2008

Parliament of Tasmania

LEGISLATIVE COUNCIL

SELECT COMMITTEE

REPORT ON

SURROGACY

Members of the Committee

Hon Sue Smith MLC
Hon Tania Rattray-Wagner MLC
Hon Lin Thorp MLC (Chair)
Hon Jim Wilkinson MLC

Secretaries: Mrs Sue McLeod & Dr Colin Huntly

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INTRODUCTION

APPOINTMENT AND TERMS OF REFERENCE

The Select Committee on Surrogacy was appointed on 1 April 2008 by Order of the Legislative Council with power to send for persons and papers, with leave to sit during any adjournment of the Council, and with leave to adjourn from place to place to inquire into and report upon the issue of surrogacy and, in particular -

1. *Investigate how Tasmanian law currently deals with the issue of surrogacy.*
2. *Whether Tasmanian statutes require amendment to better deal with surrogacy and related matters.*
3. *What complexities might arise from the implementation of such changes.*
4. *The status of children born through surrogacy who now live in Tasmania.*
5. *The interplay between existing State and Federal legislation as it affects all individuals involved in, and affected by, surrogacy.*
6. *The efficacy of surrogacy legislation in other jurisdictions and the possibility of working towards national consistency in legislation dealing with surrogacy; and*
7. *Any related matters.*

The membership of the Committee as determined by Order of the Legislative Council was Hon. Sue Smith MLC, Hon. Lin Thorp (Chair) MLC; and Hon. Jim Wilkinson MLC. On 10 June 2008 Hon. Tania Rattray-Wagner MLC was appointed to the Committee to fill a vacancy caused by the resignation of Hon. Sue Smith MLC.

PROCEEDINGS

Advertisements were placed in the three regional daily newspapers on 5 April 2008 calling for submissions and evidence regarding the Committee's full terms of reference on Surrogacy.

Nine witnesses gave verbal evidence to the Committee in Hobart and are listed in Appendix 2. 11 written submissions were received and are listed in Appendix 3. Documents received into evidence are listed in Appendix 4.

The Committee held private hearings in Hobart on 21 May 2008. Public hearings were held in Hobart on the morning of 1 July 2008 and further private hearings were held on the afternoon of the same day and on the morning of 8 July 2008. The Committee held its final Meeting on 21 August 2008.

EXECUTIVE SUMMARY

The Committee supports the current legislative status quo regarding the prohibition of commercial surrogacy.

According to the infertility advocacy group "ACCESS" one in six Australian couples are infertile. For one in ten Australian couples there is an identifiable medical cause of the infertility, affecting male and female partners in roughly in equal proportions. In addition, the indications are that fertility is decreasing within Australia and around the world. One option for infertile couples is accessing Artificial Reproductive Technology (ART). However, ART is not a panacea for childlessness. Further, the adoption rates in Australia are not such that every prospective parent can be assured of a positive outcome to their application.

For some, surrogacy offers perhaps the only achievable avenue to parenthood. It is clear to the Committee that as long as there have been childless families, there has been a demand for surrogacy. For equally as long, there have been individuals and couples who have been prepared to meet a small portion of this need. Surrogacy remains as much a fact of modern life as it was in biblical times. Indeed, the effluxion of time has only served to introduce new and unforeseen human and legal complexities into the surrogacy equation.

Such is the community interest in the issue of surrogacy, that since 1985 "*in Australia alone 11 inquiries have issued recommendations on the regulation of surrogacy.*" This Committee's inquiry increases that number to at least a dozen completed inquiries, and there is presently an inquiry under way in Queensland with a report to the Standing Committee of Attorney's General being prepared at the same time.

Section 5 of the *Surrogacy Contracts Act 1993* prohibits the provision of; "*any technical or professional services in relation to achieving a pregnancy which to that person's knowledge is, or is to be the subject of, a surrogacy contract*." This prohibition has been read very restrictively in some cases, according to evidence provided to the Committee. Tasmanian couples preparing for lawful surrogacy arrangements in other States have even been denied access to local legal and psychological services based on a literal interpretation of this clause.

The Committee notes that ART in Tasmania is governed by the National Health and Medical Research Council's current "*Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*" (NHMRC 2007) pursuant to the *Human Embryonic Research Regulation Act 2003* (Tas). Given that these guidelines, at Chapter 9 "*Information Giving, Counselling and Consent*"; require legal and psychological counselling as part of the ART treatment process, there is an apparent point of conflict between those Guidelines and the State legislation. Regardless of any Tasmanian

legislative reform flowing from this or any other report on Surrogacy, this potential inconsistency must be addressed as a matter of urgency and this is reflected in the Committee's first recommendation.

In a more general sense, the Committee is of the view that the present patchwork of regulation regarding surrogacy in Australia is both unwieldy and pernicious. The implementation of any recommendations flowing from the current Standing Committee of Attorneys-General inquiry into altruistic surrogacy will require the eventual repeal of the *Surrogacy Contracts Act 1993* and its replacement with nationally consistent legislation. The Committee supports the commitment of the Federal Ministerial Standing Committee of Attorneys-General to develop uniform legislation in relation to "*legal recognition of parentage achieved by surrogacy arrangements*".

When setting laws and high policy in the area of surrogacy, the central preoccupation of both legislators and the executive government must be the best interests of the children born and raised into adulthood as a result of any surrogacy agreement. For this reason the Committee is not persuaded by arguments centred on factors such as:

- Distinguishing between children in any way based on the circumstances of their birth;
- The right to be a parent;
- Banning or unduly hampering ethically rigorous altruistic surrogacy;
- Restricting access to ART facilities;
- Limiting access to relevant counselling;
- Limiting access to relevant information;
- Unnecessary disclosure of personal information on Birth Certificates; and,
- Establishing or perpetuating legislative "ghetto's" in any state or territory.

The Committee accepts that there is much wisdom in requiring the prospective parties to an altruistic surrogacy agreement to enter into a formal pre-conception agreement detailing all of the anticipated roles, contributions, expectations and potential outcomes (both short-term and long-term) relating to the agreement. While such an agreement should remain legally unenforceable, it should be a document of which, once lodged with a Court, a Court can subsequently take due cognisance when making any subsequent orders relating to a child born as a result of an altruistic surrogacy agreement. Because of the peculiar legal and ethical issues surrounding altruistic surrogacy, the supervision and sanction of pre-conception altruistic surrogacy agreements, together with the making of relevant parent recognition orders and general parenting orders, should be referred to the Family Court.

The Committee believes that it is time for a national, or at the very least a nationally consistent, birth certificate. The Committee has recommended the

establishment of a complimentary "*Register of Filial Interests*" to allow for the maintenance of records, relating to appropriate parental and parental-like interests, for the benefit of children with expanded filial circumstances.

Legislation should require all parties to a pre-conception altruistic surrogacy agreement to undertake a recognised course of counselling within a period of 6 months immediately following the completion of the pregnancy for which a Court approved pre-conception altruistic surrogacy agreement was concluded. All prospective parties to a pre-conception altruistic surrogacy agreement should be not less than 21 years of age and all prospective surrogate women should have carried at least one previous child to term before being eligible to undertake the relevant ART program. A pre-conception altruistic surrogacy agreement should be required to be lodged with the Family Court for the making of relevant parent recognition orders between six weeks and six months from the date of birth of the child at the heart of the agreement.

While opposed to any form of "*surrogacy brokering*", the Committee believes that there is the need for a focal point and clearinghouse type organisation relating to surrogacy in Australia in general and Tasmania in particular. In this respect, the C.O.T.S. organisation in the United Kingdom provides a useful model on which to base a local equivalent.

Hon Sue Smith MLC was an inaugural member of this Committee until her elevation to the Presidency of the Legislative Council on 10 June 2008. Madam President's position on the Committee was thereupon taken by Hon Tania Rattray-Wagner MLC. The Committee acknowledges with gratitude the diligence and professionalism of these Honourable members in service to the Legislative Council in this inquiry. In addition, the Committee has been ably assisted in the timely conduct of this inquiry by the highly professional staff of the Legislative Council Committee Secretariat. On behalf of the Committee I extend our thanks to them and to Committee Secretaries Mrs Sue McLeod and Dr Colin Huntly.

2008

Lin Thorp MLC
Chair

RECOMMENDATIONS

The Committee has made the following recommendations in this report:

RECOMMENDATION 1

Section 5 of the *Surrogacy Contracts Act 1993*, reads as follows:

"A person must not provide any technical or professional services in relation to achieving a pregnancy which to that person's knowledge is, or is to be the subject of, a surrogacy contract.

Penalty:

Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 12 months."

The Committee **recommends** that section 5 of the *Surrogacy Contracts Act 1993*, be repealed and a new section 5 be inserted in the following terms:

"A person must not provide any technical or professional services in relation to achieving a pregnancy which to that person's knowledge is, or is to be the subject of, a surrogacy contract.

The provision of legal, psychiatric or psychological services are not "services in relation to achieving a pregnancy" for the purposes of this section.

Penalty:

Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 12 months."

RECOMMENDATION 2

The Committee **recommends** that the Tasmanian Government implement the final recommendations of the Standing Committee of Attorneys-General in relation to "*legal recognition of parentage achieved by surrogacy arrangements*" at the earliest possible time following their formulation.

RECOMMENDATION 3

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

RECOMMENDATION 4

The Committee **recommends** that supervision and sanction of lawful, albeit unenforceable, pre-conception altruistic surrogacy agreements together with the making of relevant parent recognition orders and general parenting orders be referred to the Family Court.

RECOMMENDATION 5

The Committee **recommends** that any prospective party to a pre-conception altruistic surrogacy agreement should be required to undertake relevant recognised courses of therapeutic counselling and legal advice. A report from the counselling providers should be provided to the Court when any application to lodge a pre-conception altruistic surrogacy agreement is made. The Court should take due cognisance of any recommendations made in a post-counselling report when making, or refusing to make its order approving the pre-conception altruistic surrogacy agreement.

RECOMMENDATION 6

The Committee **recommends** that any prospective party to a pre-conception altruistic surrogacy agreement should be not less than 21 years of age at the time when the agreement is reached.

RECOMMENDATION 7

The Committee **recommends** that all prospective surrogate women should have carried at least one previous child to term before being eligible to enter into a pre-conception altruistic surrogacy agreement.

RECOMMENDATION 8

The Committee **recommends** that parties to a pre-conception altruistic surrogacy agreement should be required to lodge an application for the making of relevant parent recognition orders to the Family Court between six weeks and six months from the date of birth of the child at the heart of the agreement.

THE FACT OF SURROGACY

1. Introduction – Ancient Origins

The Old Testament, at Genesis 16 details a tragic surrogacy-like story regarding the conception of a child named Ishmael (Stuhmcke 2004, 13). It follows that the practice has been known to three of the world's great faiths since antiquity. It is equally clear to this Committee that surrogacy remains as much a fact of modern life as it was in biblical times. Indeed, the effluxion of time has only served to introduce new and unforeseen human and legal complexities into the surrogacy equation.

2. What is "Surrogacy"?

One of the most helpful recent definitions of surrogacy, together with an explanation of its various forms is of South Australian origin. The Joint Social Development Committee of the Parliament of South Australia (South Australia 2007, 13) defined and explained surrogacy in the following terms:

> ***WHAT IS MEANT BY SURROGACY?***
>
> *In the context of a child's conception and birth, surrogacy refers to an arrangement in which a woman agrees to carry and bear a child for another woman (or couple) and relinquishes the child at, or shortly after, birth. The woman who gives birth to the child as part of a surrogacy arrangement, irrespective of whether her own reproductive material is used, is known as the surrogate. The couple that arrange for a woman to carry a child on their behalf and to whom care of the child is relinquished are referred to as the 'commissioning couple'. Two types of surrogacy arrangements exist: traditional and gestational.*
>
> ***Traditional surrogacy***
>
> *Traditional surrogacy refers to a situation in which a woman not only carries the foetus for another woman or couple but also provides the ova to create the pregnancy. In other words, the surrogate mother is genetically related to the child. Upon birth, the child born through this arrangement is relinquished to the commissioning father (the sperm donor) and his partner. This type of surrogacy may, but does not necessarily, require the use of IVF technology. More often traditional surrogacy happens in private either by the use of artificial insemination - a procedure involving the placing of sperm into the female genital tract - or through sexual intercourse. It has been said of traditional surrogacy that: '[for] all its social complications, surrogacy is technologically the simplest of the various alternative reproductive techniques in use today [and] when it relies upon natural sexual intercourse between surrogate-to-be and the man who desires a child, it uses no technology at all'.*

Gestational Surrogacy

Gestational surrogacy refers to a situation in which a woman carries one or more foeti for another woman or couple but does not provide the ova to create the pregnancy. In other words, the surrogate mother carries the child and gives birth. Gestational surrogacy is used when a woman is incapable of carrying a child to full-term. It requires the use of IVF technology for the collection of eggs and sperm from the commissioning mother and commissioning father. From this procedure, a number of embryos are created, one or more of which are then implanted into the surrogate mother's uterus for gestation. If either (or both) of the commissioning parents are not able to provide reproductive material, donor eggs and sperm can be used. In gestational surrogacy, reproductive material can come from:

- both the commissioning parents, or
- one of the commissioning parents and a third-party donor (donor egg or donor sperm), or
- neither of the commissioning parents (donor egg and donor sperm).

In other words, in cases of gestational surrogacy, the child may be biologically related to both commissioning parents, one of them, or neither of them. While it is the case that in this type of surrogacy, the surrogate mother does not provide the reproductive material, she may still have a familial connection and genetic similarity to the child if she is a close relative of one of the commissioning parents [or of one of the donors].

The South Australian Committee identified at least four medical indications that could give rise to prospective commissioning parents to seek to enter into a surrogacy arrangement (South Australia 2007, 15). These include situations where:

- *a woman does not have a uterus;*
- *a woman has Ascherman's Syndrome, a damaged uterus, or major uterine abnormalities;*
- *a woman has a condition that would make pregnancy life-threatening, such as a major heart condition or a renal condition requiring dialysis; or*
- *repeated IVF cycles have not resulted in a pregnancy and the uterus is indicated as the likely cause.*

The incidence of the above indications in the general population was estimated in evidence to the South Australian Committee (South Australia 2007, 17) by the South Australian Department of Health to be as follows:

- *the congenital absence of a uterus occurs in 1 in 2000 to 1 in 5000 women;*
- *Ascherman's syndrome (to the point of inability to carry a baby) occurs in 1 in 2000 to 1 in 5000 women;*
- *where a woman has a damaged uterus such as through uterine cancer and is of child bearing age, (but having ovaries preserved) occurs in 1 in 10 000 women; and*

- *where a woman has a medical condition that would make pregnancy life threatening (such as a major heart condition or a renal disorder requiring dialysis). Given that many such conditions can now be treated and women can be better assisted through a pregnancy, one in 10 000 women may be in this situation*

3. How Common Is Surrogacy?

Given the variety in the forms of surrogacy, and given also that only a few of these forms are in any sense capable of regulation, it is impossible to be certain of the incidence of the practice. This Committee however, notes the following information disclosed in the report of the South Australian Committee (South Australia 2007, 16) relating to IVF-facilitated surrogacy arrangements in New Zealand and the United Kingdom:

> *In New Zealand, the National Ethics Committee on Assisted Human Reproduction (NECAHR) considers applications for surrogacy on a case-by-case basis. Over a sixyear period – from 1997 to 2003 – NECAHR received a total of 30 applications for surrogacy of which 24 were approved. Not all approved surrogacy applications resulted in live births; to 2005, five births have resulted from surrogacy arrangements in New Zealand.*
>
> *In the United Kingdom, around 35 IVF surrogacy procedures are performed each year.*

This Committee concurs with the finding of the South Australian Committee (South Australia 2007, 16) that "*gestational surrogacy is not a commonly used medical procedure*."

4. Why "Surrogacy"?

It is apparent to the Committee that infertility is an issue with implications for all legislators considering the specific issue of surrogacy. According to the infertility advocacy group "ACCESS", 15% (one in six) of Australian couples are infertile. For 80% of these (representing more than one in ten Australian couples) there is an identifiable medical cause of the infertility, affecting male and female partners in roughly equally proportions (ACCESS 2008).

In addition, the indications are that fertility is decreasing within Australia and around the world (DFCS 2001). One option for infertile couples is accessing Artificial Reproductive Technology (ART). However, as outlined in the South Australian Committee's report, ART is not a panacea for infertility in all cases. Further, the adoption rates in Australia are not such that every prospective parent can be assured of a positive outcome to their application.

The Committee had the privilege of hearing from two couples for whom surrogacy offers perhaps the best chance for achieving their natural desire for a family (Duggan 2008) and (Private Witness No.7 2008). In both cases ART is not medically indicated, and they have been advised that an adoption application is unlikely to be successful because of the very small numbers of children who become available for adoption each year.

The Committee was fortunate to take evidence from Victorian Senator Stephen Conroy who testified how his own family overcame the barrier of infertility through surrogacy (Conroy 2008). The Committee had the further privilege of hearing from a couple for which repeated ART has thus far failed to achieve the pregnancy they so much desire (Private Witness No.8 2008).

For couples such as these, surrogacy offers perhaps the only achievable avenue to parenthood. It is clear to the Committee that as long as there have been couples who, for no fault of their own have faced the trauma of infertility and the related heartache of childlessness, there has been a demand for surrogacy (Conroy 2008), (Lewis 2008) and (Gissane 2008). For equally as long, there have been individuals and couples who have been prepared to meet a small portion of this need.

5. Previous and Current Surrogacy Inquiries

The South Australian Committee that reported its findings late in 2007 identified at least six major inquiries into the question of surrogacy in Australia since 1985 (South Australia 2007, 18). Another source suggests that since; "*1985 in Australia alone 11 inquiries have issued recommendations on the regulation of surrogacy*" (Stuhmcke 2004, 14). Since the South Australian Committee report was tabled the following additional inquiries have been implemented and/or completed:

1. The Western Australian Legislative Council has published a report of an inquiry into the Surrogacy Bill 2007 (WA) by the Legislation Committee of that House (Western Australia 2008). This Bill has now progressed through both Houses of the Western Australian Parliament.
2. The Federal Ministerial Standing Committee of Attorneys-General has agreed to develop uniform legislation in relation to "*legal recognition of parentage achieved by surrogacy arrangements*" (SCAG 2008). The terms of reference of that proposal are that:
    - *commercial surrogacy is to remain illegal;*
    - *altruistic surrogacy arrangements will be legal but unenforceable;*
    - *informed consent will be required from all parties;*
    - *there should be mandatory specialist counselling; and*
    - *a court order should enable the intended parents to be recognised as the legal parents if all legal prerequisites are met and it is in the best interests of the child.*
3. The Parliament of Queensland has also established a Select Committee (Queensland 2008, 1) "*to be known as the Investigation into Altruistic Surrogacy Committee be appointed to investigate and report to the Parliament on the possible decriminalisation and regulation of altruistic surrogacy in Queensland*."

6. Current State Level Regulation of Surrogacy in Australia

The South Australian Committee report contains a useful summary table highlighting the comparative legislative treatment of various aspects of surrogacy across Australia (South Australia 2007, 22). That table was expanded upon in the recent Issues Paper published by the *Investigation into Altruistic Surrogacy Committee* (Queensland 2008, Appendix A):

> *The following table is adapted from the Victorian Law Reform Commission's report,* Assisted reproductive technology & adoption*: Final Report (2007); Report 26, South Australia Parliament, Social Development Committee,* Inquiry into Gestational Surrogacy *(2007) and the relevant legislation.*

	QLD	**ACT**	**Vic#**	**SA**	**Tas**	**WA**	**NSW***
	Surrogate Parenthood Act 1988	*Parentage Act 2004*	*Infertility Treatment Act 1995*	Statutes Amendment Surrogacy Bill 2008 **	*Surrogacy Contracts Act 1993*	Surrogacy Bill 2007	*Assisted Reproductive Technology Act 2007*
Altruistic surrogacy prohibited/ illegal	✓	No – IVF gestational surrogacy permitted; one commissioning parent must be a biological parent; surrogate is not genetically related	Technically no, but difficult in practice as surrogate mother must be assessed as infertile and unlikely to transfer genetic illness to child	No – commissioning parents must be married and one must be biological parent (unless not possible), surrogate must be a relative	No	No – must be eligible for assisted reproductive technology	No
Commercial surrogacy prohibited/ illegal	✓	✓	✓	✓	✓	✓	✓
Arranging surrogacy service prohibited	✓	✓	✓ (if commercial)	✓	No	✓ (if commercial)	(legislation silent)
Entering into a surrogacy contract prohibited	✓	✓ (if commercial)	✓ (if commercial)	✓	✓	✓ (if commercial)	(legislation silent)
Advertising for surrogacy services prohibited	✓	✓	✓	✓	✓	✓ (if commercial)	✓ (if commercial)
Receiving payment prohibited	✓	Payment of expenses reasonably incurred allowed	✓	Payment of expenses reasonably incurred allowed	✓	Payment of expenses reasonably incurred allowed (including lost earnings)	(legislation silent)

	QLD	ACT	Vic#	SA	Tas	WA	NSW*
Surrogacy agreement is void or not enforceable (eg if surrogate mother changes her mind and will not relinquish the child)	✓	✓	✓	✓	✓	✓	✓
Provision of technical/ professional services illegal	No	✓ (if commercial)	No	No	✓	✓ (if commercial)	(legislation silent)
Legal parentage	Woman who carries and gives birth to child and her male partner, married or de-facto (if any)	Woman who carries and gives birth to child and her male or female partner, married or de-facto (if any and if consents)	Woman who carries and gives birth to child and her male partner, married or de-facto (if any)	Woman who carries and gives birth to child and her male partner, married or de-facto (if any)	Woman who carries and gives birth to child and her male partner, married or de-facto (if any)	Woman who carries and gives birth to child and her male or female partner, married or de-facto (if any)	Woman who carries and gives birth to child and her male partner, married or de-facto (if any and if consents)
Transfer of legal parentage to commissioning parents possible	No	✓ By Supreme Court order (commissioning parents must live in ACT and fertilization must occur in ACT)	✓ May apply to the Family Court for a parenting order (limited parental status), or adopt the child+	✓ Can apply to Youth Court for legal parenting status	✓ May apply to the Family Court for a parenting order (limited parental status), or adopt the child+	✓ Family Court judge can transfer legal parentage (conditional on receipt of counseling and legal advice)	✓ May apply to the Family Court for a parenting order (limited parental status), or adopt the child+

\# *VLRC report recommendations accepted by Vic Parliament for further consultation – fertility criteria to apply to commissioning parents (not surrogate), payment of reasonably incurred expenses, relax marital status & sexual orientation criteria, transfer of legal parentage to commissioning parents by Court decision on best interests of child.*

* *NSW legislation only partially regulates surrogacy. In NSW and the NT, ethical guidelines of the NHMRC apply to altruistic surrogacy arrangements. NSW Assisted Reproductive Technology Bill 2007, currently under consideration.*

\+ *possibility of adoption limited*

** *Private Members Bill brought by Hon J Dawkins MP*

The relevant National Health and Medical Research Council (NHMRC) ethical guidelines specifically relating to surrogacy are as follows:

13. Surrogacy

13.1. Do not undertake or facilitate commercial surrogacy

It is ethically unacceptable to undertake or facilitate surrogate pregnancy for commercial purposes. Clinics must not undertake or facilitate commercial surrogacy arrangements.

13.2. Noncommercial surrogacy

Noncommercial surrogacy (whether partial surrogacy or full surrogacy) is a controversial subject (see Appendix C) and is prohibited in some states and territories. In other states and territories, clinics must not facilitate surrogacy arrangements unless every effort has been made to ensure that participants:

- *have a clear understanding of the ethical, social and legal implications of the arrangement; and*
- *have undertaken counselling to consider the social and psychosocial significance for the person born as a result of the arrangements, and for themselves.*

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

The detail of the varied regulatory framework relating to surrogacy was well documented in the Western Australian Committee report (Western Australia 2008, 6-12) and is reproduced as follows without comment:

Surrogacy legislation in other jurisdictions

4.18 All five Australian states prohibit commercial surrogacy.

Victoria (Vic)

4.19 According to the Infertility Treatment Act 1995 *(Vic) surrogacy agreements are void and cannot be enforced in court.10 It is also illegal to "make, give or receive or agree to make, give or receive a payment or reward in relation to or under a surrogacy agreement or an arrangement to act as a surrogate mother." While the legislation does not specifically prohibit altruistic surrogacy where no payment is made, such agreements have no legal force.*

4.20 The Victorian Law Reform Commission's 2007 comprehensive review of Assisted Reproductive Technology (ART) and Adoption (VLRC Report) recommended that access to ART services be provided to potential surrogates. Recommendations in relation to the regulation of surrogacy include:

4.20.1 Surrogacy agreements should continue to be void however where parties to a surrogacy arrangement have agreed to the reimbursement of prescribed payments, that part of the agreement should be enforceable.

4.20.2 Commercial surrogacy should not be permitted however reimbursement of prescribed payments actually incurred should be permitted.

4.20.3 The County Court should be empowered to make substitute parentage orders subject to certain conditions:

- *The court is satisfied it would be in the best interests of the child.*
- *The application was made no earlier than 28 days and no later than six months after the birth of the child.*

- *At the time of the application, the child is living with the applicant/s.*
- *The applicants have met the eligibility criteria for entering into a surrogacy arrangement.*
- *The surrogate mother has not received any material advantage from the arrangement.*
- *The surrogate mother freely consents to the making of the order.*

4.20.4 Prescribed payments should be limited to reasonable medical expenses, lost earnings up to a maximum of two months in the absence of paid maternity leave, any additional lost earnings or medical expenses incurred as a result of special circumstances and reasonable legal expenses.

4.20.5 A woman intending to act as a surrogate should not be subject to the requirement that she is infertile.

4.20.6 A woman intending to act as a surrogate should be at least 25 years old and in assessing whether she is able to give informed consent, consideration should be given to whether she has already experienced pregnancy and childbirth, however, this should not be a prerequisite.

4.20.7 Partial surrogacy should be permitted where the surrogate mother's egg is used in the conception of the child.

4.20.8 While a genetic connection between the child and commissioning parent/s is preferred, people who are unable to contribute their own gametes should also be able to commission a surrogacy arrangement.

4.20.9 Regulations should specify issues to be addressed during counselling.

4.20.10 The court should have the discretion to make parentage orders in favour of people who already have children through surrogacy arrangements if certain requirements are met.

4.21 The VLRC carefully considered the question of whether partial surrogacy and/or surrogacy using donor gametes should be permitted and concluded that it was "difficult to generalise about the value of genetic connections in family relationships."

4.22 Consequently the VLRC recommended that partial surrogacy should be permitted but that "caution needs to be exercised because there is limited research on outcomes for children and surrogates in these situations."

4.23 The Commission noted that research indicated that a genetic connection between the child and arranging parents is preferable however it was considered that this should not exclude those people who were unable to provide their own gametes but were otherwise eligible for ART.

4.24 The VLRC concluded that surrogacy should be carefully regulated and that: [e]ven if the law permits gestational but not partial surrogacy, the

surrogate should retain the right to refuse to consent to the transfer of parentage of the child upon birth.

Australian Capital Territory (ACT)

4.25 Provisions in Part 4 of the Parentage Act 2004 *(ACT) make commercial surrogacy (where payment is made other than for expenses) an offence. Altruistic surrogacy, known as 'substitute parent' agreements, are not illegal, but have "no legal validity except to establish the circumstances in which a parentage order can be made."*

4.26 According to the Explanatory Statement for the Parentage Bill 2003, "[s]ubstitute parent agreements of all kinds are discouraged" however "[a]llowance is made for a limited number of altruistic surrogacy agreements to be given effect through a court order transferring the parentage of a child from the birth parents to the commissioning parents."

4.27 The ACT legislation makes it illegal to provide intermediary, advertising or medical services in order to facilitate surrogacy agreements. It is prohibited to:

- *procure someone to enter into a surrogacy agreement with a third person;*
- *advertise in relation to surrogacy agreements; or*
- *intentionally provide technical or professional services to facilitate a pregnancy for the purposes of a commercial surrogacy agreement.*

4.28 Unlike other states, the ACT enables legal parentage to be transferred to the commissioning parents of a non-commercial surrogacy agreement if certain conditions are met:

- *the child was conceived as a result of ART carried out in the ACT;*
- *neither the surrogate or her partner is a genetic parent of the child;*
- *a least one of the commissioning parents is a genetic parent of the child; and*
- *the commissioning parents live in the ACT.*

4.29 The Supreme Court must make the parentage order if it is satisfied that:

- *it is in the best interests of the child; and*
- *the birth parents freely agree to the order and understand what is involved.*

4.30 A parentage order has essentially the same legal effect as an adoption order.

New South Wales (NSW)

4.31 Until recently there was no legislation in NSW in relation to surrogacy. The purpose of the Assisted Reproductive Technology Act 2007 *(NSW) includes the regulation of ART services and service providers and the establishment of an ART register.*

4.32 Part 4 of the Act prohibits commercial surrogacy and its solicitation, and makes surrogacy agreements void.

4.33 Parental status is determined according to the Status of Children Act 1996 *(NSW). Presumptions of parentage arising out of the use of fertilisation procedures at section 14 of the Act set out certain irrebuttable presumptions:*

- *The husband of a woman who has undergone a fertilisation procedure (with her husband's consent) is presumed to be the father of the child even if he did not provide any or all of the sperm used in the procedure and the woman is presumed to be the mother even if she did not provide the ovum used in the procedure.*
- *A man who provides sperm for an insemination to a woman who is not his wife is presumed not to be the father.*
- *If a woman becomes pregnant following a fertilisation procedure using a donated ovum, the woman who donated the ovum is presumed not to be the mother of the child.*

4.34 Adoption by the arranging parents to obtain parental status is generally not an option as privately arranged adoptions are illegal in NSW and a surrogacy agreement that presumes later adoption of the child may involve serious breaches of the Adoption Act 2000 *(NSW). An option available to arranging parents is to apply to the Family Court for parental responsibility orders.*

Queensland (Qld)

4.35 The Surrogate Parenthood Act 1988 *(Qld) makes both altruistic and commercial surrogacy arrangements illegal.*

4.36 The parentage of children born through ART procedures is determined in accordance with the Status of Children Act 1988 *(Qld).*

4.37 The presumptions are similar to those in the NSW Act. Where a woman has undergone an ART procedure with the consent of her husband, the husband is presumed to be the father of the child and the donor of semen shall be presumed not to be the father. Following a fertilisation procedure where a donated ovum is used and semen from the husband or from donated sperm, the married woman shall be presumed to be the mother. The donor of the ovum is presumed not to be the mother. The husband shall be presumed to be the father whether or not he provided the sperm and the sperm donor (if any) shall be presumed not to be the father.

South Australia (SA)

4.38 According to the Family Relationships Act 1975 *(SA) both a surrogacy contract and a procuration contract is illegal and void.*

4.39 The legal parentage of a child born as a result of ART is determined in accordance with the Family Relationships Act 1975 *(SA) which provides that the woman who gives birth to a child is the mother, regardless of whether donated ovum was used. The donor is not regarded the mother. Where a married woman undergoes a fertilisation procedure with the consent of her husband, the husband is*

presumed to be the father of the child. The donor of the sperm is not regarded as the father.

Tasmania (Tas)

4.40 Under the Surrogacy Contracts Act 1993 *(Tas), surrogacy contracts are "void and unenforceable". It is an offence to "make or receive, or agree to make or receive, a payment or reward in relation to a surrogacy contract" and it is illegal to "provide any technical or professional services in relation to achieving a pregnancy" for the purposes of a surrogacy contract.*

4.41 The legal parentage of children born as a result of assisted reproductive technology is determined in accordance with the Status of Children Act 1974 *(Tas) which provides that when a woman becomes pregnant following a fertilisation procedure, she and her husband or partner are considered to be the legal parents of the child born as a result of the pregnancy. Any donor of sperm or ovum is not considered a legal parent.*

More particularly with respect to the Tasmanian legislative framework, section 5 of the *Surrogacy Contracts Act 1993* is as follows:

A person must not provide any technical or professional services in relation to achieving a pregnancy which to that person's knowledge is, or is to be the subject of, a surrogacy contract.

Penalty:

Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 12 months.

The Committee was alarmed to learn that one interpretation of this provision is to deny couples preparing for lawful surrogacy arrangements in other states access to legal and psychological services in Tasmania relevant to a prospective surrogacy based pregnancy (Private Witness No.7 2008).

In addition, the Committee notes that ART generally in Tasmania is governed by the NHMRC's current "Ethical guidelines on the use of assisted reproductive technology in clinical practice and research" (NHMRC 2007) pursuant to the *Human Embryonic Research Regulation Act 2003* (Tas). Given that these guidelines, at Chapter 9 "*Information Giving, Counselling and Consent*"; require legal and psychological counselling as part of the ART treatment process, there is a significant apparent point of conflict between the Guidelines and the State legislation.

7. Interplay of Commonwealth and State Level Legislation

The South Australian Committee report contains the following useful summary table highlighting the interplay between relevant Commonwealth surrogacy related legislation and that of the States and Territories (South Australia 2007, Appendix 2):

Maternity Payment *A New Tax System (Family Assistance) Act 1999* (Cth) *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth)	Any decision about eligibility for this payment is determined under the family assistance law by Centrelink. Eligibility for this payment requires actual care of the child. The Maternity payment can be apportioned between two eligible parties. Commissioning parents who assume actual care of the child immediately after its birth will have sole claim to the payment. A birth mother may be eligible for all or a percentage of the maternity payment if she has actual care of the child for a period after the birth.
Maternity Immunisation Allowance *A New Tax System (Family Assistance) Act 1999* (Cth) *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth)	Like the Family Tax Benefit, Child Care Benefit and Maternity Payment, the Maternity Immunisation Allowance is assessed under the A New Tax System (Family Assistance) Act. Claims are made under the A New Tax System (Family Assistance) (Administration) Act.
Parenting Payment *Social Security Act 1991* (Cth)	Parenting payment is available to principal carers including parents, grandparents or foster carers. Commissioning parents may not be entitled unless they are legally recognised as parents of the child.
Tax exemption for Superannuation Death Benefits *A New Tax System (Family Assistance) Act 1999* (Cth) *Superannuation Act 1976* (Cth)	A child in a dependent relationship to a commissioning parent may be eligible for a tax exemption on superannuation death benefit paid in respect of the death of a commissioning parent.

Entry into Australia following an international surrogacy arrangement	Citizenship by descent is only available where there is a direct biological link between an Australian citizen parent and the surrogate child. The laws of the country where a surrogacy has been commissioned denotes what is filled in on a birth certificate. In cases where a decision-maker suspects a child has been born of surrogacy arrangements, it is possible to request the child and parent show evidence of that biological link. There is currently no option under migration provisions which cater for surrogacy arrangements. At present, surrogate arrangements are considered under the expatriate adoption provisions, which require (among other things) that the adoptive parent(s) were residing overseas for 12 months prior to the adoption, for reasons other than to adopt a child.

8. What Existing Regulatory Framework Offers the Best Fit for Surrogacy Legislation in Australia?

This question was addressed most recently in the Western Australian Legislative Council's Legislation Committee inquiry into the Surrogacy Bill 2007 (WA). That inquiry's findings are reproduced here with specific emphasis placed on those portions that were particularly informative in the opinion of the Committee:

> *5.7* *Evidence from the Department* [of Health] *indicates an assumption that surrogacy arrangements will necessarily involve reproductive technology. This assumption leads to the conclusion that the regulation of surrogacy, to a large extent, can be achieved simply by linking it to regulation of treatment provided under the* Human Reproductive Technology Act 1991[(WA)]*:*
>
> > The provision of treatment in connection with the surrogacy arrangement is all governed by the Reproductive Technology Act. That is the way all reproductive technology is regulated. To the extent that we are dealing here with providing reproductive technology services for the purposes of something else, we are looking at regulation. We do not want to duplicate. Basically, we have a system that is up and running and regulates all reproductive technology services. We are not wanting to have something separate and aside from that. We are trying to build on what is there and what is currently operating effectively.

5.8 *A significant problem with this approach is that not all surrogacy arrangements necessarily involve reproductive technology and the Bill does not limit surrogacy arrangements to those that do. The* Human Reproductive Technology Act 1991 [(WA)] *was not developed to deal with surrogacy and attempts to make surrogacy 'fit' is bound to be problematic.*

5.9 *The underlying assumption that the issues relating to surrogacy are more or less the same as those arising in connection with assisted reproductive technology is questionable. While there are clearly issues in common, the VLRC for example, recognised important differences:*

> The commission's assessment of surrogacy is that it is sufficiently different from other forms of ART to warrant a cautious regulatory approach, with an additional set of requirements for access to treatment services. Our view is that the eligibility criteria that apply to surrogacy should address the risks associated with surrogacy arrangements that do not arise in other forms of ART. In particular, surrogacy involves another party (the surrogate mother) who carries the child throughout pregnancy but will be asked to relinquish that child upon birth.
>
> Because surrogacy involves the relinquishment of a baby by the woman who gives birth to it, the commission views it as having important similarities to adoption.

The history of the legal framework surrounding adoption in Australia is one of the most fraught chapters of the nation's social history (Kirkby 2008, 25). The Committee took evidence from two witnesses who carry continuing scars as a consequence of the less enlightened (and legally sanctioned) practices of previous generations (Private Witnesses No.6 2008). The Committee is grateful to these witnesses for their courage and wisdom, and for the cautionary notes that they sounded about the importance of establishing the infrastructure for counselling, consent and the long-term care of all parties to a surrogacy arrangement.

As legislators, the Committee has taken care to remember at all times that the consequence of a successful surrogacy agreement is the coming into being of a precious child. To the fullest extent possible, any legislative framework that facilitates such new life must account for the range of unique challenges that will be faced by that new life into old age.

9. Jurisdiction Shopping

The lack of uniformity of legislation dealing with surrogacy means that there is the opportunity for "*jurisdiction shopping*" on the part of potential commissioning parents. That is to say, commissioning parents may choose to pursue surrogacy options across borders in the event that the regulatory environment of their home state or territory proves too restrictive. This introduces the issue of cost. The result being that access to surrogacy options becomes, to some extent, a matter of the relative wealth of potential commissioning parents.

In this respect, the Committee notes with interest the findings of the South Australian Committee relating to the potential financial impact of pursuing an altruistic surrogacy arrangement (South Australia 2007, 27):

> *The Inquiry heard about the financial burden placed on couples having to travel interstate to undergo surrogacy procedures. This financial burden is compounded because both the commissioning couple and surrogate mother are excluded from Medicare funding. The Inquiry heard that the financial cost experienced by couples seeking surrogacy arrangements is significant:*
>
> > Surrogacy is an expensive process. There are no Medicare rebates, with all expenses being out of our own pocket. [There] are so many couples in South Australia for whom this would be totally out of reach, especially with the recurrent expenses of flights and accommodation interstate.
>
> *When asked by the Committee to estimate the expense of pursuing a surrogacy arrangement, including interstate travel, one couple told the Inquiry* 'we stopped keeping tabs at about $40,000'*. Another witness estimated that the total cost* 'was well over $50,000'*.*
>
> *The potential liability of surrogate parents for child support payments is another issue. Under current law given that the birth mother and, if married, her husband are deemed to be the legal parents of a child born through a surrogate arrangement, they could potentially be liable to support a child raised by the commissioning parents. This problem could be obviated if a mechanism was put in place at the State level – and recognised by the Commonwealth – to transfer the legal parentage from surrogate to the commissioning parent(s).*
>
> *The Inquiry also heard that there may be potential problems with child support in the event that commissioning parents separate before they are legally recognised as the parents of a surrogate child. Evidence provided to the Inquiry indicates that in a situation such as this, the commissioning parents would not be entitled to an administrative assessment of child support and there may be an inability for a court to order the payment of maintenance to a child born as a result of a surrogacy arrangement.*
>
> *Furthermore, the Inquiry was told that commissioning parents may not be entitled to receive social security parenting payments unless they are legally recognised as the parents of the child.*

The Committee is of the view that the present regulatory system is both unwieldy (in that there is a lack of uniformity across the nation) and pernicious (in that it is economically discriminatory of poorer potential commissioning parents on the one hand, and tends to commodify children at the centre of a surrogacy agreement on the other). Evidence presented to this Committee by two witnesses with first-hand experience, indicate costs in line with those referred to by the South Australian Committee report above (Conroy 2008), (Duggan 2008, 5), (Lewis 2008), (Private Witness No.7 2008), (Private Witness No.8 2008) and (Willmott 2006, 229).

The Committee has formed the view that the implementation of any recommendations flowing from the current Standing Committee of Attorneys-General inquiry into altruistic surrogacy will require the eventual repeal of the *Surrogacy Contracts Act 1993*. In the meantime however, the Committee

believes that the present uncertainty regarding the meaning of section 5 of the *Surrogacy Contracts Act 1993* must be clarified.

For this reason the Committee makes the following recommendation:

RECOMMENDATION 1

Section 5 of the *Surrogacy Contracts Act 1993*, reads as follows:

"A person must not provide any technical or professional services in relation to achieving a pregnancy which to that person's knowledge is, or is to be the subject of, a surrogacy contract.

Penalty:

Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 12 months."

The Committee **recommends** that section 5 of the *Surrogacy Contracts Act 1993*, be repealed and a new section 5 be inserted in the following terms:

"A person must not provide any technical or professional services in relation to achieving a pregnancy which to that person's knowledge is, or is to be the subject of, a surrogacy contract.

The provision of legal, psychiatric or psychological services are not "services in relation to achieving a pregnancy" for the purposes of this section.

Penalty:

Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 12 months."

THE CONSEQUENCES OF SURROGACY

1. Tasmanian Law: Surrogacy and Parental Status

The law relating to questions of parentage in Tasmania in situations of surrogacy is highly technical and very difficult to articulate in a readily understandable way. This is so whether the method of surrogacy chosen is "*traditional*" or "*gestational*". However there are particular technicalities relating to gestational surrogacy that the Committee wishes to highlight in this report.

As part of its Terms of Reference, the Inquiry was charged with examining the legal status of children who though born interstate through surrogacy arrangements, now reside in Tasmania. It is apparent to the Committee that the current legislation fails to recognise the commissioning parents in any altruistic surrogacy agreement as the child's legal parents.

In Tasmania, the legal status of children born through surrogacy is regulated by the *Status of Children Act 1974* and the *Adoption Act 1988*. Section 10C of the *Status of Children Act 1974* "*Presumptions as to parenthood*" relevantly states as follows with respect to the question of maternity:

> *(3) Where a woman who is married or in a significant relationship, within the meaning of the* Relationships Act 2003*, undergoes a fertilization procedure as a result of which she becomes pregnant and the ovum used for the purposes of the fertilization procedure was taken from another woman, the first-mentioned woman shall, for the purposes of the law of the State, be treated as if she were the mother of any child born as a result of that pregnancy.*
>
> *(4) Where a woman undergoes a fertilization procedure as a result of which she becomes pregnant, and another woman produced the ovum used for the purposes of the fertilization procedure, that other woman shall, for the purposes of the law of the State, be treated as if she were not the mother of any child born as a result of that pregnancy.*

It follows from this statutory measure that a woman who gives birth to a child is always legally considered the mother, even where she is genetically unrelated to the child in question. While this legal presumption is admirably suited to the intention and consequences of regular assisted reproduction technology (ART) initiated pregnancies, it is clearly unsuited to those small number of ART initiated pregnancies that may give effect to altruistic surrogacy agreements.

It can be readily appreciated that the current ART focussed legislation does not assist in resolving the unique questions raised by "*partial*" surrogacy where a woman supplies her own gamete to conceive a child for commissioning parents. In such a case the ordinary presumption of maternity contained within legislation based on the identity of the gestational/birth mother is determinative of maternity.

In relation to paternity the following rules apply:

> *(1) Where a woman who is married or in a significant relationship, within the meaning of the* Relationships Act 2003*, with a man, with the consent of her husband or the other party to that relationship, undergoes a fertilization procedure as a result of which she becomes pregnant, the husband or other party is, for the purposes of the law of the State, to be treated as if he were the father of any child born as a result of that pregnancy.*
>
> *(2) Where a woman undergoes a fertilization procedure as a result of which she becomes pregnant, any man, not being her husband or her partner in a significant relationship, within the meaning of the* Relationships Act 2003*, who produced semen which was used in the fertilization procedure, shall, for the purposes of the law of the State, be treated as if he were not the father of any child born as a result of the pregnancy.*
>
> *...*
>
> *(5) In any proceedings in which the operation of subsection (1) is relevant, the consent of a husband or other party to the significant relationship to the carrying out of a fertilization procedure shall be presumed, but that presumption is rebuttable.*

It follows from this statutory measure that the spouse or de-facto spouse of a woman who gives birth to a child is always legally considered the father, even where he is genetically unrelated to the child in question. Once again these presumptions are clearly unsuited to those small number of ART initiated pregnancies that may give effect to altruistic surrogacy agreements. In the event that a single woman undertakes a successful ART initiated pregnancy for the purposes of fulfilling an altruistic surrogacy agreement, the child produced would have no legal father.

In addition, *Adoption Act 1988* s 3 defines what is meant by 'natural parents' as follows:

> *"**natural parent**", in relation to an adopted person, means –*
>
> *(a) a person who is named in the entry relating to the adopted person in a register of births, whether in Tasmania or in a place outside Tasmania, as a parent of the adopted person;*
>
> *(b) a man who is declared to be the father of the adopted person under a declaration of paternity in force under section 10 of the* Status of Children Act 1974*, if a copy of the declaration is filed in the office of the Registrar under section 9(3) of that Act;*
>
> *(c) ...*
>
> *(d) a man who is named in an instrument filed in the office of the Registrar under section 9(1) of the* Status of Children Act 1974 *that acknowledges that he is the father of the adopted person; or*
>
> *(e) in relation to an application under section 83, 84, or 90, a man who satisfies a relevant authority that there is evidence that the man is the father of the adopted person;*

Under the *Adoption Act 1988* then, the birth mother is identified as the woman who gave birth to the child. In the case of the birth father's identification, this is established in one of two ways: either the man who acknowledges the paternity of the child is listed as the father, or (in situations where the man does not acknowledge paternity) this may be established by a court. Therefore as the law currently stands, in the ordinary course of things the surrogate mother – the woman who gives birth – is listed as the mother on the child's birth certificate and, if applicable, her spouse or de-facto spouse is listed as the father.

The South Australian Committee Report reduced this situation into the following useful table (South Australia 2007, 32) with a slight amendment:

Figure 1: Surrogacy and Registration of parentage

If surrogate is married *Birth certificate will either record:*	***If surrogate is single*** *Birth certificate will either record:*
Mother: Surrogate *Father: Surrogate's husband* *or* *Mother: Surrogate* *Father: Not recorded*	*Mother: Surrogate* *Father: Not recorded* [or Father: Where paternity is established by a Court]

The Committee accepts that the above provisions account for the vast majority of adoption scenarios. However, the limitations of mandating such parental relationships in the situation of altruistic surrogacy can be readily appreciated.

As noted by the South Australian Committee when addressing that State's equivalent legislation to the *Status of Children Act 1974* and the *Adoption Act 1988*, these provisions (South Australia 2007, 32):

> *... were designed to ensure that a couple treated for infertility who used donor reproductive material would be considered the legal parents of the child. Conversely, under those provisions it was intended that individuals who had donated reproductive material would not be legally recognised as the parents of any child born of their donated reproductive material. In other words, the legislation intended to protect the interests of the couple seeking infertility treatment as well as the interests of donor(s) who had provided the reproductive material.*

The above legislation was designed to avoid placing parental responsibilities on donors who would normally wish to limit their involvement to the donation of genetic material. However, such provisions do not suit the circumstances envisaged in cases of gestational surrogacy. In such situations the commissioning parents intend to take responsibility for raising the child within an appropriate period of time following birth. Increasingly, due to advances in ART, commissioning parents provide some or all of the reproductive material required to create the viable embryo.

The Tasmanian legislation as it is presently drafted is an obstacle to settling parental rights on commissioning parents in an altruistic surrogacy agreement. This not only unsatisfactory for the commissioning parents, but is contrary to the best interests of the child in question (Conroy 2008, 3), (Lewis 2008), (Private Witness No.7 2008), (Private Submission No.2 2008) and (Willmott 2006, 229). As far as possible, there should be full and accurate records regarding the circumstances surrounding the birth of a child to enable that child to fully appreciate their own unique place in the world at a time and in a manner that is suitable to their changing needs. This is consistent with Australia's obligations under Articles 7 and 8 of the United Nations Convention on the Rights of the Child which are as follows:

> ***Article 7***
>
> 1. *The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.*
> 2. *States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*
>
> ***Article 8***
>
> 1. *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*
> 2. *Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.*

The only way for commissioning parents to legally gain parental status of a child, who may to varying degrees be biologically their own, is through a formal adoption process. The Committee has formed the view that this situation represents a significant deficiency in the existing legislation of Tasmania. The present legislation concerning the determination of the parentage of children does not adequately account for the reality of either traditional or gestational surrogacy. The Committee is particularly concerned that, with respect to children born as a result of an altruistic surrogacy agreement, the existing legislation fails to discharge the stated paramount consideration of the *Adoption Act 1988* s 8 which states that; "*the welfare and interests of the child or adopted person concerned shall be regarded as the paramount consideration at all times*".

There are numerous ways in which this deficiency could be addressed:

As was stated by the South Australian Committee (South Australia 2007, 36):

> *The Committee is particularly mindful that children should not be denied access to information regarding their genetic history or the circumstances of their birth. Likewise, the Committee considers that the privacy of children born through gestational surrogacy arrangements should be protected and they should not have to disclose their surrogate birth status each time their birth certificate is presented.*

In its submission to the Committee, the Australian Christian Lobby (ACL) stated that:

> *It is not in the public good to allow children to be conceived in arrangements that are fraught with such difficulties and complexities.*
>
> *These difficulties include:*
>
> - *Legal challenges as to who is the parent;*
> - *Access to singles and same-sex couples;*
> - *Blurred family relationships and disruption to relationship links between marriage, conception, gestation, birth and motherhood, which are important to human identity.*

While the Committee respects the sincerity with which these views were put to it, the Committee had difficulty in discerning whether the ACL's objection was made to surrogacy in particular, or access to ART and adoption more generally. In addition, the ACL submission contains a wide-ranging critique of the modern family unit from a moral perspective that has a married husband and wife with children as its ideal. The Committee stresses that it's Terms of Reference do not extend to such wide-ranging critiques.

The Committee readily accepts that the legislation summarised in this section is "*fraught with ... difficulties and complexities*". However, it is only the small proportion of ART-facilitated pregnancies and subsequent adoptions involving altruistic surrogacy that the Committee can consider in the present context. The ACL submission to this inquiry did highlight many of the moral and ethical difficulties surrounding altruistic surrogacy and, to this extent, it has informed the Committee's views.

The Committee has also taken note of the limited available reported empirical research from the United Kingdom and the United States of America on the specific issue of surrogacy. This research suggests that: "surrogacy arrangements are, on the whole, successful." (Willmott 2006, 230). In addition, in evidence taken before the Committee from the Chief Psychiatrist, it was suggested that the long-term welfare of children raised by adopted parents generally is best addressed by establishing optimal relationships from the outset (Kirkby 2008, 21). As this witness stated:

> *In terms of these long-term emotional sequelae, I think much would depend on having clear parameters at the outset in terms of the child's rights and the child's ability to access knowledge about its parents. Whether that is a necessary part of the procedure or whether it can be left to the discretion of the parties involved is particularly important.*

The witness shortly thereafter observed (Kirkby 2008, 22):

> *The comparator has to be what happens in the real world in terms of people getting pregnant, having babies and so forth. Without prejudice I say it is fairly chaotic. People can give birth in the most exceptionally good circumstances and the most exceptionally appalling circumstances. I think in surrogacy that range would be narrowed somewhat because there would*

necessarily be some form of screening process in terms of legal and legislative requirements – common-law requirements, implicit contracts and so forth – and medical supervision would likely be higher than it would in normal circumstances

2. Parental Status in other States and Territories

In Tasmania, and most Australian jurisdictions, the surrogate [birth] mother and her male partner (if any) are regarded as the legal birth parents of the child. The Australian Capital Territory is presently the only jurisdiction in which the transfer of legal parentage from a surrogate to the commissioning parents can occur via a special-purpose legal mechanism by way of a Court order.

An overview of the present legal parentage provisions in other jurisdictions taken from the South Australian Committee's report (South Australia, 2007 p. 36) is as follows.

Victoria

In relation to legal parental status, the Status of Children Act 1974 *determines how legal parentage is defined in situations in which a child is born through the use of donated sperm and eggs. It does not, however, adequately address legal parentage of children born of surrogacy arrangements. In most situations:*

- *the commissioning parents have no legal relationship with the child; and*
- *the surrogate and her partner (if any) are regarded as the child's parents.*

If the commissioning person or couple wish to be recognised as the legal parents of the child they can:

- *apply for a parenting order from the Family Court of Australia but these do not confer full parental status on a person but rather a range of powers and responsibilities in relation to the child; or*
- *adopt the child. However, privately arranged adoptions are not permitted in Victoria, except where one of the adopting parents is a relative of the child, which would only be possible where the surrogate is a relative of one of the commissioning parents.*

Even if the commissioning couple were to be recognised as the legal parents of the child under state law, the surrogate could still apply for orders for the child.

New South Wales

*While altruistic surrogacy is permissible, legal parentage remains unclear. If surrogacy is undertaken, the birth parents are considered to be the legal parents. There is a possible mechanism for relative surrogacy adoptions (*Adoptions Act*) but these are not allowed until the child reaches five years of age.*

South Australia

As has been noted above, the current legislative situation in South Australia is not materially different to that in Tasmania. However, a Private Member's Bill (Statutes Amendment (Surrogacy) Bill 2008) is currently before the South Australian Parliament.]

Western Australia

The Western Australian Surrogacy Bill seeks to address concerns about birth certificates issued to children born through surrogacy arrangements. The intention of the Bill is to allow the transfer of the legal parentage of a child from the birth parents to the commissioning parents.

Australian Capital Territory

In terms of legal parentage, the approach followed in the Australian Capital Territory is broadly as follows:

- *Legal parentage is transferred from the surrogate to the commissioning parents under the* Births, Deaths and Marriages Registration Act 1997 *(A.C.T.).*
- *Automatic transfer of parentage is affected after a specified period through a court order.*
- *Legislation does not directly regulate who is eligible to enter into surrogacy arrangements.*
- *Legal intervention follows the birth of the child.*
- *The court is empowered to transfer legal parentage from the surrogate/partner to commissioning parents on a number of conditions:*
    - *the surrogate/partner are not the genetic parents;*
    - *either one of the commissioning parents is a genetic parent of the child;*
    - *it is in the best interests of the child; and*
    - *the surrogate/partner, freely with full understanding, agrees to the making of the order.*
- *A parentage order is given the same legal effect as an adoption order.*

Commonwealth

The presumptions of parentage for the purposes of the *Family Law Act 1975* (Cth) essentially follow the presumptions established in State and Territory legislation and are laid out in Part VII, Division 12, Subdivision D.]

QUO VADIS?

1. General Concerns

It is perhaps unsurprising that the Committee has found that surrogacy is a fact of life in Tasmania. Both traditional and gestational surrogacy does occur. While the incidence is rare, advances in ART means that the proportion of the community for which altruistic gestational surrogacy may be an option is growing. The intended consequence of an altruistic surrogacy agreement is the birth of a child and the coming into being of a fellow citizen with all the attendant hopes, fears, joy, pain and changes. While a certain amount of moral and ethical controversy surrounds the question of surrogacy, the Committee has formed the view that it is a fact of life. As the issue was framed by one expert witness (Prof D. Chalmers & Prof M. Otlowski 2008, 3):

> *With IVF, everyone around the world eventually said, "Well, if it's going to happen it should be done well". It now represents at least 2 per cent of births in developed countries. You want quality assurance; you don't want cowboys running it. You want seriously qualified practitioners and so on. I think this is what is happening in surrogacy now. People are saying, "Well, if its happening should we, as a responsible community, leave it outside to black markets, unregulated markets and exploitation?" – not of the people involved but of the whole procedure – or does public policy say that it's better if it is there. We can be morally agnostic. We can simply say that we know something is going on. We know about things in the community that we don't agree with but we still say it is better to regulate them.*

Another expert witness expressed the situation in the following terms (Kirkby 2008, 32):

> *I think it is an unstoppable tide. It is best to work with technology rather than go into battle against it. People have a genuine wish to have children and have used all sorts of very arduous techniques. IVF is a very arduous process for many people, with very low success rates. This has a much higher success rate, as I understand it, because the people are chosen for their fertility and not for infertility. It is so straightforward that it is not going to stop and you have to go with it.*

The Committee is firmly of the view that the central preoccupation of both legislators and the executive government, when setting laws and high policy in the area of surrogacy, must be the best interests of the children born and raised into adulthood as a result of any surrogacy agreement (Overton 2008, 3), (Ferguson 2008, 2), (TGLRG 2008, 2) and (Private Submission No.2 2008). For this reason the Committee is not persuaded by arguments centred on factors such as:

- Distinguishing between children in any way based on the circumstances of their birth;
- The right to be a parent;
- Banning or unduly hampering ethically rigorous altruistic surrogacy;
- Restricting access to ART facilities;

- Limiting access to relevant counselling;
- Limiting access to relevant information;
- Unnecessary disclosure of personal information on Birth Certificates; and,
- Establishing or perpetuating legislative “ghettos” in any state or territory.

The Committee supports the current legislative status quo regarding the prohibition of commercial surrogacy. Community values within Australia are rightly set against the commodification of children, and the exploitation of socially and economically disadvantaged women (Ferguson 2008, 3), (Lambropoulos 2005), (Overton 2008), (Tatman 2008), (TGLRG 2008) and (Willmott 2006, 228).

The Committee accepts that there is much wisdom in requiring the prospective parties to an altruistic surrogacy agreement to enter into a formal pre-conception agreement detailing all of the anticipated roles, contributions, expectations and potential outcomes (both short-term and long-term) relating to the agreement. The potential harm to the child at the centre of a pre-conception altruistic surrogacy agreement and the parties to the agreement is too great to leave any aspect of such an agreement to chance (Overton 2008). It may be that a pre-conception altruistic surrogacy agreement can form a useful adjunct to the counselling required in order to obtain ethics clearance for any subsequent pregnancy (Kirkby 2008, 24). At the very least, requiring such an agreement prior to a commissioned pregnancy would serve to ensure that surrogacy does not become a fall-back position in the case of an unplanned pregnancy.

Such an agreement is reasonably necessary to exhibit the intention of the parties to safeguard the best interests of any child that is born as a consequence of the agreement. The agreement would also have a secondary benefit in establishing from the outset an appropriate level of expectation in the minds of all parties as to a range of possible outcomes. While such an agreement should remain legally unenforceable, it should be a document of which, once lodged with a Court, a Court can subsequently take due cognisance when making any subsequent orders relating to a child born as a result of an altruistic surrogacy agreement.

In the course of its inquiry, the Committee has identified a number of particular matters of detail that will be of particular significance when translating the desire for meaningful surrogacy law reform into workable legislation. These are addressed briefly in the following paragraphs:

2. Uniform Legislation

The Committee supports the commitment of the Federal Ministerial Standing Committee of Attorneys-General to develop uniform legislation in relation to

"*legal recognition of parentage achieved by surrogacy arrangements*" (SCAG 2008). The terms of reference of that proposal are that:

- commercial surrogacy is to remain illegal;
- altruistic surrogacy arrangements will be legal but unenforceable;
- informed consent will be required from all parties;
- there should be mandatory specialist counselling; and
- a court order should enable the intended parents to be recognised as the legal parents if all legal prerequisites are met and it is in the best interests of the child.

The importance of this development was also supported by a number of submissions to the inquiry (Conroy 2008, 10), (Gissane 2008), (Lewis 2008), (Overton 2008) and (TGLRG 2008). The Committee is of the view that the current legislative tapestry dealing with surrogacy across Australia fails to adequately regulate the practice in a manner that provides ethical rigor and clinical or legal best practice (Gissane 2008, 7). In the words of one author; "*If altruistic surrogacy is a practice that is to be permitted, then governments have a responsibility to regulate it to achieve optimal outcomes for all involved*." (Willmott 2006, 231).

For this reason the Committee makes the following recommendation:

RECOMMENDATION 2

The Committee **recommends** that the Tasmanian Government implement the final recommendations of the Standing Committee of Attorneys-General in relation to "*legal recognition of parentage achieved by surrogacy arrangements*" at the earliest possible time following their formulation.

In addition to this, as outlined in the following paragraph, the Committee believes that it is time for a national birth certificate to be implemented.

3. A National Birth Certificate

The most basic legal document to which any citizen can lay claim is their birth certificate. As documented earlier in this report, the current focus of most birth certificates is in declaring parentage in a manner consistent with existing legislation. However, at least in the case of ART-facilitated surrogacy, it is entirely possible that a baby born to a surrogate mother might share none of her genetic material, while sharing some or all of their genetic material with the commissioning parents. In which sense can the notion of parentage be neatly drawn in such a case?

The Committee believes that legislators do not have the luxury of simply ignoring such difficult ethical questions (Ferguson 2008, 2). In truth, such questions literally require greater wisdom than that of even Solomon.

However, most potential parental scenarios can be envisaged and considered by relevant national legal and medical ethics advisory bodies. These bodies are well placed to articulate a set of workable guiding principles to assist the Family Court and relevant Superior Courts in making determinations in the best interests of the child in question.

The legal fact of adoption has already required birth certificates to allow for an expanded concept of parentage (Campbell 2007) and (Stuhmcke 2004, 16). The Committee believes that it is time for a national, or at the very least a nationally consistent, birth certificate (Private Witnesses No.6 2008). While the contents of such a document would be open for debate at a later stage, the Committee makes the following observations:

- The inclusion of irrelevant and intrusive detail on a person's birth certificate is both unnecessary and potentially discriminatory.
- The existing "Mother and Father" birth certificate categories could be retained and a new discrete check-box entry could be added as follows:

Registered Filial Interests ☐

- Checking this box could activate the opening of a confidential entry in a separate secure register. A process similar to this was alluded to in evidence taken before the Committee by one eminent witness (Prof D. Chalmers & Prof M. Otlowski 2008, 12). The initial entry of information on such a register could be unrestricted where the birth mother gives free and informed consent to it being included in the original registration of birth. The register itself could be maintained by a government department charged with child welfare responsibilities.
- Subsequent additions to such a register could be by way of a court order from a court of suitable jurisdiction. These entries might relate to the registration of any recognised *in loco parentis* relationship, short of formal adoption. Entry in the register might then, on meeting further qualifications, be relevant to subsequent formal adoption proceedings. For example, where a child can be shown to have resided with a person or persons with a registered filial interest continuously for more than 12 months, a streamlined process of formal adoption could be implemented. Where a child can be shown to have resided with a person or persons with a registered filial interest continuously for more than 12 months, and that child shares some or all of its genetic material with the couple in question, and the birth mother gives free and informed consent, the adoption process could be streamlined even further.
- A *Register of Filial Interests* could also hold all supporting documents relevant to each entry of filial interests, and could be a permanent record for the child in question, of all matters relating to their parentage. A *Register of Filial Interests* potentially could also contain a memorandum relevant to the intended guardianship of minors. Such a facility would have potential advantages for a far wider portion of the community than those concerned with surrogacy. Obviously the

confidentiality of such a register would be an important matter of detail to be addressed in any legislation.

For this reason the Committee makes the following recommendation:

RECOMMENDATION 3

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

4. Family Court

The supervision and sanction of pre-conception altruistic surrogacy agreements together with the making of relevant parent recognition orders and general parenting orders should be referred to the Family Court. The model adopted in the Western Australian Surrogacy Bill 2007 whereby surrogacy agreements are lawful but unenforceable recommends itself to the Committee as an appropriate one on which to base future legislation in this State.

For this reason the Committee makes the following recommendation:

RECOMMENDATION 4

The Committee **recommends** that supervision and sanction of lawful, albeit unenforceable, pre-conception altruistic surrogacy agreements together with the making of relevant parent recognition orders and general parenting orders be referred to the Family Court.

5. Counselling

Legislation should require all parties to a pre-conception altruistic surrogacy agreement to undertake a recognised course of counselling within a period of 6 months immediately following the completion of the pregnancy for which a Court approved pre-conception altruistic surrogacy agreement was concluded.

For this reason the Committee makes the following recommendation:

RECOMMENDATION 5

The Committee **recommends** that any prospective party to a pre-conception altruistic surrogacy agreement should be required to undertake relevant recognised courses of therapeutic counselling and legal advice. A report from the counselling providers should be provided to the Court when any application to lodge a pre-conception altruistic surrogacy agreement is made. The Court should take due cognisance of any recommendations made in a post-counselling report when making, or refusing to make its order approving the pre-conception altruistic surrogacy agreement

6. Age Limits

The Committee believes that any prospective party to a pre-conception altruistic surrogacy agreement should be of full age and able, so far as is practicable, to appreciate the implications of entering into such an agreement.

For this reason the Committee makes the following recommendation:

RECOMMENDATION 6

The Committee **recommends** that any prospective party to a pre-conception altruistic surrogacy agreement should be not less than 21 years of age at the time when the agreement is reached.

7. Non-Primigravida Surrogate

The Committee notes that the ethically responsible practice adopted in other jurisdictions is to require all prospective surrogate women to have carried at least one previous child to term before being eligible to undertake the relevant ART program.

For this reason the Committee makes the following recommendation:

RECOMMENDATION 7

The Committee **recommends** that all prospective surrogate women to have carried at least one previous child to term before being eligible to enter into a pre-conception altruistic surrogacy agreement.

8. Time-Limits for Parental Recognition Orders

In the interests of the child at the centre of any pre-conception altruistic surrogacy agreement, it is essential that there be legal certainty surrounding the status of their parents.

For this reason the Committee makes the following recommendation:

RECOMMENDATION 8

The Committee **recommends** that parties to a pre-conception altruistic surrogacy agreement should be required to lodge an application for the making of relevant parent recognition orders to the Family Court between six weeks and six months from the date of birth of the child at the heart of the agreement.

9. C.O.T.S.

The Committee was interested to note the existence of COTS in the United Kingdom. The Acronym stands for "*Childlessness Overcome Through Surrogacy*". According to the organisation's website (COTS 2007):

- *COTS was founded in 1988 and now has over 750 members. We celebrated our 600th surrogate birth in 2007. It is run without financial gain by people dedicated in helping others through surrogacy.*
- *COTS is NOT an American style commercial surrogacy agency. Our prime objective is to pass on our collective experience to surrogates and would be parents, helping them to understand the implications of surrogacy before they enter into an arrangement and to deal with any problems that may arise during it.*
- *...*
- *Triangle is a splinter group of COTS and it is they who put surrogates in touch with intended parents.*

While opposed to any form of "*surrogacy brokering*", the Committee believes that there is the need for a similar focal point and clearinghouse type organisation in Australia in general and Tasmania in particular. There is much to recommend the COTS model so long as it were to remain strictly non-commercial, and free from governmental policy bias. The Committee notes that there are already similarly structured agencies at work in the welfare sector, and their knowledge and expertise should be sought out in developing a surrogacy support network in Tasmania.

APPENDIX 1

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Transcript of Evidence. Private Witness No.7. Hobart. 1 July 2008.

Transcript of Evidence. Private Witness No.8. Hobart. 1 July 2008.

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APPENDIX 2

List of Witnesses

Name of Witness	Representing
Professor Don Chalmers & Professor Margaret Olkowski	**University of Tasmania Law School**
Professor Ken Kirkby *Chief Psychiatrist*	
Ms Erin Hopson & Mr Malcolm Duggan	
Senator Stephen Conroy *(Vic)*	
Mr Nicholas Overton	**Australian Christian Lobby ACN 075 120 517**
Private Witnesses No.6	
Private Witnesses No.7	
Private Witness No.8	
Private Witness No.9	

APPENDIX 3

Written Submissions Taken into Evidence

Private Submission No.1, 14 April 2008.
Private Submission No.2, 21 April 2008.
Private Submission No.3, 16 April 2008.
Hopson, E and Duggan, M, 28 April 2008.
Lewis, J, 1 May 2008.
Private Submission No.4, 1 May 2008.
Tatman, Dr L, 1 May 2008.
Overton, N, A - *Australian Christian Lobby ACN 075 120 517*, 2 May 2008.
Gissane, H – *Newcastle University Student Association Women's and Queer Collectives*, 2 May 2008.
Ferguson, M, 5 May 2008.
Croome, R – Tasmanian Gay and Lesbian Rights Group, 8 July 2008.

APPENDIX 4

Documents Taken into Evidence

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