Chief Health Officer, Queensland Health, Brisbane
19. Louise Johnson, CEO, Infertility Treatment Authority, Melbourne
20. Dr Nyaree Jacobsen, Senior Policy Officer, Health Policy and Clinical Reform, WA Department of Health, Perth
21. Dr Trevor Jordan, President of Jigsaw and Senior Lecturer, Humanities Program, Queensland University of Technology, Brisbane
22. Dr Maggie Kirkman, Research Fellow and Lecturer, Key Centre for Women’s Health in Society, The University of Melbourne, Melbourne
23. Helen Kane, Manager, Donor Registers Services, Infertility Treatment Authority, Melbourne
24. Michael Limerick, barrister, Brisbane
25. Helen Lucas, Register-General, Births, Deaths and Marriages, Brisbane
26. Steve Mam, Kupai Omasker Working Group, Brisbane
27. Sue Midford, Perth Psychological Services Pty Ltd, Perth
28. Miranda Montrone, private practice clinical psychologist, Sydney
29. Dr David Molloy, Director, Queensland Fertility Group, Brisbane
30. Professor John Morgan, St John’s College, University of Queensland, Brisbane
31. Dean Murphy, doctoral student, University of NSW, Sydney
32. Jean Murray, Principal Consultant, Ethico-Legal Reform, Policy and Intergovernmental Relations Division, SA Health, Adelaide
33. Dana Ober, Kupai Omasker Working Group, Saibai Island
34. Kay Oke, Senior Social Worker, Melbourne IVF, Melbourne
35. Mary Polis, former Project Manager, ART and Adoption, Victorian Law Reform Commission, Melbourne
36. Di Raeburn, A/Assistant Director, Legislation, Strategic Policy and Research Branch, Department of Child Safety, Brisbane
37. Zoe Rathus, Director, Legal Clinic, Griffith University Law School, Brisbane
38. Helen Rees, Nurse Advisor, Private Health Unit, Queensland Health, Brisbane
39. Francis Tapim, Kupai Omasker Working Group, Townsville
40. Ivy Trevallion, Kupai Omasker Working Group, Thursday Island
41. Jac Tracey, doctoral student, Melbourne
42. Rabbi Mosheh M Serebryanski, Gold Coast
43. Malcolm Smith, doctoral student, Queensland University of Technology, Brisbane
44. Dr Martyn Stafford-Bell, Canberra Fertility Centre, Canberra
45. Elizabeth Wilson, Project Manager, Legislative Policy Unit, Queensland Health, Brisbane
46. Ben White, Faculty of Law, Queensland University of Technology, Brisbane
47. Professor Lindy Willmott, Faculty of Law, Queensland University of Technology, Brisbane
48. Colin Wood, A/Business Improvement Coordinator, Registry of Births Deaths and Marriages, Brisbane
49. Kathy Williams, Executive Officer, South Australian Council on Reproductive Technology, Adelaide
50. Linda Wright, solicitor, Wollongong, NSW
Surrogacy related counselling requirements

1. CURRENT NATIONAL REQUIREMENTS

Excerpts from National Health and Medical Research Council Guidelines

Guideline 9.3: Provide Counselling Services

ART involves complex decision making and participants may find it an emotional and stressful experience. Clinics must provide readily accessible services from accredited counsellors to support participants in making decisions about their treatment, before, during and after the procedures.

9.3.1. Clinics should therefore provide counselling services, with professionals who have appropriate training, skills, experience and accreditation necessary for their counselling role. The counselling services should:

- Provide an opportunity to discuss and explore issues;
- Explore the personal and social implications for the persons born and for the participants;
- Provide personal and emotional support for participants including help in dealing with unfavourable results;
- Provide advice about additional services and support networks;
- Reflect an integrated, multidisciplinary approach, including medical, nursing, scientific and counselling staff; and
- Provide participants with information, when requested, about professional counsellors who are independent of the clinic.

9.3.2 For participants in a gamete or embryo donation program, counselling should include a detailed discussion of the complex issues relating to gamete or embryo donation, including the following specific aspects:

- The long-term psychosocial implications for each individual and each family involved;
- The psychosexual implications;
- The motives of the gamete or embryo provider for becoming involved in a donated gamete program;
- The need to ensure that gamete and embryo donors make their own independent decision to participate and that this decision is reached free from coercion in any form; and
- The right of persons born to have identifying information about their genetic parents and information about the possibility that they will make contact in the future.420

Guideline 13.2: Non-commercial surrogacy

Noncommercial surrogacy (whether partial or full surrogacy) is a controversial subject and is prohibited in some states and territories. In other states and territories, 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.421

Excerpts from RTAC code of practice

Section 6: Counselling

It is mandatory that a counsellor with expertise in reproductive issues, recognisable by ANZICA, be attached to the ART unit.

All gamete embryo donors, donors’ partners and recipients of donor gametes or embryos must undergo counselling.

420 National Health and Medical Research Council 2007, pp. 43-44.
421 National Health and Medical Research Council 2007, p. 57.
All surrogates, surrogates’ partners and commissioning couples must undergo counselling. In an ART treatment program, both the physical and the emotional wellbeing of the patients need to be addressed. Counselling is therefore an integral part of the treatment process and must be offered to all patients. Counselling services include decision-making counselling, crisis counselling and follow-up support. Counsellors may also provide therapeutic counselling or arrange an appropriate referral to an outside agency.

Counselling of all participants in a donor or surrogacy arrangement is critical, given the significant social implications for these treatments, and must be provided.

6.1: Counselling staff

Each ART unit must have an infertility counsellor recognised by ANZICA.

Counselling must:

- Be available and accessible to all patients attending the ART unit;
- Be integrated into patient treatment; and
- Include crisis, decision-making and implications counselling.

Counsellors must be encouraged to participate in the ART unit’s interdisciplinary meetings and actively participate in quality assurance within the unit. RTAC must be notified of any change of status in the counselling position.

ANZICA membership eligibility

It is recommended that counsellors be members of ANZICA, which is an association of professional counsellors. ANZICA’s established requirements for membership have been adopted by RTAC and the FSA Council as appropriate minimum criteria for ART unit counsellors.

The ANZICA executive committee may admit to membership a person who has agreed in writing to be nominated for membership of the association and who:

a. has at least four-year tertiary qualification from a recognised institution and is
   (i) register as a psychologist in a state of Australia or in New Zealand; or
   (ii) a member of, or is eligible for membership of, the Australian Association of Social Workers or the New Zealand Association of Social Workers (Bachelor of Social Work – four years); or
   (iii) registered to practise as a psychiatrist in a state of Australia or in New Zealand; and
b. is counselling clients who are concerned about issues related to infertility; and

c. has at least two years full-time or equivalent supervised postgraduate counselling experience; and

d. has demonstrated current knowledge of infertility and infertility treatments.

Counsellors may also be eligible for associate membership if they fulfil the requirements of a, b and c above but cannot yet demonstrate current knowledge of infertility and infertility treatments.

It is acknowledged that in remote ART units the only appropriate candidate for a position may be eligible only for associate ANZICA membership. This person should be taking active steps to upgrade their qualifications and experience to attain full ANZICA membership. In the interim, they must receive supervision from an ANZICA member and have access to the ANZICA web pages.

The ANZICA executive can advise ART units on such matters, and in exceptional circumstances other professional counselling courses may be approved on request. See Attachment B for an outline of additional information about counselling.

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422 RTAC 2005, ‘Section 6, Counselling’, p. 18.
Attachment B - ANZICA guidelines for RTAC accreditation of counselling services

Counsellors appointed to ART programs are an integral part of the service provided to all patients undergoing ART treatment.

Counsellors offer psychological counselling, information, crisis counselling, follow-up support and many other services. They may also provide psychotherapy for ongoing problems or arrange a referral to another service for continuing management.

The Medicare benefit for stimulated cycles contains a provision for at least one counselling consultation per cycle. This level of funding must be allocated to the provision and support of the ART unit’s counselling personnel.

It is an accreditation requirement that RTAC be notified of any change to the status of the counselling position in the ART unit (eg replacement of counsellor, change of hours).

The role of counsellor

1.1 ART counselling

Professional counselling is recommended for all patients attending ART units, particularly at times of stress such as an initial diagnosis, while awaiting treatment, after a failed treatment cycle, when deciding to stop treatment and after an unsuccessful pregnancy.

ANZICA requires that counselling be integrated into patient treatment. ART units should proactively inform patients of counselling services through pamphlets and other means.

ART counselling includes:
- Crisis counselling;
- Decision-making counselling; and
- Implications counselling.

and may also include:
- Supportive counselling; and
- Therapeutic counselling.

Crisis counselling should be available to patients who experience a crisis or adverse outcome during ART treatment, particularly pregnancy loss.

Decision-making counselling should be available to patients at significant points in their decision-making about their treatment (eg undertaking treatment involving additional parties, stopping treatment).

Implications counselling aims to enable the person concerned to understand the implications of the proposed course of action – personally, for their family and for any child born as a result of treatment.

1.2 Donor counselling

Counselling of patients who wish to use donated gametes and of people who donate gametes requires special attention. Professional practice indicates these people should be counselled about the relevant issues so that they can make informed decisions.

ANZICA requires that appropriate educative and psychological counselling be a standard protocol for all donors and recipients involved in donor sperm, oocyte and embryo programs.

All donors, donors’ partners and recipients of donor gametes or embryos are required to have counselling.

Counselling about the implications of receiving donated material must be offered separately from counselling about the implications of treatment.

Treatment with donated material should not proceed until the patient and donor have been given sufficient time for appropriate counselling.
Donors and recipients must have separate interviews, with a minimum of two interviews for each party: one session for information/treatment implications counselling, and one for psychosocial/donor counselling.

Issues to be addressed in donor counselling include:
- The motivations of donors and recipients, in the context of their family and social histories;
- The recipients’ and donors’ feelings about monogenetic parenting;
- The risks and benefits of donation;
- The short-term and long–term consequences for all parties concerned, including the possibility that the donation will result in an adverse outcome;
- Exploration of the acknowledged importance of donor information being accessible for any donor-conceived person and the future availability of donors for information about identity;
- Attitudes to telling others and plans to disclose donor conception to children;
- Relevant national and state legislation; and
- Relevant RTAC/NHMRC guidelines.

Surrogacy counselling

Counselling of all parties to a surrogacy arrangement requires special attention. Professional practice indicates that patients so involved should be counselled about the relevant issues so that they can make informed decisions.

ANZICA requires that appropriate educative and psychological counselling be a standard protocol for surrogates, their parents and the commissioning couple.

Surrogates, surrogates’ partners and commissioning couples are required to have counselling.

Counselling about the implications of the surrogacy arrangement should be offered separately from counselling about treatment implications.

Treatment involving a surrogate arrangement should not proceed until all parties have been given sufficient time for appropriate counselling.

All parties must separate interviews, with a minimum of two interviews for each party: one session for information/treatment implications counselling and one for psychosocial/surrogacy counselling.

Issues to be addressed in surrogacy counselling include:
- The motivations of surrogate and commissioning couples, in the context of their family and social histories;
- The recipients' and surrogates’ feelings about parenting arrangements;
- The risks and benefits of the surrogacy arrangement;
- The short-term and long-term consequences for all parties concerned, including the possibility of an adverse outcomes;
- Perceptions of the needs of any children born as a result of the arrangement;
- Attitudes to telling others and plans to disclose surrogate conception to children;
- Relevant national and state legislation; and
- Relevant RTAC/NHMRC guidelines.\(^{424}\)

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\(^{424}\) RTAC 2005, 'Attachment B ANZICA Guidelines for RTAC accreditation for counselling services, Role of the counsellor (Parts 1.1, 1.2 and 1.3), pp. 80-82.
2. EXAMPLES OF PROPOSED REQUIREMENTS

Excerpts from the Western Australian draft Human Reproductive Technology Act 1991 Directions on Surrogacy

Part 6: Preparation

6.1 Clinical Surrogacy Coordinator

Each clinic that offers artificial fertilisation procedures in connection with a surrogacy arrangement is to appoint a person to be Surrogacy Coordinator. The person must be an approved counsellor employed at the clinic.

6.2 Role of clinic Surrogacy Coordinator

The clinic Surrogacy Coordinator must ensure that the parties to any proposed surrogacy arrangement are provided with all the necessary information about the process of assessment and approval of surrogacy arrangements and to be the primary contact point for inquiries about surrogacy arrangements.

6.3 Implications Counselling

The clinic Surrogacy Coordinator must ensure that the birth mother, her husband or de facto spouse (if any), the arranged parent(s), the donor of any gametes or embryos to be used in the procedure (if any) and the spouse or de facto partner of any donor complete implications counselling provided by an approved counsellor (who may be the Surrogacy Coordinator) that covers the following issues:

(a) the eligibility of the parties to undertake the practice of surrogacy;
(b) the motivation of the parties to pursue surrogacy;
(c) whether the parties are freely considering this practice and/or whether any party feels coerced or pressured to participate;
(d) whether, and to what extent, arranged parents should have input on aspects of the birth mother’s lifestyle and behaviour during pregnancy;
(e) whether prenatal testing will be considered and how the birth mother will address a situation where a serious defect of the foetus is found;
(f) identification of costs associated with the pregnancy and birth that would be reimbursed to the birth parent(s);
(g) whether the arranged parents are to present at the child’s birth and the timing of their taking over the care of the child, including the process of separation of birth parents (s) from the child;
(h) how the birth of a child born with a disability would be dealt with;
(i) how the death or separation of the arranged parent(s) before the child’s birth would impact on the arrangement;
(j) what information will be given to the child about the circumstances of birth and when it will be given;
(k) what communication is proposed between the child and the birth family during childhood and how any proposed contact is to be managed;
(l) the likely effects of surrogacy on other children of the birth parent(s), and the involvement of those children in the process in ways appropriate to their age and maturity;
(m) the likely effects of the surrogacy on the birth mother’s husband or de facto partner (if any), including consideration of how surrogacy may impact on the relationship;
(n) the emotional, social and financial costs associated with the birth parent(s) changing their minds and keeping the child;
(o) the attitude towards, and impact of, surrogacy on the extended families of both the birth parent(s) and arranged parents;
(p) the level of support networks for the parties during the process of surrogacy and enhancing if required; and
(q) Methods of conflict resolution. 425

**Part 7: Investigations**

7.5 **Psychological assessment of arranged parent(s)**

An independent clinical psychologist is to undertake assessment and appropriate psychological testing of the suitability of the arranged parent(s) to take part in a surrogacy arrangement and to care for a child born as a result of a surrogacy arrangement. The assessment is to include any existing child of the arranged parent(s) who is over the age of 4 years. The clinical psychologist is to prepare a report on the assessment in the form approved by the Council.

7.6 **Psychological assessment of birth mother and her immediate family**

An independent clinical psychologist is to undertake assessment and appropriate psychological testing of the suitability of the intended birth mother and her husband or defacto partner (if any) to take part in a surrogacy arrangement. The assessment is to include any existing child of the intended birth mother and her husband or defacto partner (if any) who is over the age of 4 years. The clinical psychologist is to prepare a report on the assessment in the form approved by the Council. 426

**Part 9 Ongoing counselling and support**

9.1 **Counselling and support services to be available**

The clinic Surrogacy Coordinator is to ensure the parties have access counselling and support services in connection with a surrogacy:

(a) following a decision by the Clinic Surrogacy Review Committee/Panel;
(b) during reproductive technology treatment;
(c) following a decision to discontinue reproductive technology treatment;
(d) during any pregnancy; and
(e) following the birth of any child.

9.2 **Counselling requirements during any pregnancy**

In the event of a pregnancy in connection with a surrogacy arrangement, the clinic Surrogacy Coordinator must ensure that the arranged parent(s), the birth mother and her husband or defacto partner (if any) attend joint counselling at 20 weeks gestation, at 34 weeks gestation and within 14 days after the birth of the child. 427

**Excerpt from the submission received from the Commission for Children and Young People and Child Guardian**

The CCYPCG suggested that pre-conception counselling should include:

- The needs of the child, particularly, their need for information and possible contact with the birth mother;
- The potential emotional impact of relinquishment on the birth mother;
- The possibility of an unplanned multiple pregnancy, including the risks to the child the birth mother and the arrangements for the resulting children;
- The parties’ understanding of the birth mother’s management of the pregnancy;
- Possible inclusion of any existing children;
- Particular life experiences and risk factors (e.g. psychiatric problems, substance/physical/sexual abuse, criminal history);
- Possibility of termination or a decision not to terminate by the birth mother (eg, in cases of foetal abnormalities or risk to the birth mother’s health or life) and the management of resulting consequences;

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• Possibility of a breakdown in the arrangement (e.g. if the birth mother refuses to relinquish, or the intending parents change their minds);
• The risk of rejection of the child (e.g. if born with a disability);
• A dispute resolution process (e.g. mediation);
• The nature of the relationship between the intending parents and the birth mother;
• The impact on the child of the absence/presence of ongoing contact with the birth mother; and
• The impact of potential media involvement.⁴²⁸

Motion extending the committee’s reporting date

Hansard, Record of Proceedings, Tuesday, 26 August 2008

Hon. RE SCHWARTEN (Rockhampton—ALP) (Leader of the House) (10.29 am), by leave, without notice:
I move—

That the date for the select committee known as the Investigation into Altruistic Surrogacy Committee to report to the House in accordance with its order of appointment dated 14 February 2008 be extended from 30 September 2008 to 9 October 2008.

Question put—That the motion be agreed to.

Motion agreed to.
## Table of comparative surrogacy legislation across Australia

<table>
<thead>
<tr>
<th>Relevant legislation</th>
<th>QLD</th>
<th>ACT</th>
<th>NSW</th>
<th>V/C</th>
<th>TAS</th>
<th>SA</th>
<th>WA</th>
<th>NT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Altruistic surrogacy allowed</td>
<td>✗</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Commercial surrogacy allowed</td>
<td>✗</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Pre-conception arrangement only</td>
<td>✗</td>
<td>✓</td>
<td>✓</td>
<td>silent</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>silent</td>
</tr>
<tr>
<td>Agreements void or unenforceable</td>
<td>✓</td>
<td>✓</td>
<td>silent</td>
<td>silent</td>
<td>silent</td>
<td>silent</td>
<td>silent</td>
<td>silent</td>
</tr>
<tr>
<td>Payment of reasonable expenses allowed</td>
<td>n/a</td>
<td>✓</td>
<td>silent</td>
<td>✓</td>
<td>436</td>
<td>silent</td>
<td>437</td>
<td>438</td>
</tr>
<tr>
<td>Advertising for altruistic surrogacy allowed</td>
<td>✗</td>
<td>✓</td>
<td>silent</td>
<td>silent</td>
<td>silent</td>
<td>✓</td>
<td>✓</td>
<td>By clinics</td>
</tr>
<tr>
<td>Brokerage for altruistic surrogacy allowed</td>
<td>439</td>
<td>✗</td>
<td>✓</td>
<td>silent</td>
<td>440</td>
<td>✗</td>
<td>✓</td>
<td>By clinics</td>
</tr>
</tbody>
</table>

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**429** In many jurisdictions, parliamentary committee reviews into surrogacy are still underway, or surrogacy bills are before the house. This table reflects the legislation in effect and those changes that are proposed in Victoria, Tasmania, South Australia and Western Australia. Surrogacy regulation in NSW is currently provided for under ART legislation. The NSW Parliament is undertaking an inquiry into the regulation of surrogacy in that state.

**430** The VLRC report recommendations were considered by the Victorian Government and the Assisted Reproductive Treatment Bill 2008 introducing new surrogacy legislation was introduced in the Victorian Parliament on 9 September 2008.

**431** The Tasmanian Legislative Council Select Committee on Surrogacy undertook an inquiry into the regulation of surrogacy in Tasmania. It reported on 27 August 2008. The committee recommended minor changes to the Surrogacy Contracts Act 1993. However its recommendations largely maintain the status quo in Tasmania until uniform national legislation regulating surrogacy is enacted.

**432** The Statutes Amendment (Surrogacy) Bill (SA) is a Private Member’s Bill introduced in the Upper House by Hon John Dawkins MLC in June 2006. It proposes changes to the Family Relationships Act 1975. Hon Dawkins re-introduced the bill in revised format in February 2008 following an inquiry by the Parliamentary Social Development Committee. The amended bill passed a conscience vote in the Legislative Council in June 2008. Information provided in August was that it was yet to be debated in the Lower House. The revised bill also seeks to amend the Reproductive Technologies (Clinical Practices) Act 1988 and the Births, Deaths and Marriages Registration Act 1996.

**433** The Bill was passed by the WA Legislative Council on 26 June 2008 and was awaiting the concurrence of the Lower House when WA went to the polls. One of the first priorities of the new Government appears to be the re-introduction of the bill.

**434** The Surrogacy Contracts Act 1993 is silent on permitting altruistic surrogacy. Providing technical or professional services for surrogacy is an offence.

**435** The report refers to reimbursement of actual expenses incurred including medical expenses not otherwise provided for under Medicare, insurance or other benefits, lost earnings not otherwise provided for under maternity leave entitlements and legal expenses associated with the surrogacy.

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**436** Called valuable consideration and includes expenses connected with pregnancy, birth or care of the child, counselling, medical & legal services (incl. after birth).

**437** Called payment or valuable consideration and includes reasonable expenses associated with pregnancy or birth and assessment or expert advice.

**438** Whilst anything pertaining to surrogacy is illegal, it might be more correct to note that this category is not applicable as the Act does not refer to brokerage of altruistic surrogacy by third parties.

**439** The VLRC investigation did not consider brokerage.
### Table of comparative surrogacy regulation in other jurisdictions

<table>
<thead>
<tr>
<th>Relevant legislation</th>
<th>NZ</th>
<th>UK</th>
<th>CANADA</th>
<th>CALIFORNIA USA</th>
<th>FLORIDA USA</th>
<th>NEW YORK USA</th>
<th>ARIZONA USA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Altruistic surrogacy permitted</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commercial surrogacy allowed</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
<td>✓</td>
<td>✗</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Advertising/brokerage for altruistic surrogacy services allowed</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Payment of reasonable expenses allowed</td>
<td>(does not incl. employment-related expenses)</td>
<td>incl. loss of income</td>
<td>And fees</td>
<td>n/a</td>
<td>n/a</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Surrogacy agreement is void or not enforceable</td>
<td>✓</td>
<td>✓</td>
<td>conditions vary across provinces and territories</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Legal parentage presumption with BM and partner (if any)</td>
<td>✓</td>
<td>✓</td>
<td>(if partner consents)</td>
<td>✓</td>
<td>(if partner consents)</td>
<td>In gestational surrogacy only</td>
<td>✓</td>
</tr>
<tr>
<td>Transfer of legal parentage to IPs possible</td>
<td>Adoption only</td>
<td>Court Order</td>
<td>conditions vary across provinces and territories</td>
<td>Pre-birth parentage order available through courts</td>
<td>Automatic transfer at birth for gestational surrogacy; Post-birth court order for traditional surrogacy</td>
<td>n/a</td>
<td>n/a</td>
</tr>
</tbody>
</table>

441 In the USA it is the states’ responsibility to regulate surrogacy and each state approaches this differently. This table provides an example of four different approaches.

442 Conditions include: at least one intending parent must be a biological parent, medical infertility as a pre-requisite, prefer birth mother is relative or friend and has completed family.

443 The NZ Law Commission Report, *New Issues in Legal Parenthood*, April 2005, recommended a pre-birth interim order be made available and, if not disputed, transfer should become effective at 21 days post-birth. The NZ Government agreed with the commission on the need for clarity around parentage, but considered that further consideration of the issues was required before it could implement a solution.

444 Conditions include: intending couple must be married and at least 18 years, one intending parent must be a biological parent, application must be made within 6 months of the birth, child must reside with the intending parents.

445 For example, the *Family Law Act 2003* in Alberta provides a mechanism to transfer parentage in the case of gestational surrogacy when an intending mother’s gametes have contributed to the conception of the child. Similarly, in Nova Scotia, the Birth Registration Regulations 2007 permits the Family Court to make an order transferring legal parentage on a number of conditions including that one of the intending parents is genetically related.

446 Californian courts take into account the test of ‘intent’. 
### Table comparing criteria for transfer of legal parentage

<table>
<thead>
<tr>
<th>Relevant regulations</th>
<th>QLD</th>
<th>ACT</th>
<th>NSW</th>
<th>Vic</th>
<th>TAS</th>
<th>SA</th>
<th>WA</th>
<th>NT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Presumption of parentage with BM (and partner, if any)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Special transfer of parentage mechanism</td>
<td>×</td>
<td>✓</td>
<td>×</td>
<td>✓</td>
<td>Implement any SCAG recommendations ASAP</td>
<td>✓</td>
<td>×</td>
<td>✓</td>
</tr>
<tr>
<td>Must use ART</td>
<td>n/a</td>
<td>✓</td>
<td>n/a</td>
<td>✓</td>
<td>silent</td>
<td>✓</td>
<td>➥</td>
<td>n/a</td>
</tr>
<tr>
<td>Pre-conception arrangement only</td>
<td>n/a</td>
<td>×</td>
<td>n/a</td>
<td>silent</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>n/a</td>
</tr>
<tr>
<td>At least one IP must have a genetic connection &amp; gestational only</td>
<td>n/a</td>
<td>✓</td>
<td>n/a</td>
<td>×</td>
<td>silent</td>
<td>×</td>
<td>×</td>
<td>n/a</td>
</tr>
<tr>
<td>Must demonstrate informed consent</td>
<td>n/a</td>
<td>✓</td>
<td>n/a</td>
<td>✓</td>
<td>silent</td>
<td>✓</td>
<td>✓</td>
<td>n/a</td>
</tr>
<tr>
<td>IP Must be resident in jurisdiction</td>
<td>n/a</td>
<td>✓</td>
<td>n/a</td>
<td>silent</td>
<td>silent</td>
<td>✓</td>
<td>✓</td>
<td>n/a</td>
</tr>
<tr>
<td>Child already resident with IP</td>
<td>n/a</td>
<td>✓</td>
<td>n/a</td>
<td>silent</td>
<td>silent</td>
<td>✓</td>
<td>✓</td>
<td>n/a</td>
</tr>
<tr>
<td>Time limit</td>
<td>n/a</td>
<td>&gt;6weeks - &lt;6months</td>
<td>n/a</td>
<td>&gt;28days - &lt;6months</td>
<td>&gt;6weeks - &lt;6months</td>
<td>&gt;6weeks - &lt;6months</td>
<td>&gt;28days - &lt;6months</td>
<td>n/a</td>
</tr>
</tbody>
</table>

447 This table includes criteria that is either in force or has been recently proposed in the various jurisdictions.
448 The VLRC report recommendations under consideration by the Victorian Government may motivate changes to the current Status of Children Act 1974 (Vic).
449 In Tasmania the Legislative Council Select Committee on Surrogacy recently undertook an inquiry. It reported on 27 August 2008. The committee recommended the Tasmanian Government implement any recommendations of the Standing Committee of Attorneys-General as soon as practical after they are made to ensure clarity around the legal parentage of children born of surrogacy arrangements.
450 If a mechanism was available, under the current Status of Children Act, transfer of parentage could be available to a single woman or lesbian couples.
451 In recommendation 127 the VLRC sets out the criteria for transfer of parentage. Applicants need to have met eligibility criteria for entering into a surrogacy arrangement, which is explained as having undertaken surrogacy with the assistance of a clinic.
452 The Surrogacy Bill 2007 considers a couple or person eligible for transfer if they are eligible for ART (i.e. medically infertile).
453 If there is a genetic connection with one intending parent and no genetic connection with the birth mother the court can dispense with consents, counselling, legal advice and the requirement for an approved plan.
454 Requirement for informed consent may include any or all of the following: independent counselling, psychological assessment, legal advice.
455 Recommends post-birth counselling
### Table comparing regulatory criteria for access to ART for surrogacy

<table>
<thead>
<tr>
<th>Relevant legislation/ regulations</th>
<th>QLD</th>
<th>ACT</th>
<th>NSW</th>
<th>VIC</th>
<th>TAS</th>
<th>SA</th>
<th>WA</th>
<th>NT</th>
</tr>
</thead>
<tbody>
<tr>
<td>RTAC &amp; NHMRC Guidelines</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Canberra Fertility Centre standards</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td>Sydney IVF standards</td>
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<td>Reproductive Technologies (Clinical Practices) Act 1988</td>
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<td>Surrogacy Bill 2007 and draft Directions on Surrogacy</td>
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<td>RTAC &amp; NHMRC Guidelines</td>
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<th>Surrogacy currently facilitated by clinics</th>
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<td>IP medically infertile, unable to carry, or at risk from pregnancy</td>
<td>n/a</td>
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<td>Permit traditional surrogacy</td>
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<td>Require genetic connection to IP</td>
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<td>Age – BM</td>
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<td>IP must reside in jurisdiction</td>
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<td>Criminal history check required</td>
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<td>BM must have at least 1 child</td>
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<td>IP married or de-facto &amp; heterosexual</td>
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<th>SA</th>
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<tr>
<td>18 - &lt;38 years</td>
<td>&lt;42 years</td>
<td>21 years +</td>
<td>18 years +</td>
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<tr>
<td>25 - &lt;37 years</td>
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<td>21 years +</td>
<td>18 years +</td>
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<td>&amp; for birth mother</td>
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<td>Stat Dec</td>
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<td>Non-discriminatory</td>
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456 This table includes criteria that is either in force or has been recently proposed in the various jurisdictions.

457 The Infertility Treatment Act 1995 currently regulates ART in Victoria and establishes the Infertility Treatment Authority to licence and oversee clinics. However, the Act may soon be amended.

458 In Tasmania the Surrogacy Contracts Act 1993 currently prohibits medical assistance in surrogacy. The Legislative Council Select Committee on Surrogacy recently undertook an inquiry. It reported on 27 August 2008. The committee recommended maintaining the status quo in Tasmania until uniform national legislation regulating surrogacy was enacted. However, the committee provided some recommendations around the criteria for intending parents and birth mothers. The committee’s views are presented in this table.

459 As amended by the Statutes Amendment (Surrogacy) Bill 2006.

460 In Victoria, the surrogate is currently required to be infertile to access ART. The VLRC recommended this to no longer be a requirement.

461 s10HA (2) (b) (vii) (B) of the Statutes Amendment Surrogacy Bill 2008 requires a medical certificate to advise that a genetic connection with IPs is impossible or not advised.

462 Includes assessment pre-surrogacy, at 20-30 weeks pregnant and at 6-8 weeks post-birth, independent legal advice and counselling (also for existing children aged 4-18yrs) and a 3 month cooling off period.

463 Includes pre-assessment, independent legal advice, psychiatric assessment and counselling.
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Frame, Tom 2008, ‘Children are not a right’, The Australian, 4 April.


Maher, S 1996, ‘Sisters to have surrogate babe’, *The Sunday Mail*, 11 August.


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Prohibition of Human Cloning Act 2002
Sex Discrimination Act 1984
Sex Discrimination Amendment Bill (No.1) 2000

Queensland
Adoption of Children Act 1964
Births, Deaths and Marriages Registration Act 2003
Child Protection Act 1999
Child Protection Regulation 2000
Guardianship and Administration Act 2000
Status of Children Act 1978
Status of Children Act Amendment Bill 1988
Status of Children Regulation 2002
Succession Act 1981
Surrogate Parenthood Act 1988

ACT
Parentage Bill 2003
Parentage Act 2004

Northern Territory
Status of Children Act 1978

NSW
Assisted Reproductive Technology Act 2007
Assisted Reproductive Technology Bill 2007
Status of Children Act 1996

South Australia
Family Relationships Act 1975
Reproductive Technologies (Clinical Practices) Act 1988
Statutes Amendment (Surrogacy) Bill 2008

Victoria
Surrogate Treatment Act 1993
Infertility Treatment Act 1995

Western Australia
Human Reproductive Technology Act 1991
Surrogacy Bill 2007

New Zealand
Human Assisted Reproductive Technology Act 2004

United Kingdom
Human Fertilisation and Embryology Act 1990
Surrogacy Arrangements Act 1985
SELECT CASES

Family Law Court cases


Queensland surrogacy cases

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1993, *name withheld*, Ipswich District Court

1993, *R v White*, Mossman Magistrates Court

(1998, see *Re Evelyn* Above)

2001, *Standen*, Rockhampton Magistrates Court

ART anti-discrimination cases
