Independent Review

The Review of the Western Australian *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008*

(Report: Part 2)

by Sonia Allan

The Review of the Western Australian *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008* (Report: Part 2)

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January 2019

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Citation:

Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and Surrogacy Act 2008 (Report: Part 2)* (2019)

ISBN-13: 978-0-6484752-1-7
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The Review of the Western Australian *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008*

Terms of Reference

The Review of the *Human Reproductive Technology Act 1991* (*HRT Act*) is to consider such matters as appear to be relevant to the operation and effectiveness of this Act including:

- the effectiveness of the current licensing regimen, including fee structure, reporting requirements, powers of inspection and powers of obtaining information
- the effectiveness of the operation of the Council and committees of the Council
- the Chief Executive Officer's (CEO) power to issue directions, the power to make a Code of Practice, regulations and guidelines, and the scope and effect of the existing directions and regulations under the *HRT Act*
- the effectiveness of powers of enforcement and disciplinary provisions under the *HRT Act* and the adequacy of offences and penalties
- whether there should be a process of review or appeal of decisions – made (by the Reproductive Technology Council (Council) – under the *HRT Act*
- the impact on the *HRT Act* of relevant Commonwealth and State legislation, and aspects of legislation of other jurisdictions which could be incorporated into the *HRT Act*
- the need for the continuation of the functions conferred, on the Council and on the CEO respectively by the *HRT Act*
- management of information / the Reproductive Technology Registers, including:
    - confidentiality of information
    - use of data for research
    - use of data for purposes of national data collection and
    - access to information about donation, genetic parentage and donor conception
    - the Voluntary Register (donor-assisted conception)
- rights to storage of gametes and embryos including:
    - rights upon separation or divorce, or the death or the physical or mental incapacity of an individual, or one or both members of a couple
    - rights of third parties such as subsequent spouses, and the rights of other relatives.
- the storage of gametes, eggs in the process of fertilisation, and embryos (including the duration of storage and procedures for extension of storage periods)
- posthumous collection, storage and use of gametes and embryos, including the consent required, conditions for use, and any impact on other legislation such as the *Human Tissue and Transplant Act 1982, Artificial Conception Act 1985, Births, Deaths and Marriages Registration Act 1998, Administration Act 1903 and Family Provision Act 1972*

- genetic testing of embryos, saviour siblings, mitochondrial donation and gene-editing technology
- research and experimentation on gametes, eggs in the process of fertilisation and embryos. In particular, consideration should be given to the current disparity between the *HRT Act* and relevant Commonwealth legislation and the need to adopt nationally consistent legislation regarding research on excess assisted reproductive technology (ART) human embryos and prohibited practices.

The review of the *Surrogacy Act 2008* is to include the effectiveness and operation of the Act with particular reference to:

- interaction with the *HRT Act*
- the need for provision as to the administration of the *Surrogacy Act* and any functions to be conferred on the Minister, Council, CEO and assisting staff/persons, respectively by this Act
- the effectiveness of the current regime, reporting requirements, powers of inspection and investigation and powers of obtaining information
- the effectiveness of powers of enforcement and disciplinary provisions under the *Surrogacy Act*, the adequacy of offences, penalties and timeframe for bringing proceedings
- the impact on the *Surrogacy Act* of relevant Commonwealth and State legislation and aspects of legislation of other jurisdictions, which could be incorporated into the Act, including consideration of harmonisation of domestic surrogacy legislation
- the need for continued prohibition on commercial surrogacy
- international commercial surrogacy arrangements
- international trade in gametes and embryos
- the effectiveness of the operation of the Council and committees of the Council
- whether there should be a process of review or appeal of decisions made (by Council) under the *Surrogacy Act*.

Foreword

I am very pleased to present my report, in two parts, on the Review of the *Human Reproductive Technology Act 1991* (WA) and the *Surrogacy Act 2008* (WA), 2019. I wish to thank the Honourable Roger Cook for putting his faith in me to lead the review. It is an honour to have been appointed to undertake such a task. It was also a privilege to have consulted with people across Western Australia to inform this report. Their contributions have enabled me to better understand the key issues and complexities faced in Western Australia regarding assisted reproductive technology (ART) and surrogacy. Via written submissions, meetings, and follow-up discussions, I gained an understanding of how current regulation and practices are meeting expectations, and where they are not. The contributions of many were fundamental to developing recommendations to improve the regulation and practice of ART and surrogacy.

Many significant issues were raised as part of this review. It is apparent that society has changed and developed since ART was first practised in Western Australia and the initial regulation enacted. Science and technology have also progressed and continue to do so at a rapid rate. ART is now very much an accepted practice, albeit there remains debate over ethical, social and legal issues raised by new technologies and possibilities. Many complex interests exist, including those of people seeking treatment, those who have accessed treatment, donors of gametes or embryos, women who act as surrogate mothers, and their partners and families. Central to all considerations remains the child that will be born as a result, and its best interests and well-being. When considering the regulation of ART and surrogacy the challenge now is to determine not only *when* to regulate and *where* to draw the line concerning permissible and prohibited activities, but also *how* to regulate in areas that are ever-changing and rapidly advancing. I hope that my recommendations provide an appropriate balance and flexibility to serve into the future.

In relation to the conduct of the review and the writing of the report, I wish to acknowledge and thank Dr Maureen Harris, Manager of the Reproductive Technology Unit, and program manager for the review. I am very grateful for the support she showed me. I am also grateful to all those within the Department of Health who provided very open and honest insights regarding the operation, functions, and challenges faced regarding the regulation of ART. Throughout the review I observed a commitment to seeing positive change. The insights I gained enabled me to make recommendations relevant to improving and developing a better regulatory scheme. I also thank Ms Alyssa Hiscox who assisted me in the initial qualitative analysis of submissions.

Finally, but not least, I am grateful to all the Members of Parliament and staffers who attended the Parliamentary briefings and/or followed the progress of the review on behalf of their constituents. As the report is passed to the Minister, and then to the parliament, it is with hope that the contents herein will find support and lead to positive change.

Sonia Allan

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Chapter 1

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Executive Summary

Chapter 1

Chapter 1 introduces Part 2 of the report on the review of the *Human Reproductive Technology Act 1991* (WA) and the *Surrogacy Act* (WA). It notes that in this second part of the report, the focus is upon the terms of reference relevant to surrogacy, as governed in Western Australia by the *Surrogacy Act 2008* (WA), as well as a number of other matters relevant to both surrogacy and assisted reproductive technology (ART). It then details the reasons for the current review, the scope of the review, the principles upon which the review is predicated. Details are again given regarding the process of consultation. Chapter 1 concludes by recommending review of the regulation of surrogacy every five years.

Chapter 2

Chapter 2 details the regulatory system in Western Australia. It examines the call for harmonisation of laws across the country and what has been done to date to achieve more uniform laws. It also notes a number of reviews that have been conducted at Commonwealth and State levels. The chapter then provides an overview of the law in Western Australia and other jurisdictions and compares responses to surrogacy. This informs discussion in the subsequent chapters. It also informs the recommendations to improve the regulation of surrogacy in Western Australia.

Chapter 3

Chapter 3 examines two particular issues which were raised with the review that limit access to assisted reproductive technology (ART) and surrogacy. They involve limitations on access to ART:

1. access to ART by women who face impending infertility or who cannot conceive, carry, or bear a child, or who do not already have a surrogacy arrangement in place
2. and surrogacy based on relationship status, sex, sexual orientation, gender identity and/or intersex status.

The discussion is relevant to the terms of reference requiring consideration of the interaction of the *Surrogacy Act 2008* (WA) with the *HRT Act 1991* (WA) (HRT Act); the impact on the *Surrogacy Act* of relevant Commonwealth and State legislation and aspects of legislation of other jurisdictions, which could be incorporated into the Act, including consideration of harmonisation of domestic surrogacy legislation. Discussion also touches on the functions conferred upon the Reproductive Technology Council (RTC) and the operation and effectiveness of the Council.

Chapter 4

Chapter 4 examines requirements for:

- pre-approval of the surrogacy agreement by the RTC
- counselling
- legal advice
- a psychological evaluation by a clinical psychologist and provision of a report for each of the parties to a surrogacy arrangement
- a medical evaluation and report for each of the parties to be submitted to the RTC
- donors of gametes or embryos to be a party to the surrogacy arrangement and also subject to the aforementioned requirements.

Significant recommendations for change are made to address the need to modernise and streamline requirements on people who wish to enter into a lawful surrogacy arrangement, including that only necessary obligations be imposed on the parties. Barriers to accessing a lawful surrogacy arrangement are found to contribute to people seeking surrogacy arrangements abroad or interstate. The chapter discusses issues, raised during the review in relation to the role and functions of the RTC regarding pre-approval of surrogacy arrangements and recommends an alternative process that will better support parties to a lawful surrogacy arrangement and uphold the interests of any child to be born as a result as paramount. It also focuses on harmonisation of laws with other states that provide for counselling, legal advice, and an independent assessment prior to transfer of legal parentage.

Chapter 5

Chapter 5 considers matters that may be addressed in the pre-surrogacy arrangement counselling. In particular, this chapter examines issues raised during the review regarding how to operationalise the principle that the welfare of the child is to be the paramount consideration when deciding whether to provide an artificial fertilisation procedure in connection with a surrogacy arrangement. It notes that in Western Australia references to the 'best interests' of children and the paramountcy of the welfare of the child are not defined in terms of how such considerations should be operationalised.

The chapter highlights that the welfare of the child provision (also referred to as the 'best-interests' principle), is often interpreted in practice as requiring consideration of whether any child born as a result of the provision of ART or a surrogacy arrangement might be at *significant* risk of physical harms, such as physical and/or sexual abuse, neglect, family violence, and/or drug or alcohol problems; and/or psychological harms, such as being at risk of exposure to any of the above forms of violence, neglect or abuse, or where other family factors, such as mental illness or addiction, may affect a child's well-being. Different approaches to screening are examined, and recommendations made that would enable a uniform approach and clear guidelines to counsellors/clinics/medical directors regarding how to manage prospective patients for whom they have serious concerns regarding providing treatment.

Chapter 6

Chapter 6 examines several more matters relevant to the terms of reference which require consideration of the impact on the *Surrogacy Act* of relevant Commonwealth and State legislation and aspects of legislation of other jurisdictions, which could be incorporated into the Act, including consideration of harmonisation of domestic surrogacy legislation. It considers age requirements for intended parent(s) and surrogate mothers (which differ across the country), the requirement for surrogate mothers to have had a previous live birth (consistent with Tasmania and Victoria; not required in other states), and traditional and gestational surrogacy being permitted (similar to all states except the Australian Capital Territory and Victoria).

Chapter 7

Chapter 7 explores the current policy position taken by both Western Australia and across other states and territories in Australia in relation to altruistic versus commercial surrogacy, and – as per the terms of reference – addresses the question of whether there is a need for a continued prohibition of commercial surrogacy in Western Australia.

Chapter 8

Chapter 8 discusses other matters that were raised with the review relevant to surrogacy arrangements in Western Australia, that are again relevant to the terms of reference to the review including:

- advertising regarding altruistic surrogacy arrangements
- agents and brokerage
- unenforceability of surrogacy contracts, and exceptions
- information and support.

Chapter 9

This chapter considers issues concerning international commercial surrogacy arrangements. It provides a general overview of the regulation of surrogacy across the world before considering submissions by Western Australians who engaged in international commercial surrogacy as well as other submissions to the review.

The chapter also looks at:

- issues relevant to commercial surrogacy arrangements abroad and the jurisdictions in which they occur
- laws relating to residency that have been implemented to prevent foreigners from travelling to certain countries
- the issuance of passports and granting of citizenship by descent in Australia
- extraterritorial offences
- legal parentage of children born as a result of international commercial surrogacy and related matters.

The chapter is particularly focussed on matters relevant to the Terms of Reference that require consideration of international commercial surrogacy, the impact of Commonwealth and other state laws, and issues regarding the harmonisation of laws across Australia.

Chapter 10

Chapter 10 examines further matters relevant to assisted reproductive technology (ART) and surrogacy that fell within the terms of reference and were raised with the review. These include:

- State legislation: powers, enforcement and disciplinary provisions
- State legislation: recognition of birth registration and equivalent laws
- Commonwealth legislation: Medicare
- Commonwealth and State legislation: international trade in gametes and embryos and anonymous donations.

It is noted that some matters are not in the scope of this review to address. Recommendations are made concerning further consideration and consultation with Commonwealth and state and territory governments as required.

Findings

Chapter 3 – Particular issues limiting access to surrogacy

1. The Western Australian *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) prevent women with impending infertility from accessing ART or surrogacy.
2. The Western Australian *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) prevent women with impending infertility or who are unable to carry or bear a child from accessing ART or surrogacy unless they have an existing approved surrogacy arrangement in place.
3. It is unacceptable to leave a woman who is faced with impending infertility/inability to carry and/or bear children unable to access ART in order to preserve her fertility.
4. It is unacceptable to require that a woman who is faced with infertility or an inability to carry or bear a child to have a surrogacy arrangement in place, and have met all the current pre-requisites for such an arrangement, before she is able to undergo ART. This fails to recognise that a woman may need to undergo ART at a stage at which she may be too young, too sick, not ready, or not in the position to have entered into a suitable surrogacy arrangement or to have met all the current requirements for counselling, advice, reporting, and approvals.
5. The Western Australian *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) discriminate against people on the grounds of their sex, relationship status, gender identity, intersex status, or sexual orientation. This is contrary to Commonwealth law.
6. It is unacceptable to discriminate against people on the grounds of their sex, relationship status, gender identity, intersex status, or sexual orientation. To do so is contrary to Commonwealth law.
7. Current provisions in the *HRT Act* and the Surrogacy Directions 2009 (WA) impede the operation and effectiveness of the *Surrogacy Act*, preventing people from entering into lawful surrogacy arrangements in Western Australia due to poor wording of the legislation and discriminatory provisions.
8. A Bill tabled in the Western Australian Parliament in 2018 if enacted would address some of the identified issues that require immediate attention. The proposed amendments are an important first step in the law reform process. Further legislative change will be needed in the future as the Bill:
    - does not resolve issues of access to ART for women who may need a surrogacy arrangement in the future *but do not yet have one in place*;
    - does not remove discrimination related to gender identity or intersex status;
    - is an interim measure (albeit an important one) that will insert provisions into an outdated Act that this report recommends should be repealed and replaced.
9. Legislative change and careful consideration of drafting is needed to ensure the regulation of ART and surrogacy reflects contemporary social values and standards.

Chapter 4 – RTC pre-approval, counselling and legal advice

1. The existing surrogacy process should be modernised and streamlined, with only necessary obligations imposed on parties to the arrangement.
2. Issues raised during the review in relation to the role and functions of the Reproductive Technology Council (RTC) regarding pre-approval of surrogacy arrangements were consistent with those raised in relation to those discussed in Part 1 of the report regarding the operation and effectiveness of the RTC. Submissions regarding surrogacy did not present reason to form an alternative view.
3. Western Australia should adopt similar provisions to those in New South Wales which require an independent counsellor's report to the Court for each of the parties to the agreement and their partners (if any) that focuses on (among other things) whether transfer of legal parentage is in the best interests of the child, and whether any consent given by the birth parent(s) to the parentage order is informed consent, freely and voluntarily given.[1]
4. Current legislative requirements for pre-surrogacy psychological and medical assessments and reports to be provided to the RTC as part of a pre-approval process were misplaced and added to the burden and cost of surrogacy arrangements. They do not provide additional safeguards for, nor serve the best interests of children. The layers of requirements were found to discourage local surrogacy and had led people to seek surrogacy interstate or overseas.
5. Requirements for implications counselling and independent legal advice regarding surrogacy arrangements are essential in supporting parties to the surrogacy arrangement and ensuring the paramountcy of the best interests of any child born as a result and should be maintained.
6. There is a need for the legislation, regulations and/or directions to stipulate that implications counselling be undertaken individually (with independent qualified counsellors) and at least once jointly prior to entering into the surrogacy arrangement.
7. It would be beneficial for all parties to a surrogacy arrangement and to the welfare of the child, to mandate a minimum of one counselling session per trimester that a pregnancy continues and one counselling session post-miscarriage or birth for each of the parties. Opportunities for further individual and joint counselling as provided for in Directions 12 and 13 should also continue to be available throughout the pregnancy and after birth.
8. Regulation 4 of the Surrogacy Regulations 2009 (WA) provides extensively for what should be discussed during implications counselling. The requirements are appropriately focussed and are not about convincing a woman to relinquish a child. Rather, implications counselling is focussed on discussing with each party who is considering entering into a surrogacy arrangement, before pregnancy has occurred, the matters that may arise during the pregnancy and after the birth, and how they plan to deal with such matters.
9. The focus of required post-birth counselling is to 'explain the effects of transferral of legal parentage' and is not intended to compel such transfer.

1 *Surrogacy Act 2010* (NSW) s 17.

10. Concern that counsellors are currently limited to only 'approved counsellors' who are very few and who work for fertility clinics would be addressed by implementing recommendations in Part 1 that include that provisions referring to 'approved counsellors' be repealed or amended as required, and that 'qualified counsellors' be defined as 'qualified mental health professionals'.
11. Restricting counselling to 'approved counsellors' may also complicate or impede arrangements when the surrogate lives outside Western Australia. The Surrogacy Regulations should be amended to allow the provision of counselling by a 'qualified mental health professional'.
12. Guidance regarding the expected costs of required counselling and independent legal advice in Western Australia should be provided by the Minister/DG/Department.
13. Information regarding what should be covered when independent legal advice is sought, as well as sample templates for written surrogacy agreements that meet the requirements of the Western Australian legislation should be made available by the Minister/DG/Department.
14. Dispensation provisions for certain requirements that must be met prior to the transfer of legal parentage are appropriate and may only be applied by the Court in limited circumstances in which the making of parentage orders is considered to be in the best interests of the child.
15. Current provisions in the *Surrogacy Act 2008* (WA) that require donors of gametes or embryos to sign the surrogacy agreement and meet all counselling and legal advice requirements in relation to that agreement, serve as yet another barrier to altruistic surrogacy arrangements in Western Australia. Provided there is consent by a donor of gametes or embryos that such a donation may be used in a surrogacy arrangement, such inclusion was seen as unnecessary and should be repealed. It was noted that Western Australia provides for access to information by children born as a result of donor conception about their genetic heritage.
16. The consent and counselling process for gamete and embryo donation in Western Australia should include the prospect of such gametes or embryos being used in a surrogate.

Chapter 5 – Paramountcy of the welfare of the child and screening/ risk assessment

1. Many people call for some form of consistent assessment (screening) of people wishing to access ART and surrogacy regarding any risks of physical and/or psychological harm that may exist for a child who may be born as a result of providing treatment. Such screening is supported by 1) the paramountcy of the welfare of the child principle, and 2) the involvement of third parties such as the State and health professionals in the provision of ART and surrogacy.
2. Counsellors and clinicians have called for clarity and uniformity regarding the circumstances in which they may refuse ART or surrogacy treatment and have also sought guidance on how to manage prospective patients about whom they have serious concerns regarding providing treatment.

3. Consideration of the various approaches to, and/or recommendations about, screening found the most suitable approach to be that taken in the United Kingdom, where guidelines stipulate the requirements and process for conducting a child welfare check during counselling pre-treatment and steps that may be taken when there is a concern. Western Australia would benefit from adopting similar guidelines and processes that would enable uniform application of the welfare of the child principle.
4. In addition, it was found that there should be explicit options and processes open to clinicians and/or counsellors to seek support and advice from experts, agencies or authorities, as well as the ability to obtain further information via requesting a criminal record, child protection order or Australian National Child Offender Register (ANCOR) checks if needed in individual cases.
5. The guidelines should also require referral of the applicant to appropriate support services if needed (for example drug, alcohol, family violence, mental health services, or otherwise).
6. The focus of 'screening' applicants should always be upon the welfare of any child to be born as a result of ART and surrogacy and decisions should not be premised upon a social or moral judgement of the applicants. Criteria used should be evidence based and directly related to the risk of harm to a child that may be born as a result of a surrogacy arrangement.
7. Provision should be made to create an offence in relation to applicant(s) providing false information during the assessment. The requirements and rights of review should be clearly explained to applicants during legal advice sessions.

Chapter 6

Age

Discussion of age requirements is had at 6.2. It is noted that the designated age of 25 reflects the UN notion of youth. However, UNESCO notes that this is for statistical consistency and it is recognised that *'youth is a more fluid category than a fixed age-group'*. It is important to recognise, therefore, that there is no one age that indicates a person will or won't be mature enough to understand the sociological and psychological implications of entering into a surrogacy arrangement. The review received calls for some flexibility regarding age requirements.

Requirement for previous live birth

1. Western Australia's legislation includes provision that requires an intending surrogate mother to have previously given birth to a live child.
2. This provision was included in the legislation based upon the view that the woman will understand what it is like to be pregnant and therefore assess her capacity to carry, bear and then relinquish a child.
3. There are also views, however, that such a requirement is too prescriptive and fails to recognise that individuals may vary in whether having had a previous pregnancy and live birth is indicative of a person's ability to engage as a surrogate mother.
4. While some states, including Western Australia, Victoria and Tasmania, have included the requirement of a previous live birth as a legislative requirement, each of these states also allows for dispensation of this requirement in exceptional circumstances.

5. Other states emphasise that this is a matter for exploration during pre-surrogacy counselling.
6. The review received one submission on the matter, which saw the current provision as serving a protective function for the surrogate mother.
7. Consideration of several state reviews and submissions found views that having had a previous live birth did not guarantee the way that a planned pregnancy would progress or the outcome in terms of relinquishment. The latter is the reason for laws that allow a period of time in which the birth mother may change her mind.
8. The review found the states and the Australian Capital Territory were equally split on whether or not on they included a legislative requirement for the surrogate mother to have had a prior live birth and thus there was no clear path to deciding which way to harmonise the law.
9. The current law in Western Australia requiring a surrogate mother to have had a previous live birth was found to be suitable, noting the law also provides for an exception to this requirement in exceptional circumstances. It is preferable to examine such exceptions prior to the surrogacy arrangement (during the required pre-surrogacy implications counselling) and not at the time of application for transfer of legal parentage.
10. Required certification from counselling should include any finding that it was suitable for a woman who had not previously had a live birth to proceed in the surrogacy arrangement.

Genetic Connection

1. Personal circumstances and medical requirements will influence whether a traditional or gestational surrogacy arrangement is entered into, and whether there is a genetic connection between the intended parent(s) and the child born as a result of such an arrangement.
2. The role of counsellors and medical professionals is fundamental to ensuring an appropriate surrogacy arrangement is put into place having considered both the sociological and psychological implications of such an arrangement, the medical needs of the parties, and that the best interests of any child(ren) who will be born as a result are to be considered paramount.
3. The law in Western Australia is consistent with that of most other states of Australia in relation to allowing both gestational and traditional surrogacy to occur, and not requiring a genetic connection between the intended parent(s) and child. Noting all such law emphasises the importance of counselling, assessment, and legal advice.
4. Changes to the *Surrogacy Act 2008* (WA) in relation to the availability of traditional and gestational surrogacy are not required.
5. Changes to the *Surrogacy Act 2008* (WA) requiring a genetic connection between the intended parent(s) and the child(ren) that will be born as a result of a surrogacy arrangement are not required.

Chapter 7 – Altruistic and commercial surrogacy

1. While the review received submissions calling for a complete ban on all forms of surrogacy, it was not within the terms of reference to consider prohibiting all forms of surrogacy in Western Australia. Rather, the terms of reference required consideration of the continued prohibition of commercial surrogacy.
2. Prohibitions on commercial surrogacy reflect the public policy position that commercial surrogacy should be discouraged or deterred on the basis that it commodifies the child and the surrogate mother and risks the exploitation of poor families for the benefit of rich ones.
3. The majority of submissions received supported a continuation of laws that permit altruistic surrogacy and prohibit commercial surrogacy. Such submissions were consistent with the legal acceptance of altruistic surrogacy arrangements that enable family formation where the intended parent(s) suffer significant medical issues or otherwise may not be able to have children.
4. While it is recognised that altruistic arrangements are not without risk, the recognition of domestic altruistic surrogacy arrangements provides legal certainty in relation to when such arrangements may occur and ensures the right of people born as a result to access identifying information about their birth mother and any gamete donors. A parentage order can only be made if the court is satisfied that it is in the best interests of the child.
5. The reimbursement for costs provisions for altruistic surrogacy were comparable with New South Wales and Queensland. Clearer information needs to be provided to people concerning what may be reimbursed.
6. While the review was presented with a number of cases in which people had engaged in commercial surrogacy arrangements abroad, this was frequently reported to have been a consequence of the law and associated practices preventing their access to altruistic arrangements in Western Australia.
7. Arguments in favour of introducing commercial surrogacy often focus on increasing the number of women available for surrogacy but fail to recognise issues concerning the commodification of women's reproductive capacity and/or children, the risk of exploitation and/or the violation of human rights norms and standards that may exist in such arrangements.
8. Several participants in the review who had entered into altruistic arrangements objected to the introduction of commercial surrogacy in Western Australia (and beyond) stating they perceived it would change the nature of the special relationship between the intended parents and the surrogate mother, and impact negatively upon any child(ren) born as a result.
9. Concerns were also expressed about increasing the cost of surrogacy in Western Australia via the introduction of commercial surrogacy, rather than addressing accessibility to altruistic arrangements.
10. It was submitted that placing caps on the professional fees associated with altruistic surrogacy, such as those of lawyers, counsellors, and clinical treatment may assist with increasing the accessibility of altruistic arrangements.
11. Removing prohibitions on commercial surrogacy would not be in the best interests of children.

Chapter 8 – Advertising

1. Western Australian law does not impose restrictions on advertising for a surrogacy arrangement by prospective arranged parents or a prospective birth mother, provided this is not for a commercial surrogacy arrangement and is consistent with the law permitting altruistic arrangements.
2. Public awareness that such advertising is permitted was found to be limited.
3. Challenges were found to exist when intending parent(s) and/or women who are willing to act as altruistic surrogates considered advertising themselves either publicly or on online forums in relation to privacy, contact with unknown parties and personal safety.
4. Clinics in Western Australia are able to accept expressions of interest from women who are willing to volunteer to be an altruistic surrogate mother.
5. Clinics in Western Australia should also be able to advertise for altruistic surrogates. This would be consistent with their ability to advertise for altruistic donors of gametes and embryos, may increase the number of known women who are willing to volunteer to be an altruistic surrogate mother, and raise community awareness of Western Australian surrogacy laws.
6. Clinics should not be able to charge a fee to either intending parent(s) or women who are willing to volunteer to act as an altruistic surrogate mother either in relation to such advertising or for subsequently introducing the parties.

Agents and brokers

1. The current Western Australian law prohibits the introduction of parties to a surrogacy arrangement for valuable consideration.
2. The current Western Australian law prohibits providing a service knowing it is to facilitate a surrogacy arrangement that is for reward (except if the service is a health service provided to the birth mother after she has become pregnant).
3. The Western Australian law is consistent with laws in New South Wales, Queensland, Tasmania, and arguably South Australia (although subject to interpretation) that prohibit commercial brokerage or introductory services and make it an offence for a person to receive a payment, reward, valuable consideration, or other material benefit or advantage in relation to another person agreeing to enter into or entering into a surrogacy arrangement.
4. The review found that it would not be suitable to allow the establishment of ‘agencies’, ‘agents’ or any other kind of ‘brokerage’ or introductory service between intended parents and surrogates that involves the payment of a reward or valuable consideration. The reason for this is to prevent assisted reproduction clinics or other organisations profiting from assisting to arrange altruistic surrogacy arrangements, and thus transforming an altruistic arrangement into a commercial surrogacy arrangement.
5. The law, regulations, and/or directions should be clear that such prohibitions do not extend to the provision of lawful services in relation to surrogacy arrangements nor prevent *free and voluntary* support groups from operating and enabling people to get in touch with each other.

Enforceability of surrogacy arrangements

1. In Western Australia an altruistic surrogacy arrangement is considered legal but is unenforceable.
2. The policy position that lies behind such law was identified to be *'to provide that a contract [is] enforceable detracts from the principle that the interests of the child rather than the terms of the contract should be what is paramount in deciding where the child should live, and contracts for personal services are not enforceable by way of specific performance.'*
3. There are two exceptions to the above rule:
    a. the law in Western Australia provides that the reimbursement of the reasonable expenses associated with the pregnancy or the birth; or any assessment or expert advice in connection with the arrangement is enforceable
    b. the Court is not prevented from making a parentage order without the birth mother's consent, if that order is in the best interests of the child and the birth mother is not the child's genetic parent and at least one arranged parent is the child's genetic parent.
4. The review received submissions that reflected a lack of knowledge that the second exception exists and/or its purposes.
5. In this regard, the law was found to be balanced, and nuanced, in a way that allowed the Court to consider the best interests of the child in such circumstances, but there was a clear need for information and education about the law to be provided to prospective surrogate mother and intending parent(s) about the law.

Information and support

1. There is a significant need to improve the availability and accessibility of information and support to the public and those who provide lawful services in relation to lawful surrogacy arrangements in Western Australia.
2. This should include, but is not limited to, clear and accessible information about
    - the law
    - what is expected of clinics, counsellors and lawyers in relation to the provision of services, support, information, and advice
    - the expected and reasonable costs of a surrogacy arrangement in Western Australia.
3. To achieve this the Department of Health and relevant government units and staff who are responsible for supporting the Act need to be adequately resourced, provided training, and supported in the commissioning and/or development of additional resources that address the short-comings identified in information provision in this report and submissions made to the review.
4. Information provided by the Government should also inform people of voluntary community support groups available to people facing issues related to infertility and inability to carry or bear a child due to their social or medical circumstances.

Chapter 9 – International commercial surrogacy

1. Despite prohibitions on commercial surrogacy and extraterritorial effect of laws in some jurisdictions, some Australians, including Western Australians, travel abroad to engage in commercial surrogacy. Others report that they do not wish to enter into a commercial surrogacy arrangement. Such people may seek altruistic arrangements in other jurisdictions, while others are hoping Western Australian legislation will be amended so they may enter into a lawful altruistic arrangement in their home state.
2. The impact of Commonwealth citizenship and passport laws, lack of uniformity of extraterritorial prohibitions across the states, and the current Western Australian law which serves to exclude certain people from accessing altruistic surrogacy in Western Australia may lead *some* people who are seeking surrogacy to travel to other jurisdictions where:
    - they are able to access surrogacy when they cannot in Western Australia
    - the commercial nature of surrogacy leads to greater availability of women willing to act as surrogate mothers
    - there are significantly fewer requirements placed on the intending parent(s) (or scrutiny) than in Western Australia (or other states of Australia or the Australian Capital Territory)
    - there is placement of the intended parent(s) names on birth-certificates (often whether or not there is a genetic relationship with the child)
    - contracts are enforceable (again with little or no judicial scrutiny of questions concerning the welfare of the child)
    - there is the ability to return to Western Australia with the child(ren) resulting from the surrogacy and apply for citizenship by descent and a passport for the child(ren), or an extended visa; and having no further requirements for scrutiny of the arrangement or to appear before a Court.
3. It is misplaced to focus only on the issue of whether legal parentage should be granted once such people are in Western Australia with the child(ren) who were born as a result. Consideration must be given to what:
    - has led the intended parent(s) to engage in commercial arrangements overseas
    - aspects of the regulation of surrogacy in Western Australia need amendment in order to address this
    - has happened at a Commonwealth level to allow people to bring child(ren) back into the country following a commercial surrogacy arrangement.
4. The recommendations throughout this report, if implemented, will serve to increase access to altruistic surrogacy in Western Australia. In turn, such changes may serve to reduce the number of people from Western Australia who seek international commercial surrogacy.
5. Introducing provisions that provide for extraterritorial application of the law, consistent with New South Wales, Queensland and the Australian Capital Territory, would support the public policy position taken against commercial surrogacy and establish at law before people enter into commercial surrogacy arrangements abroad and/or engage in other prohibited practices, that they would be committing an offence. It would also serve to harmonise Western Australia's law to a greater degree with those jurisdictions.

6. Discussion should be had with the Commonwealth Government and other states and territories concerning the issue of the granting of citizenship, passports, and/or long-term visas to children born as a result of commercial surrogacy arrangements given the specific complexities that arise in relation to ART, donor conception, and surrogacy, and the strong public policy position against commercial surrogacy taken in Australia. The Commonwealth, State and Territory governments have called for 'greater harmonisation of laws'. This may include "consideration of whether Commonwealth citizenship laws should be harmonised with all the other laws of this country".[2]

7. Discussion with the Commonwealth should also be had about the provision of uniform information to the public concerning Commonwealth laws that *'comprehensively criminalise. human trafficking, slavery and slavery-like practices, including servitude and forced labour'* noting the Australian Government's response to its House of Representatives Standing Committee inquiry into surrogacy stated that *'these offences have extended geographical jurisdiction and could apply to international commercial surrogacy arrangements that involve the exploitation of the surrogate mother or the child'*.

8. The Western Australian Government should consider whether to require *all* applicant parent(s) who are granted entry into Australia with a baby born as a result of an overseas surrogacy arrangement with whom they intend to reside in Western Australia, be issued with notice that they *must* appear before the Family Court of Western Australia within a certain time (specified) to allow the Court to consider whether the granting of *parenting orders* is in the best interests of the child. This would:

    - avoid the current situation of people avoiding the courts altogether because they do not wish to incur further costs or scrutiny of the arrangement
    - allow an appropriate order to be made to secure the child's interests
    - serve as another factor that may discourage people from engaging in such activity due to additional hurdles, scrutiny, and costs.

9. The State Government should monitor ongoing discussion and outcomes concerning the work of The Hague Conference on Private International Law and the Australian Law Reform Commission (ALRC) on matters relevant to legal parentage.

10. As the reviewer of the Western Australian legislation I did not find agreement with the suggestion by the Family Law Council in 2013 (endorsed in the South Australian Law Reform Institute's (SALRI) review report) that the most appropriate way to protect the interests of children born to Australians of overseas surrogacy arrangements would be to enact a Commonwealth law to provide the Family Court with *'a discretionary power to transfer parentage from the surrogate mother to the intended parents where certain 'safeguards' or criteria have been satisfied.'*[3] The assumption that this would offer a *'practical solution'* that would allow recognition of *'properly regulated international surrogacy jurisdictions'*[4] appears to lack foundation noting the many issues of concern that are discussed in this report relating to jurisdictions that permit commercial surrogacy. It begs the question of what criteria would be used to determine whether a jurisdiction that permits commercial surrogacy is 'properly regulated'? Most importantly, it fails to recognise that such action would conflict with, and potentially undermine, the

2 *Farnell v Chanbua FCWA [2016] 17*. per Thackray J.

3 See summary of laws around the globe above at section 9.2 of this report.

4 David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy:*

strong public policy stance taken against commercial surrogacy within the Western Australian law (and all states and the Australian Capital Territory).

11. Commercial surrogacy is prohibited in Western Australia and the findings of this review do not support changing that. Altruistic surrogacy is permitted but only when criteria are met that are intended to ensure the psychological and sociological well-being of all parties involved, and that it is undertaken in a manner that sees the best interests of children as paramount. It would not be appropriate for the State to then endorse practices elsewhere that do not meet the standards agreed upon for citizens within the State or by those who choose to uphold the law rather than circumvent or breach it.

Chapter 10
State legislation – Powers of enforcement and disciplinary provisions

1. Current proposals before parliament to amend the *HRT Act* would provide the Reproductive Technology Council (RTC) with powers of enforcement in relation to the *Surrogacy Act 2008* (WA) that are consistent with powers under the current *HRT Act* as to its role regarding ART.
2. While conferring such powers in the short term may provide such consistency, the recommendations of this report are for:
    - a co-regulatory approach to governing ART and surrogacy which emphasises cooperation, mutual respect, and oversight that is responsive and flexible
    - the abolition of the Reproductive Technology Council (RTC) and the establishment of a new advisory body. This report has recommended that the 'advisory body' would not have the role of 'regulator', 'enforcer' or adviser to the Minister for Health or DG of the Department of Health on matters relating to the administration or enforcement of the Act. Rather it is recommended in this report that it would focus on advising the Minister for Health in relation to ethical, social and legal issues related to ART and surrogacy

    It was found that in the future such powers should lie with the Minister responsible for the Act and the relevant department and should complement the system of regulation that has been proposed to the extent that such powers of enforcement would enable egregious behaviour to be investigated and addressed if required.

State legislation – Recognition of birth registration and other equivalent laws

1. That further consideration, research and consultation is required by the Minister (Department of Health) regarding:
    - whether 'reciprocal arrangements' directed at state-based births, deaths, and marriages registers and/or courts responsible for the transfer of parentage in relation to lawful altruistic surrogacy arrangements, should be introduced,
    - the extent to which such reciprocal arrangements should apply

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A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA) (South Australian Law Reform Institute, Adelaide, 2018), p 303 [26.3.12].

- what should occur should one state change its laws in a manner that was not consistent with the laws of Western Australia.

Commonwealth legislation – Medicare

1. That Medicare funding related to ART for surrogacy arrangements would reduce the costs and support altruistic surrogacy arrangements in Western Australia. They may also serve to support people in choosing not to travel to other jurisdictions to engage in commercial surrogacy.
2. Medicare funding, however, is a matter for the Commonwealth.
3. In 1999 the Western Australian Select Committee review of the *HRT Act* it was recommended that the Western Australian Minister for Health approach the Commonwealth Government with a view to allowing in vitro fertilisation (IVF) surrogacy treatments to be considered by Medicare as any other IVF treatment'. I concur with this view and as such recommend the same.

Commonwealth legislation – International trade in gametes and embryos and anonymous donation

1. The review found that it is consistent with the law to impose restrictions on the import and export of human reproductive material and to promote compliance with the requirements of the *HRT Act 1991* (WA) and *Surrogacy Act 2008* (WA).
2. On rare occasion there may be a need to exercise some discretion for situations in which there are exceptional circumstances, in a way that is consistent with Australian law. Such circumstances would need to be considered on a case-by-case basis and approval sought from the Minister for Health or DG of the Department or delegate.
3. Decisions should take into account the welfare of any child who may be born as a result of ART and/or surrogacy, as well as the welfare of participants. It would also be relevant to consider the interests or impact of any decision on existing children within the applicant family.

Recommendations

Chapter 3 – Particular issues limiting access to surrogacy:

1. Noting the recommendation in Part 1 of the report that the *HRT Act* be repealed and that a new Act be drafted, the *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) and related directions and regulations should be amended to provide for access to IVF procedures in circumstances in which a patient faces the impending loss of, or significant impairment to, their fertility or the ability to carry or bear a child in addition to providing for such access by person(s) who were already infertile or unable to carry or bear a child.
2. Noting the recommendation in Part 1 of the report that the *HRT Act* be repealed and that a new Act be drafted, that the *HRT Act 1991* (WA), the *Surrogacy Act 2008* (WA) and related directions and regulations be amended to remove any requirement that a person who needs to preserve their fertility for future treatment in which a surrogacy arrangement may be required, must already have a surrogacy agreement in place before being able to access ART. The *HRT Act 1991* (WA), s23(1)l(iii) and the Surrogacy Directions 2009, Direction 7 requirements for an RTC-approved surrogacy arrangement prior to a person undergoing a fertilisation procedure, should be repealed.
3. That discriminatory provisions within the *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) that prevent access to ART or surrogacy on the basis of sex, relationship status, gender identity, intersex status, or sexual orientation, be repealed and amended as a matter of priority.
4. That the Minister for Health should progress interim measures as far as is possible to address issues raised in the review that require urgent attention, recognising that further reform is required as a matter of priority.
5. That the wording of relevant ART and surrogacy legislation and associated regulations and directions in Western Australia be drafted or amended as required to refer to an ‘eligible person or couple’ (rather than ‘man’ ‘men’ ‘woman’ or ‘women’) which should then further be defined to include ‘a person or couple who due to medical or social reasons are unlikely to be able to conceive, carry or bear a child, unlikely to survive a pregnancy or birth, or likely to conceive a child affected by a genetic condition or disorder or that will be unlikely to survive the pregnancy or birth or whose health would be significantly affected by the pregnancy or birth’. A couple should include ‘two people who are married or in a de facto relationship with each other’.
6. That the Western Australian Government consult the Commonwealth concerning issues related to transgender pregnancy, which may involve access to ART by a man who has a female reproductive tract, to determine the status of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth), s 19(2) which provides that a person commits an offence if the person intentionally places a human embryo in the body of a human, other than in a woman’s reproductive tract and any implications relevant to the amendments to the *Sex Discrimination Act 1984* (Cth) and/or access to ART or surrogacy.

Chapter 4 – RTC pre-approval, counselling and legal advice

7. The existing surrogacy process should be modernised and streamlined, including that only necessary obligations should be imposed on the parties to the arrangement.
8. Noting recommendation 5 in Part 1 of this report to abolish the current Reproductive Technology Council (RTC) and establish an advisory body, the role of which would be neither that of a 'regulatory' nor 'approval body', and on the basis of the below recommendations, the requirements for RTC pre-approval of a surrogacy arrangement and all references to such approval should be repealed. (Repeal *Surrogacy Act 2008* (WA) ss 15 and 16; Surrogacy Regulations, Reg 5; Surrogacy Directions, Direction 7).
9. That current legislative requirements for pre-surrogacy psychological and medical assessments and reports be repealed. (Noting more suitable mechanisms to protect the best interests of children and to support the parties to a surrogacy arrangement are recommended below).
10. Requirements for counselling and legal advice prior to surrogacy arrangements taking place are essential and should be maintained for the intending parent(s), the surrogate mother and her partner (if any). Such requirements should not apply to donors of gametes or embryos.
11. Current provisions in the *Surrogacy Act 2008* (WA) that require donors of gametes or embryos to sign the surrogacy agreement and meet all counselling and legal advice requirements in relation to that agreement should be repealed.
12. That the consent and counselling process for gamete and embryo donation in Western Australia should include the prospect of such gametes or embryos being used in a surrogacy arrangement.
13. (Relevant also to Chapters 5 and 6).

    That Section 17 of the *Surrogacy Act 2008* (WA) be amended to provide:

> **17. Requirements for surrogacy arrangement**
>
> A surrogacy arrangement may proceed only on the basis that:
>
> a) the birth mother has previously given birth to a live child and has reached 25 years of age or if younger is assessed by a qualified counsellor to be an adult of sufficient maturity, and
>
> b) that the intended parent(s) have reached 25 years of age or if one or both is/are younger that they are assessed by a qualified counsellor to be an adult of sufficient maturity, and
>
> c) the arrangement is set out in a written agreement signed by –
>
> i) each of the intended parents; and
>
> ii) the birth mother and her husband or de facto partner (if any); (**the *parties***) and
>
> d) each of the parties referred receives independent legal advice about the legal requirements for entering into a surrogacy arrangement and the effect of the surrogacy arrangement;

e) each of the parties undertakes in-person counselling sessions with a qualified counsellor

i) **prior to the arrangement taking place** about

1. the implications of the surrogacy arrangement; and
2. the best interests and welfare of any child that will be born as a result;

ii) **in circumstances in which a pregnancy has been achieved** at least one counselling session in each trimester that the pregnancy continues; and

iii) **post-miscarriage or birth of a child(ren)** whether stillborn or live at least one counselling session with a qualified counsellor about the effects of a legal parentage order before consenting to the parentage order.

Section 17A

a) When undertaking the counselling required pursuant to section 17

i) the intending surrogate mother and her partner (if any) must engage in such counselling with a qualified counsellor of her/their choice;

ii) the intending parent(s) must engage in counselling with a different qualified counsellor of their choice to that of the surrogate mother and her partner (if any);

iii) the parties to the surrogacy arrangement must engage in at least one joint session concerning the implications of the intended arrangement with all parties agreeing as to the qualified counsellor they will engage.

14. Regulation 4 of the Surrogacy Regulations 2009 (WA) – which provides for what should be discussed during implications counselling and for a certificate to be issued at the end of counselling – should be maintained.
15. That opportunities for individual and joint counselling provided for in Surrogacy Directions 12 and 13 continue to be available throughout the pregnancy and after birth to each of the parties to a surrogacy arrangement *in addition* to the above required counselling.
16. That the *Surrogacy Act 2008* (WA) be amended to insert a requirement that a report to the Court about the application for a parentage order be prepared by an 'independent counsellor' (post-birth) which is to include whether the proposed parentage order is in the best interests of the child and reasons for that opinion, including reference to:
    - each affected party's understanding of the social and psychological implications of the making of a parentage order (both in relation to the child and the affected parties)
    - each affected party's understanding of the principle that openness and honesty about a child's birth parentage is in the best interests of the child
    - the care arrangements proposed by the applicant or applicants in relation to the child

- any contact arrangements proposed in relation to the child and his or her birth parent or parents or biological parent or parents
- the parenting capacity of the applicant or applicants
- whether any consent given by the birth parent or parents to the parentage order is informed consent, freely and voluntarily given
- any other relevant matters.

17. That definitions and terminology concerning counsellors be amended to:
    - remove all reference to 'approved counsellors'
    - include 'qualified counsellor' who is a qualified mental health professional
    - include 'independent counsellor' who is a qualified counsellor who is not the counsellor who counselled the birth mother, the birth mother's partner (if any) or an intended parent about the surrogacy arrangement and is not connected with a medical practitioner who carried out a procedure that resulted in the conception or birth of a child.
18. The Minister/DG/Department should provide guidance to the public regarding the expected costs of required professional services for counselling (per session) and legal advice in Western Australia.
19. The Minister/DG/Department should provide information to the public regarding what should be covered when independent legal advice is obtained, as well as sample templates for written surrogacy agreements that meet the requirements of the Western Australian legislation.
20. Dispensation provisions that exist in the *Surrogacy Act 2008* (WA) s 21(3) & (4) in relation to requirements that must have been met before the Court may make a transfer of parentage order are appropriate and should be maintained.

Chapter 5 – Paramountcy of the welfare of the child and screening/ risk assessment

21. The Minister/DG/Department should develop guidelines that provide for a clear and consistent risk assessment framework and process to be used by clinicians/health professionals when assessing applicants and their partners (if any) in relation to the welfare principle, prior to their engaging in a surrogacy arrangement. Such guidelines should:
    - include criteria to be considered such as:
        - previous convictions relating to harming children
        - child protection measures taken regarding existing children
        - violence or serious discord in the family environment
        - mental or physical conditions
        - drug or alcohol abuse
        - medical history, where the medical history indicates that any child who may be born is likely to suffer from a serious medical condition
        - other circumstances likely to cause serious harm to any child.

- outline the process to be followed when there is a concern about the welfare of any child who may be born as a result of a surrogacy arrangement (or an existing child)
- provide for referral to, and consultation with, external experts, authorities, agencies, and/or support services
- allow for criminal record, ANCOR and/or child protection order checks in individual cases that raise significant concern. A form should also be developed that all providers of treatment must use and on which the outcomes of the assessment must be recorded and that may be audited by the Minister from time to time.

22. That the *Surrogacy Act 2008* (WA) (and/or associated regulations/directions) be amended to require the use of the above guidelines in the pre-surrogacy counselling process to undertake a risk assessment (screening) of each of the intending parent(s), the intended surrogate mother, and her partner (if any).
23. Provision should be made in the *Surrogacy Act 2008* that it is an offence for applicant(s) to provide false information during the welfare of the child assessment.
24. Information should be provided to applicants regarding avenues available to them for review (as appropriate).
25. That, consistent with Recommendation 65 in Part 1 of this report, provision should be made in the Western Australian legislation and/or directions that there be no obligation upon health practitioners or ART clinics to provide surrogacy treatment.

Chapter 6

Age

It is recommended at 6.2.4 that Western Australian legislation be amended to require the age of all parties at the time they enter into a surrogacy arrangement to be 25 or more or that they be considered of sufficient maturity by a qualified counsellor providing the implications counselling that is required under the Act. This is given form above in Recommendation 13.

Requirement for previous live birth

26. If the recommendations to repeal the RTC pre-approval requirements are implemented, that the *Surrogacy Act 2008* (WA) be amended to include a provision that in exceptional circumstances the section 17 requirement for the intended surrogate mother to have previously given birth may be dispensed with, provided the counsellor is of the view that dispensation of the requirement is appropriate following assessment of the woman's individual circumstances during pre-surrogacy counselling. Such evaluation should be included in the certificate of counselling which must be provided to the Family Court of Western Australia after the birth of a child(ren) when the application for transfer of legal parentage is made.

Genetic connection

27. Changes to the *Surrogacy Act 2008* (WA) in relation to the availability of traditional and gestational surrogacy are not required.
28. Changes to the *Surrogacy Act 2008* (WA) requiring a genetic connection between the intended parent(s) and the child(ren) who will be born as a result of a surrogacy arrangement are not required.

Chapter 7 – Altruistic and commercial surrogacy

29. That the current public policy position that altruistic surrogacy is permitted subject to meeting certain criteria required by the law and that commercial surrogacy is prohibited, should be maintained.
30. The reimbursement for costs provisions for altruistic surrogacy are comparable with New South Wales and Queensland and as such do not require amendment. However, clearer information needs to be provided to people concerning what may be reimbursed in altruistic surrogacy arrangements.

Chapter 8 – Advertising

31. The current ability for intended parent(s) and women who are willing to volunteer to act as altruistic surrogates is acceptable and consistent with laws that permit altruistic surrogacy and should be maintained.
32. Provision should be made in the Western Australian legislation, regulations or directions that clinics in Western Australia may advertise for altruistic surrogates. This would require amendment of Surrogacy Directions 2009 (WA), Direction 9 – which currently prohibits clinics from actively recruiting birth mothers – to make clear that such prohibitions do not include advertising to inform people that they may approach the clinic to express their interest in volunteering to act as an altruistic surrogate. The Directions should maintain that clinics may introduce a woman who has approached the clinic, offering to be a birth mother, to prospective arranged parents. They must not charge a fee for doing so, otherwise they would be in contravention of s 9 of the Act.
33. Information should be made available to the public by the Minister/DG/Department to assist in raising public awareness about surrogacy laws that relate to advertising in Western Australia.

Agents and brokers

34. That it would not be suitable to allow the establishment of ‘agencies’, ‘agents’ or any other kind of ‘brokerage’ or introductory service regarding surrogacy in Western Australia that involves payment of a reward or valuable consideration. The reason for this is to prevent assisted reproduction clinics or other organisations profiting from assisting to arrange altruistic surrogacy arrangements, and thus transforming an altruistic arrangement into a commercial surrogacy arrangement.
35. That prohibitions on the introduction of parties to a surrogacy arrangement for valuable consideration, and on providing a service knowing that the service is to facilitate a surrogacy arrangement that is for reward, remain as law in Western Australia.
36. That the Minister for Health ensures that laws, regulations, and/or directions are clear that such prohibitions do not extend to the provision of lawful services in relation to surrogacy arrangements nor prevent free and voluntary support groups from operating and enabling people to get in touch with each other.

Enforceability of surrogacy arrangements

37. That the current law be maintained regarding surrogacy arrangements being unenforceable subject to the relevant exceptions regarding:
    - the enforceability of agreements as to the reimbursement of reasonable expenses related to the surrogacy arrangement
    - the ability of the Family Court of Western Australia to make parentage orders without the birth mother's consent, if that order is in the best interests of the child and the birth mother is not the child's genetic parent and at least one arranged parent is the child's genetic parent.
38. That the Minister/DG/Department ensure that the public is provided information about the provisions of the *Surrogacy Act 2008* (WA) regarding the unenforceability of altruistic surrogacy arrangements, and the exceptions that apply.

Information and support

39. That the Minister/DG/Department work to greatly improve the availability and accessibility of information and support to the public and those who provide lawful services in relation to lawful surrogacy arrangements in Western Australia. This should include, but is not limited to, clear and accessible information about:
    - the law
    - what is expected of clinics, counsellors and lawyers in relation to the provision of services, support, information, and advice
    - the expected and reasonable costs of a surrogacy arrangement in Western Australia.
40. That the Department and relevant Government units and staff who are responsible for supporting the Act be adequately resourced, provided training, and supported in the commissioning and/or development of additional resources that address the short-comings identified in information provision in this report and submissions made to the review.
41. Information provided by the State Government should also inform people of voluntary community support groups available to people facing issues related to infertility and inability to carry or bear a child due to their social or medical circumstances.

Chapter 9 – International commercial surrogacy

42. That the Western Australian Government seeks to address matters that may lead some people to travel to other jurisdictions to engage in commercial surrogacy arrangements including, but not limited to:

    - the current Western Australian law which serves to exclude certain people from accessing altruistic surrogacy in Western Australia
    - the impact of Commonwealth citizenship and passport laws
    - lack of uniformity of extraterritorial prohibitions across the states

    via introducing necessary amendments to remove barriers to accessing altruistic surrogacy, consulting with the Commonwealth regarding laws that do not correspond to the public policy position taken in Australia and discussing with other jurisdictions the need for harmonisation regarding extraterritorial prohibitions relevant to commercial surrogacy.

43. That the Western Australian Government considers the recommendations in this report in light of the need to increase access to altruistic surrogacy in Western Australia which in turn may serve to reduce the number of people from Western Australia who seek international commercial surrogacy.

44. That the Western Australian Government amends the *Surrogacy Act 2008* (WA) to provide for extraterritorial application of the law – consistent with New South Wales, Queensland, and the Australian Capital Territory – which would make it an offence to enter into, or engage in, other practices related to commercial surrogacy arrangements abroad and/or other prohibited practices.

45. That the Western Australian Government consults with the Commonwealth about the provision of uniform information to the public concerning the Commonwealth laws that *'comprehensively criminalise human trafficking, slavery and slavery-like practices, including servitude and forced labour'* noting *'these offences have extended geographical jurisdiction and could apply to international commercial surrogacy arrangements that involve the exploitation of the surrogate mother or the child'* (referred to by the Australian Government in its response to its House of Representatives Standing Committee inquiry into surrogacy).

46. That the Western Australian Government requires that all applicant parent(s) who are granted entry into Australia (on whatever basis) with a baby born as a result of an overseas surrogacy arrangement with whom they intend to reside in Western Australia, should be issued with notice that they *must* appear before the Family Court of Western Australia within a specified time to allow the Court to consider whether the granting of parenting orders is in the best interests of the child.

47. That the Western Australian Government monitors ongoing discussion and outcomes concerning the work of The Hague Conference on Private International Law and the Australian Law Reform Commission (ALRC) on matters relevant to legal parentage.

48. That commercial surrogacy is prohibited in Western Australia and the findings of this review do not support changing that. Altruistic surrogacy is permitted, but only when criteria are met that are intended to ensure the psychological and sociological well-being of all parties involved, and that it is undertaken in a manner that sees the best interests of children as paramount. It would not be appropriate for the State to then endorse practices elsewhere (for example via recognition of legal parentage orders in cases of international surrogacy) that do not meet the standards agreed upon for citizens within the State or by those who choose to uphold the law rather than circumvent or breach it.
49. That the Western Australian Government considers whether it is necessary to make explicit provision in the relevant legislation that states that the transfer of legal parentage is not available in circumstances in which a child has been born as the result of an international commercial surrogacy arrangement that offends the law in Western Australia.

Chapter 10 – State Legislation: Powers of enforcement and disciplinary provisions

50. That current proposals before Parliament to amend the *HRT Act* to confer power on the RTC to advise the Minister for Health in relation to the administration and enforcement of the *Surrogacy Act* be considered an interim measure in light of the findings and recommendations of this review. In particular, the recommendations that the RTC be abolished and a new advisory body be established whose role would not be regulatory in nature.
51. If the recommendation that the RTC be abolished is implemented, then in the future powers related to the administration and enforcement of the *Surrogacy Act* should lie with the Minister for Health and delegates.
52. Current proposed amendments to the *HRT Act 1991* (WA) would also:
    - extend authority to an officer to investigate a breach or possible breach of the *Surrogacy Act 2008* (WA)
    - permit a justice, where duly satisfied on the evidence, to exercise the same power available under existing section 55 of *HRT Act* to issue a warrant to an authorised officer or member of the police force to enter, search and seize records and other evidence, in relation to an offence or suspected offence under the *Surrogacy Act*.

    It is recommended that if such amendments are enacted, that the powers conferred be carried out in a manner consistent with the recommended responsive regulatory model proposed in this report. That is, they would only be used when other compliance measures have failed, or the behaviour is particularly egregious. Such powers would then complement the recommended system of regulation to enable such behaviour to be investigated and addressed if required.

State legislation: Recognition of birth registration and other equivalent laws

53. That the Minister for Health and the Department of Health give further consideration to, and conduct research and consultation, regarding:
    - whether 'reciprocal arrangements' directed toward State-based births, deaths, and marriages registers and/or Courts responsible for the transfer of parentage in relation to lawful altruistic surrogacy arrangements, should be introduced
    - the extent to which such reciprocal arrangements should apply
    - what should occur should one state changes its laws in a manner that is inconsistent with the laws of Western Australia.

Commonwealth legislation: Medicare

54. That the Western Australian Minister for Health approach the Commonwealth Government with a view to allowing in vitro fertilisation (IVF) surrogacy treatments to be considered by Medicare as any other IVF treatment.

Commonwealth legislation: International trade in gametes and embryos and anonymous donation

55. It is consistent with the law to impose restrictions on the import and export of human reproductive material and to promote compliance with the requirements of the *HRT Act 1991* (WA) and *Surrogacy Act 2008* (WA). It is recommended that discretion be exercised in situations in which there are exceptional circumstances – to be decided on a case-by-case basis and approval sought from the Minister for Health or delegate. It is recommended that in such circumstances decisions should uphold the welfare of any child that may be born as a result of ART and/or surrogacy as the paramount consideration. Also to be considered are the welfare of participants, the interests or impact of any decision on existing children within the applicant family, and the law.

Glossary

Altruistic surrogacy: where the woman who intends to be, or becomes, the birth mother in a surrogacy arrangement does not receive any payment or reward from which she derives a profit. Note, she may receive reimbursement of expenses actually incurred.

Artificial insemination procedure: A procedure where human sperm are introduced, by a non-coital method, into the reproductive system of a woman but which is not, and is not an integral part of, an in vitro fertilisation procedure. (*HRT Act 1991*)

Assisted reproductive technology (ART): Includes a range of methods used to circumvent human infertility, including in vitro fertilisation (IVF), embryo transfer (ET), gamete intra-fallopian transfer (GIFT), artificial insemination (AI), all manipulative procedures involving gametes and embryos and treatment to induce ovulation or spermatogenesis when used in conjunction with the above methods.

ART with donor: ART may involve the use of 'donor' sperm and/or eggs (gametes) or embryo(s). The use of 'donor' gametes or embryos may occur when there are difficulties conceiving due to medical reasons such as infertility, when a person carries a disease or genetic abnormality, or when single people or people in a same-sex couple access ART to have children.

ANCOR: Australian National Child Offender Register

Birth mother: A woman who conceives and gives birth to a child.

Birth parent/s: Includes the birth mother and her partner (if any).

Blastocyst: The term for an *embryo* five days after fertilisation which has now developed a distinctive shape with different parts clearly identifiable within its fluid-filled cavity.

Commercial surrogacy: (also referred to as 'compensated' or 'for-profit' surrogacy), where the birth mother in a surrogacy arrangement is paid a fee or receives reward from which she derives a profit.

Egg donor: A woman who donates eggs (oocytes) for assisted reproduction for use by another person or couple to conceive a child, with the intention that the other person or couple will be the legal parent(s) of any child(ren) born as a result of the use of such eggs and the egg donor will have no rights or responsibilities in relation to that child.

Egg retrieval: The process by which eggs are removed from the egg donor for fertilisation.

Frozen embryo transfer: A process that occurs when a frozen embryo (an already fertilised and frozen egg) is thawed and transferred into a surrogate.

Gestational surrogacy: Pregnancy where the birth mother is genetically unrelated to the baby and the intent is to transfer legal parentage to another person or couple. The embryo(s) are created using the eggs from the intended mother or an egg donor, and sperm from the intended father(s) or a sperm donor. The term 'gestational carrier' 'surrogate' or 'surrogate mother' has been applied to the birth mother in cases of gestational surrogacy.

Infertility: Is the inability to conceive after a year of unprotected intercourse in women under 35 or after six months in women over 35, or the inability to carry a pregnancy to term. Also included are diagnosed problems such as anovulation, tubal blockage, and low sperm count. The 'causes' of infertility may relate to ovulation, tubal or uterine factors, the male-factor, sperm mucous interaction, endometriosis, sexual dysfunction, or be simply unexplainable.

Intended parent/s: Person or persons who intend to become the legal parent of a child born through surrogacy. Also referred to as 'arranged' parent(s) or 'commissioning' parent(s).

In vitro fertilisation (IVF): A process by which eggs are fertilised by sperm outside the womb in a controlled environment: either a test tube or Petri dish. The process is performed by a reproductive endocrinologist at an IVF clinic.

Parent/s: the person/s who are identified as the legal guardian of a child under the law of a relevant state or territory.

Parentage order: a court order that transfers parentage from the birth parent/s to the intended parent/s – as part of the surrogacy arrangement.

Parenting order: A set of orders made by a court about parenting arrangements for a child.

Pre-birth order: A court-issued order that is acquired before the birth of the child. In some jurisdictions, in relation to surrogacy, it enables the names of the intended parent/s to be placed on the birth certificate of any child born as a result and allows the intended parent/s access to the child while he/she is in the hospital.

Post-birth order: A court-issued order that is acquired after the birth of the child. Typically, it will transfer the birth mother's legal parentage to the intended parents and allow a new birth certificate to be issued for the newborn with the intended parent(s)' name.

Sperm donor: A male who provides spermatozoa (sperm) for its use by another person or couple to conceive a child, with the intention that the other person or couple will be the legal parent(s) of any child(ren) born as a result of the use of such sperm and the sperm donor will have no rights or responsibilities in relation to that child.

Surrogacy: the practice by which a woman who is to become pregnant (and her partner if any) agrees to surrender permanently the child born of that pregnancy to another person or couple (the intended parent/s). The intent is that the other person or couple will be the parent(s) of the child.

Surrogacy arrangement /agreement: An agreement between the prospective birth parent/s and intended parents regarding their intention to enter into an arrangement and the terms upon which they agree.

Surrogate mother: A woman who conceives a child with the intention of transferring at, or after, birth any parentage rights or responsibilities she has regarding the child ('legal parentage') to another person or couple, referred to as the 'intended parent(s)'.

Traditional surrogacy: Pregnancy where the woman who is intending to be the birth mother in a surrogacy arrangement becomes pregnant through sexual intercourse or artificial insemination and is thus genetically related to the baby.

Chapter 1

Introduction to the Review (Part 2)

Chapter 1:
Introduction to the Review – Part 2

1.1 Introduction

On 13 January 2018 the McGowan Government announced an independent review of the *Human Reproductive Technology Act 1991* (HRT) (WA) (*HRT Act*) and the *Surrogacy Act 2008* (WA). It was acknowledged that there exists considerable public interest in assisted reproductive technology (ART) and surrogacy as about one in six couples have difficulty in conceiving a baby; about four per cent of births in Australia occur through ART. The Government noted there had been significant developments in technology and changes in community attitudes to ART and surrogacy and that the relevant Western Australian laws were 'outdated in parts and are arguably not meeting current needs and developments in practice occurring in other Australian States and Territories.'[5] It was intended the review would provide a strong foundation for updating the regulation of ART and surrogacy. As such the terms of reference were drafted to provide an opportunity for a wide range of complex scientific, ethical and legal issued to be considered in today's society. The Government emphasised that the review should be consultative in seeking the public's views about the two Acts and independent of government departments or agents.

The report on the review is provided in two parts. Part 1 of the report on the review of the *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) detailed my background as the reviewer; and that the review has been conducted based on principles of 1) independence, 2) objectivity, 3) an inclusive and rigorous methodology, and 4) openness and transparency.[6] Details of the scope of the review and the public consultation process were also provided, which is again detailed below. Part 1 then focussed on issues relevant to ART in Western Australia including examination of the regulatory structure established by the *HRT Act 1991* (WA) and subordinate legislation and directions, the operation and effectiveness of the regulatory regime, and the ethical, social and legal issues raised by several matters relevant to the practice of ART in Western Australia.[7] Findings were detailed and recommendations made to better improve the regulatory system and to update the law in relation to such things.

In this, Part 2 of the report, the focus is upon the terms of reference relevant to surrogacy, as governed in Western Australia by the *Surrogacy Act 2008* (WA), and a number of other matters relevant to both surrogacy and ART.

5 Government of Western Australia, Media Statement: Independent Review of Assisted Reproductive Technology and Surrogacy Legislation, 13 January 2018, The Hon Roger Cook, available at https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/01/Independent-review-of-assisted-reproductive-technology-and-surrogacy-legislation.aspx accessed December 2018.

6 Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 1)*, 2019.

7 Western Australia Government Gazette # 201. 30 November 2004. Previous directions were revoked.

1.2 Background – Surrogacy

1.2.1 What is surrogacy?

Surrogacy is the practice by which a woman who is to become pregnant (and her partner if any) agrees to surrender permanently the child born of that pregnancy to another person or couple. The intent is that the other person or couple will be the parent(s) of the child. It is also a contentious issue that invokes a variety of opinions and touches on deeply held beliefs relating to reproduction and family formation. Its use reflects the strong drive for some people to have children, and the social, cultural, and psychological importance of doing so. It enables people to have children when otherwise, due to their circumstances, they would not be able to do so (perhaps other than via adoption or foster care). Such arrangements may involve several combinations of parties ranging from the birth mother and a single intended parent (two people), to the birth mother and her partner, a couple who are the intended parents, and the donors of ova and sperm and their partners (eight people). In many, if not most, instances it involves the use of an intended father's sperm and/or the egg of an intended mother, thus enabling them to have a child(ren) who is genetically related to one or both of the intended parents. The practice of surrogacy in such circumstances thus provides something that other means of family formation for childless couples cannot, in that the intended parent(s) may have a genetic link to the child they will rear. Note, however, surrogacy arrangements may not always be limited to situations in which such a genetic link exists to either or both the intended parent(s), and donor egg and/or sperm may be used.

Reasons people may seek a surrogacy arrangement include, but are not limited to:

- a woman is unable to become pregnant or carry a pregnancy because she has had a hysterectomy or is missing parts of her uterus, ovaries or other parts of the genital tract
- a woman has a health condition that makes pregnancy dangerous or not possible
- a couple in a male same-sex relationship wish to have a child using the sperm of one or the other partner
- a single man wishes to have a child using his sperm
- a woman who has frozen eggs/embryos in storage dies and her male partner wishes to use the eggs/embryos to have a child.

People in such situations may or may not be able to engage in a surrogacy arrangement dependent on the law in the jurisdiction in which they live.

1.2.2 Some key terminology

Terminology in relation to surrogacy can be contentious and may reflect views about the arrangement and roles of the respective parties. Terminology used in this report is set out in the glossary. For the purposes of this report, the usage of the following terms is noted for clarity.

The woman who is to become pregnant and bear the child is most often referred to as the 'surrogate mother', 'birth mother', or 'surrogate', although she may also be referred to as a 'gestational carrier' (where she is not genetically related to the child she is carrying), and more colloquially in various regions as the 'tummy mummy'. In this report, the woman is most often referred to as the surrogate mother.

The person or persons to whom the child is surrendered is most often referred to as the 'commissioning', 'arranged' or 'intended' parent(s).[8] In this report, such person(s) are referred to as the 'arranged' or 'intended' 'parent(s) – the former mirroring the language used in the Western Australian legislation, the latter being the term preferred by parties to surrogacy arrangements.

1.2.3 Relevant legislation and review

In Western Australia, the *Surrogacy Act 2008* received Royal Assent on 9 December 2008. Surrogacy regulations and surrogacy directions were declared in the *Government Gazette* in early 2009.[9] The *Surrogacy Act 2008*, Surrogacy Regulations 2009 and Surrogacy Directions 2009 set the current standards for use of an artificial fertilisation procedure in connection with a surrogacy arrangement. There also exists Family Court (Surrogacy) Rules 2009 which set out the form and process necessary for an application for legal parentage.[10]

A legislated review of the operation and effectiveness of the *Surrogacy Act 2008* (WA) was undertaken in accordance with section 45 of the Act in 2014. The review, however, received only a small number of submissions (17), of which there were no submissions from past or present surrogacy applicants in Western Australia. Nevertheless, the review resulted in some recommendations, including a call to develop information resources and clear pathways to provide a better understanding of surrogacy legislation and policy for consumers in Western Australia; and to permit access to artificial fertilisation procedures before approval of a surrogacy arrangement, in circumstances where there is a medical need to do so (which is not possible under the Act). Five more general recommendations were made to support further Commonwealth and State Government inquiries and research into domestic and international surrogacy, and to conduct further review within five years.[11]

Subsequently, some information regarding surrogacy was made available on the Reproductive Technology Council (RTC) website.[12] Western Australia has participated in other government inquiries, for example, the RTC made a submission to a Commonwealth inquiry into surrogacy in 2016;[13] and the RTU established a collaboration with the University of Technology, Sydney as part of a larger program of surrogacy research. The recommended changes to allow ART before approval of a surrogacy agreement have not, to date, occurred.

This review occurs nearly five years after the last review of the *Surrogacy Act 2008* (WA). It is almost 20 years since the last comprehensive review of the *HRT Act 1991* (WA).

8 John Seymour and Sonia Magri, 'ART, Surrogacy and Legal Parentage: A Comparative Legislative Review', Victorian Law Reform Commission, *VLRC Occasional Paper No 4*, 2004.

9 Surrogacy Regulations 2009, Western Australian Government Gazette on 25 Feb 2009 p. 501-8; Surrogacy Directions 2009, Western Australian Government Gazette 27 February 2009 p 512.

10 Western Australian Government Gazette 25 February 2009 p 491-499.

11 Government of Western Australia, *Review of the Surrogacy Act 2008 Report to the Western Australian Parliament*, November 2014. Recommendations 3-7.

12 https://www.rtc.org.au/surrogacy-in-wa/ accessed December 2018.

13 Reproductive Technology Council, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016), Submission, 10/02/2016.

1.3 The scope of the Review

The Terms of Reference were extensive and covered a wide variety of issues related to regulation, governance and practices associated with ART, surrogacy and donor conception. The Review did not go beyond the scope of the Terms of Reference. As noted in Part 1 of the report, other legislation relevant to ART, surrogacy and associated considerations in Western Australia were not the subject of this Review, however, incidental research, discussion and recommendations that may impact some such legislation occurs as a result of considerations under the HRT and Surrogacy Acts. In addition, discussion of other relevant legislation and common law decisions concerning for example, the regulation of all health practitioners, sex discrimination, access to Medicare and/or private insurance, and/or family law matters, takes place when considering the operation and effectiveness of the HRT and surrogacy legislation and related matters.

1.4 Public consultation

Details of the public consultation are again noted in this second part of the report. The public consultation was advertised and submissions invited and received in several ways.

1.4.1 Initial announcement and media

The Government of Western Australia announced the review on the 13 January 2018 via a number of media statements and interviews.[14] Information about the review and public consultation was published on the Government of Western Australian Department of Health website.[15] Advertisements were placed in close to 50 Western Australian newspapers and publications, announcing the review, inviting public submissions, and notifying the community of the public consultation forums. (See Appendix 1). The Department of Health Review Program Manager and Manager of the Reproductive Technology Unit, Dr Maureen Harris, also engaged in interviews with the media about the review.

1.4.2 Written submissions

A call for written submissions to the review was made on 13 January 2018, with a closing date of 16 March 2018 (although written submissions continued to be made and applications for extensions were accepted up until June 2018). The call was made via: The Review Webpage;[16] regular postings on social media such as Facebook and Twitter to alert the public to the review were made by the Department of Health's communications team; the reviewer using social media to regularly 'tweet' and post to Facebook via my personal accounts, to raise awareness and to encourage participation in the review; 141 personal letters of invitation to make a written submission to the review were also sent in the first month of the consultation period

14 See for example, Government of Western Australia, Media Statement: Independent Review of Assisted Reproductive Technology and Surrogacy Legislation, 13 January 2018, available at https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/01/Independent-review-of-assisted-reproductive-technology-and-surrogacy-legislation.aspx accessed December 2018.

15 See Government of Western Australia, Department of Health. *Review of the Human Reproductive Technology Act 1991 and Surrogacy Act 2008* available at https://ww2.health.wa.gov.au/review accessed December 2018.

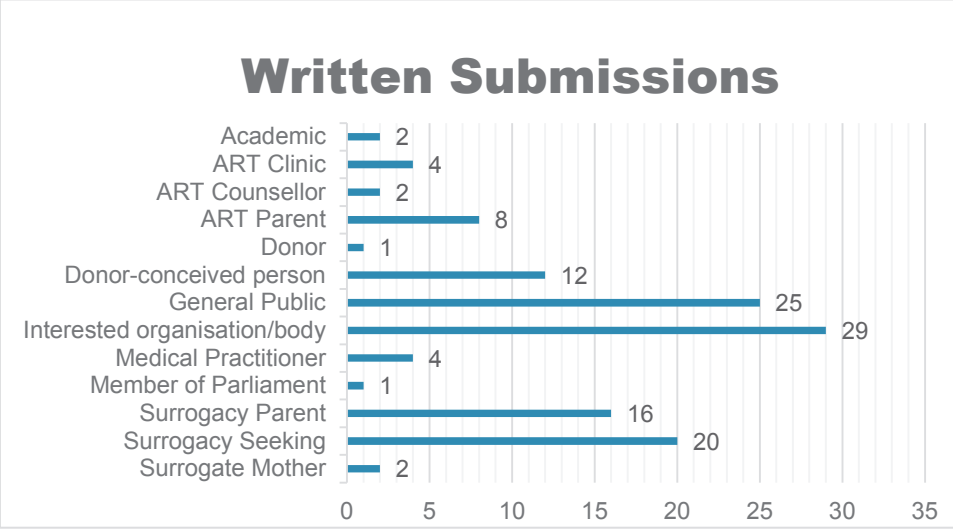
16 Ibid.

(See Appendix 2). Further reminder letters sent on 7 February 2018 to clinics (Concept Fertility Centre, PIVET, Fertility Great Southern, Fertility North, Fertility Specialists South, Fertility Specialists South West, Keogh Research Institute, and Hollywood Fertility Centre) to notify them of upcoming face-to-face consultations, ask them to encourage participation by consumers, and to remind them of the written submission period.[17] A flyer was also developed to invite people to make submissions to the review. It was included in social media posts and reminder letters to the clinics regarding the review.[18]

Written submissions to the review were received via a designated email address for the review and via the post. In total the review received 138 written submissions. There were 126 written submissions accepted on the basis that the submitter was an identifiable person or organisation. When a submitter could not be identified as a real person or organisation, an email was sent to ask them to provide further details (except in one case where no contact email or address was provided). It was explained that the submission could be confidential, but that it could not be completely anonymous. In many cases the submitter replied immediately providing their information and the submission was accepted. However, 12 written submissions could not be accepted as the identity of the submitter could not be confirmed. These submissions were read, and any issues raised that had not been raised elsewhere were followed up via research to ensure relevant issues were not missed or ignored. Written submissions were numbered from one to 126 in the order of receipt,[19] with the 12 excluded submissions not being included in the numbering. There were 20 submissions requesting confidentiality as to their identity.

Figure 1 below shows the types of organisations and persons who lodged written submissions to the review.

Figure 1: Written Submissions to the Review, by submitter category



* Figure above displays the total accepted submissions by submitter category n = 126
** Submissions that could not be accepted and are not included in the above table: n = 12

17 Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (Report: Part 1), 2019, Appendix 3.

18 Ibid, Appendix 4.

19 Ibid, Appendix 5.

The qualitative analysis of written submissions adopted a thematic analysis approach. Familiarisation with and organisation of the data enabled broad understanding of the data prior to the generation of themes and categories within them.[20] An independent research assistant was used to do an initial coding of the data in which she was required to extract data from each submission and place it into the respective categories. Independent coding was also conducted by the reviewer which enabled emergent understanding of the data. The analysis of submissions, research, and data was then drawn upon to write this report and formulate the recommendations.

1.4.3 Public consultation forums

Four face-to-face public consultation forums were conducted from 9-20 April 2018 as follows:

Date	Time	Venue
Friday 13 April 2018	2 pm to 4 pm	Health Consumers' Council, Perth
Saturday 14 April 2018	1 pm to 3 pm	Joondalup Library, Joondalup
Monday 16 April 2018	10 am to 12 pm	Bunbury Library, Bunbury
Friday 20 April 2018 (LGBTQI)	2 pm to 4 pm	Health Consumers' Council, Perth

The public consultation forums were attended by approximately 60 people. They included people who were donor-conceived, donors, people seeking assisted reproduction and/or surrogacy, parents of children born as a result of ART/donor conception/surrogacy in Western Australia, other states of Australia and abroad, people who had engaged in ART or surrogacy but remained childless, surrogate mothers, members of the Christian church, a lawyer representing people who had engaged in cross-border surrogacy, parents of people who had faced infertility or sought ART or surrogacy, and other members of the public. Attendees represented people from across Western Australia, with some attendees travelling from rural areas to contribute.

1.4.4 Individual meetings

Individual meetings were held in February 2018, during the face-to-face consultation period from 9-20 April 2018, through to August, in person, via Skype or via telephone with:

- Members of the public:
  - a donor-conceived person who was born and resides in Perth, who had found a sibling via the WA Voluntary Register, and her donor via direct-to-consumer DNA testing and ancestry tracing
  - a donor-conceived person who was born and resides in Perth, who had found her donor via direct-to-consumer DNA testing and ancestry tracing
  - a donor-conceived person who resides in the Northern Territory for whom sperm sourced from Perth had been used in her conception in the Northern Territory
  - a donor-conceived person who was born and resides in Perth, who had found her donor via direct-to-consumer DNA testing and ancestry tracing

20 Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 1)*, 2019, Appendix 6.

- an egg donor and her donor-conceived daughter, who was not seeking information about her donor
- a couple who had accessed commercial surrogacy in India (and had a daughter as a result)
- an egg donor who had assisted two different women to have children
- a recipient of egg donation, who had children as a result
- a woman who had engaged in IVF overseas and in Australia, and was calling for more information regarding clinic success rates
- a Rabbi
- a woman who had engaged in commercial surrogacy in the United States, following cancer and loss of her fertility
- a woman who had engaged in commercial surrogacy in the United Sates, who had suffered previous IVF failure and miscarriage
- a sperm donor who has been contacted by his donor-conceived daughter, subsequent to direct-to-consumer DNA testing and ancestry tracing
- the above sperm donor's wife

• Professionals:
  - a lawyer who has represented parties to surrogacy agreements
  - a counsellor from Jigsaw adoption and donor-conception support services
  - a United States based psychologist associated with a clinic that requires open-identity donations
  - the Chair of the Australian and New Zealand Infertility Counsellor's Association

• Office Holders and Government Employees – Western Australian Government:
  - the Chair of the Reproductive Technology Council (RTC)
  - Executive Director/Policy Officer of the RTC/Reproductive Technology Unit (RTU)
  - Policy officer supporting the RTC, RTU and voluntary register
  - Policy officer supporting the RTU, RTC
  - employees working in the WA Department of Health Data and Information Unit including the Director of the data unit; Manager of the Maternal and Child Health Unit; and a consultant researcher regarding data collection and reporting (two x meetings);
  - Senior Solicitor, Legal and Legislative Services, at the WA Department of Health;
  - The Registrar of the WA Registry of Births, Deaths and Marriages

• Officials and representatives from other jurisdictions – National and State matters relevant to the review:
  - the Chief Justice of the Federal Circuit Court, Justice Pascoe (dealing with family law matters relevant to ART and surrogacy, and the Australian representative to The Hague expert committee on cross-border surrogacy
  - the Chair of the National Embryo Research Licensing Committee, Professor Constantine Michael AO (also former Chair of the RTC):

- the Minister for Health and Well-Being in South Australia, the Hon. Stephen Wade
- the New South Wales Ministry of Health Donor Register Officer
- CEO Victorian Assisted Reproductive Authority, Victoria
- Director of the National Epidemiology and Statistics Unit

- Other law reform reviewers:
  - the South Australian Law Reform Institute (SALRI) in relation to their review of surrogacy laws and practices in South Australia
  - Michael Gorton AO who is leading the current review of the Victorian *Assisted Reproductive Treatment Act 2008* (Vic) and Victorian Department of Health policy officers
  - the United Kingdom Law Reform Commission in relation to their current review of surrogacy laws and practices in the United Kingdom.

1.4.5 Meetings with clinics and associated employees

Visits were undertaken with Concept Fertility Centre, PIVET, Fertility North, Keogh Research Institute and Hollywood Fertility Centre. I spent from two hours up to six hours at the respective sites, with visits at most clinics being on average four to five hours. I spoke with 31 people working at the five licensed sites I visited, including key personnel such as the:

- Medical Director
- Scientific Director
- Nurse Manager
- Senior Counsellor
- Head of Donor Program
- Person/people responsible for records management
- Managing Director/CEO/authorised officers.

Each person I spoke to spent between 30 minutes to 1.5 hours talking to me. If personnel could not attend (and in the case of one meeting when I had to leave after four hours) to attend my next meeting, I arranged a time to speak to them separately.

1.4.6 International human rights meeting

In October 2018 I was invited to participate as an expert in a two-day meeting in Bangkok, Thailand, convened by the United Nations Population Fund, United Nations Office of the High Commissioner, and the World Health Organization, on human rights issues raised by transnational surrogacy. The meeting was attended by a variety of United Nations representatives, academics, health practitioners and judicial and government representatives experienced in human rights and/or surrogacy matters with a particular focus upon practices and matters relevant to the South East Asia and Pacific regions.

1.4.7 Parliamentary briefings

I engaged in seven parliamentary briefing sessions with members of the Greens, Labor Party, Liberal Party, National Party, Shooters Fishers and Farmers Party and their staffers, to discuss the terms of reference, brief the members about the Review, hear from them concerning any issues they wished to raise or have me examine, and ask them to communicate with their constituents about the review. I invited all members of Parliament to contact me throughout the review if they wanted to have further input.

I also kept the Hon. Roger Cook and his Department informed of any pertinent issues to ensure timely responses if required.

1.5 Advice to participants

All people who participated in the Review, either by making written submissions, engaging in meetings or forums, or speaking via telephone or Skype with me, were informed that once the Review was completed a report would be produced. They were told that the report would include recommendations regarding the regulation of ART and surrogacy in Western Australia, and that their input could help shape the recommendations in the report. They were further informed that the report would be tabled in Parliament and made publicly available, and that the recommendations would be considered by the Government. It was communicated that if the Government decided to proceed with any recommendations that required legislative change, that a Bill would be drafted and would be debated in Parliament and that such debate would determine whether and how such change was implemented into law.

To encourage full and frank disclosure of matters pertinent to the Review, people were told that confidential submissions would be accepted, and that in this event the material in the submission would be used to inform the review, but the submitter would not be referred to by name or otherwise identified to the best of the reviewer's ability. People were informed that if they did not mark a written submission as 'Confidential' that it may be published on the Department of Health's website after the Review had been concluded.

1.6 Conclusion

It being almost 20 years since the previous comprehensive review of the *HRT Act 1991*(WA) and 10 years since the enactment of the *Surrogacy Act 2008* (WA), it was clear that the issues raised during the review reflected that community attitudes toward ART and surrogacy had changed significantly since the first passing of such Acts. Australia has seen much greater acceptance of ART and surrogacy as a means by which families may be formed, significant advances in the recognition of the rights of donor-conceived people to access information about their genetic and birth heritage, and significant changes in community attitudes, acceptance, and calls for non-discrimination in relation to marital status, sexual orientation, and gender identity. Same-sex marriage has also been overwhelmingly supported across Australia. In Western Australia, out of 801,575 votes returned in the state, 63.7 per cent of registered voters indicated Yes, with 36.3 per cent voting No. In relation to surrogacy, there has been an increase in people engaging in international commercial surrogacy, which also raises new challenges.

In light of such change, as well as the passage of time, there is much to say about how best to refine the regulatory system that has been adopted and how to implement or change provisions in the respective Acts and associated instruments to better serve those born as a result of ART, recipients (and their partners if any), intended parents, surrogate mothers, donors of gametes and/or embryos, and the people who work to support and help people to create families and ensure their health and well-being.

In addressing the Terms of Reference for the review in both parts of the report I considered the current legislation in Western Australia and in other jurisdictions, the oral and written submissions made to me as the independent reviewer, relevant research, and other information gathered at meetings conducted throughout the course of the review. These form the basis of the discussion and recommendations that follow. Many of the issues raised during the review required a significant amount of in-depth analysis and discussion in order to reach a conclusion about what recommendation(s) should be made. The discussion in the following pages reflects this.

In the following chapters, where relevant, I have stated what I have found in relation to the terms of reference and issues raised (headed 'Findings'), as well as recommendations regarding what action needs to be taken (headed 'Recommendations') to ensure the effective operation of the legislation that regulates ART, surrogacy and related matters in Western Australia.

No doubt, attitudes, knowledge, understanding and practices, will continue to evolve and change over time. It is important, therefore, to be mindful that whatever the results of this review, that further review in the future, will again be needed. In Part 1, it was therefore recommended to ensure provision for five-yearly reviews to occur after the date of the report from the last review is received by the Minister. Similar provision should be made in the *Surrogacy Act 2008*.

Recommendation

Provision should be made in the *HRT Act* and *Surrogacy Act* for review of their operation and effectiveness every five years after the date of the report from the last review being received by the Minister. (See Recommendation 1, Report: Part 1 of this Review).

Chapter 2

The Regulation of Surrogacy

Chapter 2:
The Regulation of Surrogacy

2.1 Introduction

While surrogacy is a recognised means for people to have children, over time numerous ethical, legal, social and human rights issues have been raised concerning its practice and the boundaries within which it should occur. Matters that have been debated include, but are not limited to:

- the acceptability of surrogacy arrangements in which a woman intentionally conceives, carries, and bears a child she intends to relinquish
- the implications of transferring legal parentage of a child from a birth mother to intended parent(s)
- the implications of surrogacy for the relationships between the intended parent(s) and the surrogate mother and any partner, as well as the donor(s) or any gametes
- the possible impact on the surrogate mother's health and well-being, own personal relationships, and/or other children
- the implications of the arrangement for any existing children of the intended parent(s)
- pressures that may be placed on a woman or that influence her to act as a surrogate mother
- the separation of a child(ren) from its birth mother
- the unequal social and/or economic relationship that may exist between the intended parent(s) and the surrogate mother
- the possibility of medical complications for the birth mother and/or gamete providers
- the possible psychological impacts on the woman who relinquishes the child
- the possible physical or psychological impacts on the child born because of surrogacy (with or without the use of donor gametes and/or ART)
- the possibility that any of the parties may change their mind (including that the surrogate mother may, after pregnancy, not want to relinquish the child or the intended parent(s) may refuse to accept the child)
- whether 'gestational surrogacy' is preferable to 'traditional' surrogacy (on the assumption it may be more difficult for the birth mother to relinquish a child(ren) to whom she is genetically related)
- the motivation and attitudes of the surrogate mother, intended parent(s), and donor(s) of any gametes regarding their engagement in surrogacy
- the need to tell the child of its birth history and biological heritage
- whether there should be an ongoing relationship between the birth mother and the child (and any donor(s) of gametes)
- whether surrogacy should be altruistic

- whether reimbursement of costs in altruistic arrangements is acceptable
- whether payment to a surrogate mother, from which she profits (referred to as 'commercial', 'compensated', or 'for profit' surrogacy) is acceptable
- whether surrogacy involves the exploitation of the woman who will become pregnant and bear the child
- whether surrogacy involves exploitation and/or commodification of the child born as a result
- whether the involvement of third parties, including lawyers, agents, and clinics, who may profit from the arrangement, leads to exploitation of the parties involved or the children born as a result of surrogacy arrangements
- whether the commodification of human reproductive capabilities is acceptable
- the social and/or human rights implications of certain practices.[21]

In response to such issues, numerous inquiries into surrogacy have been conducted in the respective Australian jurisdictions over many decades[22] with consideration given to the regulation

21 Some such listed arguments were included in the 2007 version of the NHMRC Ethical Guidelines (2007), Appendix C, 92. They do not appear in the 2017 Ethical guidelines but are still relevant to any discussion of surrogacy.

22 At least 12 over the past decade, and over thirty since the early 1980s. See for example (noting this list is not exhaustive), **FEDERAL/COAG:** House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016); Family Law Council of Australia, *Report on Parentage and the Family Law Act* (2013); Family Law Council, *Creating Children: A Uniform Approach to the Law and Practice of Reproductive Technology in Australia* (1985); Standing Committee of Attorneys-General, Australian Health Ministers' Conference, Community and Disability Service Ministers' Conference, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009); National Bioethics Consultative Committee, *Surrogacy: Report 1* (April 1990); National Bioethics Consultative Committee, *Discussion Paper—Surrogacy 2: Implementation* (October 1990); ACT: Attorney-General [ACT], *Discussion Paper: Surrogacy Agreements in the ACT* (October 1993); **NEW SOUTH WALES:** Department of Justice, Government of New South Wales, *Statutory Review Surrogacy Act 2010*(July 2018); NSW Standing Committee on Law and Justice, *Legislation on altruistic surrogacy in NSW* (2009) (Report ; no. 38); New South Wales Law Reform Commission, *Artificial Conception—Surrogate motherhood: Australian public opinion, Research Report 2* (1987); New South Wales Law Reform Commission, *Artificial Conception: Surrogate Motherhood, Discussion Paper 18* (1988); New South Wales Law Reform Commission, *Artificial Conception: Surrogate Motherhood, Report 60* (1988); **QUEENSLAND**: Legislative Assembly Investigation into Altruistic Surrogacy Committee, Parliament of Queensland, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland*, 2008; Special Committee Appointed by the Queensland Government to Enquire into the Laws relating to Artificial insemination, In Vitro Fertilisation and other related matters, *Report* (1984); **SOUTH AUSTRALIA**: South Australian Law Reform Institute, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA)* (October 2018); Select Committee of the South Australian Legislative Council, *Report on Artificial Insemination by Donor, In Vitro Fertilisation and Embryo Transfer Procedures and Related Matters in South Australia* (1987); Committee to Investigate Artificial Conception and Related Matters, Final Report (June 1985); Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation, *Report on the Disposition of Embryos Produced by In Vitro Fertilisation* (August 1984); **TASMANIA:** Parliament of Tasmania Legislative Council Government Administration Committee 'A', *Inquiry Into Surrogacy Bill 2011 And Surrogacy (Consequential Amendments) Bill 2011* (2011); Parliament of Tasmania, Legislative Council Select Committee, *Report on Surrogacy* (2008); **VICTORIA:** Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Final Report* (2007); Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation (Waller Committee) *Report on Donor Gametes in IVF* (advance copy, Victoria, August 1983); Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation (Waller Committee) *Report on the Disposition of Embryos Produced by In Vitro Fertilisation* (Vic

of surrogacy, criteria that should be met, and the complex issues related to the status of the child and the transfer of legal parentage. More recently there has also been increased discourse on the ethical, legal, social and human rights issues raised in relation to cross-border surrogacy and trade in human gametes. As a result, all states and territories, except the Northern Territory,[23] have enacted legislation that addresses key issues and sets the parameters within which surrogacy may occur. However, while the essence of each Australian jurisdiction's legislation is similar, there are also differences in laws and practice to be found. This has meant that those people seeking surrogacy arrangements, surrogate mothers, and the children born as a result may have different experiences and challenges dependent upon the state or territory in which they live.

The Terms of Reference for this Review require consideration of such laws, including the Western Australian regulatory system, aspects of legislation of other jurisdictions that could be incorporated into the Western Australian Act, and consideration of the harmonisation of domestic surrogacy legislation. The following section notes the call for harmonisation of laws across the country and what has been done to date to achieve more uniform laws. The chapter then provides an overview of the law in Western Australia and other jurisdictions, illustrating similarities and differences in how other states and territories of Australia have responded to surrogacy. This enables and informs the discussion in the subsequent chapters and recommendations to improve the regulation of surrogacy in Western Australia.

2.2 Reviews and calls for harmonisation of laws

While recognising that Australia is a federation and as such respective state and territory laws may differ, there have been calls at both Commonwealth and state levels to achieve national consistency in relation to surrogacy. In January 2009, a Joint Working Group of the Standing Committee of Attorneys-General (SCAG), the Australian Health Ministers' Conference and the Community and Disability Services Ministers' Conference published 'A Proposal for a National Model to Harmonise Regulation of Surrogacy.[24] Following public consultation, Ministers comprising the SCAG agreed to a set of 15 draft principles upon which model provisions for the regulation of surrogacy could be based – these were drawn particularly from the *Assisted Reproductive Treatment Act 2008* (Vic), the *Surrogacy Act 2008* (WA) and the *Parentage Act 2004* (ACT). These principles are listed in Appendix 7.

Government Printer, August 1984); **WESTERN AUSTRALIA:** Committee of Inquiry, *Report of the Committee Appointed by the Western Australian Government to Enquire into the Social Legal and Ethical Issues Relating to In Vitro Fertilisation and its Supervision* (October 1986); Health Department of Western Australia: Reproductive Technology Working Party, *Report to the Minister for Health for Western Australia* (1988); Department of Health Western Australia, *Review of the Surrogacy Act 2008* (November 2014).

23 Where clinics adhere to the National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2017* (the NHMRC Ethical Guidelines).

24 Standing Committee of Attorneys-General, *Australian Health Ministers' Conference, Community and Disability Service Ministers' Conference, Joint Working Group, A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009). At http://webarchive.nla.gov.au/gov/20141215115112/http://www.lccsc.gov.au/sclj/archive/former_sclj/standing_council_publications/2009_publications.html accessed December 2018.

The public policy position of the SCAG model was to permit altruistic arrangements and to prohibit commercial arrangements. Within these parameters, the model aims to support that intended parents become recognised throughout Australia as the legal parents of the child in place of the birth parent(s), and to design a model which was underpinned by principles that meant: 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.[25] The draft surrogacy principles were endorsed by the SCAG in November 2009 and it was agreed in May 2010 to refer the principles to the Australian Health Ministers' Conference and the Community Services Ministers' Conference to consider. Following this referral, progress on the SCAG project appeared to stall. However, New South Wales, Queensland, South Australia, and Tasmania did subsequently introduce or amend their legislation.

The SCAG model was again considered by the Commonwealth House of Representatives Standing Committee on Social Policy and Legal Affairs in 2016 during an inquiry into domestic and international commercial surrogacy. The Committee recommended that the practice of commercial surrogacy remain illegal in Australia and that altruistic surrogacy continue to be permitted.[26]

In its response to the Standing Committee on Social Policy and Legal Affairs report in November 2018, the Australian Government said:

> *While recognising that the substantive regulation of surrogacy arrangements is the responsibility of the states and territories, the Government agrees in principle with the Committee's recommendation that commercial surrogacy should remain illegal in Australia. Acknowledging the exploitation risks to the child and surrogate mother, as evidenced in some international commercial surrogacy arrangements, the Government agrees with the principle of commercial surrogacy remaining illegal under domestic law.* [27]

The Standing Committee further called for the disparate nature of surrogacy legislation concerning altruistic surrogacy to be addressed. It recommended that a model law be developed for altruistic surrogacy that should have regard to four guiding principles that the best interests of the child should be protected (including the child's safety and well-being and the child's right to know about their origins); the surrogate mother be able to make a free and informed decision about whether to act as a surrogate; sufficient regulatory protections be in place to protect the surrogate mother from exploitation; and that there be legal clarity about the parent-child relationships that result from the arrangement.[28]

The Standing Committee stated that it believed the Australian Law Reform Commission (ALRC), with its strong background in legal policy development, would be a suitable body to develop a model national law that could be taken by the Commonwealth Attorney-General to the Council of Australian Governments (COAG) for review, adoption and implementation. In its response to this recommendation the Australian Government has said:

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25 Ibid, p 2.

26 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements (2016)*, Recommendation 1.

27 Australian Government, *Australian Government Response to the Recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters Report*, November 2018, p 3.

28 Ibid, Recommendation 2.

> *The Government agrees that state and territory laws should, to the greatest extent possible, be consistent in their approach to the regulation of domestic altruistic surrogacy arrangements… States and territories currently have legislative frameworks that are broadly consistent with the surrogacy principles developed in 2009 by the then Standing Committee of Attorneys-General, although there are some inconsistencies.*
>
> *The Government agrees that the Committee's four guiding principles should inform the domestic regulation of surrogacy arrangements. The Government will seek agreement from the states and territories to list the issues raised in the Committee's report for consideration by the Council of Attorneys-General (CAG). Through this forum, the Government will seek the views of the states and territories about opportunities to progress consistency in the regulation of domestic altruistic surrogacy arrangements. The Government considers that CAG is the most appropriate forum for jurisdictions to discuss the legislative frameworks and other arrangements that regulate domestic altruistic surrogacy.* [29]

It is noted that an ALRC review of the family law system was announced on May 2017, but the terms of reference did not include surrogacy specifically, and the ALRC has not been asked to develop a model law for surrogacy.[30] The reference did state that the ALRC should *'have regard to existing reports relevant to: the family law system, including on surrogacy, family violence, access to justice, child protection and child support.'*[31] An issues paper released in May 2018 by the ALRC Family Law review recognised the increased use of assisted reproduction and surrogacy and asked whether the *Family Law Act* should be amended to better reflect the diversity of families in which children are cared for, and to better support decision making by the courts in cases where children are living in non-traditional families. Specifically, it invited comment regarding *'What changes could be made to Part VII of the Family Law Act to enable it to apply consistently to all children irrespective of their family structure?'* [32] The ALRC is due to report on its review by 19 March 2019.

In its response to the Standing Committee on Social Policy and Legal Affairs report the Australian Government noted the review of family law currently being undertaken by the ALRC. It further said:

> *the Government considers that CAG is the appropriate forum to consider how to achieve consistency in the legislative and regulatory frameworks governing domestic surrogacy arrangements. The Government will consult with the states and territories with a view to listing surrogacy matters for discussion at CAG.* [33]

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29 Australian Government, *Australian Government Response to the Recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters Report*, November 2018, p 4.

30 The ALRC review of the family law system has wide ranging terms of reference in which the ALRC has been asked to consider the need for reform in relation to areas that include: appropriate early and cost-effective resolution of all family law disputes; the protection of the best interests of children and their safety; the best ways to inform decision makers about the best interests of children and their views; family violence and child abuse, including protection for vulnerable witnesses; and laws in relation to parenting and property division after separation.

31 Review of the Family Law System, terms of reference, available at https://www.alrc.gov.au/inquiries/family-law-system/terms-reference accessed December 2018.

32 Australian Law Reform Commission, *Review of the Family Law System Issues Paper* (IP48), March 2018, pp 46-47.

33 Australian Government, *Australian Government Response to the Recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters Report*, November 2018, p 3.

In the meantime, states have continued the discussion, call, and work to achieve harmonisation of laws. In addition to the current review of Western Australian assisted reproduction and surrogacy laws, in 2018 there were also reviews completed in New South Wales and South Australia, with recommendations that seek to work toward this aim. A review is also under way in Victoria, with a final reporting date in 2019. As the reviewer for Western Australia, I have paid careful regard to such work, and have ensured communication with the respective state reviewers. I have also been conscious of the need for careful consideration of how potential reforms in Western Australia may interact with developments around Australia. To this end, detailed consideration of all the respective laws, reveals that while uniformity of legislation across jurisdictions has not been achieved and there are differences amongst states, there are also similarities – several of which reflect underlying principles shared by all jurisdictions and that have been reiterated in both Commonwealth and state and territory inquiries and reports. Such analysis then enables consideration of what may need to change.

2.3 State and Territory laws

2.3.1 General requirements

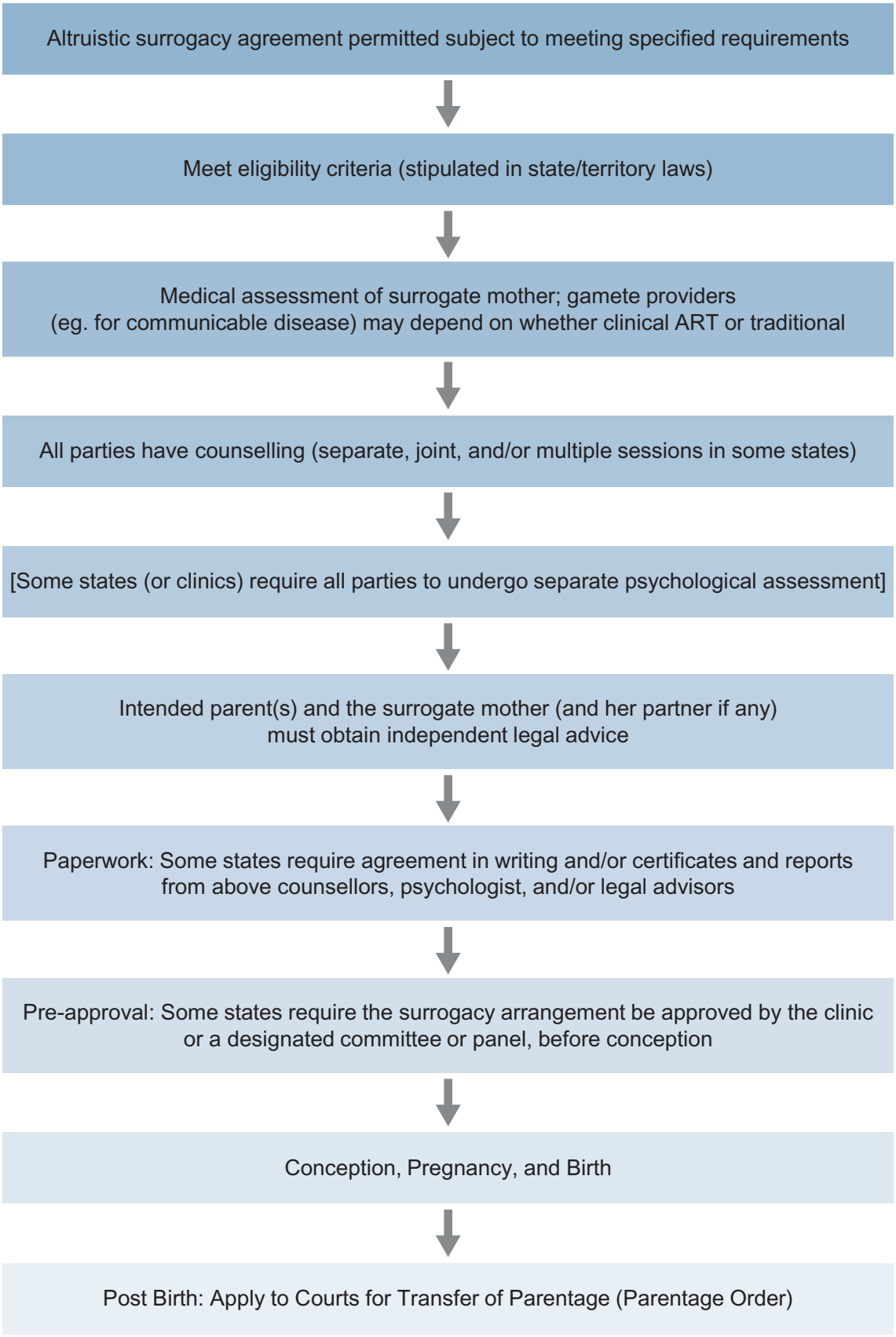
The regulation of ART and surrogacy falls to the states and territories of Australia. There is also relevant Commonwealth law and guidelines.

It is noted that sitting above all the laws that are described below is an overarching or guiding principle in each of the states and the Australian Capital Territory that the well-being, welfare and/or best interests of a child born as a result of a surrogacy arrangement, both through childhood and for the rest of his or her life, are paramount. This is central to the discussion and recommendations made in this report.

The flowchart on the following page sets out the general requirements of surrogacy arrangements across Australia. This is followed by a brief overview of state, territory and Commonwealth laws related to the above mentioned issues. In the interests of transparency, it is noted that the information about state, territory and Commonwealth laws is drawn from the reviewer's prior work researching and writing about laws across the country. It has further been updated, where necessary, to reflect the law at the time of writing and to provide the reader with pertinent information.

Tables have also been produced for visual comparison. Discussion that follows notes the main differences between Western Australian legislation and that of the other jurisdictions of Australia. The information is descriptive in nature and is provided with the intention to inform the reader prior to further in-depth discussion of matters raised by the terms of reference.

Flowchart: General Requirements for Surrogacy Arrangements



2.3.2 Western Australia

The *Surrogacy Act 2008* (WA) received Royal Assent on 10 December 2008. Surrogacy Regulations and Surrogacy Directions were declared in the *Government Gazette* in early 2009.[34] These instruments set the current standards for use of an artificial fertilisation procedure in connection with a surrogacy arrangement. The purpose of the Surrogacy Act is to establish the boundaries in relation to what is permissible and what is prohibited in relation to surrogacy arrangements, and to…*enable the court to transfer, from the birth parents to the arranged parents, the parentage of a child born under a surrogacy arrangement in certain circumstances*.[35]

Reference to 'Court' in the *Surrogacy Act 2008* (WA) is to the Family Court of Western Australia (see section 14 of the Act). The Family Court (Surrogacy) Rules 2009 set out the form and process necessary for an application for legal parentage.[36]

Legal recognition and/or enforceability of surrogacy contracts

In Western Australia the *Surrogacy Act 2008* (WA) refers to the woman who carries and bears the child as the 'birth mother' and the people who intend to parent the child as the 'arranged parents'.[37] Altruistic surrogacy arrangements are permitted but such arrangements are not enforceable except as to an agreement to pay or reimburse reasonable expenses incurred by the surrogate mother.[38] This means that the intended parent(s) cannot oblige the surrogate to relinquish the child, nor can the surrogate mother insist the intended parent(s) take the child but any reasonable expenses incurred in relation to the pregnancy or birth may be ordered to be reimbursed. The agreement must be in writing and signed by the intended parent(s) and the birth parent(s).[39]

Traditional versus gestational surrogacy

Distinction is often drawn in surrogacy between 'traditional surrogacy' and 'gestational surrogacy'. In 'traditional surrogacy' (sometimes also referred to as 'partial' surrogacy) a surrogate mother carries and bears a child that is genetically related to her, conceived by sexual intercourse, self-insemination or by medically supervised artificial insemination. The sperm of an intended father, her own partner or a donor may be used. In 'gestational' or 'full'[40] surrogacy arrangements, the surrogate mother carries a child that is the genetic offspring of other persons. It may be that an intended mother has healthy ova but is unable to carry a pregnancy – in such circumstances an embryo may be created in vitro, using her eggs and her male partner's sperm (the intended mother and father's gametes), and then transferred into the surrogate mother's uterus. Alternatively, the intended parent(s), of opposite or same-sex, may elect to use the eggs of a donor and the intended father's sperm, or donor sperm. When 'gestational' surrogacy takes place the use of ART is required.

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34 Surrogacy Regulations 2009, Western Australian Government Gazette on 25 Feb 2009 p. 501-8; Surrogacy Directions 2009, Western Australian Government Gazette 27 February 2009 p 512.

35 *Surrogacy Act 2008* (WA) s 12.

36 Western Australian Government Gazette 25 February 2009 p 491-499.

37 *Surrogacy Act 2008* (WA) s 3.

38 *Surrogacy Act 2008* (WA) s 7.

39 *Surrogacy Act 2008* (WA) s 21(2)(f).

40 E Jackson, *Regulating Reproduction: Law, Technology and Autonomy*, Oxford Hart, 2001, p 261.

The *Surrogacy Act 2008* (WA) does not place conditions on access to either traditional or gestational surrogacy and there is no requirement for the child to have a genetic link with the arranged parent or arranged parents. Both 'traditional' and 'gestational' surrogacy are, therefore, permissible in Western Australia provided other criteria are met.

Altruistic versus commercial surrogacy

Surrogacy arrangements may be 'altruistic' or 'commercial'. In 'altruistic' arrangements the woman who agrees to be the birth mother does not receive payment by which she derives a profit. She may, however, receive reimbursement of expenses incurred in relation to the conception, pregnancy, or birth. 'Commercial' ('compensated' or 'for-profit') surrogacy involves arrangements where the woman who agrees to be the birth mother may be paid a fee from which she derives a profit.

Altruistic surrogacy arrangements are permitted in Western Australia. Reimbursement for 'reasonable expenses' are listed in the legislation to include:

- reasonable expenses associated with — (a) the pregnancy or the birth; or (b) any assessment or expert advice in connection with the arrangement
- reasonable expenses associated with achieving, or attempting to achieve, the pregnancy
- reasonable medical expenses that are not recoverable under any health insurance or other scheme
- the value of earnings foregone because of leave taken for a period of not more than two months during which the birth occurs or was expected to occur; or at any other time during the pregnancy for medical reasons
- reasonable expenses of psychological counselling
- a premium payable for health, disability or life insurance that would not have been taken out if the surrogacy arrangement had not been entered into and provides cover for a period during which an expense referred to above is incurred or might be, or have been expected to be, incurred.[41]

Commercial surrogacy is prohibited in Western Australia. A person who enters into a surrogacy arrangement that is for reward (that is, commercial surrogacy) commits an offence that is subject to a penalty – a fine of $24,000 or imprisonment for two years.[42] A person who provides a service knowing the service is to facilitate a surrogacy arrangement that is for reward commits a crime, except if the service is a health service provided to the birth mother after she has become pregnant. Penalty includes imprisonment for five years, or on summary conviction a fine of $12,000 or imprisonment for one year.

41 *Surrogacy Act 2008* (WA) s 6.

42 *Surrogacy Act 2008* (WA) s 8.

Eligibility

Intending parents

The *Surrogacy Act 2008* (WA) provides that an 'eligible' person or couple can arrange an altruistic surrogacy arrangement provided a comprehensive assessment and approval process has been undertaken by the Reproductive Technology Council (RTC).[43]

At the time of writing, an eligible person is a woman who is unable to conceive a child due to medical reasons or, although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or disease, or is unable for medical reasons to give birth to a child.

An eligible couple is defined to mean two people who are married, or two people in a de facto relationship who are of opposite sex to each other who are unable to conceive a child due to medical reasons or although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or a disease.[44] Provisions limiting access to couples 'of the opposite sex' or due to 'medical reasons' are contrary to the Commonwealth Sex Discrimination Act provisions prohibiting discrimination based on relationship status, sexual orientation, gender identity, or intersex status. This, and matters of access, eligibility, and discrimination are further discussed in Chapter 3.

RTC approval

The current law requires RTC approval before the arrangement proceeds.[45] If such approval is not obtained, the *Surrogacy Act 2008* (WA) provides that an order for legal parentage cannot be made. The RTC approval requirements further stipulate eligibility criteria in that the RTC must not approve a surrogacy arrangement unless satisfied that:

- the surrogate mother is at least 25 years of age, and (except in exceptional circumstances) has previously given birth to a live child
- the surrogacy agreement is in writing, signed by all parties (including the intended parent(s)
- the surrogate mother and her partner, if any, and the sperm and/or egg donor(s) and their partners if any, have been assessed as medically suitable to be part of the surrogacy arrangement
- a medical report is submitted to the RTC for approval.[46]

43 *Surrogacy Act 2008* (WA) ss 16 and 19.

44 *Surrogacy Act 2008* (WA) s 19.

45 *Surrogacy Act 2008* (WA) s 17(c)(ii); see also the Surrogacy Directions, Cl. 7

46 *Surrogacy Act 2008* (WA) s 17(c)(ii); see also the Surrogacy Regulations 2009 (WA), Reg. 9.

Each of the parties (i.e. the intended parent(s), the potential surrogate mother and her partner if any, and any donor(s) and their partners if any) must also have undergone counselling with an approved RTC counsellor[47] about the implications of the arrangement;[48] been assessed by a clinical psychologist as being psychologically suitable for the arrangement with a written report being supplied to the RTC;[49] and received legal advice about the general effect of the agreement. Such counselling, assessment, and legal advice must be obtained at least three months prior to the application to the RTC. Note, the requirements to be assessed by a clinical psychologist are *in addition* to the requirements for each of the named parties to have received counselling by an RTC approved counsellor.

The Surrogacy Regulations 2009 include detailed provisions about what must be covered in counselling. The requirements are set out in Box 2.1.

Box 2.1 Counselling requirements for Altruistic Surrogacy in Western Australia – per the Surrogacy Regulations 2009 (Regulation 4)

Counselling provided by an approved counsellor must cover the following issues:

- the likely effect of the surrogacy arrangement on the birth mother and on her relationship with the arranged parents
- whether, and to what extent, the birth mother should allow the arranged parents or a donor to express their views about aspects of the birth mother's lifestyle and behaviour during a pregnancy in connection with the surrogacy arrangement
- whether prenatal testing will be considered and how the birth mother, the arranged parents and any donor will address a situation where a serious defect of a foetus is found
- identification of expenses associated with the pregnancy and the birth that may be paid on behalf of, or reimbursed to, the birth parents and the circumstances in which those expenses may be paid or reimbursed
- identification of expenses associated with a donation of eggs or sperm intended to be used for the conception of a child that may be paid on behalf of, or reimbursed to, a donor and the circumstances in which those expenses may be paid or reimbursed
- who is to be present at a child's birth
- arrangements for the arranged parents to take care of a child following birth, including the process of separation of birth parents from the child
- how the birth of a child born with a disability would be dealt with under the surrogacy arrangement
- how the separation of the arranged parents, or the death of either or both of them, before a child's birth would be dealt with under the surrogacy arrangement

47 In Western Australia counsellors must be approved by the RTC as meeting the requirements set out in Part 1 of Schedule 4 of the Directions to the *Human Reproductive Technology Act 1991*.

48 *Surrogacy Act 2008* (WA) s 17; see also the Surrogacy Regulations 2009 (WA).

49 *Surrogacy Act 2008* (WA) s 17(c)(i); see also the Surrogacy Regulations 2009 (WA).

- what information would be given to the child about the circumstances of the child's birth and when and by whom it would be given
- what communication it is proposed that a child would have with the birth parents and the family of the birth parents during childhood and how any proposed contact is to be managed
- what communication it is proposed that a child would have with a donor and the family of a donor during childhood and how any proposed contact is to be managed
- the likely effects of the surrogacy arrangement on other children of the birth parents or the arranged parents, and the involvement of those children in the process in ways appropriate to their age and maturity
- the likely effects of the surrogacy arrangement on the birth mother's husband or de facto partner (if any), including consideration of how the surrogacy arrangement may impact on that relationship
- the likely effects of the surrogacy arrangement on a donor or the family of a donor
- how the situation of birth parents changing their minds about transferring the care of a child to the arranged parents would be dealt with
- the attitude towards, and impact of, the surrogacy arrangement on the extended families of the birth parents, the arranged parents and any donor
- the level of support networks for the parties during the surrogacy arrangement
- methods of conflict resolution.

The surrogacy regulations provide that the approved counsellor is to determine the process to be used in the provision of counselling. After the requirements of counselling have been met, the approved counsellor is to prepare and give to the arranged parents a written certificate stating the name of each party who has undertaken the counselling, details of any concern the counsellor has about the surrogacy arrangement as a result of the counselling, and the day on which counselling was completed by each of the parties. There is no further prescribed information concerning the requisite clinical psychologist assessment of each of the parties involved in the proposed surrogacy arrangement.

In Western Australia there is no requirement under the Act for parties to a surrogacy arrangement to have a criminal record check.

Residency requirements

The law requires that 'arranged parent(s)' must reside in Western Australia and that at least one arranged parent must have reached 25 years of age.[50] There is no stipulation that the surrogate mother reside in Western Australia.

50 *Surrogacy Act 2008* (WA) s 19.

Advertising

The *Surrogacy Act 2008* does not impose restrictions on advertising for a surrogacy arrangement by prospective arranged parents or a prospective birth mother, provided this is not for a commercial arrangement. That is, where intended parent(s) are seeking an altruistic arrangement that complies with the Act, that will not be for fee or reward, they may advertise. Similarly, a woman who wishes to offer to be a surrogate mother may advertise, provided she does not expect, or enter into, a commercial arrangement. There are also no restrictions on where such advertisements may be made.

Advertising in relation to *commercial* surrogacy is prohibited. A person commits an offence if they publish or cause to be published anything that is:

- intended to, or likely to, induce a person to enter into a surrogacy arrangement that is for reward
- seeking a person who is willing to enter into a surrogacy arrangement that is for reward
- offering that they are, or might be, willing to enter into a surrogacy arrangement that is for reward.[51] (Reward does not include reimbursement of reasonable expenses).

Agents and brokerage of surrogacy arrangements

It is also an offence to introduce parties to a surrogacy arrangement for valuable consideration.[52] This applies whether or not it is intended that the surrogacy arrangement be one that is for reward or an altruistic arrangement. Committing such an offence carries a penalty of a fine of $12,000 or imprisonment for one year.

The Directions to the Act also prohibit clinics from actively recruiting birth mothers but they can introduce a woman who has approached the clinic offering to be a birth mother, to prospective arranged parents (Direction 9). They must not charge a fee for doing so because this would contravene s 9 of the Act.

A person who provides a service knowing that the service is to facilitate a surrogacy arrangement that is for reward, commits a crime except if the service is a health service provided to the birth mother after she has become pregnant.[53] Committing such an offence carries a penalty of a $12,000 fine or imprisonment for five years.

Legal parentage

Once a child(ren) is born following an arrangement that meets the above requirements, the 'arranged' (intended) parent(s) may apply to the Family Court of Western Australia for an order conferring parental status on them. The application can be lodged with the court only after a period of 28 days has elapsed since the day on which the child is born and after no more than six months after the day on which the child is born except with the leave of the court, which may be given in exceptional circumstances.[54]

51 *Surrogacy Act 2008* (WA) s 10.

52 *Surrogacy Act 2008* (WA) s 9.

53 *Surrogacy Act 2008* (WA) s 9.

54 *Surrogacy Act 2008* (WA) s 20(2) and 20(3).

In making a parentage order the court is to recognise that the best interests of the child are paramount, it being presumed to be in the best interests of the child for the intended ('arranged') parents to be the parents of the child unless there is evidence to the contrary.[55] Before making the order the court must also be satisfied that the birth parents and intended parent(s) have made a written plan which includes details of the amount of time and communication the child will have with the birth parents, and about balancing the child's long-term welfare.[56]

In circumstances where the birth mother is not the child's genetic parent and at least one arranged parent is the child's genetic parent, or the birth mother cannot be found, is deceased or incapacitated, the legislation permits the court to dispense with the requirement for the birth parent to have:

- received counselling
- received legal advice
- consented to the making of the parenting order
- agreed to an appropriate plan.[57]

Access to information by the individual born as a result of surrogacy

People in Western Australia conceived using donor gametes after 2004 may access identifying information about their donor when they turn 16. Information is held on the Reproductive Technology Register maintained by the WA Department of Health. The child about whom a parentage order relates has the right to have access to the registration of their birth.[58] There is currently no mechanism for notification of the child's birth or conception status.

2.3.2 Australian Capital Territory

Legality and enforceability

The Australian Capital Territory has had laws recognising altruistic surrogacy agreements since 1994.[59] Surrogacy is currently regulated pursuant to the *Parentage Act 2004* (ACT). A woman who gives birth to a child(ren) is called the 'birth parent' (as is her spouse if any). The person(s) who intend to parent the child are called 'substitute parents'. A 'substitute parent agreement' is not enforceable by implication as parentage orders will not be made unless both birth parents freely, and with a full understanding of what is involved, agree to the making of the order.[60] The *Parentage Act* also stipulates that a substitute parent agreement has no legal effect other than under the relevant division of the Act.[61]

55 *Surrogacy Act 2008* (WA) s 13.

56 *Surrogacy Act 2008* (WA) ss 21(2)(f) and 22.

57 *Surrogacy Act 2008* (WA) s 21(3).

58 *Surrogacy Act 2008* (WA) s 38.

59 Prior to the *Parentage Act 2004* (ACT), the *Substitute Parents (Agreements) Act 1994* (ACT) provided for the recognition of parentage in altruistic surrogacy arrangements.

60 *Parentage Act 2004* (ACT) s 26(b).

61 *Parentage Act 2004* (ACT) s 31.

Altruistic versus commercial

It is an offence to intentionally enter into a 'commercial substitute parent agreement' in the Australian Capital Territory.[62] A 'commercial substitute parent agreement' is defined as a substitute parent agreement under which a person agrees to make – or give to another – a payment or reward, other than for expenses, connected with a pregnancy that is the subject of the agreement or the birth or care of the resulting child.[63] Altruistic surrogacy is permitted as is providing reimbursement of expenses for altruistic surrogacy agreements.[64]

Eligibility and transferral of legal parentage

The *Parentage Act 2004* (ACT) provides for criteria that must have been met before a parentage order will be made.

Parentage orders will be made in favour of the intended parent(s) only when the child has been conceived as a result of a fertilisation procedure.[65] The *Parentage Act* further provides that neither of the child's birth parents[66] must be a genetic parent of the child but at least one of the 'substitute parents' must be genetically related to the child.[67] As such, only gestational surrogacy is recognised for the purposes of granting a 'substitute parenting agreement', and only then when at least one of the intending parents is genetically related to the child.

In granting a 'substitute parenting agreement' the court must make the order if it is satisfied it is in the child's best interests and both birth parents understand what is involved.[68] The court must take the following factors into consideration:

- whether the child's home is with the substitute parent(s)
- whether both substitute parents are at least 18 years old
- whether only one of the substitute parents has made the application and whether the other agrees to the making of the order
- whether payment or reward (other than for expenses reasonably incurred) has been given or received by either of the child's substitute parents pursuant to the agreement
- whether both birth parents and both substitute parents have received appropriate counselling and assessment.[69]

The court may also take into consideration any other relevant information.[70]

62 *Parentage Act 2004* (ACT) s 41.
63 *Parentage Act 2004* (ACT) s 40.
64 *Parentage Act 2004* (ACT) s 40.
65 *Parentage Act 2004* (ACT) s 24.
66 Defined as the woman who gave birth and the other person presumed to be the parent of the child: s 23.
67 *Parentage Act 2004* (ACT) s 24.
68 *Parentage Act 2004* (ACT) s 26(1).
69 *Parentage Act 2004* (ACT) s 26(3).
70 *Parentage Act 2004* (ACT) s 26(4).

Residency requirements

The Act provides that it applies if the child was conceived as a result of a procedure carried out in the Australian Capital Territory.[71] There are no residency requirements stipulated for either the birth mother or the substitute parents. The Act provides for extraterritorial effect regarding offences committed by a person who is ordinarily resident in the Australian Capital Territory.[72]

Advertising and brokerage

Pursuant to the current *Parentage Act 2004* (ACT) altruistic surrogacy arrangements are permitted provided no advertising or intermediaries are involved.[73] It is, however, an offence to procure a 'substitute parent agreement'.[74] It is also an offence to publish any advertisement to induce a person to enter into such an agreement or to publish an advertisement seeking someone willing to do so.[75]

Access to information by the individual born as a result of surrogacy

If a parentage order is made about a child, a number of provisions of the *Adoption Act 1993* apply in relation to the parentage order as if the parentage order were an order made under that Act for the adoption of the child and the child were an adopted child. The child is thus entitled to access identifying and non-identifying information about his/her birth parent(s) upon request to the Attorney General.[76]

There is no provision in the Australian Capital Territory for registration of the details of gamete donors onto a central registry. There also appears to be no provision that enables notification of status.

71 *Parentage Act 2004* (ACT) s 26(1).

72 *Parentage Act 2004* (ACT) s 45.

73 *Parentage Act 2004* (ACT) s 40.

74 *Parentage Act 2004* (ACT) s 42.

75 *Parentage Act 2004* (ACT) s 43.

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

2.3.3 New South Wales

Legality and enforceability

In New South Wales, the woman who will become pregnant and give birth to a child(ren) who are the subject of a surrogacy agreement is called a 'birth mother'. The person(s) who will apply for legal parentage are called 'intended parents'. Pursuant to the *Surrogacy Act 2010* (NSW) altruistic surrogacy arrangements are legal; however, they are not enforceable[77] except insofar as there was an agreement to pay or reimburse the birth mother's 'reasonable costs' incurred.[78] This means that person(s) may enter into surrogacy agreements but if any party changes their mind the agreement cannot be enforced other than with respect to a requirement that the intended parent(s) pay any reasonable costs incurred by the surrogate mother. For an agreement on costs to be enforceable, the agreement between the surrogate and the intended parent(s) must have been made prior to the surrogate conceiving a child.[79]

Altruistic versus commercial

In New South Wales 'reasonable costs' may be reimbursed in altruistic arrangements, provided they are associated with becoming or trying to become pregnant, a pregnancy or a birth; and/or entering into and giving effect to a surrogacy arrangement.[80] This may include:

- costs associated with the surrogate mother's medical treatment, travel or accommodation
- health, disability or life insurance that would not have been obtained otherwise
- loss of earnings as a result of unpaid leave
- entering into the agreement; and/or costs associated with the surrogate mother and her partner (if any) undergoing counselling; receiving legal advice
- being a party to proceedings in relation to parentage orders (including reasonable travel and accommodation costs).[81]

The New South Wales Act provides that the costs will only be 'reasonable' if they are actually incurred and can be verified by receipts or other documentation.

Commercial surrogacy agreements that involve the provision of a fee, reward or other material benefit or advantage to a person in relation to entering into a surrogacy agreement, giving up a child, or consenting to the making of parentage orders are prohibited and subject to significant fines and/or up to two years in prison.[82] It is also prohibited to travel abroad to engage in commercial surrogacy arrangements because the law has extraterritorial effect.[83]

77 *Surrogacy Act 2010* (NSW) s 6(1).
78 *Surrogacy Act 2010* (NSW) s 6(2).
79 *Surrogacy Act 2010* (NSW).
80 *Surrogacy Act 2010* (NSW) s 7.
81 *Surrogacy Act 2010* (NSW) s 7.
82 *Surrogacy Act 2010* (NSW) s 8.
83 *Surrogacy Act 2010* (NSW) s 11.

Eligibility

Whilst access to ART in New South Wales does not require a person to meet specific eligibility criteria, people entering surrogacy arrangements, whether using 'traditional' or 'gestational', must meet a list of criteria in order for a parentage order to be made.[84] Such criteria include that the best interests of the child be paramount;[85] the surrogacy arrangement be altruistic;[86] and the arrangement be made prior to the surrogate conceiving a child.[87] The intended parent must be a single person or a member of a couple — in which case both must apply.[88] Age requirements for both the surrogate mother and the intending parent(s) apply. The birth mother must be over the age of 25 years;[89] the intended parent(s) must be over the age of 25 years[90] or the maturity of a younger intended parent has to have been established via counselling.[91]

The applicant(s) must demonstrate a medical or social need for a surrogacy arrangement.[92] There is a medical or social need for a surrogacy arrangement if there is only one intended parent under the surrogacy arrangement and the intended parent is a man or an 'eligible woman', or there are two intended parents under the surrogacy arrangement and the intended parents are a man and an 'eligible woman', two men or two 'eligible women'.

An eligible woman is a woman who is unable to conceive a child on medical grounds, or likely to be unable, on medical grounds, to carry a pregnancy or to give birth, or unlikely to survive a pregnancy or birth, or is likely to have her health significantly affected by a pregnancy or birth.[93] Alternatively, an eligible woman is one who if she were to conceive a child, is likely to conceive a child affected by a genetic condition or disorder, the cause of which is attributable to the woman, or is likely to conceive a child who is unlikely to survive the pregnancy or birth, or whose health would be significantly affected by the pregnancy or birth.[94]

Each of the parties must have received counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications *before* entering the arrangement. The birth mother and her partner (if any) must have received further counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications *after the birth* of the child and before consenting to the parentage order.[95]

Similarly, each of the affected parties must have received legal advice from an Australian legal practitioner about the surrogacy arrangement and its implications before entering into the surrogacy arrangement.[96] The legal advice obtained by the birth mother and the birth mother's

84 *Surrogacy Act 2010* (NSW) ss 18, 21–38.
85 *Surrogacy Act 2010* (NSW) s 22.
86 *Surrogacy Act 2010* (NSW) s 23.
87 *Surrogacy Act 2010* (NSW) s 24.
88 *Surrogacy Act 2010* (NSW) s 25.
89 *Surrogacy Act 2010* (NSW) s 27.
90 *Surrogacy Act 2010* (NSW) s 28.
91 *Surrogacy Act 2010* (NSW) s 29.
92 *Surrogacy Act 2010* (NSW) s 30.
93 *Surrogacy Act 2010* (NSW) s 30(3).
94 *Surrogacy Act 2010* (NSW).
95 *Surrogacy Act 2010* (NSW) s 35.
96 *Surrogacy Act 2010* (NSW) s 36.

partner (if any) must have been obtained from an Australian legal practitioner who is independent of the Australian legal practitioner who provided legal advice about the surrogacy arrangement to the applicant or applicants.[97]

Residency requirements

Applicants for a legal parentage order must be resident in New South Wales.[98]The extraterritorial effect of prohibitions on engaging in commercial surrogacy applies to people who are usually resident in New South Wales.[99]

Advertising, agents and brokerage

In New South Wales a person must not publish any advertisement, statement, notice or other material that states or implies that a person is willing to enter into, or arrange, a surrogacy arrangement; seeks a person willing to act as a birth mother under a surrogacy arrangement; states or implies that a person is willing to act as a birth mother under a surrogacy arrangement; or is intended, or is likely, to induce a person to act as a birth mother under a surrogacy arrangement. There is a maximum penalty for doing so in the case of a commercial surrogacy arrangement of 2,500 penalty units for corporations or 1,000 penalty units or imprisonment for two years (or both) in any other case. Where the arrangement is not commercial a maximum penalty of 200 penalty units for corporations or 100 penalty units otherwise, applies. If the surrogacy arrangement is not a commercial surrogacy arrangement the provisions do not apply, provided no fee has been paid for the advertisement, statement, notice or other material.

Transfer of legal parentage

The *Surrogacy Act 2010* (NSW) provides for transfer of legal parentage to the intended parent(s) subject to an application being made to the court.[100] All parties must consent to the order[101] and the applicant(s) must be resident in New South Wales.[102] The surrogacy arrangement must be in writing.[103] The birth of the child must have been registered.[104] The child must be living with the applicant(s).[105] The child's age and wishes are to be considered.[106] An application for a parentage order in relation to a child may be made not less than 30 days and not more than six months after the child's birth.[107] Birth siblings must be kept together.[108]

97 *Surrogacy Act 2010* (NSW) s 36(2).
98 *Surrogacy Act 2010* (NSW) s 32.
99 *Surrogacy Act 2010* (NSW) s 11.
100 *Surrogacy Act 2010* (NSW) ss 12–20.
101 *Surrogacy Act 2010* (NSW) s 31.
102 *Surrogacy Act 2010* (NSW) s 32.
103 *Surrogacy Act 2010* (NSW) s 34.
104 *Surrogacy Act 2010* (NSW) s 38.
105 *Surrogacy Act 2010* (NSW) s 33.
106 *Surrogacy Act 2010* (NSW) s 26.
107 *Surrogacy Act 2010* (NSW) s 14.
108 *Surrogacy Act 2010* (NSW) s 20.

An application for a parentage order must be supported by a report about the application prepared by an independent counsellor.[109] The report must contain the independent counsellor's opinion as to whether the proposed parentage order is in the best interests of the child and the reasons for that opinion.[110]

Access to information by the individual born as a result of surrogacy

A person who is the child of a surrogacy arrangement and in respect of whom a parentage order is made is entitled to receive, if the person is 18 years of age or older the person's original birth certificate, and the person's full birth record.[111] This is complemented by section 25 of the *Births, Deaths, Marriages Registration Act*,[112] which provides that when a birth certificate is issued to a person who was the child of a surrogacy arrangement and who is at least 18 years of age, the Registrar of Births Deaths and Marriages must attach an addendum indicating that further information is available. The person can then request their original birth certificate and full birth record.[113] This is also possible for people under the age of 18 subject to the consent of the person(s) who have parental responsibility for the child.[114]

In addition, information concerning a child born as a result of a surrogacy arrangement, and the donors of gametes and/or birth parents must be entered on the Central Register maintained in New South Wales by their health department.[115] This includes information about the child's full name, the date and place of birth and its sex. The following information must be recorded for each person who is a gamete provider or a birth parent:

- the full name of the person
- the residential address of the person
- the date and place of birth of the person
- the ethnicity and physical characteristics of the person
- any medical history or genetic test results in relation to the person or members of the person's family that are relevant to the future health of a child born as a result of the surrogacy arrangement or the child's descendants
- information about biological siblings of a child born as a result of a surrogacy arrangement (year of birth and sex).

All information (identifying and non-identifying) may be released to the individual born as a result of a surrogacy arrangement when they reach 18 years of age.

109 *Surrogacy Act 2010* (NSW) s 17(1).

110 *Surrogacy Act 2010* (NSW) s 17(2).

111 *Surrogacy Act 2010* (NSW) s 55(1).

112 *Births, Deaths, and Marriages Registration Act 1995* (NSW), s 25.

113 Department of Justice, Government of New South Wales, *Statutory Review Surrogacy Act 2010* (July 2018) [3.27].

114 *Surrogacy Act 2010* (NSW) s 55(2).

115 *Surrogacy Act 2010* (NSW) s 37; *Assisted Reproductive Technology Act 2007* (NSW) s 41B; Assisted Reproductive Technology Regulation (NSW) cl 17A.

2.3.4 Queensland

Legality and enforceability

The *Surrogacy Act 2010* (Qld) addresses the issues of legality, enforceability, payment, and the making of parentage orders and is quite similar to the New South Wales law. Surrogacy agreements are legal in Queensland but not enforceable other than payment of reasonable costs.[116]

Altruistic versus commercial

Commercial surrogacy is prohibited with penalties of fines and/or up to three years in prison.[117] Altruistic surrogacy is permitted. Although the birth mother cannot profit from the surrogacy arrangement, she is entitled to the reimbursement of the surrogacy costs. These include for example reasonable medical costs related to the pregnancy and birth of the child; health or life insurance obtained that would not have been taken if not for the surrogacy arrangement; counselling and legal costs associated with the surrogacy arrangement, including preparation of reports; actual lost earnings because of leave taken during pregnancy or following birth for a period of up to two months; reasonable travel expenses incurred.[118]

Eligibility

The *Surrogacy Act 2010* (Qld) allows a single person (male or female) or a couple (heterosexual or same sex) to enter into an agreement with a woman (the birth mother) and her partner (if she has one) to become pregnant with the intention that the child will be relinquished to the intended parent(s). Like New South Wales, the applicant(s) must demonstrate a medical or social need for a surrogacy arrangement.[119] There is no requirement regarding how the child is to be conceived nor for the child to be genetically related to the parties. There are no restrictions placed on the birth mother in terms of how she manages her pregnancy.

Advertising

It is prohibited to advertise for any surrogacy arrangement – whether it is a woman who is willing to be the birth mother or the intended parent(s) looking for someone to be a birth mother for them.

Agents and brokerage

It is an offence for a person to receive a payment, reward or other material benefit or advantage for another person agreeing to enter into or entering into a surrogacy arrangement.

116 *Surrogacy Act 2010* (Qld) s 15.

117 *Surrogacy Act 2010* (Qld) s 56.

118 *Surrogacy Act 2010* (Qld) s 11.

119 This is defined in the *Surrogacy Act 2010* (Qld) at s 14.

Residency requirements

Applicants for a birth parentage order must reside in Queensland,[120] unless exceptional circumstances apply.[121] Extraterritorial prohibitions on commercial surrogacy apply to those who ordinarily reside in Queensland.[122]

Transfer of legal parentage

The intended parent(s) may apply to the Children's Court for a parentage order once the child is between 28 days and six months old, or at a later time with the court's leave.[123] Parentage orders may be made on such application subject to meeting identical criteria as that set out above in relation to New South Wales.[124] The Queensland legislation provides extensive requirements for parties to the agreement (the birth mother[125] and her partner (if any),[126] any other 'birth parent'[127] (a person who under the law would be considered the legal parent of the child), and the intended parent(s),[128] counsellors[129] and legal advisers[130] to provide to the court written affidavits concerning the agreement swearing that the requisite criteria have been met.

Access to information by the individual born as a result of surrogacy

There is no central registry for details of the birth mother and/or donors of gametes to be recorded in Queensland. Therefore, the child's future access to information about its birth, birth mother and/or donors of gametes is reliant upon the parties honouring the undertaking, made at the time that the independent counselling for the surrogacy guidance report and parenting order application were being made, to be open and honest.

2.3.5 South Australia

Legal recognition and/or enforceability of surrogacy contracts

In South Australia, surrogacy is governed by the *Family Relationships Act 1975* (SA). The law in South Australia provides that surrogacy contracts and procuration contracts are illegal and void,[131] except in limited circumstances in which surrogacy arrangements may be lawful (see discussion below).[132] Other than provided for in the Act, it is an offence for a person to negotiate, arrange or

120 *Surrogacy Act 2010* (Qld) s 22(2)(g)(ii).

121 *Surrogacy Act 2010* (Qld) s 23(2).

122 *Surrogacy Act 2010* (Qld) s 54.

123 *Surrogacy Act 2010* (Qld) s 21(1).

124 *Surrogacy Act 2010* (Qld).

125 *Surrogacy Act 2010* (Qld) s 27.

126 *Surrogacy Act 2010* (Qld) s 28.

127 *Surrogacy Act 2010* (Qld) s 29.

128 *Surrogacy Act 2010* (Qld) s 26.

129 *Surrogacy Act 2010* (Qld) s 31.

130 *Surrogacy Act 2010* (Qld) s 30.

131 *Family Relationships Act 1975* (SA) s 10G. (Note: s 10F defines surrogacy contract and procuration contract.)

132 *Family Relationships Act 1975* (SA) s 10HA. The discussion focuses upon operative provisions within

obtain the benefit of a surrogacy contract on behalf of another, for valuable consideration; or to induce another to enter into a surrogacy contract. It is also an offence to publish an advertisement or cause an advertisement to be published 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.[133] Only when persons meet the requirements for a 'recognised surrogacy agreement' is surrogacy lawful and it possible to transfer legal parentage.

Altruistic versus commercial

It is an offence to receive valuable consideration under a procuration contract or to enter such a contract in the expectation of receiving valuable consideration.[134] No valuable consideration may be provided for 'recognised surrogacy' arrangements other than for:

- expenses connected with a pregnancy (including any attempt to become pregnant) that is the subject of the agreement
- the birth or care of a child born as a result of that pregnancy
- counselling or medical services provided in connection with the agreement (including after the birth of a child)
- legal services provided in connection with the agreement (including after the birth of a child).[135]

Eligibility

A 'recognised surrogacy agreement' is an agreement in which: all parties to the agreement are at least 18 years old; the intended parent(s) live in South Australia, are legally married or in a registered relationship, or have lived together continuously in a marriage-like relationship (irrespective of their sex or gender identity) for the period of three years immediately preceding the date of the agreement, or for periods aggregating not less than three years during the period of four years immediately preceding the date of the agreement.[136]

The commissioning persons must be unlikely in their circumstances to become pregnant, or to be able to carry a pregnancy or give birth (whether because of infertility, other medical reasons, risk to an unborn child or for some other reason); or there must appear to be a risk that a serious genetic defect, serious disease or serious illness would be transmitted to a child born to a commissioning parent; or there must appear to be a risk that becoming pregnant or giving birth to a child would result in physical harm to a female commissioning parent (being harm of a kind, or of a severity, unlikely to be suffered by females becoming pregnant or giving birth generally).[137]

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the *Family Relationship Act 1975* (SA), and not upon provisions introduced in 2015 which have not been operationalised and are currently under review (i.e. ss 10FA and 10FB).

133 *Family Relationships Act 1975* (SA) s 10H.

134 *Family Relationships Act 1975* (SA) s 10H.

135 *Family Relationships Act 1975* (SA) s 10HA.

136 *Family Relationships Act 1975* (SA) s 10HA(d).

137 *Family Relationships Act 1975* (SA) s 10HA(e).

The surrogate mother must additionally have been assessed by and approved as a surrogate by a counselling service.[138] The surrogate mother and her husband or partner (if any) and the commissioning persons must also all be issued with a certificate that they have complied with counselling requirements.[139]

Advertising

South Australia has repealed its previous offences relating to advertising and replaced them with offences relating to brokering surrogacy contracts or inducing someone to enter a surrogacy contract for valuable consideration.[140]

Brokerage

The *Family Relationships Act* provides that a person who, for valuable consideration, negotiates, arranges or obtains the benefit of a surrogacy contract on behalf of another is guilty of an offence, with a maximum penalty of imprisonment for 12 months. In addition, a person who, for valuable consideration, induces another to enter into a surrogacy contract is guilty of an offence, with a maximum penalty: imprisonment for 12 months. It need not be proven that a surrogacy contract was, in fact, entered; or a woman became pregnant, or a child born, pursuant to a surrogacy contract.

Transfer of legal parentage

Application must be made to a court for parentage orders. In addition to being satisfied as to the above, the court must not make an order unless it is satisfied that the surrogate mother freely, and with a full understanding of what is involved, agrees to the making of the order (unless she is dead, incapacitated or unable to be contacted).[141] The court will further consider whether the child is living with the intended parent(s); that all parties agree to the order; that counselling of all parties has occurred and any other matter it considers relevant.[142]

Access to information by the individual born as a result of surrogacy

When an order under s 10HB or s 10HC of the *Family Relationship Act 1975* (SA) is made, the court is to give to the Registrar of Births, Deaths and Marriages written notice of the date of the order; the full name, address and occupation of each of the birth parents; the full name, address and occupation of each of the intended parent(s); the name by which the child to whom the order relates is known before, and is to be known after, the order becomes effective; and details of the date and place of birth of the child.

It is unclear whether this information will be released to the individual born as a result of the surrogacy arrangement, or if so, whether there are any requirements surrounding access to information. At the time of writing this report the South Australian surrogacy legislation was under review.

138 *Family Relationships Act 1975* (SA) s 10HA(f).

139 *Family Relationships Act 1975* (SA) s 10HA(g).

140 *Family Relationships Act 1975* (SA), s 10H.

141 *Family Relationships Act 1975* (SA) s 10HB.

142 *Family Relationships Act 1975* (SA) s 10HB.

2.3.6 Tasmania

Legality and enforceability

A surrogacy arrangement is unenforceable, however an obligation to pay or reimburse the surrogate mother's reasonable costs may be enforced.[143] It is an offence to enter into, or offer to enter into, a commercial surrogacy arrangement.[144]

Altruistic versus commercial

The *Surrogacy Act 2012* (Tas) provides that altruistic surrogacy is permitted, and that 'reasonable costs' may be recovered where they are associated with trying to become pregnant, a pregnancy or birth, counselling of the birth mother and her spouse (if any) and/or being a party to proceedings in relation to a parentage order.[145]

Eligibility and transfer of legal parentage

The intended parent(s), who may be a single person or couple (regardless of sex), are able to apply to the court for parentage orders[146] not less than 30 days, and not more than six months, after the day on which the child is born or with the court's leave at a later time where there are exceptional circumstances.[147] In making parentage orders the court must be satisfied that each relevant party received independent legal advice; the arrangement is not a commercial surrogacy arrangement; the birth mother was 25 years of age or more when the arrangement was made and has previously given birth to a live child; and counselling has been received both before the child was conceived and after the birth of the child (and before the application for a parentage order) about the social and psychological implications of the surrogacy arrangement.[148] The court will only make parentage orders if it considers such orders to be in the best interests of the child. In addition, the birth mother must consent unless she cannot be contacted, does not have the mental capacity to consent or is deceased.[149]

Advertising and brokerage

Commercial brokerage or advertising of surrogacy arrangements are prohibited. A person must not, for payment, or in anticipation of receiving payment initiate or take part in any negotiations with a view to the making of a surrogacy arrangement; or offer or agree to negotiate the making of a surrogacy arrangement; or compile any information with a view to its use in making, or negotiating the making of, any surrogacy arrangements; or knowingly cause another person to do any of these acts. There is a penalty for doing so of a fine not exceeding 100 penalty units.[150]

143 *Surrogacy Act 2012* (Tas) s 10.

144 *Surrogacy Act 2012* (Tas) s 40.

145 *Surrogacy Act 2012* (Tas).

146 *Surrogacy Act 2012* (Tas) Pt 4.

147 *Surrogacy Act 2012* (Tas) s 15.

148 *Surrogacy Act 2012* (Tas) s 16.

149 *Surrogacy Act 2012* (Tas) s 22.

150 *Surrogacy Act 2012* (Tas) s 41.

Access to information by the individual born as a result of surrogacy

The *Surrogacy Act 2012* (Tas) provides that the birth registrar must make a reference to the legislation and making of parentage orders on the birth registration documents.[151]

2.3.7 Victoria

At the time of writing this report Victoria was also conducting a review of its assisted reproduction and surrogacy legislation. The information below reflects the law in October 2018.

Legality and enforceability

In Victoria, the *Status of Children Act 1974* (Vic) provides for transfer of legal parentage where a surrogacy arrangement has been made subject to meeting certain criteria. When ART has been used, the *Assisted Reproductive Treatment Act 2008* (Vic) is also relevant. The legislation is silent on whether surrogacy agreements are enforceable; however, parentage orders will not be made unless the surrogate mother freely consents to the making of such an order[152] or an exception applies such as she is deceased, cannot be found, or is so physically or mentally ill that she cannot give valid consent.[153]

Altruistic versus commercial

Pursuant to the *Assisted Reproductive Treatment Act 2008* (Vic) a surrogate mother must not receive any material benefit or advantage as a result of a surrogacy arrangement.[154] Significant fines and/or up to two years' imprisonment apply if a person breaches this provision.[155] Similarly, the *Status of Children Act 1974* (Vic) provides that parentage orders will not be granted if the surrogate mother and/or her partner (if any) have received any material benefit or advantage from the surrogacy arrangement.[156] The law does not prevent a surrogate mother being reimbursed for the prescribed costs actually incurred by her as a direct consequence of entering into the surrogacy arrangement.[157] Any provisions within a surrogacy agreement that provide for more than reimbursement of prescribed costs are void and unenforceable.[158]

151 *Surrogacy Act 2012* (Tas) s 34.

152 *Status of Children Act 1974* (Vic) s 22.

153 *Status of Children Act 1974* (Vic) s 24.

154 *Assisted Reproductive Treatment Act 2008* (Vic) s 44(1).

155 *Assisted Reproductive Treatment Act 2008* (Vic) s 44(1).

156 *Status of Children Act 1974* (Vic) s 22(d).

157 *Assisted Reproductive Treatment Act 2008* (Vic) s 44(2).

158 *Assisted Reproductive Treatment Act 2008* (Vic) s 44(3).

Eligibility

When ART is used to achieve the surrogate's pregnancy, the *Assisted Reproductive Treatment Act 2008 (*Vic) requires certain criteria be met. All parties to the arrangement must undergo criminal record and child protection order checks to establish they have not been charged with violent or sexual crimes, or had a child(ren) removed from their care.[159] The surrogacy arrangement must have been approved by a Patient Review Panel[160] which must be satisfied:

- a doctor has formed an opinion that in the circumstances, the commissioning parent is unlikely to become pregnant, be able to carry a pregnancy or give birth or if the commissioning parent is a woman, the woman is likely to place her life or health, or that of the baby, at risk if she becomes pregnant, carries a pregnancy or gives birth
- the surrogate mother's oocyte will not be used in the conception of the child (only gestational surrogacy is legal)
- the surrogate mother has previously carried a pregnancy and given birth to a live child
- the surrogate mother is at least 25 years of age
- the commissioning parent, the surrogate mother and the surrogate mother's partner, if any, have received counselling and legal advice
- the parties to the surrogacy arrangement are aware of and understand the personal and legal consequences of the arrangement
- the parties to the surrogacy arrangement are prepared for the consequences if the arrangement does not proceed.[161]

In exceptional circumstances the Patient Review Panel may approve a surrogacy arrangement despite it failing to satisfy all of the above.

Advertising, agents and brokerage

It is an offence for a person to publish a statement, advertisement, notice or document to the effect that a person is or may be willing to enter into a surrogacy arrangement; seeking another person who is or may be willing to enter into a surrogacy arrangement, act as a surrogate mother, or arrange a surrogacy arrangement; willing to arrange a surrogacy arrangement; or willing to accept any benefit under a surrogacy arrangement, whether for himself or herself or for another person; or to publish such matter that is intended or likely to counsel or procure a person to agree to act as a surrogate mother; or to the effect that a person is or may be willing to act as a surrogate mother. There is a penalty of 240 penalty units for doing so or two years imprisonment or both.[162]

159 *Assisted Reproductive Treatment Act 2008* (Vic) ss 10, 14 and 42.

160 *Assisted Reproductive Treatment Act 2008* (Vic) Pt 9.

161 *Assisted Reproductive Treatment Act 2008* (Vic) s 40.

162 *Assisted Reproductive Treatment Act 2008* (Vic) s 45.

Transfer of legal parentage

Following a child being born, the intended parent(s) may make an application to the court for a legal parentage order. Pursuant to the *Status of Children Act 1974* (Vic), the court must be satisfied that making the order is in the best interests of the child; the Patient Review Panel approved the surrogacy arrangement before it was entered into; and the child was living with the intended parent(s) at the time the application was made.[163] The court will also require confirmation that no material benefit has been gained by the surrogate mother and/or her partner (if any) and that she and her partner (if any) consent to the order. It will also make any other considerations deemed relevant.[164]

The *Status of Children Act 1974* (Vic) provides additionally for surrogacy arrangements that have occurred without the assistance of a registered ART provider.[165] When the surrogate mother has become pregnant as a result of artificial insemination, and the intended parent(s) have applied for a substitute parentage order, the court must be satisfied that the surrogate mother was at least 25 years of age before entering the arrangement, that all parties (the surrogate mother, her partner (if any) and the intended parent(s)) have received counselling as per the requirements described above, and have received information about the legal implications of the surrogacy arrangement.[166]

Access to information by the individual born as a result of surrogacy

When ART has been used in Victoria there is a requirement that donors of gametes consent to the placing of information on a Central Registry. ART providers and doctors must provide the Central Registry with details in the case of a birth of the name of the person born as a result of ART; the name of the donor; the name of the woman on whom the procedure was carried out and the name of her partner (if any); and the kind of procedure carried out.[167] Application can be made by an adult conceived using donor gametes, or a child subject to having the approval of parent(s) and/or guardian(s) and having undergone counselling, for information about the donor.[168]

2.3.8 Northern Territory

There are no specific laws in the Northern Territory governing surrogacy. From a regulatory perspective clinics must adhere to the National Health and Medical Research Council *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* 2017 in order to be accredited under the Reproductive Technology Accreditation Committee (RTAC) accreditation scheme (see Part 1 of this report for discussion of this scheme). While this may allow altruistic arrangements, there is no provision to transfer legal parentage following a surrogacy arrangement in the Northern Territory. A woman and her husband, if any, are presumed to be the legal parents of a child conceived through a 'fertilisation procedure.[169]

163 *Status of Children Act 1974* (Vic) s 22.

164 *Status of Children Act 1974* (Vic) s 22.

165 *Status of Children Act 1974* (Vic) s 23.

166 *Status of Children Act 1974* (Vic) s 23.

167 *Assisted Reproductive Treatment Act 2008* (Vic) Pt 6, Div. 1.

168 *Assisted Reproductive Treatment Act 2008* (Vic) ss 56 and 59.

169 *Status of Children Act 2004* (NT) ss 5C and 5D.

A birth mother is recognised as the legal mother of the child(ren) she gives birth to and there is no opportunity to remove her from this status unless she relinquishes the child for adoption. If the birth mother is married or in a de facto relationship, her partner, if any, will be deemed the other legal parent of the child.

2.3.9 Commonwealth laws and guidelines

Commonwealth family law

The Commonwealth has power to legislate in areas that are relevant to international surrogacy agreements and the federal family law. In particular, the *Australian Citizenship Act 2007* (Cth) is relevant to international cross-border surrogacy as it determines matters of citizenship by descent, relevant to a child born to an Australian 'parent' overseas. The *Australian Passports Act 2005* (Cth) is relevant to the issuance of an Australian passport to the child.

Arrangements that do not meet state/territory requirements for surrogacy may be considered by the Family Law Courts pursuant to the *Family Law Act 1975*, which allows for orders for 'parental responsibility' (as opposed to transfer of legal parentage). Note, the *Family Law Act* is currently under review.

The *Child Support (Assessment) Act 1989*, may also be relevant when relationships break down.

These Acts and their provisions, and other relevant laws, are discussed further, where relevant, in Chapter 9 which examines international commercial surrogacy.

Commonwealth legislation prohibiting trade in gametes and embryos

The *Prohibition of Human Cloning for Reproduction Act 2002* prohibits commercial trading in human eggs, human sperm or human embryos, which carry a maximum penalty of 15 years imprisonment (s 21). The respective states and territories have legislation that mirror this provision to ensure the law extends to persons and entities over which the Commonwealth laws do not cover (for example, sole traders, state agencies, and individuals).

Anti-discrimination laws

As mentioned above, in 2013, the *Sex Discrimination Act 1984* (Cth) was amended to provide protection against discrimination on the basis of sexual orientation, gender identity and intersex status. Such amendment was accompanied by provision for an exemption for conduct that would otherwise constitute discrimination on the grounds of sexual orientation (s 5A), gender identity (s 5B) or intersex status (s 5C) if the conduct was in direct compliance with a Commonwealth, state or territory law prescribed by regulations.

All Commonwealth, state and territory laws in force at 1 August 2013 were initially prescribed until 31 July 2014, to allow time for jurisdictions to review their laws and assess compliance with the new protections against discrimination. The sunset date was subsequently extended for all states and territories' laws to 31 July 2016. Further extension was provided to Western Australia via The Sex Discrimination Amendment (Exemptions) Regulation 2016 until 31 July 2017 for the *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA). The effects of such prescription were that actions taken in direct compliance with prescribed legislation would not be unlawful discrimination on the grounds of sexual orientation, gender identity, or intersex status. However, the Commonwealth Government did not intend to prescribe any state or territory laws after 31 July 2017.

After the 31 July 2017 the *HRT Act* and *Surrogacy Act* (WA) were no longer prescribed. As such, they are currently in contravention of the *Sex Discrimination Act* in so far as they contain provisions that restrict access to ART and surrogacy by requiring that persons seeking to be treated as a couple must be married to each other or in a de facto relationship with each other and *be of the opposite sex to each other* – discriminating against people based on their relationship status as well as sexual orientation, gender identity or intersex status.

2.3.10 National Health and Medical Research Council ethical guidelines

Clinics providing ART services are also required, via their registration and accreditation process, to adhere to the National Health and Medical Research Council *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*[170] (NHMRC Ethical Guidelines), which include provisions relevant to surrogacy. The NHMRC Ethical Guidelines provide that commercial surrogacy is ethically unacceptable 'due to it raising concern about the commodification and exploitation of the surrogate, the commissioning parent(s) and any person born as a result of the surrogacy arrangement.'[171]

In relation to 'altruistic' arrangements the guidelines provide that clinics must not facilitate ART treatment under a surrogacy arrangement if there are concerns about whether the arrangement is ethical and/or legal. The guidelines recognise reimbursement of verifiable out-of-pocket expenses, which may include expenses directly associated with the procedure or pregnancy such as medical and counselling costs, before, during, and after the pregnancy or birth; travel and accommodation costs within Australia; loss of earnings; insurance; child care costs when needed to allow for attendance at appointments and procedures related to the surrogacy arrangement; legal advice – subject to state or territory legislation that regulates what out-of-pocket expenses can be reimbursed.[172] The guidelines also provide that clinics must ensure that the potential surrogate in an altruistic arrangement is medically and psychologically suitable to undertake the requested ART activity and perform only a single embryo transfer. [173] Clinics must also ensure the giving of information and counselling to,[174] and valid consent by, the relevant party(ies) for each specific treatment or procedure.[175] In addition, the NHMRC Ethical Guidelines recognise that persons born via a surrogacy arrangement are entitled to details of their birth and to have the opportunity to determine the significance of their gestational connection with the surrogate.[176]

170 National Health and Medical Research Council, Ethical guidelines on the use of assisted reproductive technology in clinical practice and research (2017). (NHRMC Ethical Guidelines)

171 NHMRC Ethical Guidelines [8.8.1]- [8.8.2].

172 NHMRC Ethical Guidelines [8.9.1].

173 NHMRC Ethical Guidelines [8.9.2].

174 NHMRC Ethical Guidelines [8.10].

175 NHMRC Ethical Guidelines [8.11].

176 NHMRC Ethical Guidelines [8.12].

2.3.11 Summary of Australian laws

In each jurisdiction of Australia that has legislation, the public policy position that has been adopted is that altruistic surrogacy is acceptable, subject to meeting certain criteria, while commercial surrogacy is prohibited. The jurisdictions all provide that altruistic surrogacy agreements are legal but not enforceable. They also all require independent counselling and legal advice. The jurisdictions then diverge on eligibility criteria, what may be reimbursed as a reasonable expense in altruistic surrogacy arrangements and requirements for the transfer of legal parentage.

Table 2.1 summarises the relevant laws at Commonwealth and state/territory levels.

Table 2.1: Commonwealth and state/territory laws and regulation of relevance to surrogacy

Jurisdiction	Legislation/Regulation	Provision, Operation and/or Effect
Commonwealth	*Australian Citizenship Act 2007*	Relevant to international cross-border surrogacy. Matters of citizenship by descent, relevant to child born to Australian 'parent' overseas.
	Australian Passports Act 2005	Relevant to international cross-border surrogacy and issuing of passports to child.
	Family Law Act 1975	Relevant to arrangements that do not meet state/territory requirements. 'Parental responsibility' orders. (Also, definitions of parent and presumptions – ss60H and 60HB). * Currently under review.
	Child Support (Assessment) Act 1989, ss 5, 20.	Relevant when relationships break down. Reference to *Family Law Act 1975*.
	NHMRC, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2017*	Relevant to the extent that states/territories do not have legislation on an issue. Relevant also to licensing. Prohibits clinics from engaging with commercial surrogacy. Specifies requirements for altruistic arrangements.
	Prohibition of Human Cloning for Reproduction Act 2002	Prohibits commercial trading in human eggs, human sperm or human embryos. Maximum penalty of 15 years imprisonment (s21). PHCR Act not intended to exclude the operation of any law of a state to the extent that the law of the state is capable of operating concurrently with the Act (s24)
	Sex Discrimination Act 1984 (Cth)	Prohibits discrimination on the basis of sexual orientation, gender identity and intersex status.
Australian Capital Territory	Births, Deaths and Marriages Registration Act 1997	Birth registration; altering birth register after transfer of parentage order.
	Human Cloning and Embryo Research Act 2004, s19	Prohibits commercial trading in human eggs, human sperm or human embryos. Maximum penalty of 15 years imprisonment.
	Parentage Act 2004	Regulation of altruistic surrogacy. Prohibits commercial surrogacy. Makes provision for transfer of parentage in altruistic arrangements.
New South Wales	*Assisted Reproductive Technology Act 2007*	Regulation of ART clinics; Provision for central register, recording and release of information for people born as a result of surrogacy and donor-conception.
	Births, Deaths and Marriages Registration Act 1995	Birth registration; altering birth register after transfer of parentage order.
	Human Cloning for Reproduction and Other Prohibited Practices Act 2003, s26	Prohibits commercial trading in human eggs, human sperm or human embryos. Maximum penalty of 15 years imprisonment.

Jurisdiction	Legislation/Regulation	Provision, Operation and/or Effect
	Status of Children Act 1996	Parenting presumptions.
	Surrogacy Act 2010	Regulation of altruistic surrogacy. Prohibits commercial surrogacy. Makes provision for transfer of parentage in altruistic arrangements.
Queensland	*Births, Deaths and Marriages Registration Act 2003*	Birth registration; altering birth register after transfer of parentage order.
	Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003, s17	Prohibits commercial trading in human eggs, human sperm or human embryos. Maximum penalty of 15 years imprisonment.
	Status of Children Act 1978	Parenting presumptions.
	Surrogacy Act 2010	Regulation of altruistic surrogacy. Prohibits commercial surrogacy. Makes provision for transfer of parentage in altruistic arrangements.
South Australia	*Births, Deaths and Marriages Registration Act 1996*	Birth registration; altering birth register after transfer of parentage order.
	Family Relationships Act 1975	Regulation of altruistic surrogacy. Prohibits commercial surrogacy. Parenting presumptions.
	Prohibition of Human Cloning for Reproduction Act 2003	Prohibits commercial trading in human eggs, human sperm or human embryos. Maximum penalty of 15 years imprisonment.
Tasmania	*Births, Deaths and Marriages Registration Act 1999*	Birth registration; altering birth register after transfer of parentage order.
	Human Cloning for Reproduction and Other Prohibited Practices Act 2003, s20	Prohibits commercial trading in human eggs, human sperm or human embryos. Maximum penalty of 15 years imprisonment.
	Surrogacy Act 2012	Regulation of altruistic surrogacy. Prohibits commercial surrogacy.
	Status of Children Act 1974	Parenting presumptions.
Victoria	*Assisted Reproductive Treatment Act 2008*	Regulation of altruistic surrogacy. Prohibits commercial surrogacy. Provision for central register, recording and release of information for people born as a result of surrogacy and donor-conception.
	Births, Deaths and Marriages Registration Act 1996	Birth registration; altering birth register after transfer of parentage order.
	Prohibition of Human Cloning for Reproduction Act 2008, s17	Prohibits commercial trading in human eggs, human sperm or human embryos. Maximum penalty of 15 years imprisonment.
	Status of Children Act 1974	Parenting presumptions, parentage orders.
Western Australia	*Artificial Conception Act 1985*	Parenting presumptions.
	Births, Deaths and Marriages Registration Act 1998	Birth registration; altering birth register after transfer of parentage order.
	Human Reproductive Technology Act 1991, s53Q	Prohibits commercial trading in human eggs, human sperm or human embryos. Maximum penalty of 15 years imprisonment.
	Surrogacy Act 2008	Regulation of altruistic surrogacy, ban of commercial surrogacy.
Northern Territory	*Births, Deaths and Marriages Registration Act 1997*	Registration of birth; (N.B. No provision for altering birth register in case of surrogacy).
	Status of Children Act 1996	Parenting presumptions.

Table 2.3 summarises the law across jurisdictions in relation to the type of surrogacy arrangement permitted, and whether advertising and brokerage are possible.

Table 2.3: Laws regarding type of surrogacy arrangement, advertising and brokerage

	WA	ACT	NSW	QLD	SA	TAS	VIC
Commercial	✗	✗	✗	✗	✗	✗	✗
Extraterritorial prohibitions (commercial)	✗ Subject to interpretation	✔	✔	✔	✗	✗	✗
Altruistic	✔	✔	✔	✔	✔	✔	✔
Traditional	✔	✗	✔	✔	✔	✔	✗
Gestational	✔	✔	✔	✔	✔	✔	✔
Advertising	✔	✗	✔ unpaid	✗	✔	✗	✗
Agents/ Brokerage	✗	✗	✔ unpaid	✗	✗	✗	✗

Table 2.4 summarises state and territory laws regarding the types of expenses that are permitted to be reimbursed in altruistic surrogacy arrangements.

Table 2.4: State and territory laws permitting reimbursement of costs by expense type

	WA	ACT	NSW	QLD	SA	TAS	VIC
Pregnancy/Attempt to become pregnant	✔	✔	✔	✔	✔	✔	✗
Birth and care of child	✔	✔	✔	✔	✔	✔	✗
Counselling	✔	✔	✔	✔	✔	✔	✔
Legal Fees	✔	✗	✔	✔	✔	✔	✔
Lost earnings	✔	✗	✔	✔	✗	✔	✗
Parentage Orders	✔	✗	✔	✔	✔	✔	✗
Insurance	✔	✗	✔	✔	✗	✔	✗
Travel and accommodation	✗*	✗	✔	✔	✗	✔	✔
Other reasonable out of pocket expenses	✔	✗	✔	✔	✔	✔	✗

* Reimbursement of travel and accommodation may be possible in Western Australia pursuant to the broad wording of the statutory provisions which permit reimbursement of ‘reasonable expenses associated with — (a) the pregnancy or the birth’.

Table 2.5: State and territory laws regarding eligibility and parenting order requirements

	WA	ACT	NSW	QLD	SA	TAS	VIC
Heterosexual Couple	✔	✔	✔	✔	✔	✔	✔
Same-sex Couple	✗	✔	✔	✔	✔	✔	✔
Single Female	✔	✗	✔	✔	✗	✔	✔
Single Male	✗	✗	✔	✔	✗	✔	
Age of Intended Parent(s)	25 (at least one)	18	25/ sufficient maturity >18	25	18	21	-
Age of Surrogate	25	-	25	25	18	25	25
Surrogate previous live birth	✔	✗	✗	✗	✗	✔	✔
Genetic connection to IPs	✗	✔	✗	✗	✔ (unless med.cert.)	✗	✗
Criminal record screening	✗	✗	✗	✗	✗	✗	✔
Child Protection Order Check	✗	✗	✗	✗	✗	✗	✔
Counselling	✔	✔	✔ + independent report IPs post birth	✔ + independent report IPs post birth	✔	✔	✔
Psychological Evaluation and Report	✔	✗	✗	✗	✗	✗	✗
Medical Evaluation and Report	✔	✗	✗	✗	✗	✗	✗
Independent Legal Advice	✔	✔	✔	✔	✔	✔	✔
Written Agreement	✔	✗	✔	✔	✔	✔	✗
Pre-Surrogacy Approval	✔	✗	✗	✗	✗	✗	✔
Domiciled in State	IPs	IPs	IPs	IPs	All parties	Each party at time of agreement	IPs
No parentage order if commercial	✔	✔	✔	✔	✔	✔	✔
Right to Access information by child	✔ Central register	✔ No Central register	✔ Central register	✔ No Central register	✔ No Central register	✔ No Central register	✔ Central register

2.4 Discussion

Australia has seen many inquiries into surrogacy over decades that have involved extensive public consultation and debate. The result has been laws across the country that provide broad consistencies in terms of what is permitted or prohibited, while also differing in some of the detail. Generally, surrogacy laws across Australia provide for:

- the paramountcy of the welfare and/or best interests of children born as a result of surrogacy and/or assisted reproduction, in a number of states
- acceptance and regulation of *altruistic* surrogacy
- *prohibitions on commercial surrogacy*, including that in New South Wales, the Australian Capital Territory, and Queensland such prohibitions extend extraterritorially (which means it is illegal to enter into such arrangements in other jurisdictions also)
- the birth mother always being recognised as the legal mother in the first instance
- the reimbursement of costs in altruistic arrangements for the 'surrogate' mother, where permitted, being limited to expenses *actually incurred* and prohibitions on 'payment' or 'compensation' or 'reward' above such expenses (noting variations among states regarding what is actually reimbursed)
- surrogacy agreements being void and unenforceable (other than payment of reasonable expenses associated with the pregnancy)
- residency requirements in a number of states for commissioning persons and/or 'surrogate' mother – which means there is a requirement that those engaged in the agreement must reside in the state in which the surrogacy arrangement takes place. Such requirements are seen as important to avoid people being flown in from overseas to engage in surrogacy
- requirements for independent legal advice and counselling for both commissioning persons and 'surrogate' mother prior to agreement
- prohibitions on acting as an agent/broker to procure a surrogacy agreement (except in New South Wales if not paid)
- restrictions on advertising in some states
- age requirements for parties to the agreement (noting these vary from state to state)
- application for 'substitute' parentage orders to be made before a Court (at a state level), with conditions for meeting legal parentage requirements. (These laws again vary across jurisdictions – but are very clear and comprehensive within each state/territory that have laws).

In regard to the differences amongst states, there have been ongoing calls to harmonise legislation across the country. There have also been calls to better support people to engage in practices that are permitted. With reference to the laws and practices across Australia, and beyond, the following chapters of this report will explore further the key issues raised by the terms of reference for the review of laws and practices in Western Australia regarding surrogacy, assisted reproduction, and associated matters. It is here noted that the main areas of difference between Western Australia and the other jurisdictions of Australia are:

- lack of access to altruistic surrogacy by same-sex couples (permitted in all other states of Australia)
- lack of access to altruistic surrogacy by single males (currently also not permitted in the Australian Capital Territory or South Australia – with South Australia recently recommending change)
- the requirement for pre-surrogacy approval of the surrogacy agreement by the RTC (pre- approval is also required in Victoria by their 'Patient Review Panel', it is not required in any other state or territory)
- the requirement for a psychological evaluation by a clinical psychologist for each of the named parties and a report as well as a medical evaluation and a report both submitted to the RTC along with other information prior to the surrogacy agreement *in addition* to the requirements for counselling and legal advice
- the welfare provision and the screening of parties (Victoria conducts criminal record checks and child protection checks)
- age requirements for intended parent(s) and surrogate mothers (which differ across the country)
- the requirement for surrogate mother to have had a previous live birth (consistent with Tasmania and Victoria; not required in other states)
- traditional and gestational surrogacy being permitted (similar to all states except the Australian Capital Territory and Victoria)
- that reimbursement of expenses does not explicitly provide for travel and accommodation (which is possible in New South Wales, Queensland, Tasmania and Victoria) although note this may be covered pursuant to the broad nature of provision for reimbursement of 'reasonable expenses associated with — (a) the pregnancy or the birth'.

Some such differences were found to have a significant impact on access to altruistic surrogacy in Western Australia. They, along with other relevant considerations raised by the Terms of Reference, are further discussed in the following chapters.

Chapter 3

Operation and Effectiveness of the *Surrogacy Act 2008* – issues limiting access to ART and surrogacy

Chapter 3: Operation and Effectiveness of the *Surrogacy Act 2008* – issues limiting access to ART and surrogacy

3.1 Introduction

In considering the operation and effectiveness of the *Surrogacy Act 2008* the Terms of Reference required attention to be given to several matters that concern the regulatory structure adopted in Western Australia, and consequently, how requirements within it impact on ART and surrogacy. Referring also to the discussion in Part 1 of this report[177] this chapter examines two issues that were raised with the review that limit access to ART and surrogacy being:

1. limitations on access to ART by women who face impending infertility or inability to conceive, carry, or bear a child or who do not already have a surrogacy arrangement in place
2. limitations on access to ART and surrogacy based on relationship status, sex, sexual orientation, gender identity and/or intersex status.

The discussion is relevant to the Terms of Reference requiring consideration of:

- the interaction of the *Surrogacy Act 2008* (WA) with the *HRT Act 1991* (WA) (*HRT Act*),
- the impact on the *Surrogacy Act* of relevant Commonwealth and State legislation and aspects of legislation of other jurisdictions, which could be incorporated into the Act, including consideration of harmonisation of domestic surrogacy legislation, and
- the functions conferred upon and the operation and effectiveness of the Reproductive Technology Council (RTC).

3.2 Limiting access to ART by women who face impending infertility or do not have a surrogacy arrangement in place

The *Surrogacy Act 2008* (WA) inserts provision into the *HRT Act* that an in vitro fertilisation procedure may be carried out in relation to a surrogacy arrangement when it is *'likely to benefit a woman who is unable to give birth to a child due to medical reasons and is party to a surrogacy arrangement (as defined in the Surrogacy Act 2008, section 3) that is lawful'*.[178] In addition, the Surrogacy Directions 2009, which are intended to 'set the standards for use of an artificial fertilisation procedure in connection with a surrogacy arrangement' provide via Direction 7 that:

> *A licensee is not to provide an artificial fertilisation procedure in connection with a surrogacy arrangement unless the arrangement has been approved by the Council in accordance with the requirements in the Surrogacy Act 2008 section 17.*

177 Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 1)*, 2019.

178 *Surrogacy Act 2008* (WA), s 67; *HRT Act 1991* (WA), s 23(a)(iii).

Section 17 of the *Surrogacy Act* and the Surrogacy Regulations 2009, Regulation 5, then stipulate the requirements for such approval, which includes a significant number of steps – which in practice, take a long time and have significant costs associated with them. These include that at least three months prior to the RTC giving such approval for a surrogacy arrangement, the parties must have undertaken relevant counselling, been assessed by a clinical psychologist as suitable, been assessed by a medical professional as suitable, and have received independent legal advice. The application for approval must then be submitted to the RTC accompanied by all of the following:

- evidence of the age and obstetric history of the birth mother
- evidence of the age of each arranged parent
- a copy of the signed surrogacy arrangement
- a copy of the certificate provided by an approved counsellor evidencing counselling
- a copy of a clinical psychologist's report for each of the parties stating the name of the clinical psychologist who undertook the assessment and the day on which the assessment was completed
- a written notice from each legal practitioner who has provided legal advice about the effect of the surrogacy arrangement
- a copy of a medical practitioner's report for each of the parties detailing any concerns the medical practitioner has about the effect that involvement of the person in the surrogacy arrangement may have on any known medical condition of the person; details of any medical condition of the person that may pose a risk to a child born as a result of the surrogacy arrangement; and in the case of the intended parents, whether the eligibility criteria set out in the *Surrogacy Act* have been met.

It was found that such requirements significantly impede access to ART and surrogacy.

Firstly, the wording of the Act provides the requirement that a woman *be unable* to give birth to a child because of medical reasons. Such wording prevents necessary access to ART by a woman who is in the situation of *impending* infertility – that is, women who are not yet unable to give birth to a child due to medical reasons but will become so at a future date. For example, a woman who is about to undergo a hysterectomy due to cancer does not yet meet the criterion of being unable to give birth to a child due to medical reasons but will meet the criterion once she has had the hysterectomy. However, she will need to collect eggs prior to surgery in order to preserve them for future use in a surrogacy arrangement after the hysterectomy. In conducting the review, I found that the interpretation of the current law by consumers and clinicians was that such a woman is prevented from doing so.

Compounding this situation are the requirements in both the *HRT Act* and the Surrogacy Directions 2009 (WA) that the woman *already be a party to an approved surrogacy arrangement* (due to the inclusion of the word *'and'* in section 23 of the *Surrogacy Act*, and the requirements in Direction 7).[179] Such requirements may prevent access to treatment when for example, a person is very young in age, lacks a partner, lacks a person willing to act as an altruistic surrogate, or requires urgent medical treatment and as such an approved surrogacy arrangement is not in place. The requirements for an approved surrogacy agreement as set out above may also not readily be met by a patient who is for example, very ill, submerged in treatments for their illness and not able to have yet found a person willing to act as an altruistic surrogate, sought counselling, obtained legal advice, gained separate clinical psychology and medical reports, and/

179 *Surrogacy Act 2008* (WA), s 67; *HRT Act 1991* (WA), s 23(a)(iii).

or prepared forms with three months leeway for the RTC to consider its approval of whether or not she may enter a surrogacy agreement. For example, a young girl, teenager, or woman who needs to undergo urgent treatment for cancer that will render her infertile, unable to become pregnant or unable to carry a child may not have an approved surrogacy arrangement in place, nor the time or health to engage in the above processes.

This was recognised by the RTC in its submission, in which it stated that:

> *the legislative policy behind these criteria is to limit IVF procedures to patients who require intervention on medical grounds, Council considers that they do not adequately respond to patients who require urgent medical or surgical treatment that will give rise to those grounds.*[180]

The Australian Medical Association submission is noted:

> *There is an opportunity to revisit eligibility criteria for surrogacy. The current legislation requires that a …surrogate… is arranged before an embryo can be made. However, conditions necessitating assisted reproductive technology such as hysterectomy due to cancer or other impending medical issues, mean that this is not always plausible. The AMA (WA) recommends that this criterion be revisited and amended to allow an embryo to be made before a surrogate is identified.*[181]

The impact of the current law is exemplified by the following submission:

> *I harvested eggs and made embryos for my own use as originally 'all' I had been diagnosed was early menopause. There was no reason to think I could not carry a child. However, if it had been known I needed a surrogate, I would not have been allowed to make embryos, unless I had a surrogacy agreement in place. This seems nonsensical. My only opportunity to have a biological child could be taken away by the WA government as my eggs were running out and it would likely take two plus years to find a surrogate. What about my friends with Mayer-Rokitansky-Küster-Hauser syndrome (MRKH) that is women born without a womb? Admittedly these women likely know from a young age they will need a surrogate, but they may not be in a relationship or in place in life where they can look for or find one so does that mean their eggs should be left to just 'expire'?! This is discriminatory.*[182]

The submitter added:

> *It started to become apparent that my lining might never be thick enough to have an embryo transfer and towards the end of my last cycle but before the doctor cancelled it, I called the donor coordinator at our clinic and made my first verbal enquiry into surrogacy. Then, low and behold, four follicles (equivalent to four eggs) were visible on my next scan. It was a shock as I had not had any / many follicles in a number of months. …I asked the clinic to remove the eggs. I was told no because I did not have a surrogacy agreement in place and I had mentioned surrogacy a few days prior! So, my possibly last genetic material in the world was effectively being thrown away because of WA surrogacy law. We were heartbroken.*[183]

180 RTC, Submission 122.

181 Australia Medical Association, Submission 96.

182 Confidential, Submission 89.

183 Confidential, Submission 89.

Ms. Kate Ranger also described her personal situation in the hope that things would change. She explained that she had been born without a uterus, having found this out when she was 16 and told she could never become pregnant. She is now married and she and her husband wish to have children via an altruistic surrogacy arrangement. She described significant stress caused by the requirement for an 'approved' surrogacy agreement to be in place before they could create embryos. This was particularly so as she had been informed by her doctor that she had a low egg reserve and that time was limited to collect her eggs. She and her husband joined many online groups searching for a surrogate, knowing that their time was limited, and feeling added emotional stress. She submitted:

> *Currently someone with my condition is not able to create embryos unless a surrogacy agreement is in place and has written approval from the Reproductive Technology Council… This is one of my biggest hopes for the changes to the Act, allowing couples in similar situations to myself, to create embryos without a surrogacy agreement in place.*[184]

It is the finding of the review that it is unacceptable to leave a young girl, teenager, or woman who is faced with impending infertility/inability to carry and/or bear children unable to access ART in order to preserve her fertility at a crucial time. Requirements that a surrogacy arrangement already be in place are also unacceptable as they may create pressure or a sense of urgency to enter into a surrogacy arrangement and to engage in meeting all requirements and any approvals at a time in which she may be too sick to do so, or not ready to undertake surrogacy due to age, relationship status, or lack of a person willing to act as an altruistic surrogate.

Surely, the intention of the Parliament in enacting the current law and directions was aimed at the surrogate mother not undergoing a fertilisation procedure until requisite criteria to enter into a surrogacy arrangement has been met; rather than at preventing a woman from undergoing procedures that would preserve her fertility at a time where there is a need to do so, whether or not she has even contemplated surrogacy. However, the provisions in the *HRT Act* and the Surrogacy Directions impede the operation and effectiveness of the *Surrogacy Act*, preventing people in such situations from preserving their fertility with the intention of entering into a lawful surrogacy arrangement in the future.

In Part 1 of the report it was recommended that the *HRT Act* be repealed and that a new Act be drafted. It is further recommended that the *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) and any associated directions or regulations be amended (or new legislation be drafted) to:

- provide for access to IVF procedures in circumstances where a patient faces the impending loss of or significant impairment to their fertility or the ability to carry or bear a child in addition to providing for such access by person(s) who are already infertile or unable to carry or bear a child
- remove any requirement for a person who wishes to preserve their fertility (for example by collecting and storing their ova) to already have a surrogacy agreement in place (noting It is also a recommendation of this report that the requirement for pre-approval of a surrogacy agreement be repealed (see further discussion in Chapter 4)).

See further discussion below regarding a Bill that was entered into Parliament in 2018 that aims to address the first issue, but does not in its current form address the second.

184 Kate Ranger, Submission 101.

3.3 Limiting access based on relationship status, sex, sexual orientation, gender identity, and/or intersex status

As was seen above in Chapter 2 and Table 2.5, all states other than Western Australia allow access to surrogacy by same-sex couples. Western Australia, the Australian Capital Territory, and South Australia do not currently allow access by single males, and South Australia and the Australian Capital Territory continue to also exclude single females.

In Western Australia the *HRT Act*[185] and *Surrogacy Act*[186] restrict access and transfer of legal parentage respectively to:

- **'eligible couples'** defined as two people *of opposite sexes* who are married to, or in a de facto relationship with, each other and who, as a couple are unable to conceive a child due to medical reasons or although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or a disease; or
- **an 'eligible person'** defined as *a woman* who is unable to conceive a child due to medical reasons not excluded by subsection; or although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or a disease; or although able to conceive a child, is unable for medical reasons to give birth to a child.

This gives rise to significant issues concerning discrimination.

3.3.1 Anti-discrimination challenges in other states

In the past, it was the practice of some clinics in Australia, and a legislative requirement in the states of Victoria and South Australia, to restrict access to ART to women who were married or in heterosexual de facto relationships. However, restrictions based on marital or relationship status in those states changed following separate legal challenges to the South Australian[187] and Victorian[188] laws. It was held that such laws contravened s 22 of the *Sex Discrimination Act 1984* (Cth). The state laws were declared invalid pursuant to s 109 of the *Australian Constitution*, which provides that 'when a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.[189] Laws were subsequently amended in those states to enable access by single women and same-sex couples to ART. In the recent review of the South Australian laws by the South Australian Law Reform Institute (SALRI) it was recommended that the current prohibition in South Australia on single people accessing surrogacy 'is discriminatory and inappropriate and should be repealed'.[190]

185 *HRT Act 1991* (WA), s 23(1)(c).

186 *Surrogacy Act 2008* (WA), ss 19(1b) and (2).

187 *Pearce v South Australian Health Commission* (1996) 66 SASR 486.

188 *McBain v State of Victoria* (2000) EOC 93-102; [2000] FCA 1009.

189 *Pearce v South Australian Health Commission* (1996) 66 SASR 486; *McBain v State of Victoria* (2000) EOC 93-102; [2000] FCA 1009.

190 David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA)* (South Australian Law Reform Institute, Adelaide, 2018), Recommendation 26.

3.3.2 Current WA restrictions contrary to the *Sex Discrimination Act 1984* (Cth)

Notably, in 2013, the *Sex Discrimination Act 1984* (Cth) was amended to provide further protections against discrimination on the basis of sexual orientation (s 5A), gender identity (s 5B) and intersex status (s 5C). At the same time, states were given time to review their laws and assess compliance with the new protections against discrimination via the provision of an exemption for conduct that would otherwise be discrimination upon these grounds if the conduct was in direct compliance with a Commonwealth, state or territory law prescribed by regulations. All Commonwealth, state and territory laws in force at 1 August 2013 were initially prescribed until 31 July 2014.[191] The sunset date was subsequently extended for all states and territories' laws to 31 July 2016;[192] and then again via the Sex Discrimination Amendment (Exemptions) Regulation 2016 which specifically continued to prescribe the Western Australian *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) until 31 July 2017.

In effect, Western Australia had four years to amend its legislation prior to the expiration of such exemptions. However, this did not occur. It is now the case that the provisions that limit eligibility to ART and surrogacy to heterosexual couples or women, no longer being prescribed, contravene the *Sex Discrimination Act 1984* (Cth). That is, the Western Australian provisions discriminate against people on the basis of their relationship status, sex, sexual orientation, gender identity and/or intersex status in effect preventing people who are single males, in a same-sex relationship, transgender and/or intersex from access to ART or surrogacy. Such discrimination is unacceptable. Maintaining the status quo poses the risk of litigation and the prospect of the relevant provisions of the *HRT Act* and *Surrogacy Act* being held by a court to be invalid.

3.3.3 Submissions to the review regarding discrimination

The review received numerous submissions calling for changes to the legislation to remove such discrimination.[193] This included submissions from people who had people willing to act as altruistic surrogates for them but had to refuse due to the current eligibility criteria. For example, Dr Glen Lo submitted:

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191 Sex Discrimination Regulations 1984 (Cth), reg. 5.

192 Regulation 5 was amended by the Sex Discrimination Amendment (Exemptions) Regulation 2015.

193 Adam Copple-Smith, Submission 2; Rodino & Clissa (Counsellors), Submission 8; Brendan Mahony, Submission 10; Tracy and Tamburri, Submission 11; Jenna Farthing, Submission 12; Lisa Baker, Submission 13; Amy Hodson, Submission 19; Confidential, Submission 20; Confidential, Submission 22; Kellie Smith, Submission 24; Garrett & Leon Chapell, Submission 25; Daniel Scarparolo, Submission 29; Dr Glen Lo, Submission 30; Confidential, Submission 31; Ishar (Multi-cultural women's health centre), Submission 36; Jessica Steele, Submission 38; Vanessa Droper, Submission 39; Confidential, Submission 42; Confidential, Submission 43; Confidential, Submission 52; Peter Ravi-Pinto, Submission 53; Belinda Stewart, Submission 60; ANZICA WA Fertility Counsellors, Submission 61; Stephen Page, Submission 65; Anita Bennetts, Submission 69; Philip Lillingston, Submission 70; Danny Rhys Steele, Submission 71; Gay Dads WA, Submission 74; Hollywood Fertility, Submission 75; Confidential, Submission 76; FINRRAGE, Submission 93 (recognising discrimination but noting they call for a complete ban on surrogacy); Australia Medical Association, Submission 96; Ross Jutras-Minett, Submission 104; Surrogacy Australia, Submission 105; Genea Limited, Submission 107; Family Law Practitioners Association WA, Submission 115; Human Rights Law Centre (Anna Brown & Lee Carnie), Submission 119; Greg Chang, Submission 120; Reproductive Technology Council, Submission 122; John van Bockxmeer, Submission 126.

We have had several offers from family and friends for altruistic gestational surrogacy but have had to immediately decline, shutting the door on this pathway to our own family in our own country because the Surrogacy Act 2008 excludes us as an eligible couple, or individually as an eligible person.[194]

Others also lamented the loss of opportunity to engage locally with support systems in place, submitting that they felt forced to travel overseas to engage in commercial surrogacy to have a baby. For example, Mr Ross Jutras-Minnett submitted:

At the end of the day Western Australians deserve the right to undertake surrogacy legally at home and to do so with locally familiar support and environment, support of family and friends and known medical practitioners. The system as it stands now unfairly discriminates families like my own. It's just illegal for same sex couples to undertake surrogacy and to access the IVF for two men would be impossible. This just is not good enough and it forces couples like us to go overseas and spend over $100,000 to have a baby, this is not fair it's not equitable and it's just not right.[195]

Ms Kate Granger noted:

I have seen friends and family go overseas to pursue surrogacy solely due to the fact that it is not legal for homosexual couples in WA. This is a major downfall in the Act that really does need to be changed.[196]

A submission on behalf of a Facebook Group for surrogates and intending parents confirmed the above and the availability of women willing to act as altruistic surrogates for gay couples who were prevented from doing so due to the law:

As a group we want change to the current restrictions surrounding surrogacy in Western Australia. We recommend that the restrictions for same-sex couples be loosened. Same sex male couples are currently prohibited from using a local surrogate to fulfil their dream of becoming parents. They are forced to pursue surrogacy in countries overseas. Some of these countries have regulations in place that support, guide and protect Australian couples …[o]ther couples will take a chance at using other countries where surrogacy is unregulated and risky…It is extremely unfair and unsafe that gay men are forced into making these choices due to the discrimination of Western Australia's Surrogacy Laws. Furthermore, there are surrogates in Western Australia who wish to help male couples. They may have a brother or another family member who is gay and wanting to have children. Sadly, that woman is unable to help them fulfil their dreams under the current legislation. There are other women (potential surrogates) in the group who simply wish to help a gay couple have children. These potential surrogates soon learn that gay men in WA are prohibited from pursing surrogacy in Australia and so they look to other states to help another gay couple where the legislation is less stringent. This is extremely unfair for gay men in WA. It is a huge exercise for a surrogate to travel interstate repeatedly to pursue surrogacy. We need to allow local surrogates to be able to pursue surrogacy locally for whomever they choose.[197]

194 Dr Glen Lo, Submission 30.

195 Ross Jutras-Minett, Submission 104.

196 Kate Granger, Submission 101.

197 Confidential, Submission 43.

A number of family members of people excluded from accessing ART and surrogacy in Western Australia also provided submissions. Ms Vanessa Droper submitted:

> *One of my sons is in a long-term relationship, they have built a home together, have great jobs, great friends and family. They are trying to live their life together as any normal couple, same-sex or not does. As grown adults they are planning their future and children would be a big part of that, though they have come to the crossroads of being unable to do that at this stage due to surrogacy being illegal here in WA. They have looked into the costs of other countries to do surrogacy and the cost is outrageous. This loving couple and many more that we personally know are finding this legality incredibly disheartening and sad.*[198]

Ms Jenna Farthing submitted:

> *I also have a gay younger brother and I hope that one day if he decides he would like a family of his own that he is supported in that right by our government without the discrimination and difficulties that currently exist.*[199]

That such discrimination is out of step with social attitudes was noted by many. For example, the Australian Medical Association submitted:

> *Access to IVF in WA is based upon 'medical reasons', such as clinical infertility. The definition of 'infertility' is inevitably changing with shifting demographics, for example same sex couples, increasing age of parents, and chronic comorbidities. The AMA (WA) believes that access to assisted reproductive technology and surrogacy should not discriminate against individuals on the basis of their sexual orientation. Removing the requirement that an 'eligible couple' be of the opposite sex to each other would both bring these Acts in line with other Australian legislation and reflect societal views.*[200]

Similarly, Ishar, a multicultural women's health centre, pointed to contemporary standards and laws:

> *Both the current Surrogacy Act (2008) and Human Reproductive Technologies Act 1991 (HRT) only supports heterosexual, de facto couples. As per the change in December 2017, Australia now nationally recognises homosexual marriage as a legal and binding act and respects the rights of both heterosexual and homosexual couples. We believe that everyone in a de facto or married relationship should all have the same rights in Surrogacy and HRT.*[201]

In relation to outcomes for children raised by same-sex parents, Mr Martin Brigman submitted that 'children fare better with a mother and a father'.[202] However, his was the sole submission received by the review that posited this view. In contrast, the Human Rights Law Centre noted research demonstrating positive findings, as well as contemporary standards and regulation, submitting:

> *research [shows] that children of same-sex parents fare as well as children of different-sex parents on scales of emotional, social and educational development. The restriction on surrogacy for gay men is outdated, discriminatory and out of step with contemporary Australian standards and legal regulation of surrogacy in other states and territories.*

198 Vanessa Droper, Submission 39.

199 Jenna Farthing, Submission 12.

200 Australia Medical Association, Submission 96.

201 Ishar, (Multicultural Women's Health Centre), Submission 36.

202 Martin Bridgman, Submission 35.

Similarly, the Gay Dads WA submission pointed to comprehensive research that children raised in same-sex families do as well emotionally, socially, and educationally as children raised by heterosexual couples.[203] Such evidence was found by the reviewer to be robust.

3.4 Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018

Recognising that the above two issues were of great importance and that the completion of this review may take some time, in August 2018 the McGowan government introduced the *Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018* into Parliament. The Bill proposes amendments to the *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) in ways that would go some way to addressing the above discussed issues. The proposed amendments if enacted would be an important step in realising long-awaited and necessary reforms of the ART and surrogacy legislation in Western Australia.

The Bill passed through the Legislative Assembly in September 2018, and moved to the Legislative Council in October 2018, where it had been introduced but not debated at the time of writing this report. The following discusses the proposed amendments in the Bill that relate to the above issues, what they will immediately resolve if enacted, and further amendments that will be necessary to resolve fully such issues and meet the larger body of reform recommended in this report.

3.4.1 The 2018 proposed changes regarding access by women with impending fertility issues

In relation to restrictions on women accessing ART when they are not yet infertile or unable to carry a pregnancy or bear a child, but likely to become so, the Bill proposes amendments to the definition of 'eligible woman' that would insert the words *'likely to be'* immediately before 'unable to conceive or give birth to a child for medical reasons' in the eligibility criteria for IVF under section 23 of the *HRT Act*, as well as the corresponding provisions in section 19 of the *Surrogacy Act*. The Bill does not, however, amend the requirement that an eligible woman be a party to a surrogacy agreement.

In its current form, the proposed legislation would, therefore, continue to prevent women from accessing ART who are, for example:

- too young or too sick to have already entered into a surrogacy arrangement
- as yet unable to have found a person willing to act as a surrogate mother for them
- as yet unable to have achieved all the requisite counselling, advice, reports, and approvals to have an 'approved' surrogacy arrangement in place.

Thus if the current Bill is enacted without amendment, further reform will be required to remove the requirement for an 'approved' surrogacy arrangement (see above at 3.2), Should the recommendations of this report be implemented in full, new legislation should be drafted to ensure such matters are addressed.

203 Gay Dads WA, Submission 74.

3.4.2 The 2018 proposed changes regarding discrimination

Regarding the above-mentioned discrimination on the basis of sex, relationship status, sexual orientation, gender identity and intersex status, the Bill only addresses access to surrogacy through use of ART for male same-sex couples and single men. This is an important first step in removing discrimination in Western Australia regarding relationship status, sex, and sexual orientation, but further reform will be necessary to ensure non-discrimination on the basis of gender identity or intersex status. The latter appear not to have been included in the current Bill due to a need to clarify the impact of provisions in the *Commonwealth Prohibitions on Human Reproductive Cloning Act 2002* (see discussion below), which will take time.

In the meantime, the current Bill addresses pertinent issues that were reported by the Government to be seen as requiring immediate action. That is, in the second reading speech it was said that the Bill enables licensed fertility clinics and practitioners to provide such services without discrimination based on sex and sexual orientation, in compliance with Commonwealth and State legislation (*Equal Opportunity Act 1984* (WA)).

Proposed amendments relevant to discrimination based on relationship status, sex, and sexual orientation

The Bill proposes amendments to section 23 of the *HRT Act* to allow an IVF procedure to be carried out for the purposes of a surrogacy arrangement where there are 'medical or social reasons'. 'Medical or social reasons' is defined under new section 19(1A) of the *Surrogacy Act* to mean an eligible woman *or a man*, in the case where there is one arranged parent, and, in the case where there are two arranged parents, a married or de facto couple, who are an eligible woman and a man; or two eligible women; or two men.

The second reading speech also stated that the Government was committed to upholding the values of equality, fairness and diversity, and that broadening access to surrogacy proposed under the Bill, adds to the family formation options of adoption and fostering that are already available to male same-sex couples and single men in WA. The Government noted its intention was to 'bring WA in to line with all other Australian jurisdictions that permit male same-sex couples to engage in altruistic surrogacy, with the exception of the NT which has no relevant laws'; and that it was also expected that following the enactment of the Bill there may be a reduced impetus to travel overseas to engage in surrogacy.

The proposed amendments are a significant step toward removing discrimination in Western Australia.

Future work to remove all discrimination

The Bill does not address all issues of discrimination against people based on gender identity or intersex status. Further work will be needed into the future to remove discrimination from the HRT and surrogacy legislation. This section notes areas in which further amendments will be required in the future.

It appears that the language chosen for the current proposed amendments was decided upon as an interim measure due to further clarification being required regarding the impact (if any) of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth). Section 19(2) of that Act provides that a person commits an offence if the person intentionally places a human embryo in the body of a human, *other than in a woman's* reproductive tract' (emphasis added).[204] Thus, the wording of the proposed legislation refers to 'man' and 'woman'. It is noted that a person who identifies as neither a 'man' nor a 'woman' or who is intersex, may not be able to access ART or surrogacy. Secondly, the Bill does not address matters related to transgender pregnancy which involves access to ART by a man who has female reproductive organs that require resolution in conference with the Commonwealth Government.

To remove discrimination resulting from the HRT and *Surrogacy Act* it would be preferable for the wording of the legislation to avoid using the terms such as 'woman' or 'man' and instead refer to an *'eligible person or couple'*. The requirements for accessing ART or surrogacy may then be further defined to include for example, *'a person or couple who due to medical or social reasons are unlikely to be able to conceive, carry or bear a child; unlikely to survive a pregnancy or birth, or likely to conceive a child affected by a genetic condition or disorder or that will be unlikely to survive the pregnancy or birth or whose health would be significantly affected by the pregnancy or birth'. A couple should include 'two people who are married or in a de facto relationship with each other'.*

Here, I reiterate my overall finding that the *HRT Act* is outdated and should be repealed and replaced. Nevertheless, the proposed Bill is seen as an important interim measure which would resolve issues of access for many people in Western Australia and is timely – particularly, as the recommendations of this report if implemented will take time and further delay is not recommended in regard to addressing such issues. Future reform, however, will be required with the drafting of a new Act providing the opportunity to bring the legislation properly into line with other legislation across Australia, societal views, and principles of better regulation. The *Surrogacy Act 2008* (WA) should also be accordingly amended.

Findings

1. The Western Australian *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) prevent women with impending infertility from accessing ART or surrogacy.
2. The Western Australian *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) prevent women with impending infertility or who are unable to carry or bear a child from accessing ART or surrogacy unless they have an existing approved surrogacy arrangement in place.
3. It is unacceptable to leave a woman who is faced with impending infertility/inability to carry and/or bear children unable to access ART in order to preserve her fertility.
4. It is unacceptable to require that a woman who is faced with infertility or an inability to carry or bear a child to have a surrogacy arrangement in place, and have met all the current pre-requisites for such an arrangement, before she is able to undergo ART. This fails to recognise that a woman may need to undergo ART at a stage at which she may be too young, too sick, not ready, or not in the position to have entered into a suitable surrogacy arrangement or to have met all the current requirements for counselling, advice, reporting, and approvals.

204 *Prohibition of Human Cloning for Reproduction Act 2002* s19(2).

5. The Western Australian *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) discriminate against people on the grounds of their sex, relationship status, gender identity, intersex status, or sexual orientation, and contrary to Commonwealth law.
6. It is unacceptable to discriminate against people on the grounds of their sex, relationship status, gender identity, intersex status, or sexual orientation, and contrary to Commonwealth law.
7. Current provisions in the *HRT Act* and the Surrogacy Directions 2009 (WA) impede the operation and effectiveness of the *Surrogacy Act*, preventing people from entering into lawful surrogacy arrangements in Western Australia due to poor wording of the legislation and discriminatory provisions.
8. A Bill tabled in the Western Australian Parliament in 2018 if enacted would address some of the identified issues that require immediate attention. The proposed amendments are an important first step in the law reform process. Further legislative change will be needed in the future as the Bill:
    - does not resolve issues of access to ART for women who may need a surrogacy arrangement in the future *but do not yet have one in place*
    - does not remove discrimination related to gender identity or intersex status
    - is an interim measure (albeit an important one) that will insert provisions into an outdated Act that this report recommends should be repealed and replaced.
9. Legislative change and careful consideration of drafting is needed to ensure the regulation of ART and surrogacy reflect contemporary social values and standards.

Recommendations

Recommendation 1

Noting the recommendation in Part 1 of the report that the *HRT Act* be repealed and that a new Act be drafted, that the *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) and related directions and regulations should be amended to provide for access to IVF procedures in circumstances in which a patient faces the impending loss of, or significant impairment to, their fertility or the ability to carry or bear a child in addition to providing for such access by person(s) who are already infertile or unable to carry or bear a child.

Recommendation 2

Noting the recommendation in Part 1 of the report that the *HRT Act* be repealed and that a new Act be drafted, that the *HRT Act 1991* (WA), the *Surrogacy Act 2008* (WA) and related directions and regulations be amended to remove any requirement that a person who needs to preserve their fertility for future treatment in which a surrogacy arrangement may be required, must already have a surrogacy agreement in place before being able to access ART. The *HRT Act 1991* (WA), s23(1)(c)(iii) and the Surrogacy Directions 2009, Direction 7 requirements for an RTC approved surrogacy arrangement prior to a person undergoing a fertilisation procedure, should be repealed.

Recommendation 3

That discriminatory provisions within the *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) that prevent access to ART or surrogacy on the basis of sex, relationship status, gender identity, intersex status, or sexual orientation, be repealed and amended as a matter or priority.

Recommendation 4

That the Minister of Health should progress interim measures as far as is possible to address issues raised in the review that require urgent attention, recognising further reform is required as a matter of priority.

Recommendation 5

That the wording of relevant ART and surrogacy legislation and associated regulations and directions in Western Australia be drafted or amended as required to refer to an *'eligible person or couple'* (rather than 'man' 'men' 'woman' or 'women') which should then further be defined to include *'a person or couple who due to medical or social reasons are unlikely to be able to conceive, carry or bear a child, unlikely to survive a pregnancy or birth, or likely to conceive a child affected by a genetic condition or disorder or that will be unlikely to survive the pregnancy or birth or whose health would be significantly affected by the pregnancy or birth'. A couple should include 'two people who are married or in a de facto relationship with each other'*.

Recommendation 6

That the Western Australian Government consult with the Commonwealth concerning issues related to transgender pregnancy, which may involve access to ART by a man who has a female reproductive tract, to determine the status of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth), s 19(2) which provides that a person commits an offence if the person intentionally places a human embryo in the body of a human, *other than in a woman's* reproductive tract' (emphasis added) and any implications relevant to the amendments to the *Sex Discrimination Act 1984* (Cth) and/or access to ART or surrogacy.

Chapter 4

RTC Pre-approval, Counselling, Assessments and Legal Advice

Chapter 4:
RTC Pre-approval, Counselling, Assessments and Legal Advice

4.1 Introduction

Section 16 of the *Surrogacy Act 2008* (WA) provides that a parentage order cannot be made in respect of a child unless the surrogacy arrangement has been approved in writing under section 17 by the Reproductive Technology Council (RTC). Direction 7 of the Surrogacy Directions 2009 requires that such approval must be obtained *prior* to the surrogacy arrangement as it prevents a licensee from providing an artificial fertilisation procedure in connection with a surrogacy arrangement unless the arrangement has been approved by the RTC.

Section 17 of the *Surrogacy Act* and Regulation 5 of the Surrogacy Regulations 2009 provide the requirements for such approval, noting that such requirements differ from other jurisdictions in Australia in a number of ways. In particular, in addition to meeting requirements for counselling, legal advice, and other eligibility criteria set out in the legislation regulations, and directions, the Western Australian provisions require:

- an independent psychological assessment by a clinical psychologist and a report provided to the RTC confirming the 'psychological suitability' of each of the arranged parents; the birth mother and her husband or de facto partner, if any; and any other person(s) (a donor/s) whose egg or sperm is to be used for the conception of the child or who is the spouse or de facto partner of a donor (that is, *up to eight independent psychological assessments and reports*)
- a medical practitioner assessment and written report to the RTC in relation to each of the arranged parents, the birth mother and any donor, detailing any concerns the medical practitioner has about the effect that involvement of the person in the surrogacy arrangement may have on any known medical condition of the person; details of any medical condition of the person that may pose a risk to a child born as a result of the surrogacy arrangement; and in the case of the intended parents, whether the eligibility criteria set out in the *Surrogacy Act* have been met
- the inclusion of donors of gametes or embryos as parties to the agreement who are therefore also subject to meeting requirements for counselling and legal advice as well as sign the surrogacy agreement.

This chapter examines requirements for 1) pre-approval of the surrogacy agreement by the RTC, 2) counselling, 3) legal advice, 4) a psychological evaluation by a clinical psychologist and provision of a report for each of the parties to a surrogacy arrangement, 5) a medical evaluation and report for each of the parties to be submitted to the RTC, 6) that donors of gametes or embryos be a party to the surrogacy arrangement and also subject to the aforementioned requirements.

Such issues are relevant to particular the Terms of Reference that require consideration of the need for provision as to the administration of the *Surrogacy Act 2008* (WA) and any functions to be conferred on the Minister, RTC, DG and assisting staff/persons; the impact on the *Surrogacy*

Act 2008 (WA) of relevant Commonwealth and State legislation and aspects of legislation of other jurisdictions, which could be incorporated into the Act, including consideration of harmonisation of domestic surrogacy legislation; the effectiveness of the operation of the RTC and committees of the RTC; and whether there should be a process of review or appeal of decisions made (by RTC) under the *Surrogacy Act 2008* (WA).

4.2 The requirement for pre-surrogacy approval by the RTC and related requirements

4.2.1 The role of the RTC in providing pre-approval

Numerous parties who participated in the review, particularly in the public forums, but also via written submissions did not think that the RTC should have a role in approving surrogacy arrangements, and/or thought that the pre- approval process was 'unnecessary', 'bureaucratic', 'stressful', 'costly', 'burdensome', 'misplaced', 'inappropriate', 'yet another hurdle', and/or 'a barrier to accessing ART'. It was instead suggested by people who participated in the review that the more appropriate place for exploring the suitability of the arrangement and whether the parties should proceed was via the counselling process and clinical assessment by suitably qualified medical practitioners. In addition, there was significant evidence presented to the review that the numerous requirements for pre-surrogacy reports and RTC approval, which were in addition to counselling and legal advice, were not only barriers to accessing surrogacy in WA, but were driving people overseas.

The views and experiences of people who attended the forums and/or provided written submissions in relation to RTC pre-approval requirements, and how many had decided as a result to engage in surrogacy outside of Western Australia, are illustrated by the following submissions.

Mr Ross Jutras-Minett, who has three children via altruistic surrogacy in Canada, stated:

> *I also believe that Section 17 of the Act is overly onerous. I understand the need for medical approval but for the "Council" to have to approve a surrogacy agreement, it seems a to be too much red tape, this should be something that forms part of the IVF practices and requirements for clinics to administer. I am not opposed to the prerequisite criteria of age and having given birth prior, what bothers me is the highly regulatory nature of that process and the possible time delays incurred in administrating that process and the time it takes to achieve such an approval.*[205]

Ms Rebecca Kalpakoff, who had with her husband decided also to engage in surrogacy overseas, described the circumstances that had led her to making such a decision. She described that she had been diagnosed with Stage 4 Asherman's syndrome following a miscarriage and dilation and curettage. She had undergone many medical procedures trying to improve her condition, including having flown to Sydney to see expert medical practitioners, but was left unable to become pregnant or carry a child. She noted the subsequent barriers she had experienced in Western Australia in not having anyone in her family or friendship circle who could act as an altruistic surrogate and finding that the process in Western Australia was 'so arduous' that she and her husband had decided to go overseas. She noted:

205 Ross Jutras-Minett, Submission 104.

> *When we looked at doing surrogacy locally we discovered that the process was very long and was going to cost the same or even more then doing it in the Ukraine.*[206]

In face-to-face consultation she described the number of steps involved as having been seen by her and her husband as *'too much after all that we had already been through'*, and that her experience had been that she had not felt she had been treated very well in Western Australia.

The length of time the entire pre-surrogacy approval process took was also seen as a significant barrier. Ms Fiona Glumac noted:

> *From what my friend has learnt, to do surrogacy in WA, her and her husband are looking at two years before the first frozen transfer into their surrogate. This timeframe is appalling. After all they have already been through, this timeframe is unacceptable. I understand that in some countries and states within Australia, you are able to have that first transfer within months, not years.*[207]

Another couple, who had undertaken altruistic surrogacy in Western Australia submitted:

> *It is not just a question of convenience. A lack of resourcing creates a void of information and this becomes an impenetrable barrier to progressing an altruistic surrogacy arrangement in Western Australia. The following comments are based on our experience with the RTC. We consider that we were afforded an inappropriate level of support by the Reproductive Technology Council (RTC). Via telephone we requested assistance. In my opinion, my enquiry to the RTC to understand how I could find an appropriately qualified psychologist to meet the requirements of the Surrogacy Act was inappropriately addressed. I was shocked with the response of the RTC representative on the telephone, "I do not know. There are very few if any." This is not only an indictment on the level of customer service provided by the RTC; it implies that altruistic surrogacy is impossible.*[208]

Notably, the issues raised during the review in relation to the RTC's role and functioning regarding pre-approval of surrogacy arrangements were consistent with those raised in relation to the terms of reference discussed in Part 1 of the report. There were calls for the existing surrogacy process to be modernised, streamlined and for necessary but not onerous obligations to be imposed on the parties to the arrangement. For example, the Gay Dad's Group called for *'a process that has clear and consistent documentational requirements; establishes clear and concise medical, psychological and legal qualification criteria; and where assessments and decisions are subject to a review process through the State Administrative Tribunal'*.[209]

The conclusion in Part 1 of this report was to recommend abolition of the current RTC and the establishment of an advisory body whose role will not be one of a 'regulator' or 'approval body'. The considerations relevant to surrogacy did not present reason to form an alternative view. The discussion below, and in Chapter 5, therefore not only considers the operation and effectiveness

206 Rebecca Kalpakoff, Submission 83.

207 Fiona Glumac, Submission 87.

208 Confidential, Submission 17. (N.B. It is likely that the described enquiry was dealt with by someone at the DoH in the RTU and not an RTC member – see Part 1 of this report which notes the structure of the current system and the confusion the public has over what the RTC or RTU are, and who they are dealing with).

209 Gay Dads WA, Submission 74.

of the current provisions in relation to required counselling, legal advice, and assessments, but also examines how such things may occur in a way that better meets the best interests of children who are born as a result of surrogacy arrangements and supports the respective parties within the surrogacy arrangement.

4.3 Requirements for counselling

4.3.1 Legislative requirements

Requirements and provision for counselling in relation to surrogacy arrangements are extensive in Western Australia. Section 17(c)(i) of the *Surrogacy Act 2008* (WA) requires that counselling be undertaken by each of the arranged parents; the birth mother and her husband or de facto partner, if any; and any other person (a *donor*) whose egg or sperm is to be used for the conception of the child or who is the spouse or de facto partner of a donor about the implications of the surrogacy arrangement. The Surrogacy Regulations 2009 (WA) reg. 4 then set out the matters that must be covered in such implications counselling.

Section 21(2)(b) of the *Surrogacy Act 2008* (WA) also requires that before a transfer of parentage order may be made, the child's birth parents and the arranged parents must have received appropriate counselling about the effect of the proposed order.

In addition, the Surrogacy Directions 2009 (WA) provide for licensees to provide for access to counselling for all parties during treatment, following a decision to discontinue treatment, during pregnancy that results from treatment, and following the miscarriage or birth of any child born in connection with a surrogacy arrangement.[210] The licensee must also make all reasonable efforts to facilitate joint counselling for the birth mother and the arranged parents at each of 20 weeks after the beginning of a pregnancy; 34 weeks after the beginning of a pregnancy; and within 14 days after a miscarriage or the birth of a child.[211]

People who participated in the review were generally very supportive of counselling taking place and of the requirements set out under the Act concerning implications counselling and post-birth counselling regarding the effects of transfer of legal parentage. For example, Gay Dads WA submitted that they thought that *'implications counselling is well defined and well managed under the Act and regulations'* and that they were not aware of any reported issues regarding implications counselling.[212]

4.3.2 Counselling and the best interests of children

Some also noted the protective element counselling could have for children. For example, the LJ Goody Bioethics Centre submitted:

> *In order to protect the rights of children born of surrogacy arrangements, and to maintain alignment between the Surrogacy Act and WA adoption practices, the extent of implications counselling as described in Regulation 4 should be maintained.*[213]

210 Surrogacy Directions 2009 (WA), Direction 12.

211 Surrogacy Directions 2009 (WA), dir. 13.

212 Gay Dads WA, Submission 74.

213 LJ Goody Bioethics Centre, Submission 85.

Others saw the counselling process as a place in which the parties could also discuss any areas of concern to ensure the best interests of children that may be born as a result.[214] This is further discussed in Chapter 5 which considers what matters may be relevant in operationalising the Direction that when considering whether to provide an artificial fertilisation procedure in connection with a surrogacy arrangement 'the welfare of any child that may be born as a result of the procedure is to be the paramount consideration; and the welfare of any existing child of the birth mother, a donor or the arranged parents is to be taken into account.'

4.3.3 Call for mandatory counselling throughout pregnancy

Some people who participated in the Review noted that while pre-and post-birth counselling was mandatory regarding the implications and effects of transfer of legal parentage, counselling referred to in the directions which may take place during the pregnancy and post-birth was not mandatory. Several people said in face-to-face submissions that they thought that such counselling should be mandatory. A written submission, illustrative of such views, by a woman who had acted as a surrogate mother said:

> *…There is obviously an amount of counselling that takes place prior to being approved to go ahead with the arrangement, however there is no mandate on continued counselling during pregnancy. Surrogacy is a highly emotive journey for all persons involved. [Partners of surrogates are also affected and should have access to counselling too]. The partner of a surrogate sacrifices a lot in a surrogacy arrangement but receives very little recognition or support. In our situation, [my husband] was not offered any emotional support and he lived in fear of what toll surrogacy could take on our family. Thankfully we survived, and our relationship is strong. My recommendation is for mandatory counselling each trimester during a surrogacy pregnancy and more frequently if required.*[215]

The review found that it would be appropriate for the law to require parties to have at least one counselling session per trimester of pregnancy, and one session post-miscarriage or birth. It would also be appropriate to continue to provide the opportunity for people to engage in joint counselling sessions. The latter should remain voluntary so that there is no pressure felt by any party that they must engage in joint counselling if this was not suitable to them at the time.

4.3.4 Requirement for counsellor to be an 'Approved Counsellor'

Requirements concerning counselling to be provided by an 'approved counsellor'[216] were also questioned. It was submitted to the review that:

> *surrogates and intending parents …not [be] restricted to choosing from professionals within Western Australia or those of the specific Fertility Clinic. It would be preferable to have the option of using other professionals in other states who have far more experience in surrogacy therefore can appropriately counsel and guide families.*[217]

214 See for example, Mara Hayler, Submission 41; Confidential Submission 89.

215 Confidential, Submission 43.

216 Surrogacy Regulations 2009 (WA), regs. 4 and 6.

217 Confidential, Submission 43.

The RTC submission identified that restricting counselling to 'Approved Counsellors' in surrogate arrangements *'may complicate or impede arrangements when the surrogate lives outside Western Australia'*.[218] They recommended that the Surrogacy Regulations be amended to *'allow the provision of counselling by a similarly qualified mental health professional.'*[219]

The current requirements for a person to obtain status as an 'approved counsellor' and recommendations for change were discussed in Part 1 of this report.[220] It was there recommended that the requirements be repealed and replaced with terminology that refers to a 'qualified counsellor' defined as a qualified mental health professional.

4.3.5 Lessons from past practices regarding adoption

Others called for the need to learn from unacceptable past practices regarding adoption and raised their concern that counselling should not be skewed or focused on persuading a woman to relinquish the child; that those providing counselling may have vested interests to see the child relinquished; and that legislative requirements for counselling (and other related matters) should never be dispensed with. In particular, the Association of Relinquishing Mothers (ARMS) submitted:

> *Counselling services in adoption were heavily skewed towards persuading the pregnant woman to give up her child and promoting the interests of the prospective adoptive couple. When IVF began, again, counselling services were extremely poor, avoiding – as much as possible – addressing the implications of donated genetic material. We can't assume that the services offered in the surrogacy context are any better, and what we know to this point is that 'counselling' is often provided by those who have a vested interest in the outcome...*

The National Council of Single Mothers and their Children (NCSMC) submitted:

> *It is our dark history combined with our contemporary concerns that we seek adequate protections for the birth mother. Therefore, the [NCSMC] endorses the ARMS Submission to The Review of Surrogacy Act 2008 …and in particular we wish to reiterate four of those recommendations: 1. There should be NO circumstance where the Court would dispense with the requirement to undertake counselling by any party to the surrogacy. 2. There should be NO circumstance where a party is not required to take independent legal advice. 3. There should be NO circumstance in which the Court dispenses with the consent of the birth mother, unless she died in the delivery of the child, or through an accident, or is in a coma that she is not likely to emerge from in the foreseeable future. 4. There should be NO circumstance in which the birth mother's agreement to the Plan should be dispensed with.*[221]

218 RTC, Submission 122.

219 RTC, Submission 122.

220 Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 1)*, 2019, Chapter 3, Recommendations, and section 3.4.5.

221 National Council of Single Mothers and their Children Inc (NCSMC), Submission 58.

Ms Dorothy Kowalski also submitted:

> *I oppose strongly the court's power of dispensation with all of the following: 21. (2)(b) the court can dispense with the requirement for a birth parent to have received counselling. This should be compulsory, not dispensed with. 21.2(d) the court may even dispense with the requirement for a birth parent's consent. The situation/s in which such a dispensation may be granted are not specified.*

That it is important to learn from past practices in relation to adoption and particularly forced adoptions is acknowledged to be of no doubt. It is also important that counselling in relation to lawful surrogacy arrangements does not focus on convincing a woman to relinquish a baby, but rather focuses on supporting all parties to such an arrangement, ensuring they are able to exercise their autonomy and consent freely and without coercion.

In examining the law with the above concerns in mind, it was found that the Surrogacy Regulations 2009 (WA), Regulation 4 extensively stipulates what should be discussed during implications counselling and that the requirements are not focused upon convincing a woman to relinquish a child. Rather, implications counselling is focused on discussing with each party that is considering entering into such an arrangement, before pregnancy has occurred, the matters that may arise during the pregnancy and after the birth, and how they would like such matters to be dealt with.

Box 4.1 lists these requirements.

Box 4.1: Matters that are required to be covered in implications counselling are:

1. the likely effect of the surrogacy arrangement on the birth mother and on her relationship with the arranged parents
2. whether, and to what extent, the birth mother should allow the arranged parents or a donor to express their views about aspects of the birth mother's lifestyle and behaviour during a pregnancy in connection with the surrogacy arrangement
3. whether prenatal testing will be considered and how the birth mother, the arranged parents and any donor will address a situation where a serious defect of a foetus is found
4. identification of expenses associated with the pregnancy and the birth that may be paid on behalf of, or reimbursed to, the birth parents and the circumstances in which those expenses may be paid or reimbursed
5. identification of expenses associated with a donation of eggs or sperm intended to be used for the conception of a child that may be paid on behalf of, or reimbursed to, a donor and the circumstances in which those expenses may be paid or reimbursed
6. who is to be present at a child's birth
7. arrangements for the arranged parents to take care of a child following birth, including the process of separation of birth parents from the child
8. how the birth of a child born with a disability would be dealt with under the surrogacy arrangement
9. how the separation of the arranged parents, or the death of either or both of them, before a child's birth would be dealt with under the surrogacy arrangement

10. what information would be given to the child about the circumstances of the child's birth and when, and by whom, it would be given
11. what communication it is proposed that a child would have with the birth parents and the family of the birth parents during childhood and how any proposed contact is to be managed
12. what communication it is proposed that a child would have with a donor and the family of a donor during childhood and how any proposed contact is to be managed
13. the likely effects of the surrogacy arrangement on other children of the birth parents or the arranged parents, and the involvement of those children in the process in ways appropriate to their age and maturity
14. the likely effects of the surrogacy arrangement on the birth mother's husband or de facto partner (if any), including consideration of how the surrogacy arrangement may impact on that relationship
15. the likely effects of the surrogacy arrangement on a donor or the family of a donor
16. how the situation of birth parents changing their minds about transferring the care of a child to the arranged parents would be dealt with
17. the attitude towards, and impact of, the surrogacy arrangement on the extended families of the birth parents, the arranged parents and any donor
18. the level of support networks for the parties during the surrogacy arrangement
19. methods of conflict resolution.

The focus of required post-birth counselling is to 'explain the effects of transferal of legal parentage' and is not intended to compel such transfer.

As discussed above, the review also supports that opportunities for individual and joint counselling continue to be available throughout the pregnancy and after birth, with a minimum of one counselling session per trimester and one session post-miscarriage or birth being mandated. Above, (at 4.3.4) it is further recommended that Western Australia adopt similar provisions to those of New South Wales which requires an independent counsellor's report post birth that focuses on (among other things) whether transfer of legal parentage is in the best interests of the child, and whether any consent given by the birth parent or parents to the parentage order is informed consent, freely and voluntarily given.[222]

The concern that counsellors are currently limited to people who work for fertility clinics and who thus may be perceived to have a vested interest, would also be addressed by the recommendations in this report that counsellors not be limited to 'approved counsellors' as defined in the current legislation. Implementation of such recommendations would enable the surrogate mother and her partner to choose their own suitably qualified counsellor, again adding protection against coercion.

222 *Surrogacy Act 2010* (NSW) s 17.

In considering where the Act provides for dispensation of its requirements it was noted that such provision only relate to:

- *post-birth* counselling or legal advice as to the effect of the transfer of legal parentage
- consent of the birth mother in relation to transfer of legal parentage
- the presence of an agreed upon written plan.

Further, the Act stipulates that such dispensation may only occur if the court is satisfied that:

- the birth parent is deceased, incapacitated or the arranged parents have been unable to contact the birth parent despite having made reasonable efforts to do so,[223] or
- the birth mother is not the genetic parent of the child and at least one of the applicants for the order is a genetic parent and the making of the order is in the best interests of the child.[224]

The Act does not dispense with requirements that must have been met prior to entering into the arrangement or during the surrogacy arrangement. The importance of ensuring that dispensation provisions are there to ensure that a parentage order that is in the best interests of the child may be made would not (and should not) be taken lightly by a court. (See also discussion below at 8.3)

It was, however, identified that the legislation, regulations and direction do not stipulate whether the implications counselling is to be undertaken individually and/or jointly. It is recommended that this be addressed to ensure that the intending surrogate mother and her partner (if any) engages in counselling with a qualified counsellor of her/their choice and that such counselling is focussed on the needs of the surrogate mother, free of the interests of the intending parent(s). The intending parent(s) should also have individual counselling. It would then be beneficial for all parties to engage in at least one joint session of counselling prior to entering into the surrogacy arrangement.

4.3.6 Costs related to counselling

Finally, it was suggested and discussed during face-to-face consultations that there should be guidance given by the Government as to the fees that people should be expected to pay and caps on what is payable in relation to required counselling. Guidance and information would provide for transparency and mean that people have a better idea as to the actual costs involved in such arrangements.

4.4 Legal advice

The importance of the parties understanding the legal requirements and implications of a surrogacy arrangement is unquestionable. There are significant legal matters raised by arrangements in which a woman conceives, carries and bears a child with the intention to then relinquish that child to another person or couple following its birth. The law is designed to protect and uphold the best interests of any child that will be born as a result of such arrangements, and to put in place criteria that serve to protect women who act as surrogate mothers and set

223 *Surrogacy Act 2008* (WA) s 21(3).

224 *Surrogacy Act 2008* (WA) s 21(4).

the boundaries in which surrogacy arrangements may lawfully occur. The *Surrogacy Act 2008* (WA) therefore requires that each party to the agreement (and their partner if any) receives independent legal advice concerning the arrangement. Independent legal advice is 'legal advice provided by a person who is chosen by the person receiving the advice; and is not providing advice to the arranged parents as well as to any other person required to receive the advice'.[225]

4.4.1 Content of the legal advice

The Act is not prescriptive in terms of the independent legal advice that must be provided, other than stipulating it must be 'about the effect of the surrogacy arrangement'[226] and 'about the effect of a proposed order' for transfer of legal parentage.[227] It is presumed that such advice would ensure that all parties are informed of legal matters relevant to the arrangement and parentage orders including, but not limited to:

- the altruistic surrogacy arrangement being legal but not enforceable (and what this means)
- the requirement for the arrangement to be altruistic but that reimbursement of the surrogate mother's reasonable expenses may occur (and what such expenses may be)
- the legal requirements that must be met in relation to the surrogacy arrangement (for example, eligibility criteria)
- the requirement for a surrogacy agreement to be in writing (again noting that such an agreement is not enforceable at law)
- that the surrogate mother and her partner (if any) are considered the legal parents of the child(ren) at birth
- that the surrogate mother is not required at law to relinquish the baby at birth, and the implications thereof for all parties involved (although also noting that the court may make parentage orders absent of such consent where the birth mother is not genetically related to the child and at least one of the intending parents are, if that is in the best interests of the child (See further discussion at 8.3)
- legal matters relevant to the child that will be born as a result of such an arrangement (for example, access to information about its birth mother and genetic heritage)
- the legal requirements that must be met in order to apply for a transfer of legal parentage
- the process and requirements involved in making the application for transfer of legal parentage
- the legal consequences of a court granting (or denying) the application for transfer of legal parentage.

225 *Surrogacy Act 2008* (WA) s 14.

226 *Surrogacy Act 2008* (WA) s 17(c)(iii).

227 *Surrogacy Act 2008* (WA) s 21(2)(c).

The lawyers may also assist on drafting and amending the written surrogacy agreement. The review found that it would be beneficial for people who are considering entering into a surrogacy agreement to have access to example templates for surrogacy agreements that may be accessed prior to seeking legal advice. Such templates may be provided on the Health Department's website, noting that they would not amount to, or be a substitute for, legal advice but that they are provided as guidance as to the sorts of matters that an agreement may include. Information more generally about what legal advice should entail would also be useful.

4.4.2 Costs

That independent legal advice be provided to each of the parties to a surrogacy arrangement and is fundamentally important was not questioned during the review. It was, however, presented to the review during face-to-face forums that the costs associated with required legal advice can by high and are often an unknown to parties.

It was noted that some people were utilising professionals in other jurisdictions due to the level of experience and costs in Western Australia were too high. For example, a woman who had acted as a surrogate mother in Western Australia noted:

> *…we chose a lawyer in Queensland to give us independent legal advice prior to being approved and post the birth of the surrogate baby to transfer the parentage. We felt more confident in using a lawyer that had had far more experience with surrogacy in various states around Australia and that she knew what was relevant, her costs were within reasonable limits compared to those quoted in Western Australia, she had had experience with relationship breakdowns during surrogacy arrangements due to various reasons and she advised us on how to avoid these with legal protection.*[228]

It was suggested and supported by several attendees at the forums that similar to other family law costs, there should be guidance given by the government regarding the fees that people should be expected to pay. Some also suggested that there should be set fees, or that fees should be capped. This would reduce the financial burden on intended parent(s) who must pay for all parties' legal costs and allow for monies to be directed to reasonable reimbursement of the surrogate mother's expenses related to conception, pregnancy and birth. Transparent and reasonable legal costs would also help families of varying financial means to engage in lawful surrogacy arrangements.

It is noted that the above suggested guidance regarding example surrogacy agreements that would meet Western Australian legal requirements, as well as guidance regarding what should be covered when people obtain independent legal advice, might also serve to reduce costs.

228 Confidential, Submission 43.

4.5 Pre-surrogacy psychological assessment and report

The review found that the additional pre-surrogacy requirement that all parties to a surrogacy arrangement be assessed by a clinical psychologist as to their 'psychological suitability' to engage in the surrogacy arrangement and to provide a report in this regard to the RTC for their 'approval'[229] was described by many as being duplicative, unclear, stressful, costly, burdensome and misplaced. For example, a confidential submission by a couple who had undertaken surrogacy in Western Australia described their experience as follows:

> *The amount of money we have to pay in counselling, legal and psychological assessments is really large. Our first child through surrogacy cost over $20,000 in lawyer and psychological fees. We do believe having psychological assessments are important, however we do not feel that having to attend counselling at both the fertility clinic and an external psychologist clinic are warranted.*[230]

Another confidential submission by a husband who had undertaken surrogacy with his wife in Western Australia told the review in his submission:

> *After nine years of recurrent miscarriage, ectopic pregnancies, failed IVF and three different egg donors who were all unsuccessful…we attempted gestational surrogacy with known donor eggs…Unfortunately we were unable to harvest any eggs from the donor…Our surrogate, who had become a friend, offered to do traditional surrogacy. The RTC had to approve the arrangement after submissions from us. We had to undergo lengthy and expensive psychological evaluation by a clinical psychologist far in excess of the counselling sessions we had had with our egg donors. We also had to again have the two counselling sessions three months apart both as individual couples and a group. We had to have new legal submissions drawn up about the parenting orders after the baby was born… We had to go through the whole counselling, psychological evaluations, and legal advice requirements twice [even though we were the same parties to the first gestational attempt and the second traditional surrogacy attempt]. The psych evaluations and report were not cheap…. This was quite stressful on all parties. I believe the bureaucratic hurdles were quite cumbersome, and a lot of the time it felt as if the requirements were being made up as we went along. In essence, despite all our previous efforts to start a family, the decision rested on a psychologist and the RTC.*[231]

Dr John Yovich submitted:

> *The Act in Western Australia, with layers of counselling, makes the entire process extremely costly therefore only available to those with sufficient means (especially sufficient wealth).*

He echoed the view that the whole process was too onerous in Western Australia and informed the Review that as a result he now *'conducts surrogacy arrangements via [a fertility center in Cairns] and [is] aware that the processes in Queensland are much simpler and satisfying to all parties.'*[232]

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229 *Surrogacy Act 2008* (WA) s 17(c)(ii); Surrogacy Directions 2009 (WA), dir. 7.

230 Confidential, Submission 18.

231 Confidential, Submission 116.

232 PIVET Medical Center, Submission 114. (John Yovich)

It was also noted that little to no guidance is given in relation as to what the psychological assessment should involve nor to what 'psychologically suitable' means. Gay Dads WA submitted:

> *Approval of an altruistic surrogacy arrangement by the RTC may turn on a psychologist's report. NIL guidance is given to clinical psychologists in the Act, Regulations or Directions as to the conclusion the psychologist is to make regarding 'psychological suitability' or the process of assessment of the parties to the arrangement. Though section 17c(ii) of the Act requires that the arranged parents, the birth mother and her husband or de facto and any other person (as defined under s17 b(iii)) be examined by a clinical psychologist as to whether they are psychologically suitable to be involved in a surrogacy arrangement, there is no definition in the Act of what is 'psychologically suitable'.*
>
> *Without a definition it is impossible for a clinical psychologist to assess the parties to a surrogacy arrangement as to suitability. For example, is 'psychologically suitable': (a) Limited to the psychological competence of the parties to understand the contractual arrangements they might enter into; (b) Does it extend to the parties' capacity and/or competence to care for a child born of a surrogacy arrangement; (c) Does it require that the clinical psychologist confirm that they understand all of the implications counselling they have undertaken and that any risks or potential conflicts have been discussed and that the parties have planned appropriate strategies to mitigate those risks? (d) If the parties are all psychologically suitable but there are existing children who may be at psychological risk if the arrangement goes ahead, what difference might that make to the assessment of 'psychological suitability'; (e) Should the parties to an arrangement be required to complete psychological testing?*
>
> *The above are important questions because reporting clinical psychologists pay passing attention to the questions, while others go into much more detail.*[233]

Mr Stephen Page, a lawyer with experience in surrogacy arrangements, noted in relation to such requirements:

> *The regulatory model in Western Australia …has in my belief two flaws:*
>
> 1. *It adds another step which really does not reduce risk to any great degree but adds delay and a cost burden to taxpayers which does not exist for taxpayers in the other States.*
> 2. *It doesn't address what happens post birth. …There [is] no mechanism for post birth assessment or counselling as there is in Queensland and New South Wales and as there is now to a limited degree …in South Australia. If …the parties fall out post birth, it is extremely helpful if there is some counselling or assessment process so that each of the parties know that they have been heard and they can move towards a workable solution with a minimum of acrimony. In my view, the post birth model as seen in Queensland or New South Wales works well.*[234]

233 Gay Dads WA, Submission 74.

234 Stephen Page, Submission 65.

Note, as discussed at 4.3.1, the Western Australian Surrogacy Directions (2009), 12 and 13 do require a licensee to provide access to counselling throughout the surrogacy agreement for each party, as well as joint counselling at various stages of the surrogacy arrangement, being 20 weeks after the beginning of a pregnancy; 34 weeks after the beginning of a pregnancy; and within 14 days after a miscarriage or the birth of a child. The current wording of the Act does not, however, mandate such counselling. Post-birth counselling is mandated in Section 21(2)(b) of the *Surrogacy Act 2008* (WA) in relation to the effect of an order for transfer of legal parentage prior to any such order being made.

New South Wales in comparison has legislative requirements for post-birth counselling of the birth mother and her partner (if any) about the surrogacy arrangement and its social and psychological implications before they consent to the parentage order.[235]

Both New South Wales[236] and Queensland[237] also require post-birth assessment by an independent counsellor (who is not the person who has provided counselling in relation to the surrogacy arrangement) who is to prepare a report prior to the transfer of legal parentage as to whether such a transfer is in the best interests of the child and the reasons why. This appeared to be better practice than the pre-surrogacy RTC approval requirements of an additional psychological evaluation as it was focused on the best interests of the child that had been born as well as matters relevant to the parties to the agreement, and free and informed consent. The New South Wales provisions require evaluation at the point prior to transfer of:

1. each affected party's understanding of the social and psychological implications of the making of a parentage order (both in relation to the child and the affected parties)
2. each affected party's understanding of the principle that openness and honesty about a child's birth parentage is in the best interests of the child
3. the care arrangements proposed by the applicant or applicants in relation to the child
4. any contact arrangements proposed in relation to the child and his or her birth parent or parents or biological parent or parents
5. the parenting capacity of the applicant or applicants
6. whether any consent given by the birth parent or parents to the parentage order is informed consent, freely and voluntarily given
7. the wishes of the child, if the counsellor is of the opinion that the child is of sufficient maturity to express his or her wishes.

Victoria was the only other state that had pre-approval and psychological evaluation requirements, which were reported to raise similar issues as those discussed above in relation to Western Australia. That is, while Victoria was seen to provide more information about what the requisite evaluation and approval processes involved, the system was nevertheless seen as 'overly bureaucratic' and placing 'unnecessary burden' upon parties that 'did not add anything in terms of protecting children or parties to the surrogacy arrangement'.[238]

235 *Surrogacy Act 2010* (NSW) s 35.

236 *Surrogacy Act 2010* (NSW) s 17.

237 *Surrogacy Act 2010* (Qld) s 35.

238 Views conveyed during face-to-face consultations. See also Stephen Page, Submission 65.

South Australia, Tasmania, and the Australian Capital Territory did not have requirements for additional pre or post-birth psychological evaluation, pre-approval requirements for surrogacy arrangements, or an independent counsellor's report prior to transfer of legal parentage.

When considering all of the above I found the position taken in New South Wales and Queensland to be the most preferable. While the requirement for a post-birth counselling session for the surrogate mother, and an independent counsellor's report as described above, would still involve additional costs, the requirements for such counselling and assessment were clearly set out and ensured post-birth follow up and reporting to the court that is focused upon matters of particular relevance to the best interests of the child(ren), as well as issues pertinent to the relinquishment of the child by the birth mother.

Taking into consideration that Part 1 of the report on the review of the *HRT Act* and the *Surrogacy Act* recommends disbanding the RTC and the submissions to the review concerning pre-approval and additional psychological assessment and reporting, it is recommended that the *Surrogacy Act 2008* (WA) and relevant regulations and directions be amended to require a post-birth counselling session for the surrogate mother, and an independent counsellor's report to the court in line with the New South Wales requirements.

4.6 Pre-surrogacy medical assessment and report

In addition to the above, section 17(d) of the *Surrogacy Act 2008* (WA) requires a medical practitioner assessment and written report to the Council in relation to each of the arranged parents, the birth mother and any donor to be medically suitable to be involved in the surrogacy arrangement. The Surrogacy Regulations 2009 (WA) (Reg 5(g) further require that such a report details any concerns the medical practitioner has about the effect that involvement of the person in the surrogacy arrangement may have on any known medical condition of the person; details of any medical condition of the person that may pose a risk to a child born as a result of the surrogacy arrangement; and in the case of the intended parents, whether the eligibility criteria set out the *Surrogacy Act 2008* (WA) have been met.

Such a reporting requirement does not exist in any other jurisdiction in Australia. It was, however, evident that medical practitioners involved in ART, gamete or embryo donation, and/or surrogacy clinically assess the medical suitability of their patients to undergo treatment or to donate their gametes or embryos, or to enter into a surrogacy arrangement. If there are concerns, they refer such concerns to their clinical ethics committee, and have a legal obligation not to provide medical treatment to patients that is not medically suitable. Some clinics also have dedicated surrogacy panels/committees which are comprised of the Medical Director, Counselling Manager, Donor Program Manager and Nurses in which every potential surrogacy arrangement is considered to ensure eligibility criteria are met prior to commencing the surrogacy process.

Notably, in the recent New South Wales Department of Justice review of their surrogacy legislation, it was found that in relation to the suggestion that there be a statutory requirement for birth mothers to undergo such an assessment:

> *…a medical assessment will be undertaken as a matter of course in surrogacy arrangements involving ART by its nature as a medical service, even though this is not a statutory requirement. We do not recommend amendment to include provisions requiring birth mothers to receive a positive medical assessment.*

The requirement for a medical assessment to be reported to the RTC for RTC pre-approval of the surrogacy agreement was thus seen to be unnecessary and redundant, with some participants in the face-to-face forums concurring that it was yet another bureaucratic requirement that added cost to the surrogacy process in Western Australia but that added nothing in regard to protection of patients or the safety of children. It is recommended that the legislated requirement for a medical assessment and report prior to entering into a surrogacy agreement be repealed.

4.7 Requirement that donors of eggs, sperm or embryos are parties to the agreement and meet above requirements

The law in Western Australia currently requires donors of eggs, sperm, or embryos to be a party to the surrogacy arrangement and as such to meet all requirements for counselling, legal advice, and psychological and medical evaluations and reports – as well as being party to the required written agreement. This is not required in any other state of Australia. This was also noted in the submission of Mr Stephen Page who wrote:

> *Western Australia is alone for requiring the donor to sign the surrogacy arrangement and thereby have legal advice and counselling. Nowhere else in the world to my knowledge is this a requirement. Donor recruited sperm, egg or embryos therefore cannot be used for surrogacy in Western Australia. This step does not go to reducing risk (as opposed to surrogacy journeys occurring interstate) but does go to increasing cost and delay and lack of availability of surrogacy in Western Australia thereby increasing the chances of intended parents travelling overseas to access surrogacy. …*[239]

The impact of this on people trying to access surrogacy in Western Australia was noted by a woman who is currently seeking a surrogacy arrangement:

> *The [medical] consensus is] that …my best chance at a healthy child… is to use a surrogate. I passed the counselling, and my disability did not create concerns about my ability to parent my child. I was put on the waiting list, only to then find out that [an] anonymous sperm cannot be used in a surrogate. [I am informed that] donors consent to their sperm being used for RT and/or in the in vitro fertilisation (IVF) process. This consent does not extend to using the sperm to fertilise an embryo carried by a surrogate (as opposed to the intended parent) … Further, the counselling requirements for surrogacy in Western Australia, require the [donor] to be counselled as part of the surrogacy process, and the counselling process prior to becoming an anonymous sperm donor does not currently extend to surrogacy counselling...Once an individual realises their inability to conceive naturally/carry a child, grieves this loss and learns to accept it, it then becomes heartbreakingly apparent that the law in Western Australia makes it impossible for all but a few to access and make use of advancements in ART/ surrogacy…*

239 Stephen Page, Submission 65.

The review found that requirements that donors of gametes or embryos be parties to the written surrogacy arrangement, and as such must meet all requirements that the surrogate mother and intending parents must meet in relation to signing the agreement, counselling and legal advice serves as yet another barrier to altruistic surrogacy arrangements in Western Australia. Such requirements mean that the only way for surrogacy to proceed is if the parties to the arrangement are engaged in a traditional surrogacy arrangement in which the surrogate mother's own eggs are used and a male intended parent's sperm is used, or the intended parent(s) or surrogate use an egg and/or sperm donor, or embryo donor that is known to them. It prevents the use of donor eggs or sperm or embryos that are lawfully provided by people to clinics who are not known to the surrogate mother or intended parent(s).

Noting that Western Australia provides for access to information by children born as a result of donor conception about their genetic heritage and provided there is consent by a donor of gametes or embryos that such a donation may be used in a surrogacy arrangement, it is not necessary to include the donor as a party to the surrogacy arrangement. It is recommended that the consent and counselling process for gamete and embryo donation should include the prospect of such gametes or embryos being used in a surrogate. It is also recommended that requirements for the donor of gametes or embryos to be a party to the surrogacy arrangement and thus subject to requirements for counselling and legal advice in relation to the arrangement be repealed.

4.8 Discussion

In considering the multiple layers and requirements currently required by the *Surrogacy Act 2008* (WA) and associated regulations and directions that people are expected to engage in prior to being able to enter into a surrogacy arrangement I examined the Western Australian Legislative Council's Legislation Committee (2008) inquiry into the Surrogacy Bill and Hansard to understand why so many criteria had been included prior to the surrogacy arrangement. At the time, the application of ART in surrogacy arrangements was considered new and it appears that the Committee and legislature proceeded with an abundance of caution, with the best of intentions to ensure that the arrangements proceed in a manner that would support all parties and uphold the principle that the best interests of children who may be born as a result must be paramount.

Unfortunately, the multiple layers and requirements have proven to be experienced by many people seeking lawful altruistic surrogacy arrangements in Western Australia as insurmountable. In fact, there are so many conditions that must be met prior to people entering into such arrangements the associated stress, burden and cost meant many people felt compelled to explore avenues in other states or overseas. The system that had been put in place, therefore, was found to have been so cautious as to make altruistic surrogacy in Western Australia virtually inaccessible to Western Australians, who were then faced with a wide variety of risks associated with cross-border surrogacy. The discussion above details many of the issues and challenges that people faced in this regard. To conclude that discussion, the below case study clearly illustrates the impact the current system is having on people and is demonstrative of several similar stories that were presented to the review.

Case Study: Ms Gayle Hall and Petar Spralja

I have a Neuro-Cardio Condition that involves passing out with certain triggers. When I pass out, I have to lie down for safety reasons as I will go unconscious no matter what position my body is in (including lying down). Each time I pass out or faint, my body reaches complete heart block. This can be dangerous. In April 2016 my partner…and I fell pregnant. This was very exciting as it was a planned pregnancy. By 5.5 weeks of the pregnancy, I was passing out around four times per day. I was raced to Royal Perth Emergency dept. as that is where the cardio specialists are. After careful consideration, we all decided that it may be dangerous for the baby and myself, and therefore I was taken to a clinic where a termination was performed. …this was a traumatic experience, and not only did we need to grieve the loss, we also needed to cope with the news that it wouldn't be safe for us to fall pregnant again.

After about four or five months, we decided to explore surrogacy. This was incredibly difficult to do in Perth as it seemed quite an untouchable subject to approach with others. We also found the list of pre-requisites …were near impossible. It was here that we commenced exploring overseas surrogacy. We researched South Africa, Thailand, Russia and Canada. Our final decision was Canada, as we felt comfortable with the altruistic method, as well as the culture of Canada. Our application fee of $15K was transferred and we had a surrogate match by October 2016. At this stage, we thought it would be smooth sailing, but no, we hadn't even touched the sides yet. We then learned that in Perth, we could not even create and freeze embryo. Apparently, our only option was to go overseas or over east to NSW. … [My condition means] I [am] not able to fly in a plane safely while on IVF, so …I [had to be] in NSW for three weeks … we only received one embryo. This was devastating. We then learnt it costs over $4K to send embryos to Canada whether it is for one or more. Given the poor statistics for first transfer success with a surrogate, we then had to repeat the IVF program. This included another trip to Sydney and accommodation for three weeks. Again, we only received one embryo.

Meanwhile, we found out we needed a lawyer for ourselves in Canada, and another one for our surrogate, plus another lawyer in Australia to go over the Surrogate Contract. It was then we also learnt that no lawyer in Western Australia was permitted to do this. We had to source a lawyer from Queensland. But, after we finalised our contract with our Queensland lawyer, we were then told we had to fly to Victoria to have it legally signed by ourselves, a witness (which was random due to not knowing anyone in Melbourne) and we had to have it sent from Melbourne for tracking purposes.[240]

So now, Pete and I finally thought we were making head way with our new baby! Our wonderful surrogate fell pregnant first transfer – how exciting! We then found out it was a Blighted Ovum. The next transfer (final embryo) did not stick at all. This was devastating! Pete and I were then back to the beginning. Our surrogate even decided it was easier to move on to another couple in Canada. We are now lost and wished we never took this journey. I have spared you the emotional details, but not only that, we have now spent over $50K….

…it really should not be this hard in Western Australia… I realise this review may not help Pete and I for the future, however I wish to submit this letter to assist other couples.

240 It may be presumed that the lawyer in Queensland had the couple fly to Melbourne to have their agreement signed as engaging international commercial surrogacy is an offence in Queensland. See further discussion in Chapter 9.

Findings

1. The existing surrogacy process should be modernised and streamlined, including that only necessary obligations should be imposed on the parties to the arrangement.
2. Issues raised during the review in relation to the role and functions of the Reproductive Technology Council (RTC) regarding pre-approval of surrogacy arrangements were consistent with those raised in relation to those discussed in Part 1 of the report regarding the operation and effectiveness of the RTC. Submissions regarding surrogacy did not present reason to form an alternative view.
3. Western Australia should adopt similar provisions as those in New South Wales that require an independent counsellor's report to the Court for each of the parties to the agreement and their partners (if any) that focuses on (among other things) whether transfer of legal parentage is in the best interests of the child, and whether any consent given by the birth parent(s) to the parentage order is informed consent, freely and voluntarily given.[241]
4. Current legislative requirements for pre-surrogacy psychological and medical assessments and reports to be provided to the RTC as part of a pre-approval process were misplaced and added to the burden and cost of surrogacy arrangements. They do not provide additional safeguards for, or serve the best interests of, children. The layers of requirements were found to discourage local surrogacy and have led people to seek surrogacy interstate or overseas.
5. Requirements for implications counselling and independent legal advice regarding surrogacy arrangements are essential in supporting parties to the surrogacy arrangement and ensuring the paramountcy of the best interests of any child born as a result and should be maintained.
6. There is a need for the legislation, regulations and/or directions to stipulate that implications counselling is to be undertaken individually (with independent qualified counsellors) and at least once jointly prior to entering into the surrogacy arrangement.
7. It would be beneficial for all parties to a surrogacy arrangement and to the welfare of the child to mandate a minimum of one counselling session per trimester that a pregnancy continues and one counselling session post-miscarriage or birth for each of the parties. Opportunities for further individual and joint counselling as provided for in Directions 12 and 13 should also continue to be available throughout the pregnancy and after birth.
8. Regulation 4 of the Surrogacy Regulations 2009 (WA) provides extensively for what should be discussed during implications counselling. The requirements are appropriately focussed and are not about convincing a woman to relinquish a child. Rather, implications counselling is focused on discussing with each party who is considering entering into a surrogacy arrangement, before pregnancy has occurred, the matters that may arise during the pregnancy and after the birth, and how they plan to deal with such matters.
9. The focus of required post-birth counselling is to 'explain the effects of transferal of legal parentage' and is not intended to compel such transfer.

241 *Surrogacy Act 2010* (NSW) s 17.

10. Concern that counsellors are currently limited to only ‘approved counsellors’ who are very few and who work for fertility clinics would be addressed by implementing recommendations in Part 1 that include that provisions referring to ‘approved counsellors’ be repealed or amended as required, and that ‘qualified counsellors’ be defined as ‘qualified mental health professionals’.
11. Restricting counselling to ‘approved counsellors’ may also complicate or impede arrangements when the surrogate lives outside Western Australia. The Surrogacy Regulations should be amended to allow the provision of counselling by a ‘qualified mental health professional’.
12. Guidance regarding the expected costs of required counselling and independent legal advice in Western Australia should be provided by the Minister/DG/Department.
13. Information regarding what should be covered when independent legal advice is sought, as well as sample templates for written surrogacy agreements that meet the requirements of the Western Australian legislation should be made available by the Minister/DG/Department.
14. Dispensation provisions for certain requirements that must be met prior to the transfer of legal parentage are appropriate and may only be applied by the Court in limited circumstances in which the making of parentage orders is considered to be in the best interests of the child.
15. Current provisions in the *Surrogacy Act 2008* (WA) that require donors of gametes or embryos to sign the surrogacy agreement and meet all counselling and legal advice requirements in relation to that agreement, serve as yet another barrier to altruistic surrogacy arrangements in Western Australia. Provided there is consent by a donor of gametes or embryos that such a donation may be used in a surrogacy arrangement, such inclusion was seen as unnecessary and should be repealed. It was noted that Western Australia provides for access to information by children born as a result of donor conception about their genetic heritage.
16. The consent and counselling process for gamete and embryo donation in Western Australia should include the prospect of such gametes or embryos being used in a surrogate.

Recommendations

Recommendation 7

The existing surrogacy process should be modernised and streamlined, including that only necessary obligations should be imposed on the parties to the arrangement.

Recommendation 8

Noting recommendation 5 in Part 1 of this report to abolish the current RTC and establish an advisory body the role of which would be neither that of a 'regulatory' nor 'approval body', and on the basis of the below recommendations, the requirements for RTC pre-approval of a surrogacy arrangement and all references to such approval should be repealed. (Repeal *Surrogacy Act 2008* (WA) ss 15 and 16; Surrogacy Regulations, Reg 5; Surrogacy Directions, Direction 7).

Recommendation 9

That current legislative requirements for pre-surrogacy psychological and medical assessments and reports be repealed. (Noting more suitable mechanisms to protect the best interests of children and to support the parties to a surrogacy arrangement are recommended below).

Recommendation 10

Requirements for counselling and legal advice prior to surrogacy arrangements taking place are essential and should be maintained for the intending parent(s), the surrogate mother and her partner (if any). Such requirements should not apply to donors of gametes or embryos.

Recommendation 11

Current provisions in the *Surrogacy Act 2008* (WA) that require donors of gametes or embryos to sign the surrogacy agreement and meet all counselling and legal advice requirements in relation to that agreement should be repealed.

Recommendation 12

That the consent and counselling process for gamete and embryo donation in Western Australia should include the prospect of such gametes or embryos being used in a surrogacy arrangement.

Recommendation 13 (* relevant also to discussion in Chapters 5 and 6)

That Section 17 of the *Surrogacy Act 2008* (WA) be amended to provide:

17. Requirements for surrogacy arrangement

A surrogacy arrangement may proceed only on the basis that

a) the birth mother has previously given birth to a live child and has reached 25 years of age or if younger is assessed by a qualified counsellor to be an adult of sufficient maturity, and

b) that the intended parent(s) have reached 25 years of age or if one or both is/are younger that they are assessed by a qualified counsellor to be an adult of sufficient maturity, and

c) the arrangement is set out in a written agreement signed by –

   i) each of the intended parents; and

   ii) the birth mother and her husband or de facto partner (if any); (**the *parties***) and

d) each of the parties referred receives independent legal advice about the legal requirements for entering into a surrogacy arrangement and the effect of the surrogacy arrangement;

e) each of the parties undertakes in-person counselling sessions with a qualified counsellor

   i) **prior to the arrangement taking place** about

      1. the implications of the surrogacy arrangement; and

      2. the best interests and welfare of any child who will be born as a result;

   ii) **in circumstances in which a pregnancy has been achieved** at least one counselling session in each trimester that the pregnancy continues; and

   iii) **post-miscarriage or birth of a child(ren)** whether stillborn or live at least one counselling session with a qualified counsellor about the effects of a legal parentage order before consenting to the parentage order.

Section 17A

a) When undertaking the counselling required pursuant to section 17

   i) the intending surrogate mother and her partner (if any) must engage in such counselling with a qualified counsellor of her/their choice;

   ii) the intending parent(s) must engage in counselling with a different qualified counsellor of their choice to that of the surrogate mother and her partner (if any);

   iii) the parties to the surrogacy arrangement must engage in at least one joint session concerning the implications of the intended arrangement with all parties agreeing as to the qualified counsellor they will engage.

Recommendation 14

Reg. 4 of the Surrogacy Regulations 2009 (WA) which provides for what should be discussed during implications counselling and for a certificate to be issued at the end of counselling, should be maintained.

Recommendation 15

That opportunities for individual and joint counselling provided for in Surrogacy Directions 12 and 13 continue to be available throughout the pregnancy and after birth to each of the parties to a surrogacy arrangement in addition to the above required counselling.

Recommendation 16

That the *Surrogacy Act 2008* (WA) be amended to insert a requirement for a report to the Court about the application for a parentage order prepared by an 'Independent Counsellor' (post birth) which is to include whether the proposed parentage order is in the best interests of the child and reasons for that opinion, including reference to:

1. each affected party's understanding of the social and psychological implications of the making of a parentage order (both in relation to the child and the affected parties)
2. each affected party's understanding of the principle that openness and honesty about a child's birth parentage is in the best interests of the child
3. the care arrangements proposed by the applicant or applicants in relation to the child
4. any contact arrangements proposed in relation to the child and his or her birth parent or parents or biological parent or parents
5. the parenting capacity of the applicant or applicants
6. whether any consent given by the birth parent or parents to the parentage order is informed consent, freely and voluntarily given
7. any other relevant matters.

Recommendation 17

That definitions and terminology concerning counsellors be amended to:

- remove all reference to 'approved counsellors'
- include 'qualified counsellor' who is a qualified mental health professional
- include 'independent counsellor' who is a qualified counsellor who is not the counsellor who counselled the birth mother, the birth mother's partner (if any) or an intended parent about the surrogacy arrangement and is not connected with a medical practitioner who carried out a procedure that resulted in the conception or birth of a child.

Recommendation 18

The Minister/DG/Department should provide guidance to the public regarding the expected costs of required professional services for counselling (per session) and legal advice in Western Australia.

Recommendation 19

The Minister/DG/Department should provide information to the public regarding what should be covered when independent legal advice is obtained, as well as sample templates for written surrogacy agreements that meet the requirements of the Western Australian legislation.

Recommendation 20

Dispensation provisions that exist in the *Surrogacy Act 2008* (WA) s 21(3) & (4) in relation to requirements that must have been met before the Court may make a transfer of parentage order are appropriate and should be maintained.

Chapter 5

Paramountcy of the Welfare of the Child (Screening)

Chapter 5: Paramountcy of the Welfare of the Child (Screening)

5.1 Introduction

This chapter further considers matters that may be addressed in the pre-surrogacy arrangement counselling. In particular, it examines issues raised during the review regarding how to operationalise the welfare of the child principle, which requires that:

> *when a person to whom a licence applies or an exempt practitioner is considering whether to provide an artificial fertilisation procedure in connection with a surrogacy arrangement the welfare of any child that may be born as a result of the procedure is to be the paramount consideration; and the welfare of any existing child of the birth mother, a donor or the arranged parents is to be taken into account.*[242]

In Western Australia references to the 'best interests' of children and the paramountcy of the welfare of the child are not defined in terms of how such considerations should be operationalised. The welfare of the child provision (also referred to as the 'best-interests' principle), however, is often interpreted in practice as requiring consideration of whether any child born as a result of the provision of ART or a surrogacy arrangement might be at significant risk of physical harms, such as physical and/or sexual abuse, neglect, family violence, and/or drug or alcohol problems; and/or psychological harms, such as being at risk of exposure to any of the above forms of violence, neglect or abuse, or where other family factors, such as mental illness or addiction, may affect a child's well-being.

The issue then becomes whether, in the context of ART and surrogacy, it is appropriate to conduct a risk assessment and if so, how. In this regard, the Australian and New Zealand Infertility Counsellors Association (ANZICA) WA Counsellors submitted:

> *The counsellors acknowledge the discrepancies between states on this matter, and the difficulties encountered within existing models, there needs to be more attention given to an operational definition of the "best interests of the child" and guidelines to clinics/ medical directors regarding how to manage prospective patients about whom they have serious concerns regarding providing treatment.*[243]

In several parliamentary briefings members of Parliament also requested that I consider these issues. I also heard from people who had engaged in surrogacy arrangements who said that they felt proper counselling and screening was important, and more so when people didn't know each other.[244]

242 Surrogacy Directions 2009 (WA), Direction 5.

243 ANZICA WA Counsellors (Joint Submission), Submission 61; Hollywood Fertility, Submission 75 concurring.

244 For example, see Confidential, Submission 89.

Welfare of the child: Is a 'risk assessment' warranted?

Discussion of 'screening' or 'risk assessment' in no way should be taken as suggesting that there are a significant number of people who engage in altruistic surrogacy in Australia who are doing so with the intention of harming children. Nor are there statistics or evidence that indicate children born as a result of ART or surrogacy are at higher risk of suffering abuse than children in the general population. Surrogacy is most often accessed as a last resort or is the only option people have to become parents. This was demonstrably the case for the people who came forward to participate in the review.

All of the women who presented as seeking or having engaged in surrogacy had significant medical issues. Many had endured years of medical treatment. I met with women who had survived cancer, who had Mayer-Rokitansky-Küster-Hause Syndrome (who had been born without a uterus), cerebral palsy, brittle bone disease, Asher's Syndrome and women who either as a result of such issues or due to other infertility or medical issues, had turned to surrogacy. I also met with people in same-sex relationships, the male partners of women who could not conceive, carry, or bear a child, and was aware of a male in Perth who had lost his wife to cancer who had embryos in storage. For them, surrogacy was the only way they could become parents of children with whom they would be genetically related, and for the man who had lost his wife, the only way he could use the embryos they had created together.

At the face-to-face forums[245] there were people who travelled from rural regions of Western Australia, people who lived in the suburbs, and people who lived in the city who came to meet with me. Some had explored adoption and foster care, others had endured years of failed IVF procedures. There were people of varied income status, who engaged in a wide variety of work, and who came from a wide variety of cultures. What they all shared were stories of wanting to love and care for children as part of their family – something many people who may conceive naturally also seek. Some of those who had children showed me their pictures, spoke of them with love, told me about their lives and reflected the norms of any other family one may meet. Many had extended families who supported them.

The women who I met who had been altruistic surrogate mothers or were embarking on becoming so, were also of varied backgrounds, some teachers, lawyers, midwives, sisters, and friends. They appeared to be very compassionate, caring, and kind individuals. They spoke of wanting to help families who were childless, and of partners who were supportive of their wanting to be a surrogate for a childless person or couple.

It was apparent that the decision for such people to engage in surrogacy was not taken lightly, and that the journey to become a family with child(ren), or to help a family in doing so, involved numerous hurdles, often heartache and many hardships. Personally, I was deeply touched by the experiences and people who engaged with the review, and saw first-hand, how important being a good parent was to each of them.

245 Face-to-face forums on 13 April, 14 April, 16 April, and 20 April 2018.

However, as the reviewer of the Western Australian *Surrogacy Act 2008* (WA) I was also presented with information that in some instances, there are situations in which people present to clinics seeking ART or surrogacy about whom counsellors and/or medical practitioners may have serious concerns regarding providing treatment. In this regard I was told of cases involving untreated mental health conditions, drug and/or alcohol addiction, family violence, criminal behaviour of concern, or child protection issues, and the dilemma of not having an adequate structure in place to deny or postpone treatment.

There have also been several instances, albeit in relation to accessing overseas commercial surrogacy, in which Australian people have attempted, or have accessed, surrogacy for the purposes of obtaining children for sexual exploitation,[246] or where it was later revealed that the person had a significant prior record of child sex offences (for example, the infamous *'Baby Gammy'* case).[247] Such cases often result in calls for criminal history screening to be implemented within the Australian domestic regulatory surrogacy framework.[248] For example, following the Baby Gammy case, the Australian National Commissioner for Children, and Foster Care Advocate, Megan Mitchell wrote:

> *I have no doubt that overwhelmingly, babies born through surrogacy have loving, protective parents and families. However, …[i]t is well known that predators can be very determined and will seek out ways to procure access to children. It is not unrealistic to consider surrogacy as one method to do this. The current practise (sic) of surrogacy does not adequately consider the risks to the child, nor to surrogate mother or the intended parents. We apply tests when people are working with children, or when they foster or adopt, so why don't we consider this for children born into surrogate families as well?*[249]

246 For example, Mark Newton and Peter Truong, a US/Australian couple engaged in numerous attempts using commercial surrogacy before finding a woman in Russia who was already pregnant and willing to sell them her baby for $8000 once it was born. The couple, and numerous other men, abused the boy from six weeks to six years of age. See United States of America v Mark Jonathan Newton (United States District Court, 1: 12-cr-00121-SEB-TAB, 25 June 2013). In another Australian case, a man engaged a Thai surrogate who bore twin girls. He pleaded guilty to sexually abusing the twins from when they were 27 days old. He was sentenced in May 2016 to 22 years in prison. Nino Bucci, '22 years in jail for man who abused his surrogate baby twins' The Age May 2016, at https://www.theage.com.au/national/victoria/22-years-in-jail-for-man-who-abused-his-surrogate-baby-twins-20160519-goyn2h.html

247 *Farnell v Chanbua FCWA [2016] 17*. Mr. Farnell accessed surrogacy in Thailand which resulted in twins being born, one twin, 'Baby Gammy' has Down Syndrome and remains living with the surrogate mother. The other twin, Pippah, lives in Western Australia with Mr. Farnell and his wife. Mr. Farnell has a significant history of child sex offending, which includes him having been convicted of offences against two girls aged between five and 12 years between January 1982 and December 1984, and against another girl between January 1988 and May 1996. A charge relating to a fourth girl who was seven years old was dropped. It is assumed there may have been others. He was sentenced to a total of 4.5 years in prison, spending two years in jail between 1997-1999, and was then released on parole until March 2000. He was subsequently assessed as 'low-risk' for reoffending albeit with caution and recommendations that he be monitored. For a discussion of Mr. Farnell's history of child sex offences, see *Farnell v Chanbua FCWA [2016] 17*. [478]-[495].

248 See for example, Editorial, Children's Commissioner wants background checks on parents using surrogates, The Courier Mail, 12 August 2014, https://www.couriermail.com.au/news/childrens-commissioner-wants-background-checks-on-parents-using-surrogates/news-story/d6e6218a894878831830a14deb41a337.

249 Megan Mitchell, 'Time to Strengthen our Lax Surrogacy Laws', *The Newcastle Herald*, 29 September 2014.

In its 2016 submission to the Commonwealth House of Representatives Standing Committee inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements, the Australian Human Rights Commission expressed similar views, calling for criminal record checks and working with children checks. Although recognising differences between foster care, adoption and surrogacy arrangements they drew the analogy that in each of these arrangements *'there is a regulatory regime administered by the State which provides for the transfer of parental responsibility for children'*. It was their view that that the involvement of the State created an obligation to ensure the best interests of the child, which includes protection *'against injury or abuse while in the care of parents or legal guardians'* and *'the taking of preventative measures … [which require] assessing the possibility of future risk and harm…'*[250]

The review received some written submissions that also drew an analogy with adoption and explicitly called for screening and criminal record checks.[251] Others questioned any form of risk assessment drawing the analogy to 'couples who are able to have children naturally' and noting that they 'are not subject to such assessment'.[252]

In the face-to-face forums, discussion of such issues demonstrated that many attendees were of the view that as surrogacy involves numerous parties and the transfer of legal parentage of a child, counselling, medical assessment, and risk assessment were an important part, of the process. Several attendees acknowledged that due to the involvement of the state, medical practitioners, and other third parties there was an added obligation for them, as far as possible, to identify and address any apparent risks. In this regard, there was support for counselling, medical and risk assessment aimed at increasing the likelihood that children born as a result of surrogate arrangements will fare well. Many people I spoke with also saw such counselling, medical and risk assessment as an important step to help determine whether surrogacy is the right option, to ensure everyone understood what is involved, and to make sure everyone was able to cope with the challenges they may be presented with. One person said 'really, at the end of the day, you want to make sure that you've got all the checks and balances in place, so that everything works out in the end and most importantly, that everyone is OK'.[253] Many favored an approach that helped to resolve or address any issues when possible, and that would enable supported decisions regarding whether ART or surrogacy should proceed at the time, in the future, or not at all. There was, however, also emphasis that people should be treated as having genuine motives and not like they have ill intent or purposes from the outset.

250 Australian Human Rights Commission, Submission No 67 to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (17 February 2016) 20–21 [98]– [102].

251 See for example, Australian Christian lobby, Submission 77; Women and Newborn Health Service, Submission 121.

252 See for example, David Lord, Submission 118.

253 Attendee at Perth city public forum.

5.2 Comparison to other jurisdictions

To inform the review, examination was undertaken of models implemented or recommended in recent reviews in other jurisdictions.[254]

5.2.1 Victoria

Victoria requires screening by way of criminal record and child protection order checks of all applicants for ART and surrogacy and their partners, if any. There are legal presumptions against treatment when 1) a criminal record check specifies that charges have been proven against a woman or her partner for a sexual offence or violent offence;[255] or 2) there has been a child protection order made removing a child from the custody or guardianship of the woman or her partner.[256] Refusal of treatment may also occur if a registered ART provider or doctor reasonably believes that a child that may be born would be at risk of abuse or neglect.[257]

If there is 'presumption against treatment',[258] or refusal of treatment because of a reasonable belief concerning risk of abuse or neglect,[259] an application for review may be made to the Victorian Patient Review Panel (PRP).[260] Such proceedings are not open to the public and are conducted with minimal formality. Applicants do not have a right to be legally represented without leave from the PRP. Within 14 days of the hearing, the PRP must give the applicant written reasons for its decision. PRP decisions are reviewable by the Victorian Civil and Administrative Tribunal (VCAT). Research conducted in the course of the review revealed that the VCAT review process does not always lead to overturning of PRP decisions as was submitted to this review.[261]

The quasi-judicial review system adopted reflects the view of the Victorian Law Reform Commission (VLRC) that such a system would 'implement a fair and transparent process that enables a clinic to investigate concerns about risks to children on a case-by-case basis and according to identifiable and established risk factors…' [262] Note the VLRC had recommended a statutory declaration system concerning criminal records and child protection orders; the criminal record and child protection order checks were introduced by Parliament.

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254 Note that such considerations were also undertaken by me in relation to the South Australian review of their ART legislation from 2015-2017. Some of the information presented in this chapter is drawn from that research. It has, however, also been added to and updated based on recent reviews in other states, and further research and consultation conducted for the current Western Australia review. REF SA REPORT

255 *Assisted Reproductive Treatment Act 2008* (Vic), s14(1)(a).

256 *Assisted Reproductive Treatment Act 2008* (Vic), s14(1)(b).

257 *Assisted Reproductive Treatment Act 2008*, (s15(1)(c)).

258 *Assisted Reproductive Treatment Act 2008* (Vic), s 14.

259 *Assisted Reproductive Treatment Act 2008*, (s15(1)(c)).

260 The Panel is established under section 82 of the *Assisted Reproductive Treatment Act 2008* (Vic) and is independent of the Department for Health and Human Services (the Department) and assisted reproductive treatment (ART) providers.

261 See *TRV v Department for Health and Human Services (Human Rights)* [2015] VCAT 1188 (5 August 2015), VCAT REFERENCE NO. H68/2015, [14].

262 Victorian Law Reform Commission ART and Adoption: Final Report (2007), 61. (Noting that it was held in *Patient Review Panel v ABY and ABZ* [2012] VSCA 264 that it was this report 'on which the provisions of the Act are clearly based…' at [91].

Regarding what 'identifiable and established risk factors' may be considered, VCAT has stated that:

> *…The following factors were identified [in the VLRC Report] as relevant factors to consider when assessing the risk of harm:*
>
> 1. *physical violence by a person or couple applying for treatment*
> 2. *sexual violence by a person or couple applying for treatment*
> 3. *risk of emotional abuse or neglect*
> 4. *physical or psychiatric illness of a person or couple applying for treatment*
> 5. *any intellectual disability of a person or couple applying for treatment*
> 6. *'some other problem' that raises a doctor's concern about a person or couple's capacity to care for their child*
> 7. *previous child neglect by a person or couple necessitating the removal of a child(ren) from his or her care*
> 8. *domestic violence between the parents.*[263]

The *Victorian Assisted Reproductive Treatment Act 2008* (Vic) does not permit the PRP to consider factors that come within s 5(e), namely, discrimination on the basis of sexual orientation, marital status, race or religion. It is also not open to the Tribunal to consider poverty, as this is not an 'identifiable and established' risk factor for harm to children. In addition, the presence of a physical or psychiatric illness, an intellectual disability or 'some other problem' that raises a doctor's concern about a person's capacity to care for a child, does not alone create a barrier to treatment.[264]

While clinics must comply with relevant legislation and regulations, specific auditing in relation to criminal record or child protection order checks, or of refusals based on other factors, does not currently take place. It is therefore unknown how many people are refused treatment on the basis of criminal convictions or child protection orders, as only those who appeal such refusal become known.

In researching the Victorian requirements, it was found that despite the intention to provide a mechanism to protect children born as a result of surrogacy or ART from the risk of harm, the current Victorian system has not proved popular. A study conducted by DeLacey et al. revealed that although Victorian IVF counsellors saw the process where a woman (or her partner) met the criteria for a presumption against treatment as straightforward – in that they were able to inform the person(s) treatment could not be offered, and provide support if they wished to appeal to the PRP—they also experienced difficulties in relation to the system.[265] Counsellors reported people could be 'quite angry and quite abusive, particularly if they feel that they've been convicted and they've paid their price' and felt they were being unjustly punished again.[266] In addition, there was concern about checks revealing other crimes which did not fit the legal criteria for a presumption against treatment that were nonetheless concerning from a welfare perspective—for example,

263 *TRV v Department for Health and Human Services (Human Rights)* [2015] VCAT 1188 (5 August 2015), VCAT REFERENCE NO. H68/2015, [59]-[63]. See also *Patient Review Panel v ABY and ABZ* [2012] VSCA 264.

264 Ibid.

265 Sheryl L. de Lacey, Karen Peterson, and John McMillan, 'Child interests in assisted reproductive technology: how is the welfare principle applied in practice? (2015) *Hum. Reprod.* first published online January 6, 2015 doi:10.1093/humrep/deu343.

266 Ibid.

convictions for drug trafficking. While it was noted that counsellors could request a presumption against treatment in such cases, some counsellors reported considerable professional conflict in doing so, particularly as they would be named on the application.[267] They called for a more nuanced approach to screening for the welfare of the child.

Discussion of the system in the popular media also reports feelings ranging from dissatisfaction to anger. Imposing criminal record and child protection checks on all ART applicants has been criticised by patients and clinicians as burdensome, expensive, and discriminatory.[268] It has been suggested that it would make more sense to provide 'IVF clinics access to the Australian National Child Offender Register (ANCOR), rather than presuming that everyone accessing IVF is suspect until proven otherwise'.[269] In addition, with thousands of couples seeking IVF treatment each year, questions have been raised, not only about the revenue that such checks must raise, but about whether the police resources are available, and should be used in such a manner.[270] Media reports have reported refusal regarding overseas record checks due to a lack of resources which at times has led to significant delay or an inability to undergo treatment even when there is no criminal history.[271]

5.2.2 New South Wales

The New South Wales health department considered the issue of screening for risk of harm to children to be born as a result of ART in 2003 and decided not to mandate screening criteria. In its information guide on the draft legislation proposed at the time, and subsequently implemented, it said:

> *It is recognised that some children will be born into families where they will suffer harm from their parents. Accordingly, laws have been enacted that enable the government to intervene in the care of such children and in some cases for children to be removed from the custody of their parents and alternative arrangements to be made for their care. The role of the legislature has not been to make rules regarding classes of persons who may or may not become parents (as this is not necessarily a predictor of harm) but to make rules to safeguard the rights of individual children whose welfare has been compromised.*[272]

There are also no requirements in the New South Wales surrogacy legislation for screening of applicants for criminal convictions or child protection orders. The New South Wales Parliamentary Committee canvassed the issue of criminal record checks in its inquiry into altruistic surrogacy in 2009 and concluded that it did not receive sufficient information to make further comment on the issue. The 2018 Review did not recommend implementing criminal record checks for prospective surrogate parents, noting that the New South Wales surrogacy legislation:

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267 Ibid.

268 Christopher Scanlon, 'Police Checks on IVF Patients add to the Pain', Sydney Morning Herald, 27 September 2013, http://www.smh.com.au/comment/police-checks-on-ivf-patients-add-to-the-pain-20130926-2ugs6.html accessed December 2018. Emily Bourke, 'IVF Patients Enraged over Police Checks' PM ABC 3 September 2009, http://www.abc.net.au/pm/content/2009/s2675919.htm accessed December 2018.

269 Ibid, Scanlon.

270 Ibid.

271 Ibid; Marianne Betts, Herald Sun 23 October 2013.

272 New South Wales Department of Health, *Consultation Draft Assisted Reproductive Technology Bill 2003 Information Guide New South Wales* (2003), [4.3].

> *provides a mechanism for transferring legal parentage in respect of altruistic surrogacy arrangements. These arrangements often occur between family members or close friends and there is little evidence to suggest that such arrangements are not in good faith. The requirement may merely cause unwarranted inconvenience, expense and distress for those seeking to use altruistic surrogacy for genuine purposes.*[273]

It was further noted that the 'Baby Gammy case' involved an international commercial surrogacy arrangement, which is illegal for New South Wales residents, and that 'implementing a requirement for criminal record checks in domestic arrangements would not necessarily prevent similar situations occurring in the future.'[274]

At a clinical level in New South Wales a patient will consult with medical professionals who may decide not to proceed with treatment on a variety of bases provided such refusal does not infringe anti-discrimination laws. The issue that arises in this situation is that 'screening' at a clinical level lacks transparency, may lack consistent criteria, and may be applied differently across or within clinics by different health professionals.

5.2.3 South Australia

In South Australia, a lawful surrogacy agreement requires the surrogate mother and her husband or partner (if any) and the intending parents to be issued with a certificate by a counselling service,[275] which states that in the opinion of the Accredited Independent Counsellor:

> *The proposed recognised surrogacy agreement would not jeopardise the welfare of any child born as a result of the pregnancy that forms the subject of the agreement.*[276]

There is no guidance or mechanism for how this should be assessed.

In the 2017 report on the review of the South Australian ART legislation it was found that some 'screening' provisions intended to protect the welfare of any child born as a result of ART were removed in 2010 when their Code of Ethical Clinical Practice was repealed. This included requirements that a person wishing to access ART or surrogacy, and their partner (if any), sign a statutory declaration concerning whether they had prior criminal convictions, child protection orders, mental health issues, or drug use. Under the current regime the regulations state that there is no legal obligation upon a registered provider (or anyone else) to provide ART,[277] but there is no further detail regarding when such refusal may occur. The Department for Health and Ageing advises, via a Fact Sheet on its website, that the welfare of the child provision 'allows for consideration of the suitability of a client wanting to undertake ART',[278] but again no explanation is provided regarding what this entails.

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273 Department of Justice, Government of New South Wales, *Statutory Review Surrogacy Act 2010* (July 2018), [3.38].

274 Ibid, [3.39].

275 *Family Relationships Act 1975* (SA) s 10HA(2)(g).

276 *Family Relationships Act 1975* (SA) s 10HA(3)(b)(ii).

277 Assisted Reproductive Treatment Regulations 2010 (SA) reg. 4.

278 SA Health, Fact Sheet: Access to ART at a Registered clinic in South Australia, http://www.sahealth.sa.gov.au/wps/wcm/connect/60b1688043a636fca671eeed1a914d95/FS1_Access+to+ART.Sep+2015.pdf?MOD=AJPERES&CACHEID=60b1688043a636fca671eeed1a914d95.

In that review, there were multiple submissions received from parents, donor-conceived people, support services, medical practitioners, ART providers, and donors calling for screening for risk of physical or psychological harm to children that may be born as a result of ART.[279] There was one submission received that opposed screening, but said that if it must occur it should comply with anti-discrimination laws.[280] It was subsequently recommended that the United Kingdom 'Welfare Check' approach, which is further discussed below, be adopted.[281]

In the 2018 South Australian review of their surrogacy legislation SALRI considered options such as disclosure during counselling, statutory declarations, and Working with Children checks. It was their view that the first two options risked people who had histories of concern or ill intentions simply not disclosing this or lying. In relation to Working with Children Checks they said:

> *SALRI considers this is potentially and ideally the most accurate and appropriate screening measure in the surrogacy context to identify potential risks to the child and help protect the best interests of the child. However, it must be noted that a Child-Related Employment Screening or Working with Children Check is not an assessment of the party's capacity or suitability to be a parent. There are also legal and operational implications as to whether a Working with Children Check is presently available in a surrogacy context.*[282]

They noted that while the information considered by such checks varies across jurisdictions, generally, such checks consider:

- convictions – whether or not they are considered spent or were committed by a juvenile
- apprehended violence orders and other orders, prohibitions or reporting obligations; charges (i.e. where a conviction has not been recorded because, for example, a proceeding has not been heard or finalised by a court, or where charges have been dismissed or withdrawn)
- relevant allegations or police investigations involving the individual; relevant employment proceedings and disciplinary information from professional organisations (for example, organisations associated with teachers, child care service providers, foster carers and health practitioners).

279 Confidential, submission 8; Confidential, submission 14; Kay, submission 18; Lauren Burns, submission 33; Damian Adams, submission 34; Kim Buck, submission 41; Professor Marilyn Crawshaw, submission 51; Professor Eric Blyth, submission 52; Myfanwy Cummerford, submission 56; Professor Olga van den Akkar, submission 57; Relationships Australia, submission 66; Sandra Bevin, submission 67; Kylie Dempsey, submission 69; Sofie Gregory, submission 70; Confidential, submission 71; International Social Services Australia, submission 72; Reece Trevenan, submission 79 Submissions to Sonia Allan, Report on the Review of the Assisted Reproductive Treatment Act 1988 (SA) (2017).

280 Ibid, Submission: Confidential, submission 68.

281 Sonia Allan, Report on the *Review of the Assisted Reproductive Treatment Act 1988* (SA) (2017), Recommendation 11, page xxxii; Section 3.6.

282 David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA)* (South Australian Law Reform Institute, Adelaide, 2018), p194.

However, such checks require intergovernmental agreement as to their use, which is currently limited to employment vetting, and would require further intergovernmental agreement for their use in relation to screening people for surrogacy arrangements. SALRI thus recommended that any surrogacy act:

> *require the full and frank exchange of information between the parties to a lawful surrogacy agreement (that is the surrogate mother, her partner (if any) and the intending parents) and the Accredited Independent Counsellor(s), prior to a surrogacy agreement being entered into, so that all parties can properly assess whether or not to enter such an agreement and/or the agreement is appropriate and will be in the best interests of the child. Included in the information exchanged should be any information that will enable the other parties to the lawful surrogacy agreement, and the Accredited Independent Counsellor(s), to consider whether or not a party might pose a risk to the child or another party. As part of this process, each party should (if possible) obtain and provide to the other parties and the Accredited Independent Counsellor(s) either a Working with Children Check (though SALRI notes there may well be difficulties at this stage with such a requirement) or a National Criminal History Check.*[283]

They further recommended that *'parties should be advised of this requirement as part of their independent legal advice obtained in the process of receiving their lawyer's certificate'*.[284]

The SALRI recommendations focussed particularly on criminal record and child protection issues, and not on other matters that may compromise the well-being, health and/or safety of children. However, it is presumed that the recommended 'full and frank' disclosure would include discussion of such matters if they existed.

5.2.4 Tasmania, Queensland, and the Australian Capital Territory

Tasmania, Queensland, and the Australian Capital Territory, like New South Wales (and currently South Australia) do not have requirements for screening including no requirements for police record checks, child protection order checks, or Working with Children checks.

5.2.5 The United Kingdom

The United Kingdom approach provides an example of a middle ground. The *Human Fertilisation and Embryology Act 1990* provides that treatment services should not be provided 'unless account has been taken of the welfare of any child who may be born as a result of the treatment, and of any other child who may be affected by the birth.[285] This provision is also repeated in license conditions for all ART providers. The Human Fertilisation and Embryology Authority (HFEA) then provides guidance on the scope of the welfare of the child provision, and how it should be applied, within its Code of Practice. The HFEA also provides a form that all providers of treatment must use in which the intended parent(s), the surrogate mother, and her partner if she has one, are asked to answer a series of questions which include:

283 Ibid, Recommendation 32.

284 Ibid.

285 *Human Fertilisation and Embryology Act 1990* (UK), s 13(5). (Section 2 (1) defines "treatment services" as medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children.)

- *Do you have any previous convictions related to harming children?*
- *Have any child protection measures been taken regarding your children?*
- *Is there any serious violence or discord within your family environment?*
- *Do you have any mental or physical conditions?*
- *To your knowledge, is your child at increased risk of any transmissible or inherited disorders?*
- *Do you have any drug or alcohol problems?*
- *Are there any other aspects of your life or medical history which may pose a risk of serious harm to any child you might have or anything which might impair your ability to care for such a child?*

If a person answers yes to any of the above questions, they are asked to provide more detail. The outcomes of the assessment must be recorded on the form. Such forms may be audited from time to time.

The factors the HFEA requires all clinics to consider and record are also set out in a HFEA Guidance Note which identifies factors likely to cause a risk of significant harm or neglect to any child who may be born or to any existing child of the family including any aspects of the patient or (if they have one) their partner:

- past or current circumstances that may lead to any child mentioned above experiencing serious physical or psychological harm or neglect, for example: i) previous convictions relating to harming children; ii) child protection measures taken regarding existing children; or iii) violence or serious discord in the family environment
- past or current circumstances that are likely to lead to an inability to care throughout childhood for any child who may be born, or that are already seriously impairing the care of any existing child of the family, for example: i) mental or physical conditions; ii) drug or alcohol abuse; iii) medical history, where the medical history indicates that any child who may be born is likely to suffer from a serious medical condition, or iv) circumstances that the centre considers likely to cause serious harm to any child mentioned above.

Centres are also to consider whether there is a commitment to the health, well-being and development of the child (called 'supportive parenting'), with the Guidance stating *'it is presumed that all prospective parents will be supportive parents in the absence of any reasonable cause for concern that any child who may be born, or any other child, may be at risk of significant harm or neglect.'*

In relation to process concerning what to do when a concern is raised, the HFEA provides that the centre should obtain consent from the prospective patient (and their partner if they have one) to approach any individuals, agencies or authorities for any factual information required; and that the centre should refuse treatment if it:

- concludes that any child who may be born or any existing child of the family is likely to be at risk of significant harm or neglect
- cannot obtain enough information to conclude that there is no significant risk.

In deciding whether to refuse treatment, the guidance provides that the centre should take into account the views of all staff who have been involved with caring for the patient (and their partner if they have one), and give the patient (and their partner if they have one) the opportunity to respond to the reason or reasons for refusal before the centre makes a final decision. If treatment is refused, the centre is required to explain, in writing, to the patient (and their partner if they have one) why treatment has been refused; any circumstances that may enable the centre to reconsider its decision; any remaining options, and opportunities for obtaining appropriate counselling.

A study conducted by Lee *et al.* provides insight into the early operation of the United Kingdom regime.[286] They found that the number of prospective patients deemed to raise 'welfare of the child concerns' in the United Kingdom remains small; that very few people are subject to further investigation, and even fewer are denied treatment. Nevertheless, Lee *et al.* found that despite the low number of formal cases concerning a risk to the 'welfare of a child', there was widespread concern about the issue. They said:

> *…most reported that the vast majority of patients were 'normal', but this co-existed with an often overtly expressed sense that 'you can never know' or 'you can never prove it'. The study detected the significance of the spectre of the paedophile, as a person hardly ever encountered but whose threat nevertheless creates a powerful rationale for pre-emptive action.*

In relation to the United Kingdom screening method, some counsellors and nurses expressed concern that people may not be honest if they had a conviction for sex offending '10 years ago' and questioned whether it would be possible and/or preferable to do criminal record checks. In addition, despite the defined process, some staff reported struggling to work out how to resolve the small number of 'difficult cases' they experienced.[287]

In another paper published in 2014 by the same researchers Lee et al. found that where there was concern the general approach taken was that deferral of treatment was invoked and was followed by further assessment and attempts to resolve behavioural, lifestyle or relationship concerns.[288] This was seen as a positive effect of using the welfare screening process.

286 Ellie Lee, Jan Macvarish, Sally Sheldon, *Welfare under the Human Fertilisation and Embryology Act: The New Law - Summary of Findings* (September 2012).

287 Examples of such cases are provided in the study report as being 1) a male patient in his 20s who disclosed a conviction for a sexual offence against a child when a teenager. The clinic was willing to treat him and his partner, subject to social services providing an assessment that he no longer posed a risk to children. The social services would not provide a judgement prior to any pregnancy being achieved or a child being born. The couple did not receive treatment. 2) A male patient had a spent criminal conviction for a violent crime (not related to harming a child), but it could not be established whether his crime had been triggered by mental illness. Treatment did not proceed. 3) A clinic refused to treat a woman on the grounds that her serious heart problem and other medical complications made fertility treatment and a possible pregnancy unacceptably high-risk—she was very likely to deteriorate, and she could possibly lose her life. The welfare of her existing child was considered to be the overwhelming factor in deciding to deny treatment, but it was also felt that it was unfair for clinic staff to have to provide treatment to a patient with such a poor prognosis.

288 E. Lee, J. Macvarish, and S. Sheldon 'Assessing child welfare under the human Fertilisation and embryology Act 2008: a case study in medicalization' (2014) 36 Sociol Health Illn 500-515.

Lee *et al.* found that very few interviewees saw the process as 'unjustified' or 'illiberal', reporting 'the new streamlined process is generally welcomed, tempered by a view that considering the welfare of the child is good and necessary (if difficult to achieve).' Further, the general view was that 'whatever the limitations of the formal process, it is intrinsically right for staff to take some responsibility for the future child as a 'third patient'.[289]'

5.3 An examination of criteria

The review received a call from counsellors and clinicians for clearer guidance regarding criteria and processes to be followed to uphold the paramountcy of the welfare of the child principle. As discussed in Part 1 section 12.3 of the Review report, it was also submitted by a number of clinicians that a provision should be inserted into the *HRT Act* and *Surrogacy Act 2008* (WA) similar to that found in South Australia that there is no obligation upon clinics to provide ART or surrogacy treatment subject to ensuring non-discrimination and, when appropriate, referral of the person to appropriate other services that may assist with the issue of concern. The Review also received indications from several Members of Parliament that they thought it important to consider screening applicants for ART and surrogacy as part of the Review.

It was found that lack of explicit screening requirements in relation to ART and/or surrogacy may lead to an inconsistent approach amongst clinics. A uniform system that provides guidance to clinics and counsellors about acceptable criteria and processes surrounding the conditions in which delay, or refusal of treatment may occur, is thus, preferable to no system or guidance at all. Nevertheless, criteria need to be clear and evidence based. Discussion of criteria that is often debated, follows before consideration of which approach might be most suitable.

5.3.1 Physical disability and/or illness

Domestic anti-discrimination laws generally prevent blanket discrimination against providing services to people with a disability. Moreover, disability and/or illness, in and of itself, may not compromise the welfare of a child, and must be considered in light of a person's commitment to the health, well-being, and development of the child. Great care must be taken not to make discriminatory or unfounded judgements about the life a disabled child or person will lead, nor the capacity of a person who has a disability to parent. In the absence of any reasonable cause for concern that a child may be born as a result of ART or surrogacy might be at risk of significant harm or neglect, disability alone is not a reason to preclude treatment.

5.3.2 Psychiatric disability or mental health issues

While many psychiatric illnesses respond to medications and therapy, there are some that are recalcitrant to medical treatment. Where mental health issues are severe in a parent, significant negative impacts are known to occur for young children growing up in the home. Tough *et. al*, for example, found that poor maternal mental health put young children at significantly increased risk of developmental delay.[290] However, again caution must be had. The presence of a mental

289 Lee, Ibid, p 7.

290 S. C. Tough, J. E. Siever, S. Leew, D. W. Johnston, K. Benzies, and D. Clark, 'Maternal Mental Health Predicts Risk of Developmental Problems at three Years of Age: Follow Up of a Community Based Trial' (2008) 8 BMC *Pregnancy and Childbirth* 16.

disability or mental health issue does not alone justify preventing a person from accessing ART or surrogacy. Many mental disorders are transient, of different levels of severity, and amenable to treatment. While concerns may be raised about the impact that an existing mental condition will have on the welfare of a child to be born, with proper care and treatment the concern may be allayed. In addition, research has found that children who have parents with mental health issues may cope adequately, provided they are given the appropriate care, explanations and support systems both in and out of home.[291]

Thus, while living with a parent with mental illness may pose challenges for a child/children, 'equity requires that particular applicants for ART and surrogacy be clinically assessed on their individual merits, and not be denied rights of access on grounds of impersonal, collective stigmatisation and discrimination'.[292] In such cases, assessment of the applicant by an independent mental health worker and/or consultation with a disability advocate may be warranted, to assess short and long term actions and suitability for treatment.

5.3.3 Substance abuse

Using alcohol or other drugs while pregnant can harm an unborn child's health and affect the child's development. Most drugs, including alcohol and tobacco, cross the placenta and can cause distress to the foetus; abnormalities; miscarriage, premature labour, low birth weight and developmental delay.[293] Maternal substance abuse during pregnancy can also lead to several behavioural and developmental disorders in children.[294]

Parents who use alcohol or other drugs in problematic ways are more likely to neglect and physically or emotionally abuse their children.[295] Children who see their parents struggling with alcohol and drug use are more likely to experience emotional stress and develop social, emotional and behaviour problems. They may suffer from poor self-image, loneliness, guilt, anxiety, feelings of helplessness, fear of abandonment and chronic depression. Evidence also indicates that they are more likely than other children to start smoking tobacco and to develop their own substance abuse problems in the future.[296]

5.3.4 Domestic violence

Family violence is a pervasive and serious problem in Australia. It has profoundly negative effects on children, whether they are directly targeted, witness the violence or are aware of the violence in the family. They can suffer from a variety of physical, emotional, mental and developmental effects as a result. Long-term effects of trauma from family violence can be carried

291 Vicky Cowling, *Children of Parents with Mental Illness 2: Personal and Clinical Perspectives* (2004) (ACER Press, Victoria).

292 Ibid.

293 American Academy of Traumatic Stress, 'Effects of Parental Substance Abuse on Children and Families' at http://www.aaets.org/article230.htm.

294 Ibid.

295 Australian Institute of Family Studies (AIFS) *Issues for the safety and wellbeing of children in families with multiple and complex problems: The co-occurrence of domestic violence, parental substance misuse and mental health problems*. (2010) Melbourne: AIFS.

296 S., Dawe, S. Frye, D. Best, D. Moss, J. Atkinson, C. Evans, M. Lynch, & P. Harnett Drug use in the family: Impacts and implications for children. (2007) Canberra: Australian National Council on Drugs.

into adulthood and result in a range of detrimental emotional, mental and behavioural problems. Children's witnessing or exposure to family violence has been increasingly recognised as a form of child abuse. Screening for the presence of family violence may improve identification of people experiencing violence and promote help-seeking. It again, therefore, may have protective functions for children. In surrogacy situations, the purpose of screening would be to identify any concerns and direct a person to appropriate services. It may, however, be a difficult setting to have people disclose such issues, particularly if they are focused on moving forward with the surrogacy arrangements.

5.3.5 Criminal convictions or charges

It is known that exposure to crime and violence can have a severe and long-lasting impact on a child's subsequent development, influencing their physical, social and psychological functioning.[297] Children's reliance on others to meet their primary needs makes them particularly vulnerable to victimisation from people known or related to them.[298]

While it is reasonable to want to protect children from the risk of for example, violence or sexual offences, the question becomes how ART providers and the State should manage this. Criminal record checks, for example, may identify some offenders, but not all. Many violent or sexual offenders have no prior convictions for such offences.[299] Often, such offences are never reported to police[300] or difficult to secure charges or conviction when they are. It should also be noted that where past convictions, charges or orders do exist, this does not in and of itself indicate that a person will be violent or sexually abusive toward a future child. The identification of such records would, however, enable further consideration of whether a risk is posed.

Of course screening applicants for ART or surrogacy also does not protect the child from the risk of abuse from known non-family members, male relatives, acquaintances or neighbours, who are more frequently the perpetrators of sexual crimes.[301]

However this does not mean that reasonable checks regarding a history of violence or sexual offences should not be conducted. It is just important to be aware that implementing blanket criminal record or working with children checks may prove to be a bureaucratic burden that fails to detect actual risk in all cases. It may be that if the Government wished to conduct such screening in a way that more comprehensively detected risk, based on the analogy of adoption or fostering context, that responsibility for administration of the Act, or at least the screening, would need to be transferred to the Department of Communities, Child Protection and Family Support (FAS), which has sole responsibility for such placements and related assessments in Western Australia.

297 Australian Institute of Criminology, Australian Crime Facts and Figures 2011, Chapter 8: Spotlight on Child Victims – crime and child maltreatment, https://aic.gov.au/publications/facts/2011/chapter-8-spotlight-child-victims-crime-and-child-maltreatment accessed December 2018.

298 Ibid.

299 For example, Mark Newton and Peter Truong had no prior convictions. See above n 246.

300 Dr Karen Gelb, *Recidivism of Sex Offenders* (2007) (Sentencing Advisory Council).

301 Ibid.

5.3.6 Child protection issues

Child protection notifications are often raised when there is concern that a child has been, is being, or is likely to be, abused, neglected, or otherwise harmed. Such issues may include family situations involving domestic violence, mental health issues, substance abuse, neglect, and maltreatment. In most cases, child protection matters are dealt with by statutory child protection services in each state or territory,[302] and the majority of cases are managed through health and other therapeutic interventions. Less than 10 per cent of all child protection matters in Australia involve the prosecution of an offender through the criminal justice system. This in itself explains the call for separate discussion and/or checks of whether child protection orders have been made, as criminal record checks would not identify the majority of such cases.[303]

When the issues that have warranted child protection intervention and/or orders are ongoing, or likely to present continued risks to children, it may not be appropriate to immediately provide ART or continue with a surrogacy arrangement. This is especially so as only 10 per cent of cases lead to such orders, thus representing the most serious of matters. Such circumstances might instead warrant referring the applicant to appropriate other services, such as mental health, drug and alcohol, or family violence services; and/or liaising with other relevant authorities to determine an appropriate course of action. Formalising a process to enable consistency of approach when child protection concerns are raised, which starts with discussion and enables further checks if required, as well as referral to appropriate services, would again be desirable.

5.4 Discussion

Fertility counsellors and doctors in Western Australia have called for guidance to be provided as to the circumstances in which they may refuse ART or surrogacy treatment and regarding how to manage prospective patients about whom they have serious concerns regarding the provision of treatment. In addition, to give operational effect to the paramountcy of the welfare of the child guidelines concerning what should be considered in this regard would enable a clear and consistent approach to 'screening'.

Screening may consider a range of factors that may enable further investigation of whether there may be significant risks to the child in the form of serious physical or psychological harm or neglect or a parent being unable to care for the child, including:

- consideration of previous convictions relating to harming children
- child protection measures taken regarding existing children
- violence or serious discord in the family environment
- mental or physical conditions
- drug or alcohol abuse
- medical history, where the medical history indicates that any child who may be born is likely to suffer from a serious medical condition, or
- other circumstances likely to cause serious harm to any child.

302 Australian Institute of Criminology, *Australian Crime: Facts & Figures 2011: Chapter 8 Spotlight on Child Victims – Crime and Child Maltreatment, Canberra: Australian Institute of Criminology*, March 2012.

303 Ibid.

Most Australian jurisdictions currently have no guidelines or legal requirements for screening in surrogacy arrangements. Victoria has legislated criminal record checks and child protection order checks for all applicants and presumptions against treatment where there is a prior sexual or violent offence, or a child has been removed from care. A recent review of the New South Wales legislation did not call for the implementation of screening while a review of South Australian legislation suggested 'full and frank disclosure' be mandated by statute, accompanied by a national criminal record check or working with children check.

In the United Kingdom, there is guidance provided to clinics about how to conduct a 'welfare check' and what to do when there are concerns. It also utilises a signed form in which parties to a surrogacy agreement answer questions that require them to declare factors that may pose a risk of harm to a child born as a result of ART or surrogacy and which will be discussed with the counsellor and clinic.

As noted in the recent New South Wales review report, many (if not most) altruistic arrangements are undertaken in Australia between family and friends in good faith. Calls for criminal record checks to be implemented in all surrogacy arrangements also appear to be reactive to the exposure of cases in which paedophiles have attempted to or have accessed children via commercial surrogacy arrangements overseas. At present, there is not strong evidence that the same risks exist within the altruistic regimes of the various states and territories of Australia, all of which are tightly regulated and have numerous counselling, medical screening, legal advice, and eligibility requirements that must be met prior to an application to the Court for transfer of legal parentage. There is a lack of evidence that imposing such checks on all ART and surrogate applicants and their partners is a necessary or protective measure.

Nevertheless, there is a call for guidance in Western Australia and support for some kind of screening process and there is benefit in having a system that is explicit about what sorts of considerations should be had, and what should be done when there are concerns. In Chapter 4, my recommendations were to remove the RTC pre-approval process, and the associated pre-surrogacy requirements for clinical psychologist and medical evaluation reports, in favour of:

- maintaining the independent counselling and independent legal advice requirements prior to the surrogacy arrangement
- *requiring* at least one counselling session each trimester for each of the parties to the agreement and their partners (if any) along with the ongoing availability of optional individual and/or joint counselling as needed
- *requiring* post-birth counselling
- *requiring* an independent counsellor's report post-birth which is to be provided to the Court prior to any transfer of legal parentage.

These sessions and the Independent Counsellor's report will provide ample opportunities to identify any concerns regarding the best interests of any child to be born and to address them.

In addition, I recommend that as part of the pre-surrogacy counselling, a similar 'Welfare Check' as used in the United Kingdom be implemented, which should be accompanied by guidelines developed by the Minister/DG/Department in consultation with appropriately qualified counsellors similar to those developed by the HFEA that stipulate the criteria that must be discussed during pre-ART/surrogacy counselling. Like those of the United Kingdom, the guidelines should set out the process that must be followed and actions that may be taken when there is concern. In addition, I recommend that there be explicit options and processes included for clinicians and/or counsellors to seek support and advice from experts, agencies or authorities, as well as the ability to obtain further information via requesting a criminal record, child protection order check, Australian National Child Offender Register (ANCOR), or other checks if needed in individual cases. As occurs in the United Kingdom, there should also be a form that all providers of treatment must use and on which the outcomes of the assessment must be recorded. It should be available for auditing from time to time. This approach would create a consistent baseline for all ART clinics to engage in open dialogue with applicant(s) about areas of known risk to children – not limited only to violence or sex offences – and enable decisions to be made to delay or refuse treatment if a significant risk is identified. The guidelines should also require referral of the applicant to appropriate support services if needed (for example drug, alcohol, family violence, mental health services, or otherwise).

The focus of the process should always be upon the welfare of any child to be born as a result of ART and surrogacy and decisions should not be premised upon a social or moral judgement of the applicants. It should be an offence for applicant(s) to provide false information during the assessment. If a person is unfairly discriminated against, judicial review is open to them, and all applicants for ART and surrogacy should be made aware of this during their legal advice sessions (as well as via public information that should be developed by the Department). It is recommended that the Minister/DG/Department monitor the adherence of clinics via having the ability to audit the assessments that have been conducted (as per the regulatory model suggested in Part 1 of this report).

Findings

1. Many people called for some form of consistent assessment (screening) of people wishing to access ART and surrogacy regarding any risks of physical and/or psychological harm that may exist for a child who may be born as a result of treatment. Such screening is supported by the paramountcy of the welfare of the child principle, and the involvement of third parties such as the State and health professionals in the provision of ART and surrogacy.
2. Counsellors and clinicians have called for clarity and uniformity regarding the circumstances in which they may refuse ART or surrogacy treatment and have also sought guidance on how to manage prospective patients about whom they have serious concerns regarding the provision of treatment.
3. Consideration of the various approaches to, and/or recommendations about, screening found the most suitable approach to be that taken in the United Kingdom, where guidelines stipulate the requirements and processes for conducting a child welfare check during counselling pre-treatment and steps that may be taken when there is a concern. Western Australia would benefit from adopting similar guidelines and processes that would enable uniform application of the welfare of the child principle.

4. In addition, it was found that there should be explicit options and processes open to clinicians and/or counsellors to seek support and advice from experts, agencies or authorities, as well as the ability to obtain further information via requesting a criminal record, child protection order or Australian National Child Offender Register (ANCOR) check if needed in individual cases.
5. The guidelines should also require referral of the applicant to appropriate support services if needed (for example drug, alcohol, family violence, mental health services).
6. The focus of 'screening' applicants should always be on the welfare of any child to be born as a result of ART and surrogacy and decisions should not be premised on a social or moral judgement of the applicants. Criteria used should be evidence based and directly related to the risk of harm to a child who may be born as a result of a surrogacy arrangement.
7. Provision should be made to create an offence in relation to applicant(s) providing false information during the assessment. The requirements and rights of review should be clearly explained to applicants during legal advice sessions.

Recommendations

Recommendation 21

The Minister/DG/Department should develop guidelines that provide for a clear and consistent risk assessment framework and process to be used by clinicians/health professionals when assessing applicants and their partners (if any) in relation to the welfare principle, prior to their engaging in a surrogacy arrangement. Such guidelines should:

- include criteria to be considered such as:
  - previous convictions relating to harming children
  - child protection measures taken regarding existing children
  - violence or serious discord in the family environment
  - mental or physical conditions
  - drug or alcohol abuse
  - medical history, where the medical history indicates that any child who may be born is likely to suffer from a serious medical condition
  - other circumstances likely to cause serious harm to any child.
- outline the process to be followed when there is a concern about the welfare of any child that may be born as a result of a surrogacy arrangement (or an existing child)
- provide for referral to, and consultation with, external experts, authorities, agencies, and/or support services
- allow for criminal record, ANCOR and/or child protection order checks in individual cases that raise significant concern

A form should also be developed that all providers of treatment must use and on which the outcomes of the assessment must be recorded and that may be audited by the Minister from time to time.

Recommendation 22

That the *Surrogacy Act 2008* (WA) (and/or associated regulations/directions) be amended to require the use of the above guidelines in the pre-surrogacy counselling process to undertake a risk assessment (screening) of each of the intending parent(s), the intended surrogate mother, and her partner (if any).

Recommendation 23

Provision should be made in the *Surrogacy Act 2008* that it is an offence for applicant(s) to provide false information during the welfare of the child assessment.

Recommendation 24

Information should be provided to applicants regarding avenues available to them for review (as appropriate).

Recommendation 25

That consistent with recommendation 65 in Part 1 of this report, that provision should be made in the Western Australian legislation and/or directions that there is no obligation upon health practitioners or ART clinics to provide surrogacy treatment.

Chapter 6

Surrogacy Matters

- **Age of parties**
- **Requirement for prior live birth**
- **Gestational/traditional surrogacy and genetic connections**

Chapter 6:
Surrogacy Matters
- Age of parties
- Requirement for prior live birth
- Gestational/traditional surrogacy and genetic connections

6.1 Introduction

This chapter examines several more matters relevant to the terms of reference which require consideration of the impact on the *Surrogacy Act* of relevant Commonwealth and State legislation and aspects of legislation of other jurisdictions, which could be incorporated into the Act, including consideration of harmonisation of domestic surrogacy legislation. It considers: age requirements for intended parent(s) and surrogate mothers (which differ across the country); the requirement for the surrogate mother to have had a previous live birth (consistent with Tasmania and Victoria; not required in other states); and traditional and gestational surrogacy being permitted (similar to all states except the Australian Capital Territory and Victoria).

6.2 Age requirements for intended parent(s) and surrogate mothers

6.2.1 Background and current law

Age requirements were the subject of deliberation by the Legislative Council's Legislation Committee (2008) inquiry into the Surrogacy Bill. The Committee was divided on a suitable age for either the surrogate mother and the intended parents. The current age at the time of the Committee's reporting was 18. The Committee noted:

> *In view of the complexity and significance of the issues surrounding surrogacy, the Committee considers that minimum age limits should apply however the Committee could not agree whether the current age requirement of 18 years was appropriate.*[304]

It recommended:

> *A majority of the Committee …recommend that …the Surrogacy Bill 2007 be further amended to include a minimum age requirement of 21 years for an "eligible couple", an "eligible person" and "eligible surrogate". A minority of the Committee …consider that the current minimum age requirement of 18 is acceptable.* [305]

304 Standing Committee on Legislation, *Report on Legislation in Relation to the Surrogacy Bill 2007* (Report 12) May 2008, p 43.

305 Ibid.

However, in Parliamentary debates the Honourable Robyn Sweeney proposed to amend the Bill to require an age of 25.[306] There was debate and disagreement on the matter, with the Hon. Giz Watson noting:

> *It is important for members to realise that the question of maturity is a very variable commodity. Somebody can be very mature at 21, and somebody else can be very immature and unprepared at 30. …It is difficult for us to predetermine whether somebody is mature enough at a certain age. It is a personal thing and sufficient checks and balances are in place. It is not appropriate for us to say the arranging parent or parents should be 21 or 25. It is quite arbitrary.*[307]

Others said they felt that 18 was too young and supported the amendment; the Hon. Ken Baston noting that the age of 25 was based on the United Nations' definition of "youth", which extends to persons under 25. The amendment passed, and the current legislation provides:

- The RTC may approve a surrogacy arrangement only if the birth mother has reached 25 years of age and has given birth to a live child.[308] The RTC may dispense with the requirement of having previously given birth if it is satisfied that there are exceptional circumstances.
- At the time an application is made for a parentage order: at least one arranged parent has reached 25 years of age.[309] There is no provision for dispensation of this requirement, noting that it is a pre-condition for making a parentage order.[310]

6.2.2 Comparison with other Australian jurisdictions

Across Australian jurisdictions the minimum age of at least one of the arranged parents ranges from 18 years of age to 25 years of age. The age range for surrogate mothers also differs from 18 to 25 years of age. The timing of when age requirements must have been met also differ (for example, at the time of agreement or at the time of making application for a parentage order).

In the Australian Capital Territory, both intended parents should be at least 18 years old at the time of making an application for a parentage order, if they are not the Court will consider this at the time of considering the application.[311] There is no stipulated age requirement for the surrogate mother in the legislation. It is presumed she would be required to be an adult of at least 18 years of age.

306 Hansard, 19 June 2008, p.4173-4176.

307 Ibid.

308 *Surrogacy Act 2008* (WA), s 17(a)(i).

309 *Surrogacy Act 2008* (WA), s 19(a)(i).

310 *Surrogacy Act 2008* (WA) s 21(2)(a)

311 *Parentage Act 2004* (ACT) s 26(3)(b).

In New South Wales the birth mother must have been at least 25 years old at the time of entering into the arrangement;[312] and each intended parent must have been at least 18 years old when they entered into the arrangement.[313] In relation to the intended parents as applicants to a parentage order, however, section 29 of the *Surrogacy Act 2010* (NSW) provides that if an intended parent was under the age of 25 when they entered the surrogacy arrangement then the intended parent maturity of a younger applicant must be demonstrated. That is, they must provide evidence to the court that they received counselling from a qualified counsellor before entering into a surrogacy arrangement, and that the counsellor was satisfied that they were of sufficient maturity to understand the surrogacy arrangement and its social and psychological implications.

In Queensland all parties including the birth mother and her spouse (if any) and the intending parents must be 25 years of age at the time the agreement is made.[314] There is no provision for dispensation of this requirement.

In South Australia all parties to a surrogacy arrangement, including the surrogate mother, must be over the age of 18.[315] There is no provision for dispensation of this requirement.

In Tasmania the intended parent(s) must be 21 years of age or more when the surrogacy arrangement is made.[316] The court is unable to dispense with this condition. In order for a parentage order to be made the court must be satisfied that the surrogate mother was 25 years of age or more when the surrogacy arrangement was made.[317] The Tasmanian surrogacy legislation provides that the court may make an order even though the age requirement concerning the surrogate mother is not satisfied if it considers it is in the best interests of the child.[318]

The Victorian *Assisted Reproductive Treatment Act 2008* (Vic) and the *Status of Children Act 1974* (Vic) are silent on the matter of age of intending parent. In practice individual clinics have their own guidelines.[319] The surrogate mother must be at least 25 years of age at the time of applying for approval of the surrogacy agreement,[320] although the Victorian Patient Review Panel can dispense with requirements in exceptional circumstances and it is reasonable to do so.[321]

Table 6.1 summarises the above legislative requirements concerning age of the parties for each of the jurisdictions of Australia.

312 *Surrogacy Act 2010* (NSW) s 27(a).

313 *Surrogacy Act 2010* (NSW) s 28(a).

314 *Surrogacy Act 2010* (Qld) ss 22(f) and 22(g).

315 The *Family Relationships Act 1975* (SA) s 10HA(2a) (b).

316 *Surrogacy Act 2012* (Tas) s 16(2)(b).

317 *Surrogacy Act 2012* (Tas) s 16(2)(c).

318 *Surrogacy Act 2012* (Tas) s 16(3).

319 For example, Monash IVF guidelines stipulate that intended parent/s must be 25-53 years of age (treatment must be completed by the 53rd birthday of the youngest partner): https://monashivf.com/fertility-treatments/donor-surrogacy/surrogacy/#otp4; Melbourne IVF do not state a lower age but stipulate the commissioning woman may use her own eggs until her 46th birthday, if medically appropriate or donor eggs or embryos, until her 51st birthday.

320 *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(b).

321 *Assisted Reproductive Treatment Act 2008* (Vic) s 41.

Table 6.1: Legislative requirements concerning age of parties to a surrogacy arrangement

	WA	ACT	NSW	QLD	SA	TAS	VIC
Age of intended parent(s)	25 (at least one)	18	18 but if under 25 sufficient maturity >18	25	18	21	n/a
Age of surrogate	25	n/a	25	25	18	25	25
Dispensation	✔ surrogate mother	✔ intended parent(s)	✔ intended parent(s)	✗	✗	✗ intended parent(s) ✔ surrogate mother	✔ surrogate mother

6.2.3 Submissions to the review

The review received several submissions calling for more flexibility in the age requirements in Western Australia. It was noted in these submissions that while maturity for a surrogacy arrangement was necessary because of the complex nature of such arrangements that discretion should be available to determine such maturity in individual cases.

The RTC in its submission noted that the minimum age requirement of 25-years was 'one of the highest in Australia' and submitted:

> *that [while] maturity of participants is desirable given the emotional, social and legal complexity of surrogacy arrangements…there may be cases in which some flexibility in a specified age limit may be warranted and desirable. [We] support… the retention of 25 years, but recommend… that persons aged between 18-25 years, who seek to enter into a surrogacy arrangement as the arranged parent/s, have an opportunity to apply to the Court to be assessed as eligible based on legal and psychosocial evaluations.*[322]

Similarly, the Australian Medical Association submitted:

> *The current lower limit of arranged parent age is 25 years. Again, given the complexities inherent in assisted reproductive technology, this cut-off need not be rigid. There are other existing ways in which the parents' maturity is assessed, such as psychological counselling.*[323]

322 RTC, Submission 122.

323 Australia Medical Association, Submission 96.

Counsellors, Rodino and Clissa, also submitted:

> *continued support for the current age stipulations of the Surrogacy Act (2008) although we would recommend …powers of discretion for younger suitably evaluated arranged parents (i.e. arranged parents aged between 18 to 25 years).*[324]

In relation to the surrogate mother, the Association of Relinquishing Mothers (ARMS) saw that the 25-year age limit combined with a requirement that she had given birth to a live child was protective in that the woman would have to have some maturity and understanding of what the arrangement entailed. They said:

> *It appears that this is one of the few sections that offer protections to a prospective birth mother – that she be at least 25 years of age and that she has had the experience of giving birth to a child, ARMS.*[325]

6.2.4 Discussion

In the recent review of the South Australian surrogacy legislation SALRI examined each of the state positions and the reasoning behind the current legislation. It noted the comments of parliamentarians around the country who had many differing views concerning where the age limit should be set and why. There was no agreement, similar to that noted above in relation to where the current legislative requirements lie, and how they came about. SALRI recommended that South Australia raise its age limit to 25 years unless the 'Accredited Independent Counsellor', as part of the counselling (and screening) process, is satisfied that there are exceptional circumstances to support a woman or intending parent under the age of 25 years to engage in the arrangement. Their recommendation was based on their preference for a consistent age for all parties (like Queensland) but also the flexibility that New South Wales provided in younger people being able to engage in surrogacy if they demonstrated sufficient maturity. Such flexibility was recommended to apply to all parties, and not just the intended parents.[326]

In considering the submission made to the review, the position recommended by SALRI is consistent with those of the Australian Medical Association, the RTC, and counsellors who work in Western Australia. It is also consistent with the view that a requirement for a certain level of maturity may serve a protective function for a woman when deciding whether to enter into a surrogacy arrangement (as submitted by ARMS). This may also be the case when safeguarding the best interests of children to be born as a result of a surrogacy arrangement, although in this regard it is noted that the age of parents is not considered to be a risk factor for children.

It should also be recognised that the designated age of 25 is rather arbitrary. While it reflects the UN notion of youth, UNESCO notes that this is for statistical consistency and states that it is recognised that *'youth is a more fluid category than a fixed age-group'*.[327] It is important to recognise, therefore, that there is no one age that indicates a person will or won't be mature enough to understand the sociological and psychological implications of entering into a surrogacy

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324 Rodino & Clissa, Submission 8.

325 ARMS, Submission 33.

326 See David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975* (SA) (South Australian Law Reform Institute, Adelaide, 2018), pp 140-151.

327 UNESCO, 'What do we mean by Youth', http://www.unesco.org/new/en/social-and-human-sciences/themes/youth/youth-definition/ accessed December 2018.

arrangement, or the implications and effects of the transfer of legal parentage. It therefore also is acceptable that there should be room to assess individual circumstances.

I agree with the recommendations of SALRI that age requirements and the opportunity for flexibility in individual cases must be consistently applied to all parties. In Western Australia the age limit is 25 for all parties, albeit the wording actually indicates that the surrogate mother must be 25 at the time the agreement is being assessed while the intended parents must be 25 at the time they are applying for parentage orders (which may be a significant time later given it may take some time for the surrogate to become pregnant and then gestation is a full nine months). The ability to dispense with the age requirements also only applies to the surrogate mother.

I recommend that the Western Australian legislation be amended to require the age of all parties at the time they enter into a surrogacy arrangement to be 25 or more or that they be considered of sufficient maturity by a qualified counsellor providing the implications counselling that is required under the Act. This recommendation is given form in Recommendation 13.

6.3 The requirement for a woman who wishes to act as a surrogate mother to have had a previous live birth

6.3.1 Current law

In Western Australia,[328] Tasmania,[329] and Victoria,[330] a woman who wishes to act as a surrogate mother must have previously given birth to a live child. However, in each of these states this requirement may be dispensed with in exceptional circumstances by the approving authority (Victoria, Western Australia) or if the court considers that the making of a parentage order is in the best interests of the child (Tasmania). In the Australian Capital Territory, New South Wales, Queensland and South Australia there is no such requirement.

6.3.2 Submissions

The review received one submission in relation to this requirement from the Association of Relinquishing Mothers (ARMS). As noted in the above section 6.2.3 they see this as a protective provision. They submitted:

> *[the requirement] …that she has had the experience of giving birth to a child… [although] …very poorly worded [means] that (b) she can know something of the implications of giving a child she has nurtured through a pregnancy to others, forever, and potentially without any further contact.*[331]

ARMS, however, objected to provisions that allowed for the dispensation of such requirements.

328 *Surrogacy Act 2008* (WA) s 17(a)(ii).

329 *Surrogacy Act 2012* (Tas) s 16(2)(d).

330 *Reproductive Treatment Act 2008* (Vic) s 40(1)(b).

331 ARMS, Submission 33.

6.3.3 Reasoning for and against prior live birth requirement

In examining the reasoning behind the Western Australian provision, it is noted that the Legislative Council's Legislation Committee (2008) inquiry into the Surrogacy Bill said:

> *The Committee considers it preferable for a surrogate to have experienced a live birth prior to entering into a surrogacy arrangement but accepts that there may be some situations where a woman chooses to proceed anyway, with a full understanding of the risks. Mandatory counselling and other assessment procedures will assist in both informing the potential surrogate and alerting the Surrogacy Review Panel to issues that may make the woman ineligible for treatment.* [332]

In the second reading speech, the then Minister for Health, the Dr Kim Hames, said that the requirements (regarding age and having previously given birth) were *'intended to ensure that the parties have carefully considered all the implications of a surrogacy arrangement and are suitable to take part in the arrangement.'*[333]

In Victoria, the Victorian Law Reform Inquiry into Assisted Reproductive Technology and Adoption, recommended that:

> *In assessing whether a woman is able to give informed consent to act as a surrogate mother, consideration should be given to whether she has already experienced pregnancy and childbirth, however, this should not be a steadfast requirement. Exceptions should be allowed where it is apparent that the surrogate understands the implications of the arrangement and is able to make an informed decision.*[334]

In the 2011 Tasmanian Parliament Legislative Council Inquiry Into Surrogacy Bill, it was noted that they had been presented with both concerns that a restriction requiring that the intending surrogate mother had a prior birth may result in some parties being denied access to surrogacy; and concerns that unless a birth mother had experienced pregnancy and had given birth previously, she may be ill prepared for the experience and find it difficult to relinquish the child.[335] They were also presented with information from Jenni Millbank, who noted the case of *re Evelyn*[336] a disputed surrogacy case that occurred in Australia in the 1990s (without many of the support systems that are now required at law) – she submitted to that review:

> *[the case] involved a birth mother who already had three kids. The surrogacy arrangement was her idea and she repeatedly raised it with the intended parents over a three-year period, yet when she had the child she was painfully depressed, could not bear the relinquishment, missed the child, thought she had made a terrible mistake and litigated for two years to get the child returned to her. …You can hope that if someone has had children before then they know what they are doing, but maybe they won't. Equally, there might be someone who has never had children who does understand*

332 Standing Committee on Legislation, *Report on Legislation in Relation to the Surrogacy Bill 2007* (Report 12) May 2008, p 43.

333 Extract from Hansard [ASSEMBLY - Tuesday, 2 December 2008] p736d-738a, Dr Kim Hames.

334 Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (2008) p 173; see also their Recommendation 115.

335 Tasmanian Parliament Legislative Council Government Administration Committee 'A' Inquiry into Surrogacy Bill 2011 and Surrogacy (Consequential Amendments) Bill 2011 (2011), p 68.

336 *Re Evelyn* (1998) FLC 92.

themselves sufficiently to know this is something that they can do and can do well. As it happens a lot of the clinics do require or prefer that a woman already has her own children, has completed her own family, for reasons that include not just psychological readiness but also, as you said, the possibility that pregnancy can go wrong and can impair your future fertility, for example. I can see that it is a desirable element, but I would encourage you not to mandate it on the basis that you just lose that ability to make a case-by-case assessment.[337]

As noted above, each of Western Australia, Victoria and Tasmania did introduce this requirement into their legislation but each makes provision for exceptions. In the recent reviews conducted in New South Wales and South Australia of their surrogacy legislation, two states that do not have such a legislative requirement, each concluded that they did not recommend the introduction of a requirement that a surrogate mother has previously given birth. The New South Wales Review concluded:

The Review does not recommend prescribing such a requirement in legislation. Pre-surrogacy counselling addresses the birth mother's individual circumstances, including whether she has given birth or not. Professional counsellors are best placed to consider emotional and physical risks that arise for each woman.[338]

Similarly, the recent South Australian review conducted by SALRI recommended:

that there should be no legislative requirement for a surrogate mother to have previously carried a pregnancy and given birth to a live child in order to access a lawful surrogacy agreement in South Australia, on the basis that this consideration should be addressed as part of the counselling (and screening) process.[339]

6.3.4 Discussion

The current review received one submission on this matter from ARMS recognising the requirement that the intending surrogate mother must have had a previous live birth as 'protective' of a woman considering acting as a surrogate mother. The review did not receive any other submissions commenting on the provision. In considering the harmonisation of laws and how the review could be informed by other state laws, it was found that the states are divided. Three states, including Western Australia, have the requirement, although each currently also includes provision that the requirement can be dispensed with, recognising that individual circumstances are relevant and should be taken into consideration. The other states have not legislated such a requirement, emphasising that such individual circumstances and psychological factors are best explored during counselling which will determine whether it is suitable for an individual to proceed to act as an altruistic surrogacy.

337 Prof Jennifer Millbank, Hansard Transcript (Tasmania), 11 July 2011, p. 15, appearance before the Tasmanian Parliament Legislative Council Government Administration Committee 'A' Inquiry into Surrogacy Bill 2011 And Surrogacy (Consequential Amendments) Bill 2011 (2011), Ibid, p 69.

338 NSW Department of Justice, *Statutory Review Surrogacy Act 2010*, July 2018, [3.85].

339 David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975* (SA) (South Australian Law Reform Institute, Adelaide, 2018), Recommendation 25.

Given the lack of submissions on this matter to the review, and the divided views amongst the states, I do not make a recommendation here to repeal the provision. However, due to my above recommendations to repeal the pre-approval process, which is where an exception to the requirement may be approved in exceptional circumstances,[340] consideration must be given as to how to ensure that there remains scope for individual circumstances to be taken into account. In Tasmania, such exceptions are considered at the court stage when the application for parentage has been made and thus a child already born. This seems too late to decide that an exemption should apply given the surrogacy arrangement will already have occurred.

I therefore recommend that such a matter is best explored at the pre-surrogacy implications and best interests of the child counselling. This is consistent with the recommendations of the New South Wales and South Australia review reports, albeit not removing the initial requirement that would apply in most circumstances. The legislation or regulations should then include provision that in exceptional circumstances the requirement for a woman to have previously given birth may be dispensed with when, during implications counselling and/or best interests of the child counselling, the qualified counsellor had assessed the woman's individual circumstances and was of the view that dispensation of the requirement was appropriate. Such evaluation should then be included in the certificate of counselling which must be provided to the Court after the birth of a child(ren) when the application for legal parentage is made. This would ensure assessment prior to birth still occurs, noting the other recommendations in this report also provide for ongoing counselling, and independent assessment post-birth before transfer of legal parentage.

Findings

1. Western Australia's legislation includes provision that requires an intending surrogate mother to have previously given birth to a live child.
2. This provision was included in the legislation based upon the view that the woman will understand what it is like to be pregnant and therefore assess her capacity to carry, bear and then relinquish a child.
3. There are also views, however, that such a requirement is too prescriptive and fails to recognise that individuals may vary in whether having had a previous pregnancy and live birth is indicative of a person's ability to engage as a surrogate mother.
4. While some states, including Western Australia, Victoria and Tasmania, have included the requirement of a previous live birth as a legislative requirement, each of these states also allows for dispensation of this requirement in exceptional circumstances.
5. Other states emphasise that this is a matter for exploration during pre-surrogacy counselling.
6. The review received one submission on the matter, which saw the current provision as serving a protective function for the surrogate mother.
7. Consideration of several state reviews and submissions found views that having had a previous live birth did not guarantee the way that a planned pregnancy would progress or the outcome in terms of relinquishment. The latter is the reason for laws that allow a period of time in which the birth mother may change her mind.

340 *Surrogacy Act 2008* (WA) s 17(a)(ii).

8. The Review found the states and the Australian Capital Territory were equally split on whether or not they included a legislative requirement for the surrogate mother to have had a prior live birth and thus there was no clear path to deciding which way to harmonise the law.
9. The current law in Western Australia requiring a surrogate mother to have had a previous live birth was found to be suitable, noting the law also provides for an exception to this requirement in exceptional circumstances. It is preferable to examine such exceptions prior to the surrogacy arrangement (during the required pre-surrogacy implications counselling) and not at the time of application for transfer of legal parentage.
10. Required certification from counselling should include any finding that it was suitable for a woman who had not previously had a live birth to proceed in the surrogacy arrangement.

Recommendations

Recommendation 26

If the recommendations to repeal the RTC pre-approval requirements are implemented, that the *Surrogacy Act 2008* (WA) be amended to include a provision that in exceptional circumstances the section 17 requirement for the intended surrogate mother to have previously given birth may be dispensed with when during pre-surrogacy counselling, following assessment of the woman's individual circumstances and the counsellor being of the view that dispensation of the requirement is appropriate. Such evaluation should be included in the certificate of counselling which must be provided to the Family Court of Western Australia after the birth of a child(ren) when the application for transfer of legal parentage is made.

6.4 Gestational and traditional surrogacy and genetic connection

6.4.1 Current law

In Western Australia, as with New South Wales, Queensland, South Australia, and Tasmania, both gestational and traditional surrogacy are permitted. In all such states it is the case that there is also no requirement that the intended parent(s) be genetically related to the child. Only the Australian Capital Territory and Victoria limit arrangements to gestational surrogacy, and only the Australian Capital Territory and South Australia require a genetic connection by at least one of the intending parents, although South Australia allows dispensation of this requirement with an appropriate medical certificate. Table 6.2 summarises the current legal situation in this regard.

Table 6.2: Legislative requirements relevant to genetic connection of surrogate and intending parents to child

	WA	ACT	NSW	QLD	SA	TAS	VIC
Traditional	✔	✗	✔	✔	✔	✔	✗
Gestational	✔	✔	✔	✔	✔	✔	✔
Genetic connection with intending parent(s)	✗	✔	✗	✗	✔ (unless med.cert.)	✗	✗

6.4.2 Reasoning behind the law

That the law in most states does not require the intended parents to have a genetic connection with the child may at first appear to be a curious situation given that it is often argued that the very justification for surrogacy is that it enables people, who would not otherwise be able to do so, to have children who are genetically related to one or both of the intended parents. However, there may be circumstances in which an intending parent(s) is unable to use their own gametes or embryos due to for example, a medical condition or risk of transmitting a heritable condition to the child.

Similarly, whether to use traditional or gestational surrogacy requires consideration of personal circumstances. It is noted that in practice, while traditional surrogacy was once the only means to have a surrogacy arrangement, with advances in ART, most arrangements are now gestational. But, while some argue that only gestational arrangements should occur to avoid issues concerning relinquishment, the evidence is divided as to whether this is actually the case. Further, it is noted that in some cultures, it is not uncommon for families to have extended kinship arrangements in which a child born to one member of the family is raised by another who is unable to have their own child. Some traditional surrogacy arrangements may be rather akin.

In other situations, traditional surrogacy is an option when all other options have failed. For example, the review received a submission (also noted above at 4.5) from a husband in a couple who had suffered *'nine years of recurrent miscarriage, ectopic pregnancies, failed IVF and three different egg donors who were all unsuccessful…[and a failed attempt at] gestational surrogacy with known donor eggs…[before]…Our surrogate, who had become a friend, offered to do traditional surrogacy*.[341] Traditional surrogacy succeeded and they have a healthy son. Such cases illustrate the importance of families being able to have options available to them that may be explored via counselling and determined on a case-by-case basis. They also illustrate that the traditional arrangement also means that third-party egg donation is not used, thus resulting in the person born as a result having a reduced number of adults involved in its conception and birth.

The law in most states and territories of Australia thus reflects that counselling and medical consultation prior to surrogacy are best placed for consideration of the type of surrogacy arrangement to be undertaken, and whether there will be a genetic connection to the surrogate

341 Confidential, Submission 116.

mother and/or the intended parent(s). It is in such contexts that suitably qualified professionals can assist patients to make decisions based on their individual circumstances and any medical condition that may warrant the use of donor eggs, sperm or embryos.

In considering the background to such law, it is noted that in Western Australia, the Standing Committee on Legislation that considered the Surrogacy Bill 2007 considered the issue only in so far as whether arrangements should be limited to only occurring in a clinic. Acknowledging 'natural' and ART assisted surrogacy could both occur, their view was that while some arrangements may occur without access to ART that:

> *… in order for the State to sanction a surrogacy arrangement, certain counselling and assessment procedures should occur before assisted reproductive technology treatment is provided…*[342]

In this regard, the Committee did not differentiate between traditional or gestational surrogacy, nor whether the intended parent(s) have a genetic connection with any child(ren) that will be born as a result of the arrangement.

The recent SALRI report noted that in deliberations in Queensland in 2008 and New South Wales in 2009 concerning their respective surrogacy legislation that state parliamentary committees were troubled by such matters. The SALRI report noted:

> *… The NSW Committee received differing views about whether traditional surrogacy should be permitted…[but] ultimately advised against a prescriptive approach, noting that this aspect was best left to the counselling (and screening) process to consider and resolve….The Queensland Committee outlined the concerns it received about the situation of a surrogate mother providing her own ovum to a surrogacy arrangement, especially what was seen as the increased risks of the surrogate mother not relinquishing the child….The Queensland Committee acknowledged these concerns but also ultimately advised against a prescriptive approach, concluding that this issue was best left to the counselling (and screening) process to consider and resolve.*[343]

SALRI concurred with the conclusion of both the New South Wales and Queensland Committees that 'a prescriptive approach regarding traditional or gestational surrogacy 'is inappropriate'. They also acknowledged *'[t]here may be 'rare' situations where the intending parents do not provide any genetic material in which traditional surrogacy is appropriate.'*[344]

Neither the 2016 Commonwealth inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements[345] nor the 2018 New South Wales Department of Justice review of the *Surrogacy Act 2010* (NSW)[346] considered this matter.

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342 Standing Committee on Legislation, *Report on Legislation in Relation to the Surrogacy Bill 2007* (Report 12) May 2008, p 40-41.

343 David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975* (SA) (South Australian Law Reform Institute, Adelaide, 2018), p 173.

344 Ibid.

345 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (17 February 2016).

346 NSW Department of Justice, *Statutory Review Surrogacy Act 2010*, July 2018.

6.4.3 Discussion

I note that the Western Australian Review did not receive any submissions calling for changes to the law in relation to the ability to engage in traditional or gestational surrogacy, nor in relation to the presence or absence of genetic connection of the intended parent(s) to any child that will be born as a result. The law in Western Australia is congruent with most other states of Australia. I do not recommend any changes. The importance of the role of counsellors and medical professionals in this regard is emphasised, not only in that they will consider the most suitable option for the surrogate mother and intending parent(s) but also that they are required to consider the best interests of any child(ren) who will be born as the result of the use of donated gametes and/or surrogacy and the importance of such children having access to information about any donors and their birth mother (whether or not she is also their genetic parent).

Findings

1. Personal circumstances and medical requirements will influence whether a traditional or gestational surrogacy arrangement is entered into, and whether there is a genetic connection between the intended parent(s) and the child born as a result of such an arrangement.
2. The role of counsellors and medical professionals is fundamental to ensuring an appropriate surrogacy arrangement is put into place having considered both the sociological and psychological implications of such an arrangement, the medical needs of the parties, and that the best interests of any child(ren) that will be born as a result are to be considered paramount.
3. The law in Western Australia is consistent with that of most other states of Australia in relation to allowing both gestational and traditional surrogacy to occur, and not requiring a genetic connection between the intended parent(s) and child. Noting all such law emphasises the importance of counselling, assessment, and legal advice.
4. Changes to the *Surrogacy Act 2008* (WA) in relation to the availability of traditional and gestational surrogacy are not required.
5. Changes to the *Surrogacy Act 2008* (WA) requiring a genetic connection between the intended parent(s) and the child(ren) who will be born as a result of a surrogacy arrangement are not required.

Recommendations

Recommendation 27

Changes to the *Surrogacy Act 2008* (WA) in relation to the availability of traditional and gestational surrogacy are not required.

Recommendation 28

Changes to the *Surrogacy Act 2008* (WA) requiring a genetic connection between the intended parent(s) and the child(ren) who will be born as a result of a surrogacy arrangement are not required.

Chapter 7

Altruistic and Commercial Surrogacy

Chapter 7:
Altruistic and Commercial Surrogacy

7.1 Introduction

When there is acceptance of some form of surrogacy, there may be disagreement as to the circumstances in which it should take place including the type of arrangement that is acceptable. This chapter further explores the current policy position taken both in the State and across Australian states and territories in relation to altruistic versus commercial surrogacy, and as per the Terms of Reference addresses the question of whether there is a need for a continued prohibition on commercial surrogacy in Western Australia.

7.2 Altruistic versus commercial surrogacy

7.2.1 The policy position across Australia

Legislation exists in all states of Australia and the Australian Capital Territory to regulate surrogacy arrangements.[347] The general policy position taken in all such jurisdictions has been to permit 'altruistic' surrogacy, but to prohibit 'commercial' arrangements.

In relation to altruistic surrogacy agreements, the law recognises that altruistic arrangements may take place when family members, close friends, or other known parties agree to act as an altruistic surrogate mother, subject to meeting certain criteria. The woman who intends to be, or becomes, the birth mother does not receive any payment or reward in relation to the conception, pregnancy or birth of the child from which she derives a profit, although in all jurisdictions that regulate such arrangements in Australia, she may receive reimbursement of expenses actually incurred. The policy position underpinning the law governing such agreements is that altruistic surrogacy should be regulated 'with great care', particularly as long-term research on outcomes for children and surrogate mothers has not been conducted in enough detail to justify allowing such arrangements to occur without careful scrutiny and safeguards to protect surrogate mothers, intending parents and children.[348]

Commercial surrogacy (also referred to as 'compensated' or 'for-profit' surrogacy), in contrast, involves an arrangement in which the birth mother is to be paid a fee or receive a reward in relation to the conception, pregnancy, or birth from which she derives a profit. That payment or reward moves beyond expenses actually incurred. The prohibitions on commercial surrogacy agreements reflect the policy position that such agreements should be discouraged or deterred, on the basis that it *'commodifies the child and the surrogate mother and risks the exploitation of poor families for the benefit of rich ones'*.[349]

347 See *Parentage Act 2004* (Tas); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); Statutes Amendment Act (Surrogacy) Act 2009; *Surrogacy Act 2012* (Tas); *Assisted Reproductive Treatment Act 2008* (Vic); *Surrogacy Act 2008* (WA).

348 See for example, Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption Final Report* (2007), p 168.

349 Standing Committee of Attorneys-General, Australian Health Ministers' Conference and Community

In 2012 such prohibitions were also listed by the Australian Government as being 'an explicit prohibition of the sale of children' pursuant to Australia's obligations under the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPCC).[350] Article 2 of the OPCC defines the sale of children as 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration',[351] within which on a literal interpretation commercial surrogacy was seen to fall. The Convention on the Rights of the Child requires that States Parties take 'all appropriate national, bilateral and multilateral measures to prevent the … sale of or traffic in children for any purpose or in any form'.[352]

The National Health and Medical Research Council (NHMRC) *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* 2017 (Ethical Guidelines) state:

> *Commercial surrogacy, where the surrogate receives financial compensation above and beyond expenses associated with the surrogacy procedure and pregnancy, is ethically unacceptable because it raises concerns about the commodification and exploitation of the surrogate, the commissioning parent(s) and any person born as a result of the surrogacy arrangement. …Clinics and clinicians must not practise, promote or recommend commercial surrogacy, nor enter into contractual arrangements with commercial surrogacy providers (see paragraphs 4.2.7 – 4.2.10). … It is ethically unacceptable to provide, or offer to provide, direct or indirect inducements for surrogacy services.*[353]

7.2.2 Recent Commonwealth and State inquiries

In 2016, the Commonwealth House of Representatives Standing Committee inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements recommended that the practice of commercial surrogacy remain illegal in Australia. In considering the divergent views put forward to it regarding commercial surrogacy, the Committee took the position that:

> *even if a regulated system of commercial surrogacy could be implemented, the risk of exploitation of both surrogates and children remains significant. Therefore, the Committee strongly supports the current legislative position of Australian States and Territories that the practice of commercial surrogacy remains illegal in Australia.*[354]

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and Disability Services Ministers' Conference Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009).

350 Attorney-General's Department (Commonwealth), *Australia's response to the List of Issues – Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 4–5 June 2012, available at http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/default.aspx.

351 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, *Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002), art 2(a).

352 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 35.

353 NHMRC Ethical Guidelines (2017), p 65.

354 Commonwealth Government, House of Representatives Standing Committee on Social Policy and Legal Affairs, Surrogacy Matters Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements (April 2016), [1.19].

In its response to the Committee's report, the Australian Government agreed in principle with this view.[355]

In 2018, the New South Wales and South Australian state reviews also supported the continued prohibition on commercial surrogacy. In July 2018 the New South Wales Department of Justice found that:

> *The policy objective of preventing commercial surrogacy remains valid and we do not recommend amending this objective. …This policy objective aims to prevent exploitation, preserve the dignity of children and women and prevent the commodification of women and children. Such concerns would not be protected by a narrower objective.*[356]

In October 2018 the South Australian Law Reform Institute (SALRI) noted the Hon. John Dawkins statement regarding the aim of the current law in that state as being:

> *to secure the welfare of children born through surrogacy, to try to make accessibility of surrogacy arrangements in this jurisdiction wider, to limit overseas use of the commercial surrogacy process, and to ensure that commercial surrogacy remains banned in South Australia.*[357]

In its report the South Australian reviewer SALRI stated that it did not support either a system of regulated commercial surrogacy in South Australia 'in light of the well-documented concerns that commercial surrogacy gives rise to'….[358] noting 'the risk of exploitation of both surrogate mothers and children remains significant'.[359] SALRI further recommended that:

> *the practice of commercial surrogacy should remain illegal in South Australia, but that domestic, non-commercial surrogacy agreements should be permissible in certain specified circumstances.*[360]

7.3 Submissions to the Western Australian Review

Many divergent views regarding the regulation and practice of surrogacy in Western Australia were expressed during the Review via written submissions and during face-to-face consultations ranging from those who considered that all forms of surrogacy should be banned those who preferred that only altruistic surrogacy be permitted and those who believed that Western Australia should permit altruistic and commercial surrogacy.

355 Australian Government, *Australian Government Response to the Recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters Report*, November 2018, p 3.

356 NSW Department of Justice, *Statutory Review: Surrogacy Act 2010*, July 2018, [2/26]- [2.27].

357 South Australia, Parliamentary Debates, Legislative Council, 12 November 2014, 1597–8 (John Dawkins) cited in David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA)* (South Australian Law Reform Institute, Adelaide, 2018), p 1.

358 Ibid, South Australian Law Reform Institute, p 2.

359 Ibid, South Australian Law Reform Institute, [6.2.1].

360 Ibid, South Australian Law Reform Institute, Recommendation 7.

7.3.1 Submissions opposed to all surrogacy arrangements

Several feminist groups, adoption rights groups, and individuals who participated in the Review were opposed to the practice of surrogacy in principle and called for a complete ban.[361] For example, a submission by Feminist International Network of Resistance to Reproductive and Genetic Engineering (FINNRAGE) suggested that Western Australia should become the first state in Australia to prohibit all forms of surrogacy:

> *based on the fact that surrogacy is a human rights violation of the birth mothers, the egg 'donors' and the resulting children.*[362]

Equally, Anna Kerr from the Feminist Legal Clinic submitted:

> *I would just comment that the risks of surrogacy for both women and children cannot be adequately addressed by way of regulation and that a complete ban is appropriate. Like the sale of body parts, surrogacy is inherently exploitative and beset with ethical problems. On behalf of Feminist Legal Clinic Incorporated, I urge you to resist the commodification of women and children.*[363]

The Women's Bioethics Alliance urged the Western Australian Government to:

> *abolish all forms of surrogacy in Western Australia and to strengthen laws that protect women and children from this exploitative practice.*[364]

Submissions received by adoption rights groups concurred.[365] For example, the Association of Relinquishing Mothers (ARMS), submitted:

> *We wish to convey in the strongest possible terms our opposition to any form of commercial surrogacy and believe that 'altruistic' surrogacy is a dangerous notion that should not be supported by the State.*[366]

Dr Catherine Lynch from the Australian Adoptees Rights Action Group submitted:

> *The global campaign against all forms of surrogacy has managed to unite many well-known religious and secular feminists and human rights advocates, despite obvious ideological differences. That is because there is nothing good about surrogacy, most especially for the person created for it. The only way to deal with it is to abolish it entirely.*[367]

361 Dr. Catherine Lynch (Australian Adoptee Rights Action Group), Submission 4; Andrew & Jody Burgel, Submission 23; ARMS (Marie Meggitt), Submission 33; Confidential, Submission 56; Adoption Origins Victoria INC., Submission 62; Dorothy Kowalski, Submission 66; Anna Kerr (Feminist legal clinic), Submission 73; FINRRAGE, Submission 93; Women's Bioethics Alliance, Submission 95; Richard Egan (Defend Human Life), Submission 109.

362 FINRRAGE, Submission 93.

363 Anna Kerr, Submission 73.

364 Women's Bioethics Alliance, Submission 95.

365 Dr. Catherine Lynch (Australian Adoptee Rights Action Group), Submission 4; ARMS (Marie Meggitt), Submission 33; Adoption Origins Victoria INC., Submission 62.

366 ARMS, Submission 33.

367 Dr. Catherine Lynch (Australian Adoptee Rights Action Group), Submission 4.

Similarly, Dorothy Kowalski submitted:

> *I am strongly opposed to any suggestion of allowing commercial surrogacy and believe that altruistic surrogacy is the thin edge of the wedge to possibly allowing that pernicious practice (commercial surrogacy) to be undertaken legally in Australia. The miniscule penalties in the Act (8.-11.) would hardly be significant in amount to deter those involved in the multi-million-dollar surrogacy industry from achieving their aims. Any form of surrogacy is against the best interests of the child, who is destined from before conception to be separated from its mother and in actual fact, to be sold.*
>
> *When commenting in 2016 on his judgment in the Baby Gammy case, Justice Thackray said "… this case serves to highlight the dilemmas that arise when the reproductive capacities of women are turned into saleable commodities, …". Justice Thackray also said "… surrogate mothers are not baby-growing machines, or 'gestational carriers". I believe that surrogacy completely disregards the trauma of separation of mother and child, and this has been borne out by the Federal and State Government's apology for past wrongs with regard to adoption practices. We must learn from the mistakes of the past.*[368]

7.3.2 Submissions supporting altruistic surrogacy

The majority of submissions received by the Review on the matter of whether surrogacy should be permitted and in what form supported regulated altruistic arrangements and continued prohibitions on commercial surrogacy.[369] Some submissions generally stated their support for the current law, for example, the Australian and New Zealand Infertility Counsellors Association (ANZICA) Fertility Counsellors (Joint Submission) stated in relation to continued permitting of altruistic surrogacy but maintaining prohibitions on commercial arrangements that *'the counsellors are fully supportive of this and recommend that the RTC actively promotes the benefits (present and future) of altruistic surrogacy.*[370] Their submission was endorsed by Hollywood Fertility.

Others emphasised that only altruistic surrogacy should be permitted to avoid commodification of women and/or children and the impact this may have upon them. For example, the SQC Family Planning Association of Western Australia submitted that surrogacy should be restricted to altruistic relationships to *'reduc[e] the likelihood of further commodification of the bodies of women, as unfortunately happens in other countries.'*[371] Lauren Burns and Damian Adams, people born as a result of the use of donated gametes, also supported continuing prohibitions on commercial surrogacy for similar reasons. Ms Burns noted:

368 Dorothy Kowalski, Submission 66.

369 For example, SQC-Family Planning Association of WA, Submission 6; Rodino & Clissa, Submission 8; Jenna Farthing, Submission 12; Confidential, Submission 14; Confidential, Submission 17 (parents following an altruistic arrangement); Damian Adams, Submission 40; Janice Burdinat, Submission 45; Peter Ravi-Pinto, Submission 53; ANZICA WA Fertility Counsellors (Joint submission), Submission 61; Julie Waddel, Submission 64; Hollywood Fertility, Submission 75 (endorsing Submission 61); LJ Goody Bioethics Centre (Felicity Roux), Submission 85; Lauren Burns, Submission 92; Confidential, Submission 94; Family Law Practitioners Association, Submission 115; Reproductive Technology Council, Submission 122.

370 ANZICA WA Fertility Counsellors (Joint submission), Submission 61; Hollywood Fertility, Submission 75 (endorsing Submission 61).

371 SQC-Family Planning Association of WA, Submission 6.

> *Surrogacy should continue to operate strictly on an altruistic basis. Commercial surrogacy will exploit the reproductive capabilities of vulnerable women, and will commodify, and therefore dehumanise people born from these arrangements.*[372]

Mr Adams shared this view, submitting:

> *Commercial surrogacy is the commodification of human life…. We do not pay people for the donation of blood, organs such as kidneys, or even gametes (only reimbursement is allowed), and under no circumstances should this position change for surrogacy. It must remain altruistic.*[373]

The LJ Goody Centre for Bioethics also submitted that human embryos should never be reduced to commodities, and that as such *'surrogacy in WA should never be permitted for profit or otherwise than on an altruistic basis (subject to reimbursement of reasonable costs).'*[374]

The RTC submission noted:

> *In the face of a growing global commercial surrogacy market, 'controlled' payments for domestic surrogacy arrangements have been proposed as a mechanism to increase the availability of surrogates in Australia and so decrease the demand for international commercial surrogacy… However, … it is incongruous for discussions about payment for surrogacy to take place in isolation from other contexts that rely on altruism, including the donation of embryos, gametes, tissue and solid organs. There is evidence to suggest that commercialism undermines altruism, and the insidious effects of payment should not be underestimated.*

The RTC further noted the World Health Organization's 'Guiding Principles on Human Cell, Tissues and Organ Transplantation' (2010) which state that payment for cells, tissues and organs is likely to take unfair advantage of the poorest and most vulnerable groups, undermines altruistic donation and leads to profiteering and human trafficking. As such it was the RTC's position that:

in line with the position in most countries, Council considers that:

- *the human body and its parts, should not, as such, give rise to financial gain; and*
- *there should be no incentives that might unduly influence a person to enter a surrogacy arrangement, which would undermine the principles of voluntary consent.*

They concluded that their firmly established stance on the prohibition against commercial surrogacy should not be undermined.[375]

The Family Law Practitioners Association submitted that:

> *The Association supports a continued prohibition on commercial surrogacy, provided that this does not have the inadvertent effect of exploiting 'altruistic' surrogates who engage in approved domestic arrangements.*[376]

372 Lauren Burns, Submission 92.

373 Damian Adams, Submission 40.

374 LJ Goody Bioethics Centre (Felicity Roux), Submission 85.

375 RTC, Submission 122.

376 Family Law Practitioners Association, Submission 115.

A number of submissions also called for 'a more supportive structure in place for surrogates' to encourage more people to offer to engage in such arrangements; clearer information regarding how to undertake altruistic surrogacy in Western Australia; a faster process; and removal of discrimination preventing single people and same-sex couples from entering into altruistic arrangements in Western Australia.[377]

7.3.3 Submissions supporting commercial surrogacy

The Review also received submissions that supported the introduction of 'commercial' or some form of 'compensated' surrogacy.[378] These included submissions from people seeking surrogacy,[379] people who have had children via, or were engaged in international commercial surrogacy arrangements,[380] a lawyer,[381] an ART practitioner,[382] a doctor,[383] and Surrogacy Australia – a not-for-profit organisation whose founder has children born as a result of international commercial surrogacy that runs seminars, provides information, and was reported to offer advice to people seeking both altruistic and commercial surrogacy arrangements in Australia and abroad.[384]

A confidential submission emphasised that it is not acceptable to tell women what to do with their bodies, stating that 'unlike organ transplant, surrogacy is not a permanent womb donation, and the surrogate will be able to retain all their organs, retain their fertility, and go 100% back to their old life after acting as a surrogate'.[385]

Dr Vincent Chapple perceived commercial surrogacy as 'necessary' to negate the need for international commercial surrogacy, which he said should continue to be prohibited.[386]

Mr Daniel Scarparolo emphasised that the children were wanted and loved, and as such the people involved should not have to 'suffer fear of persecution and prosecution during what should be a celebrated and happy time'.[387]

Many of the submissions received by the Review also pointed to the difficulties in entering altruistic surrogacy arrangements in Western Australia as a reason for their views, or indeed their having entered into commercial surrogacy arrangements abroad.

377 Gillian Hodson, Submission 21; Kelly Smith, Submission 24; Confidential, Submission 25.

378 For example, Caroline Mansour, Submission 5; Confidential, Submission 9; Dr. Vincent Chapple, Submission 28; Daniel Scarparolo, Submission 29; Confidential, Submission 31; Confidential, Submission 42; Stephen Page, Submission 65; Phillip Lillingston, Submission 70; Confidential, Submission 76; Rebecca Kalpakoff, Submission 83; Confidential, Submission 89; Confidential, Submission 91; Surrogacy Australia, Submission 105; John van Bockxmeer, Submission 126.

379 For example, Confidential, Submission 9; Daniel Scarparolo, Submission 29; Confidential, Submission 31; Confidential Submission, 52; Leigh Hodson, Submission 97.

380 For example, Confidential, Submission 42; Phillip Lillingston, Submission 70; Confidential, Submission 76; Rebecca Kalpakoff, Submission 83; Confidential, Submission 89.

381 Stephen Page, Submission 65;

382 Dr. Vincent Chapple, Submission 28.

383 John van Bockxmeer, Submission 126.

384 Surrogacy Australia, Submission 105.

385 Confidential, Submission 9.

386 John van Bockxmeer, Submission 126.

387 Daniel Scarparolo, Submission 29.

7.3.4 Public consultations

In public consultations a similar array of views was expressed ranging from those who believe that Western Australia should permit altruistic and commercial surrogacy those who preferred that only altruistic surrogacy be permitted and those who considered that all forms of surrogacy should be banned. This included attendees who were members of the general public, lawyers, politicians, donor-conceived people, people who had engaged in other forms of ART, and couples who had had completed surrogacy arrangements, were in the process of doing so, or who were seeking surrogacy.

Some people who attended the public consultation forums or met with me individually had engaged in international commercial surrogacy or altruistic surrogacy abroad. They reported that they were either prevented from entering altruistic surrogacy arrangements in Western Australia due to current laws prohibiting their access (for example due to being in a same-sex couple) or concern that surrogacy in Western Australia was impossibly difficult. Others had entered into altruistic surrogacy agreements in other states of Australia for similar reasons.

Many people who attended the consultations shared very personal circumstances that had led them to seek surrogacy. They also described the difficulties and challenges they had faced or were facing, in relation to seeking surrogacy in Western Australia, and the decisions they made concerning whether to move interstate or to engage in an international surrogacy arrangement. Those who had children as a result of surrogacy arrangements emphasised the love that they had for the children. Some described ongoing relationships with the surrogate mother and lamented that she was so far away.

Many described the extreme financial pressures and constraints that they had faced (or were facing) in deciding to seek a commercial surrogacy arrangement including, for example, one couple describing how they were going to sell their house; and another woman describing how all her family's savings had been put toward a commercial arrangement in the United States after visiting India and not being able to engage in a commercial surrogacy arrangement there due to concerns about the conditions in which such arrangements were taking place. The latter woman also described how this had impacted her family significantly in terms of their current financial status and ability to make choices regarding such things as the education of their child.

Others described having chosen jurisdictions overseas that were less costly, due to their otherwise not being able to afford to engage in commercial surrogacy. Some compared these jurisdictions with the cost of altruistic surrogacy in Australia and said that they perceived the arrangement they had abroad probably 'worked out cheaper' or 'about the same'.

In contrast, some said they were 'lucky' to be in the financial position to afford to enter very expensive commercial arrangements and had done so in the United States where they felt the 'services' they received were of a high standard.

A number of attendees at the forums who had engaged or were in the process of engaging in altruistic surrogacy, submitted that they would not like to see commercial surrogacy in Australia as they perceived it would 'change the nature of the relationship between them and the surrogate mother', undermine altruistic arrangements, and/or 'impact their child'. Several attendees who had engaged in altruistic surrogacy said they would not have felt comfortable if the relationship or the creation of their child was based on a commercial transaction.

Some attendees feared that any law enabling commercial surrogacy or requiring some form of additional 'compensation' about the reimbursement of expenses actually incurred, would either make the cost too high or would attract women who 'needed the money' or was 'just doing it for the money' and may give rise to a commercial transaction they would not be comfortable with.

Some submitted that the cost of altruistic surrogacy is also high due to having to pay lawyers, counsellors and clinicians and that this creates an additional barrier in Western Australia to access. Such people submitted that adding to such costs was not desirable. In this regard, many agreed that they would like to see the commercial aspects of surrogacy that exist in relation to fees charged by lawyers, counsellors, clinicians and agents reduced. Some described feeling particularly vulnerable in feeling they were at the mercy of such people who knew 'how desperately we want a baby'. Several people stated they would like to see caps on costs payable to such people so that they could afford to properly reimburse the surrogate mother for her expenses and medical costs and provide for the resulting child.

7.4 Examination of issues raised

7.4.1 Differing philosophical perspectives

Concerns that commercial surrogacy arrangements commodify[388] the woman's reproductive capabilities in relation to the conception, pregnancy, or birth, and/or the child were raised frequently during the Review. Such concerns also underpin current laws that prohibit commercial surrogacy. In this regard, at the core of prohibitions on commercial surrogacy is the deontological[389] perspective that it is unethical and wrong to treat people as mere objects as human beings have inherent moral worth and dignity[390] and it is unacceptable to treat beings worthy of respect merely as a means to satisfy one's own interests or ends.[391] Commercial surrogacy is seen to violate human dignity and worth by commodifying human beings, and to treat women and children as a means to an end by placing a price on women's reproductive capacity and/or the birth of a child to satisfy a person's or couple's interest in procuring the child. In addition to those submissions referred to above, Ms Julie Waddel submitted to the Review that:

> *Every child should enjoy the right to life, dignity and respect. Commercial surrogacy (whether domestic or international) and all trade in gametes or embryos is entirely inconsistent with these rights of the child and should continue to be illegal under the Surrogacy Act 2008. There is abundant evidence now available, particularly from overseas experience, that separating childbearing from motherhood leads to many problems for biological mother and child. The child becomes a traded commodity, rather than a human person to be respected and loved. The mother is treated as a service provider, rather than a mother able to love and nurture the child. Commercial surrogacy and all trading of embryos or gametes should remain illegal.*

In contrast, arguments put forth in the literature and via submissions that favoured commercial surrogacy emphasised views that were more libertarian or utilitarian in nature. For example,

388 Commodification involves treating something as product that can be bought, sold or rented.

389 Deontology is the philosophical perspective concerned with duties and rights.

390 Kant I. *Groundwork of the metaphysic of morals*. [Translated by Paton H.] New York: Harper and Row, 1948.

391 Ibid.

some arguments supported that the body, its parts and/or its capabilities, may be bought, sold, and/or rented arguing it is acceptable for a woman to receive payment for providing her reproductive 'services' or 'labour', or the products thereof (most often while also proposing certain legal requirements be introduced to regulate such practice to define the boundaries within which this may occur). This position derives from the view that each individual's body belongs to that individual,[392] and as such the potential surrogate mother's 'autonomy' and 'consent' are fundamental to her ability to treat her reproductive capacity and her body as she wishes. Arneson, for example, argues that provided no harm is done to others, prospective parents and potential surrogates should be free to act (and contract) as they wish.[393] That is, provided the woman is acting autonomously and with informed consent she should be free to offer her 'services', 'labour', or indeed, her body, in exchange for some form of remuneration.[394]

Others emphasised that they perceived commercial surrogacy as presenting a 'win-win' situation for all involved in that:

- the surrogate mother benefits financially by receiving remuneration which is said to be capable of improving her quality of life, aiding her to pay her (or her husband's) debts, and/or enabling her to contribute to her family
- the 'intended parents' benefit physically, psychologically, and emotionally, having overcome the obstacles of infertility or inability to bear a child, while also often acquiring a child that is genetically related to one or both of them
- the resulting child benefits by entering a loving home in which it will be raised by parents who wanted it and who, most often, have the means to provide a relatively high standard of living.

It was found that each of the various perspectives focussed on particular aspects or ideals informing debate about what position should be taken. Notably, while some views emphasise a woman's individual exercise of 'autonomy' and 'informed consent' it was found they often did not consider nor address issues concerning economic, class or social disparities that may lead a woman to offer herself as a surrogate mother in return for financial reward or gain. For example, in some commercial environments surrogate mothers have reported that their decision to act as a commercial surrogate was made in lieu of other 'options' such as selling a kidney[395] or entering the sex worker trade.[396] Pande describes the realities of one 25-year-old Indian housewife's 'compulsion' to become a 'surrogate' mother in which the woman said:

> *Where we are now, it can't possibly get any worse…In our village we don't have a hut to live in or crops in our farm. The work is not ethical, it's just something we have to do to survive. When we heard of this surrogacy business, we didn't have clothes to wear after the rain…and our house had fallen down. What were we to do?* [397]

392 Propounded by the philosopher John Locke in relation to labour generally. See S. Wilkinson 'The exploitation argument against commercial surrogacy' (2003) 17(2) *Bioethics* 169-87.

393 R. J. Arneson, 'Commodification and Commercial Surrogacy' (1992) 21 Philosophy and Public Affairs 132.

394 Ibid.

395 *Made in India (Documentary)*, 2010 (Co-Directors: Rebecca Haimowitz and Vaishali Sinha; Elly Teman, *Birthing a Mother: The Surrogate Body and the Pregnant Self* (2010), 24.

396 Ren Jue, 'Why Surrogacy Is No Miracle Cure for China's Population Problem' Sixth Tone, 27 Feb 2017.

397 A. Pande, 'Not an Angel, Not a Whore: Surrogates as Dirty Workers in India' (2009) 16 *Indian Journal of Gender Studies* 141, 160.

While such positions do not necessarily mean that the women involved were unable to make autonomous decisions or provide consent, sociological studies have suggested that because many women who become commercial surrogates come from a low to low-middle income status and/or desperate circumstances (for example in relation to caring for their own children, lack of money, debt, and/or lack of work), they 'are susceptible to financial inducement and vulnerable to exploitation'.[398] In such circumstances there are strong arguments against the law supporting the commodification of their reproductive capabilities in lieu of addressing the broader social, economic, and class issues they face.

Arguments that viewed commercial surrogacy as simply a matter of a woman entering into an agreement concerning the provision of her 'labour' were also noted as having long been seen to be problematic in that:

> *What distinguishes women's reproductive labour from other forms of labour, [is] that the product…is not something but someone...*[399]

Views that the surrogate mother is simply 'renting out' her womb,[400] providing her 'services',[401] or being paid a moderate sum for the burden she bears,[402] are often thus argued to be inadequate justifications for commercial surrogacy as they do not satisfactorily address nor resolve concerns about the commodification of the child.[403]

The argued utility of commercial arrangements as being a practice that is beneficial to all parties has also been questioned given evidence of unconscionable practices;[404] social, financial, and class disparities between the parties involved; and the continuing unquantifiable costs to women and/or children in relation to the long-term impacts of commercial surrogacy arrangements. While individual arrangements may not be seen as such by those involved, such issues require recognition of the broader implications of commercial practices beyond individual examples of family formation. There is, for example, a paucity of longitudinal research concerning outcomes for women and people born as a result of such arrangements. It is nevertheless apparent that while personal views and experiences may (and evidently do) vary, that any person born as a result of commercial surrogacy subjectively feels commodified is unacceptable. The impact upon such people is illustrated by the statement of a nearly 18-year-old boy born as a result of commercial surrogacy who was quoted by Smerdon as stating:

398 Katherine Drabiak, Carole Wegner, Valita Fredland and Paul R. Helft, 'Ethics, Law, and Commercial Surrogacy: A Call for Uniformity' (2007) 35 *Journal of Law, Medicine and Ethics* 300, 301.Ibid, 304.

399 A. van Niekerk and L. van Zyl, 'The ethics of surrogacy: women's reproductive labour' (1995) 21(6) J *Med Ethics* 345-9.

400 Joseph Pelzman, '"Womb for Rent": International Service Trade Employing Assisted Reproduction Technologies (ARTs)' (2013) 21(3) *Review of International Economics* 387–400.

401 Ibid.

402 Jenny Millbank, 'Paying for Birth: The case for (cautious) commercial surrogacy' Opinion, *The Guardian* 2 Sept. 2013.

403 Susan Berke Fogel et al., 'Invoking "choice" when discussing surrogacy as a feminist concern is a mistake', *RH Reality Check*, 23 April 2014.

404 See further discussion in Chapter 9 regarding international commercial surrogacy.

> *When you exchange something for money it is called a commodity. … Babies are not commodities. Babies are human beings. How do you think this makes us feel to know that there was money exchanged for us? Because somewhere between the narcissistic, selfish or desperate need for a child and the desire to make a buck, everyone else's needs and wants are put before the kids ['] needs. We the children become lost ….*[405]

An Australian donor-conceived person also expressed her concerns to me as follows:

> *Personally, I felt dehumanised to discover that I was conceived as a result of a small commercial transaction … I feel like the product of this industry of baby making. I co-facilitate a support group for adult "donor" conceived people and this group has been attended by a man who felt so much like a commodity he had a bar code tattooed on the back of his neck. Payment can be given many names, including 'reimbursement' or 'moderate expenses'. However, where money changes hands, a transaction has occurred. The debate about commercial surrogacy illustrates a trend towards the commodification of children that fits into an overall philosophy of a market society in which everything can be bought and sold. State and Federal regulations have struggled to keep pace with these rapid changes. The focus tends to be on the commissioning parents and the 'joyous miracle baby' aspect of these stories and too often nobody asks probing questions such as "Does society condone baby trade?" Or, "What happens to these babies when they grow up to be adults?*[406]

Such voices must be given weight when examining the public policy position to be taken in relation to commercial surrogacy arrangements.

7.4.2 Human rights issues and norms

Surrogacy arrangements raise a number of human rights issues relevant to the children born as a result of such arrangements, the women who act as surrogate mothers, and the intended parent(s). While there is no international human rights instrument that specifically addresses surrogacy, a number may be relevant to the issues it raises. These include the:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- International Convention on the Rights of the Child (ICRC)

The review found that consideration of how the application of such instruments are relevant, and how commercial surrogacy impacts human rights is increasingly being undertaken at an international level.

Most recently, in the 2018 report to the United Nations General Assembly the UN Special Rapporteur on the Rights of the Child stated:

405 Usha Rengachary Smerdon, 'Crossing Bodies, Crossing Borders: International Surrogacy Agreements between the United States and India' (2009) 39 *Cumberland Law Review* 60.

406 Lauren, statement provided to reviewer to be read to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016).

> *Surrogacy, in particular commercial surrogacy, often involves abusive practices. Furthermore, it involves direct challenges to the legitimacy of human rights norms, as some of the existing legal regimes for surrogacy purport to legalize practices that violate the international prohibition on sale of children, as well as other human rights norms. Moreover, many of the arguments provided in support of these legal regimes for commercial surrogacy could, if accepted, legitimate practices in other fields, such as adoption, that are considered illicit. Thus, if this type of governing legal regime becomes accepted, whether as international or national law, or through recognition principles, it would undermine established human rights norms and standards.*[407]

The Special Rapporteur also stated that commercial surrogacy could amount to the sale of children under the OPCC, and that human rights principles including:

- the prohibition of the sale of children
- the best interests of the child as a paramount consideration
- the lack of a right to a child
- strict regulations and limitations regarding financial transactions
- rights to identity and access to origins
- protections against exploitation.

'must be maintained against the pressures created by the large-scale practice of a market- and contract-based form of commercial surrogacy.' [408]

Increased consideration is also being given to the human rights issues raised by commercial surrogacy by the United Nations Office of the High Commissioner, United Nations Population Fund, and the World Health Organization, with similar considerations being had as those noted above in relation to whether it is acceptable to commodify human reproductive capabilities, issues of 'autonomy' and 'consent', and whether such practices are beneficial or otherwise, for those involved (and/or born as a result).[409]

At present, and as further discussed in Chapter 9, it is recognised that the majority of countries that legislate on the matter, prohibit either all forms of surrogacy or permit altruistic surrogacy subject to stringent criteria and prohibit commercial surrogacy. Very few jurisdictions allow commercial surrogacy at law. Further, the pattern has emerged that when legislation is being introduced or amended in jurisdictions around the world, it is generally to prohibit commercial surrogacy, not to permit it.

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407 United Nations, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material,* A/HRC/37/60, 15 January 2018, [24].

408 Ibid, [28].

409 United Nations Office of the High Commissioner, United Nations Population Fund, World Health Organization, Experts Meeting on Surrogacy, Bangkok, attended by the reviewer in November 2018.

Findings

1. While the Review received submissions calling for a complete ban on all forms of surrogacy, it was not within the Terms of Reference to consider prohibiting all forms of surrogacy in Western Australia. Rather, the Terms of Reference required consideration of the continued prohibition of commercial surrogacy.
2. Prohibitions on commercial surrogacy reflect the public policy position that commercial surrogacy should be discouraged or deterred on the basis that it commodifies the child and the surrogate mother and risks the exploitation of poor families for the benefit of rich ones.
3. The majority of submissions received supported a continuation of laws that permit altruistic surrogacy and prohibit commercial surrogacy. Such submissions were consistent with the legal acceptance of altruistic surrogacy arrangements that enable family formation where the intended parent(s) suffer significant medical issues or otherwise may not be able to have children.
4. While it is recognised that altruistic arrangements are not without risk, the recognition of domestic altruistic surrogacy arrangements provides legal certainty in relation to when such arrangements may occur and ensures the right of people born as a result, to access identifying information about their birth mother and any gamete donors. A parentage order can only be made if the court is satisfied that it is in the best interests of the child.
5. The reimbursement for costs provisions for altruistic surrogacy are comparable with NSW and Queensland. Clearer information needs to be provided to people concerning what may be reimbursed.
6. While the Review was presented with a number of cases in which people had engaged in commercial surrogacy arrangements abroad this was frequently reported to have been a consequence of the law and associated practices preventing their access to altruistic arrangements in Western Australia.
7. Arguments in favour of introducing commercial surrogacy often focus on increasing the number of women available for surrogacy but fail to recognise issues concerning the commodification of women's reproductive capacity and/or children; the risk of exploitation; and/or the violation of human rights norms and standards that may exist in such arrangements.
8. Several participants in the Review who had entered into altruistic arrangements objected to the introduction of commercial surrogacy in Western Australia (and beyond) stating they perceived it would change the nature of the special relationship between the intended parents and the surrogate mother, and impact negatively upon any child(ren) born as a result.
9. Concerns were also expressed about increasing the cost of surrogacy in Western Australia via the introduction of commercial surrogacy, rather than addressing accessibility to altruistic arrangements.
10. It was submitted that placing caps on the professional fees associated with altruistic surrogacy, such as those of lawyers, counsellors, and clinical treatment may assist with increasing the accessibility of altruistic arrangements.
11. Removing prohibitions on commercial surrogacy would not be in the best interests of children.

Recommendations

Recommendation 29

That the current public policy position that altruistic surrogacy is permitted subject to meeting certain criteria required by the law and that commercial surrogacy is prohibited, should be maintained.

Recommendation 30

The reimbursement for costs provisions for altruistic surrogacy are comparable with New South Wales and Queensland and as such do not require amendment. However, clearer information needs to be provided to people concerning what may be reimbursed in altruistic surrogacy arrangements.

Chapter 8

Further Matters Relevant to Surrogacy Arrangements

Chapter 8:
Further Matters Relevant to Surrogacy Arrangements

The following discusses further matters that were raised with the review relevant to surrogacy arrangements in Western Australia, that are again relevant to the Terms of Reference to the review.

8.1 Advertising

8.1.1 Current law

Whether people may advertise that they are seeking a surrogate or wishing to act as a surrogate varies across jurisdictions. Some jurisdictions prohibit all advertising (Victoria, Queensland and the Australian Capital Territory). All jurisdictions in Australia that have surrogacy legislation prohibit advertising willingness to enter into a *commercial* surrogacy arrangement or publishing with the intention of inducing a person to enter into a commercial arrangement.[410] Western Australia, New South Wales,[411] South Australia, and Tasmania either permit or do not prohibit advertising willingness to enter into an altruistic arrangement, although they vary in terms of whether such advertising may be paid.

In relation to those states that permit (or do not prohibit) advertising for altruistic arrangements, in Western Australia the *Surrogacy Act 2008* does not impose restrictions on advertising for a surrogacy arrangement by prospective arranged parents or a prospective birth mother, provided this is not for a commercial arrangement. That is, where intended parent(s) are seeking an altruistic arrangement that complies with the Act, that will not be for fee or reward, they may advertise. Similarly, a woman who wishes to offer to be a surrogate mother may advertise provided she does not expect or enter into a commercial arrangement. There are also no restrictions on where such advertisements may be made. Nor are there restrictions upon paying for such advertising (e.g. paying to put an advertisement in a relevant publication).

In New South Wales the provisions prohibiting advertising do not apply if the surrogacy arrangement is not a commercial surrogacy arrangement, provided no fee has been paid for the advertisement, statement, notice or other material.[412] *This contrasts with the position in Western Australia, in that it does not allow paid advertising. However, it is noted that* the recent legislative review of the New South Wales Act found that:

410 *Surrogacy Act 2008* (WA) s 10; *Parentage Act 2004* (ACT) s 43; *Surrogacy Act 2010* (NSW) s 10; *Surrogacy Act 2010* (Qld) s 55; *Surrogacy Act 2012* (Tas) s 41; *Assisted Reproductive Treatment Act 2008* (Vic) s 45.

411 *Surrogacy Act 2010* (NSW) s 10(2).

412 *Surrogacy Act 2010* (NSW) s 10(2).

> *there are grounds for relaxing the current restrictions on paid advertising for altruistic surrogacy arrangements as altruistic surrogacy arrangements are legal, as is unpaid advertising by persons willing to act as or seeking an altruistic surrogate. If no rewards or other inducements are sought or offered and any advertisement makes clear that the arrangement would be a non-commercial one, that the advertisement itself did not need to be unpaid.*[413]

It was suggested that such reform may make altruistic surrogacy more accessible in New South Wales.[414]

In South Australia previous offences relating to advertising were repealed and replaced with offences relating to brokering surrogacy contracts or inducing someone to enter a surrogacy contract for valuable consideration.[415] However, there exists some lack of clarity regarding when 'advertising' may occur for altruistic arrangements as a result of other prohibitions and offences regarding inducting a person into a surrogacy contract. In the 2018 review of that state's surrogacy legislation, SALRI called for:

> *any offence to focus upon commercial advertising and commercial brokerage as opposed to unwittingly undermining the valuable work of online surrogacy related social networks… or impede parties from getting in touch (however they may choose) …*[416]

In Tasmania, the *Surrogacy Act 2012* (Tas) is silent on advertising willingness to enter into an altruistic arrangement but commercial advertising or brokerage of surrogacy arrangements is prohibited.[417]

8.1.2 Submissions to the review

It was found during face-to-face forums and meetings, as well as via written submissions, that many people did not realise or know that they were able to advertise for altruistic surrogacy in Western Australia. Many also did not know that advertising may include paid advertisements. Illustrative of this were calls to allow such advertising. One submission for example said:

> *West Australians should have the ability to advertise desires to be a surrogate or intended parent without fear of breaking any laws. People are having to find alternative ways to find a surrogate if they don't have anyone in their immediate family and friend network. A lot of the time it means giving up on their dreams or travelling abroad.*[418]

413 Department of Justice, Government of New South Wales, *Statutory Review Surrogacy Act 2010* (July 2018) [3.66].

414 Ibid.

415 *Family Relationships Act 1975* (SA), s 10H.

416 David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975* (SA) (South Australian Law Reform Institute, Adelaide, 2018), p 120.

417 *Surrogacy Act 2012* (Tas) s 41.

418 Confidential, Submission 42.

Another woman submitted:

> *My Husband and I have had extreme difficulty in finding a gestational surrogate. We feel that it is unfair that we cannot advertise for a surrogate in Western Australia.*[419]

Surrogacy Australia noted that confusion over when advertising was permitted mean:

> *a lot of intending parents feeling frightened to advertise for a surrogate, even if it is under an altruistic model. Most Australian intending parents would rather undertake surrogacy with an Australian surrogate than with overseas surrogates. However, locating a suitable surrogate is made very difficult under current law. There needs to be clear guidance regarding advertising for a surrogate in Western Australia.*[420]

Kate Ranger, a woman who shared her story with the Review as to why she was seeking altruistic surrogacy, submitted that she would like to see more encouragement and support for finding surrogate mothers.[421] She described how her and her husband's interactions with two Perth-based clinics had not provided them any further avenue to do so, also noting that they were provided with varying information and her concern that there needed to be clearer information and support networks.

Evidence conveyed to me during the extensive public consultations and meetings conducted, included personal stories of how difficult finding an altruistic surrogate mother, or intending parent(s) can be. There were both intending parent(s) and women who were wanting to volunteer to help others have children by acting as an altruistic surrogate who expressed their concern that if they placed an advertisement in a newspaper, for example, while being very public, may be an exercise in futility if a willing altruistic surrogate mother or intending parent(s) did not see the advertisement. Others described feeling fearful about placing a public advertisement concerning their search for or willingness to volunteer as an altruistic surrogate as they would be exposed to risk in relation to having to individually deal with people who responded. They pointed to the fact that they felt this may compromise their personal safety.

Online forums such as Facebook Groups were described as another avenue often used. However, while seen by many as useful in finding a community and some support, they were also found by some to create enormous stress, when they were placed in a situation of having to share their most personal stories in the hope that they would be picked. There was a call for more support in connecting people and making it known that people were looking to volunteer as an altruistic surrogate mother or were intending parent(s) seeking someone who would help them become parent(s) via a lawful altruistic surrogacy arrangement.

The Family Law Practitioners Association WA submitted that consideration should be given to the establishment of a central register of women willing to act as a surrogate mother.[422] However, in meetings with the SALRI reviewers of the South Australian legislation, and as demonstrated in their recent report, consideration of a similar proposal in South Australia recognised views that the proposal for such a register 'was well intentioned but impractical' and that such a register would 'raise privacy, policy and practical concerns and is inappropriate'.[423] It was also seen

419 Confidential, Submission 18.

420 Surrogacy Australia, Submission 105.

421 Kate Ranger, Submission 101.

422 Family Law Practitioners Association WA, Submission 115.

423 David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy:*

by the South Australian reviewers that creating such a register would overstep the role of the state in what is largely seen in South Australia to be a private arrangement that must occur within the boundaries of the law, and not an arrangement in which the Attorney General or other government department should play a role in actively coordinating.[424]

The RTC submitted:

> *Finding a surrogate can be an insurmountable obstacle for some people. Currently, fertility clinics may accept expressions of interest from women who would consider being a surrogate but are not permitted to advertise for altruistic surrogates. Council notes that:*
>
> - clinics may currently advertise for altruistic gamete and embryo donors
> - New South Wales and Tasmania permit advertising for altruistic surrogates
> - advertising may increase both the number of available surrogates and community awareness of WA surrogacy laws.
>
> *Council supports permitting WA clinics to advertise for altruistic surrogates.*[425]

8.1.3 Discussion

While many altruistic surrogacy arrangements take place in circumstances in which the altruistic surrogate mother is a friend or relative of the intended parent(s), some intended parents do not have friends or relatives who are willing or able to do so. For such people, although altruistic surrogacy is a lawful option for them, they may not be able to find a person willing to assist them unless they are able to connect with people outside of their personal sphere.

Whether advertising for surrogacy arrangements should be permitted has been a topic of debate, most often with those against such advertising arguing that it may lead to (or risks) arrangements of a more commercial nature or that it may lead to situations in which the surrogate mother is less likely to remain a part of the child's or intending parent(s)' life. However, the alternative argument is that as the law permits altruistic surrogacy arrangements it would not be consistent or warranted to prevent people from trying to find other parties who are willing to enter into such an arrangement, subject to meeting all of the requirements of the law.

That Western Australian law does not impose restrictions on advertising for a surrogacy arrangement by prospective arranged parents or a prospective birth mother, provided this is not for a commercial arrangement, is therefore consistent with the law permitting altruistic arrangements.

It is acceptable that intending parent(s) and women who are willing to act as altruistic surrogates are able to advertise in Western Australia.

A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA) (South Australian Law Reform Institute, Adelaide, 2018), [10.4].

424 Ibid.

425 RTC, Submission 122.

The submission by the RTC that clinics – which are already able to accept expressions of interest from women willing to volunteer to be an altruistic surrogate – should also be able to advertise for altruistic surrogates, was also compelling. This would be consistent with their ability to advertise for altruistic donors of gametes and embryos may increase both the number of known women who are willing to volunteer to be an altruistic surrogate mother; and may also increase community awareness of Western Australian surrogacy laws. It would also provide an alternative avenue for those willing to volunteer as an altruistic surrogate to express their interest to a clinic rather than to the public at large and to enable those seeking an altruistic surrogacy to know that they can contact clinics privately in this regard. Such steps would require amendment (or clarification) of the Surrogacy Directions 2009 (WA), Direction 9, which currently prohibits clinics from 'actively recruiting' birth mothers, to provide that this does not include advertising to inform women that they may approach the clinic if they are interested in volunteering to be an altruistic surrogate mother. It should continue to be the case that clinics not be able to charge a fee to either intending parent(s) or an altruistic surrogate mother, either in relation to such advertising or for introducing the parties.

Findings

1. Western Australian law does not impose restrictions on advertising for a surrogacy arrangement by prospective arranged parents or a prospective birth mother, provided this is not for a commercial surrogacy arrangement and is consistent with the law permitting altruistic arrangements.
2. Public awareness that such advertising is permitted was found to be limited.
3. Challenges were found to exist when intending parent(s) and/or women who are willing to act as altruistic surrogates considered advertising themselves either publicly or on online forums in relation to privacy, contact with unknown parties, and personal safety.
4. Clinics in Western Australia are able to accept expressions of interest from women who are willing to volunteer to be an altruistic surrogate mother.
5. Clinics in Western Australia should also be able to advertise for altruistic surrogates. This would be consistent with their ability to advertise for altruistic donors of gametes and embryos; may increase the number of known women who are willing to volunteer to be an altruistic surrogate mother; and raise community awareness of Western Australian surrogacy laws.
6. Clinics should not be able to charge a fee to either intending parent(s) or women who are willing to volunteer to act as an altruistic surrogate mother either in relation to such advertising or for subsequently introducing the parties.

Recommendations

Recommendation 31

The current ability for intended parent(s) and women who are willing to volunteer to act as altruistic surrogates is acceptable and consistent with laws that permit altruistic surrogacy and should be maintained.

Recommendation 32

Provision should be made in the Western Australian legislation, regulations or directions that clinics in Western Australia may advertise for altruistic surrogates. This would require amendment of Surrogacy Directions 2009 (WA), Direction 9, which currently prohibit clinics from actively recruiting birth mothers to make clear that such prohibitions do not include advertising to inform people that they may approach the clinic to express their interest in volunteering to act as an altruistic surrogate. The Directions should maintain that clinics may introduce a woman who has approached the clinic, offering to be a birth mother, to prospective arranged parents. They must not charge a fee for doing so, otherwise they would be in contravention of s 9 of the Act.

Recommendation 33

Information should be made available to the public by the Minister/DG/Department to assist in raising public awareness about surrogacy laws that relate to advertising in Western Australia.

8.2 Agents and brokerage of surrogacy arrangements

8.2.1 Current law

In Western Australia it is an offence to introduce parties to a surrogacy arrangement for valuable consideration.[426] This applies whether or not it is intended that the surrogacy arrangement be one that is for reward or an altruistic arrangement. Committing such an offence carries a penalty of a $12,000 fine or imprisonment for one year.

The Directions to the Act also prohibit clinics from actively recruiting birth mothers but they can introduce a woman who has approached the clinic offering to be a birth mother to prospective arranged parents (Direction 9). It was recommended above, that this Direction be amended to allow them to also advertise to inform women who wish to volunteer to be an altruistic surrogate mother that they may approach the clinic to express their wishes in doing so. Clinics must not charge a fee for doing so, otherwise they would be in contravention of s 9 of the Act.

426 *Surrogacy Act 2008* (WA) s 9.

A person who provides a service knowing that the service is to facilitate a surrogacy arrangement that is for reward commits a crime except if the service is a health service provided to the birth mother after she has become pregnant.[427] Committing such an offence carries a penalty of a $12,000 fine or imprisonment for five years.

The Western Australian law is consistent with laws in New South Wales, Queensland, Tasmania, and arguably South Australia (although subject to interpretation) which all focus on commercial brokerage or introductory services and where it is an offence for a person to receive a payment, reward, valuable consideration, or other material benefit or advantage in relation to another person agreeing to enter into or entering into a surrogacy arrangement. The New South Wales review committee said it considered that any 'brokerage' or introductory service between intended parents and surrogates should not involve payment of a reward. The reason for this is to prevent assisted reproduction clinics or other organisations profiting from assisting to arrange altruistic surrogacy arrangements, and thus transforming an altruistic arrangement into a commercial surrogacy arrangement.[428]

8.2.2 Discussion

In some jurisdictions the use of agents or brokers involves the engagement of third parties who operate, usually for a fee, that act in relation to the surrogacy arrangement. Agents/brokers may operate to find, meet, and engage (recruit) potential surrogate mothers; co-ordinate the agreement, including terms of the surrogacy contract, payment, medical matters, and relationship between parties; locate or recommend a lawyer licensed in the jurisdiction; introduce the intended parent(s) and/or surrogate mother to the fertility clinic; manage all clinical appointments for the donors and surrogate mother; oversee the surrogate mother throughout the pregnancy; manage any conflicts in the relationship between the surrogate mother, the clinic and/or the intended parent(s); and/or arrange the delivery at a hospital or birth centre.

The Review received a number of submissions that wanted to see some kind of agency and/or brokerage service permitted in relation to surrogacy, including that such an agency might be paid a fee.[429] However, while such a system may mean that the burden of entering into or carrying out a surrogacy arrangement is removed or lessened, the payment of an agency fee has again proved controversial and is prohibited in many jurisdictions. This is particularly so as such agents often require significantly high fees (for example, in Canada while surrogacy is altruistic, some agents charge $32,000 per surrogacy arrangement). There is also some evidence that the presence of 'agents' may lead to the recruitment of vulnerable women to act as surrogate mothers being increased and unscrupulous agents who take advantage of vulnerable intending parent(s). Most often, the introduction of agencies is opposed on the policy basis that whether agents act as commercially for profit or as 'not-for-profit' organisations when there are fees or reward involved for introducing people, their operation may encourage the commercialisation of surrogacy.

427 *Surrogacy Act 2008* (WA) s 9.

428 NSW Department of Justice, Statutory Review *Surrogacy Act 2010*, July 2018, [3.67].

429 See for example, Confidential, Submission 17; Confidential, Submission 18; Confidential, Submission 20; Confidential, Submission 43; Peter Ravi-Pinto, Submission 53; Danny Rhys Steele, Submission 71; Gay Dads WA Submission 74; Ross Jutras-Minett, Submission 104; Surrogacy Australia, Submission 105.

The Review agrees with the above stated position in the New South Wales review that any 'brokerage' or introductory service between intended parents and surrogates should not involve payment of a reward. The reason for this is to prevent assisted reproduction clinics or other organisations profiting from assisting to arrange altruistic surrogacy arrangements, and thus transforming an altruistic arrangement into a commercial surrogacy arrangement.[430] The law, regulations, and/or directions should, however, be clear that such prohibitions do not extend to the provision of lawful services in relation to surrogacy arrangements nor prevent free and voluntary support groups from operating and enabling people to get in touch with each other.

Findings

1. The current Western Australian law prohibits the introduction of parties to a surrogacy arrangement for valuable consideration.
2. The current Western Australian law prohibits providing a service knowing it is to facilitate a surrogacy arrangement that is for reward (except if the service is a health service provided to the birth mother after she has become pregnant).[431]
3. The Western Australian law is consistent with laws in New South Wales, Queensland, Tasmania, and arguably South Australia (although subject to interpretation) that prohibit commercial brokerage or introductory services and make it an offence for a person to receive a payment, reward, valuable consideration, or other material benefit or advantage in relation to another person agreeing to enter into or entering into a surrogacy arrangement.
4. The Review found that it would not be suitable to allow the establishment of 'agencies', 'agents' or any other kind of 'brokerage' or introductory service between intended parents and surrogates that involve the payment of a reward or valuable consideration. The reason for this is to prevent assisted reproduction clinics or other organisations profiting from assisting to arrange altruistic surrogacy arrangements, and thus transforming an altruistic arrangement into a commercial surrogacy arrangement.
5. The law, regulations, and/or directions should be clear that such prohibitions do not extend to the provision of lawful services in relation to surrogacy arrangements nor prevent *free and voluntary* support groups from operating and enabling people to get in touch with each other.

430 NSW Department of Justice, Statutory Review *Surrogacy Act 2010*, July 2018, [3.67].

431 *Surrogacy Act 2008* (WA) s 9.

Recommendations

Recommendation 34

That it would not be suitable to allow the establishment of 'agencies', 'agents' or any other kind of 'brokerage' or introductory service regarding surrogacy in Western Australia that involves payment of a reward or valuable consideration. The reason for this is to prevent assisted reproduction clinics or other organisations profiting from assisting to arrange altruistic surrogacy arrangements, and thus transforming an altruistic arrangement into a commercial surrogacy arrangement.

Recommendation 35

That prohibitions on the introduction of parties to a surrogacy arrangement for valuable consideration; and on providing a service knowing that the service is to facilitate a surrogacy arrangement that is for reward, remain as law in Western Australia.

Recommendation 36

That the Minister for Health ensures that law, regulations, and/or directions are clear that such prohibitions do not extend to the provision of lawful services in relation to surrogacy arrangements nor prevent free and voluntary support groups from operating and enabling people to get in touch with each other.

8.3 Enforceability of surrogacy arrangements

8.3.1 Current law

In all jurisdictions of Australia, the surrogacy agreement is considered legal, but is unenforceable. Such provision in law reflects the general presumption that a woman who gives birth to a child is that child's mother, and her partner (if any) is the other legal parent. This generally means that the intended parent(s) cannot oblige the surrogate mother to relinquish the child; and conversely the surrogate mother and her partner (if any) cannot insist the intended parent(s) take the child. If the birth mother and her partner (if any) did not wish to, or could not, parent the child they would be able to relinquish the child for adoption.

In examining the policy position that lies behind Western Australian laws it was found that the position taken by the Department when the legislation was drafted was that:

> *All other jurisdictions provide that surrogacy arrangements should not be enforceable. To provide that a contract [is] enforceable detracts from the principle that the interests of the child rather than the terms of the contract should be what is paramount in deciding where the child should live, and contracts for personal services are not enforceable by way of specific performance.*[432]

432 Ms Daphne Andersen, Senior Legal Adviser, Department of Health WA, Transcript of Evidence, 14 February 2008, p4 noted in Standing Committee on Legislation, *Report on Legislation in Relation to the Surrogacy Bill 2007* (Report 12) May 2008, pp 28 and 29.

Notably, however, there are two exceptions to the above rule. First, the law in Western Australia provides that the only part of a surrogacy agreement that is enforceable is reimbursement of the reasonable expenses associated with (a) the pregnancy or the birth or (b) any assessment or expert advice in connection with the arrangement.[433]

Secondly, the Court is not prevented from making an order under Part 3, section 21(4) which permits the Court to dispense with the requirement for a birth mother's consent to the making of a parentage order, *if that order is in the best interests of the child and the birth mother is not the child's genetic parent and at least one arranged parent is the child's genetic parent*. (As above mentioned at 4.3.5). The Western Australian Standing Committee on Legislation were of the view that the practical result of this provision is to confer 'a degree of enforceability on some surrogacy arrangements on the basis of genetic relatedness to the intending parent(s), noting that if not for a surrogacy arrangement, a birth mother would not be required to relinquish a child born as a result of assisted reproductive technology using donor gametes'.[434] However, the provision does not make the surrogacy agreement enforceable, rather, it means that upon refusal to relinquish the child where the surrogate mother is not a genetic parent of the child but at least one intended parent is, the Court has the power to examine the situation and to make a decision based on what it views to be in the best interests of the child in the circumstances.

8.3.2 Submissions and discussion

The question of whether surrogacy arrangements should or should not be enforceable was raised in some submissions. Several submissions emphasised the negative impacts that removal of a child from its birth mother may have.[435] As noted above, some such submissions called for abolition of surrogacy altogether.[436] Several submissions supported the current law, emphasising that the birth mother should always be the legal mother upon birth and that the transfer of legal parentage should only occur after a Court had considered that to be in the best interests of the child.[437]

433 *Surrogacy Act 2008* (WA) ss 6(1) and 7(3).

434 Standing Committee on Legislation, *Report on Legislation in Relation to the Surrogacy Bill 2007* (Report 12) May 2008, pp 28 and 29, noting also the Artificial Conception Act 1985 ss 5, 6 and 7. When donated ovum and/or sperm are used in an artificial fertilisation procedure, the birth mother and father are the legal the parents of the child.

435 Dr. Catherine Lynch (Australian Adoptee Rights Action Group), Submission 4; Sharon Genovese, Submission 32; ARMS (Marie Meggitt), Submission 33; Jo Fraser, Submission 34; Janice Burdinat, Submission 45; Trevor Harvey, Submission 47; VANISH, Submission 54; Pauline Hey, Submission 56; Brenda Harvey, Submission 51; Adoption Origins Victoria INC, Submission 62; Julie Waddell, Submission 64; Dorothy Kowalski, Submission 66; Australian Christian Lobby, Submission 77; Coalition for the Defence of Human Life, Submission 90; FINRRAGE, Submission 93; Women's Bioethics Alliance, Submission 95; Defend Human Life (Richard Egan), Submission 109; Joan Smurthwaite, Submission 124.

436 Dr. Catherine Lynch (Australian Adoptee Rights Action Group), Submission 4; Andrew & Jody Burgel, Submission 23; ARMS (Marie Meggitt), Submission 33; Confidential, Submission 56; Adoption Origins Victoria INC., Submission 62; Dorothy Kowalski, Submission 66; Anna Kerr (Feminist legal clinic), Submission 73; FINRRAGE, Submission 93; Women's Bioethics Alliance, Submission 95; Richard Egan (Defend Human Life), Submission 109.

437 For example, Chief Justice Pascoe, personal meeting.

Some pointed to other jurisdictions in which the intending parents are considered the parents due to the agreement pre-birth or upon birth and/or called for the intending parent(s) to be recognised from birth as the legal parents.[438]

There was particular angst shown by some intending parent(s) in face-to-face meetings regarding their fear that the surrogate mother could carry a child conceived using their genetic material (eggs and/or sperm) and then not relinquish the child to them. Their concerns were heartfelt. For example, one woman during the face-to-face forums described having gone through years of failed IVF with her husband, having embryos in storage, and seeing those embryos as *their* children. She expressed absolute despair at the thought that they could make an agreement, undertake counselling, journey through a pregnancy with a surrogate mother in which she was carrying a child conceived with their genetic material, and then have no rights to apply for legal parentage orders if the surrogate changed her mind.[439]

Notably, it did not appear that any of the women who had acted, or were intending to act, as surrogates, nor the intending parent(s) that I met with had knowledge or understanding of the above mentioned provision in the *Surrogacy Act 2008* (WA) that in such circumstances the law does allow the Court to make a parentage order in their favour, if the making of the order was considered to be in the best interests of the child. Again, while this does not mean that the surrogacy arrangement per se is enforceable, it does give the Court discretion in such circumstances to act in the best interests of the child. In this regard, the law was found to be balanced, and nuanced, in a way that allowed the Court to consider such interests.

Findings

1. In Western Australia an altruistic surrogacy arrangement is considered legal but is unenforceable.
2. The policy position that lies behind such law was identified to be *'to provide that a contract [is] enforceable detracts from the principle that the interests of the child rather than the terms of the contract should be what is paramount in deciding where the child should live, and contracts for personal services are not enforceable by way of specific performance.'*
3. There are two exceptions to the above rule:
    a. the law in Western Australia provides that the reimbursement of the reasonable expenses associated with the pregnancy or the birth; or any assessment or expert advice in connection with the arrangement is enforceable
    b. the Court is not prevented from making a parentage order without the birth mother's consent, if that order is in the best interests of the child and the birth mother is not the child's genetic parent and at least one arranged parent is the child's genetic parent.
4. The Review received submissions that reflected a lack of knowledge that the second exception existed and/or its purposes.

438 For example, Tracey Tamburri, Submission 11; Rebecca Kalpakoff, Submission 83; Confidential, Submission 91.

439 Woman attendee at face-to-face forum in Perth, 20 April 2018.

5. In this regard, the law was found to be balanced, and nuanced, in a way that allowed the Court to consider the best interests of the child in such circumstances, but there was a clear need for information and education about the law to be provided to prospective surrogate mother and intending parent(s) about the law.

Recommendations

Recommendation 37

That the current law be maintained regarding surrogacy arrangements being unenforceable subject to the relevant exceptions regarding:

- the enforceability of agreements as to the reimbursement of reasonable expenses related to the surrogacy arrangement
- the ability of the Family Court of Western Australia to make parentage orders without the birth mother's consent, if that order is in the best interests of the child and the birth mother is not the child's genetic parent and at least one arranged parent is the child's genetic parent.

Recommendation 38

That the Minister/DG/Department ensure that the public is provided information about the provisions of the *Surrogacy Act 2008* (WA) regarding the unenforceability of altruistic surrogacy arrangements, and the exceptions that apply.

8.4 Information and support

8.4.1 The issue and submissions

Connected to the discussion above, and throughout this report there was an overwhelmingly consistent view put forward to the Review that people did not feel supported or informed about lawful surrogacy in Western Australia. This was evident, for example, by people's lack of knowledge about important aspects of the law. There were significant calls for more support[440] and information[441] to be provided to all parties involved in the surrogacy arrangement.

440 Adam Copple-Smith, Submission 2; Caroline Mansour, Submission 6; Jenna Farthing, Submission 12; Confidential, Submission 16; Confidential, Submission 17; Amy Hodson, Submission 19; Confidential, Submission 20; Gillian Hodson, Submission 21; Kelly Smith, Submission 24; Confidential, Submission 43; Peter Tavi-Pinto, Submission 53; Charlotte Adams, Submission 68; Anita Bennetts, Submission 69; Confidential, Submission 76; Steve Adams, Submission 81; Fiona Glumac, Submission 87; Confidential, Submission 89; Kate Ranger, Submission 101; Alana and Chris Richards, Submission 103; Surrogacy Australia, Submission 105; RTC, Submission 122.

441 Confidential, Submission 16; Confidential, Submission 17; Garrett and Leon Chappel, Submission 25; Confidential, Submission 43; Peter Ravi-Pinto, Submission 53; ANZICA WA Fertility Counsellors (Joint Submission), Submission 61; Charlotte Adams, Submission 68; Danny Rhys-Steele, Submission 71; Gay Dads WA, Submission 74; Hollywood Fertility, Submission 75; Fiona Glumac, Submission 87; Confidential, Submission 89; Kate Ranger, Submission 101; Alana and Chris Richards, Submission 103; Surrogacy Australia, Submission 105.

Amy Hodson, for example, submitted:

> *There needs to be a clearer path on how to go about surrogacy in WA: I am at a loss with how to go about surrogacy in WA and there is a severe lack of information and support available to take this option as an Intended Parent. After everything I have been through, shouldn't there be support on this surrogacy path? Clear and understandable Information available online of how to go about surrogacy step by step in WA.*[442]

A woman who had been an altruistic surrogate mother in Western Australia submitted:

> *My first recommendation for the review of the Surrogacy Act is that there be more public education surrounding surrogacy. There is very little information available online about surrogacy in Australia. The Surrogacy Act is extremely difficult to make sense of it you are not familiar with reading such documents. I believe an information booklet about surrogacy would be a very valuable resource to Fertility Clinics around Perth and Western Australia. I also believe that there needs to be more resources available to women who have had a terrible diagnosis that has stripped her of her fertility and/or the ability to carry a child. I have spoken to many women who were unfortunate to be in this position and had no idea where or who to turn to. In providing this information online or in the form of an information booklet, many of the resources that were helpful to me can be easily accessed for those following in my footsteps.*[443]

Another submission from people who were parents as a result of a surrogacy arrangement emphasised both the need for clearer information for people who are involved in surrogacy arrangements, but also the need to educate the people who support surrogacy arrangements (such as department staff, clinicians, counsellors), and the public. They said:

> *We recommend the following changes:*
>
> - *Improve education;*
> - *Upgrade the poor level of services on the RTC website. The lack of information required us to access details from. [a website in a different state]. As you know, there are risks associated with cross jurisdictional research, as there is a lack of consistency across surrogacy legislation in Australia;*
> - *Educate health professionals about altruistic surrogacy, emphasising the legal nature of the arrangement. (…target health professionals in obstetrics, oncology, IVF and other areas of expertise that will have an increased chance of meeting women that have fertility challenges;*
> - *…Empower a delegated body to undertake the advocacy role associated with altruistic surrogacy. Importantly, it needs to be appropriately resourced for the advocacy attempts to be effective;*
> - *Specifically upskill counsellors and psychiatrists in this state to support people progressing an altruistic surrogacy journey…*[444]

442 Amy Hodson, Submission 19.

443 Confidential, Submission 43.

444 Confidential, Submission 17.

8.4.2 Discussion

In the 2016 House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements it was noted:

> *To access altruistic surrogacy in Australia, intended parents and surrogates are not only required to navigate complex State and Territory legislation, but they are also faced with limited and inconsistent information on which to base their decisions… Often, those seeking altruistic surrogacy arrangements are left with inaccurate information or information aligned to commercial interests…. This may be one of the reasons why some choose to pursue offshore surrogacy.*[445]

The evidence presented to this Review confirmed such a view.

In its response to the Standing Committee on Social Policy and Legal Affairs report in November 2018, the Australian Government said:

> *The Government supports there being a strong information framework for Australians considering domestic altruistic surrogacy. In consultation with states and territories through CAG, the Government will consider the best approach to providing uptodate information on domestic altruistic surrogacy…To ensure that information is regularly updated and current, the Government supports the effective linking of relevant state, territory and Commonwealth sources of information.*[446]

In this report, the recommended amendments to the *Surrogacy Act 2008* (WA) and related legislation, regulations and directions are intended to significantly improve access to altruistic surrogacy as well as address issues related to the support people receive and the information available to them and the public. If implemented the recommended changes will help people to connect, reduce red-tape, burden and cost, enable people to be supported throughout the process via counselling, and obtain accurate information via legal advice.

It is imperative that the Minister/DG/Department also work to ensure that information and advice is available to the public and to those who support them about what the law is in Western Australia, and what is expected in terms of services, support, information, and the associated costs. It was repeatedly conveyed to the review that the current approach taken by the RTC and the Department to public inquiries, and the information provided, was inadequate and/or unhelpful. It was noted in Part 1 of this report that this was sometimes a consequence of the many constraints people were working with within the Department. This needs to be remedied as it adds to the situation of Western Australians leaving their home state to find support and information in other jurisdictions of Australia and abroad, subjecting them to risk and resulting in a situation that is not in the best interests of children born as a result. It also means they are vulnerable to having to pay people for information or support that should be readily accessible to them without cost.

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445 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements (2016), p 122.

446 Australian Government, *Australian Government Response to the Recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters Report*, November 2018.

Finally, I note that while my recommendations are intended to provide more suitable access to altruistic surrogacy in Western Australia, and support to parties to a surrogacy arrangement individually and jointly, the importance of being able to connect with others who face similar issues was emphasised by those who participated in the review. Many such people said they would have been completely lost without the voluntary community support groups they had found, such as a Facebook Group for people considering volunteering as surrogate mothers and intending parents or Gay Dads WA. The Government may consider also assisting people facing issues related to infertility and inability to carry or bear a child due to their social or medical circumstances by making them aware of the existence of voluntary community support groups available to them.

Findings

1. There is a significant need to improve the availability and accessibility of information and support to the public and those who provide lawful services in relation to lawful surrogacy arrangements in Western Australia.
2. This should include, but is not limited to clear and accessible information about:
    - the law
    - what is expected of clinics, counsellors and lawyers in relation to the provision of services, support, information, and advice
    - information about the expected and reasonable costs of surrogacy arrangement in Western Australia.
3. To achieve this, the Department of Health and relevant Government units and staff who are responsible for supporting the Act need to be adequately resourced, trained, and supported in the commissioning and/or development of additional resources that address the short-comings identified in information provision in this report and submissions made to the Review.
4. Information provided by the Government should also inform people of voluntary community support groups available to people facing issues related to infertility and inability to carry or bear a child due to their social or medical circumstances.

Recommendations

Recommendation 39

That the Minister/DG/Department work to greatly improve the availability and accessibility of information and support to the public and those who provide lawful services in relation to lawful surrogacy arrangements in Western Australia. This should include, but is not limited to, clear and accessible information about:

- the law
- what is expected of clinics, counsellors and lawyers in relation to the provision of services, support, information, and advice
- the expected and reasonable costs of surrogacy arrangement in Western Australia.

Recommendation 40

That the Department and relevant Government units and staff who are responsible for supporting the Act be adequately resourced, trained, and supported in the commissioning and/or development of additional resources that address the short-comings identified in information provision in this report and submissions made to the Review.

Recommendation 41

Information provided by the State Government should also inform people of voluntary community support groups available to people facing issues related to infertility and inability to carry or bear a child due to their social or medical circumstances.

Chapter 9

International Commercial Surrogacy Arrangements

Chapter 9: International Commercial Surrogacy Arrangements

9.1 Introduction

This chapter considers issues concerning international commercial surrogacy arrangements. It provides a general overview of the regulation of surrogacy across the world before considering submissions by Western Australians who had engaged in international commercial surrogacy as well as other submissions to the Review, followed by examination of issues relevant to commercial surrogacy arrangements abroad and the jurisdictions in which they occur; laws relating to residency that have been implemented to prevent foreigners from travelling to certain countries; the issuance of passports and granting of citizenship by descent in Australia; extraterritorial offences; and legal parentage of children born as a result of international commercial surrogacy and related matters. The chapter is particularly focussed on matters relevant to the Terms of Reference that require consideration of international commercial surrogacy, the impact of Commonwealth and other state laws, and issues regarding the harmonisation of laws across Australia.

9.2 Current law: Regulation of surrogacy abroad

Current regulation of surrogacy across the globe reflects four broad approaches including jurisdictions that:

- prohibit all surrogacy arrangements (the majority of jurisdictions that have laws)[447]
- permit altruistic but prohibit commercial arrangements (a moderate number of jurisdictions, including Australian jurisdictions)[448]
- take a permissive approach to surrogacy, including commercial surrogacy (very few jurisdictions)[449]
- have no specific regulation of surrogacy.

447 Algeria, Austria, Bahrain, Bangladesh, China (mainland), Croatia, Egypt, El Salvador, Ethiopia, Finland, France, Germany, Iceland, Indonesia, Italy, Jordan, Kuwait, Malaysia, Maldives, Malta, Mauritius, Mexico (some parts, for example, Queretaro), Moldova, Morocco, Norway, Oman, Portugal, Qatar, Saudi Arabia, Serbia, Singapore, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Taiwan, Tajikistan, Tunisia, Turkey, Turkmenistan, the United Arab Emirates, some jurisdictions within the United States of America (for example, Arizona), Vietnam and Yemen. (NB. the law in China simply bans trade in fertilised eggs and embryos and forbids hospitals from performing surrogacy procedures. It is reported that such regulations are not adhered to by some; Arizona statute forbids “surrogate parent contracts”; however, the Arizona Court of Appeals, a court of intermediate jurisdiction, ruled in 1994, that the parentage presumption was rebuttable as to the intended mother.)

448 Australia (all states and territories except the Northern Territory), Belarus, Belgium, Brazil, Bulgaria, Canada, Denmark, Greece, Hong Kong Hungary, Ireland, Latvia, Lithuania, some states in Mexico, the Netherlands, New Zealand, South Africa, South Korea, Thailand, the United Kingdom, Uruguay, and Peru. Several of these jurisdictions, allow reimbursement of ‘reasonable expenses’. This is generally limited to costs actually incurred.

449 Albania, Armenia, Georgia, Israel, Kazakhstan, Russia, Uganda, the Ukraine, Liechtenstein and some states in the United States of America.

Within these categories the majority of jurisdictions with specific laws in place prohibit surrogacy of any form – more than double the next most frequent category which permits altruistic surrogacy but prohibits commercial.

9.2.1 Jurisdictions that prohibit all surrogacy arrangements

The ethos underpinning laws in jurisdictions in which all surrogacy arrangements are prohibited is the view that surrogacy is 'a violation of the child's and surrogate mother's human dignity'. There may also exist the view that surrogacy involves the commodification of women and children, and/or a multitude of other unacceptable risks and practices including (but not limited to) those of exploitation, sale, trafficking, particularly in relation to commercial surrogacy. If surrogacy were to occur in any of these jurisdictions, the birth mother would be considered the legal mother of any resulting child, and the surrogacy arrangement would be void and unenforceable. Criminal sanctions may apply to the parties involved in the arrangement or, more commonly, for any intermediaries and/or medical institutions facilitating the arrangement.

9.2.2 Jurisdictions that expressly permit and regulate 'altruistic' surrogacy but prohibit commercial surrogacy

Some jurisdictions permit and regulate altruistic surrogacy but prohibit commercial surrogacy. This includes all states and the Australian Capital Territory in Australia. In such jurisdictions most allow for reimbursement of expenses actually incurred by the surrogate mother, and there are mechanisms to transfer legal parentage, provided requisite criteria have been met. The jurisdictions vary on what is permitted regarding reimbursement of expenses, the requisite criteria, and how transfer of parentage occurs (for example, in New Zealand it occurs via adoption).

In many of these jurisdictions reimbursement of expenses is limited and defined in terms of categories of payment (like Australian states and the Australian Capital Territory). In other countries there has been some criticism of 'blurring' of the lines and higher payments to surrogate mothers that have been equivalent to those made in commercial surrogacy arrangements in other nations. This has reportedly occurred, for example, in the United Kingdom, Canada, and Greece.[450]

Criteria for altruistic surrogate mothers may include such things as age requirements, engagement with counselling and assessments, having already had a living child and/or having completed her family, civil status and having received independent legal advice. The surrogate mother may have to be a family relative. For example, in Thailand the surrogate mother must be a sibling of the intending parent(s), in Uruguay, the surrogate mother must be a relative of the woman who cannot carry a pregnancy due to genetic or other diseases.

Intending parent(s) may need to be unable to carry a pregnancy, have a particular relationship status, undergo criminal record and child protection checks, be of a certain age, and meet counselling, and legal advice. There is also a 'strong trend' to permit only surrogacy arrangements where at least one of the intended parents is genetically related to the child, and in some jurisdictions only 'gestational' surrogacy is permitted.

450 In Greece, due to youth unemployment hitting over 50%, it has been reported that women are enticed into surrogacy agreements by the offer of money for arrangements that are represented as 'altruistic'. In Canada it has been reported in the media that additional financial arrangements outside of the official signed contracts family law attorneys prepare were being made. It is unknown the extent to which this happens.

Many of these countries have residency requirements. For example, laws in Thailand now only permit altruistic surrogacy when the intended parents are a married couple who are citizens of Thailand. Foreigners are not permitted surrogacy unless they have been married to a Thai national for three or more years. Only gestational surrogacy is permitted, and the surrogate mother has to have at least one of her own children. The surrogate mother must also be a citizen of Thailand and must be over 25 years old. Such laws are specifically designed to stop foreigners travelling to the country to engage in surrogacy.

Other countries do not have residency requirements. For example, in Greece altruistic surrogacy is available to non-EU citizens (married or unmarried heterosexual couples or single women). Canada has also become a destination country for people engaging in cross-border altruistic surrogacy be they single, in a hetero-sexual, or same-sex relationship.

In most countries that permit altruistic surrogacy, fees to agencies that arrange surrogacy are generally prohibited, however, this is not true of all countries and in some places agencies, 'intermediaries', 'consultants', or 'not-for-profits' operate and charge significant fees. In addition, while reimbursement of costs may be limited, the fees charged by 'agencies', 'intermediaries', and lawyers in some jurisdictions can be very high. For example, one 'not-for-profit' agency in the United Kingdom charges £9000 (approx. AUD $16,800) for options exploration (a two-hour meeting), matching and management, and surrogacy support services. In Canada 'consultant' fees can range from $5000 – $20,000, with one such service identified during the review as advertising online fees of $32,000. One surrogacy information service reports the total costs of surrogacy in the United Kingdom as being between approximately AUD$79,000 and $122,600, and in Canada from AUD$72,000 to $115,400.

9.2.3 Jurisdictions that take a permissive approach to surrogacy, including commercial surrogacy

In the jurisdictions that permit commercial surrogacy there are usually procedures which enable legal parentage to be granted to one or both of the intending parent(s); there may or may not be a domicile or habitual residence requirement for intending parent(s); and differences are found regarding who is permitted to enter into such agreements, and requirements such people must meet. That is, policy perspectives in the countries that permit commercial surrogacy vary, and do not mean that people can access surrogacy in all of these nations from abroad.

In Armenia, legislation allows foreign residents and couples (including same-sex and/or LGBT) to undergo surrogacy.[451] However, there have been proposals in Armenia to amend the law to prohibit foreigners from hiring Armenian women to be 'surrogate' mothers for them, due to the belief that "the usage of Armenian women's womb for giving birth to foreigners' children is unacceptable."[452] In 2016 it was reported that the Armenian law was amended to provide that the surrogate has no rights to the child. A woman is allowed to be a surrogate mother twice in her lifetime. Single foreigners are not allowed to use Armenian women as surrogate mothers to have children.[453]

451 Law of the Republic of Armenia "On reproductive health and reproductive rights of a human" No.474 of 26.12.2002, Art 11-19.

452 Gayane Abramyhan, "Birth Rights and Concerns: Issue of surrogate birthing raises debate," *Society 07* March 2012 http://www.armenianow.com/society/36243/armenia_surrogate_mothers_legislation

453 PanArmenian, 'Armenian Government makes amendments to laws on surrogacy' 29 September 2009 at http://www.panarmenian.net/eng/news/221995/ accessed December 2018.

In Georgia, 'extracorporeal fertilisation' is permitted for heterosexual couples, in the case of infertility, to avoid transmission of genetic disease, and/or if the woman has no uterus, using the couple's or donor gametes. In such circumstances a 'surrogate' mother has no legal rights over the child born. Children are considered stateless until their biological parent applies for citizenship by descent in their home country. Information on Georgian surrogacy practices indicates that foreign intended parents can authorise surrogacy agency staff to sign contracts on their behalf (via a mailed Power of Attorney). Both intended parents appear on the birth certificate. It has been reported on occasion that experts and officials have become increasingly concerned about a lack of oversight and have also considered banning commercial surrogacy.[454]

In Russia the prospective parents must be a heterosexual couple or single woman, who meet certain medical criteria regarding inability to conceive, carry or deliver a child. Stipulations regarding who may act as a surrogate also exist such as age; requirement of having given birth to a previous healthy child; medical certification of good health; and signed permission from husband, if married.[455] The 'surrogate' mother must not be the egg donor. Surrogate mothers are encouraged to see the arrangement as a financial one, and those who appear altruistically motivated may be rejected. Weis describes the policies of surrogacy agencies as discouraging any emotional involvement or a friendly relationship between the intended parents and the surrogacy workers as such relationships are considered messy and as having the potential to spoil both process and outcome.'[456]

The Ukraine allows heterosexual married couples to access surrogacy and register them on the child's birth certificate. The registered parents are required to apply for citizenship and a passport for the child in their home country.

In the United States there are wide variations in whether surrogacy is permitted and if so the types of arrangement allowed across the various states.[457] Approximately 19 states have laws (either statutes or judicial decisions) recognising commercial surrogacy. Of the states that permit commercial surrogacy some grant pre-birth orders meaning the intending parent(s) will appear on the birth certificate. Some states, for example California, enforce gestational surrogacy contracts.[458] Children born as a result of a surrogacy arrangement in the United States are entitled to a United States passport.

Issues relevant to jurisdictions that permit commercial surrogacy are further discussed at section 9.5 below.

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454 Monica Ellena, Georgia Considers Ending Fee-Based Surrogacy, Mar 25, 2014 http://www.eurasianet.org/node/68188 accessed December 2018.

455 The use of ART is regulated by order No. 107H of the Ministry of Healthcare of Russia dated 30 August 2012, "On the Procedure for the Use of Assisted Reproductive Technologies, Contraindications and Restrictions to their Application." See http://www.garant.ru/products/ipo/prime/doc/70218364/.

456 See Christina Weis, 'Workers or Mothers? The business of surrogacy in Russia', 15 December 2015, available at https://www.opendemocracy.net/beyondslavery/christina-weis/workers-or-mothers-business-of-surrogacy-in-russia.

457 For example, some states prohibit all surrogacy (e.g. New York law provides "surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable."); a number prohibit payment to surrogate mothers; others permit commercial surrogacy; some states limit intended surrogate parents to married couples; some states restrict who can act as a surrogacy mother; others have been silent about surrogacy in both legislation and case law

458 *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993).

9.2.4 Jurisdictions that do not have specific laws governing surrogacy

In some jurisdictions there is no direct legislation or regulation of the practice of surrogacy, or no explicit prohibition of altruistic and/or commercial surrogacy. While this has meant some have been used as 'destinations' for commercial surrogacy, in other countries there may be other forms of regulation, for example, guidelines; a common law position recognising or denying surrogacy arrangements; or other laws that operate to prevent commercial surrogacy (for example, via anti-trafficking legislation in Cambodia, Turkmenistan and Azerbaijan). Whether surrogacy is practised in these jurisdictions thus varies. Most often, however, the trend has been that in the states where laws did not exist, and commercial surrogacy has occurred, the government has subsequently enacted laws and policies to prohibit commercial surrogacy and/or to prevent foreigners from entering the country to engage in surrogacy. For example, Thailand, India, Nepal, and Cambodia.

9.3 Western Australians and international commercial surrogacy

The evidence presented to the Review was demonstrative that the greater proportion of Western Australians who have had a child(ren) through surrogacy had entered into an international commercial surrogacy arrangement to do so (with others choosing interstate surrogacy or international surrogacy in Canada, which was perceived as altruistic surrogacy). For example, the Gay Dads WA submission noted:

> *For the period 2010 to 2017 the WA Reproductive Technology Council approved a total of 28 surrogacy applications and recorded 10 births…Members of Gay Dads WA are the parents of 48 children – almost five times the total number of WA surrogacy births over the period 2010 to 2017. 97% of these children were born as a result of overseas commercial surrogacy…*[459]

There were also heterosexual couples who made submissions to and/or attended the face-to-face forums during the consultation period of the Review who had children as a result of commercial surrogacy. Presumably there would be other single people and couples who did not participate in the Review.

All the people who participated in the Review who had undertaken surrogacy or were seeking such an arrangement presented as having a very strong desire to have children. There were examples of people who were willing to sell their house; pay interest only on their mortgages; borrow from family and friends or enter into personal loans with lending agents; take risks in relation to their own health, well-being and safety; and when their arrangement resulted in the birth of a live child (which it is noted was not always the case) return to Western Australia with the child(ren) despite the law not recognising them as legal parents.

For those who had entered into international commercial surrogacy arrangements there were examples of people who had done so in the United States, the Ukraine, Thailand, Mexico, Nepal, and India (noting that in some such jurisdictions commercial surrogacy arrangements are no longer permitted). Some were not able to find a woman willing to act as an altruistic surrogate for them in Australia, others were prohibited by law in Western Australia from entering into such

459 Gay Dads WA, Submission 74.

an arrangement either because of their relationship status, sexual orientation, gender identity, intersex status, or because they had *impending* infertility and/or did not already have a surrogacy arrangement in place.[460] Many had entered into such arrangements only after they had explored all other avenues available to them, including IVF, adoption, and/or fostering and/or had found the laws in Western Australia concerning altruistic surrogacy insurmountable.[461]

The Review also received some submissions from people who said that they preferred the systems of the countries they had engaged in where they were recognised on the child's birth certificate, were considered (in those jurisdictions) as the child's 'legal parents' from birth, and/or the 'contract was legally enforceable'. Sometimes their choice did not just extend to the 'legal certainty' they felt, but also to the way in which they were treated. One woman, for example, described her experiences during the face-to-face forums as follows:

> *In Western Australia my experience had not been good. I felt sometimes when I was being treated at the clinic by the doctors like I was wasting their precious time. They didn't really seem to know what they were doing... It seemed like they didn't even understand how personal all of this is, having to go in there and undergo really intimate examinations and treatments… The doctor at [the clinic] didn't even remember my name, even though I'd seen that same doctor many times before. It all felt very unprofessional. At first, we also couldn't find much information about surrogacy here [in Western Australia] and then we found out how hard it was going to be. After everything we had been through…we looked abroad. We went to the Ukraine. There everything is taken care of, we were treated so well, even the doctor, when he saw me – which was only the second time I'd been there – he waved, then came rushing down the corridor, called me by name, and welcomed me back. It really felt like he genuinely cared. It is also significantly cheaper.*[462]

Two other woman who engaged together in a Skype meeting with me described their respective experiences in the United States. They emphasised that they were 'lucky to be in the position to be able to afford it' and that being considered the parents at birth was important to them.[463] They too also emphasised that the system they had experienced was superior in their view to anything that existed in Western Australia, if not Australia generally. One of these women had only one embryo that she had created with her husband and did not wish to risk using it in Australia and losing it. In her case she had exported the embryo out of Australia to use in the United States which was implanted in a surrogate mother and resulted in the birth of a child. The other woman, who had survived cancer, also had a child resulting from commercial surrogacy in the United States. They both believed that what they had done was illegal in Western Australia. Both were thus very conscious that I committed to complete confidentiality as to their identities. One of the women insisted on using a pseudonym when speaking with me.

460 See discussion above in Chapter 3 and Chapter 4.

461 Ibid. See also for example, Brendan Mahoney, Submission 10; Stephen Page, Submission 65; Charlotte Adams, Submission 68; Danny Rhys Steele, Submission 71; Confidential, Submission 76. Also, personal stories submitted during face-to-face forums, and included in Gay Dads, Submission 74.

462 Woman attendee who had accessed surrogacy in the Ukraine, face-to-face forums Joondalup, 14 April 2018.

463 Woman A had experienced cancer prior to undertaking commercial surrogacy; Woman B had children to a prior marriage, and upon remarriage discovered had suffered miscarriage, undergone IVF, and with one remaining embryo had gone to the United States for commercial surrogacy. Confidential, Skype meeting.

Other submissions highlighted to the Review that the experience could depend on the jurisdiction in which one engaged. For example, a couple who had attempted surrogacy in Mexico and in Connecticut in the United States said:

> *One of our concerns about the clinic we worked with in Mexico was the lack of transparency, and particularly the little information and contact we had with the gestational carrier, both before and during the pregnancy. Over a period of six months we had three unsuccessful cycles of embryo transfers. While we had a confirmed pregnancy on two of these occasions, we lost both babies at a later stage. During this time the laws [there] changed and we could not proceed in Mexico … [We took some time before deciding to try again… in the United States] We wanted this to be different this time – not only for our own reassurance but for the woman carrying our child. After visiting the clinic and agency in Connecticut we left with a feeling of hope and trust… [After being matched with our surrogate, Tracy, and a few months getting to know her and her husband (they are a nurse and a doctor, she has four of her own children, and she was very calm and natural about what we were undertaking together) …] we had two embryos transferred [which resulted in a pregnancy] with a single baby boy. The quality of medical service and legal protection for both the gestational carrier and us as intending parents has come at a financial cost but been greatly reassuring. We have stayed in constant contact with Tracy throughout the pregnancy…In Connecticut we will meet Tracy and her husband at a courthouse to obtain a pre-birth order from a judge acknowledging us as our baby's parents from the moment of birth. When we apply for a birth certificate, it will be both our names listed as his parents. This is wonderful, but sadly something we could never achieve in Australia…*[464]

Similarly, another woman at the forums described having first considered India (before their laws had changed) but said that when she and her family visited a clinic she was not comfortable to hear how the surrogate mothers were spoken to or treated. She and her husband had then pursued surrogacy in the United States. She also emphasised that she liked that they had been considered their daughter's parents from birth.[465] She, however, highlighted that her family's financial position had been significantly compromised by having gone to the United States, noting that she could not buy a better car now, or send her daughter to the school she would liked to have sent her to, because they could no longer afford it.

I also met with a couple who had engaged in commercial surrogacy in India before the laws had changed. They described having spent a significant amount of time in Western Australia trying to adopt a child, only to be told they were too old. They also said that they had tried to foster children but had not been able to. They described finding the scrutiny in Western Australia as too much and the hoops they had to jump through too many. They said they didn't even contemplate surrogacy in Western Australia. In India, they received a birth certificate with both of their names listed as the mother and father of the girl that was born as a result, which they showed to me. They also explained to me that they had been advised not to apply for parenting orders, because as they had a birth certificate, their child was granted Australian citizenship by descent, and she had a passport. They noted that they had been advised 'not to go to unnecessary expense' and their lives were fine without Court orders.[466] They described how much they had wanted and love the little girl who had been conceived using the father's sperm and an egg donor from Eastern

464 John and Aiden in Gay Dads, Submission 74.

465 Woman attendee at face-to-face forum in Perth, 13 April 2018.

466 Private meeting at offices of the Department of Health, April 2018.

Europe. They said they were now intending to engage in another surrogacy arrangement in Kenya.[467]

Similarly, several people who attended the forums, and/or who spoke personally with me, also reported that they had not sought or did not intend to seek orders from the Western Australian Family Court. Surrogacy Australia also submitted:

> *Parents utilising surrogacy arrangements in the US can list both their names on the birth certificate. This [was] also the case for heterosexual couples using India. Such a practice, as well as the granting of an Australian passport under Citizenship by Descent processes, gives the clear majority of parent's sufficient security not to bother applying for parenting orders….Even in cases where one intended parent is not named on the foreign birth certificate, parenting orders are rarely applied for given the need to do this through the court system and the large amount of time, cost and often stress...*[468]

Nevertheless, the Review received several submissions from parents who had engaged in overseas commercial surrogacy who said that they should be granted legal parentage in Australia.[469] Some did not appear aware that they could apply for *parenting orders* which would give them court ordered parental responsibility.[470]

There were people who described being in contact with the surrogate mother on a regular basis, while others had contact at special times during the year. Some described the surrogate mother as part of their extended family. A number lamented that the surrogate mother of their child(ren) was so far away.[471] There were also people who engaged in commercial surrogacy in countries where they were not in direct contact with the surrogate mother.[472] At least two such couples also did not know the identity of the surrogate mother. They said this was the practice in the country and at the time they had undertaken commercial surrogacy. These couples described being told that the mother had been well taken care of and that the money she received had helped educate her children. One couple said while they could not be sure this was the case they were connected to the people who had helped them in that country and trusted that this was so.[473]

Some people who had engaged in international commercial surrogacy noted that there were language differences between them and the surrogate mother thus it would have made communication or contact difficult. In such circumstances this was described as one of the reasons they had communicated through intermediaries or clinics of the country the surrogate mother was in.[474] One intending parent described talking frequently with the surrogate mother who was pregnant with twins using Skype and 'Google Translate' to help them communicate.[475]

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467 Private meeting at offices of the Department of Health, April 2018.

468 Surrogacy Australia, Submission 105.

469 Tracy and Tamburri, Submission 11; Confidential, Submission 42; Confidential, Submission 76; Rebecca Kalpakoff, Submission 83; Confidential, Submission 89.

470 For example, Confidential, Submission 75.

471 Several attendees shared such experiences at the face-to-face forums on 12 April 2018 and 20 April 2018.

472 Attendees shared such experiences at the face-to-face forums on 20 April 2018 and in private meetings with the reviewer at the offices of the Department of Health, April 2018.

473 Attendee at face-to-face forum in Perth, 20 April 2018.

474 Attendees shared such experiences at the face-to-face forums on 20 April 2018 and in private meetings with the reviewer at the offices of the Department of Health, April 2018.

475 For example, Rebecca Kalpakoff, Submission 83.

Many participants in the Review who had engaged in overseas surrogacy arrangements said that they would not have engaged in international commercial surrogacy if they had been permitted or able to undertake surrogacy in Western Australia. Of these people, some said they would have engaged in altruistic surrogacy if it was more readily accessible and the problems described throughout this report were addressed.

Others called for similar systems to that which they had engaged in overseas – particularly the United States and the Ukraine.[476] For example, in separate submissions a husband and wife described how they supported commercial surrogacy being implemented in Western Australia and that they would have preferred to have engaged in surrogacy locally. He said:

> *My daughter was born to an American surrogate in December 2017. Going to America was very much a last resort, we would have much preferred to have a local surrogate as going overseas was daunting and expensive and we felt very removed from the process. We had to go overseas because it was just impossible for us to find a surrogate here or get the support and assistance we needed. I believe WA needs to decriminalise profiting from surrogacy and educate health professionals, so clinics are able to assist.*[477]

The wife submitted:

> *My husband and I couldn't be happier, but it was a long, emotional journey and I really struggled with having a surrogate and pregnancy so far away…We have used every penny of our savings, borrowed a large amount of money from my parents and are left with personal loans and paying interest only on our mortgage just to become parents. In my opinion this is largely because the law of our country/state was not able to accommodate our surrogacy needs.*[478]

Another man described his and his wife's circumstances in which she had been undiagnosed for more than 12 months with ovarian cancer, then subsequent diagnosis meant immediate treatment involving nine weeks of chemotherapy, followed by a hysterectomy, followed by six weeks recovery, and then another nine weeks of chemotherapy. After this, they were informed that egg retrieval was not possible. He described how his wife has two sisters, one of whom was willing to donate her eggs to them. He conveyed:

> *We quickly realised that the laws in WA are behind the times and very restrictive… we didn't want to be in a situation where we invest a lot of time, money and emotion to get to a point where if we could even find a surrogate in WA, we would then have to be judged by a panel called the RTC. This was daunting for both of us. We soon realised that the process in WA was not possible for us so we reached out…and …met a wonderful woman who had just come back from America with a child born through surrogacy…We joined surrogacy pages from overseas [and soon matched with] an incredible woman [who is] now 24 weeks pregnant with not one but two beautiful bundles of joy… West Australians should have the ability to advertise…commercially compensate a surrogate for their services…[and] should not feel like they are judged by the RTC as to whether they should or shouldn't have children…*[479]

476 For example, Woman A and Woman B, above n 460; Confidential, Submission 42; Confidential, Submission 76; Rebecca Kalpakoff, Submission 83; Confidential, Submission 89.

477 Confidential, Submission 76.

478 Confidential, Submission 89.

479 Confidential, Submission 42.

The Review also received submissions from members of the public who said legal parentage should not be granted to people who return from overseas with a child born of a surrogacy arrangement, even if the child has been in their care.[480] Others called for international commercial surrogacy to be made an offence, as this would prevent the situation of people engaging in practices offshore that were not legal here and then seeking recognition of their overseas arrangement in Australia.[481]

9.4 Issues concerning commercial surrogacy in other jurisdictions

Chapter 7 discussed the public policy position that underpins the law in Western Australia and each of the states and the Australian Capital Territory. Each of these jurisdictions permit altruistic surrogacy with reimbursement of reasonable expenses incurred and prohibit commercial surrogacy on the basis that commercial surrogacy *'commodifies the child and the surrogate mother and risks the exploitation of poor families for the benefit of rich ones'*.[482] It was noted in that chapter that in 2016 the Commonwealth House of Representatives Standing Committee took the position that:

> *even if a regulated system of commercial surrogacy could be implemented, the risk of exploitation of both surrogates and children remains significant. Therefore, the Committee strongly supports the current legislative position of Australian States and Territories that the practice of commercial surrogacy remains illegal in Australia.*[483]

The Australian Government response to that recommendation agreed, stating:

> *The Government recognises the serious risks of exploitation and human rights violation in some overseas jurisdictions conducting commercial surrogacy. The Australian Capital Territory, New South Wales and Queensland have extraterritorial provisions prohibiting Australian residents engaging in international commercial surrogacy.*
>
> *At the Commonwealth level, Australia has comprehensively criminalised human trafficking, slavery and slavery-like practices, including servitude and forced labour. These offences have extended geographical jurisdiction and could apply to international commercial surrogacy arrangements that involve the exploitation of the surrogate mother or the child.*[484]

480 Women's Bioethics Alliance, Submission 95.

481 For example, Damian Adams, Submission 40; VANISH, Submission 54; Australian Christian Lobby, Submission 77, Attendee at Face-to-Face consultation, 16 April 2018.

482 Standing Committee of Attorneys-General, *Australian Health Ministers' Conference, Community and Disability Service Ministers' Conference, Joint Working Group, A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009). At http://webarchive.nla.gov.au/gov/20141215115112/http://www.lccsc.gov.au/sclj/archive/former_sclj/standing_council_publications/2009_publications.html accessed December 2018.

483 Commonwealth Government, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (April 2016), [1.19].

484 Australian Government, *Australian Government Response to the Recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters Report*, November 2018, p 3.

It was also noted that reviews conducted in 2018 of state surrogacy legislation in New South Wales[485] and South Australia[486] concurred. Each of these Commonwealth and state reviews considered similar submissions to those made to this Review.

In Chapter 7 it was recommended that Western Australia maintain its current position regarding permitting altruistic surrogacy arrangements, and prohibiting commercial surrogacy.[487] It is here noted that the submissions received regarding international commercial surrogacy, while demonstrative of the lengths to which people from Western Australia have gone to in order to access surrogacy, and not indicative in any way that such people were anything but genuine in their attempts to love and care for a child as a family unit, were not of themselves evidence that the public policy position regarding commercial surrogacy should be altered. Nevertheless, the evidence presented to the Review by such people served to highlight the acute need to address current laws in Western Australia that prevented many of them from engaging in altruistic surrogacy in their home state.

This view was further confirmed via examination of the evidence available to the reviewer regarding the jurisdictions in which commercial surrogacy arrangements are permitted (or was previously permitted and is now prohibited) and issues raised. While some jurisdictions were considered by those in the surrogacy industry and/or intended parents as better than others, and there were stories of successful transactions and relationships, the review found that there are also reports of exploitation and at times, trafficking including in those jurisdictions that are put forward as destinations of choice.

For example, examination of recent media regarding surrogacy in Georgia[488] and the Ukraine[489] revealed articles describing exploitation and poor treatment of women on 'both sides' of the arrangement. The articles present that surrogate mothers were often in financially desperate situations, with children they were otherwise struggling to support. Interviews with some surrogates reported they were told not to complain to intending parents about poor conditions, and to make sure that intending parent(s) believed everything was good. There were also reports that surrogate mothers may be fined for a variety of reasons. In a recent Australian report, it was noted that *'A surrogate has no say in an abortion. She has no rights. Recently this clause was enforced when a heart defect was discovered 17 weeks into the pregnancy of one of [the] surrogates.'* [490]

485 NSW Department of Justice, *Statutory Review: Surrogacy Act 2010*, July 2018, [2.26]- [2.27].

486 Ibid, South Australian Law Reform Institute, [6.2.1].

487 See above Chapter 7, Recommendation 29.

488 Paraszka Boroka, 'The new Caucasian chalk circle: Georgia`s surrogate motherhood business' 128Ora 27 November 2017 at https://168ora.hu/kriziszona/the-new-caucasian-chalk-circle-georgias-surrogate-motherhood-business-12709. Note the largest provider of surrogacy services in Georgia is also known to have set up clinics in countries around the world where regulation was absent (such as Nepal; Cambodia; and Thailand] prior to those countries moving to ban commercial surrogacy.

489 Madeline Roache, 'Ukraine's 'baby factories': The human cost of surrogacy' *Al Jazeera* 13 September 2018 https://www.aljazeera.com/indepth/features/ukraine-baby-factories-human-cost-surrogacy-180912201251153.html; Silvia Blanco, 'The Dark Side of the Ukraine's Surrogacy Boom' 1 October 2018, El Pais at https://elpais.com/elpais/2018/09/27/inenglish/1538051520_476218.html

490 Christopher Bobyn, 'Inside Ukraine's surrogacy industry where Australians are travelling to have a family' ABC News 15 December 2018, https://www.abc.net.au/news/2018-12-15/inside-ukraines-surrogacy-industry/10614172

There have also been complaints by intending parent(s) that embryos have been lost or that they have received lack of explanations when pregnancies failed.[491] In mid-2018 criminal proceedings were brought against the owner of the largest provider of ART and surrogacy services in the Ukraine by the Ukrainian prosecutor general pursuant to laws on trafficking in persons and evasion of taxes.[492] The charges relate to an Italian couple having believed their DNA was used in a surrogacy arrangement only to find out on return to Italy that the child was not related to them. The child was subsequently adopted by another Italian couple. It is also alleged that the clinic recorded, converted and legalised the proceeds from criminal activity and paid salaries involved in the escort and resettlement of foreigners while evading paying tens of millions of Ukrainian hryvnias in taxes.

The review also noted examples of cases of trafficking and/or exploitation spanning the last two decades reported in China, Europe, Thailand, and Nepal.[493] As noted in Chapter 5, there have also been identified cases of Australian people who have attempted, or have accessed, international commercial surrogacy in Russia and Thailand for the purposes of obtaining children for sexual exploitation,[494] or where it was later revealed that the person had a significant prior record of child sex offences.[495]

While surrogacy in the United States was reported as 'a safer option' due to it having a more reliable medical and legal system, it was also found not to be risk free. There have been reported cases of 'baby-selling'[496] and of cases raising significant concern in relation to child welfare and current law that enforces contracts.[497]

491 Madeline Roache, 'Ukraine's 'baby factories': The human cost of surrogacy' *Al Jazeera* 13 September 2018 https://www.aljazeera.com/indepth/features/ukraine-baby-factories-human-cost-surrogacy-180912201251153.html

492 Більше читайте тут: https://tsn.ua/ukrayina/u-kiyevi-vikrili-reproduktivnu-kliniku-yaka-prodala-za-kordon-sotni-ukrayinskih-nemovlyat-1187370.html.

493 For example, cases include but not limited to young Polish women being recruited to travel to Holland, Belgium and Germany to work (illegally in some cases) as surrogates in 1995; women from Myanmar were sold to Chinese men to work as surrogates in 2009. The women 'had been lured to China in the hope of finding jobs' but were instead paid $250.00 to act as surrogates; several Taiwanese, Chinese and Burmese people were arrested for allegedly running an illegal surrogacy ring in Thailand in 2011. In this instance, some of the 14 Vietnamese women being housed as surrogates, seven of whom were pregnant, had been tricked or forced into the arrangements and, according to the Public Health Minister, some had been raped; in Nepal, in 2015 the government shut down the commercial surrogacy trade which involved flying women in from India to act as 'surrogate' mothers for foreign commissioning persons.

494 See above n 246.

495 See *Farnell v Chanbua FCWA [2016] 17*. (Commonly referred to as the 'Baby Gammy' case).

496 Federal Bureau of Investigation, 'Baby-selling ring busted' at http://www.fbi.gov/sandiego/press-releases/2011/baby-selling-ring-busted. Three individuals in the United States were convicted in 2011 of criminal charges relating to paying 'surrogate' mothers to be sent to the Ukraine for implantation with embryos, without any surrogacy arrangements in place. If the pregnancy continued into the second trimester, the unborn children were 'sold' to prospective parents under false representations that they were the result of legitimate surrogacy arrangements in which the original commissioning person(s) had 'backed out'

497 See for example, *C.M. v M.C. A Petition for a Writ of Certiorari* 274228 https://www.thecassidylawfirm.com/global_pictures/U.S._Supreme_Court_Petition_for_Writ_of_Certiorari.pdf; *C.M. v. M.C.*, B270525 (Cal. Ct. App. 2017) at https://www.courtlistener.com/opinion/4341771/cm-v-mc/

In considering the implications of the California system of 'enforceable contracts'[498] the case of *C.M. v M.C.* is noted. In that case M.C., a 47-year-old Californian woman gave birth to triplets pursuant to a surrogacy contract executed in California. C.M., the intended parent, was a single 50-year-old man, a deaf-mute who lived in Georgia in his elderly parents' basement. His parents were both of failing health. His nephew, a 28-year-old male, a long-term heroin addict, lived in the same house. C.M. was reported to have mental health issues and had a history of being cruel to animals. He had repeatedly declared that he was not capable of caring for three children. He had during the pregnancy asked M.C. to abort one or more of the children, but she had refused. The children were removed from M.C. at birth but, as they were premature, were hospitalised for nine weeks. C.M. did not visit the children during this period. The hospital sent three nurses, and at least one doctor to Georgia with the children to deliver them to C.M. The head nurse subsequently called the Georgia Division of Family and Children Services and told the department that C.M. was unfit to raise the children, and that the children should be taken from him. M.C. petitioned to have the children returned to her. The California courts held that Californian law requires a court to enforce the contract. In the Petition for a *Writ for Certiorari* it was noted that the original Court had said, "what happens to the children is none of the Court's business."[499] An appeal was dismissed on the grounds that M.C.'s arguments concerning the interests of the children were foreclosed by specific legislative provisions and by a prior decision by the Supreme Court. Pursuant to 'the well-established law in this area', the Court said its role on appeal is limited to reviewing whether the legislative requirements for establishing an enforceable surrogacy contract had been met.[500]

Advocacy by the American Bar Association (ABA) concerning commercial surrogacy has also been noted by Chief Justice Pascoe (as he then was) as of concern. In referring to the findings of Ms. Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children the Chief Justice said:

> *the …ABA…advocates for commercial surrogacy and for the profit-driven intermediaries who practise globally…[it] notes that "it is undeniable that the commissioning of children through surrogacy — for money — represents a market" and praises this market for allowing international surrogacy to operate efficiently. Consequently, it objects to any attempt to regulate the market, and in doing so rejects application of the best interests of the child standard to surrogacy, rejects most forms of suitability review and evaluation of parental fitness of intending parents, rejects licensing requirements for surrogacy agencies and rejects rights to birth records or origins information. In fact, it rejects "regulation of the surrogacy industry for the purpose of reducing human rights violations"…*[501]

498 Gestational Surrogacy is permitted by statute, California Family Law Sections 7960 – 7962 (2013), with additional supporting case law: *Johnson v Calvert* 851 P.2d 776 (Cal. 1993) and *Buzzanca v Buzzanca* 61 Cal.App.4th 1410 (1998).

499 C.M. v M.C. A Petition for a Writ of Certiorari 274228 https://www.thecassidylawfirm.com/global_pictures/U.S._Supreme_Court_Petition_for_Writ_of_Certiorari.pdf.

500 *C.M. v. M.C.*, B270525 (Cal. Ct. App. 2017) at https://www.courtlistener.com/opinion/4341771/cm-v-mc/

501 The Honourable Chief Justice John Pascoe, AC CVO Family Court of Australia *'Sleepwalking through the minefield: commercial surrogacy and the global response'* Family Court of Australia, Blackburn Lecture Canberra, ANU 15 March 2018, referring to Ms. Maud de Boer-Buquicchio, Special Rapporteur, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material UN Doc A/HRC/37/60 (15 January 2018).

All jurisdictions that allow commercial surrogacy were found to also allow for the buying and selling of human eggs and human sperm. Australian Commonwealth, state and territory laws prohibit commercial trading in human eggs, human sperm or human embryos.[502] While the explanatory memoranda of the Commonwealth Act notes that the s 21 was *'not intended to address the issue of surrogacy'*, it being *'proposed that surrogacy continue to be dealt with through State and Territory legislation and… not be addressed as part of this particular national scheme'*,[503] the Commonwealth law otherwise 'extends to every external Territory'.[504] It does apply to matters relevant to ART and surrogacy such as the use of donated gametes and/or embryos. The law applies abroad as well as within Australia.

9.5 Residency requirements

It is noted that several overseas jurisdictions have recently limited surrogacy to only people who are citizens or married to a citizen of the particular state.[505] The intention is to prevent foreigners from engaging women to act as surrogate mothers for them in cross-border commercial surrogacy arrangements. There is also concern about women being moved across borders to act as surrogate mothers in jurisdictions that have less regulation or permit commercial surrogacy. Only a few jurisdictions currently explicitly allow access to foreigners and do have not residency requirements for example, the United States, the Ukraine and Russia. Proposed bills in both the Ukraine and Russia have been discussed to prevent foreigners from engaging in surrogacy.

9.6 Passports and citizenship by descent

In Australia, at a Commonwealth level, people who have engaged in surrogacy arrangements abroad are able to apply for citizenship by descent for the child(ren) who have been born as a result, provided there is a genetic relationship with one of the intending parent(s), and subsequently a passport. The granting of citizenship by descent involves the determination of applications pursuant to the *Australian Citizenship Act 2007* (Cth).[506] Australian citizenship laws apply universally to the children of an Australian parent and the current law does not give discretion to refuse a child's application for citizenship once it has been established that one of its parents is Australian.[507]

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502 *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) s 21; *Human Cloning and Embryo Research Act 2004* (ACT) s 19; *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (NSW) s 17; *Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003* (Qld) s 17; *Human Cloning and Other Prohibited Practices Act 2003* (Tas) s 17; *Prohibition of Human Cloning for Reproduction Act 2003* (SA) s 16; *Prohibition of Human Cloning for Reproduction Act 2008* (Vic) s 17; *Human Reproductive Technology Act 1991* (WA) s 53Q.

503 The Parliament of the Commonwealth of Australia, The Senate Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006, Explanatory Memorandum (Circulated by authority of Senator Patterson) 2004-2005-2006.

504 *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) s 6.

505 See for example, India and Thailand.

506 *Australian Citizenship Act 2007* (Cth) Part 2 Subdivision 2 Div. A.

507 Department of Immigration and Border Protection, Submission 45, pp. 3-4 to the Commonwealth Government, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (April 2016). (Note the DIBP has been subsumed by the Department of Home Affairs).

Likewise, Australian passport laws[508] apply universally to child passport applications, no matter how the child came to be conceived. If a child is granted Australian citizenship and meets the requirements of the *Passports Act 2005* (Cth) (that is, they meet citizenship, identity and consent requirements) they have a legal entitlement to an Australian passport.[509] Note, if a child is to travel from Australia throughout its life it is likely to have at least four passports issued before it reaches adulthood as they are valid for five years – thus at age 0, 5, 10 and 15 years (and more if it is lost or the child changes its name). Consent of the surrogate mother will be required unless there is a recognised order from an Australian court (such as an order for legal parentage, parental responsibility, adoption, registering a foreign order); or having the passports office dispense with the requirement for consent (which may for example, occur when there 'has been no contact between the child and the nonconsenting person for a substantial period before the application is made'). The latter would reflect that the relationship between the child and the surrogate mother had been severed.

The Review received two submissions that were concerned about the granting of citizenship by descent or the issuance of a passport to children who have been born as a result of commercial surrogacy arrangements, noting that such action does nothing to deter international commercial surrogacy.[510] It is, however, beyond the scope of this Review to make recommendations for changes to Commonwealth laws, which are a matter for the Commonwealth. The Australian Government has emphasised that:

> *Extreme caution is exercised by the Australian Government in cases involving international surrogacy arrangements, to ensure that Australia's citizenship provisions are not used to circumvent either adoption laws or other child welfare laws.* [511]

Further discussion of the impact of Commonwealth laws in relation to Western Australia is had further below (as per the Terms of Reference).

508 *Australian Passport Act 2005* (Cth).

509 Department of Foreign Affairs and Trade, *Submission 47*, p. 3 to Ibid.

510 VANISH, Submission 54; Australian Christian Lobby, Submission 77.

511 Australian Government, *Australian Government Response to the Recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters Report*, November 2018, p 7.

9.7 Extraterritorial offences

9.7.1 The current law

In some Australian states and territories prohibitions on entering into commercial surrogacy arrangements outside of Australia also exist, as the law applies extraterritorially.

In New South Wales it is an offence to enter into, or offer to enter into, a commercial surrogacy arrangement.[512] The legislation provides for a geographical nexis in which a person will be liable to be prosecuted for this offence if they are ordinarily resident or domiciled in New South Wales,[513] or if the offence is committed wholly or partly in New South Wales or has an effect in New South Wales.[514] The maximum penalty is a fine of up to $275,000 (2500 penalty units @ $110/unit) for a corporation or $110,000 (1000 penalty units @ $110/unit) for an individual or imprisonment for up to two years (or both).[515] Offences related to advertising certain matters also apply extraterritorially, including that advertisements related to commercial arrangements attract a maximum penalty which, for an individual, is $110,000 or up to two years imprisonment (or both).

In Queensland it is an offence to enter into, or offer to enter into, a commercial surrogacy agreement.[516] The legislation provides for a geographical nexus in which a person will be liable to be prosecuted for this offence if they were ordinarily resident in Queensland at the time the act was done.[517] The maximum penalty is a fine of up to $11,000 (100 penalty units @ $110/unit) or imprisonment for up to three years. Other offences, which also have extraterritorial effect, relate to advertising, and giving or receiving consideration for, or providing technical, professional or medical services in relation to a commercial surrogacy arrangement.[518]

In the Australian Capital Territory it is an offence to intentionally enter into a 'commercial substitute parent agreement'.[519] The legislation provides for a geographical nexus in which a person will be liable to be prosecuted for this offence if they were ordinarily resident in the Australian Capital Territory at the time the offence was committed.[520] The maximum penalty is a fine of up to $75,000 (100 penalty units @ $750/unit) for a corporation or $15,000 (100 penalty units @ $150/unit) for an individual or imprisonment for up to one year (or both). Other offences, which also have extraterritorial effect, relate to advertising, and procuring or facilitating a commercial substitute parent agreement.

The general underpinning reasoning for such prohibitions is illustrated by the statement of the then New South Wales Minister for Community Service in relation to the extension of prohibitions on commercial arrangements to other jurisdictions:

512 *Surrogacy Act 2010* (NSW) s 8.

513 *Surrogacy Act 2010* (NSW) s 11.

514 *Crimes Act 1900* (NSW) s 10C.

515 *Surrogacy Act 2010* (NSW) s 10.

516 *Surrogacy Act 2010* (Qld) s 56.

517 *Surrogacy Act 2010* (Qld) s 54.

518 *Surrogacy Act 2010* (Qld) ss 55, 57 and 58.

519 *Parentage Act 2004* (ACT) s 41.

520 *Parentage Act 2004* (ACT) s 45.

> *My amendment will … give effect to the policy position agreed to by all States and Territories in Australia that commercial surrogacy is not supported in this country. We all know that the desire to be a parent is very powerful. That instinct is an important part of humanity's survival. However, in this brave new world we must protect everybody involved, including the surrogate mother. … I acknowledge the sadness of people who cannot realise that dream. However, gaining access to children by circumventing local laws and travelling overseas to engage the services of private clinics and then bring the children back to Australia is not a practice that we as the lawmakers of this State should encourage … It is crucial to the long-term psychological wellbeing of children to know who they are and where they come from. As Minister for Community Services I see evidence of this time and again. My amendment relates also to the issues of women's rights and to the potential for exploiting women in a vulnerable position, especially women in poor or developing countries. By making commercial surrogacy an extraterritorial offence we will help to prevent exporting this exploitation of women overseas. We do not support it here so why should we support it overseas.*

In Western Australia section 8 of the *Surrogacy Act 2008* (WA) provides that "a person who enters into a surrogacy arrangement that is for reward commits an offence". The *Surrogacy Act 2008* (WA) itself does not purport to have effect outside Western Australia; however, by operation of section 12 of the Criminal Code, an offence is committed if an act that makes up an element of the offence occurred in Western Australia.[521]

South Australia, Tasmania, and Victoria do not make provision for the extraterritorial effect of their surrogacy legislation.

9.7.2 Application of extraterritorial provisions

The review noted that there have not been any cases brought for prosecution under the extraterritorial provisions in Queensland, New South Wales or the Australian Capital Territory for engagement in international commercial surrogacy. Nor has anyone been prosecuted in Western Australia pursuant to section 12 of the Criminal Code in relation to a surrogacy arrangement undertaken abroad. In Queensland, in June 2011, Watts J in the Family Court of Australia referred two cases[522] to the Director of Public Prosecutions (DPP) that involved intended parents from Queensland who had engaged in commercial surrogacy arrangements in Thailand. The DPP did not proceed with prosecutions.

However, the extraterritorial provisions have proved relevant to considerations regarding applications for the registration of overseas orders that relate to commercial surrogacy arrangements pursuant to the *Family Law Act 1975* (Cth).

521 *Criminal Code Act 1913* (WA) s 12; Farnell v Chanbua FCWA [2016] 17..

522 Findlay & Punyawong [2011] FamCA 503; Dudley & Chedi [2011] FamCA 502.

In cases[523] each heard by Forrest J, Mr Stephen Page, the solicitor acting for each of the respective applicants (and the acting solicitor also in *Rose*) in his written submissions referred to 'public policy considerations concerning surrogacy arrangement' and noted that New South Wales, Queensland, and the Australian Capital Territory have expressly criminalised the entry into commercial surrogacy arrangements abroad by persons ordinarily resident in those States or in the Australian Capital Territory, and then argued that as the applicants were not ordinarily resident in one of those places the prohibition did not apply to them. In granting each of the orders respectively, Forest J held (amongst other things) in relation to *Halvard* that the applicability of extraterritorial prohibitions was not relevant as the surrogacy was an altruistic arrangement; regarding *Grosvenor* that despite the surrogacy having been a commercial arrangement the applicants were not 'ordinarily resident' in Australia as they continued to live in the United States; and in *Sigley,* despite being a commercial arrangement, that the applicants intended to return to Victoria which does not have extraterritorial prohibitions as part of its law.[524]

However, in *Rose* [2018][525] Carew J declined to exercise his discretion in favour of registering an order for parentage in relation to a gestational surrogacy[526] that took place in the United States. The order provided that Mr Rose *'have all the corollary rights and obligations that any genetic or legal parent would have...[and] be treated as the sole Legal Parent for all purposes under the law'*. Mr Rose was considered to be ordinarily resident in the United States, however, the application was filed in Queensland. It was submitted that Mr Rose had grown up in New South Wales and intended to visit Australia from time to time. Carew J said in denying the application:

> *…I would nevertheless decline to exercise my discretion in favour of registration of the C order because I am not satisfied that the Agreement is not a commercial surrogacy. This is of significance because in Queensland commercial surrogacy arrangements are prohibited, attracting penalties of up to three years imprisonment…To register an order which recognises a commercial surrogacy would be contrary to public policy because it would give curial approval to something that is prohibited by law.*[527]

523 *Re: Halvard and Anor* [2016] FamCA 1051 (5 December 2016) at [32]; *Re: Grosvenor* [2017] FamCA 366 (26 May 2017) at [31]; *Sigley & Sigley* [2018] FamCA 3 at [32].

524 In *Re: Halvard and Anor* Mr Halvard was an Australian citizen married to an American citizen residing in the United States. His intention was to visit Australia with his son from time to time. The agreement was found to be altruistic. In *Re: Grosvenor* the applicants were Australian citizens who had prior to relocating to the U.S. lived in Canberra up until 2014, where members of their family still lived. They expressed intention to return to Australia in January 2018 upon the conclusion of Mr Grosvenor's posting to the United States. They were considered to be 'not ordinarily resident' in Australia; In *Sigley & Sigley* Forrest J found the applicants expressed intention to return to Australia permanently, their Australian citizenship, and years of being ordinarily resident in Victoria prior to relocating to the U.S. on temporary work visas.

525 *Rose* [2018] FamCA 978 (23 November 2018).

526 Pursuant to section 70G of the *Family Law Act 1975* (Cth) which provides the statutory basis for the making of regulations enabling the registration of 'overseas child orders, other than excluded orders'. An 'overseas child order' is defined in s four of the Act and relevantly includes an order made by a court of a 'prescribed overseas jurisdiction' that 'however it is expressed, has the effect of determining the person or persons with whom a child who is under 18 is to live, or that provides for a person or persons to have custody of a child who is under 18'. 70H and 70J of the *Family Law Act 1975* (Cth) are also relevant in that they provide for the effect of registration.

527 *Rose* [2018] FamCA 978 (23 November 2018) at [48].

Carew J further noted:

> *It seems to me that the payment of rent, mortgage expenses and utility expenses fall into the category of a 'payment, reward or other material benefit or advantage' that is directly related to the entering into the Agreement. Such payments do not fall within the definition of a birth mother's surrogacy costs. The explanatory notes to the Queensland legislation make it clear that the intention of the legislature was to bring Queensland into line with other States and Territories by decriminalising altruistic surrogacy arrangements while maintaining a prohibition on commercial surrogacy. The application to register an overseas child order that may arise out of a prohibited commercial surrogacy arrangement is contrary to the clear intention of parliament. There are no competing public policy considerations in this case such as the child being in need of protection… Accordingly, I decline to exercise my discretion to register the order.*[528]

Thus, while it has been recognised that there 'have been no prosecutions for offences under these laws' and 'the practical effectiveness of such extraterritorial criminal laws to deter overseas surrogacy has been doubted',[529] as illustrated by Rose extraterritorial provisions have a practical as follows:

- they prohibit advertising and procuring or facilitating a commercial substitute parent agreement when there is a geographical nexus to the respective jurisdictions, noting that penalties apply to individuals and corporations
- they are relevant to whether the Family Court has registered orders from overseas concerning commercial surrogacy arrangements from overseas jurisdictions.

It may also be erroneous to conclude that because some people choose to enter into commercial surrogacy arrangements abroad that the laws prohibiting such action do not have a deterrent effect. That is, while they may not have deterred those who go ahead and engage in commercial surrogacy anyway, there has been no research conducted to determine how many people choose *not* to enter into commercial surrogacy arrangements because they are deterred by or uphold the laws of Australia.

In this regard as the reviewer of the Western Australian legislation I respectfully disagree with the findings of the South Australian SALRI review that referred to the 'ineffectual nature' of such provisions.[530] With respect, it appears that that review's conclusions were drawn from a focus primarily on the absence of prosecution of intending parent(s) who had potentially breached the law, and assumed that the law has no deterrent effect based only upon evidence that some people choose to engage in commercial surrogacy abroad in spite of the law. The current review was presented a number of cases in which people sought only 'altruistic' surrogacy as they did not agree with commercial surrogacy arrangements, some expressed concern regarding the potential impacts on the surrogate mother and the child(ren) born as a result; and some (who believed that Western Australian provisions did have extraterritorial effect) who said they did not

528 *Rose* [2018] FamCA 978 (23 November 2018) at [55]-[56].

529 See David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975* (SA) (South Australian Law Reform Institute, Adelaide, 2018), p124 citing also the House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (April 2016) 23 [1.71], 31 [1.113].

530 Ibid, [12.3.5].

wish to break the law.[531] There were also people who had chosen not to go overseas but rather were seeking altruistic arrangements in Western Australia, some waiting for the law to change so that they could proceed.

In the current Review, it was apparent that some people believed they had broken the law and were concerned about not revealing their identities – noting if confidentiality had not been guaranteed some may not have participated in the Review nor disclosed information as fully and frankly as they did. It also appeared to be the case that people were being advised to move address (or at least make it appear that they were resident in a state such as Victoria) in order to present that they did not reside in, nor engage in an overseas commercial surrogacy arrangement from, an Australian jurisdiction that has such prohibitions.[532] The lack of uniformity across the country in this regard, makes this possible.

9.7.3 Submissions

Gay Dads WA recognised that:

> *In some States, there are specific extraterritorial prohibitions on commercial surrogacy arrangements, but in Western Australia offences relating to surrogacy arrangements and reproductive technology have extra-territorial effect by virtue of s 12 of the criminal code of Western Australia.*[533]

As noted above, I also met and spoke with many people during face-to-face forums and private consultations who had undertaken surrogacy arrangements. Some believed that they had committed a crime by entering into commercial surrogacy overseas. Some said the law should be changed. Others said they would not have done so if they could have accessed altruistic surrogacy in Western Australia. Others said they would not enter a commercial surrogacy arrangement overseas because it was illegal, and/or because they were not comfortable with commercial surrogacy and were concerned about the implications for women and children.

Mr. Stephen Page, the solicitor who acted in the above-mentioned cases discussed at 9.8.2, submitted:

> *The provisions of sections 6 and 8 of the Surrogacy Act and section 12 of the Criminal Code means that they may have in some cases committed an offence under Western Australian law. No-one has been prosecuted…. If those in Western Australia undertake surrogacy abroad, then there ought to be the ability (currently denied them) to seek a declaration from the Court that they are the parents of the child - and thereby have judicial scrutiny by Judges of the Family Court of Western Australia.*[534]

531 Attendees at face-to-face forums, April 2018; personal communications by members of the community to the reviewer, 2018.

532 See for example case study in Chapter 4, section 4.8 above.

533 Gay Dads WA, Submission 74.

534 Stephen Page, Submission 65.

The Reproductive Technology Council noted:

> *New South Wales, the Australian Capital Territory and Queensland all have extraterritorial reach in relation to the prohibition of commercial surrogacy…Western Australia does not have specific exterritorial provisions in the Surrogacy Act; and while prosecution under s 12 of the Criminal Code 1913 (WA) may be possible where any part of a commercial surrogacy arrangement is undertaken in WA, this has little practical effect since overseas-based agents and clinic representatives are seldom in WA for sufficient periods to initiate proceedings [or not at all]…Council recommends amendment of the Surrogacy Act to give extraterritorial effect to the prohibition of commercial surrogacy, at least insofar as those provisions apply to persons other than the persons who have parental responsibility for a/ the resulting child. (Noting the paramountcy of welfare of the child whose interests may not be served by prosecution of the person/s having parental responsibility.*[535]

The views and evidence concerning the application of the extraterritorial provisions were considered when formulating the findings and recommendations below.

9.8 Legal parentage

9.8.1 Current law

Jurisdiction

Western Australia is unique among Australian states in that it is the only state with its own Family Court.[536] The Family Court operates under Western Australian legislation and Commonwealth legislation. The *Family Law Act 1975* (Cth)[537] (FLA) is used by the WA Family Court regarding those married people who want to divorce and make arrangements for children, property and spousal maintenance. The *Family Court Act 1997* (WA) (and associated rules and regulations)[538] covers child and property matters for de facto relationships. The Court also has responsibility under the *Adoption Act 1994* (WA) and the *Surrogacy Act 2008* (WA). In Farnell & Anor and Chanbua, Thackray J held that a matter concerning an international commercial surrogacy arrangement falls for determination under the *Family Court Act 1997* (WA).[539]

Family law matters in all other states are dealt with by two federal Courts – the Family Court of Australia and the Federal Magistrates Court, both of which operate under the *Family Law Act 1975* (Cth).[540] The Family Court in Western Australia operates under Western Australian legislation and Commonwealth legislation – depending on the matter.

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535 RTC, Submission 122.

536 The Family Court of Western Australia is an integrated court, in that it combines the functions of a Superior court and a lower Court. Officially, the WA Family Court is two courts in one – the Family Court itself (constituted by its Judges) and a Magistrates Court (constituted by Family Law Magistrates).

537 and the *Family Law Rules 2004* (Cth) and *Family Law Regulations 1984* (Cth).

538 See https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a1839_subsidiary.html.

539 Following consideration of sections 60H, 60HB, and 60F of the FLA and finding that s 60(H)(1) of the FLA does not apply to children born of surrogacy, and s 60F (1) of the FLA has no application to children born as a result of artificial conception. That the *Surrogacy Act 2008* did not apply as the pre-conditions had not been met; and pursuant to the state *Artificial Conception Act 1985* (WA).

540 *Farnell v Chanbua FCWA* [2016] 17.

Legal parentage

In all states and territories of Australia issuance of citizenship by descent or a passport does not confer on the intending parent(s) legal parentage of the child born as a result of an international commercial surrogacy arrangement in Australia.

In Western Australia, under the *Surrogacy Act 2008* (WA) judges of the court may make parentage orders and other related orders to transfer the parentage of a child from his or her surrogate birth parent/s to the child's arranged parents. However, for such an order to be made, any person wishing to enter into a surrogacy arrangement must comply with all the requirements of the Act (and Regulations and Directions).[541]

Persons bringing a child into Western Australia that was born as a result of an international commercial surrogacy arrangement abroad (or indeed any commercial surrogacy arrangement) are unable to apply for an order for a legal parentage order under the *Surrogacy Act 2008* (WA) as such arrangements do not meet the legal pre-conditions for an order for legal parentage to be made.[542] Further, such people are not considered a legal parent of the child pursuant to provisions in the *Artificial Conception Act 1985* (WA) which provide:

1. Where …a woman becomes pregnant in consequence of an artificial fertilisation procedure and the ovum used for the purposes of the procedure was taken from some other woman, then for the purposes of the law of the State, the woman from whom the ovum was taken is not the mother of any child born as a result of the pregnancy.
2. Where… a woman becomes pregnant in consequence of an artificial fertilisation procedure and a man (not being the woman›s husband) produced sperm used for the purposes of the procedure, then for the purposes of the law of the State, the man shall be conclusively presumed not to have caused the pregnancy; and is not the father of any child born as a result of the pregnancy.[543]

In the case of surrogacy arrangements, the woman who becomes pregnant is the surrogate mother, a woman who provided her ovum or man who provided his sperm is considered a donor regardless of whether they are the intended parent(s) – that is, their *intention* is not the deciding factor. In this regard, in *Farnell v Chanbua*, Thackray J noted the contradictory positions in the prior cases of *W v C*[544] and *Blake*[545] and observed:

> *… any interpretation which makes the paternity of a child dependent upon the intention of the donor of the sperm would be a recipe for disaster … arrangements involving artificial fertilisation procedures come in a variety of forms.… If the intention of the sperm donor was to be determinative, the question would arise, at what point on the spectrum does the father's intended involvement in the life of the child change his status from sperm donor to father? … In my view, the law in this area is already sufficiently fraught for it to be highly undesirable to introduce the contestable element of "intention". One need only look at the time and money expended on this litigation to see how difficult it can be to establish intention.*

541 Family Court of Western Australia, https://www.familycourt.wa.gov.au/S/surrogacy.aspx?uid=1460-8294-1524-5599 accessed December 2018.

542 See further *Farnell v Chanbua* FCWA [2016] 17..

543 *Artificial Conception Act 1985* (WA).

544 *W v C* [2009] FCA 61.

545 *Blake* [2013] FCWA 1.

In the Family Court of Australia, the same position was arrived at in the appeal case of *Bernieres and Anor & Dhopal* [2017], which was the first time the full-bench of the Family Court of Australia decided such an application. The full bench of the Family Court held that the parentage of children born of surrogacy arrangements entered into overseas or in Australia is a 'state matter' and cannot be resolved within the present *Family Law Act 1975* (Cth). Prior applications for legal parentage by people from the other states had seen various single court judges of the Commonwealth family law courts apply the *Family Law Act 1975* (Cth) in differing ways. The Full Court of the Family Court in *Bernieres and Anor & Dhopal* [2017] said:

> *60HB of the Family Law Act 1975 (Cth) specifically addresses the position of children born under surrogacy arrangements,[][546] leaving s60H to address the status of children born by means of conventional artificial conception procedures. …[T]he plain intention of s 60HB is to leave it to each of the States and Territories to regulate the status of children born under surrogacy arrangements, and for that to be recognised for the purposes of the Act.*[547]

The Full Bench in Bernieres noted that in the case before them there was no question that the father was the child's biological father, but that does not translate into him being a 'parent' for the purposes of the Act. Further, the mother was not the biological mother, and thus was even less likely to be the "legal parent". As the intended parents did not meet the criteria required of their state Act (in this case Victoria) legal parentage orders could not be granted.[548] The Full Bench also agreed with the lower court judgement from which the case before them had been appealed, in that while the circumstances surrounding the birth of the child were not dealt with directly either by the relevant state legislation or by reference to section 60HB *'it is not open to [the Court to] fill the legislative vacuum …by judicial interpretation; [this can] only be done by legislation.'*[549] They therefore held there was no merit to the appeal and did not grant legal parentage orders.

This has not, however, foreclosed applications to the Family Court of Australia which has seen subsequent applications and single judge orders granting registration of overseas orders resulting from commercial surrogacy arrangements in Australia. As noted above at 9.8.2 in the 2018 case of *Sigley and Sigley* such orders were granted by Forrest J in relation to an overseas order to transfer legal parentage following a commercial surrogacy arrangement in an unnamed United States jurisdiction.[550] In his reasons for judgment, Forrest J identified that the Applicants reside in the USA and not one of the jurisdictions of Australia that have extraterritorial prohibitions and that it was presented to the Court that they intended to return to live in the State of Victoria at some time in the future – which does not have such prohibitions. The acting solicitor argued on behalf of the clients that as:

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546 Section 60HB provides that for children born under surrogacy arrangements (1) If a court has made an order under a prescribed law of a State or Territory to the effect that: (a) a child is the child of one or more persons; or (b) each of one or more persons is a parent of a child; then, for the purposes of this Act, the child is the child of each of those persons…

547 *Bernieres and Anor & Dhopal and Anor* [2017] FamCAFC 180 at [62].

548 In this regard it was also noted that s 69VA of the *Family Law Act 1075* (Cth) was of no assistance and is not an independent source of power.

549 *Bernieres and Anor & Dhopal and Anor* [2017] FamCAFC 180 at [62] referring to *Bernieres and Anor & Dhopal and Anor* [2015] FamCA 736 at [121].

550 *Sigley & Sigley* [2018] FamCA 3. As noted above, relevant to the application to register the Orders of the State C Court in the Family Court of Australia were ss 70G, 70H and 70J of the *Family Law Act 1975* (Cth) which provide for registration of orders and the effect of registration.

- Victoria allows intended parents to enter into commercial surrogacy arrangements overseas at least in that it has not sought to criminalise such behaviour
- entry by the Applicants into the commercial surrogacy agreement was lawful in the state of the United States where the twins were conceived
- the Australian government had not determined to criminalise entry by Australian citizens or residents into commercial surrogacy agreements overseas as, arguably, it could do, registration of the overseas orders should be granted. In *Sigley*, Forrest J agreed. Forrest J had also previously granted such applications as discussed above in *Re Grosvenor*[551] and Re *Halvard*.[552]

However, as noted above at 9.8.2, in a similar case, *Rose,* Carew J more recently declined an application filed in Queensland to make such an order noting that:

> *[t]o register an order which recognises a commercial surrogacy would be contrary to public policy because it would give curial approval to something that is prohibited by law.*[553]

As granting or denying an application to register such orders is based on the discretion of the judge there is no particular rule as to whether such applications will be granted or refused. Nevertheless, it does appear that the presence or absence of extraterritorial prohibitions on the actions undertaken are relevant. In addition, Carew J emphasised the importance of upholding the public policy position taken in Australia concerning commercial arrangements.

Parenting orders

The Family Court of Western Australia may consider an application for a parenting order which does not confer legal parentage but is an order that relates to how parenting responsibilities will be allocated in the best interests of the child.[554] For example, in the case of *Adair & Anor and Bachan* [2017][555] the Family Court of Western Australia made orders granting *equal shared parental responsibility* to the biological father, Mr Adair, of twins born in India as a result of a commercial surrogacy arrangement and his former partner, Mr Bonfils, who lived with Mr Adair and shared the care of twins. The birth mother had been served with the application and expressed she had no objection. In noting that the Court must proceed with caution, particularly due to the risk of exploitation of vulnerable women in poorer countries, Duncanson J granted the orders in favour of the applicants on the following basis:

> *…I have approached this matter on the basis that the best interests of the children are the paramount consideration….*[556] *The children have a meaningful relationship with the applicants and it is to their benefit that it continues. They are not at risk of harm in their care. ….*[557] *I have considered the terms of the Surrogacy Agreement*

551 *Re: Grosvenor* [2017] FamCA 366 (26 May 2017).

552 *Re: Halvard and Anor* [2016] FamCA 1051 (5 December 2016).

553 *Rose* [2018] FamCA 978 (23 November 2018) at [48].

554 *Family Court Act 1997* (WA), ss 88(c), 84(2a) and 89(1). Any party "concerned with the care, welfare or development" of a child may apply for an order for parental responsibility and the Family Court may allocate such responsibility.

555 FCWA 78.

556 Ibid [54].

557 Ibid [65].

and notwithstanding concerning issues which can arise from such agreements, in the circumstances of this case I am satisfied that the orders sought are in the best interests of the children.[558] *…They are loved and cared for by the first and second applicants who make sound and reliable provision for their futures.*[559]

It is noted that parenting orders were made in the above discussed Family Court of Australia case of *Bernieres* which were governed by Part VII of the *Family Law Act 1975* (Cth)[560] – the original lower Court judge finding that such orders 'were entirely appropriate'.[561]

9.9 Discussion

The questions for this review were to consider international commercial surrogacy, how the laws of the Commonwealth and other states may impact upon Western Australia, and to consider aspects of legislation of other jurisdictions, which could be incorporated into the *Surrogacy Act 2008* (WA), including consideration of harmonisation of domestic surrogacy legislation.

The legal position with respect to surrogacy in Western Australia, all other states, and the Australian Capital Territory is one that prohibits commercial surrogacy on the grounds of strong public policy objections to the risk of exploitation and/or commodification of women and children. There are significant penalties for engaging in such arrangements domestically, and transfer of legal parentage would not be possible if a commercial surrogacy arrangement occurred in Western Australia (regardless of any genetic connection to the child of the intending parent(s)).

The Australian Capital Territory, New South Wales, and Queensland have extraterritorial offences, which also prohibit people from engaging in commercial surrogacy and related practices overseas. In Western Australia the Criminal Code may apply if an offence is committed and at least one of the acts, omissions, events, circumstances or states of affairs that make up those elements occurs in Western Australia.[562] Thus also providing some extraterritorial application but requiring an element of the offence to occur within the State. Nevertheless, despite such prohibitions and extraterritorial effect of laws in some jurisdictions, it is evident that some Australians, including Western Australians, travel abroad to engage in commercial surrogacy in jurisdictions in which either the law supports such arrangements or where there is no law preventing them from doing so. In contrast, there were also people who participated in the Review who reported that they would not enter into a commercial surrogacy arrangement. Some such people had or were considering seeking, altruistic arrangements in other jurisdictions, while others were hoping Western Australian legislation would be amended so they may enter into a lawful altruistic arrangement in their home state.

For those who choose to enter into commercial surrogacy arrangements abroad, where there is a genetic connection to the child(ren) born as a result they may apply for an Australian citizenship by descent and subsequently a passport; others will apply for long-term visas for the child, and subsequently enter the country. That there is an apparent conflict between all of the states and

558 Ibid [65].

559 Ibid [72]-[73].

560 *Bernieres and Anor & Dhopal and Anor* [2015] FamCA 736 at [128]-[132]; Bernieres and Anor & Dhopal and Anor [2017] FamCAFC 180 noting such orders at [33].

561 *Bernieres and Anor & Dhopal and Anor* [2015] FamCA 736 at [132].

562 *Criminal Code Act 1913* (WA) s 12.

the Australian Capital Territory prohibiting commercial surrogacy (including extraterritorially in some jurisdictions) and the Commonwealth Government enabling children born as a result of commercial surrogacy arrangements abroad to enter Australia has been recognised. But, there is also the dilemma that it may not be in the best interests of the child to leave them in the country in which they have been born, where the surrogate mother does not want to and/or cannot care for them, and where the intended parent(s) – who may also be one or both the genetic parent(s) of the child – may not have entitlement to stay.

Some, on return to Australia with a child or children born as a result of such an arrangement would like to have 'legal parentage' granted to them. Others may seek 'parenting orders' so that there is a legal order giving them parental responsibility over the child. The position in law was explained in the judgment of Thackray J in *Farnell & Chanbua* as being that the Family Court of Western Australia has jurisdiction regarding this issue, that legal parentage cannot be conferred on the 'intending parents' as the arrangements do not meet the requirements of the *Surrogacy Act 2008* (WA), that they are not 'legal parents' regardless of their intention pursuant to the *Artificial Conception Act 1985* (WA), but that parenting orders may be made if such orders are in the best interests of the child.

In relation to the other states and territories, the Full Bench of the Family Court of Australia, has agreed with Thackray's J reasoning, further noting that it is for the states and territories to regulate the status of children born as a result of surrogacy and not for the Family Court to *'fill a legislative vacuum'*. Arguably, the 'vacuum' or 'gap' exists to the extent that it is via judicial reasoning that such a position has been arrived at, rather than explicit legislative provision regarding whether legal parentage should or should not be conferred in circumstances in which people have engaged in international commercial surrogacy arrangements and then appear before the respective Australian family law courts with baby in hand. Notably, again, the Courts are placed in the unenviable position of having to make some kind of order in relation to a situation that offends the public policy position taken by Commonwealth, state and territory governments prohibiting commercial surrogacy but that cannot be ignored given the existence of a child(ren).

Other applicants have instead sought to have orders granted in the overseas jurisdiction registered by the Family Court of Australia. There are, however, again issues concerning the registering of an order from another jurisdiction where a commercial surrogacy arrangement has occurred as such registration may be seen as contrary to public policy because it would give curial approval to something that is prohibited by law. While in *Rose* such application was denied, in other cases they have been granted – particularly when the parties do not ordinarily reside in one of the jurisdictions that has extraterritorial prohibitions on such arrangements. It is noted that while section 70J(2)(a) of the *Family Law Act 1975* (Cth) requires the Court to consider whether 'the welfare of the child is likely to be adversely affected 'if the order is not made' it does not require consideration of whether the foreign legal parentage order considered and/or upheld the welfare or best-interests of the child (or the surrogate mother). This is not a consideration, for example, in California, where the Californian Supreme Court of Appeal has clearly stated that considerations about the welfare of the child are of no concern to the Court in enforcing surrogacy contracts.

While it does not appear that such declarations have been/may be sought in Western Australia, it is relevant that Western Australians are being instructed by, for example, Queensland lawyers, to sign agreements in Victoria. The reason for this perhaps is to avoid the presence of extra-territorial laws which is thought to then allow them to travel overseas, and perhaps to return seeking recognition of an order from the country they engaged in commercial surrogacy.

Others still – indeed the vast majority – enter Australia with the child having been given a birth certificate with the intended parent(s) names on it, Australian citizenship, a passport, (or a long-term visa), and decide never to appear before the Courts at all (and are in fact advised by surrogacy 'support' groups and/or their lawyers not to unless their circumstances necessitate doing so.)

Taking all of the above into account, it was found that Commonwealth laws when coupled with the current laws and inaccessibility of altruistic surrogacy in Western Australia, and inconsistency in state legislation regarding the presence of extraterritorial prohibitions, may lead some people who are seeking surrogacy to travel to other jurisdictions where:

- they are able to access surrogacy when they cannot in Western Australia
- the commercial nature of surrogacy leads to a readier availability of women willing to act as surrogate mothers[563]
- there are significantly less requirements placed on the intending parent(s) (or scrutiny) than that in Western Australia (or other states of Australia or the Australian Capital Territory)
- there is placement of the intended parent(s) names on birth-certificates (often whether or not there is a genetic relationship with the child)
- contracts are enforceable (again with little or no judicial scrutiny of questions concerning the welfare of the child)
- there is the ability to come back into Western Australia with the child(ren) born as a result and apply for citizenship by descent and a passport for the child(ren), or an extended visa; and have no further requirements for scrutiny of the arrangement or to subsequently appear before a Court.

As noted, the issues raised in this regard are complex. They do not just raise issues as to whether legal parentage should be granted at the end but also require consideration of what has led the intended parent(s) to engage in commercial arrangements overseas and what aspects of the regulation of surrogacy in Western Australia need amendment in order to address this. They also require consideration of the apparent contradictions to public policy at a commonwealth level that allows people to bring child(ren) back into the country following a commercial surrogacy arrangement.

The recommendations throughout this report, if implemented, will serve to:

- remove discriminatory provisions that prevent access to altruistic surrogacy in Western Australia
- remove unnecessary and obstructive steps to entering into a lawful surrogacy arrangement
- require publication and consideration of costs related to mandated counselling and legal advice

563 Whether or not they are considered to be 'exploited' commercial surrogacy in many jurisdictions involves women for whom the payment they receive will be a significant sum of money compared to what they would ordinarily earn. Some such women may be in debt, face financial distress, and/or may be unable to support their own children. In the United States there is evidence that women may be from a variety of lower middle-class families, including but not limited to single income families, lower middle class, or army wives, albeit this is not always the case.

- allow clinics to advertise that women wanting to volunteer to act as altruistic surrogate mothers may express their interest to the clinics while maintaining prohibitions on charging fees for such advertising or introduction services to the surrogate mothers or intending parent(s)
- reduce costs burdens
- increase support and information provided to intending surrogate mothers, parent(s), professional service providers and the public.

In turn, such changes may serve to reduce the number of people from Western Australia who seek surrogacy abroad.

Introducing provisions for extraterritorial application of the law, consistent with New South Wales, Queensland, and the Australian Capital Territory, would be consistent with the strong public policy position taken against commercial surrogacy. It would establish clarity in the law enabling people to know *before* they enter into commercial surrogacy arrangements abroad and/or engage in other prohibited practices that they would be committing an offence. It would also make clear that such law applies not only to individual people but also to the conduct of corporations overseas and support the stated policy position across Australia that supports prohibitions on commercial surrogacy. It would also serve to harmonise Western Australia's law to a greater degree with New South Wales, Queensland and the Australian Capital Territory.

Discussion should also be had with the Commonwealth Government and other states and territories concerning the issue of the granting of citizenship, passports, and/or long-term visas to children born as a result of commercial surrogacy arrangements. This is of course, a matter for the Commonwealth, and I am not in a position in this review to recommend whether or what changes might apply. I, however, note the impact of the current Commonwealth laws and practices upon Western Australia. In *Farnell v Chanbua* Thackray J said:

> *The arrangement leading to the births of Pipah and Gammy would never have been put in place had it not been for the fact that a department of the Australian Government provided assurances that the children would receive citizenship and automatic entry to this country. Such assurances could not be provided if the citizenship laws were harmonised with all the other laws of this country.*[564]

Thackray J noted the current basis for providing citizenship on the basis that there is a "biological link between the child and the commissioning parent" or "an Australian citizen is a parent as that word is understood in ordinary usage" *'relies upon a decision of the Full Court of the Federal Court in H v Minister for Immigration and Citizenship (2010) 188 FCR 393 [which] … did not involve a person born as the result of an artificial conception procedure, let alone a surrogacy arrangement.'* [565] Given the specific complexities that arise in relation to ART, donor-conception, and surrogacy, and the strong public policy position against commercial surrogacy taken in Australia, it does appear that further consideration needs to be given to these issues specifically.

It would also be useful to discuss with the Commonwealth the provision of uniform information to the public concerning Commonwealth laws that *'comprehensively criminalise human trafficking, slavery and slavery-like practices, including servitude and forced labour'* noting the Australian Government's response to its House of Representatives Standing Committee inquiry into

564 *Farnell v Chanbua* FCWA [2016] 17 at [759].

565 Ibid.

surrogacy stated that *these offences have extended geographical jurisdiction and could apply to international commercial surrogacy arrangements that involve the exploitation of the surrogate mother or the child*.[566]

I also recommend the Government consider whether to require that all applicant parent(s) for Australian citizenship, a passport, or a visa for a child who has been born as a result of an international surrogacy agreement and with whom intended parent(s) intend to reside in Western Australia, should be issued with notice that they must appear before the Family Court of Western Australia within a certain time (specified) to allow the Court to consider whether the granting of *parenting orders* is in the best interests of the child. This would avoid the current situation of people avoiding the Courts altogether because they do not wish to incur further costs or scrutiny of the arrangement. It would also allow an appropriate order to be made to secure the child's interests. Additional hurdles, scrutiny, and costs related to engaging in surrogacy agreements abroad, may also serve as another factor that deters people from engaging in such activity.

In relation to 'legal parentage' of children born as a result of international surrogacy arrangements, it is noted that a number of other bodies are presently considering such issues. At an international level the Permanent Bureau of The Hague Conference on Private International Law has been examining private international law issues relevant to legal parentage and cross-border surrogacy arrangements. Former Chief Justice John Pascoe AC CVO of the Family Court of Australia has represented Australia in his personal capacity at the Experts' Group commissioned by The Hague Conference since November 2015. The Group had its final meeting in January 2019 following which The Hague Conference will now decide whether to progress further its work in relation to cross-border surrogacy. In addition, as mentioned at section 2.2, the Australian Law Reform Commission (ALRC) is considering whether the *Family Law Act 1975* (Cth) should be amended to better reflect the diversity of family in which children are cared for, and to better support decision making by the courts in cases where children are living in non-traditional families. It is important for the Government to continue to monitor the outcomes of such reviews.

I note that as the reviewer of the Western Australian legislation I did not find agreement with a suggestion made by the Family Law Council in 2013 (endorsed in the South Australian Law Reform Institute's review report)[567] that the most appropriate way to protect the interests of children born to Australians of overseas surrogacy arrangements would be to enact a Commonwealth law to provide the Family Court with 'a discretionary power to transfer parentage from the surrogate mother to the intended parents where certain 'safeguards' or criteria have been satisfied.'[568] The assumption that this would offer a *'practical solution' that would allow recognition of 'properly regulated international surrogacy jurisdictions'* [569] appears to lack foundation noting the many issues of concern that are discussed in this report relating to jurisdictions that permit commercial surrogacy.

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566 Australian Government, *Australian Government Response to the Recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters Report*, November 2018, 3.

567 Written by Dr. Cressida Limon Lecturer, Faculty of Law, University of Western Sydney; then the Research Fellow for the Family Law Council.

568 See summary of laws around the globe above at section 9.2 of this report.

569 David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975* (SA) (South Australian Law Reform Institute, Adelaide, 2018), p 303 [26.3.12].

Such a suggestion also begs the question of what criteria would be used to determine whether a jurisdiction that permits commercial surrogacy is 'properly regulated'? California, for example, has laws, but its Supreme Court has emphasised that the concern of such law is with the validity of the contract and its enforcement, not with ensuring the welfare or best interests of the child. All of the jurisdictions provide for, and are engaged in, the buying and selling of human sperm, human eggs, and human embryos, which is also contrary to Australian state, territory and Commonwealth law. None of them has laws protecting the interests of children born as a result of such arrangements for example, that require the recording and release of identifying information about donors of gametes, embryos and/or surrogates to surrogacy-born or donor-conceived people. None provides services in which contact with the donor(s) of gametes or embryos or the surrogate mother may be mediated. In all such jurisdictions, donor anonymity is lawful and practised – and in many such jurisdictions encouraged.

Most importantly, the Family Law Council suggestion fails to recognise that such action would conflict with, and potentially undermine, the strong public policy stance taken against commercial surrogacy within the Western Australian law (and all states and the Australian Capital Territory).

While I am extremely mindful that some people who I met during the review may be disappointed with a position that does not support international commercial surrogacy, I am also mindful that the limits and boundaries of the law have been set based upon great consideration of the risks presented by both commercial and altruistic surrogacy arrangements. This moves beyond individual situations and requires consideration of the broader implications the law has for women, children and those who seek surrogacy and ART. Commercial surrogacy is prohibited in Western Australia and the findings of this review do not support changing that. Altruistic surrogacy is permitted but only when criteria is met that is intended to ensure the wellbeing of all parties involved, and that it is undertaken in a manner that sees the best interests of children as the paramount consideration. It would not be appropriate for the State to then endorse practices elsewhere that do not meet the standards agreed upon for citizens within the State, or by those who choose to uphold the law rather than circumvent or breach it.

Findings

1. Despite prohibitions on commercial surrogacy and extraterritorial effect of laws in some jurisdictions, some Australians, including Western Australians, travel abroad to engage in commercial surrogacy. Other people who participated in the review reported that they would not enter into a commercial surrogacy arrangement. Some such people had or were considering seeking altruistic arrangements in other jurisdictions, while others were hoping Western Australian legislation would be amended so they may enter into a lawful altruistic arrangement in their home state.
2. The impact of Commonwealth citizenship and passport laws, lack of uniformity of extraterritorial prohibitions across the states, and the current Western Australian law which serves to exclude certain people from accessing altruistic surrogacy in Western Australia may lead *some* people who are seeking surrogacy to travel to other jurisdictions where:
    - they are able to access surrogacy when they cannot in Western Australia
    - the commercial nature of surrogacy leads to a greater availability of women willing to act as surrogate mothers
    - there are significantly fewer requirements placed on the intending parent(s) (or scrutiny) than that in Western Australia (or other states of Australia or the Australian Capital Territory)

- there is placement of the intended parent(s) names on birth-certificates (often whether or not there is a genetic relationship with the child)
- contracts are enforceable (again with little or no judicial scrutiny of questions concerning the welfare of the child)
- there is the ability to come back into Western Australia with the child(ren) resulting from the surrogacy and apply for citizenship by descent and a passport for the child(ren), or an extended visa; and have no further requirements for scrutiny of the arrangement or to subsequently appear before a Court.

3. It is misplaced to focus only on the issue of whether legal parentage should be granted once such people are in Western Australia with the child(ren) who were born as a result. Consideration must be given to:
   - what has led the intended parent(s) to engage in commercial arrangements overseas
   - what aspects of the regulation of surrogacy in Western Australia need amendment in order to address this
   - what has happened at a Commonwealth level to allow people to bring child(ren) back into the country following a commercial surrogacy arrangement.
4. The recommendations throughout this report, if implemented, will serve to increase access to altruistic surrogacy in Western Australia. In turn, such changes may serve to reduce the number of people from Western Australia who seek international commercial surrogacy.
5. Introducing provisions that provide for extraterritorial application of the law, consistent with New South Wales, Queensland, and the Australian Capital Territory, would support the public policy position taken against commercial surrogacy and establish at law – before people enter into commercial surrogacy arrangements abroad and/or engage in other prohibited practices – that they would be committing an offence. It would also serve to harmonise Western Australia's law to a greater degree with those jurisdictions.
6. Discussion should be had with the Commonwealth government and other states and territories concerning the issue of the granting of citizenship, passports, and/or long-term visas to children born as a result of commercial surrogacy arrangements given the specific complexities that arise in relation to ART, donor-conception, and surrogacy, and the strong public policy position against commercial surrogacy taken in Australia. The Commonwealth, state and territory governments have called for 'greater harmonisation of laws'. This may include "consideration of whether Commonwealth citizenship laws should be harmonised with all the other laws of this country".[570]
7. Discussion with the Commonwealth should also be had about the provision of uniform information to the public concerning Commonwealth laws that *'comprehensively criminalise. human trafficking, slavery and slavery-like practices, including servitude and forced labour'* noting the Australian Government's response to its House of Representatives Standing Committee inquiry into surrogacy stated that *'these offences have extended geographical jurisdiction and could apply to international commercial surrogacy arrangements that involve the exploitation of the surrogate mother or the child'.*

570 *Farnell v Chanbua FCWA* [2016] 17. per Thackray J.

8. The Western Australian Government should consider whether to require that all applicant parent(s) who are granted entry into Australia with a baby born as a result of an overseas surrogacy arrangement with whom they intend to reside in Western Australia, should be issued with notice that they *must* appear before the Family Court of Western Australia within a certain time (specified) to allow the Court to consider whether the granting of *parenting orders* is in the best interests of the child. This would:
    - avoid the current situation of people avoiding the Courts altogether because they do not wish to incur further costs or scrutiny of the arrangement
    - allow an appropriate order to be made to secure the child's interests
    - serve as another factor that may discourage people from engaging in such activity due to additional hurdles, scrutiny, and costs.
9. The Government should monitor ongoing discussion and outcomes concerning the work of The Hague Conference on Private International Law and the ALRC on matters relevant to legal parentage.
10. As the reviewer of the Western Australian legislation I did not find agreement with the suggestion by the Family Law Council in 2013 (endorsed in the South Australian Law Reform Institute's review report) that the most appropriate way to protect the interests of children born to Australians of overseas surrogacy arrangements would be to enact a Commonwealth law to provide the Family Court with *'a discretionary power to transfer parentage from the surrogate mother to the intended parents where certain 'safeguards' or criteria have been satisfied.'* [571] The assumption that this would offer a *'practical solution'* that would allow recognition of *'properly regulated international surrogacy jurisdictions'* [572] appears to lack foundation noting the many issues of concern that are discussed in this report relating to jurisdictions that permit commercial surrogacy. It begs the question of what criteria would be used to determine whether a jurisdiction that permits commercial surrogacy is 'properly regulated'? Most importantly, it fails to recognise that such action would conflict with, and potentially undermine, the strong public policy stance taken against commercial surrogacy within the Western Australian law (and all states and the Australian Capital Territory).
11. Commercial surrogacy is prohibited in Western Australia and the findings of this review do not support changing that. Altruistic surrogacy is permitted, but only when criteria is met that is intended to ensure the psychological and sociological well-being of all parties involved, and that it is undertaken in a manner that sees the best interests of children as paramount. It would not be appropriate for the State to then endorse practices elsewhere that do not meet the standards agreed upon for citizens within the state or by those who choose to uphold the law rather than circumvent or breach it.

571 See summary of laws around the globe above at section 9.2 of this report.

572 David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975* (SA) (South Australian Law Reform Institute, Adelaide, 2018), p 303 [26.3.12].

Recommendations

Recommendation 42

That the Western Australian Government seeks to address matters that may lead some people to travel to other jurisdictions to engage in commercial surrogacy arrangements including, but not limited to:

- the current Western Australian law which serves to exclude certain people from accessing altruistic surrogacy in Western Australia
- the impact of Commonwealth citizenship and passport laws
- lack of uniformity of extraterritorial prohibitions across the states.

via introducing necessary amendments to remove barriers to accessing altruistic surrogacy, consulting with the Commonwealth regarding laws that do not correspond to the public policy position taken in Australia and discussing with other jurisdictions the need for harmonisation regarding extraterritorial prohibitions relevant to commercial surrogacy.

Recommendation 43

That the Western Australian Government considers the recommendations in this report in light of the need to increase access to altruistic surrogacy in Western Australia which in turn may serve to reduce the number of people from Western Australia who seek international commercial surrogacy.

Recommendation 44

That the Western Australian Government amends the *Surrogacy Act 2008* (WA) to provide for extraterritorial application of the law, consistent with New South Wales, Queensland and the Australian Capital Territory which would make it an offence to enter into, or engage in, other practices related to commercial surrogacy arrangements abroad and/or other prohibited practices.

Recommendation 45

That the Western Australian Government consults with the Commonwealth about the provision of uniform information to the public concerning the Commonwealth laws that *'comprehensively criminalise human trafficking, slavery and slavery-like practices, including servitude and forced labour'* noting *'these offences have extended geographical jurisdiction and could apply to international commercial surrogacy arrangements that involve the exploitation of the surrogate mother or the child'* (referred to by the Australian Government in its response to its House of Representatives Standing Committee inquiry into surrogacy).

Recommendation 46

That the Western Australian Government requires that all applicant parent(s) who are granted entry into Australia (on whatever basis) with a baby born as a result of an overseas surrogacy arrangement with whom they intend to reside in Western Australia, should be issued with notice that they *must* appear before the Family Court of Western Australia within a specified time to allow the Court to consider whether the granting of *parenting orders* is in the best interests of the child.

Recommendation 47

That the Western Australian Government monitors ongoing discussion and outcomes concerning the work of The Hague Conference on Private International Law and the ALRC on matters relevant to legal parentage.

Recommendation 48

That commercial surrogacy is prohibited in Western Australia and the findings of this review do not support changing that. Altruistic surrogacy is permitted, but only when criteria are met that is intended to ensure the psychological and sociological well-being of all parties involved, and that it is undertaken in a manner that sees the best interests of children as paramount. It would not be appropriate for the State to then endorse practices elsewhere (for example via recognition of legal parentage orders in cases of international surrogacy) that do not meet the standards agreed upon for citizens within the State or by those who choose to uphold the law rather than circumvent or breach it.

Recommendation 49

That the Western Australian Government considers whether it is necessary to make explicit provision in the relevant legislation that the transfer of legal parentage is not available in circumstances in which a child has been born as the result of an international commercial surrogacy arrangement that offends the law in Western Australia.

Chapter 10

Further Assisted Reproductive Technology and Surrogacy-Related Matters

Chapter 10:
Further Assisted Reproductive Technology and Surrogacy-Related Matters

10.1 Introduction

This final chapter gives consideration to further matters relevant to ART and surrogacy that fell within the terms of reference and were raised with the Review. These include:

1. **State legislation:** Powers, enforcement and disciplinary provisions
2. **State legislation:** Recognition of birth registration and equivalent laws
3. **Commonwealth legislation:** Medicare
4. **Commonwealth and State legislation:** International trade in gametes and embryos and anonymous donations.

10.2 State legislation: Powers, enforcement and disciplinary provisions

The terms of reference require consideration of the effectiveness of the current regime, reporting requirements, powers of inspection and investigation, powers of obtaining information, powers of enforcement and disciplinary provisions under the Surrogacy Act, and the adequacy of offences, penalties and timeframe for bringing proceedings. Some of these matters have been discussed throughout this report and recommendations made for change that will improve the operation and effectiveness of the current regime.

There are a few additional matters regarding certain powers and provisions included in the *HRT Act 1991* (WA) and the *Surrogacy Act 2008* (WA) that have been included by the Department in the Bill that was placed before Parliament while this review was being undertaken. The proposed amendments include:

1. Changes to section 14 of the *HRT Act* make it clear that the functions of Council extend to advising the Minister and the DG (Department of Health) on matters of administration and enforcement of the *Surrogacy Act*.
2. Existing section 54 of the *HRT Act* authorises an officer to investigate a breach or possible breach of that Act. Proposed new section 55A of the *HRT Act*, will extend that authority to an officer to investigate a breach or possible breach of the *Surrogacy Act*.
3. The proposed section 55A provision will also permit a justice, where duly satisfied on the evidence, to exercise the same power available under existing section 55 of *HRT Act* to issue a warrant to an authorised officer or member of the police force to enter, search and seize records and other evidence, in relation to an offence or suspected offence under the *Surrogacy Act*.

While proposed amendment (1) is consistent with current legislation and the role of the Reproductive Technology Council in its current form, it is noted that in light of the findings and recommendations in this review that such a proposal would have to be considered an interim measure. This review has recommended that the RTC be abolished and a new advisory body be established whose role would not be regulatory in nature. It has also recommended that the *HRT Act*, HRT Regulations, and HRT Directions be repealed, and new legislation drafted to create a co-regulatory system for the governance of ART. If the recommendation that the RTC be abolished be implemented, then in the future the powers included in the current Bill before Parliament should lie with the Minister for Health and delegates.

In relation to the proposed amendments to the *HRT Act 1991* (WA) that would:

- extend authority to an officer to investigate a breach or possible breach of the *Surrogacy Act 2008* (WA)
- permit a justice, where duly satisfied on the evidence, to exercise the same power available under existing section 55 of *HRT Act* to issue a warrant to an authorised officer or member of the police force to enter, search and seize records and other evidence, in relation to an offence or suspected offence under the *Surrogacy Act* are acceptable

the regulatory approach recommended in this report is noted. That is, the recommendations reflect that the regulatory approach should be one that emphasises cooperation, mutual respect and oversight which is responsive and flexible. This includes use of regulatory and compliance mechanisms such as education, information dissemination, good communication, an openness to feedback from those being regulated (including addressing consumer and clinic complaints), and support. While it is also a recommendation in Part 1 of this report that powers of enforcement continue to be included in the Act and fall to the Minister/DG of the Department and/or their appointed representative, it is emphasised that such powers should only be exercised when lower level compliance mechanisms have failed or where behaviour has been, or is, particularly egregious. It is recommended that if such amendments are enacted, that the powers conferred be carried out in a manner consistent with the recommended responsive regulatory model in this report. Such powers would then complement the recommended system of regulation to enable such behaviour to be investigated and addressed if required.

Findings

1. Current proposals before Parliament to amend the *HRT Act* would provide the Reproductive Technology Council (RTC) with powers of enforcement in relation to the *Surrogacy Act 2008* (WA) that are consistent with powers under the current *HRT Act* as to its role regarding ART.
2. While conferring such powers in the short term may provide such consistency, the recommendations of this report are for:
    - a co-regulatory approach to governing ART and surrogacy which emphasises cooperation, mutual respect, and oversight that is responsive and flexible
    - the abolition of the Reproductive Technology Council (RTC) and the establishment of a new advisory body. This report has recommended that the 'advisory body' would not have the role of 'regulator', 'enforcer' or adviser to the Minister for Health or DG on matters relating to the administration or enforcement of the Act. Rather it is recommended in this report that it would focus on advising the Minister for Health in relation to ethical, social and legal issues related to ART and surrogacy.

It was found that in the future such powers should lie with the Minister responsible for the Act and the relevant department and should complement the system of regulation that has been proposed to the extent that such powers of enforcement would enable egregious behaviour to be investigated and addressed if required.

Recommendations

Recommendation 50

That current proposals before Parliament to amend the *HRT Act* to confer power on the RTC to advise the Minister for Health in relation to the administration and enforcement of the *Surrogacy Act* be considered an interim measure in light of the findings and recommendations of this review. In particular, the recommendations that the RTC be abolished and a new advisory body be established whose role would not be regulatory in nature.

Recommendation 51

If the recommendation that the RTC be abolished is implemented, then in the future powers related to the administration and enforcement of the *Surrogacy Act* should lie with the Minister for Health and delegates.

Recommendation 52

Current proposed amendments to the *HRT Act 1991* (WA) would:

- extend authority to an officer to investigate a breach or possible breach of the *Surrogacy Act 2008* (WA)
- permit a justice, where duly satisfied on the evidence, to exercise the same power available under existing section 55 of *HRT Act* to issue a warrant to an authorised officer or member of the police force to enter, search and seize records and other evidence, in relation to an offence or suspected offence under the *Surrogacy Act*.

It is recommended that if such amendments are enacted, that the powers conferred be carried out in a manner consistent with the recommended responsive regulatory model proposed in this report. That is, they would only be used when other compliance measures had failed, or the behaviour was particularly egregious. Such powers would then complement the recommended system of regulation to enable such behaviour to be investigated and addressed if required.

10.3 State legislation – Recognition of birth registration and equivalent laws

Australia is a federation of states and territories and the practice of altruistic surrogacy may involve parties who are in different jurisdictions and more than one jurisdiction's laws may be relevant. The review found that there is need for further consideration to be had regarding:

- whether 'reciprocal arrangements' directed toward state-based births, deaths, and marriages registers; and/or courts responsible for the transfer of parentage should be introduced
- the extent to which such arrangements should apply
- what should occur should one state change its laws in a manner that is not consistent with the laws of Western Australia.

The review did not have the opportunity to consider such issues in enough depth or have further time to consult with the respective departments of births, deaths, and marriages nor the Family Courts to determine the extent to which such arrangements should apply, and/or practical considerations about their operation and effectiveness. It will be important to do so.

When making such considerations it may also be useful to be mindful of jurisdiction 'shopping' and concerns that lawyers are advising people of ill-health to fly from one state in Australia to another for the signing of documents in states that may permit what is not permitted in the jurisdiction in which they usually reside, or the surrogate resides, or the lawyer resides.

Findings

1. That further consideration, research and consultation is required by the Minister (Department of Health) regarding:
    - whether 'reciprocal arrangements' directed toward state-based births, deaths, and marriages registers; and/or courts responsible for the transfer of parentage in relation to lawful altruistic surrogacy arrangements should be introduced
    - the extent to which such reciprocal arrangements should apply
    - what should occur should one state change its laws in a manner that is not consistent with the laws of Western Australia.

Recommendations

Recommendation 53

That the Minister and the Department of Health give further consideration, and conduct research and consultation, regarding:

- whether 'reciprocal arrangements' directed toward state-based births, deaths, and marriages registers, and/or courts responsible for the transfer of parentage in relation to lawful altruistic surrogacy arrangements, should be introduced
- the extent to which such reciprocal arrangements should apply
- what should occur should one state change its laws in a manner that is inconsistent with the laws of Western Australia.

10.4 Commonwealth legislation – Medicare

The review received several submissions concerning the inability of people who are accessing surrogacy in Australia to use Medicare.[573] It is noted that Medicare is governed by the Commonwealth Government and it is not within the power of the Western Australian Minister for Health to address this issue. This availability of Medicare does however impact Western Australians seeking surrogacy. It is noted that the 1999 Select Committee review of the *HRT Act* also recognised this issue, recommending in 1999 'that the Western Australian Minister for Health approach the Commonwealth Government with a view to allowing in vitro fertilisation (IVF) surrogacy treatments to be considered by Medicare as any other IVF treatment'. I concur with this view and as such recommend the same.

Findings

1. That Medicare funding related to ART for surrogacy arrangements would reduce the costs and support altruistic surrogacy arrangements in Western Australia. They may also serve to support people in choosing not to travel to other jurisdictions to engage in commercial surrogacy.
2. Medicare funding is a matter for the Commonwealth.
3. In 1999, the Western Australia Select Committee review of the *HRT Act* it was recommended that the Western Australian Minister for Health approach the Commonwealth Government with a view to allowing in vitro fertilisation (IVF) surrogacy treatments to be considered by Medicare as any other IVF treatment. I concur with this view and as such recommend the same.

573 Tracy and Tamburri, Submission 11; Confidential, Submission 9; Confidential, Submission 42; Confidential, Submission 52; ANZICA WA Fertility Counsellors (Joint Submissions), Submission 61; Hollywood Fertility, Submission 75; Daniella Stone, Submission 79; Confidential, Submission 89; Confidential, Submission 91; Kate Ranger, Submission 101; RTC, Submission 122.

Recommendations

Recommendation 54

That the Western Australian Minister for Health approach the Commonwealth Government with a view to allowing in vitro fertilisation (IVF) surrogacy treatments to be considered by Medicare as any other IVF treatment.

10.5 Commonwealth and State Legislation: International trade in gametes and embryos and anonymous donations

As noted at 9.5, Australian Commonwealth, state and territory laws prohibit commercial trading in human eggs, human sperm or human embryos.[574] The Commonwealth law 'extends to every external Territory'.[575] Such prohibitions are relevant to ART and surrogacy including the use of donated gametes and/or embryos. The law is consistent with public policy view that does not accept trade or commerce in relation to human reproductive capabilities or materials.

The Government and its delegates, when considering applications made to it under the *HRT Act 1991* (WA), *Surrogacy Act 2008* (WA) or relevant regulations or directions, must consider the welfare of any child who may be born as a result of ART and/or surrogacy, as well as the welfare of participants. It may also be relevant to consider the impact of any decision on any existing children within the applicant family.

In considering applications for the import or use of donor gametes or embryos, relevant considerations include, but are not limited to, the donation practices in the place of origin and whether:

- commercial trading in gametes and embryos is permitted
- donor identifying information is recorded and available to any resultant child.

The review found that it is consistent with the law to impose restrictions on the import and export of human reproductive material and to promote compliance with the requirements of the *HRT Act 1991* (WA) and *Surrogacy Act 2008* (WA). However, on rare occasion there may be a need to exercise some discretion for situations in which there are exceptional circumstances. Any such consideration of whether there are exceptional circumstances would require taking into account the welfare of any child who may be born as a result of ART and/or surrogacy as being paramount; as well as consideration of the welfare of participants and the interests or impact of any decision on existing children within the applicant family and the consistency with Australian law. For example, an immigrant family who used an altruistic anonymous donor in their home country to have a child before immigrating to Australia, who have embryos stored and wish to use such embryos to complete their family creating a full sibling for their current child, might be

574 *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) s 21; *Human Cloning and Embryo Research Act 2004* (ACT) s 19; *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (NSW) s 17; *Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003* (Qld) s 17; *Human Cloning and Other Prohibited Practices Act 2003* (Tas) s 17; *Prohibition of Human Cloning for Reproduction Act 2003* (SA) s 16; *Prohibition of Human Cloning for Reproduction Act 2008* (Vic) s 17; *Human Reproductive Technology Act 1991* (WA) s 53Q.

575 *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) s 6.

approved. On the other hand, it would not be consistent with Australian law to permit persons who travel to another jurisdiction and engage with the commercial trade in gametes or embryos or specifically to procure an anonymous donation, to permit such gametes or embryos to then be imported into Australia.

Findings

1. The review found that it is consistent with the law to impose restrictions on the import and export of human reproductive material and to promote compliance with the requirements of the *HRT Act 1991* (WA) and *Surrogacy Act 2008* (WA).
2. On rare occasion there may be a need to exercise some discretion for situations in which there are exceptional circumstances, in a way that is consistent with Australian law. Such circumstances would need to be considered on a case-by-case basis and approval sought from the Minister for Health or DG of the Department or delegate.
3. Decisions should take into account the welfare of any child who may be born as a result of ART and/or surrogacy, as well as the welfare of participants. It would also be relevant to consider the interests or impact of any decision on existing children within the applicant family.

Recommendations

Recommendation 55

It is consistent with the law to impose restrictions on the import and export of human reproductive material and promote compliance with the requirements of the *HRT Act 1991* (WA) and *Surrogacy Act 2008* (WA). It is recommended that discretion be exercised for situations in which there are exceptional circumstances – to be decided on a case-by-case basis and approval sought from the Minister for Health or delegate. It is recommended that in such circumstances decisions should uphold the welfare of any child that may be born as a result of ART and/or surrogacy as the paramount consideration. Also to be considered are the welfare of participants, the interests or impact of any decision on existing children within the applicant family, and the law.

Appendix 1:
Advertising of the review, including the call for submissions and notices regarding community consultations

Advertising appearances 2018

Call for submissions

Publication	Date
The West Australian	Saturday 27 January
Sunday Times	Sunday 28 January
Out in Perth Magazine	Friday 2 February
Community Newspapers (x17)	Monday 5 February
Albany Advertiser	Thursday 8 February
Augusta Margaret River Times	Friday 9 February
Avon Valley Advocate	Wednesday 7 February
Broome Advertiser	Thursday 8 February
Bunbury Herald	Tuesday 6 February
The South Western Times (Bunbury)	Thursday 8 February
Busselton Dunsborough Times	Friday 9 February
Canning/Victoria Park Examiner	Wednesday 7 February
Collie Mail	Thursday 8 February
Countryman	Thursday 8 February
Esperance Express	Friday 9 February
Examiner Newspapers (Armadale, Gosnells, Serpentine – Jarrahdale)	Thursday 8 February
Fremantle Herald	Saturday 10 February
Geraldton Guardian	Friday 9 February
Midwest Times (Geraldton)	Wednesday 7 February
Great Southern Herald	Thursday 8 February
Kalgoorlie Miner	Saturday 10 February

Publication	Date
Kimberley Echo	Thursday 8 February
Koori Mail	Wednesday 7 February
Mandurah Mail	Thursday 8 February
Mandurah Telegraph	Wednesday 7 February
Manjimup Bridgetown Times	Wednesday 7 February
Midland Kalamunda Echo	Saturday 10 February
Perth Voice (The)	Saturday 10 February
Pilbara News	Wednesday 7 February
Post Newspapers	Saturday 10 February

The below ad featured in the above papers:

Government of **Western Australia**
Department of Health

Review of the *Human Reproductive Technology Act 1991* and *Surrogacy Act 2008*
Call for Submissions

An independent review of the Western Australian *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008* is being conducted by Associate Professor Sonia Allan. The Department of Health invites comments and submissions from interested parties.

Copies of the legislation, submission instructions and terms of reference for the review can be accessed via:

ww2.health.wa.gov.au/review

Closing date: 5pm Friday 16 March 2018

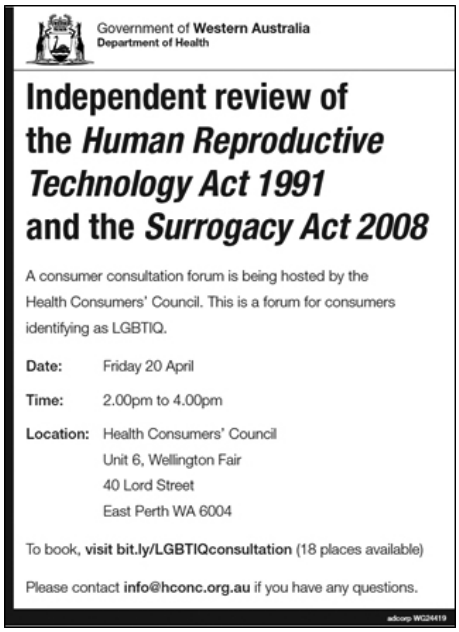
Comments and submissions can be emailed to HRTSR@health.wa.gov.au or posted to:
Program Manager
Reproductive Technology Unit
Patient Safety and Clinical Quality
Clinical Excellence Division
Department of Health
Perth WA 6004

adcorp WG23732

Community consultations

Publication	Date
South Western Times	Thursday 22 March
The West Australian	Tuesday 20 March
The West Australian	Saturday 24 March
Community Newspapers (x17) paper buy WA	Tuesday 20 March
Out in Perth Magazine	Saturday 7 April

This ad promoted the community consultations in Out in Perth Magazine:



Government of **Western Australia**
Department of Health

Independent review of the *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008*

A consumer consultation forum is being hosted by the Health Consumers' Council. This is a forum for consumers identifying as LGBTIQ.

Date: Friday 20 April

Time: 2.00pm to 4.00pm

Location: Health Consumers' Council
Unit 6, Wellington Fair
40 Lord Street
East Perth WA 6004

To book, **visit bit.ly/LGBTIQconsultation** (18 places available)

Please contact **info@hconc.org.au** if you have any questions.

adcorp WG24419

This ad was used for all the other publications for community consultations (The South Western Times (Bunbury), The West Australian and Community Newspapers):

Government of **Western Australia**
Department of Health

Review of the *Human Reproductive Technology Act 1991* and *Surrogacy Act 2008*

Community consultations

An independent review of the *Western Australian Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008* is being conducted by Associate Professor Sonia Allan.

As part of phase two of the review, A/Professor Allan will be conducting in-person consultations. She would like to meet with consumers; donors; donor-conceived people; and other interested members of the public.

Community consultation sessions are being held at:

Date	Time	Venue
Friday 13 April 2018	2.00pm to 4.00pm	Health Consumers' Council Unit 6/40 Lord St, Perth
Saturday 14 April 2018	1.00pm to 3.00pm	Joondalup Library Meeting room 1, 102 Boas Avenue, Joondalup
Monday 16 April 2018	10.00am to 12.00pm	Bunbury Library Small meeting room, 1 Parkfield St, Bunbury

We invite you to come along to share your experiences or views about assisted reproduction, surrogacy, donor conception, and/or related matters.

No booking is necessary, however, if you wish to register your intention to attend or cannot attend but would like to speak to Associate Professor Allan. Contact:

Program Manager
Reproductive Technology Unit
Department of Health
Email: HRTSR@health.wa.gov.au
Telephone: (08) 9222 4334

For further information about the review see **ww2.health.wa.gov.au/review**

adcorp WG24293

Appendix 2:
List of initial contacts to whom letters of invitation were sent inviting participation in the Review

	Contact Person	Organisation/ Department
1.	Des Martin Chief Executive Officer	Aboriginal Health Council of Western Australia
2.	Jenni Millbank	Academic
3.	Kathy Sloan	Academic
4.	Renata Klein	Academic
5.	Ken Daniels	Academic
6.	Naomi Cahn	Academic
7.	Dominique Martin	Academic
8.	Patricia Fronek	Academic
9.	Denise Cuthbert	Academic
10.	Megan Munsie	Academic
11.	Isabel Karpin	Academic, UTS
12.		ACCESS Australia
13.	Chair	ANZICA
14.		Australian Donor Conception Network
15.		Australian Family Association
16.		Australian Human Rights Commission
17.		Australian Medical Association
18.		Australian Mitochondrial Disease Foundation
19.	Secretary	Baha'i Centre of Learning
20.	President	Buddhist Society of Western Australia
21.	Ashley Reid Chief Executive Officer	Cancer Council WA
22.	Marcy Darnovsky Executive Director	Center for Genetics and Society

	Contact Person	Organisation/ Department
23.	Eric Blyth	Centre for Applied Childhood Studies University of Huddersfield
24.	Robyn Lawrence Chief Executive	Child and Adolescent Health Service, Princess Margaret Hospital
25.	Robert Norman	Clinician
26.	Antonia Clissa	Concept Fertility Centre
27.	Iolanda Rodino	Concept Fertility Centre
28.	Bruce Bellinge	Concept Fertility Centre
29.	Executive Officer	Council of Churches of WA
30.	Petra Thorn	Counsellor
31.	Vice Chancellor	Curtin University
32.	Jackie Tang Assistant Director-General	Department of Communities, Child Protection and Family Support
33.	Joanna Scheib	Department of Psychology, University of California
34.	Marilyn Crawshaw	Department of Social Policy and Social Work, University of York
35.	Daphne White Manager	Desert Blue Connect (Women's Health Resource Centre Inc)
36.	Nick Pachter	Director of Genetic Services WA
37.		Donor Conception Support Group
38.	Hans Van Hoof	Donor Register FIOM
39.	Wendy Kramer	Donor Sibling Registry
40.	Liz MacLeod Chief Executive	East Metropolitan Health Service
41.	Vice Chancellor	Edith Cowan University
42.	Phil Matson ERBSWA President	Endocrine and Reproductive Biology Society of WA
43.	Sheryl de Lacey	Faculty of Medicine, Nursing and Health Sciences Flinders University
44.		Family Court of Western Australia
45.		Family Voice Australia
46.		Fay Gale Centre for Research on Gender University of Adelaide

	Contact Person	Organisation/ Department
47.	Elizabeth Webb	Fertility North
48.	Vince Chapple	Fertility North
49.	Michael Chapman President	Fertility Society Australia
50.	Kim O'Dea Secretary	Fertility Society Australia
51.	Louise Black	Fertility Specialists of WA, Bethesda Hospital
52.	Roger Hart	Fertility Specialists of WA, Bethesda Hospital
53.		FINRRAGE
54.	Damien Riggs	Flinders University
55.		Freedom Centre
56.	Diane Snooks Director	Fremantle Women's Health Centre Inc
57.	Amanda Samanek	Genetic and Rare Disease Network WA
58.	Helen Mountain	Genetic Services of WA, King Edward Memorial Hospital
59.	Hugh Dawkins Director	Genomics
60.	Gloria Moyle Coordinator	Goldfields Women's Healthcare Association Inc
61.	Emma Basc CEO	Gosnells Woman's Health Service Inc
62.	Stephen Page	Harrington Family Law
63.	Nigel Laing	Harry Perkins Institute
64.	Rebekah Worthington CEO	Hedland Well Women Centre Inc
65.	Pip Brennan	Health Consumers' Council of WA
66.	President	Hindu Association of WA Inc.
67.	Cailin Jordan	Hollywood Fertility Centre
68.	Simon Turner	Hollywood Fertility Centre
69.	Deborah Foster-Gaitskell	Hollywood Specialist Medical Centre
70.		Human Fertilisation & Embryo Authority
71.		International Social Service

	Contact Person	Organisation/ Department
72.	Andrea Credo Director	ISHAR Multicultural Women's Health Centre Inc
73.	President	Islamic Council of Western Australia
74.	President	Jewish Community Council of Western Australia (Inc)
75.		JIGSAW
76.	Kempton Cowan Chief Executive	Joondalup Health Campus
77.	Bronwyn Stuckey	Keogh Institute for Medical Research QEII Medical Centre
78.		Living Proud
79.	Justin Manuel Manager	M Clinic
80.		Melbourne Anonymous Donors (MADMen) (c/-Mr Ian Smith)
81.	Damian Adams	Member of Public associated w/ ART, Donor Conception, or Surrogacy
82.	Penny Mackieson	Member of Public associated w/ ART, Donor Conception, or Surrogacy
83.	Sarah Dingle	Member of Public associated w/ ART, Donor Conception, or Surrogacy
84.	Kimberley Springfield	Member of Public associated w/ ART, Donor Conception, or Surrogacy
85.	Myfwany Cummerford	Member of Public associated w/ ART, Donor Conception, or Surrogacy
86.	Natalie Parker	Member of Public associated w/ ART, Donor Conception, or Surrogacy
87.	Michael Williams	Member of Public associated w/ ART, Donor Conception, or Surrogacy
88.	Ross Hunter	Member of Public associated w/ ART, Donor Conception, or Surrogacy
89.	Chloe Alworthy	Member of Public associated w/ ART, Donor Conception, or Surrogacy
90.	Kim Buck	Member of Public associated w/ ART, Donor Conception, or Surrogacy
91.	Lauren Burns	Member of Public associated w/ ART, Donor Conception, or Surrogacy

	Contact Person	Organisation/ Department
92.	Linda Alveres	Member of Public associated w/ ART, Donor Conception, or Surrogacy
93.	Adam Quinlivan	Member of Public associated w/ ART, Donor Conception, or Surrogacy
94.	Bridgette Reynolds	Member of Public associated w/ ART, Donor Conception, or Surrogacy
95.	Patsy Molloy General Manager	Midland Women's Health Care Place Inc
96.	Vice Chancellor	Murdoch University
97.	Phillipa Lamont	Neurogenic Unit, Royal Perth Hospital
98.	Wayne Salvage Chief Executive	North Metropolitan Health Service
99.	Kristen Nowak	Office of Population Health Genomics, Department of Health
100.		Office of the Archbishop
101.		Out in Perth
102.		Parents, Families and Friends of Lesbians and Gay
103.	Melanie Honour	Perth City Psychological Services
104.	Suzanne Midford	Perth Psychological Services
105.	John Yovich	Pivet Medical Centre
106.	Darryl Menaglio	Psychologist
107.	David Marryweather	Psychologist
108.	Margaret van Keppel	Psychologist/Fertility Counsellor
109.		Rainbow Families
110.		Rainbow Fertility
111.	Director	Regulation and Compliance Unit NSW Ministry of Health
112.		Robertson Research Institute
113.	Phil Matson	RTAC Chair
114.	Neroli Sawyer	School of Behavioural and Social Sciences and Humanities, University of Ballarat
115.	Debra Gook	Scientist
116.	Alan Trounson	Scientist

	Contact Person	Organisation/ Department
117.	Malcolm Smith	Senior Lecturer, Faculty of Law Queensland University of Technology
118.		Sexual Education and Counselling WA Sexual & Reproductive Health WA
119.		Sexual Health Quarters
120.	President	Sikh Association of WA
121.		SMC Australia.org.au (Single Mothers by Choice)
122.	Penny Webb CEO	South Coastal Women's Health Services Association
123.	Paul Forden Chief Executive	South Metropolitan Health Service
124.		Stop Surrogacy Now
125.		Surrogacy Australia
126.	John Langoulant Chair	Telethon Kids Institute
127.	Michelle Stuckey	The Keogh Institute for Medical Research
128.		The Law Society of Western Australia
129.	James Jarvis CEO	The Ninitirri Centre Inc
130.	Lesley Jackes Manager	The South West Women's Health and Information Centre
131.		Uniting Church Western Australia
132.	Vice Chancellor	University of Notre Dame
133.	Elizabeth Sullivan	University of Technology Sydney
134.	Pilar Blancafort	University of WA
135.	Ryan Lister	University of WA
136.	Vice Chancellor	University of Western Australia
137.		VANISH
138.	Louise Johnson CEO	VARTA
139.		Women's Bioethical Alliance
140.		Women's Community Network WA
141.	Ann Deanus CEO	Women's Healthcare Association Inc

Appendix 3:
Follow-up letter sent to clinics on 7 February 2018

Government of **Western Australia**
Department of **Health**

Reproductive Technology Unit
Patient Safety & Clinical Quality
Clinical Excellence Division
Department of Health
189 Royal Street
PERTH WA 6004

Dear

As you are aware an independent review of the *Human Reproductive Technology Act 1991* (WA) and the *Surrogacy Act 2008* (WA) is being conducted by Associate Professor Sonia Allan.

Face to Face Meetings/Consultations

A/Professor Allan will be conducting face-to-face consultations and meetings with various key stakeholders from the 9th to 20th April 2018.

If you would be willing, A/Professor Allan would welcome the opportunity to visit [insert NAME of CLINIC/ESTABLISHMENT] for a morning or afternoon during this time, to discuss matters relevant to the terms of reference. It is hoped that she will have an opportunity to speak with the following of your personnel separately (approx. 20-30min per person):

- Medical Director
- Scientific Director
- Nurse Manager
- Senior Counsellor
- Head of Donor Program
- Key personnel responsible for records management
- Managing Director/CEO/authorised officers.

If some of these personnel cannot attend A/Prof Allan could arrange a time to speak to them separately.

A/Professor Allan will be accompanied by a note taker, who will take notes of the discussions. She is also hoping to record the conversations for her to refer back to when writing her final report. Please let us know if people would prefer not to be recorded.

Meetings with Consumers, Donors, and Donor-Conceived People

We also invite you to let your consumers, donors, and donor-conceived people know of the review, and that there is the opportunity for them to make a written submission, attend a consumer meeting, or meet/talk with A/Professor Allan.

To assist you in doing so we enclose a number of flyers and posters, and request that you place them in your rooms to alert people to the review.

You may wish to also reach out to people who you are aware would like to participate in the review, as you think appropriate.

Written Submissions

We encourage and invite you to provide written submissions by 16 March 2018, as per previous correspondence. This will facilitate more productive conversations when A/Professor Allan meets with you in person.

Please call or email the Program Manager, Dr Maureen Harris, to arrange a suitable date and time for the face-to-face meetings (telephone 9222 4334 or email Maureen.harris@health.wa.gov.au. We will follow up with a phone call shortly to discuss the same.

On behalf of A/Professor Allan, I would like to thank you for taking the time to assist with the review and look forward to your feedback.

Yours sincerely

Dr Maureen Harris
Program Manager
Reproductive Technology Unit

7 February 2018

Appendix 4:
Flyer distributed via Twitter, Facebook, and printed flyers placed in clinics notifying the public of the Review

Appendix 5: List of submissions

#	Name
1	Anthony Tassinari
2	Adam Copple-Smith
3	Alicia Young
4	Catherine Lynch (Australian Adoptee Rights Action Group (AARAG))
5	Caroline Mansour
6	SHQ (t/a The Family Planning Association of Western Australia)
7	Fertility Specialists of Western Australia/Fertility Specialists South
8	Iolanda Rodino and Antonia Clissa
9	Confidential
10	Brendan Mahony
11	Daniel Tracy and Mario Tamburri
12	Jenna Farthing
13	Lisa Baker
14	Confidential
15	Gaye Gelok
16	Confidential
17	Confidential
18	Confidential
19	Amy Hodson
20	Confidential
21	Gillian Hodson
22	Confidential
23	Andrew & Jody Van Burgel
24	Kellie Smith
25	Confidential
26	Dr Melanie Walls
27	Adoption Jigsaw
28	Dr Vincent Chapple
29	Daniel Scarparolo
30	Dr Glen Lo
31	Confidential
32	Sharon Genovese
33	ARMS
34	Jo Fraser
35	Martin Bridgman
36	Multicultural women's health centre
37	Telethon Kids Institute
38	Jessica Steele
39	Vanessa Droper

40	Damian Adams
41	Mara Hayler
42	Confidential
43	Confidential
44	Gayle Hall and Petar Spralja
45	Janice Burdinat
46	Marilyn Crawshaw
47	Trevor Harvey
48	Centre for Genetics and Society
49	Confidential
50	Myfanwy Cummerford
51	Brenda Harvey
52	Confidential
53	Peter Ravi-Pinto
54	Vanish
55	International Social Service Australia
56	Confidential
57	Genetic and Rare Disease Network
58	National Council of Single Mothers & their Children
59	Australian Mitochondrial Disease Foundation Belinda
60	Stewart
61	ANZICA WA Fertility Counsellors
62	Adoption Origins Victoria
63	Ross Hunter
64	Julie Waddell
65	Stephen Page
66	Dorothy Kowalski
67	Kerri Favarato
68	Charlotte Adams
69	Anita Bennetts
70	Philip Lillingston
71	Danny Steele
72	Edith Cowan University
73	Feminist Legal Clinic – Anna Kerr
74	Gay Dads WA
75	Genea Hollywood Fertility
76	Confidential
77	Australian Christian Lobby
78	Bridgitte Reynolds
79	Danielle Stone
80	Alison Lane
81	Steve Adams
82	Confidential
83	Rebecca Kalpakoff
84	Confidential

85 L J Goody Bioethics Centre
86 Giselle Newton
87 Fiona Glumac
88 Sherrie-lee Long
89 Confidential
90 The Coalition for the Defence of Human Life
91 Confidential
92 Confidential
93 FINRRAGE
94 Maria Mansour
95 Women's Bioethics Alliance
96 Australian Medical Association (WA)
97 Leigh Hodson
98 Annette Gelok
99 Confidential
100 Katherine Vowles
101 Kate Ranger
102 Beth Wright
103 Alarna & Christopher Richards
104 Ross Jutras-Minett
105 Surrogacy Australia
106 Hayley Smith
107 Genea Limited
108 Embryo Donation Network
109 Defend human life - Richard Egan
110 Nick Pachter – Genetic Services of Western Australia
111 Confidential
112 Rabbi David Freilich OAM
113 Kate Ranger
114 PIVET Medical Centre
115 Family Law Practitioners
116 Confidential
117 Melanie Van Der Wilk
118 David Lord
119 Human Rights Law Centre
120 Greg Chang
121 Women and Newborn health service
122 Reproductive Technology Council
123 David and Lidia J
124 Joan Smurthwaite
125 Karinne Ludlow (Monash Uni)
126 John van Bockxmeer

Appendix 6: Written submissions – Qualitative analysis themes and categories

Theme: Assisted reproduction

Categories:

- Artificial insemination
- Birth certificates (posthumous use)
- Commercialisation and trade
- Cryopreservation of embryos/gametes
- Destruction of embryos/gametes
- Donor selection and screening (incl. Donor registers)
- Egg donation
- Embryo/gametes donation
- Family limits
- Harmful effects on birth mother and child
- Infertility
- Limiting the number of donations per donor
- Overseas laws and experiences
- Payment and compensation to donors
- Research
- Rights of the beginning of human life and future children
- Saviour siblings
- Storage of gametes and embryos
- Welfare/rights of the mother

Theme: Assisted reproduction – Access

Categories:

- Access for same-sex couples and single people
- Access Restrictions (Age/BMI/etc)
- Access to Information e.g. success rates, support, etc.
- Counselling
- Egg Freezing
- Female Same-sex Couples
- Posthumous use of sperm/eggs/ embryos
- Pre-Implantation Genetic Diagnosis
- Pre-Implantation Genetic Screening
- Screening Provisions
- Sex selection
- Surrogacy

Theme: Donor conception

Categories:

- Abolish
- The analogy with access to information by adoptees
- Anonymity
- Birth certificate/birth registration
- Commodification
- Consanguinity
- Contacting donors/dc siblings
- Counselling and support
- DNA testing
- Donor linkage
- Education and advocacy
- The effectiveness of current legislation
- Human rights
- Identity issues
- Management of information
- National donor conception register
- Register – central
- Register – voluntary
- Reimbursement
- Removal from biological parents
- Research of impacts
- Retrospective access to donor information (support)
- Rights of the child
- Use of overseas donors

Theme: Record-keeping, data collection and use

Categories:

- Central repository for ART data/donors
- Confidentiality of information
- Eligibility record-keeping
- Lost\destroyed\mismanaged records
- Management of information
- National data collection
- RT registers
- Statutory requirements/regulation of record-keeping
- Suggestions for changes to current record-keeping requirements
- Use of data for research

Theme: Regulation

Categories:

- Abolish
- Advertising
- Approval requirements (RTC)
- Code of practice
- Comment on the licensing regimen
- Data reporting
- DG's powers to issue directions, code of practice, etc.
- Discrimination
- Import/export gametes and embryos
- Independent auditing
- National coordination of laws
- NHMRC guidelines
- Operation of reproductive technology council and committees
- Powers of enforcement/disciplinary provisions under *HRT Act*
- Rights to appeal RTC decisions

Theme: Research and experimentation

Categories:

- The beginning of human life
- Cloning
- Embryos
- Gametes
- Nationally consistent legislation
- New technologies (eg. Mitochondrial donation; gene editing; CRISPR)
- Research

Theme: Surrogacy

Categories:

- Abolish
- Access
- Administration/functions conferred on by Minister, council, DG, etc.
- Advertising
- Agencies
- Alternatives to surrogacy
- Altruistic
- Analogy with adoption
- Arranged/intended parents
- Birth certificates/birth registration
- Breastfeeding
- Commercial
- Commodification
- Consent/anonymity of donors' sperm for surrogacy
- Cooling off period
- Counselling requirements/ psychologists
- Demand
- Discrimination
- Education/awareness
- The effectiveness of current regime, reporting, powers of inspection/ investigation/obtaining information
- Experiences surrogate parents
- Historic concerns
- Human rights
- Import/export gametes and embryos

Theme: Surrogacy (cont.)

Categories:

- Information about laws
- Interaction with the *HRT Act* and other commonwealth/state legislation
- International commercial surrogacy
- Legal parentage
- National coordination of laws/ comparison of overseas laws
- New oversight agency
- Operation of reproductive technology council and committees
- Powers of enforcement/disciplinary provisions under the *Surrogacy Act*
- Regulation
- Reimbursement of costs
- Removal from birth mother
- Reproductive technology council operation
- Research
- Right to be a parent
- Rights of the child
- Rights to access information
- Rights to appeal RTC decisions
- Social media/internet groups or forums
- Stolen generation
- Support
- Surrogacy agreements/contract
- Surrogate families
- Surrogates
- Surrogates – numbers
- Terminology

Theme: Other associated matters

Categories:

- Conduct of the review (terms of reference)
- Cooling off periods
- Federal issues
- Medicare
- Private health insurance
- Other legislation to be reviewed

Appendix 7: SCAG

Principles to form the basis of surrogacy laws in Australia

1. A court may grant a parentage order where the court is satisfied a surrogacy arrangement was entered into by the surrogate mother, her partner (if any) and the intended parents prior to conception.
2. A court may grant a parentage order where the court is satisfied all parties have undergone counselling with an accredited counsellor in relation to the surrogacy arrangement.
3. A court may grant a parentage order where the court is satisfied all parties have received independent legal advice about the surrogacy arrangement prior to entering the arrangement.
4. A court may grant a parentage order where an application was made to the court at least 21 days, but not more than six months after the birth.
5. The intended parents must reside in the jurisdiction in which the application is made.
6. All parties to the surrogacy arrangement must give informed consent to the granting of a parentage order.
7. The child must be living with the intended parents at the time the application is heard.
8. A court may grant a parentage order where the court is satisfied granting the order is in the best interests of the child.
9. A court may grant a parentage order where certain requirements set out in the model provisions are not met if the court is, despite this, satisfied granting the order is in the best interests of the child. The ability of the court to waive requirements is subject to mandatory requirements set out in legislation.
10. A court may take into account any other matter it considers relevant when determining whether to grant a parentage order.
11. A court may grant a parentage order to parents who are now lawfully raising children under the age of 18 years conceived through surrogacy if:
    a. the court is satisfied that a surrogacy arrangement was entered into prior to conception
    b. the court is satisfied the surrogacy arrangement was not a commercial arrangement
    c. all parties consent to the granting of the order
    d. it is in the bests interests of the child.

    In determining such an application, the court will be required to take into account the views of the child, where appropriate.
12. After a parentage order is granted a new birth certificate can be applied for and will resemble an ordinary birth certificate recording only the names of the legal parents.

13. The original birth record would still exist, and the child would be able to obtain both records in defined circumstances.
14. The jurisdiction where the original birth certificate was issued will provide for the mutual recognition of a parentage order granted in another jurisdiction by provision of a new birth certificate. Alternatively, the jurisdiction where the original birth certificate was issued should cancel the birth certificate and the jurisdiction where the parentage order was granted should issue a new birth certificate.
15. The surrogate mother will be able to enforce an arrangement for the reimbursement of reasonable expenses.

Independent Review of the HRT and Surrogacy Acts (WA) (Report: Part 2)

ISBN-13: 978-0-6484752-1-7
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COM-013538 MAR'19