

ELECTRONIC VERSION

SURROGACY: BORN FOR ANOTHER

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ABSTRACT

Surrogacy entails a woman agreeing to bear a child, which is then transferred to other persons. Undeniably, it is a contentious issue. Although surrogacy has occurred throughout history, the issue is currently firmly on the public agenda. Most recently, this can be attributed to the birth of the first “legal surrogate baby” in Canberra in August 1996. Prior to this event, surrogacy had already returned to the public agenda due to a combination of factors, including reports of surrogacies occurring (in Queensland and elsewhere), increases in infertility, reductions in the number of children available for adoption and the advent of IVF technology.

This Research Bulletin examines the status of surrogacy agreements in Australia. Specifically, a review of state and territory surrogacy legislation is undertaken. Relevant common law provisions are also discussed. Uncertainty in the law relating to surrogacy arrangements is found to exist. Arguments for and against the practice of surrogacy are presented and policy options are reviewed.

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1. INTRODUCTION

“Sex and reproduction remain contentious and politically charged topics in contemporary...society.”¹ Surrogacy, which embodies both concepts, is a particularly contentious issue. In August 1996, it was reported that “Australia’s first legal surrogate baby” had been born in Canberra.² This birth, however, is not the first known Australian surrogate child. Alice Kirkman was born in Victoria in 1988 amid a storm of media attention. Surrogacy is currently on the public agenda because of these recent births and reports of impending births³, and also because an increasing number of people are turning to surrogacy to address their infertility. There is a reported increase in infertility in society. This factor combined with a declining number of children available for adoption and the advent of technologies such as IVF have increased awareness and interest in surrogacy as a means for infertile couples to become parents.

Moreover, surrogacy also attracts a great deal of attention because of the powerful symbolism evoked. Both the image of the transformation of an infertile couple into a family, and that of the empty and sad arms of a reluctant relinquishing surrogate mother, engender the symbolism of motherhood.⁴ These images can evoke either support for, or abhorrence of, surrogacy. The practice of surrogacy calls into question fundamental issues of society including: the definition of motherhood, and more generally the role of women in society; the status and definition of a family; and the relationship between mother, father and child.

¹ D R Valz, ‘Review of *Children of Choice: Freedom and the New Reproductive Technologies*, Author J A Robertson, Princeton University Press, Princeton, NJ’, *High Technology Law Review* [On-line serial], vol 1, 201, Spring 1995.

Site: <http://server.berkeley.edu/HTLJ/reviews/dvalzrvw.html>, 27 April 1996.

² ‘Legal dilemma born with surrogate birth’, *Courier Mail*, 10 August 1996, p 10.

³ S Maher, ‘Sisters to have surrogate babe’, *Sunday Mail*, 11 August 1996, p 2.

⁴ National Bioethics Consultative Committee [NBCC], *Surrogacy: Report 1* (Chairperson: Ms Robyn Layton), Canberra, April 1990, p 11.

Surrogacy is variously described in emotive terms such as “rent a womb”⁵ or, on the other hand, “gift of love” or “gift of life”⁶ depending on the particular viewpoint. Regardless, surrogacies are a “... source of considerable legal, moral and ethical debate both in Australia and overseas”.⁷ Because of the attendant uncertainty about these issues, surrogacy is considered a “legal and ethical minefield”.⁸

As mentioned earlier one of the reasons surrogacy is currently on the public agenda is because of increasing difficulties with adoption. Adoption has always been a potential means for an infertile couple to become parents. The acceptance of adoption as an option for family formation recognises that the gestational and social components of mothering can be separated and accomplished by different persons. But the process of adopting a child is long, time consuming, expensive and legally arduous. Moreover, the number of children available for adoption in Western societies is declining. This factor, combined with increases in infertility in the population, have forced some infertile couples to look for alternatives, such as surrogacy.

The practice of surrogacy has occurred for centuries, involving sexual intercourse, but a new factor has entered the surrogacy debate - advances in reproductive technologies. These include artificial insemination, in vitro and in vivo fertilisation, gamete donation and embryo transfer. The new reproductive technologies have allowed many parents to have children, where they would not have been able to otherwise. In some cases these procedures can also enable a surrogate to carry the genetic child of another couple. An embryo is formed from an infertile woman’s egg and her partner’s sperm and implanted into the surrogate mother. The infertile couple’s own genetic child is produced as a result but in another woman’s womb. An infertile couple’s desire to have their own genetic child can be very strong and compelling.

⁵ G Lloyd, ‘Birth rights and wrongs’, *Courier Mail*, 6 March 1996, p 17. Where the surrogate does not provide genetic material to the child, the process has been described as “rent-a-womb”. See also: R Giles (ed), *For & Against: An Anthology of Public Issues in Australia*, 2nd ed, Jacaranda, Brisbane, 1993, p 290.

⁶ NBCC, *Surrogacy: Report I*, p 11.

⁷ A Stuhmcke, ‘Surrogate motherhood: The legal position in Australia’, *Journal of Law and Medicine*, 2(2), November 1994, pp 116-124 (p 117).

⁸ ‘ACT opens way for surrogate births’, *Courier Mail*, 5 March 1996, p 3.

There is no doubt that couples who cannot conceive a child can suffer great distress and loss. Although some people hold the opinion that childlessness should not be considered a disease or misfortune, worthy of sympathy⁹, many others believe that infertility is a serious and life-long disability. In recent decades, considerable resources have been allocated to research into preventing and curing infertility. Many programs have achieved great success, although success cannot be guaranteed.

Surrogate motherhood is increasingly being seen as an extension of the clinical treatment for infertility. Therefore surrogacy is considered an option for infertile couples to explore before coming to terms with the notion of not having children of their own.¹⁰ However, the community is divided on whether this solution, which impinges substantially on the lives of others, is valid or desirable.

Because advancing reproductive technologies, including surrogacy by embryo implantation, entail procedures and outcomes previously unassociated with parenthood, they defy traditional social boundaries and legal categorisation. Advances in reproductive technology are outstripping the legislative reform required to deal with the myriad of changes.

Consequently legislation and case law around the world differ in the way surrogacy is regulated. Some jurisdictions ban surrogacy, while others allow it, employing various standards to determine parental status. In 1991, the Australian Health and Social Welfare Ministers adopted a resolution that states and territories should pass uniform legislation with regard to surrogacy.¹¹ However the enactment of such legislation has not yet been achieved, resulting in non-uniform public policy throughout Australia.¹²

⁹ J Raymond, *Women as Wombs: Reproductive Technologies and the Battle over Women's Freedom*, Spinifex, Melbourne, 1995, p 153.

¹⁰ M Meggitt, 'Lessons to be learnt in parallels between adoption and surrogacy', *Policy Issues Forum*, April 1991, pp 7-13.

¹¹ Australian Capital Territory, Attorney General's Department, *Discussion Paper: Surrogacy Agreements in the ACT*, October 1993, p 8.

¹² Stuhmcke, 'Surrogate Motherhood', 1994, p 116.

1.1 DEFINITION OF SURROGACY

According to Bernard Dickens, Professor of Law at the University of Toronto, an initial difficulty in addressing surrogate motherhood arrangements is that they do not conform to predictable patterns of behaviour, and no legal language exists to describe the human and social relationships that they create.¹³

The New South Wales Law Reform Commission defined surrogacy as

*...an arrangement whereby a woman agrees to become pregnant and to bear a child for another person or persons to whom she will transfer custody at or shortly after birth.*¹⁴

The term **surrogate** could be considered a misnomer. In Australian jurisdictions, a woman giving birth to a child is deemed or presumed to be the mother.¹⁵ The *Macquarie Dictionary* defines **surrogate** as a **substitute**, so it is argued that a woman could not be the surrogate mother of the child she has borne.¹⁶ It could be considered that the woman who takes over the role of child rearing is actually the **surrogate mother**. Elizabeth Kane, an American surrogate mother prefers the use of the term surrogate wife, particularly in cases of partial surrogacy, as she is the biological and gestational mother. She also argues that the term **surrogate mother** should be used to refer to the social mother as she is in fact the 'substitute mother'.¹⁷ Nevertheless, the Law Reform Commission's definition of surrogacy is

¹³ B Dickens, 'Surrogate Motherhood: Legal and Legislative Issues', in A Milunsky & G Annas (eds), *Genetics and the Law III*, Plenum Press, New York, 1985, pp 183-214.

¹⁴ New South Wales Law Reform Commission, *Artificial Conception - Discussion Paper 3: Surrogate Motherhood*, NSWLRC, (DP 18), Sydney, 1988, p 6. A similar definition is presented in NBCC, *Surrogacy: Report 1*, p 3.

¹⁵ Presumption of parentage legislation determines who is a child's mother and father. See section 4.3 for a fuller discussion. See also Karen Sampford, *Parentage Presumptions and the Status of Children Bill 1995*, Legislation Bulletin 1/95, Queensland Parliamentary Library, Brisbane 1995.

¹⁶ Stuhmcke, 'Surrogate Motherhood', 1994, p 116; For a criticism of the language used in discussions of surrogacy, see J Wright, 'Wombs for rent', *Australian Left Review*, 1990, 116, p 12; J Raymond, *Women as Wombs*, 1995, pp 139-140; and J Raymond, 'Women as wombs', *Ms*, May/June 1991, p 33.

¹⁷ Meggitt, *Policy Issues Forum*, 1991, p 8.

the one traditionally accepted, and will be used in this Bulletin. There is no uniform definition of **surrogacy** or **surrogacy contract** in Australian legislation.¹⁸

1.2 TYPES OF SURROGACY

Surrogacy can be entered into on a formal or informal basis. **Formal surrogacy** arrangements are those in which the nature and terms of the agreement between the surrogate and the commissioning couple are clearly specified, and are generally in writing. These arrangements have been described as ‘contractual surrogacy’. This term denotes the potential legal enforceability of such agreements by a court of law. **Informal surrogacy** arrangements are ‘non-contractual’ and lack the legal requirements for an enforceable contract, in that they are often vague and uncertain. In practice, they are often difficult to detect or control.

The distinction between formal and informal contracts is irrelevant in most Australian jurisdictions. Although surrogacy ‘contracts’ are enforceable in some US jurisdictions, they are considered void (unenforceable) under Australian legislation.¹⁹ The common law position appears to be that in general terms, surrogacy contracts are almost certainly ‘illegal’ contracts in the sense that the civil courts will not enforce them.²⁰

The distinction between ‘commercial’ and ‘altruistic’ surrogacy is relevant in Australia, since State and Territory legislation differs in its treatment of these arrangements. **Commercial** surrogacy usually refers to arrangements which include payment of money or other benefits to the surrogate mother and, in some cases, her agents. **Altruistic** surrogacy refers to less formal arrangements between friends and relatives which involve no financial reward for the surrogate mother. However the

¹⁸ P Watson Janu, ‘Surrogacy arrangements in Australia: Analysis of the legal framework’, *Australian Journal of Family Law*, 9(3), December 1995, pp 200-221 (p 200). No Australian legislation contains a definition of surrogacy *per se*, but most incorporate a definition of an agreement or contract, eg **surrogacy agreement**: *Infertility Treatment Act 1995* (Vic), s 3; **surrogacy contract**: *Surrogacy Contracts Act 1993* (Tas), s 3, *Family Relationships Act 1975* (SA), s 10f; **substitute parent agreement**: *Substitute Parent Agreements Act 1994* (ACT), s 3; or **prescribed contract**: *Surrogate Parenthood Act 1988* (Qld), s 2. The *Infertility (Medical Procedures) Act 1984* (Vic), s 30(1) uses the term **surrogate mother** to mean a woman who enters into a surrogacy-type contract, agreement or arrangement.

¹⁹ *Family Relationships Act 1975* (SA), s 10g; *Infertility (Medical Procedures) Act 1984*, (Vic), s 30(3); *Infertility Treatment Act 1995* (Vic), s 61; *Surrogacy Contracts Act 1993* (Tas), s 7; *Surrogate Parenthood Act 1988* (Qld), s 4; *Substitute Parent Agreements Act 1994* (ACT), s 9.

²⁰ Submission 112, from the Interim Reproductive Technology Council of Western Australia, received by the National Bioethics Consultative Committee, in NBCC, *Surrogacy: Report 1*, p 9.

distinction between commercial and altruistic surrogacy can be blurred because altruistic surrogacy may still involve payment of medical and 'out of pocket' expenses. According to Meggitt, every woman involved in surrogacy is motivated by altruism, although some are paid.²¹ Further, it is argued money alone is insufficient to motivate a woman to become a mother in a surrogacy arrangement, and paid surrogacy just "perverts woman's altruism".²²

Surrogacy can also be classified as partial or total. **Partial surrogacy** is where the surrogate mother contributes genetic material to the resulting child. Until IVF, this was the only method of surrogacy. But advances in technology have allowed for the term 'surrogate' or 'substitute' mother to become clearly defined. **Total surrogacy** refers to the implantation of foreign genetic material into a woman who gestates the child for another couple who are the genetic parents.²³

New reproductive technologies make a complete description of all possible scenarios difficult. There is not a complete list of agreed terms or concepts yet developed to describe the full range of possible relationships which result from a surrogacy arrangement.²⁴ For example, Dickens has described twenty-three different surrogate options involving various combinations of gamete donation and separation of genetic, social and gestational parenthood.²⁵ This makes the discussion of surrogacy issues difficult and imprecise.

2. HISTORY OF SURROGACY

The practice of surrogate motherhood has had a long history and it has been accepted in many cultures. For example, the ancient Babylonian legal code of Hammurabi (18th century BC) recognised the practice of surrogacy and actually laid down detailed guidelines specifying when it would be permitted and the respective

²¹ Meggitt, *Policy Issues Forum*, 1991, p 12.

²² Meggitt, *Policy Issues Forum*, 1991, p 12.

²³ Total surrogacy is defined in the ACT, Dept Attorney-General, *Discussion Paper: Surrogacy Agreements in the ACT*, (p 2) as "the situation in which the woman bears a child that has been formed from the gametes of another woman and man implanted in her body. The birth mother is not, in this case, genetically related to the child."

²⁴ J Martin, 'Surrogate motherhood and children's interests', *Children Australia*, 15(4), December 1990, pp 40-46.

²⁵ Dickens, p 186.

rights of both wife and surrogate mother.²⁶ Stories of surrogacy between Abraham, Sarah and Hagar, and of Jacob, Rachel and their servant in the first book

²⁶ NBCC, *Surrogacy: Report 1*, pp 3-4.

of the Old Testament suggest that surrogacy was accepted in early Jewish society as a legitimate way of infertile couples having children and creating a family.²⁷ However, in European cultures, while surrogacy has undoubtedly been practised in the past, it has never been formally recognised by society or the law.

The National Bioethics Consultative Committee (NBCC) Report described the traditional Torres Strait Islander surrogacy practice of a woman or couple having a child for another woman or couple:

*In traditional society, the birth parent 'gives to' the adoptive parents whereas in Western adoption the birth parent 'gives up' or 'gives away' her child.*²⁸

Other societies such as the Kgatla people of Bechuanaland in Southern Africa and some traditional Hawaiian groups undertake similar practices.²⁹ In these communities surrogate motherhood is seen as an act of friendship and generosity.

Various Australian inquiries have identified informal surrogacy arrangements dating back to last century (see Appendix A). Australia's first widely publicised case of surrogacy occurred in 1988. Alice Kirkman was born on 23 May 1988 in Melbourne, as Australia's first IVF surrogate baby. The woman who gave birth to Alice, Linda Kirkman, was her genetic Aunt. Linda's sister, Maggie Kirkman is Alice's genetic and social mother as Alice grew from an embryo created from Maggie's egg fertilised by donor sperm.

More recently, in March 1996, Australia's first 'legally regulated' case of surrogacy was reported.³⁰ At that time, a woman was 17 weeks pregnant with the genetic child of her brother and sister-in-law. This case proceeded under the Australian Capital Territory's legislation which permits altruistic surrogacy.³¹ The pregnancy occurred with the assistance of the Canberra Fertility Centre. The baby was born on 7 August 1996.³² Along with this baby came a storm of media interest and questions concerning surrogacy. A couple of days after this birth, it was reported that a Queensland woman was carrying the genetic child of her sister and brother-in-

²⁷ See Genesis 16:3 and 30:1-6.

²⁸ P Ban, The application of the QLD Adoption Act 1964-1988 to the traditional adoption practice of Torres Strait Islanders, 1988, Master of Social Work thesis, University of Melbourne, p 72, quoted in NBCC, *Surrogacy: Report I*, p 38.

²⁹ NBCC, *Surrogacy: Report I*, p 38.

³⁰ Channel 9, *A Current Affair*, 13 March 1996.

³¹ *Substitute Parent Agreements Act 1994* (ACT)

³² Jacqueline Fuller, 'Surrogate baby 'very special'', *Canberra Times*, 9 August 1996, pp 1-2.

-law.³³ The procedure had also occurred at the Canberra Fertility Centre. This procedure breaches current Queensland legislation. Calls were made for the legislation to be reviewed.³⁴

3. THE ISSUES

3.1 BACKGROUND

Although surrogate motherhood by normal conception can be found in the genesis of Judeo-Christian culture, the emergence of medically assisted surrogacy in recent years has found the law to be unprepared.³⁵ New reproductive technologies have added significantly to the potential for surrogacy, making it necessary for the law to specifically address all aspects of the issue.

There have been moves since at least 1988 to introduce uniform surrogacy legislation throughout Australia. State and Federal Health and Social Welfare Ministers referred the issue of surrogate motherhood to the National Bioethics Consultative Committee in May 1988.³⁶

After an initial Draft Report, the NBCC's first report was released publicly in April 1990. It recommended that non-contractual or altruistic surrogacy arrangements should be permitted, but under strict controls. They concluded that although there is nothing immoral or anti-social about surrogacy, it should be considered socially undesirable "...in that it has the potential for the exploitation of both the surrogate mother and the child born from a surrogacy arrangement."³⁷ The Committee believed it would be impossible to stop, therefore they recommended regulation. Two dissenting views of NBCC members were recorded.³⁸

³³ Maher, p 2.

³⁴ Maher, p 2.

³⁵ Dickens, p 183.

³⁶ NBCC, *Surrogacy: Report 1*, p 1.

³⁷ NBCC, *Surrogacy: Report 1*, p 36.

³⁸ See NBCC, *Surrogacy: Report 1*, Appendix One, April 1990, with comments by Sr Regis M Dunne and Heather Dietrich.

A second document on the implementation of these recommendations was released in October 1990. It proposed the approval, supervision and regulation of surrogacy arrangements through state-approved agencies, established by uniform state and territory legislation. It contained draft model legislation. The report also recommended that:

- State-licensed agencies should be run on a non-profit basis;
- commercial and unlicensed surrogacy should be outlawed;
- a surrogate mother should have a one month “*cooling off period*” to decide if the child should be handed over, after which if she relinquished the child, the commissioning couple would automatically become the child’s legal parents. (Currently, the commissioning couple have to adopt the child or apply to the Family Court for guardianship and custody);
- surrogacy should only be available to women physically incapable of gestating their own child;
- counselling and record-keeping would be required;
- the agency would regulate but not match couples with surrogate mothers; and
- there would be no criminal penalties.³⁹

To some extent the NBCC’s findings followed up a number of significant state inquiries into surrogacy during the 1980s (See Appendix A). Most of those inquiries found surrogacy to be undesirable, and recommended the criminalisation of commercial surrogacy. However, apart from Queensland, no state inquiry resulted in the enactment of total bans on all surrogacy agreements.⁴⁰

The NBCC received praise and criticism for its stance.⁴¹ In response to the first Report and the Discussion Paper, the Australian Health Minister’s Advisory Council

³⁹ National Bioethics Consultative Committee, *Discussion Paper on Surrogacy 2: Implementation*, October 1990.

⁴⁰ See Report of the Special Committee Appointed by the Queensland Government to Enquire into the Laws relating to Artificial Insemination, In Vitro Fertilisation and other Related Matters, (Chairman: Mr Justice Alan Demack), [Demack Report] Brisbane, March 1984 and *Surrogate Parenthood Act 1988* (Qld).

⁴¹ M Lynch, “‘Choosing’ surrogacy - A national perspective?’ *Arena*, 94, 1991, pp 118-124; Martin, p 45; and Z Ratus, ‘State controlled surrogacy’, *Legal Service Bulletin*, 16(2), April 1991, p 90. Lynch described the Commission’s findings as “‘*Rambo technology*’, *that is, scientific adventure, new frontiers, disposable lives and values*” (p 121). Lynch argued the NBCC was too focussed on the short-term picture. Martin and Lynch both criticised the perceived haste involved in the Commission’s public consultation periods. Lynch went further to claim that the NBCC’s findings were biased. Ratus called for more community participation in the decision process regarding the implementation of surrogacy.

established a joint National Reproductive Technology Working Group of Health and Welfare Representatives to consider the recommendations of the NBCC. This group rejected the findings of the NBCC. Instead the Working Group concluded that surrogacy agreements should be made illegal and void, and commercial surrogacy and advertising should be prohibited together with any related technical or professional services.⁴²

3.1.1 The Resolution of the Australian Health and Social Welfare Ministers

In March 1991, the Australian Health and Social Welfare Ministers met to consider the recommendations of the National Reproductive Technology Working Group. They agreed to support uniform State legislation under which surrogacy arrangements would have no legal standing, and penalties would be imposed on those who facilitated surrogacy. The following resolution was adopted by the Ministers.

That States and Territories legislate to:

make any surrogacy contract or agreement void and unenforceable;

make it an offence to arrange or agree to arrange surrogacy services or contract to provide technical or professional services to facilitate the creation of the pregnancy;

make it an offence to induce a person to become pregnant for the purposes of surrendering custody and guardianship of, or rights in relation to, a child born as a result of the pregnancy;

make it an offence to publish, or cause to be published, a statement, advertisement, notice or other document to the effect:

that a person is or may be willing to enter into a surrogacy contract;

that a person is seeking a person willing to enter into a surrogacy contract; or

that a person is willing to negotiate, arrange or obtain the benefit of a surrogacy contract on behalf of another.

that where, despite the provision of the legislation prohibiting surrogate motherhood, it comes to the attention of authorities that a child has been born as a result of a surrogate motherhood arrangement, full records of the child's social and biological parents should be obtained and lodged with the relevant Register of Births, Deaths and Marriages.

⁴² National Reproductive Technology Working Group, *Report to Joint Session of Health and Welfare Ministers, 25 March 1991*, Canberra, 1991, p 19.

The Ministers further resolved that penalties and sanctions against third parties be applied through:

the classification of any form of assistance in the arrangement of surrogacy as instances of professional misconduct subject to penalty by the appropriate professional bodies, boards of tribunals; and

*the withdrawal of licences or approval to practise reproductive medicine from medical organisations which participate in facilitating surrogacy arrangements.*⁴³

In the intervening five years since the unanimous agreement, no further action on the development of this uniform State legislation has been reported. The issue of surrogacy in Australia remains in “legal limbo”⁴⁴. Western Australia, New South Wales, and the Northern Territory do not have any legislation specifically dealing with surrogacy. Queensland and South Australia have retained legislation passed prior to 1991. Tasmania, the ACT and Victoria have passed new, but not necessarily uniform, legislation, which conforms to varying degrees with that proposed by the resolution of the Health and Social Welfare Ministers. Details of current legislation are provided in Section 5.2 of this *Research Bulletin*.

3.2 SURROGACY: WHY NOW?

Pressure to resort to surrogacy arrangements is strong⁴⁵, for a number of reasons, mainly female infertility. Between one in six and one in fifteen couples of reproductive age experience infertility, which is defined as the inability to conceive after one year of intercourse without contraception.⁴⁶ Causes of female infertility include natural reproductive pathology or removal of the uterus and/or ovaries. Other causes may be advanced age or premature menopause; effects of chemical or mechanical contraception, such as pelvic inflammatory disease associated with the use of an intra-uterine device; the effects of sexually transmitted diseases; and

⁴³ As quoted in ACT, Dept Attorney General, *Discussion Paper: Surrogacy Agreements in the ACT*, pp 8-10.

⁴⁴ Stuhmcke, ‘Surrogate Motherhood’, 1994, p 116.

⁴⁵ The President of the Surrogate Parenthood Foundation, a Californian non-profit organisation formed to provide information to the public, testified that from early 1981 to early 1982, the foundation received 20,000 requests for information. See: W Winborne (ed), *Handling Pregnancy and Birth Cases*, Shepard’s/McGraw-Hill, Family Law Series, Colorado Springs, 1983, p 252.

⁴⁶ J Nunan, ‘Child yearning exploited’, *Sunday Mail*, 10 May 1992, p 37; Raymond, ‘Women as wombs’, p 28.

spontaneous and induced abortion. Wider causes may include alcohol and tobacco consumption, certain prescription, non-prescription and illicit drugs, and some environmental and industrial pollutants. A more direct cause is irreversible voluntary sterilisation.

Fertile couples may also seek a surrogate mother when the female cannot physically bear a pregnancy, such as when she is affected by a heart condition or chronic spontaneous abortion, or when she may transmit a harmful genetic or other congenital condition to a child she might conceive.⁴⁷ Some of these problems could be solved by in vitro fertilisation, perhaps coupled with ovum donation. For others, the only option is surrogacy. Other reasons for surrogacy may include convenience, to avoid impacts on lifestyle, career or physical appearance.⁴⁸ More controversially, surrogacy may be an option for homosexual couples wanting to have a child.⁴⁹

As mentioned earlier, adoption was traditionally the most common alternative for infertile couples. In recent years, waiting times for adoption have become exceedingly long. In Queensland, the Department of Families, Youth and Community Care reportedly had 483 couples on its waiting list for adoption in March 1996, and the waiting period is eight to ten years.⁵⁰ To even qualify to adopt an Australian newborn child, couples must be resident in Queensland, infertile, younger than 36 years of age when they first apply, and must have been married for at least two years.⁵¹ Similar conditions are imposed on couples wishing to adopt children from overseas where waiting lists can be considerably shorter.

Unlike adoption, surrogacy using IVF and the couple's own genetic material provides infertile couples with a chance of creating a child genetically related to them. Many couples who cannot wait or want to have a biological child of their own have turned to organisations such as the ACT's Canberra Fertility Centre, and

⁴⁷ Dickens, pp 183-184.

⁴⁸ New South Wales Law Reform Commission, *Artificial Conception - Surrogate Motherhood: Australian Public Opinion, Research Report*, NSWLRC, 1987, p 61.

⁴⁹ Obviously the likely method of achieving such a result for male homosexual couples would be a partial surrogacy. Female homosexual couples would not face the same dilemma. One or both members of the couple could conceive through artificial insemination, without the need for medical assistance.

⁵⁰ Lloyd, 'Birth rights and wrongs', p 17.

⁵¹ See eligibility criteria as set out in Adoption of Children Regulation 1988, *Adoption of Children Act 1964* (Qld).

the centre for Surrogate Parenting and Egg Donating in Beverley Hills, California, which has established an international business in surrogacy.⁵²

Last year, then Governor-General Bill Hayden raised the issue of surrogacy, claiming that legal obstructions to surrogacy “*should perhaps be re-examined*”.⁵³ He claimed that people objecting to IVF and surrogacy have a right to object for religious or other reasons, and therefore not use the technology. However, he argued that this view should not be imposed on all of the community. Rather he suggested that surrogacy, properly regulated ensuring the protection of the interests of parties involved, is a “... *fundamentally pro-life action central to the private affairs of those who feel it is their only practical option*”.⁵⁴

Therefore, the issue of surrogacy needs to be addressed now as there is a demand for surrogacy services, the practice is currently occurring and legal issues are arising because of the increased involvement of third parties such as doctors and lawyers in modern surrogacy arrangements. Australian society needs to determine its policy on surrogacy.

3.3 THE PRACTICE OF SURROGACY

Few studies have been undertaken in Australia which give any detail of the terms and conditions of surrogacy agreements or a description of reasons people become involved in surrogacy.⁵⁵ The actual incidence of surrogacy agreements in Australia is therefore not known. However the NSW Law Reform Commission stated in 1988 that:

*We believe we have enough evidence, from media reports and submissions made to us, to indicate that surrogacy has been practised regularly in this State in recent years.*⁵⁶

⁵² Lloyd, ‘Birth rights and wrongs’, p 17.

⁵³ Speech given by His Excellency, the Hon Bill Hayden AC to the Royal Australasian College of Physicians, 21 June 1995.

⁵⁴ Hayden, 1995.

⁵⁵ For a discussion of the lack of material in Australia refer to J Scutt (ed), *The Baby Machine*; and M & L Kirkman, *My Sister’s Child*, Penguin, Melbourne, 1988.

⁵⁶ New South Wales Law Reform Commission, *Artificial Conception - Report 3: Surrogate Motherhood*, NSWLRC (LRC 60), Sydney, December 1988, p 5.

Evidence available to the NBCC suggested that “*ten to fifteen couples might use this form of forming a family in a year*”.⁵⁷ Extrapolating from United States data, Charlesworth estimated that between 1977 and 1987 about 40 surrogate births would have occurred in Australia. In 1993, about 3000 couples sought IVF treatment in Queensland. Of these, 50-200 women could not be helped by IVF and would therefore be suitable for total surrogacy.⁵⁸ However, not all of these couples would necessarily choose surrogacy.

Surrogacy can be achieved through various forms of artificial reproduction, or through sexual intercourse. A surrogate mother can be artificially inseminated with the sperm of the commissioning man or a donor. Less frequently, the woman is inseminated by sexual intercourse with the commissioning man. In these cases the surrogate mother is the gestational and the genetic parent of the child she bears and surrogacy does not need to involve complex medical procedures. Alternatively, the surrogate mother may be implanted with an embryo formed from the gametes of at least one of the commissioning couple, or from two separate donors. In these scenarios, there is no genetic link between the surrogate mother and the child she bears.

Under Australian law a couple procuring a child through a surrogacy arrangement do not automatically become the child’s legal parents. The woman who bears the child is the legal mother. Legal fatherhood is determined by the means of conception. In the case of artificial insemination or IVF, the partner (husband or de facto) of the birthing mother is presumed to be the ‘legal father’ if he consented to the procedure. Parental status in respect of the commissioning couple can only be achieved through adoption. Therefore the issue of surrogacy deals with legal concepts relating to parentage presumption and adoption. Most Australian adoption legislation prohibits any person from entering into a private adoption arrangement. However, an application for custody and guardianship can be made through the Family Court. (See Section 5 of this Bulletin).

People get around the legal difficulties of surrogate motherhood in Australia in several ways. The surrogate mother may enter hospital under the name of the commissioning mother, thereby falsifying birth certificates, which is an offence. People also go interstate or overseas, where criminal sanctions for surrogacy do not apply. The Head of the Canberra Infertility Centre, Dr Martyn Stafford-Bell, was

⁵⁷ M Charlesworth, ‘Reasons for and against surrogate motherhood’, in M Meggitt, (ed), *Surrogacy - In Whose Interest? Proceedings of the National Conference, February 1991*, Mission of St James & St John, Melbourne, 1991, p 65.

⁵⁸ D Giles, ‘Birth rights: should the law stop childless couples fulfilling their dreams?’, *Sunday Mail*, 3 October 1993, p 53.

quoted in March 1996 as saying that at that time 14 women from around Australia were travelling to Canberra with surrogate mothers for treatment.⁵⁹ In August Dr Stafford-Bell said that in Australia there were 30 to 40 patients at the most in this country requiring surrogacy procedures at any one time.⁶⁰ The couples involved in surrogacy must arrange their own surrogate. Nevertheless, the Centre's board must approve each case and couples must receive counselling. The intention is that the child once born will be adopted to the genetic parents.⁶¹ However the necessary changes to the ACT's legislation were not finalised at the time of writing (3 September 1996) (see also Section 5.3).

Karen Synesiou, from the Californian Surrogacy Centre, said only couples with a medical infertility problem were admitted to the Californian program. Surrogate mothers were paid between \$US12,000 and \$US15,000 each, while the couples paid the centre a further \$US54,000 for a child and all legal documentation.⁶² Ms Synesiou said the centre had produced 443 babies without any custody battles from surrogate mothers. Ten babies now living in Australia had been produced by Californian surrogate mothers from the donated sperm and eggs of Australian couples. She added that in America of all the surrogacies that had occurred, there had been 17 cases where surrogate mothers had changed their minds, and 44 cases where the couples decided not to take the baby home with them.⁶³

Other reports indicate that the surrogate mother's fees can vary between \$10,000 and \$100,000 per pregnancy, and her living and medical expenses are normally paid as well.⁶⁴ Another agency, the Infertility Centre of America, stated in its publicity that it has arranged 570 surrogacies in twenty years.⁶⁵

⁵⁹ 'ACT opens way for surrogate births', p 3.

⁶⁰ Maher, p 2.

⁶¹ Fuller, p 2.

⁶² This practice can occur legally in California, as under their law, if both the egg and the sperm are donated by the commissioning couple, then the child is legally theirs at birth. If only the sperm is donated then a step-parent adoption is required.

⁶³ Lloyd, 'Birth rights and wrongs', p 17.

⁶⁴ Electronic Townhall, *General Information about Surrogate Motherhood*, [on-line item], Echoes Houston, Friendswood, TX, USA.
Site: <http://www.phoenix.net/~townhall/surrogat/informat.html>, 21 May 1996.

⁶⁵ Infertility Centre of America, *Alternatives* [On-line item]
Site: <http://www.nkeane.com/ica/alternatives.html>, 21 May 1996.

In America a number of private organisations have been established to deal with the issue of surrogacy. One organisation, the Surrogate Parent Foundation based in California is a non-profit group which provides information to the public on surrogacy issues. The Organisation of Parents through Surrogacy, also based in California, “*supports infertile couples in building families through surrogate parenting and other assisted reproductive technologies*”, but says it “*neither recommends or opposes surrogacy*”.⁶⁶ They warn that even without complicating factors and under the very best clinical conditions, the chance of taking home a child as a result of IVF surrogacy is between 10 and 15 percent. The Organisation claims that there is less than one percent failure of surrogacy arrangements, compared with failure rates of 15 percent for adoption, 25 percent for foster care and 35 percent for marriage.

Surrogacy is unlikely to ever become a popular and widespread way of overcoming infertility.⁶⁷ Most infertile couples will either resign themselves to their fate, or seek a child through adoption or IVF and allied procedures. Only a small number of couples are likely to use surrogacy because it is an expensive arrangement, fraught with difficulties. The NBCC concluded that the legalisation of surrogacy therefore was “*not likely to open the floodgates to a way of having children which will be in competition with natural reproduction*”.⁶⁸

3.4 SURROGATE MOTHERS: WHO ARE THEY?

Three studies on surrogate mothers in the USA have reached varying conclusions. Information from the Infertility Centre of America described a 1987 study of the demographics and motivation of surrogate volunteers. The study found that of the 50 women studied, the mean age of volunteers was 26.3 years and the range was 18 to 38 years. The average IQ of the group was 99.8, with the range being 82-116. Most had completed high school, many had gone to college and a few had graduate degrees. The author of the study, Dr Joan Einwohner, claimed:

Surrogates tend to be down-to-earth, practical, decent people who assume that others are also. They want to experience and enjoy pregnancy without the

⁶⁶ Organisation of Parents Through Surrogacy, *Organisation of Parents Through Surrogacy* [On-line item], OPTS, Camarillo, CA, USA. Site: <http://www.fertilitext.org/surrogcy.html>, 19 March 1996.

⁶⁷ NBCC, *Surrogacy: Report 1*, p 30.

⁶⁸ NBCC, *Surrogacy: Report 1*, p 30.

*responsibility of raising the child. Money is a major factor, but rarely is it the sole reason.*⁶⁹

The second study found surrogate mothers are between 25-35 years of age, married, have children and are home-makers.⁷⁰ The third study was reported by the NBCC, in the following terms:

Agencies report that women waiting to be hired as surrogate mothers are generally non-Hispanic, Protestant whites, twenty-six to twenty-eight years of age. Approximately 60% are married. Most have had a prior pregnancy, and approximately 20% have had either a prior miscarriage or an abortion, and fewer than 7% have been surrogates before.

*Surrogate mothers are less educated and less financially secure than those who hire them. Fewer than 35% of those waiting to be hired as surrogates had ever attended college, and only 4% had attended any graduate school. Thirty percent earn from \$30,000 to \$50,000 per year, but two thirds (66%) earn less than \$30,000.*⁷¹

Few women in Australia have spoken about their experiences as surrogate mothers. This is understandable as the practice is not legal in most jurisdictions.

3.5 ADOPTION VS SURROGACY

Adoption involves a response to a child needing a family. Surrogacy on the other hand involves the planned creation of a child to meet the needs of an infertile couple. Adoption irrevocably extinguishes any legal relationship between a child and its parents, and creates a new relationship between the adoptive parents and the child. Adoption is the only way a person other than a natural parent can currently become the legal parent of a child. Surrogacy breaches the intention of adoption legislation, by enabling prospective parents to overcome the statutory limitations on eligibility to become adoptive parents.⁷² But in Australia, current presumption of parentage legislation states that a woman is deemed to be the legal mother of any child she gives birth to.⁷³ Therefore, a couple commissioning a surrogate mother to

⁶⁹ Infertility Centre of America, p 2.

⁷⁰ Organisation of Parents Through Surrogacy.

⁷¹ R Alto Charo, quoted in NBCC, *Surrogacy: Report 1*, p 51.

⁷² In addition to those factors mentioned in section 3.2, bankruptcy may also preclude a couple from adopting a child.

⁷³ Janu, p 211; The relevant legislation is listed in Section 5.3.

bear a child must adopt the resulting child, in order for the child to be considered legally theirs, regardless of whether the child was produced from their own genetic material.

Where the commissioning parents have contributed genetic material, or where the surrogate mother is a family member, the possibility of relative or step-parent adoption may make it less inhibiting for such couples to enter a surrogacy arrangement. The ACT Attorney-General's Discussion Paper commented that such arrangements are in fact losing favour with the courts and welfare agencies, as they are considered contrary to the purpose of adoption which usually provides an alternative family for a child.⁷⁴ However, the matter is under review in the ACT (see Section 5.3).

3.6 PUBLIC OPINION

Surrogacy is an issue which polarises community opinions. This means achieving a consensus on the legal management of surrogacy is a difficult process for democratically elected legislatures. Various public opinion polls have been conducted on the issue of surrogacy. Over time, there appears to have been a gradual shift towards supporting surrogacy, although there is still strong community objection to the practice.

A Morgan Gallup Poll was held concurrently in Australia and Britain in 1982. In Australia, the poll found that 32 percent of respondents thought IVF surrogacy using a couple's own genetic material should be allowed, but 44 percent thought otherwise.⁷⁵ In Britain, the response was more polarised. Only 20 percent thought it should be allowed, while the majority (55 percent) were against the procedure. In both countries, one quarter of the respondents either had no opinion or required more information.

The New South Wales Law Reform Commission conducted a comprehensive national survey of Australian public opinion on aspects of surrogate motherhood arrangements in 1987.⁷⁶ The survey, of 2,476 people across Australia, found that one half of the Australians surveyed did not object to surrogate motherhood for married couples. Young married men and women without children were more

⁷⁴ ACT, Dept Attorney-General, *Discussion Paper: Surrogacy Agreements in the ACT*, p 14.

⁷⁵ P Singer & D Wells, *The Reproduction Revolution: New Ways of Making Babies*, Oxford University Press, Melbourne, 1984, p 115.

⁷⁶ NSWLRC, *Artificial Conception - Surrogate Motherhood: Australian Public Opinion, Research Report*.

favourably disposed towards surrogate motherhood. There was clear support for providing some form of payment to the surrogate mother. Forty percent of respondents would pay the surrogate mother her medical expenses plus an agreed fee. A further 34 percent considered the surrogate mother should receive payment for medical expenses only. A majority of Australians supported the proposition that parties involved in surrogacy should be allowed to make the arrangements, and that non-profit organisations should also be able to assist in making arrangements. There was very little support (17%) for government agencies alone being able to make these decisions.

The survey indicated that the most contentious issue was whether a surrogacy agreement should be enforced if the surrogate refuses to surrender the child to the commissioning parents. Approximately one-third of respondents took the view that in the event of such a dispute the commissioning couple should have first claim to the child. Support for the surrogate mother in such circumstances was slightly less (26%), while a further quarter of the population considered the courts should decide the matter. This survey identified very strong support for a child learning the identity of their surrogate, with 71 percent of Australians supporting this proposition.

Interestingly the NSW Law Reform Commission survey found that two-thirds of the respondents considered that some groups of people should be 'forbidden' from making surrogate parenthood arrangements. These included homosexual couples, people under 18, and people who could not financially support a child. There was less opposition to de facto couples, single men, single women and elderly couples entering surrogacy arrangements. There was very strong opposition (80%) to people entering surrogacy arrangements for other than medical reasons, such as occupation, cosmetic concerns and lifestyle.⁷⁷

During 1988, another Morgan Gallup Poll found 55 percent of Australians supported surrogate motherhood, with some conditions.⁷⁸ Twenty-four percent approved of surrogacy if no payment was made, and a further 34 percent approved regardless of payments or rewards made to the surrogate mother. This survey reported much stronger support for surrogacy than the 1982 poll.

In June 1988, Newspoll also completed a survey on surrogacy. It looked at commercial and altruistic surrogacy.⁷⁹ The survey found that of the 1150 people

⁷⁷ NSWLRC, *Artificial Conception - Surrogate Motherhood: Australian Public Opinion, Research Report*, p xix-xxii.

⁷⁸ Morgan Gallup Poll, no 1731, *Surrogate Motherhood*, 17 June 1988.

⁷⁹ 'Most back surrogacy', *Australian*, 18-19 June 1988, p 2.

interviewed, two-thirds of Australians favoured some form of surrogate motherhood. Surrogacy involving a close friend or relative received the most support with 33 percent of the sample supporting this form of surrogacy. The poll also found that women tended to support surrogacy more strongly than men, and that younger people (18-34 years) also tended to favour surrogacy more strongly than older people.

When the NBCC discussion paper was circulated in 1990, 58 percent of the submissions received disagreed with the committee's preferred option of allowing controlled surrogacy. Of these, 33 percent expressed a clear preference for the prohibition of surrogacy. Only one of the 142 submissions received supported the option that surrogacy be freely allowed. Twenty-three percent of respondents specifically endorsed the preferred option in the draft report.⁸⁰

At around the same time a Saulwick Age poll found Australians were evenly divided on the issue of surrogate motherhood.⁸¹ The strongest support was for altruistic surrogacy, where the surrogate mother is a friend or relative of the infertile couple. Younger people supported surrogacy more than older people. Men were also more likely to support surrogacy than women. Opposition came mainly from women who were religious, lived in the country and whose main duties were in the home. People were almost evenly divided on whether a Government organisation should be involved in surrogacy arrangements. Forty six percent agreed, while forty-five percent were against government involvement. However, of those supporting government involvement, a small majority opposed the use of public money to run a surrogacy service. Commentary on the findings of the poll suggested that the Government would be unwise to proceed at that time with national legislation as recommended by the National Bioethics Consultative Committee.⁸²

Media coverage and public responses provide another gauge of public opinion. In Britain, press coverage of the 'Baby Cotton Case' painted the child's surrogate mother Kim Cotton as 'wicked' because she was initially willing to surrender the baby to the natural father according to a commercial surrogacy agreement made prior to the baby's birth.⁸³ On the other hand, the case in Australia involving the Kirkman sisters, where one sister was gestating a child for the other infertile sister

⁸⁰ NBCC, *Surrogacy: Report 1*, p 85.

⁸¹ P McIntosh, 'Nation evenly divided on surrogate mothers', *Age*, 9 July 1990.

⁸² R West, 'Poll highlights difficulties of the legislators', *Age*, 9 July 1990.

⁸³ M Freeman, 'After Warnock - whither the law?', *Current Legal Problems*, 39, 1986, pp 33-55.

received very sympathetic press coverage,⁸⁴ with some exceptions.⁸⁵ These two examples clearly demonstrate society's dichotomous views on surrogacy, particularly the penalising of commercial surrogacy.⁸⁶ While these cases clearly show differences in outcomes of surrogacy cases, individual cases cannot decide the legal and ethical desirability of surrogacy. Activists on both sides of the surrogacy debate have selectively used anecdotal data on surrogate motherhood experiences as a vindication of their positions.

4. ARGUMENTS FOR AND AGAINST SURROGACY

Governments, various private organisations involved in adoption, religious groups, feminists, medical practitioners, ethicists, legal practitioners and individuals have hotly debated their varied views on the practice of surrogacy. The following two sections detail arguments that have been advanced against and for surrogacy. However for ease of presentation, specific counter-arguments in the literature are included with each class of argument.

Arguments against surrogacy primarily fall into two types, one based on moral principles and another based upon consequences. Many reasons cited in support of surrogacy are based on either the principle of personal autonomy, or the principle that the State should not regulate surrogacy arrangements.

4.1 ARGUMENTS AGAINST SURROGACY

The Effects on the Surrogate Child

Opponents of surrogacy argue that it is not in the best interests of the child to be treated as a property like any other, possessing a monetary value. This argument is more validly applied to children born as a result of commercial surrogacy agreements. The other side of the argument is that a child may feel special because of the lengths its 'parents' undertook to obtain it.

⁸⁴ M & L Kirkman.

⁸⁵ See: A Attwood, 'Alice through the looking glass', *Time*, 20 June 1988, pp 50-52; M H Woods, 'Surrogate births - a legal minefield', *News Weekly*, 2339, 21 July 1990, p 9.

⁸⁶ A Stuhmcke, 'For Love or Money: The Legal Regulation of Surrogate Motherhood', *Murdoch University Electronic Journal of Law*. Site: <http://wwwlib.murdoch.edu.au:8088/ecolln/type/jnls/murdoch/elaw/refereed/stuhmcke.html>, 7 June 1996.

One reason often cited against the use of surrogacy is the possible long-term psychological effects on a child born as a result of a surrogacy agreement.⁸⁷

⁸⁷ Demack Report, p 115.

According to Martin⁸⁸, these problems may include:

- **Identity:** The surrogate child may be confused about its identity. The term **genetic bewilderment** has been borrowed from the adoption field.⁸⁹ A critical aspect of identity is self-esteem, which may be damaged by knowing that one's birth resulted from a surrogacy agreement. Many adoptees experience a profound sense of loss and rejection on learning of their origins.⁹⁰ Some children born through surrogacy will also suffer feelings of disconnection from their origins.
- **Some people experience a strong psychological need to know their origins:** Even where there is no attempt to deny the circumstances of a child's birth, donor programs where gametes are provided ensure anonymity.⁹¹ Many studies on adoption, artificial insemination and some surrogacy cases show that social parents are often reluctant to explain to a child the origins of its birth.⁹²
- **Potential infringements of the child's human rights:** Article 7 of the *UN Convention on the Rights of the Child* states that all children have the right to be cared for by their parents, and Article 8 requires nations to "*respect the right of the child to preserve his or her identity, including nationality, name and family relations*". Surrogacy could be seen as an infringement of these rights, but the same argument could be used against adoption. It may also be against the child's rights to have a child in a situation where there is potential ambiguity with respect to its paternity and maintenance.

The principle that the best interests of the child must be paramount is also often used against surrogacy. Professor Max Charlesworth contends that the same principle is not applied during divorce and marriage break-down.⁹³ It is only after

⁸⁸ Martin, p 42.

⁸⁹ H J Sants, 'Genealogical bewilderment in children with substitute parents', *British Journal of Medical Psychology*, 37, 1964, pp 133-141.

⁹⁰ Meggitt, *Policy Issues Forum*, 1991, p 12.

⁹¹ Martin, p 42.

⁹² See: Sants, pp 133-141; H & H Humphrey, *Families with a Difference: Varieties of Surrogate Parenthood*, Routledge, London 1988; M Van Keppel, 'At whose expense? The psychological and social costs of creating children through gamete and surrogacy arrangements', Paper presented at the New Zealand Adoption Conference, Wellington, 1990.

⁹³ Charlesworth, p 56.

the divorce or break-down that the principle is invoked to determine custody. In this case, a principle is being selectively applied against surrogacy.

Some opponents of surrogacy believe that the child is treated as a means to an end. Professor Charlesworth contends that this is no different to the birth of a child in an ordinary marriage. Further, the child of a surrogacy arrangement is no more the property of those adults than the child of ordinary parents.⁹⁴ Professor Laura Purdy said that a child would hardly feel more loved than a surrogate child if the child of a 'normal' birth knew that it was born as a result of an 'accident', adopted, was born because contraception or abortion were unavailable, was conceived to cement a failing marriage, was conceived to continue a family line, to qualify for welfare aid, to sex-balance a family, as a play-mate for a sibling, or as an experiment in child-rearing.⁹⁵

There is some evidence suggesting that children who are adopted are statistically more likely to have psychological problems than children born in ordinary families.⁹⁶ Charlesworth contends that even with these findings, there is no one saying that adoptions should be prohibited, so why should the same argument, based on only the possibility of damage, be voiced to prohibit surrogacy.⁹⁷ He believes that the appropriate conclusion from the studies is that more care and attention should be taken with adoptions, and that the same care could be given in cases of surrogacy.

Legal restrictions on surrogacy in Australia mean that when it does occur, appropriate information may not be collected on the biological origins of the child, which later in life could be important. In many states, professional services are not available in relation to surrogacy because they are illegal. This means that people interested in surrogacy are denied access to counselling, leaving them vulnerable to financial and emotional exploitation.⁹⁸

⁹⁴ Charlesworth, p 64.

⁹⁵ L Purdy, 'Surrogate mothering: exploitation or empowerment', *Bioethics*, 3(1), 1989, p 31.

⁹⁶ Charlesworth, p 63.

⁹⁷ Charlesworth, p 63.

⁹⁸ R Layton, 'The Law and What It Should Say', in M Meggitt (ed), *Surrogacy - In whose interest?* pp 90-96 (p 93).

The Effects on the Surrogate Mother

Opponents of surrogacy strongly believe surrogacy is against the best interests of the birth mother.⁹⁹ They argue the mother is at significant risk of psychological trauma as a result of forming a bond with the foetus in utero. A significant amount of research from the adoption field can be cited on the validity of this trauma,¹⁰⁰ plus there are a number of surrogacy cases where the birth mother has regretted the relinquishment, and even refused to relinquish a child as a result of the formation of this bond.¹⁰¹ The gestational role in the development of a child should not be minimised. Pregnancy is more than a uterine event, as a pregnant woman experiences complex physiological and hormonal changes and develops a relationship with the foetus.

According to Professor Carl Wood, only one percent of surrogate mothers end up regretting their decision.¹⁰² He argued that natural conception is regretted more often, resulting in therapeutic abortion or adoption after birth. He also argued that at the time when adoption was the usual outcome of pregnancy for unmarried mothers, 75 percent of mothers regretted their decision later in life. He believes surrogates are better informed than most women before they commence pregnancy and have made a conscious decision, hence the lower levels of dissatisfaction.

The surrogate mother's own children may be adversely affected by seeing their mother carry a child and then relinquishing it, particularly where partial surrogacy is practiced as the relinquished child would be their half sibling.¹⁰³ Proponents of surrogacy could argue that counselling could mitigate such difficulties, and that the effect may be less in cases of altruistic surrogacy between friends and family where the surrogate child would still be part of the children's social environment.

Some feminist and other commentators consider that the birth mother is devalued as a human being and a woman, as she is treated as an incubator. It is also claimed that reproductive technologies further degrade women as the control of

⁹⁹ Martin, p 43.

¹⁰⁰ See: R Winkler & M Van Keppel, *Relinquishing Mothers In Adoption: Their Long Term Adjustment*, Australian Institute of Family Studies, Melbourne, 1984.

¹⁰¹ For an example see: T McFadden, 'Surrogate Motherhood: Refusing to Relinquish a Child', in J Scutt, (ed), *The Baby Machine*, pp 71-76.

¹⁰² Quoted in R Giles (ed), *For and Against* (1993), p 291.

¹⁰³ Martin, p 43.

reproduction is shifting into the hands of men, since the medical specialists in this field are predominantly male.¹⁰⁴

As the NBCC pointed out, personal experiences of surrogacy, positive or negative, are not proof on the correctness of a position.¹⁰⁵ Statements made by some American surrogate mothers show some of the dangers of emotional, ill-conceived attempts at surrogate motherhood. By contrast, the Australian experience of the Kirkman sisters and the more recent case in Canberra presents a certain type of surrogacy in a very attractive light, but it also does not 'prove' anything.

The Effect on Society

*Surrogate mothering has the potential to empower women and increase their status in society. The darker side of the story is that it also has the frightening potential for deepening their exploitation.*¹⁰⁶

*Surrogacy is a social unknown in its consequences for individuals and our society. It is therefore, where it is being practised, a social experiment.*¹⁰⁷

Commercial surrogacy has been vilified as child exploitation, baby-selling and the farming of humans. Professor Wood contends that we are all paid for using our bodies, both brain and muscle in our work.¹⁰⁸ The banning of commercial surrogacy could be considered discriminatory against the surrogate mother. On this argument, surrogate mothers are considered service providers to parents in respect of their children, along with doctors, nurses, nannies and teachers. They should not be discriminated against for providing their services.¹⁰⁹

Commercial surrogacy is also said to exploit the poor. Wood claims studies of surrogates show they are of a similar age and income status to other women having

¹⁰⁴ See: J Scutt, 'Disturbing Connections: Artificial and Natural Conception and the Right to Choose' in J Scutt (ed), *The Baby Machine*, pp 157-184; H Dietrich, Submission to the NBCC, *Surrogacy: Report 1*; and Meggitt, *Policy Issues Forum*, p 9.

¹⁰⁵ NBCC, *Surrogacy: Report 1*, p 10.

¹⁰⁶ Purdy, p 34.

¹⁰⁷ Dissenting report by Sister Regis Dunne, RSM, in NBCC, *Surrogacy: Report 1*, p 54.

¹⁰⁸ Quoted in R Giles (ed), *For and Against* (1993), p 292.

¹⁰⁹ C Wood, quoted in R Giles (ed), *For and Against* (1993), p 292.

children.¹¹⁰ In relation to the argument that surrogacy arrangements are exploitative, Professor Charlesworth pointed out that this is not necessarily the situation with each case.¹¹¹

Legal Problems

The main focus of any potential legal regulation falls into two broad categories:

- (a) the legal parentage of a child born from a surrogacy arrangement
- (b) the enforceability or not of a surrogacy agreement or contract, whether formal or informal.

Problems could arise when prospective parents refuse to take custody of a child born with any physical or mental defects; or where a prospective parent or parents die; or are divorced; or become too ill to look after the child prior to its birth; or where the surrogate mother or prospective parents wish to have an unborn child aborted. Lengthy legal battles could ensue if the surrogacy agreement breaks down for any reason, as has been shown in the well documented 'Baby M' case in America.

*Once we mess around with conventional arrangements for bearing and rearing children, there is no end to the complications that can arise. The result is distress for all concerned.*¹¹²

Further, many believe any agreement to regulate surrogacy would create more problems than it would solve, as it is a procedure that does not lend itself readily to control.¹¹³

Not in the Interests of the Commissioning Couple

Meggitt, and others, have raised the proposition that a longed-for child may not transform an infertile couple into the "happy family" they expected.¹¹⁴ The child

¹¹⁰ Quoted in R Giles (ed), *For and Against* (1993), p 292.

¹¹¹ Charlesworth, p 60.

¹¹² Singer & Wells, p 119.

¹¹³ 'Should surrogate motherhood be legal?', *IPA Review*, 46(2), 1993, p 21.

¹¹⁴ Meggitt, *Policy Issues Forum*, 1991, p 12.

may in fact be a reminder of the couple's inability to become parents, as their infertility is not cured, just circumvented. Meggitt suggests that the couple will instead be sitting on a "*time-bomb that is guaranteed to go off at some point in their child's life*".¹¹⁵

Weakening of Family Roles

Surrogacy confuses well-defined societal identities for parents, siblings, grandparents, and so on. Some opponents of surrogacy argue that parenting is difficult enough without adding additional hurdles.¹¹⁶

Who Pays?

IVF surrogacies in the USA are estimated to cost over \$90,000 each (See Section 3.3). Some would argue that there is no reason to suppose that the expense would be any less in Australia. With Australia's current medical care system, a large proportion of the cost of surrogacy may be funded from taxes as is the case with standard IVF procedures. Surveys have shown that many Australians are opposed to this proposition. The 1990 Saulwick Poll reported that 53 percent of the respondents opposed the use of public money to fund surrogacy, while 43 percent favoured the idea.¹¹⁷

Moral Reasons

Some argue that surrogate motherhood offends certain basic moral principles (for example, that human beings should not be used as a means to other people's ends), but Professor Charlesworth considers that these principles are used in a selective and inconsistent way. He used the example of arguments which appear to invoke a moral principle that a child has the right to expect to be brought up by its biological parents. He contended that if this principle is to be applied consistently then adoption, artificial insemination, re-marriage and reconstitution of a family after

¹¹⁵ Meggitt, *Policy Issues Forum*, 1991, p 12.

¹¹⁶ 'Should surrogate motherhood be legal?', pp 20-21.

¹¹⁷ McIntosh.

divorce should also be rejected.¹¹⁸ He believes that this kind of selective use of principles is widespread in anti-surrogacy arguments.

Others contend that the consequences of surrogacy are immoral, because it involves the exploitation of socially deprived women, or has negative sociological effects on the children, or will subvert the basic institutions of marriage and the family. Professor Charlesworth said that to argue this case, empirical evidence must actually show this, rather than using the argument that it is *possible* that the practice of surrogacy *might* produce deleterious effects.¹¹⁹ He also argued that these deleterious effects might also be consequences in 'normal' marriage and family situations, but that this in itself is no argument against marriage and family formation.¹²⁰

Some commentators argue that the naturalness or unnaturalness of a procedure should not be the central issue. They contest that the central argument should be whether the procedure is likely to cause more good than harm.¹²¹

In addition to those arguments already discussed, the following points are often advanced against surrogacy:

- surrogacy devalues children turning them into marketable products, and has been compared to slavery;
- the consent of the children, who are the prime objective of surrogacy, cannot be sought;
- surrogacy imposes fundamental shifts in values concerning the social construction of a family and is therefore "*socially irresponsible*";
- surrogacy arrangements are dominated by the medical profession giving greater weight to the interests of the infertile couple than to the interests of the child; and
- surrogacy arrangements use largely unsuccessful, costly and therefore inefficient reproductive technology.¹²²

It should be noted in relation to the final point that these statements were made six years ago, and the technology was only introduced in Queensland thirteen years

¹¹⁸ Charlesworth, p 55.

¹¹⁹ Charlesworth, p 56.

¹²⁰ Charlesworth, p 56.

¹²¹ Singer & Wells, p 116.

¹²² Martin, p 43.

ago. Advances in success rates and a subsequent lowering of costs have occurred since that time. This is not to say that the process is not still relatively expensive and inefficient.

4.2 ARGUMENTS FOR SURROGACY

Personal Autonomy

The principle of personal autonomy states that people have the freedom to choose what happens to their bodies, provided no harm occurs to others. In relation to surrogacy, a couple should have the freedom to pursue their own procreative arrangements and a woman should have the choice to make decisions about her own body, so long as harm is not caused to others. In a great number of surrogacy cases the principle of personal autonomy has operated successfully. But there are also a large number of cases where the principle has broken down for various reasons. Taken to the extreme, the personal autonomy argument could become a question of rights, as Albury pointed out: “*there seems to be a slippage of the argument from the desire for a child to the need for a child to the moral right to have a child to the legal right to be provided with a child by whatever means necessary*”.¹²³

One fundamental weakness of the autonomy argument is that decisions a woman makes in relation to childbirth do involve other people, including the child.¹²⁴ Even if it were accepted that a woman can relinquish a child she has borne, the principle of autonomy implies that resultant harm or good can be determined and measured. This is obviously not the case. The converse of the principle is the question of the degree to which an individual’s autonomy (eg that of a contracting parent) can be overridden by the state in order to prevent potential harm.

Family Formation

It could be argued that in the public interest, surrogacy has a legitimate place in family formation given that in today’s society a range of modes of family formation are already accepted. The family may include step-parents, single parents, divorced parents, adopted children, parents in defacto relationships and children born by in-vitro fertilisation. As there is no longer one accepted concept of a ‘family’, surrogacy could not subvert a concept that already has a wide variety of

¹²³ R Albury, in a submission to the New South Wales Law Reform Commission, in NSWLRC, *Artificial Conception - Report 3: Surrogate Motherhood*, p 30.

¹²⁴ ACT, Dept Attorney-General, *Discussion Paper: Surrogacy Agreements in the ACT*, p 30.

expressions. Therefore, singling out surrogacy for prohibition could be considered discriminatory.¹²⁵ Opponents of this argument contest that all of the other forms of family formation do not involve the *deliberate* creation of children with the intention, from conception, to transfer custody at birth.¹²⁶

Gift of Life

Surrogacy, particularly IVF surrogacy, offers an infertile couple the gift of life for which nothing else can be a source or substitute. It is often suggested that the fact a couple goes to such extremes to have a child means that when it arrives it will be truly loved, some claiming even more loved than many children born to natural parents.¹²⁷ Because surrogacy involves the giving of life, it is not open to the same abuses as euthanasia or abortion, which involve the taking of life.

Limited Use of Surrogacy

The number of people who would practice surrogacy in Australia would always be small, possibly as few as around a dozen couples each year. Several factors would ensure that numbers remain limited, including the cost, a woman's preference to bear her own child, and the desire not to incur social censure. Therefore, those advocating surrogacy argue that the task should be to make legislation strong and clear enough to ensure possible abuses of surrogacy are controlled.¹²⁸ The fact that so few people would avail themselves of the technology is a key reason why attempts at introducing uniform legislation have failed.

Progress Marches On

History reveals few scientific or social developments which have not been initially opposed. Most detractors were eventually proven wrong, although obviously not all. Regardless, as with other technology, such as nuclear weaponry, the procedures for surrogacy now exist. As a community we must deal with the existence of this technology. Advocates of surrogacy also argue that keeping surrogacy illegal in one

¹²⁵ Martin, p 42.

¹²⁶ Martin, p 42.

¹²⁷ 'Should surrogate motherhood be legal?', p 20.

¹²⁸ 'Should surrogate motherhood be legal?', p 21.

jurisdiction when it is allowed elsewhere only encourages people to break the law or seek out jurisdictions allowing the procedure.¹²⁹ Therefore, some people are penalised either because they cannot afford to seek out the technology, or because they choose to respect the law.

The 'Natural' Myth

If one condemns all tampering with 'natural' mothering and family formation, then logically other forms of family formation such as adoption, guardianship, custody, step-families and even contraception must also be condemned.¹³⁰ Extending this argument further, all technological advances which affect the natural order, such as organ donation, dialysis and other medical advances which keep people alive, could also be condemned for tampering with 'nature'.

Number Crunching

The quantity argument is based on information that the overwhelming majority of surrogacy arrangements end happily. If this is the case, the argument is that the practice which brings joy to the majority should not be outlawed to protect the sorrows of a few.¹³¹ Not all commentators agree that 'most' surrogacy agreements end happily.¹³²

Conclusion

To conclude this section, it is important to note the problem with all of the issues raised for and against surrogacy is that the principles do not apply generally. People involved in surrogacy arrangements are individuals and they may or may not be affected or influenced by each of the factors discussed above. There is a strong need for Australian research on the effects of surrogacy on commissioning parents and surrogate mothers and its impact on the emotional, social and intellectual development of children born from a surrogacy arrangement.

¹²⁹ 'Should surrogate motherhood be legal?', p 21.

¹³⁰ 'Should surrogate motherhood be legal?', p 21.

¹³¹ Singer & Wells, p 119.

¹³² Raymond, *Women as Wombs*, 1995, p 153.

5. LEGISLATIVE CONTEXT IN AUSTRALIA

The use of surrogacy as an alternative means of family formation impacts upon social, legal and genetic relationships created by the various alternative conception procedures. Legal issues include those relating to custody, guardianship, adoption and status of children. These have been addressed to varying degrees by State and Federal legislation, although only some of the relevant legislation refers specifically to surrogacy arrangements. The National Bioethics Consultative Committee stated:

*Within the existing Australian legislative framework, the full implications of surrogacy arrangements in terms of their impact on social and legal relationships between the various parties [are] not clear and [are] open to various interpretations.*¹³³

A number of inquiries have been undertaken on the issue of surrogacy in Australia, some resulting in legislation (see Appendix A). Generally, these inquiries have considered surrogacy undesirable, particularly where commercial arrangements are involved. They have recommended action ranging from discouragement of surrogacy arrangements to the imposition of criminal sanctions. The option favoured by most of these committees was that legislation should render surrogacy agreements void and unenforceable, as well as making commercial surrogacy arrangements illegal.¹³⁴ Some committees adopted a more liberal attitude to altruistic surrogacy arrangements.

5.1 COMMON LAW

According to Janu, writing in December 1995, there have been no reported decisions of Australian courts relating to surrogacy.¹³⁵ However a surrogacy contract would probably be found unenforceable at common law as it is contrary to public policy, although the terms of the contract could be indirectly upheld if this was thought to be in the best interests of the child.¹³⁶

¹³³ NBCC, *Surrogacy: Report I*, p 11.

¹³⁴ M Wallace, 'Substitute parent agreements in the ACT', *Canberra Law Review*, 1(1), November 1994, pp 148-152.

¹³⁵ Janu, p 203.

¹³⁶ Janu, p 204.

Janu states that surrogacy arrangements are unenforceable at common law on the ground that they are against public policy.¹³⁷ Agreements which are found to be contrary to the best interests of the child are illegal on the basis of case law and statute law focusing on child welfare. The *International Convention on the Rights of the Child* may also be relevant (see page 22, **Potential infringements of the child's human rights**).

According to Janu, as a child born of surrogacy is the subject of arrangements involving the transfer of a child to another person, a surrogacy agreement could be characterised as one involving the traffic of children, or even the sale of children if a fee is paid.¹³⁸ The English cases of *Poole v Stokes* (1914) and *Brooks v Blount* (1923) are cited by Janu as authorities for the proposition that parents cannot re-assign their parental rights.¹³⁹ In *Re Shirk's Estate* it was ruled that the sale and purchase of children is contrary to public policy, but the notion that children are their parent's property was rejected.¹⁴⁰

There have been several widely publicised cases of surrogacy in Britain and America. In the English case of *A v C* (1985),¹⁴¹ the commissioning couple paid £3,000 to a surrogate mother and sought wardship of the child. The trial judge held that the contract was for the sale of a child, which was against public policy. The case went on appeal to the Court of Appeal and the decision was upheld. Another case the same year involved an American commissioning husband, who was the genetic father of the surrogate child, while the surrogate mother was English. An agency was paid to arrange the surrogacy. The father sought custody, which the surrogate mother did not contest. The judge found in favour of the father obtaining custody based on the best interests of the child, and the child was taken to the United States.¹⁴² Commercial surrogacy has since been prohibited by a 1990 amendment to the *Surrogacy Arrangements Act 1985* (Eng).

¹³⁷ Janu, p 201.

¹³⁸ Janu, p 201.

¹³⁹ *Poole v Stokes* (1914) 110 LT 1020; *Brooks v Blount* (1923) 1 KB 257; Janu, p 201.

¹⁴⁰ *Re Shirk's Estate* 350P 2d 1 at 11-12.

¹⁴¹ *A v C* [1985] FLR 445; [1985] FLR 543, quoted by Janu, p 202.

¹⁴² Janu, p 202.

In America, the most famous case involving surrogacy is the Baby M case.¹⁴³ In this instance the surrogate mother decided to keep the child. In response, the commissioning and genetic father of the child sought a court order depriving the surrogate mother of parental rights. The trial judge upheld the commissioning husband's application, and held that the contract was enforceable. On appeal, custody was granted to the commissioning husband on the grounds of the best interests of the child, but the parental rights of the surrogate mother were restored, giving her access to the child.¹⁴⁴

In California, if a surrogate mother carries an embryo formed from another woman's egg, she is not considered the 'natural' or 'legal' mother of the resulting child. In *Anna J v Mark C* (1991)¹⁴⁵, the commissioning couple were the genetic parents of the embryo, and the surrogate mother agreed to relinquish parental rights to the child after birth for \$10,000 and an insurance policy on the surrogate mother's life. The trial court held that the commissioning couple were the "*genetic, biological and natural parents*", and the surrogate mother had no parental rights. The contract was also held to be legal and enforceable. This case provides the basis for current commercial surrogacy practice in California.

5.2 AUSTRALIAN STATE AND TERRITORY LEGISLATION

To date, four States and one Territory have passed legislation controlling the practice of surrogacy.¹⁴⁶ This legislation is not uniform in style or substance. Victoria, Tasmania, South Australia, Queensland and the Australian Capital Territory have opted to pass specific Acts formulating a clear policy on surrogacy, or to incorporate amendments into existing legislation. The remaining Australian jurisdictions, being NSW, WA and the Northern Territory, and New Zealand have not enacted legislation. The result is that surrogacy in these jurisdictions is regulated by statutory and common law principles which were not developed with surrogacy in mind, so its regulation will be uncertain or arbitrary.¹⁴⁷

¹⁴³ *Re Baby M* 525 A 2d 1128 [1987], quoted by Janu, p 202. For a discussion of this case in support of the surrogate mother, see: P Chesler, 'Pound of flesh', *New Statesman & Society*, 3(91), 9 March 1990, pp 29-31.

¹⁴⁴ *Re Baby M* 537 A 2d 1227 [1988].

¹⁴⁵ *Anna J v Mark C* 234 Cal App 3d 1557; 286 Cal Rptr 369 (1991), quoted by Janu, p 203.

¹⁴⁶ *Surrogate Parenthood Act 1988* (Qld); *Family Relationships Act 1975* (SA); *Infertility (Medical Procedures) Act 1984* (Vic), *Infertility Treatment Act 1995* (Vic); *Surrogacy Contracts Act 1993* (Tas); and *Substitute Parent Agreements Act 1994* (ACT).

¹⁴⁷ Stuhmcke, 'Surrogate motherhood', p 119.

In general, commercial surrogacy is prohibited in all jurisdictions, and non-commercial surrogacy is not prevented, except in Queensland where all surrogacy arrangements are prohibited. In all jurisdictions, all surrogacy contracts are void and unenforceable. Although Queensland is the only jurisdiction that totally prohibits surrogacy, restrictions exist elsewhere through the prohibition of medical assistance or through legislation relating to parentage presumption, adoption, guardianship and custody, ensuring generally that “*outlawing exists de facto even when it does not exist de jure*”.¹⁴⁸

As indicated previously, the Australian Health and Social Welfare Ministers agreed in 1991 that uniform legislation should be introduced by all states and territories. The key points proposed were that any contract be void and unenforceable, and that commercial surrogacy and any form of advertising be outlawed. The actual legislation currently in force throughout the relevant Australian jurisdictions is outlined below and summarised in Appendix B.

5.2.1 Queensland

The *Surrogate Parenthood Act 1988* commenced operation in Queensland on 6 October 1988. When introducing the Bill into the Queensland Legislative Assembly, then Minister for Family Services and Welfare Housing, Mr McKechnie said:

*The purpose of the Bill is to make all arrangements relating to surrogacy illegal in Queensland. It is the strong belief of members of the Queensland government that to use or to pay another human being to reproduce is the ultimate in dehumanisation.*¹⁴⁹

The legislation received all-party support.¹⁵⁰ The Bill was based on the recommendations of the 1984 government inquiry appointed to investigate the laws relating to artificial insemination, in vitro fertilisation and other matters, which was chaired by Mr Justice Demack. The inquiry made the following recommendations in relation to surrogacy:

¹⁴⁸ ‘Should surrogate motherhood be legal?’, p 20.

¹⁴⁹ *Queensland Parliamentary Debates*, 308, 1987-88, p 5546.

¹⁵⁰ Opposition Family Services Spokesperson, Ms Anne Warner, said in her second reading speech on the Bill that the “*Opposition supports this Bill in principle and supports the sentiments that are enshrined in it*” (See *Queensland Parliamentary Debates*, 309, 1988-89, p 656). However, Ms Warner expressed concerns that the Bill did not fully address the effects of advancing reproductive technologies.

- 1) *It should be made illegal to advertise to recruit women to undergo surrogate pregnancy, or to provide facilities for persons who wish to make use of the services of such women;*
- 2) *Legislation should be enacted to provide that it is an irrebuttable presumption that the woman who gives birth to a child is its mother; and*
- 3) *Ethical guidelines should be established for the provision of medical services which involve surrogacy arrangements.*¹⁵¹

The *Surrogate Parenthood Act 1988* implemented the first recommendation. The *Status of Children Act Amendment Act 1988* which was debated in the Queensland Legislative Assembly at the same time as the surrogacy legislation, implemented Justice Demack's recommendations in relation to artificial insemination and in vitro fertilisation. Amendments to that Act ensured that a woman living in a domestic relationship (married or de facto) who bears a child is legally regarded as the child's mother. The legislation was retrospective. No formal arrangements, such as legislation, were enacted to implement Demack's third recommendation for the establishment of ethical guidelines for medical services. Cabinet decided that existing health and hospital committees already undertaking these activities would be preferable to creating a new committee.¹⁵²

Queensland's legislation attaches criminal penalties to all parties involved in both altruistic and commercial surrogacy arrangements.¹⁵³ Also, this Act makes it an offence to make surrogacy arrangements outside Queensland when a person is ordinarily a resident of Queensland (s 3(2)).

Some people have been charged with surrogacy offences in Queensland courts.¹⁵⁴ In March 1991, two women appeared in a Brisbane Magistrates' Court on surrogacy charges. This case was thought to be the first surrogacy case before a Queensland court. The court was told that the women allegedly entered into a surrogacy agreement involving a \$10,000 fee between May 1990 and March 1991. All details of this case were suppressed from the media. Apparently they were later discharged

¹⁵¹ Demack Report, p 46.

¹⁵² Tony Koch, 'Cabinet decides to outlaw surrogate motherhood', *Courier Mail*, 12 May 1987, p 1.

¹⁵³ *Surrogate Parenthood Act 1988* (Qld), s 3(1).

¹⁵⁴ See: M Sparshott, 'Women on surrogacy charges', *Sun*, 20 March 1991, p 3; P Bartsch, 'Birth date of alleged surrogate baby suppressed', *Courier Mail*, 23 March 1991, p 3.

unconditionally under the provisions of section 657A of the *Criminal Code 1899*.¹⁵⁵ Section 657A (since repealed) provided for the discharge under certain circumstances of persons who were found or who had pleaded guilty.

In 1992, another two women were also charged with surrogacy offences. The women denied that they arranged a surrogate birth but agreed to plead guilty to that charge and the charge of falsifying a birth certificate.¹⁵⁶ The court discharged the women on the surrogacy offences even after they pleaded guilty.¹⁵⁷ They were however fined \$100 each and placed on 6 month good behaviour bonds for falsifying a birth certificate. No convictions were recorded. In 1993, the first doctor was also charged with several surrogacy offences.¹⁵⁸ No conviction was recorded and the doctor was placed on a \$2000, two year good behaviour bond.¹⁵⁹ Later in 1993, another woman who pleaded guilty to two charges of breaking surrogacy laws was discharged with no penalty and no conviction by the same Magistrate who had earlier heard the doctor's case.¹⁶⁰

Queensland's legislation pre-dates the recommendations of the 1991 Health and Welfare Minister's Report and is the most restrictive in Australia. The ban on surrogacy is currently the subject of widespread debate in Queensland. As far back as 1992, there have been calls to review Queensland's legislation.¹⁶¹ In fact in 1992, a childless couple established the Queensland Surrogacy Support Network to demonstrate to the government the level of public support to change the

¹⁵⁵ B O'Malley, 'Ipswich women on surrogacy charge', *Courier Mail*, 7 November 1992, p 2; and Z Rathus, *Rougher Than Usual Handling: Women and the Criminal Justice System*, 2nd ed, Women's Legal Service, Brisbane, 1994, p 184.

¹⁵⁶ O'Malley, p 2.

¹⁵⁷ 'Court clears women', *Courier Mail*, 28 May 1993, p 7.

¹⁵⁸ See: D Zwar, 'Doctor "saved 70 fetuses". Surrogacy laws vague: lawyer', *Courier Mail*, 30 September 1993, p 3; D Zwar and M McKinnon, 'Doctor on surrogacy charges', *Sunday Mail*, 26 September 1993, p 3.

¹⁵⁹ See: H Wiseman, 'Surrogacy case appeal', *Australian Doctor*, 5 November 1994, p 4; F Kennedy, "'Confusing" surrogacy law faces review', *Australian*, 2 October 1993, p 7; and 'Surrogacy bid: doctor guilty', *Sydney Morning Herald*, 26 October 1993, p 2.

¹⁶⁰ B Robertson, 'Surrogacy woman discharged: legislation under attack', *Courier Mail*, 23 November 1993, p 3.

¹⁶¹ 'Queensland to review laws on surrogacy', *Sunday Mail*, 25 October 1992, p 19.

legislation.¹⁶² Concern that any changes in State law should be in a national way may be a reason for the lack of action.¹⁶³ Leading obstetricians and gynaecologists have also called for a “*serious overhaul*” of Queensland’s surrogacy laws, describing them as “*ill-conceived, draconian and archaic*”.¹⁶⁴

In the Women’s Legal Service submission on the review of the *Criminal Code 1899*, the following comments on surrogacy were made:

*The issues concerning surrogacy are complex and intricate. It is clear that a careful examination of this issue and the concerns related to reproductive technology needs to be undertaken in Queensland so that the issue of appropriate guidelines, if any, can be determined. In the meantime, no-one is benefiting from the existing criminalisation of surrogacy. Four women have been required to undergo prosecutions which have led to the imposition of no penalty by the courts, but have caused trauma, distress and significant public and private cost.*¹⁶⁵

The Women’s Legal Service recommended that a committee be established to investigate issues relating to reproductive technology and surrogacy in Queensland and that the *Surrogate Parenthood Act 1988* be repealed or amended so that altruistic arrangements do not attract penalties.¹⁶⁶ This view was supported by Janu¹⁶⁷ who argued that making all surrogacy contracts a criminal act does not achieve a deterrent effect, and that it is not in the best interests of the child to be born in a “*manner tainted with criminality*”.

Earlier in 1996, the issue of surrogacy again found its way onto the public agenda in Queensland. Responding to pleas from infertile couples, the Minister for Families, Youth and Community Care, Hon Kev Lingard MLA was reported in March 1996 as saying that he would review the state’s surrogacy laws.¹⁶⁸ In August 1996, Mr Lingard received a report on the Queensland legislation from a policy committee and was planning to appoint another committee to examine ethical aspects of

¹⁶² W O’Hanlon, ‘Childless and mad as hell: Couple urges review of surrogacy laws’, *Courier Mail*, 17 October 1993, p 18.

¹⁶³ ‘Queensland to review laws on surrogacy’, p 19.

¹⁶⁴ D Giles, ‘Birth Rights’, p 53.

¹⁶⁵ Rathus, *Rougher Than Usual Handling*, 1994, p 185.

¹⁶⁶ Rathus, *Rougher Than Usual Handling*, 1994, p 185.

¹⁶⁷ Janu, p 206.

¹⁶⁸ G Lloyd, ‘Child law faces review’, *Courier Mail*, 8 March 1996, p 1.

surrogacy.¹⁶⁹ According to the newspaper report, Mr Lingard said “*I am very supportive of looking at the whole legislation and catering for changes that have occurred*”.

In March 1996, Brisbane Anglican Archbishop Peter Hollingworth was quoted as offering qualified support for changes in surrogacy laws, saying there might be circumstances where surrogacy could be a great blessing. However other church and community groups strongly opposed any changes to the legislation. The Australian Family Association said all forms of surrogacy had been opposed by a meeting of health and welfare ministers, the General Synod of the Anglican Church, the Australian Catholic Bishops Conference, the Australian and Victorian Council of Social Services, the National Children’s Bureau of Australia and the National Women’s Consultative Council.¹⁷⁰

As mentioned earlier, in August 1996 it was reported that a Queensland woman was two months into a surrogate pregnancy.¹⁷¹ A 37 year old mother of two is said to be carrying a baby for her 28 year old sister, who does not have a uterus. The resultant child will be the genetic child of the younger sister and her husband. The procedure occurred at the Canberra Infertility Centre. Canberra Fertility Centre director Dr Martyn Stafford-Bell said the birth would put direct pressure on the Queensland government to change the laws on surrogate births.¹⁷²

5.2.2 Victoria

Victoria was the first State in Australia to introduce legislation dealing specifically with the practice of surrogate motherhood. The relevant provisions are in section 30 of the *Infertility (Medical Procedures) Act 1984*. Section 30 does not prohibit surrogacy or surrogacy contracts (except for payment or reward), but section 13 of the Act effectively prevents surrogacy using IVF technology. Section 13 provides that a woman must not undergo an IVF procedure unless she has been diagnosed as infertile or is likely to pass on an undesirable genetic disease.

Section 30 was proclaimed on 1 July 1986 and section 13 on 1 July 1988. The much publicised IVF surrogacy of Linda Kirkman occurred before section 13 came into operation.

¹⁶⁹ Fran Metcalf, ‘Minister backs surrogacy law changes’, *Courier Mail* 19 August 1996, p 5.

¹⁷⁰ Lloyd, ‘Child law faces review’, p 1.

¹⁷¹ Maher, p 2.

¹⁷² Maher, p 2.

These provisions are to be replaced by those in the *Infertility Treatment Act 1995*, but the new provisions had not commenced as at 3 September 1996. Unless proclaimed earlier, they will commence on 28 June 1997.¹⁷³ The Standing Review and Advisory Committee on Infertility of the Victorian Parliament reported on the operation of the 1984 Act and recommended its amendment, particularly in relation to the regulation of IVF.

The **current** 1984 Act prevents courts from enforcing both altruistic and commercial surrogacy agreements, but it does distinguish between the two forms of surrogacy. Criminal sanctions are imposed on parties to commercial surrogacy contracts or agreements (those that involve a payment or reward), but are not generally imposed upon parties to altruistic surrogacy.¹⁷⁴

The current and proposed Victorian provisions accord in many respects with the recommendations of the 1991 resolution of the Australian Health and Social Welfare Ministers. In mid-1993, newspapers reported that the Victorian government was considering plans to legalise altruistic surrogacy. The ban on commercial surrogacy was to be maintained. The decision was dogged by controversy and eventually the proposals were dropped.¹⁷⁵ It was thought the government would be “*taking an enormous risk for little electoral gain*”.¹⁷⁶

The provisions of the *Infertility Treatment Act 1995* will have a similar effect to those currently in force. All surrogacy agreements are still to be void (s 61), criminal penalties are still to apply to any surrogacy arrangement or agreement for payment or reward (s 59), and offences will be created relating to advertising to seek a surrogate mother (s 60). The limitation whereby IVF treatment procedures may only be used in women who are infertile or who may transmit a genetic abnormality is retained (s 8).

5.2.3 Tasmania

The primary purpose of the *Surrogacy Contracts Act 1993* (Tas) is to prohibit surrogacy contracts (s 4). Any contracts made are declared void and unenforceable,

¹⁷³ *Infertility Treatment Act 1995* (Vic), s 2(4).

¹⁷⁴ *Infertility (Medical Procedures) Act 1984* (Vic), ss 30(2)(b) and 30(2)(c).

¹⁷⁵ ‘Victoria to legalise surrogate births’, *Sydney Morning Herald*, 8 July 1993, p 1; K Kissane, ‘The limits of altruism’, *Age*, 4 August 1993, p 12; ‘Strong campaign forces Kennett Govt to drop surrogacy move’, *News Weekly*, 23 October 1993, No 2419, p 4.

¹⁷⁶ ‘Surrogacy and the law’, *Herald Sun*, 8 October 1993, p 14.

regardless of whether a payment or reward is involved. The Minister's Second Reading Speech stated that the Bill would not penalise parties to non-commercial surrogacy.¹⁷⁷ However the making or receipt of a payment or reward in relation to a surrogacy contract is prohibited (s 4(4)). The Act also prohibits arranging or negotiating a surrogacy contract on behalf of another person (s 4(3)), introducing or inducing prospective parties to a contract (s 4(1)-(2)), and knowingly providing any technical or professional services to achieve a surrogate pregnancy (s 5). The latter provision would appear to prevent any surrogacy based on IVF procedures.

The Act provides that other laws, specifically those concerning adoption or guardianship, are not affected (s 8). The Act received all-party support.

5.2.4 South Australia

The *Family Relationships Act Amendment Act 1988* (SA) inserted provisions dealing with artificial insemination, in-vitro fertilisation, surrogacy and related procedures into the *Family Relationships Act 1975*. The legislation was based on the recommendations of the Select Committee of the Legislative Council¹⁷⁸.

Specifically, the legislation has many of the features discussed for other jurisdiction's statutes. The South Australian Act however differentiates between a **procurement contract** and a **surrogacy contract**. Section 10f defines a **procurement contract** as a contract under which

- (a) a person agrees to negotiate, arrange or obtain the benefit of, a surrogacy contract on behalf of another; or
- (b) a person agrees to introduce prospective parties to a surrogacy contract.

On the other hand, a **surrogacy contract** is one under which

- (a) a person agrees
 - (i) to become pregnant or to seek to become pregnant;
 - and
 - (ii) to surrender custody of, or rights in relation to, a child born as a result of the pregnancy;

¹⁷⁷ Hon Roger Groom MP (Minister for Community Services), Second Reading Speech, Surrogacy Contracts Bill (No 2) 1992, *Tasmanian Parliamentary Debates*, House of Assembly, Vol XIV No 4, 11 November 1992, pp 4838-4840.

¹⁷⁸ Select Committee of the South Australian Legislative Council, *Report on Artificial Insemination by Donor, In Vitro Fertilisation and Embryo Transfer Procedures and Related Matters in South Australia*, (Chairman: Hon John Cornwall MLA), South Australian Government Printer, Adelaide, April 1987.

or

(b) a person who is already pregnant agrees to surrender custody of, or rights in relation to, a child born as a result of the pregnancy

The latter definition is similar to that utilised in other Australian jurisdictions.

The distinction between surrogacy and procurement contracts is that some costs are recoverable under a procurement contract, a unique feature of the South Australian Act. Specifically, section 10g(3) allows for **valuable consideration**, such as money or property that has a monetary value, paid under a procurement contract, to be recovered from the person to whom it was given. In other contractual respects, both surrogacy and procurement contracts are illegal and void (s 10g (1) and (2)).

As in the Tasmanian legislation, the South Australian Act states that the operation of the Act does not affect other laws relating to guardianship or adoption of children (s 10I). The Act directs criminal penalties at third parties. It is **not**, however, an offence **to enter into** a surrogacy contract, even when the agreement is for valuable consideration.¹⁷⁹ This makes the South Australian legislation less interventionist than the approach recommended by the Australian Health and Social Welfare Ministers as it does not impose penalties upon the immediate parties to a commercial surrogacy arrangement.¹⁸⁰ However section 10e of the South Australian Act provides that where a woman becomes pregnant as the result of an IVF procedure, if the egg came from a second woman, that second woman is not the mother of the child, and if the sperm came from a man other than the first woman's husband, that man is not the father of the child.

5.2.5 Australian Capital Territory

The ACT Attorney-General's Department issued a discussion paper on surrogacy agreements in 1993, outlining current law and proposed changes.¹⁸¹ Responses to the paper led to the adoption of the term **substitute parent agreement** as it was considered to reflect more accurately the nature of surrogacy agreements.¹⁸²

The resulting *Substitute Parent Agreements Act 1994* adopted many of the recommendations of the Australian Health and Social Welfare Ministers resolution

¹⁷⁹ Stuhmcke, 'Surrogate motherhood', p 120.

¹⁸⁰ M Otlowski, 'Surrogacy Contracts Act 1993', *Australian Health Law Bulletin*, 2, 1993, p 27.

¹⁸¹ ACT, Dept Attorney-General, *Surrogacy Agreements in the ACT*.

¹⁸² Wallace, p 148.

in 1991. The Act provides that all substitute parent agreements are void (unenforceable)(s 9), and prohibits advertising (s 7). However only **commercial** agreements (those involving payment or reward) are **prohibited** and subject to penalties (s 5). The Act does not prohibit non-commercial surrogacy, provided no advertising or intermediaries are involved (ss 6,7). Payments to cover expenses are allowed (s 3). Provision of professional or technical services is only prohibited in relation to a commercial agreement (s 8). In addition, the welfare and interests of the child are to be regarded as paramount (s 10). Similarly to the Queensland provisions, the ACT Act applies to persons who are ordinarily residents of the ACT regardless of where the surrogacy procedures occur (s 4).

The *Substitute Parent Agreements (Consequential Amendments) Act 1994* amended the *Children's Services Act 1986* and the *Public Health (Private Hospitals) Regulations* to require that the details of a child born as a result of a substitute parent agreement be obligatorily lodged with the Registrar-General (s 3). This Act also provides for the suspension or cancellation of a private hospital's medical licence if the organisation is involved in a commercial surrogacy arrangement (s 4(2)).

In March 1996 Australian Medical Association spokesman and Queensland infertility specialist, Dr David Melloy, was quoted as saying that the ACT had been very careful and ethical in their approach to surrogacy.¹⁸³

5.2.6 Other Jurisdictions

The Commonwealth has no constitutional power to legislate on the subject of surrogacy. Therefore, the legal status of surrogacy in other Australian jurisdictions, namely New South Wales, Western Australia and the Northern Territory, as well as in New Zealand, remains subject to common law because there is no specific legislation on the issue. In these jurisdictions, existing state and federal laws affect surrogacy in quite arbitrary ways.¹⁸⁴ The issue of surrogate motherhood does not appear to be on the legislative agenda in these areas.

The **New South Wales Law Reform Commission** recommended in 1988 that all surrogacy arrangements be void and unenforceable, as in other Australian jurisdictions. The commission also recommended that:

- the payment, receipt, offering or soliciting of any reward in connection with a surrogacy arrangement should be an offence;

¹⁸³ 'ACT opens way for surrogate births', p 3.

¹⁸⁴ Stuhmcke, 'Surrogate motherhood', p 122.

- assisting or arranging a surrogacy should be prohibited regardless of whether a reward was offered; and
- a surrogate mother or commissioning couple involved in a surrogacy arrangement without reward should not face a penalty.¹⁸⁵

A more recent report in 1994 made similar recommendations.¹⁸⁶

In **Western Australia** a government committee, which reported in 1986, recommended that surrogacy be neither permitted nor recognised, and that commercial surrogacy and advertising be banned. A later inquiry, by the Western Australian Reproductive Technology Working Party, recommended in 1988 that legislation discourage people from making surrogacy arrangements.¹⁸⁷ More specifically the Working Party proposed that surrogacy and procurement contracts be unenforceable and that a number of offences be created. Penalties would be incurred if parties agreed to a surrogacy contract, introduced parties to a contract, became the commissioning couple of a surrogacy contract or operated an agency recruiting surrogates. A select committee of the Western Australian Parliament endorsed the Working Party's recommendations.¹⁸⁸ No further developments on legislation have been reported.

The legal position of parties involved in surrogacy arrangements in relation to adoption, custody and guardianship is uncertain in these jurisdictions, as it is even in the states which have surrogacy legislation.¹⁸⁹

5.3 STATUS OF CHILDREN LEGISLATION

Status of children legislation is relevant to determine the legal status of any child born in disputed or ambiguous circumstances, including as a result of a surrogacy arrangement. Such legislation is in force in each Australian State and Territory, and

¹⁸⁵ NSWLRC, *Artificial Conception - Report 3: Surrogate Motherhood*, pp 40-51, 55-60.

¹⁸⁶ New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Discussion Paper 34, NSWLRC (DP 34), Sydney, 1994.

¹⁸⁷ Reproductive Technology Working Party, *Report to the Minister for Health for Western Australia*, Health Department of Western Australia, Perth, 1988, p 9.

¹⁸⁸ Select Committee Appointed to Inquire into the Reproductive Technology Working Party's Report, *Report*, (Chair: Dr Judyth Watson MLA), Western Australia Legislative Assembly, Perth, 1988, p 9.

¹⁸⁹ Janu, p 208.

in the Commonwealth.¹⁹⁰ All the statutes have a similar effect; that “*the birthing mother is deemed to be the ‘legal mother’ of any child born of a surrogacy arrangement*”.¹⁹¹ This provision is a disincentive for parties entering into a full or total surrogacy arrangement, as the surrogate mother would be the legal mother regardless of the origin of the genetic material.

In the case of an IVF procedure or artificial insemination, where the partner (husband or de facto) of the birthing mother consents to the procedure, the partner is presumed to be the ‘legal father’. That is, the common law presumption of paternity - that a child is a child of a marriage, unless the husband can show otherwise - is retained. However, if natural intercourse occurred between the surrogate mother and the commissioning husband, the commissioning husband would be the legal father of the child, and could also be named on the birth certificate.¹⁹²

According to information provided by the ACT Chief Minister’s office, amendments to the *Artificial Conception Act 1985* (ACT) are being prepared, which, if passed, will enable the genetic parents of a child born through an IVF surrogacy procedure to become the legal parents. These arrangements will only apply to ACT residents.¹⁹³

The current provision that a woman and her spouse are deemed to be the legal parents of any child born to her will not change. Rather, the proposed amendments will enable the genetic parents to apply to the ACT Supreme Court for a **parentage order**. The effect of such an order would be that the birth would be re-registered in the names of the genetic parents and they would become the legal parents of the child.

As proposed, an application for a parentage order may only be made in the period between six weeks and six months after the baby’s birth. The birth parents must agree to the application, and the child must already be living with the genetic

¹⁹⁰ *Status of Children Act 1974* (Vic); *Status of Children Act 1974* (Tas); *Family Relationships Act 1975* (SA); *Status of Children Act 1978* (NT); *Status of Children Act 1978* (Qld); *Children (Equality of Status) Act 1976* (NSW); *Artificial Conception Act 1984* (NSW); *Artificial Conception Act 1985* (ACT); *Artificial Conception Act 1985* (WA); *Family Law Act 1975* (Cwth).

¹⁹¹ Janu, p 211.

¹⁹² Janu, p 211.

¹⁹³ Information provided by the office of Kate Carnell, Chief Minister of the ACT, 21 August 1996.

parents. The birth parents will therefore have a ‘cooling-off’ period of at least six weeks during which they are entitled to decide to keep the child.

5.4 ADOPTION, CUSTODY AND GUARDIANSHIP

Courts have long held that parents cannot assign their parental rights.¹⁹⁴ The concept that children are the property of their parents, the same as any other property that can be bought and sold is contrary to public policy and opinion.¹⁹⁵ These principles reflect various declarations of human rights. The UN *Declaration of the Rights of the Child* (1959) provides that “*the child shall be protected against all forms of neglect, cruelty and exploitation and not be the subject of traffic in any form*” (Principle 9). The more recent *Convention on the Rights of the Child* to which Australia is a signatory, provides for recognition of the primary responsibility of parents or legal guardians. Article 9 states that it is a child’s right not to be separated from its parents except for its welfare, and that, if separated, this process should be through proper state-recognised procedures and law.

In all Australian States and Territories, statutes relating to the adoption of children provide that the welfare and interests of the child shall be the paramount consideration.¹⁹⁶ Adoption laws in Australian jurisdictions effectively prevent surrogacy by ensuring those giving up a child for adoption cannot dictate to whom the child will go. Except in South Australia and the ACT, it is illegal to pay for expenses incurred by a surrogate mother in relation to a surrogacy. It is also illegal to offer a reward for the birth of a child with a view to adopting the child. Adoption is currently the only legal way a person other than a natural parent can become the legal parent of a child.

The Commonwealth *Family Law Act 1975* also impinges on surrogacy arrangements by providing for the welfare, custody and maintenance of a child. Section 64(1)(a) provides that proceedings in relation to the custody, guardianship or access to a child must “*regard the welfare of the child as the paramount consideration*”.

¹⁹⁴ Janu, p 201.

¹⁹⁵ More specifically, the English Court of Appeal rejected surrogacy as a “*pernicious contract for the sale and purchase of a child*”. In *re Shirk’s Estate* 350 P 2d 1, 11-12.

¹⁹⁶ Janu, p 212. Statutes are: *Adoption Act 1994* (WA); *Adoption of Children Act 1964* (Qld); *Adoption of Children Act 1965* (NSW); *Adoption Act 1984* (Vic); *Adoption Act 1988* (SA); *Adoption Act 1988* (Tas); *Adoption Act 1993* (ACT); and *Adoption of Children Act 1994* (NT).

6. SOME OVERSEAS RESPONSES

Regulation of surrogacy in the USA is a state responsibility. Writing in January 1993, Robinson described the range of responses that existed at that time.¹⁹⁷ Most states did not have legislation that specifically addressed surrogacy. Five states excluded surrogacy from laws that regulate adoption or artificial insemination, which in Robinson's view may enable surrogacy without specifically legitimising it. Thirteen states prohibit commercial surrogacy and of those, three specifically legitimise non-commercial surrogacy. However in the latter three cases the surrogate mother has a period of time in which she may choose to keep the child (in one case, up to 180 days after conception and in the others, either 3 or 7 days after the birth). Once the relevant period has elapsed, the commissioning mother has legal custody of the child. Most US jurisdictions are similar to Australia, in that either commercial surrogacy contracts, or all contracts are void. Generally, surrogacy contracts are found to be unenforceable in the courts if a custody dispute arises.¹⁹⁸

In the UK, the *Surrogacy Arrangements Act 1985* (Eng), prohibits commercial surrogacy arrangements. Negotiation of surrogacy arrangements is prohibited by anyone other than commissioning parents and potential surrogate mothers (s 2). Advertising is also prohibited (s 3). The Act was amended in 1990 to insert an additional provision that “*no surrogacy arrangement is enforceable by or against any of the persons making it*” (s 1A).

7. OPTIONS FOR REFORM

Stuhmcke summarised proposals for regulating surrogate motherhood in terms of the following options:

- (1) *to take no action and regulate the practice through existing law;*
- (2) *to prohibit commercial surrogacy;*
- (3) *to prohibit all forms of surrogacy;*
- (4) *to enforce surrogacy arrangements;*
- (5) *to render the surrogacy contract unenforceable; or*

¹⁹⁷ C Robinson, ‘Surrogate motherhood: Implications for the mother-fetus relationship’, *Women and Politics*, 13(3/4), January 1993, pp 203-221.

¹⁹⁸ R A Charo, ‘Legislative Responses to Surrogate Motherhood’, in L Gostin (ed), *Surrogate Motherhood*, Indiana University Press, Bloomington, 1990, p 14.

(6) *to regulate the practice of surrogacy through state control.*¹⁹⁹

Several of these options are discussed in this section.

7.1 UNIFORMITY

Many of these options are evident in Australian jurisdictions. A uniform approach to surrogacy arrangements was agreed upon in 1991, but has not been fulfilled. In 1991, Keith Mason QC stated:

*If you start from the premise that there should be a uniform national approach then we obviously have a long way to go. Those generally opposed to surrogacy may claim to see a pattern emerging although it is fairly unclear in relation to non-commercial surrogacy and key pieces in the legislative jigsaw (notably NSW) are still to be put on the table.*²⁰⁰

The issue of uniformity between State and Territory laws in this area is obviously important. The Commonwealth lacks the constitutional power to legislate in relation to surrogacy. To achieve uniformity, the States and Territories must pass uniform statutes or refer their powers to the Commonwealth.²⁰¹

Dr John Leeton, who assisted in the Kirkman surrogacy case, said:

*There is something wrong with legislation that says you can do something in one state, but in another you go to jail.*²⁰²

Numerous problems have been encountered in achieving a uniform approach to the issue in Australia. As several surveys have shown, achieving a consensus is difficult because the issue tends to polarise public opinion. The practice of surrogacy touches diverse interest groups, including infertile couples, women's groups, lawyers and the medical profession. Legislators tend to consider that surrogacy is not widely practiced. Therefore, there is little pressure to act. The issue of surrogacy may also encompass several portfolios. This can make the implementation of legislation difficult. Also, there is little empirical data on the

¹⁹⁹ Stuhmcke, 'Surrogate motherhood', p 123.

²⁰⁰ K Mason, 'Surrogacy: Setting the Australian Scene', in Meggitt (ed) *Surrogacy; In Whose Interest*, pp 7-16 (p 16).

²⁰¹ Janu, p 208.

²⁰² Channel 9, *A Current Affair*, 13 March 1996.

effects of surrogacy, which would clearly display the desirability or the harm of the practice.²⁰³

7.2 PROHIBITION OF SURROGACY

If public policy determines that surrogacy arrangements should be prohibited, then legal and criminal prohibitions are the likely outcome.

Prohibition of surrogacy is one response to a complicated moral and legal issue. It however raises its own problems, and may encourage circumvention. Those who would circumvent the law would be free from competition (leading to high prices) and scrutiny.²⁰⁴ Prohibition also precludes proper counselling reaching intending participants, or those experiencing adjustment difficulties. It also seriously disadvantages children born under surrogacy arrangements as there is no accurate or systematic information available to them. History suggests that surrogacies will occur regardless of government decisions.

7.2.1 Status Quo

Another option is for governments to retain the status quo, effectively prohibiting surrogacy in many jurisdictions. This would leave those involved in surrogacy in some jurisdictions in legal limbo, relying indirectly on adoption legislation to secure legally recognised parenthood of a child.

Director of the Centre for Surrogate Parenting, based in America, Mr Bill Handel, is very critical of Australia's surrogacy ban. He was quoted as saying:

*Some of the best reproductive technology in the world came from Australia, but while you were building up the technology, legally you were cutting yourselves off at the knees. We are helping clients from all over the world, including Australians, and we're using your technology to do it.*²⁰⁵

It has been suggested that some legislation prohibiting surrogate motherhood “was enacted in an over-hasty and ill-considered reaction to particular dramatic cases

²⁰³ Stuhmcke, ‘Surrogate motherhood’, p 124.

²⁰⁴ NSWLRC, *Surrogate Motherhood: Artificial Conception - Discussion Paper 3: Surrogate Motherhood*, p 119.

²⁰⁵ Quoted in J Tonkin, ‘Black market babies: Aussie couples pay \$90,000’, *Sunday Mail*, 18 October 1992, p 1.

such as the *Baby Cotton* affair in the UK and the *Baby M* case in the US”.²⁰⁶ Regardless of past actions, it is important to ensure that the chosen approach to surrogacy in the future, whether it be to continue prohibition or conditionally allow it, is based upon solid rational considerations rather than on media-engendered sentiment and ingrained prejudices.

7.3 REGULATING SURROGACY ARRANGEMENTS

A regulatory scheme governing surrogacy arrangements has been advocated by those opposing prohibition, or promoting certain types of surrogacy arrangements. Government could regulate surrogacy by establishing an agency to approve surrogacy agreements and provide counselling and other services to surrogate mothers and commissioning couples. This approach was advocated by the National Bioethics Consultative Committee in 1990.²⁰⁷

Similarly, the Ontario Law Reform Commission in its 1985 Report²⁰⁸ proposed that a regulatory approach be taken, advocating the use of courts to screen commissioning couples and prospective surrogate mothers before conception. The Commission also recommended that the court be involved in establishing payment, transfer of the child, insurance, and behaviour and diet of the mother during the pregnancy. Making the courts determine policy may result in an inconsistent approach, which could in the end cause more problems.

Garrison suggested that as an intermediate position surrogacy agreements should not be enforceable.²⁰⁹ If both parties still agree at the time of adoption that the baby should be given to the commissioning couple, a step-parent adoption should be approved if the procedural requirements of existing adoption statutes, including a best interest determination, have been met. If the parties are not in agreement, each would be entitled to seek custody and/or visitation, with both being responsible for the child’s support and maintenance. However, this scenario may be affected by the nuances of legislation, such as presumption of parentage statutes, in different jurisdictions. Detailed examination of these issues and legislative choices would be required in each jurisdiction to determine their effect on surrogacy arrangements.

²⁰⁶ NBCC, *Surrogacy: Report 1*, p 11.

²⁰⁷ NBCC, *Discussion Paper on Surrogacy 2: Implementation*, p 11.

²⁰⁸ Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters, Vols 1 and 2*, (Chairman J Breithaupt), OGPS, Toronto, Canada, 1985

²⁰⁹ M Garrison, ‘Surrogate parenting: What should legislatures do?’, *Family Law Quarterly*, 22(2), 1988, pp 149-172 (p 162).

7.3.1 Public Sector Regulation v Private Regulation

Singer and Wells in their book, *The Reproduction Revolution*, suggested that just as private adoptions are illegal, so private surrogacy arrangements should be illegal.²¹⁰ Instead they argued that those wanting to enter into a surrogacy agreement should have to contact a State Surrogacy Board. The Board would be charged with responsibility for finding and screening suitable surrogates, and for arranging all necessary procedures. No contracts could be signed, or fees paid, except through the Board.

*We do not claim that a Surrogacy Board will bring about problem-free surrogacy, but we do think it has the capacity greatly to reduce the incidence of problems in this area. It is clearly preferable to unregulated surrogacy, whether legal or illegal, and also preferable to attempts to enforce contracts against surrogates. While a prohibition on private surrogacy arrangements will always be difficult to enforce, the availability of officially regulated surrogacy would eliminate most of the motivation for such private arrangements. Regulation is, therefore, preferable to any other alternative that has been proposed or that we are able to suggest.*²¹¹

Professor Carl Wood, Chairman of the Department of Obstetrics and Gynaecology, Monash University, also advocated the creation of a surrogacy board under the control of a State Department of Health.²¹²

On the other hand in a number of jurisdictions, including in the ACT in Australia, there is a degree of regulation by private organisations of surrogacy arrangements. Various organisations in the USA were described in section 3.2. The Organisation of Parents through Surrogacy claims to have members in Australia, as well as England, Canada and Japan.²¹³ In 1992, a childless couple established the Queensland Surrogacy Support Network to provide assistance to couples seeking surrogacy arrangements.²¹⁴

²¹⁰ Singer & Wells, p 126.

²¹¹ Singer & Wells, p 128.

²¹² Quoted in R Giles (ed), *For and Against* (1993), p 292.

²¹³ Organisation of Parents Through Surrogacy.

²¹⁴ O'Hanlon, p 18.

7.3.2 Inducement Approach

Public regulation of surrogacy could be achieved by providing incentives to encourage interested parties to resort to a preferred practice. Dickens gave the example that legal recognition of the surrogate birth of children born through the services of an appointed agency could be one such inducement. Alternatively, legal recognition could be given to children born under an agreement conforming to model terms and conditions. The inducement that services rendered in accordance with an established preferred method would be legal, coupled with the disincentive of the legal ineffectiveness of alternative means, would be expected to coerce most people to conform to an acceptable model of surrogate motherhood.

7.3.3 Back to the Future Option

Another important option is that existing law may already be sufficient to deal with surrogacy. It has been argued that the decision-making problems in surrogate parenting cases are simply not, after the birth of the child, vastly different from those that arise in adoption or more traditional parental disputes over children. Issues such as the welfare of the child and the custodial/visitation rights of unmarried or divorced parents are already dealt with in the court system. The legal principles from case law and statutes that apply in these situations could be applied to surrogacy arrangements.²¹⁵

This proposal has the advantage that the legal concepts already developed have been formed over time and through experience with a wide variety of cases. Judges are familiar with the rules and there is a large body of interpretative case law and commentary. Utilising them as a basis of judgment in surrogate parenting cases offers the benefits of consistency with like cases.²¹⁶ While it is true that the existing law does not provide clear, precise answers to surrogate parenting, there is a wide range of existing legal rules, ranging from adoption statutes to paternity laws, that would be applicable to surrogate parenting.

*Unless surrogate parenting genuinely raises different concerns, there is no rationale for applying different principles.*²¹⁷

²¹⁵ Garrison, p 157.

²¹⁶ Garrison, p 157.

²¹⁷ Garrison, p 158.

7.3.4 “Mother” Option

Some commentators have suggested that there be a “mother option” where the mother has exclusive rights to decide to keep or hand over the child. This option has been suggested as an alternative or supplement to prohibition of surrogacy, given that prohibition does not resolve what happens to a child born through a surrogacy arrangement.²¹⁸ Such a rule would serve a deterrent function. It may also simplify litigation between parties to a surrogacy contract. But strict application of this rule may be markedly unfair in a number of cases, and would produce legal challenges. It could effectively reward one parent and penalise another for engaging in the same transaction, such as a surrogacy agreement. A prohibition on surrogacy, coupled with the granting of initial parental rights to a surrogate mother alone, appears likely to create at least as many problems as it resolves.²¹⁹

7.4 OPEN ADOPTION

As surrogacy usually involves at least one parent having to adopt the child to establish a legal relationship with it, Dickens suggested that a procedure for surrogacy adoption be established.²²⁰ This procedure would be based on the principle of a ‘preconception adoption’, in which parties present a surrogate motherhood agreement to a court for approval of the transaction before any steps are taken to implement it. This suggestion is similar to legislative proposals made in Alaska and Rhode Island, in 1981 and 1983 respectively.²²¹

Dickens argued that this procedure would respect the parties’ privacy, including the freedom of reproductive choice, and be compatible with traditional concepts of natural reproduction. All aspects of the agreement would be subject to judicial scrutiny. He suggested that legislation providing for judicial approval of agreements as a condition of their recognition, respects both individual and social interests.²²² The Ontario Law Reform Commission made similar recommendations in its findings on surrogacy.²²³

²¹⁸ Garrison, p 155.

²¹⁹ Garrison, p 156.

²²⁰ Dickens, p 191.

²²¹ Dickens, p 203.

²²² Dickens, p 192.

²²³ OLRC, *Report on Human Artificial Reproduction and Related Matters*.

Submissions to the NBCC opposed the adoption of the Ontario model in Australia, as “*courts and bureaucrats were unqualified to assess the suitability of a person for parenthood*”.²²⁴ Bodies containing medical personnel and trained counsellors were suggested as an alternative.

Adoption orders made in favour of a commissioning couple sever a surrogate child’s legal relationship with the surrogate mother.²²⁵ Instead, a court may consider that, regardless of the surrogate mother’s consent to adoption, a custody rather than an adoption order in favour of the commissioning couple should be granted to ensure that the child has access to the surrogate mother in the future. Issues which would be important to this type of decision include maintenance, payment of child support and inheritance. Some state legislation prohibits the adoption of a child by relatives unless the court is satisfied that an order in relation to custody or guardianship would not make adequate provision for the welfare and interests of the child.²²⁶ A surrogacy arrangement may or may not be covered by these types of provisions.²²⁷

Meggitt argued that the use of guardianship and custody provisions would be preferable to adoption of a surrogate child. She pointed out that current adoption procedures are based on old instruments originally designed to remove illegitimacy of the child, which is unresponsive to the needs of today’s society.²²⁸

7.5 ECTOGENESIS

Technology may outstrip legislative change. The use of ectogenesis has been discussed for several decades.²²⁹ Ectogenesis involves the gestation of a foetus by artificial means. Many would consider this option science fiction, but history has repeatedly shown that today’s science fiction becomes tomorrow’s reality. An Anglo-Japanese research team was reported in August 1996 to have successfully

²²⁴ NBCC, *Surrogacy: Report 1*, p 93.

²²⁵ Janu, p 215.

²²⁶ For example, s 12 (5) of the *Adoption of Children Act 1964* (Qld), s 12 of the *Adoption Act 1984* (Vic) or s 21 of the *Adoption Act 1988* (Tas).

²²⁷ Janu, p 216.

²²⁸ Meggitt, *Policy Issues Forum*, 1991, p 12.

²²⁹ C Jones, ‘Artificial womb births “only a matter of time”’, *Sun Herald*, 5 February 1989, p 45.

grown a goat foetus in an artificial womb. A similar success with a human foetus is expected to be possible “*within a few years*”.²³⁰

The actual period that a human embryo is required to be in a woman’s womb is shrinking at each end of the gestation period. An embryo can be formed in vitro and kept alive for some time before requiring implantation. Younger and younger premature babies are being kept alive. At present, around five months must be spent in a natural womb, but this period is being reduced and with ectogenesis could be eliminated altogether.²³¹

Ectogenesis would offer an alternative to surrogate motherhood, but would raise the same issues discussed earlier, and invariably even more objections from the community. But ectogenesis would also solve some of the problems of surrogacy. Firstly, the issue of custody would be eliminated. Secondly, the need for surrogate mothers and the consequent invasion of privacy would also be eliminated. Thirdly, ectogenesis might become a cheaper alternative, because the cost of the procedure is likely to decline with advancing technology, while the costs of surrogacy increase. Fourthly, ectogenesis could have the potential to eliminate abortion and thus win the support of Right to Life and other organisations opposed to abortion.²³²

7.6 COUNSELLING

A number of commentators have suggested that counselling for infertile couples, enabling them to explore life choices that incorporate childlessness, is an option that should be given greater emphasis. In opening the national conference on surrogacy in February 1991, former Deputy Prime Minister and Minister for Community Services and Health Brian Howe said society needs to be better at acknowledging that women make a valuable contribution in a variety of roles other than mothering.²³³

²³⁰ ‘Scientists hail birth of artificial womb’, *Australian*, 12 August 1996, p 3.

²³¹ Singer & Wells, p 133.

²³² For further discussion of ectogenesis see Singer & Wells, p 133-141.

²³³ B Howe, ‘Formal Opening’, in Meggitt, (ed), *Surrogacy - In Whose Interest?*, p 5.

8. CONCLUSION

In 1990, Julie Martin summarised the position of surrogacy in the following terms

*In the midst of forceful opposition from feminists, churches and groups concerned with preserving the “traditional” family, together with powerful support from sections of the medical establishment, certain academics and other high profile individuals, the future of surrogacy in Australia is uncertain. What is certain is that surrogacy challenges people’s ideas about acceptable means of family formation both on a personal moral level and from the broader perspective of public policy.*²³⁴

The situation is largely unchanged in 1996.

The infrequency of the practice of surrogacy and the sharply polarised views which dominate public discussion obscure the legal issues arising in surrogate parenting agreements. It is argued that whether one individual or another finds surrogacy immoral or moral is irrelevant to a government forming a response to an issue of public policy.²³⁵ Certainly that individual has the right to participate or not to participate in a practice they find immoral, but they do not have the right to force their morality into society’s laws. Australia is a pluralist society, where there are many community responses to various ethical and legal issues. It is clearly in everyone’s best interest to have all of these views canvassed, rather than legislate on the basis of default.²³⁶

*Surrogacy is here with us. It’s happening now and will continue to happen.*²³⁷

The issue of surrogacy seems as daunting as ever. It is likely to become increasingly difficult to ignore.

²³⁴ Martin, p 40.

²³⁵ J Funder, ‘Surrogacy’, *Medical Journal of Australia*, 153, December 3/17, 1990, p 642.

²³⁶ Funder, p 643.

²³⁷ Dr Max Charlesworth, National Bioethics Consultative Council member, quoted in P Gleeson, ‘Born in a storm of controversy: Nation split on ethics of surrogacy’, *Sun*, 28 February 1991, p 12.

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- *Adoption Act 1993* (ACT)
- *Adoption Act 1994* (WA)
- *Adoption of Children Act 1994* (NT).
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- *Family Relationships Act 1975* (SA)
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- *Infertility (Medical Procedures) Act 1984*, (Vic)
- *Infertility Treatment Act 1995* (Vic)
- *Status of Children Act 1974* (Vic)
- *Status of Children Act 1974* (Tas)
- *Status of Children Act 1978* (NT)
- *Status of Children Act 1978* (Qld)
- *Substitute Parent Agreements Act 1994* (ACT)
- *Surrogacy Contracts Act 1993* (Tas)
- *Surrogate Parenthood Act 1988* (Qld)

APPENDIX A

GOVERNMENT INQUIRIES INTO SURROGACY IN AUSTRALIA.²³⁸

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²³⁸ The Australian Capital Territory Attorney General's Department *Discussion Paper: Surrogacy Agreements in the ACT*, October 1993, pp 65-72 contains a summary of the recommendations of these committees.

SOUTH AUSTRALIA

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APPENDIX B: COMPARISON OF SURROGACY LEGISLATION

JURISDICTION ^a	QUEENSLAND	VICTORIA		TASMANIA	SOUTH AUSTRALIA	AUSTRALIAN CAPITAL TERRITORY
Relevant Statute	<i>Surrogate Parenthood Act 1988</i>	<i>Infertility (Medical Procedures) Act 1984</i>	<i>Infertility Treatment Act 1995</i> [not yet commenced]	<i>Surrogacy Contracts Act 1993</i>	<i>Family Relationships Act 1975</i>	<i>Substitute Parent Agreements Act 1994</i>
Altruistic Surrogacy prohibited	✓ s 3(1)(c)	X	X	X	X	X
Commercial Surrogacy prohibited	✓ s 3(1)(b)	✓ s 30(2)(b) and 30(2)(c).	✓ s 59	✓ s 4(4)	X	✓ s 5
Arranging surrogacy service prohibited	✓ s 3(1)(b)	commercial ^b agreements only s 30(2)(b)	✓ commercial agreements only s 59	✓ s 4(3)	✓ commercial agreements only s 10(h)(b)	✓ Except by a party to the proposed agreement s 6
Entering into a surrogacy contract prohibited	✓ s 3(1)(c)	✓ commercial agreements only ss 30(2)(b)	✓ commercial agreements only s 59	X	X	✓ commercial agreements only s 5
Advertising surrogacy services prohibited	✓ s 3(1)(a)	✓ s 30(2)(a)	✓ s 60	✓ s 6	✓ s 10(h)(c)	✓ s 7
Receiving a reward or payment for surrogacy services is prohibited.	✓ s 3(1)(b)	✓ ss 30(2)(b) and 30(2)(c)	✓ s 59	✓ s 4(4)	✓ s 10(h)(a) ^c	✓ s 5
Surrogacy agreement is void or unenforceable.	✓ s 4(1) and 4(2)	✓ s 30(3)	✓ s 61	✓ s 7	✓ s 10g	✓ s 9
Provision of technical and/or professional services is illegal	X	X	X	✓ s 5	X	✓ commercial agreements only s 8
Penalty for offence	\$7500 or three years jail	\$5000 or two years imprisonment	\$24,000 or two years imprisonment	\$5000 or one years imprisonment	\$4000 or 12 months imprisonment	\$10000 or 1 years jail ^d

a The Northern Territory, Western Australia, New South Wales and New Zealand jurisdictions have no specific surrogacy legislation.

b In this table the expression 'commercial agreements' is used to refer to agreements involving payment or reward, however worded in the individual Acts.

c Only relates to procurement contract. See section 5.2.4 for a fuller discussion.

d This is the case for most offences under the *Substitute Parent Agreements Act 1994* (ACT), except for section 7 which relates to advertising for surrogacy agreements. Under this section, the penalty for advertising a commercial surrogacy agreement is \$5000 and/or 6 months imprisonment. Advertising any other surrogacy agreement attracts a \$5000 fine.