

STANDING COMMITTEE OF ATTORNEYS-GENERAL
AUSTRALIAN HEALTH MINISTERS' CONFERENCE
COMMUNITY AND DISABILITY SERVICES MINISTERS'
CONFERENCE

JOINT WORKING GROUP

**A PROPOSAL FOR A NATIONAL MODEL TO
HARMONISE REGULATION OF
SURROGACY**

January 2009

Invitation to make submissions

The Joint Working Group invites interested individuals and organisations to make written submissions on the proposal outlined in this paper.

Submissions should be sent to the Executive Officer of the Secretariat of the Standing Committee of Attorneys-General, NSW Attorney General's Department, GPO Box 6, Sydney NSW 2001 or can be emailed to natalie_marsic@agd.nsw.gov.au. Inquiries may be directed to the SCAG Secretariat – ph 02 8061 9325

The closing date for submissions is 16 April 2009.

All submissions will be treated as public documents unless a request for confidentiality is made.

Disclaimer

The proposal outlined in this paper does not represent the position or views of any member of the Ministerial Councils for Attorneys-General, Health Ministers or Community Services Ministers, or of any of the Governments they represent. The proposal has been developed by officers for the purpose of public consultation.

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1. Background

The ACT's *Parentage Act 2004* (ACT) (ACT legislation) supports altruistic surrogacy by allowing parenting orders that transfer parental rights to the "commissioning" parents.

The Victorian *Assisted Reproductive Treatment Act 2008* (Vic) (Victorian Act) was passed by the Victorian Parliament on 4 December 2008 and assented to on 12 December 2008. The default commencement date is 1 January 2010. The Victorian Act allows registered Victorian ART providers to carry out treatment procedures in altruistic surrogacy arrangements when certain conditions are met. The Victorian Act also allows the Victorian County and Supreme Courts to make a substitute parentage order transferring the legal parentage of a child born in a surrogacy arrangement from the surrogate mother to the commissioning parents if the Court is satisfied of various matters.

In Western Australia the *Surrogacy Act 2008* (WA)¹ (WA Surrogacy Act) supports altruistic surrogacy by allowing access to in-vitro fertilisation (IVF) for a woman agreeing to carry a child on behalf of "arranged parents" and providing for parentage orders that transfer parental rights to the arranged parents.

In NSW and NT, the use of ART for surrogacy is regulated by guidelines issued by the National Health and Medical Research Council (NHMRC), a Commonwealth statutory authority, rather than by legislation. The guidelines permit the provision of ART services for altruistic surrogacy but prohibit commercial surrogacy. In addition, clinics must not facilitate surrogacy arrangements unless every effort has been made to ensure that participants have a clear understanding of the ethical, social and legal implications of the arrangement and have undertaken counselling to consider the social and psychosocial significance for the person born as a result of the arrangements, and for themselves.

The NHMRC ART guidelines also apply or are followed in other States and Territories, to the extent they are not affected by legislation. In addition Victoria, WA and SA (and when its new Act commences NSW) have legislation governing the provision of ART.

While the NHMRC ART guidelines also govern the clinical practice of ART in Queensland, the *Surrogate Parenthood Act 1988* (Qld) makes all surrogacy arrangements (commercial and altruistic) illegal. On 8 October 2008, the report of the Queensland Parliament Select Committee was tabled, recommending the decriminalisation of altruistic surrogacy in Queensland. The Queensland Government is yet to respond to the Committee's recommendations.

Tasmania's *Surrogacy Contracts Act 1993* (Tas), Victoria's current *Infertility Treatment Act 1995* (Vic), the recently passed Victorian Act, and South Australia's *Family Relationships Act 1975* (SA) variously prohibit commercial

¹ The *Surrogacy Act 2008* was assented to on 10 December 2008 and will commence on proclamation expected early in 2009.

surrogacy and make surrogacy contracts void. When commenced the NSW ART legislation will prohibit commercial surrogacy and soliciting commercial surrogacy agreements, and will make surrogacy agreements void.

The Tasmanian Legislative Council Select Committee on Surrogacy reported in August 2008 making a number of recommendations. The Tasmanian Government is yet to respond to the Committee's recommendations.

As discussed at Section 18 of this paper, the Commonwealth's *Family Law Act 1975* (Cth) now provides for the recognition of State and Territory orders transferring parentage of children born as a result of surrogacy agreements.

A more detailed description of the current regulatory regimes in various jurisdictions is outlined in Appendix A.

Recognising that, with advances in reproductive medicine, more infertile Australians will seek to become parents through surrogacy, Australian Attorneys-General together with their Health and Community Services counterparts are considering a national model law regulating this practice. The purpose of this paper is to outline what is proposed and to invite public comment.

The policy aim of the model would be to permit the intended parents to become recognised throughout Australia as the legal parents of the child in place of the birth parent(s). The principles on which the model is designed will be:

- parentage orders are to be made in the best interests of the child
- intervention of the law in people's private lives should be kept to a minimum, and
- the model should seek to avoid legal dispute between the birth parent(s) and the intended parents.

2. Introduction

This paper refers to the woman who agrees to carry the child as the 'surrogate mother' and to the persons who are to raise the child as the 'intended parents'.

For the purposes of this paper, a surrogacy arrangement is one in which, *before the child is conceived*, the intended parents and the surrogate mother (and her partner, if she has one) agree that the surrogate will become pregnant *with the intention* that the child will, at birth, be given into the care of the intended parents to raise as their own.

There is widespread agreement that commercial surrogacy (where the surrogate mother is remunerated for financial gain or reward) should be banned and that, if altruistic surrogacy agreements or arrangements are to be recognised (for example by making legal provision for parenting orders), the agreement that the surrogate mother would transfer the care of the child to the intended parents should not be enforceable. This means that it will always be

the right of the surrogate mother to parent the child if she finds herself unable to surrender the care of the child to the intended parents after birth.

Existing parentage presumptions will govern this situation, ensuring that the surrogate mother and her partner (if any) are regarded as the legal parents of the child, even if they are not genetically related to the child. Although a surrogacy arrangement may not be enforceable by requiring a surrogate mother to surrender a child under the arrangement there may be circumstances where a court decides that it is in the best interests of the child to be parented by the intended parents rather than the surrogate mother and makes orders accordingly.

Another possible outcome is that the intended parents refuse to take responsibility for the child's care after birth. In this situation, the surrogate mother will have the option of caring for the child or consenting to the child's adoption. Existing adoption laws will govern this situation.

However, assuming that a surrogacy arrangement proceeds as planned, the care of the child will be given to the intended parents on or shortly after birth. It is in this situation that the need arises for legal recognition of the arrangement through appropriate parentage orders, in the best interests of the child.

The proposal outlined in this paper builds on elements of the Victorian Act, ACT legislation, and the WA Surrogacy Act (see Appendix A).

3. Scope

It is proposed that the national model should be limited to the situation in which a surrogacy arrangement was made before the child was conceived. Surrogacy is not considered an appropriate solution to an unplanned pregnancy. To permit surrogacy arrangements to be made during a pregnancy creates a risk of pressure on a vulnerable woman to surrender the care of her child. Such an arrangement would also be at odds with existing laws, which make it a criminal offence to arrange or attempt to arrange a private adoption. Only when all parties intended that the child to be conceived would be given into the care of the intended parents to be raised by them should a parentage order be available.

Potentially, there are several situations that could be encompassed within this definition of surrogacy. A surrogate conception may occur where the genetic material is supplied by both of the intended parents, or by one only of them, by both of the surrogate parents, or by one only of them or by third-party donors who are not involved in the surrogacy agreement. It follows that conception in a surrogacy arrangement might come about naturally, or through assisted reproductive technology, or through the surrogate's self-insemination with donor sperm.

It is proposed that all of these types of surrogacy should be potentially eligible to lead to parentage orders. Orders will not be made in favour of the intended parents in all cases, as legislative preconditions may not be met: the surrogate mother may not consent or the Court may not be satisfied that the order would be in the child's best interests. It is suggested, however, that the national model should permit the Courts to entertain applications regardless of who has provided the genetic material. This will permit parents who are raising a child, who was given into their care by the surrogate mother as a result of a surrogacy agreement, to apply to become the legal parents, no matter what the child's genetic origins.

An alternative approach would be to limit the availability of parentage orders to cases in which neither the surrogate mother nor her partner contributes genetic material. This approach assumes that the surrogate mother will find it easier to relinquish a child who is not genetically related to her and that the intended parents who do have a genetic relationship with the child have a better claim to parentage of the child. Both these assumptions can be questioned. The Victorian Act provides for the establishment of an expert Patient Review Panel to consider various matters in respect to ART, including the approval of all surrogacy arrangements to be carried out by registered Victorian ART providers. The Patient Review Panel will comprise five members appointed by the Governor in Council. There will be at least one child protection expert on the panel. The Patient Review Panel must be satisfied before approving a surrogacy arrangement that the surrogate mother's oocyte will not be used in the conception of the child.²

Q 3.1: Should parentage orders be available regardless of the method of conception? That is should a parentage order be available regardless of whether conception is achieved naturally, through self-insemination or with the assistance of Assisted Reproductive Technology? Or should orders be available only where the child has been conceived through assisted reproductive technology?

Q 3.2 Should parentage orders be available regardless of the source of the genetic material? Should surrogacy be allowed where the surrogate mother has a genetic connection to the child who is conceived?

4. Surrogacy arrangements

(a) No financial benefit

The proposed model would not permit commercial surrogacy. That practice is already unlawful throughout Australia. It is judged that commercial surrogacy

² [Section 41 of the ART Act provides that the Patient Review Panel may approve surrogacy arrangements that do not comply with the standard criteria if the circumstances of the proposed surrogacy arrangement are exceptional and it is reasonable to approve the arrangement in the circumstances.](#)

commodifies the child and the surrogate mother, and risks the exploitation of poor families for the benefit of rich ones. Consequently, when this paper refers to surrogacy, it refers to an arrangement in which the surrogate receives no financial benefit (other than reimbursement for losses and expenses).

Surrogacy agreements would be void and unenforceable. The intended parents would have no cause of action, whether in contract or at common law, on which to sue the surrogate mother, either for damages or for delivery of the child into their care.

The model would, however, permit the intended parents, or someone else on their behalf, to reimburse the surrogate mother for necessary expenses incurred due to pregnancy, such as the cost of medical treatment and hospitalisation. This could also extend to lost wages.

There are three ways in which reimbursement of reasonable expenses could be handled:

- one approach is to provide that reasonable expenses that are necessarily incurred (without further definition) may be paid, but that an agreement to pay reasonable expenses is not enforceable
- the Victorian Act provides that, while a woman must not receive any material benefit or advantage as the result of an arrangement to act as a surrogate mother, any part of a surrogacy agreement that provides for reimbursement of prescribed costs actually incurred by the surrogate mother should be enforceable. Prescribed payments will be set by regulations which have not yet been finalised. The Victorian Act is based on a 2007 Report on ART, adoption and surrogacy by the Victorian Law Reform Commission (VLRC). The VLRC recommended that the prescribed payments should include reasonable medical expenses not otherwise provided for through Medicare, private health insurance or any other benefit, lost earnings up to a maximum period of two months (where there is no entitlement to paid maternity or other leave) and associated reasonable legal expenses. This approach has also been adopted in the WA Surrogacy Act, with the types of expenses that can be included in a surrogacy agreement set out in the Act
- a middle course could provide that an agreement to pay reasonable expenses necessarily incurred (without further definition) is enforceable.

Whichever path is adopted, it is important to make clear that any agreement in relation to the care and parentage of the child is unenforceable and that any reimbursement of expenses incurred is independent of the arrangements made in relation to the care of the child.

Q 4.1: Should the surrogate mother be able to enforce an agreement for the reimbursement of reasonable expenses necessarily incurred?

Q 4.2 Should legislation or regulations prescribe what expenses are reasonable?

(b) Counselling

The proposed model would require that the parties planning to enter into a surrogacy arrangement must first undertake counselling with counsellors who specialise in reproductive medical matters. This should be done through an accredited assisted reproductive technology provider.

The purpose of counselling is to ensure that all parties understand the risks, medical and psychological, of the proposed arrangement so that they have all the relevant information to give informed consent before conception. It would be possible to provide that counselling must cover specified matters. Risks of a surrogacy arrangement could include, for example that:

- the surrogate does not relinquish the child
- the intended parents are unwilling to take the child
- genetic testing during pregnancy discloses an abnormality
- the child is born with a disability
- the surrogate behaves during pregnancy in a way that concerns the intended parents, for example, smoking or drinking alcohol
- medical complications of pregnancy arise
- the surrogate suffers a miscarriage or undergoes termination of pregnancy
- the Court does not make the expected parentage orders.

The purpose of counselling is to prepare all parties so that they have sufficient information to give informed consent to the surrogacy arrangement and to ensure that they are aware of and have considered the issues which arise in surrogacy arrangements.

For children who are born after the new law starts, it is proposed that parentage orders should not be available unless all parties can show that they underwent this counselling before the conception. This should be readily provable from clinic records or through approval processes provided for in legislation. (Special provision would be needed in the new laws for families already raising children born through surrogacy.)

It has been suggested that it is one thing to give informed consent to a surrogacy arrangement and another to give informed consent to the making of legal parentage orders. On that view, it can be argued that, once the child has been born and has been placed in the care of the intended parents, all parties should be required to undergo further counselling preparatory to an application for parentage orders.

The other option is that all parties sign a document confirming their consent to the parentage orders, similar to the adoption process. The WA Surrogacy Act requires the parties to have received counselling prior to both the approval of the surrogacy arrangement and the making of a parentage order. The Victorian Act requires additional counselling before a substitute parentage order is made if the surrogacy was not arranged with the assistance of a registered Victorian ART provider. Substitute parentage orders will be available retrospectively in some circumstances.

The Tasmanian Legislative Council Select Committee report of August 2008 recommended that any prospective party to a pre-conception altruistic surrogacy agreement should be required to undertake relevant recognised courses of therapeutic counselling and legal advice.

Q 4.3. Should it be a pre-requisite for a parentage order that the parties demonstrate that they underwent the required counselling before the child was conceived?

Q 4.4. Should it be a pre-requisite for a parentage order that the parties demonstrate that they underwent separate counselling after the birth of the child, about the effects of the proposed order on all parties, before an application can be made for parentage orders?

(c) Form of agreement

A surrogacy agreement or arrangement must be made between the parties *before* a child is conceived.

One approach would be for there to be no requirement that a surrogacy arrangement must be made in writing or that a lawyer should prepare it, although both these would be prudent and will help the parties to provide the Court with relevant evidence to obtain parentage orders in due course. If the legislation allows for the reimbursement of expenses to be enforceable, a written agreement would be advisable.

The WA Surrogacy Act provides that a surrogacy agreement can only be approved if it is in writing and if the parties have had independent legal advice about the effect of the arrangement. There is no requirement in the Victorian Act for a written agreement, but in deciding whether to approve the surrogacy arrangement, the newly established Patient Review Panel must have regard to an acknowledgment by the parties that the parties have undergone counselling and obtained legal advice about the consequences of entering into the arrangement.

Even if an arrangement is in writing, however, it will not be a legal contract (except perhaps as to the reimbursement of expenses). The intended parents would have no cause of action, whether in contract or at common law, on which to sue the surrogate mother, either for damages or for delivery of the child into their care. The intended parents would not be able to sue the surrogate mother if she were to decline to relinquish the care of the child. They would not be able to compel the surrogate mother to terminate the pregnancy if, for example, tests disclosed an abnormality, nor to obtain damages from her if she were to terminate the pregnancy. Conversely, the surrogate mother would not be able to sue the intended parents if they were to decline to take responsibility for the care of the child, leaving her to choose between adoption and raising the child herself.

All these risks are to be addressed in the counselling process prior to conception. As the VLRC recommended, in their 2007 report, counselling

undertaken before an arrangement is entered into should address attitudes towards the conduct of the pregnancy, attitudes of the commissioning parents towards the child having a disability and attitudes of all parties to investigation of a genetic abnormality and the possibility of termination of pregnancy or other complications. The VLRC also recommended that parties obtain independent legal advice. The WA Surrogacy Act provides that before the approval of a surrogacy arrangement the parties must have undertaken prescribed counselling and received independent legal advice. Regulations will provide for the matters that are to be covered by counselling.

Q 4.5 Is it appropriate for there to be no requirement for a surrogacy agreement to be made in writing, given the unenforceable nature of the agreement?

Q 4.6 Should there be a requirement that all parties obtain independent legal advice?

5. Parentage Orders

It is proposed that, assuming the surrogate mother hands the child over into the care of the intended parents, then an application could be made by the intended parents to the Court for a parentage order. The effect of a parentage order would be similar to an adoption order, that is, *once the order is made, the intended parents will be the child's only legal parents, to the exclusion of the surrogate and her partner. Similarly, the surrogate and her partner (if she has one) will no longer be recognised by the law as the parents of the child.* The child would be issued a new birth certificate recording the intended parents as the parents.

The application would be made to the relevant State Court (legal parentage being a matter of State jurisdiction)³. However if there was any dispute as to who should have custody or parenting responsibilities in relation to the child, that would be a matter for the Family Court.

Parentage orders would be in the Court's discretion, that is, the intended parents would not be automatically entitled to an order simply because of the surrogacy arrangement. The Court would need to be satisfied that the making of the order would be in the best interests of the child. The best interests and welfare of the child are the paramount concern for the Court, not the interests of the adult parties to the agreement.

The Court would be able to make a parentage order in favour of an adult person or couple who have commissioned a surrogacy arrangement provided:

³ In Western Australia parentage orders will be made by the Family Court of Western Australia which is a State Family Court established in accordance with the *Family Law Act 1975* s 41.

- the application is made at least 28 days, but not more than 6 months, after the birth (subject to a discretion to extend time in exceptional circumstances)⁴
- all parties had received the required counselling before the child was conceived⁵
- the surrogacy arrangement was made between the parties before the child was conceived
- the surrogate mother (and her partner if the partner is a genetic parent of the child) freely, and with a full understanding of what is involved, agree to the making of the order (or consent is dispensed with because it cannot be practically obtained⁶)
- the child is now living with, and being cared for by, the intended parents, and
- the order is in the best interests of the child.

Q 5.1 What are the appropriate preconditions that must be met before a Court can make a parentage order, conferring legal parentage on the intended parents?

The Court would have a discretion to make an order where:

- the application was made outside the prescribed timeframes, or
- for good reason, prescribed counselling had not taken place,

provided that the surrogate mother was not objecting to the making of the order, the Court was satisfied that adequate counselling had occurred prior to the order being made and it was in the best interests of the child that the order be made.

The WA Surrogacy Act gives the Court the power to dispense with the requirement for the surrogate mother to consent to the making of the parentage order if she is not a genetic parent of the child and at least one of the intended parents is a genetic parent. The requirement for the child to be living with the intended parents can also be dispensed with in the same circumstances. Any decision to dispense with those requirements is based on the best interests of the child.

Q 5.2 Are these the only circumstances in which the Court should have a discretion to waive strict compliance with the preconditions?

If a Court finds that a parentage order should not be made, there may be, depending on the reason for the refusal to make the order (for example, on the basis of revealed and relevant criminal history or child protection history), an obligation on the Courts to immediately notify the relevant child welfare authorities. The Court would not have sufficient evidence before it to make a

⁴ Special arrangements would need to be made to cover families already created through surrogacy before the new law came in.

⁵ As above.

⁶ For example, because the surrogate has died, has lost legal capacity or cannot be found.

determination in relation to the welfare of the child, and this should be dealt with by the relevant welfare jurisdiction.

A parentage order would not be granted merely because the parties consent. The Court would need to be satisfied (as an overriding consideration) that the proposed order was in the best interests of the child.

This raises the question of how that criterion should be applied. On one view, the Court should have an unfettered discretion to decide where the best interests of the child lie. That would mean that the Court could refuse to make a parentage order even if all parties were consenting and the child was being raised by the intended parents. The Court would be at liberty to find that it was not in the best interests of the child that the legal parentage be altered. This is the provision included in the Victorian Act and the ACT legislation.

On another view, in cases where the surrogate mother has given free and informed consent, the intended parents have willingly received the child into their care, and other preconditions are met, the Court should not be put in the position (in the absence of evidence brought forward by the parties) of weighing the relative merits of the two sets of parents. In these circumstances, where all the preconditions for an order are met, then the Court should start from the assumption that it is in the best interests of the child that the intended parents, who are actually caring for the child and who will continue caring for the child in the future, should be treated as the legal parents.

Such a presumption could be rebutted by evidence that there was some good reason why a parentage order should not be made. This is the approach taken in the WA Surrogacy Act, supported by a requirement that a parentage order can only be made where the surrogacy arrangement was approved by the Reproductive Technology Council before the pregnancy. Approval is dependent on the surrogate mother and the intended parents being carefully screened.

Q 5.3 How should the best-interests criterion be applied? Should there be a presumption that it is, generally, in the interests of a child born through surrogacy to become legally the child of the intended parents, where all parties consent?

After a parenting order is made, a new birth certificate should be issued showing the intended parents as the legal parents of the child. The original birth record would still exist, however, and the child would be able, on reaching a specified age, to obtain both records. This would follow the same pattern as for birth certificates created after an adoption order and would allow the parties to keep private the circumstances surrounding the child's conception, birth and parentage. The surrogate mother should be able to obtain a copy of the birth certificate for her records.

An alternative view is that the birth certificate, while indicating the one or two persons who are the legal parents of the child, should also transparently record the full details of the child's birth history. This would avoid any appearance of deceit or rewriting history.

The Tasmanian Legislative Council Select Committee recommended that a national or otherwise uniform birth certificate be implemented with a facility to store relevant parental data in a complimentary register, so as to protect the wellbeing of the child in question, while preventing any form of discrimination on the basis of parentage.

It is noted Section 13 of paper deals with the topic of a donor register.

Q 5.4 Should the new birth certificate resemble an ordinary birth certificate, recording only the names of the legal parents?

Q 5.5 Who should be able to access a copy of the birth certificate?

6. Consent

It is proposed that, generally, an application could only be made if the surrogate and the intended parents consent. In rare circumstances, however, it may be impossible to obtain the surrogate's consent, or that of her partner, because that person has died, has become mentally incapacitated or cannot be found. It is proposed that the Court should be able to dispense with the consent requirement in that case. The WA Surrogacy Act also allows for the Court to dispense with consent as set out above.

Under present parentage presumptions the husband or the de facto partner of the surrogate mother is the legal parent of her child. The consent of the surrogate mother's partner to a parentage order is a prerequisite in the WA Surrogacy Act although that requirement can be dispensed with in the same circumstances that the surrogate mother's consent can be dispensed with.

An alternate approach would be for consent of the surrogate mother's partner to be a prerequisite where the partner is a genetic parent. Where the partner is not the genetic parent, the Court should be required to take the views of the surrogate's partner into consideration when making the order.⁷

A more difficult question is: what happens if, although the surrogate has voluntarily placed the child in the care of the intended parents and does not want to raise the child herself, she refuses to consent to the application? On one view, there should be no possibility of a parentage order in that case. The intended parents cannot then become the legal parents of the child but the surrogate remains the legal parent. The intended parents could, however,

⁷ See the VLRC recommendation.

apply to the Family Court for parenting orders in relation to the child's living arrangements.

Another view is that, if the Court is satisfied that, despite not consenting to the making of the order, the surrogate has voluntarily placed the child in the intended parents' care and does not seek the return of the child to her care, the Court could still make an order if it is satisfied that this would be in the child's best interest. Under the WA Surrogacy Act, the Court would be able to make a parentage order in those circumstances unless the surrogate mother is a genetic parent of the child.

Q 6.1 If the surrogate has willingly placed the child with the intended parents and does not seek to raise the child herself, but does not consent to the parentage application, should the Court be able to make a parentage order in favour of the intended parents, if satisfied that to do so would be in the child's best interests?

It is considered that only adults can give the required informed consent to surrogacy arrangements and that all parties should therefore have to be over 18. The WA Surrogacy Act provides that the surrogate mother and at least one of the intended parents must be over 25. The Victorian Act provides that the surrogate mother must be at least 25 years old for the Patient Review Panel to approve a surrogacy arrangement being carried out in a Victorian clinic. The Court must be satisfied that the surrogate mother is at least 25 years old to make a substitute parentage order where the surrogacy was not arranged with the assistance of a registered Victorian ART provider.

In seeking a parentage order, the applicant should have to establish that all parties, including the surrogate mother's partner, if the partner is a genetic parent of the child, have given valid consent to the proposed order. An order should not normally be available, however, where the surrogate mother, or her partner where the partner is the genetic parent, is opposed. In that case, an alternative approach may be that the Court would not be able to make the order, but the matter could be taken to the Family Court to be determined⁸.

Q 6.2 How is the Court to be satisfied that the consent is informed and voluntary? Is the evidence of counselling before conception and after birth sufficient? Should the parties be required to sign a form or a declaration in relation to their consent?

Q 6.3 What say, if any, should the surrogate's partner have if he or she is not genetically related to the child? Is it appropriate that the consent of the surrogate mother's partner not be an essential precondition, but that his or her non-consent is a matter that the Court takes into account?

⁸ [In Western Australia parentage orders will be made by the Family Court of Western Australia.](#)

7. Eligibility for a parentage order - same-sex couples

Jurisdictions currently have divergent laws governing whether a same-sex couple can become the legal parents of a child. No law in South Australia or Queensland currently recognises same-sex partners jointly as the legal parents of a child. Western Australia and the ACT, on the other hand, permit the surrogate mother's same-sex partner to become registered on the birth certificate as the legal parent of the child, and permit same-sex couples to adopt children.

The Victorian Act allows a person or couple to be eligible for a parentage order regardless of the person or couple's relationship, or marital status or sexual orientation provided that the other requirements in the Victorian Act are satisfied - including that the parties have undergone the required counselling and the surrogate mother is at least 25 years old.

The WA Surrogacy Act links eligibility for surrogacy to eligibility for IVF and allows parentage orders to be made where the intended parent(s) are a heterosexual couple, a female same-sex couple or a single woman.

In NSW recent amendments to the *Status of Children Act 1996* (NSW), the *Births, Deaths and Marriages Registration Act 1995* (NSW) and the *Births, Deaths and Marriages Registration Regulation 2006* (NSW):

- for parenting presumptions in favour of the birth mother and the consenting co-mother in same sex lesbian de facto relationships where the child born to the relationship was conceived by a fertilisation procedure, and
- for their status as the child's parents to be recorded on the child's birth certificate (including provisions for retrospective registration of the co-mother's details as a parent of the child by consent).

Adoption by same sex couples is not permitted in NSW. The NSW Legislative Council Law and Justice Committee is currently conducting an inquiry into Adoption and Same Sex Couples. Submissions are due by 13 February 2009.

As further explained at section 18, following the amendments to the *Family Law Act 1975* (Cth) the Commonwealth family law system recognises the parentage of children of same-sex relationships in the same way that the parentage of children of opposite-sex couples is recognised.

Q 7.1 Should there be any restrictions on which adults may apply for parentage orders?

Q 7.2 Is this an issue on which jurisdictions participating in a uniform national regime for the regulation of surrogacy should be free to differ, given the presently divergent laws in relation to the rights of same-sex parents to become parents?

8. Residency

Acknowledging that there may be some lack of uniformity in relation to various preconditions for a parentage order (for example in relation to the eligibility of same-sex parents, or the nature of screening undertaken) it is considered appropriate to specify a connection between the intended parents and the State or Territory in which the application is made, to prevent exploitation of these differences (forum shopping).

The ACT legislation and the WA Surrogacy Act both require the commissioning parents to reside in the jurisdiction in order to apply for a parentage order. A requirement to reside in the State or Territory will deny access to a parentage order to couples who forum shop if there are discrepancies in eligibility and preconditions between the jurisdictions.

A concern has been raised that there may also be a need to introduce a residency requirement for the surrogate mother, in part to prevent the exploitation of women in third-world countries, given that this seems to be a developing practice in some places.

The most conservative approach is to require that both the intended parents and the surrogate mother must ordinarily reside in the jurisdiction. It is not intended, however, to prevent an arrangement in which a relative of the couple who lives outside the jurisdiction becomes their surrogate.

A less conservative approach is to require that the intended parents must be residents of the jurisdiction in which they apply for an order, but not to require that the surrogate must normally reside there. The counselling requirement, together with the rule against commercial surrogacy, will preclude exploitative arrangements with third-world surrogates. The WA Surrogacy Act provides protection against exploitative arrangements by requiring that a parentage order can only be made where the surrogacy arrangement was approved in WA before the pregnancy, without making any requirements about the place of residence of the surrogate mother.

The Victorian Act provides that the Court must be satisfied before making a substitute parentage order that the child was conceived as a result of a procedure carried out in Victoria and the commissioning parents lived in Victoria at the time they applied for the order. Parents applying for a substitute

parentage order in respect to a child born before the Act commences must have been ordinarily resident in Victoria at the time the child was conceived.

Another approach might be that parentage orders can only be made in the jurisdiction in which the child is born, since the birth will have been registered there and the order will result in the issue of a new birth certificate. This would mean that parentage orders could not be obtained for children born overseas or interstate.

A question arises whether parties who use a clinic in one State should be able to apply for parentage orders in another. If this is not permitted, then parties who are refused treatment at local clinics would not be able to shop for an interstate clinic that will accept them. Some surrogacy arrangements may not involve the use of clinics, however, and in that case, those parents would gain an advantage over those who rely on assisted reproductive technology.

Children may also be disadvantaged because their rights and entitlements would depend on where they were conceived and whether or not they were conceived with clinic assistance. The requirement in the WA Surrogacy Act for prior approval of the surrogacy arrangement would apply to all surrogacy arrangements regardless of the method of conception.

Q 8.1 What residency requirements should be imposed on the parties? Is it appropriate and sufficient that there be a requirement that the intended parents can apply for parentage orders only in the jurisdiction in which they normally reside?

Resolution of these issues will also need to take into account the desirability of ensuring Australian residency and/or citizenship for the child.

9. Eligibility for ART – infertility treatment

Not all surrogacy arrangements will require the use of assisted reproductive technology (ART). The regulation of ART varies significantly between States and Territories. In some jurisdictions, ART is regulated solely through the application of the National Health and Medical Research Council (NHMRC) guidelines. Other jurisdictions have legislation based on an Australian Health Ministers Council model, but which contain significant variation.

A significant proportion of surrogacy arrangements are likely to require ART.

The Victorian Act outlines specific requirements that must be met before a registered Victorian ART provider can carry out a treatment procedure in a surrogacy arrangement, including that each arrangement must be approved by the expert Patient Review Panel. Commissioning parents who entered into a surrogacy arrangement before the Act took effect or without the assistance

of a registered ART provider may seek a substitute parentage order if they meet additional counselling requirements and the surrogate mother is at least 25 years old. Some jurisdictions require that people wishing to use ART be infertile, while others do not.

An alternative view is that, in line with the principle of minimal intervention in people's lives and to prevent the legal status of children being determined by the manner of their conception, surrogacy arrangements not involving ART should be capable of being recognised with parentage orders. Where ART is used, surrogacy arrangements should only involve the same eligibility requirements as those applicable to other users of ART in that jurisdiction (but adapted as appropriate to the surrogacy context – for example, if there is a prerequisite of infertility, it should be the infertility of the intended parent, not the surrogate mother, that is considered, and if same-sex couples are eligible to apply for parentage orders, “social infertility” should be sufficient compliance).

Q 9.1 Should it be a pre-requisite for a parentage order that a surrogacy arrangement has been facilitated through ART?

Q9.2 If not, should intending parents who wish to use assisted reproductive technology to conceive a child by surrogacy have to meet the usual eligibility requirements for ART applying in their jurisdiction? Or should surrogacy by assisted reproductive technology be available to all enquirers (subject to medical approval)?

10. Eligibility - age and previous pregnancies

The question was considered whether there should be further pre-requisites that a surrogate mother must be within a certain age range (for example, 25 to 48) or should have previously given birth. In the case of surrogates who are young or have not had earlier children, there may be a higher risk that the mother will decide not to relinquish the child. The Victorian Act requires that the surrogate mother must be at least 25 years old to obtain treatment from a registered Victorian ART provider (but that no age limit should apply to the commissioning parents) and that the surrogate mother must have previously carried a pregnancy and given birth to a live child.

The WA Surrogacy Act requires a surrogate mother to be over 25 and to previously have given birth to a live child. The Tasmanian Legislative Council Select Committee recommended that any party to a surrogacy agreement should be at least 21 years of age and further that all prospective surrogate women should be required to have carried at least one child to term previously.

While the issues of the age of the surrogate mother and whether the surrogate already has children may be relevant factors, an alternative to creating further

pre-requisites would be to deal with these issues in counselling. The WA Surrogacy Act provides that the requirement for the surrogate mother to have previously given birth to a live child can be waived in exceptional circumstances. Regardless of what the parties have agreed, a clinic may refuse treatment on the ground of low likelihood of success or medical contra-indications, which may be related to age.

Q 10.1 Should there be further preconditions imposed on applicants for parentage orders relating to the age or experience of the surrogate mother or intended parents?

11. Approval process

The Victorian Act provides that a registered Victorian ART provider may only carry out a treatment procedure on a woman under a surrogacy arrangement if the Patient Review Panel has approved it. The Patient Review Panel must be satisfied of various matters before approving the arrangement including that the parties have received counselling and legal advice about the social and psychological implications of entering into the arrangement. In deciding whether to approve the arrangement, the Patient Review Panel must have regard to a report from a counsellor, an acknowledgement from the parties that they have received all the relevant information and advice and various guiding principles included in the Victorian Act including that the welfare and interests of the child to be born are paramount.

A decision to not provide the service is reviewable at the request of the intended parents by the Victorian Civil and Administrative Tribunal.

A possible objection to this requirement is that people who use assisted reproductive technology for purposes other than surrogate conception do not generally require the approval of a committee or review panel unless there are special circumstances. It can be argued that there is no justification for treating applicants who seek surrogacy differently from other applicants.

If there is to be a requirement for approval, then one question is what should be the role of the relevant committee or panel. One possibility is that, clinicians and counsellors seek committee advice if before a person or couple commission a woman to carry a child on their behalf, a doctor or counsellor believes that any child that might be born as a result of the arrangement may be at risk of abuse or neglect.

The Victorian Act provides that the Patient Review Panel may review decisions of a registered Victorian ART provider or a doctor to refuse to carry out a treatment procedure on a woman because the provider or doctor reasonably believes that a child that may be born as a result of a treatment procedure carried out on the woman would be at risk of abuse or neglect. This possibility is in addition to the requirements that the Patient Review Panel

approve all surrogacy arrangements carried out by a Victorian ART provider and that parties to a surrogacy arrangement provide criminal record checks and consent to child protection order checks. If no matters of concern are detected in a particular, case, the committee is not involved.

The WA Surrogacy Act provides that a parentage order cannot be made unless the surrogacy arrangement was approved by the Reproductive Technology Council of Western Australia. This approval is required regardless of the method of conception. The Act sets out requirements for medical and psychological assessment, legal advice and counselling to have been completed at least 3 months before approval is given.

Q 11.1 Should it be a legal requirement that an ART clinic may not provide assisted reproductive technology services for the purpose of surrogacy unless the case has been considered by an expert committee?

Q 11.2 If so, what should be the role of the committee in examining a particular case?

12. Screening

The Victorian Act provides that there will be a presumption against ART treatment where women seeking treatment or their partners have:

- had charges proven against them for sexual offences
- been convicted of a violent offence as defined in clause 2, Schedule 2 of the *Sentencing Act 1991* (Vic)
- had a child protection order removing the child from their care made in relation to one or more children in their care.

The Victorian Act provides that before seeking treatment from a registered Victorian ART provider, the surrogate mother, her partner and the commissioning parents must provide the ART provider with criminal record checks and must consent to the ART provider determining whether a relevant child protection order has been made in respect to a child in the applicant's care. If these checks reveal any relevant matters, the ART provider must refuse treatment unless the Patient Review Panel decides that there is no barrier to treatment.

Such checks are not required of natural parents. Checking is mandated in adoption, but that is arguably a different case, in that the state is choosing from among numerous applicants a suitable parent or parents for this child. The approach in the Victorian Act is based on the VLRC's view that ART is regulated and supported by the state and the state has a responsibility to identify cases where there is an unacceptable risk of harm.

The least interventionist approach is to rely on counselling to identify any possible issues and to raise them with the ethics committee, where an ART procedure is being used, or with all parties, where no ART is to be used. A majority of officers in the joint working group favoured this approach. The WA Surrogacy Act is consistent with this approach and does not require criminal screening of parties.

A more interventionist approach would be for clinics to require criminal history or working-with-children checks as a pre-requisite for counselling. This may prevent some people accessing treatment in a clinic. If a clinic denied intending parents or a surrogate mother treatment, the person could seek treatment in another clinic or privately. The court would then have to consider whether the relevant eligibility criteria had been met. Even if the court refused to make the parentage order on the basis that the parties had not received required counselling, the parties could still be the caregivers of the child.

Arguably, the child protection aim is not achieved by preventing a change of legal parentage if the person who presents a risk can nonetheless remain the child's caregiver. However, general child protection processes would apply. On that view, criminal records checking or the like is not justified. A contrary view is that such checking could, at least, lead to a disclosure to the other parties to the agreement, who might decide not to proceed.

An intermediate measure would be to require statutory declarations as to any relevant criminal or child protection history without requiring independent checks. If evidence of history is required, a statutory declaration is not the best source of that evidence. This is because statutory declarations rely on the honesty of the applicant.

In this area there is a need to balance the policy considerations of ensuring the best interests of the child and the principle of least intervention. It may be that there is no substantive case for treating intending parents who plan a surrogacy arrangement differently from other intending parents, or other users of assisted reproductive technology in this respect.

There is no statutory requirement for criminal record checking in relation to either surrogacy arrangements or ART treatment in Western Australia, although this would not prevent such a check being required in individual cases if this was indicated as a concern through the preparation process.

An alternative approach might be that no criminal history check is required for access to assisted reproductive technology, but that a check is required for the making of Court orders. In this way, all intended parents who seek to become the legal parents of the child would be treated alike. It is probable, however, that those parents who have adverse criminal or child welfare histories would simply raise the child without seeking parentage orders. It is arguably also too late at that stage for this information to be disclosed because the child is already born.

Q 12.1 Should intending parents who seek to have a child through a surrogacy arrangement (and the surrogate mother?) have to pass a screening process? Or should this be addressed through counselling?

Q 12.2 If a screening process is considered appropriate, what should be the mechanism?

Q12.3 If a screening process is considered appropriate, should it be a precondition to accessing ART, or a precondition to the making of a parentage order, or both?

13. Donor register

It is important to recognise the right of a child to know their genetic heritage. The mechanism for securing appropriate access for the child and other parties to relevant information about the surrogacy arrangement and donors (such as, for example by the establishment of a national donor information register), should be determined in a consistent manner with donor registers relating to ART generally.

It is proposed that a separate paper containing detailed proposals will be developed jointly with Australian Health Ministers' Conference and Community and Disability Services Ministers' Conference officers for consultation at a later stage.

14. Retrospectivity/ Transitional

There are already some families who have children through surrogacy. At present, the parents raising the child are not the legal parents and they may face some difficulties in establishing their parental status for some purposes, such as passports.

Upon the commencement of the new law, it is intended to permit applications for parentage orders by persons who are now raising children as a result of surrogacy arrangements made in the past. In those cases, there would still need to be evidence that the surrogacy arrangement was made before conception, that the child was voluntarily handed over and that the child is now living with the intended parents, but it would not be necessary to prove that pre-conception counselling took place.

The WA Surrogacy Act provides that applications for parentage orders of children born or conceived before the commencement of the Act are to be made within one year of the commencement. The Victorian Act also allows for substitute parentage orders to be made in respect to surrogacies arranged before the Act commenced in some circumstances.

The views of the child should be put before the Court if the child is of an appropriate age.

For applications arising from surrogacy arrangements made after the new law starts, all requirements must be met.

Q 14.1 Should it be possible for parents who are now lawfully raising children conceived through surrogacy to apply for parentage orders under the new law?

Q 14.2 If so, should the child's consent be required if he or she is of an age to understand the proceedings?

Q 14.3 Should it be possible to make parentage orders in these cases even if the child is over 18?

15. Advertising

The question arises whether it should be lawful for a person seeking to enter into a lawful altruistic surrogacy arrangement, or a clinic that provides ART services, to advertise this fact.

As for parties, it can be argued that, if the practice of surrogacy is to be lawful, then it should not be unlawful for an intending parent or a person willing to act as a surrogate to place advertisements to this effect. It would, however, be unlawful to advertise that one was willing to pay or to accept payment (other than reimbursement of expenses) for a surrogacy arrangement.

As for clinics, if they are to be permitted to sell the service of counselling to parties contemplating surrogacy arrangements and to sell the service of assisted reproductive technology intended to lead to surrogate pregnancies, then it can be argued that they should be able to advertise these services, subject to the ordinary laws about misleading or deceptive advertisements. If necessary, standards for the content of such advertisements could be imposed through licensing requirements.

Q 15.1 Should there be any (and, if so, what) legal restrictions on advertising by intended parents, persons willing to be surrogates or clinics about surrogacy?

16. Brokerage

It is proposed that it should be unlawful for anyone to charge a fee for the service of locating a surrogate for an intending parent or vice versa. It should not be unlawful to provide such a service free of charge. Clinics, for example, may wish to maintain databases of potential surrogates and to make this information available to intending parents. If necessary, a licence could be required or, indeed, this service could be limited to licensed ART clinics.

Q 16.1 Should non-commercial brokerage by licensed ART clinics be permitted?

17. Mutual recognition

It is intended that (as is currently the case with adoption orders) a parentage order made in any Australian jurisdiction be recognised in all other Australian jurisdictions.

18. Commonwealth issues

At the Commonwealth level, there is recognition of the parentage established under State and Territory laws of children born through surrogacy arrangements. Following amendments to the parentage presumptions in the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) (the De Facto Act), the *Family Law Act 1975* (Cth) recognises State and Territory parenting orders, made under prescribed State and Territory law, transferring parentage of children born under surrogacy agreements. These amendments commenced on 21 November 2008, when the De Facto Act received Royal Assent.

Under new section 60HB of the Family Law Act, the parentage established under State and Territory orders will be recognised for the purposes of proceedings under the Family Law Act. Accordingly, where a child is born under a surrogacy agreement, opposite-sex married or de facto couples and female and male same-sex couples will be recognised as the parents of a child if there is a State or Territory court order transferring parentage to them. The amendments reflect the Government's commitment to removing discrimination against same-sex couples and their children in Commonwealth laws.

The new parentage amendments in the De Facto Act will also apply to several Commonwealth Acts relating to social security, child support and health, which apply the parentage presumptions in the Family Law Act. The

amendments apply to the *Health Insurance Act 1973* (Cth) and the *National Health Act 1953* (Cth), from 1 January 2009. The amendments will apply to the *Aged Care Act 1997*, *A New Tax System (Family Assistance) Act 1999* (Cth), *Child Support (Assessment) Act 1989* (Cth), *Child Support (Registration and Collection) Act 1988* (Cth), *Health Insurance Act 1973* (Cth), *National Health Act 1953* (Cth), and *Social Security Act 1991* (Cth), as of 1 July 2009.

Current Regulation

Australian Capital Territory

Overview

The *Parentage Act 2004* (ACT) provides for the parentage of children and for the regulation of substitute parentage agreements in the ACT.

The application for a parentage order under the Act must be made to the Supreme Court when the child is between the ages of 6 weeks and 6 months. The Supreme Court can make the parentage order only if it is satisfied that the making of the order is in the best interests of the child and both birth parents, freely and with a full understanding of what is involved, agree to the making of the order.

The Act also sets out the matters that the Court must take into consideration when deciding whether to make a parentage order. They include whether both birth parents and substitute parents have received appropriate counselling and assessment from an independent counselling service.

The Act prohibits surrogacy arrangements under which a person agrees to make or give to someone else a payment or reward, other than for expenses connected with the pregnancy, the birth of the child or the care of the child.

Outline of ACT legislation

- In addition to a number of presumptions about parentage in relation to a marriage or a domestic relationship, the Act deals with presumptions about parentage when a mother has become pregnant as a result of a procedure. The woman is 'conclusively presumed' to be the mother. A conclusive presumption cannot be rebutted.
- If the ovum used in the procedure was produced by another woman, that other woman is conclusively presumed not to be the mother of any child born as a result of the pregnancy, and if semen used in the procedure was produced by a man other than the woman's domestic partner at the time of the procedure, the man who produced the semen is conclusively presumed not to be the father of any child born as a result of the pregnancy.
- The Supreme Court may make a parentage order in favour of the genetic parents of a child when there has been a fully consensual surrogate parentage agreement between the birth parents and the substitute parents. The Court may take into account the interests of the child. The order has (in general) the same effect as an adoption order.
- The ACT legislation permits only 'altruistic' (non-commercial) surrogacy, and only in very limited circumstances. Those circumstances are:
 - the child was conceived as a result of a procedure (in vitro fertilisation) carried out in the ACT
 - neither birth parent of the child is a genetic parent of the child

- there is a substitute parent agreement between the birth parent/s and the substitute parents (the commissioning parents)
- at least one of the substitute parents is a genetic parent of the child.
- the substitute parents live in the ACT.
- The ACT legislation ensures the equality of status of all children, regardless of the circumstances of parentage.
- The ACT legislation also provides for offences relating to commercial substitute parent agreements (surrogacy agreements for reward other than compensation for expenses), and the procuring of mothers for the purposes of such agreements.

History and policy background to ACT legislation

The law governing surrogacy in the ACT has developed in a way broadly consistent with the approach taken by jurisdictions such as Victoria, South Australia and Tasmania. There is no explicit reference to altruistic surrogacy being permitted. It is permitted by implication only.

The ACT approach is based on the position that ‘there should be the least intervention in peoples’ lives, consistent with appropriate protections’, and ensures ‘preservation of the rights of individuals to make decisions of conscience without intervention from the State, except to prevent harm to others, and subject to public policy considerations.’

While the Act ensured that altruistic surrogacy was legal in the Territory, it did not recognise the genetic parents of the child because of the conclusive presumption, in the *Artificial Conception Act 1985* (ACT), that the woman who gives birth to the child, and her husband or domestic partner (defined), are the child’s parents. The (arguably) unsatisfactory state of the law in this regard was brought to light in the Supreme Court in *the Matter of An Application Pursuant to the Birth, Deaths and Marriages Registration Act [2000]* ACTSC 39 (5 May 2000), which concerned an application for a declaration as to parentage by the genetic parents of a child (Hamish) who was born out of a surrogacy agreement between the genetic parents and the surrogate mother, the wife of the genetic father’s brother. The genetic parents had cared for Hamish from birth. Hamish’s surrogate mother and her husband supported the genetic parents’ application to be legally recognised as the parents. Justice Crispin stated that, although “on the evidence before me I am also satisfied that it would be in Hamish’s best interests for me to grant the declaration and the order sought, regrettably I am unable to do so”, because of the conclusive parentage presumptions of the Artificial Conception Act.

Following this case, an amendment to the Artificial Conception Act was made to the Act in 2000. In presenting the *Artificial Conception Amendment Bill*, Chief Minister Kate Carnell MLA explained the unsatisfactory outcome in the Hamish case:

“To me, it is both illogical and cruel that non-commercial surrogacy is legal but when the baby arrives he or she cannot be recognised as the child of the genetic parents.”

It was not considered appropriate to amend the Artificial Conception Act to make the genetic parents the legal parents of the child, as this would be contrary to the principle that substitute parent agreements are void.

The amendments enabled the genetic parents to apply to the Supreme Court for a parentage order, which had the effect of making them the legal parents of the child. The order was made subject to five conditions being met.

Important safeguards in the legislation include enabling the birth parents to keep the child at any time before the parentage order is made, the necessity for independent counselling for all parents involved and the requirement that an order be in the best interests of the child.

The Parentage Act repealed the *Substitute Parentage Act 1994 (ACT)*, the Artificial Conception Act and the *Birth (Equality of Status) Act 1988 (ACT)*, to form a single Act about the legal recognition of parentage and family relationships. The Parentage Act made little substantive change to the repealed legislation. The main aim of the Act was to remove discrimination relating to sexuality and relationship status. The Act ensures that same-sex couples are able to obtain a parentage order in the same way as opposite sex partners.

Victoria

Current law

- The *Infertility Treatment Act 1995 (Vic)* prohibits commercial surrogacy but is silent on altruistic surrogacy.
- Advertising is banned, although people may advertise for an egg donor if the Victorian Minister for Health consents.
- To access ART in a licensed Victorian ART clinic prospective surrogate mothers must meet the same criteria as other women seeking to access ART. The surrogate must be 'unlikely to become pregnant'. This means that:
 - If the prospective surrogate mother is married or in a de facto heterosexual relationship, she must be unlikely to become pregnant with her own egg or her partner's sperm or at risk of having a child with a disease or a genetic abnormality
 - If the prospective surrogate mother does not have a male partner, she must be clinically infertile or likely to transmit a disease or genetic abnormality to a child.
- The fertility status of the commissioning parents is irrelevant.
- No treatment procedures involving surrogates are being carried out in clinics in Victoria because of the eligibility requirements imposed by the present law. Private arrangements (e.g. self-insemination) are possible. However:
 - It is an offence to make, give or receive or agree to make, give or receive a payment or reward in relation to or under a surrogacy agreement
 - It is an offence for people to advertise their willingness to enter into a surrogacy agreement

- All surrogacy agreements are void and cannot be enforced in a Court
- The law does not recognise the commissioning person or couple as the parents of the child. The surrogate mother and her partner (if any) are presumed to be the legal parents of the child. The commissioning parents can apply for parenting orders (although there are limitations, discussed further below).

Assisted Reproductive Treatment Act 2008 (Vic) (ART Act)

On 4 December 2008, the Victorian Parliament passed the ART Act, based on the recommendations of the Victorian Law Reform Commission in its 2007 Report on ART, adoption and surrogacy. The Act has a default commencement date of 1 January 2010.

Key features of the ART Act include that:

- commercial surrogacy continues to be banned and altruistic surrogacy is carefully regulated
- eligibility requirements for treatment in a clinic apply to the commissioning parents rather than the surrogate mother
- there will be a presumption against treatment where surrogate mothers or commissioning parents have a record of sexual or violent offences or if they have had child protection orders made against them
- if a presumption against treatment applies, a newly established Patient Review Panel will determine whether there is a barrier to treatment
- parties must undergo extensive counselling before being treated by a registered Victorian ART provider in relation to the risks and issues associated with a surrogacy arrangement
- surrogacy agreements will be unenforceable but prescribed payments (e.g. medical and legal expenses) will be allowed
- the Patient Review Panel may only approve a surrogacy arrangement where the surrogate mother is at least 25 years old, has given birth to a live child and if her egg is not used to conceive the child
- all surrogacy arrangements carried out by a registered Victorian ART provider must be approved by the newly established expert Patient Review Panel, and
- the County and Supreme Courts of Victoria will be empowered to make substitute parentage orders in favour of a person or couple who have commissioned a surrogacy arrangement subject to various conditions, including that the Court is satisfied that the order would be in the best interests of the child; the surrogate mother freely consents to the order and the parties have received additional counselling if the surrogacy has been arranged without the assistance of a registered Victorian ART provider.

Western Australia

The *Surrogacy Act 2008 (WA)* (the Act) was assented to on 10 December 2008. It will commence on a date to be fixed by proclamation, expected to be

early in 2009. The Act provides for the regulation of surrogacy arrangements and for the parentage of children born as a result of those arrangements.

A surrogacy arrangement means an arrangement where a woman (the birth mother) agrees to carry a child for another person or a couple (the arranged parent(s)) with the intention that the child will be raised by those arranged parents. A surrogacy arrangement can only be made prior to the birth mother becoming pregnant. The Act provides for the approval of surrogacy arrangements by the Reproductive Technology Council. The Act outlines detailed requirements that must be met before that approval can be given.

The Act sets out that it is an offence to undertake, or to provide a service to arrange, a surrogacy arrangement that is for reward. In addition, it is an offence for a person to seek or receive payment or benefit for introducing parties to a surrogacy arrangement, whether or not the surrogacy arrangement is for reward. However, a person is able to advertise or publish an article or story seeking a person to enter into a surrogacy arrangement that does not involve payment or valuable consideration other than reasonable expenses.

Reasonable expenses associated with the pregnancy (in connection with the arrangement) are also permitted. The Act sets out the types of expenses that can be covered in a surrogacy arrangement. The intention is that the birth mother should not receive a material benefit or advantage because of her involvement in the surrogacy arrangement, but that she should not be out of pocket for expenses reasonably incurred by her because of the arrangement.

A surrogacy arrangement will not be enforceable except in relation to the payment or reimbursement of expenses covered in the surrogacy arrangement.

Order giving parental status to arranged parents

A parentage order transfers the legal parentage of a child from the birth parents to the arranged parents. Applications for parentage orders are to be heard by the Family Court of Western Australia (the Court) and may be heard in chambers or in closed court.

In making any decision about a parentage order, the Court must consider the best interests of the child as paramount, and for the purpose of the Act it is presumed to be in the best interest of the child for the arranged parents to be the parents of the child, unless there is evidence to the contrary. An application for a parentage order cannot be made until the child is at least 28 days old and less than 6 months of age, unless exceptional circumstances exist.

In order to apply for a parentage order the arranged parents must reside in Western Australia and at least one of them must have met the requirements to be eligible for an IVF procedure under the HRT Act. This means that

parentage orders will be available where surrogacy has been undertaken because of medical reasons. The surrogacy arrangement must have been approved by the Reproductive Technology Council before the birth mother becomes pregnant under the arrangement. The Court must also be satisfied that the arranged parents and the birth parent/s have received appropriate counselling and independent legal advice about the effect of the order, that the birth parent/s have freely consented to the making of the order and that the child is in the day to day care of the arranged parents. The Court is able to dispense with requirements in relation to a birth parent who is deceased, incapacitated, or unable to be contacted or if the birth mother is not the child's genetic parent, and at least one arranged parent is the child's genetic parent.

All the children born following a pregnancy that results in a multiple birth will have the same legal parentage.

An approved plan sets out matters agreed between the parties such as communication between the child and the birth family and information sharing, and is approved by the Court in connection with a parentage order.

A parentage order can be discharged in limited circumstances - an application for discharge can only be made by the Attorney General, the Director General of the Department of Health, the Chief Executive Officer of the Department for Child Protection, or by a child who has reached the age of 18 and the order may only be discharged if fraud, duress or improper means were involved or in exceptional circumstances. There is also an avenue of appeal to the WA Court of Appeal.

The Court is to notify the Registrar of Births, Deaths and Marriages of the making of a parentage order and is to provide the information that is necessary for the registration of the birth of the child to include details of the changed parentage of the child.

Access to Information

If procedural requirements are met, a child, birth parent or an arranged parent has a right to access the birth registration information of the birth of a person whose parentage has been transferred and to access to all or part of the record of proceedings in relation to the application for a parentage order.

In circumstances where access to parentage order and birth registration information would be likely to place a person or his or her immediate family at serious risk, the person can apply for an order excluding another person from having access to the information.

Access to information about the parentage order and birth registration is not limited if an approved plan provides greater access than provided for in the Act, but an approved plan cannot reduce the access to information outlined in the Act.

The *Human Reproductive Technology Act 1991* (WA) also allows access to information in relation to ART procedures used in the child's conception.

A certified copy of a child's birth registration that does not refer to the birth parents or to the parentage order can be applied for by an arranged parent, or by the child if he/she has reached 16 years of age.

If a child, a birth parent or arranged parent is deceased, a grandparent, descendant or sibling of the deceased may be able to access information about the parentage order or the registration of birth.

New South Wales

Under existing parentage presumptions, the law in NSW (see *Status of Children Act 1996* (NSW)) confers parental responsibility for a child on the birth parents of that child – the woman who gives birth to the child and her husband or *de facto* husband.

Under surrogacy arrangements, if issues of parental rights arise, they are resolved through adoption or parenting orders following family law proceedings.

Additional parentage presumptions apply where a child is conceived using a fertilisation procedure where a donated ovum and/or sperm have been used. For example, even if a surrogate mother has been implanted with a fertilised egg that contains the genetic material (ovum and/or sperm) of the commissioning parents, there is an irrebuttable presumption that the commissioning parents are not the parents of the child.

The surrogate mother is the child's legal parent from birth, and is *prima facie* responsible for the care and protection of the child. Parenting orders from the Family Court may regularise the commissioning parents relationship with the child, but will not provide them with full parental rights and responsibilities. Adoption can only take place with the surrogate mother's consent, and if the surrogate mother is related to the commissioning parents, the adoption process cannot commence until after the child is five years old.

A NSW Parliamentary Inquiry into altruistic surrogacy held public hearings and received evidence throughout late 2008 with a final report due in March 2009. The terms of reference for the inquiry are to examine and report on whether NSW legislation requires amendment to better deal with altruistic surrogacy and related matters.

Queensland

Surrogacy, whether altruistic or commercial, is illegal in Queensland. The *Surrogate Parenthood Act 1988* (Qld) makes it an offence for a Queensland resident to enter into a surrogacy contract in Queensland or elsewhere. The maximum penalty is 3 years imprisonment or 100 penalty units (\$10, 000).

The Surrogate Parenthood Act was based on an assessment of community values in the 1980s which took into account the findings of two reports:

- the 1984 *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*, and
- the Family Law Council of Australia's 1985 report *Creating Children: A uniform approach to the law and practice of reproductive technology in Australia*.

A Queensland Parliamentary Select Committee was tasked in February 2008 to consider a range of issues associated with decriminalising altruistic surrogacy. In establishing the Committee, the Premier acknowledged the government should act to protect the best interests of a child, to give them legal certainty and to minimise the potential for disputes between the participants in any such arrangements.

The Committee's final report, tabled on 8 October 2008, recommended the decriminalisation of altruistic surrogacy in Queensland. The Committee recommended that altruistic surrogacy be supported by an appropriate legislative and regulatory framework that strengthens regulation for ART services for surrogacy arrangements and provides a specific mechanism to transfer legal parentage. The Queensland Government is yet to respond to the Committee's recommendations.

South Australia

Under the *Family Relationships Act 1975* (SA), commercial surrogacy is illegal and a contract of surrogacy is void. Under the *Reproductive Technology (Clinical Practices) Act 1988* (SA), assisted reproductive technology is only available where the parties are infertile or at risk of passing on a genetic defect to a child conceived naturally.

A private Member of Parliament in South Australia has more recently introduced a Bill to provide for non-commercial surrogacy arrangements. This Bill has passed the Legislative Council and has been restored in the House of Assembly.

Tasmania

Under the *Surrogacy Contracts Act 1993* (Tas), surrogacy contracts are void and unenforceable and there is a range of offences for legal and health practitioners who assist or who people who advertise such services.

In August 2008, a Select Committee of the Tasmanian Legislative Council finalised its report on surrogacy making a number of recommendations including the use of the Family Court for some matters and also recommending that the outcome of this SCAG process be used to address parentage issues.

In addition to the recommendations already discussed, the Committee recommended that a new section 5 be inserted into the Surrogacy Contracts

Act providing that a person must not provide any technical or professional services in relation to achieving a pregnancy known to be the subject of a surrogacy contract. A penalty of a fine or imprisonment not more than 12 months is proposed, however the prohibition will not cover the provision of legal, psychiatric or psychological services.

The Committee recommended that the supervision and sanction of lawful (although unenforceable) altruistic surrogacy agreements together with the making of parent recognition and general parenting orders should be referred to the Family Court.

The Committee also recommended that parties to an altruistic surrogacy agreement should be required to lodge Family Court applications for the making of parent recognition orders between six weeks and six months from the date of the child concerned.

The Tasmanian Government has not yet responded to the report's recommendations.