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University of Technology, Sydney

27 May 2008

Investigation Into Altruistic Surrogacy Committee
Parliament House
George Street
Queensland
4000

Submission to Investigation into altruistic surrogacy

Our submission to the above investigation is attached.

We also take this opportunity to thank you for the invitation to make a submission to the Committee.

Yours Sincerely,

Professor Jenni Millbank

Associate Professor Anita Stuhmcke

Investigation into altruistic surrogacy, May 2008.

Submission by Professor Jenni Millbank & Associate Professor Anita Stuhmcke, Faculty of Law, University of Technology Sydney

Our Expertise

Anita Stuhmcke is a leading national legal scholar in the area of surrogate motherhood. Her work identifies regulatory trends, gaps and jurisdictional inconsistencies across Australia. This research informs and broadens understandings of the regulatory regimes addressing surrogacy. Stuhmcke's work also pragmatically recognises that 'demand driven' new family forms such as surrogacy are occurring, and will continue to occur in Australia, to some extent regardless of the legal prohibitions put in place to prevent them. The significant impact she has had in the development of laws regarding surrogacy is illustrated by judicial and legislative reliance on her work. Her scholarship has been relied upon by the NSW Supreme Court (*Re A and B* (2000) 26 Fam LR 317) and the Supreme Court of Queensland (*Re Gray (deceased)* [2001] 2 Qd R 35; (2000) 117 A Crim R 22). The Australian Capital Territory relied upon her work in its recent surrogacy reforms (see ACT Law Reform Commission, leading to the introduction of the revolutionary *Parentage Act 2004* (ACT)). Most recently, in November 2007, a report of the Social Development Committee of the South Australian Parliament in an 'Inquiry Into Gestational Surrogacy' cited her work in recommending legislative change.

Jenni Millbank's research has made a distinctive and internationally recognised contribution to the development of critical scholarship on "functional family" and flexible interdependency principles for the recognition of non-traditional family forms. This work has had a significant impact on legal scholarship, broadening legal understandings of family laws and developing new approaches to relationship recognition in law. Her research on legal responses to non-traditional families has been relied upon extensively in judgments of the Family Court of Australia (see eg *Re Patrick* (2002) 28 Fam LR 579; *Re Alex* (2004) 31 Fam LR 503; *H and J and D* [2006] FamCA 1398), as well as by the Supreme Court of Queensland (*QFG & GK v JM* [1997] QSC 206) and the Administrative Appeals Tribunal (*Roll-over Relief Claimant and the Commissioner for Taxation* [2006] AATA 728). National and international law reform bodies that rely upon her work in developing their proposals include: the *Law Commission of Canada*, the *New Zealand Law Commission*, the *Belgian Federal Parliament*, the *Law Commission of England and Wales*, the *Human Rights and Equal Opportunity Commission*, the *NSW Law Reform Commission*, the *NSW Legislative Council Standing Committee on Social Issues*, the *Ministerial Committee on Relationships* (WA), the *Equal Opportunity Commission of Victoria*, the *Victorian Law Reform Commission*, the *Equal Opportunity Commission of South Australia*, the *Attorney General's Department of South Australia*, the *Social Development Committee of the Parliament of South Australia* and the *Tasmanian Law Reform Institute*. Millbank's "presumptive parenting" model for the recognition of the relationships of children with the second female parent in families formed through assisted reproduction was adopted in legislative reforms in Western Australia (2002), the Northern Territory (2003) and the ACT (2004), has been recommended by legislative committee in Tasmania (2004) and is due to be introduced in Victoria and NSW this year (2008).

Our publications in this area include:

Stuhmcke

- 'Looking Backwards, Looking Forwards: Judicial & Legislative Trends in the Regulation of Surrogate Motherhood in the UK & Australia' (2004) 18 *Australian Journal of Family Law* 13-40.

- 'Limiting Access to Assisted Reproduction' (2002) 16 *Australian Journal of Family Law* 245-252.

- Stuhmcke A, 'When Does a Child Have No Father?' (2002) 10(5) *Health Law Bulletin* 53

- 'Access to Infertility Treatments for Lesbians and Single Women: What is the State of Play?' (2001) 9 *Journal of Law and Medicine* 12-14.

- '*Re Evelyn*: Surrogacy, Custody and the Family Court' (1998) 12 *Australian Journal of Family Law* 297-304.

- 'For Love or Money: The Legal Regulation of Surrogate Motherhood' 3(1) (May 1996) *E Law Murdoch University Electronic Journal of Law*

- 'Surrogate Motherhood: The Legal Position in Australia' (1994) 2 *Journal of Law and Medicine* 116-124.

- Stuhmcke A, 'Surrogacy and substitute parent agreements in the ACT' (1994) 3 *Australian Health Law Bulletin* 43

- Halsbury's Laws of Australia - Medicine Title - "Surrogacy"

Millbank

- 'Unlikely Fissures and Uneasy Resonances: Lesbian Co-mothers, Surrogate Parenthood and Fathers' Rights' *forthcoming* (2008) 16(2) *Feminist Legal Studies* (accepted December 2007).

- 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family' *forthcoming* (2008) 22(2) *International Journal of Law, Policy and the Family* (accepted July 2007).

- With Reg Graycar, 'From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition' (2007) 24 *Washington University Journal of Law and Policy* 121-164.

- 'The Recognition of Lesbian and Gay Families in Australian Law: Part 2 Children' (2006) 34 *Federal Law Review* 205-260.

- 'From Here to Maternity: A Review of the Research on Lesbian and Gay Families' (2003) 38 *Australian Journal of Social Issues* 541-600.

- *Areas of Federal Law that Exclude Same Sex Couples and Their Children*, Human Rights and Equal Opportunity Commission, Research Report, 2006.

Introduction

While there have been several law reform inquiries into surrogacy in Australia over the past 20 years, legislative change has rarely followed (and been distinctly haphazard when it has).[1] Earlier inquiries are of extremely limited utility for a number of reasons. Firstly, the early reports from the 1980s are simply out of date and do not reflect current legal regulation or the present technological context. For example, while all state and territory jurisdictions have legislation according parental status to the birth mother and a male partner and severing it from a sperm or egg donor, the inter-relation of these provisions with federal family law which ascribes automatic parental responsibility to parents (covering for example the ability to make major medical decisions) is increasingly problematic.[2] Recent Family Court cases demonstrate that state and federal provisions on parental status do not operate in harmony, and considerable confusion now arises over the parental status of known gamete donors, including but not limited to commissioning parents in surrogacy arrangements.[3] Moreover, the context of ART has changed significantly in the past decade, with, for example, a wider range of private providers in non-legislative states, far greater accessibility for unmarried clients, growing use of fertility facilities by clients from other jurisdictions, and increasingly common use of donor eggs and embryos. These developments contribute to the blurring of traditional distinctions drawn between the 'medical' and 'non-medical' uses of ART such that surrogacy is both increasingly accepted and increasingly seen as a valid application of ART,[4]

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[1] See discussion in Anita Stuhmcke, 'Looking Backwards, looking forwards: Judicial & Legislative Trends in the Regulation of Surrogate Motherhood in the UK & Australia' (2004) 18 *Australian Journal of Family Law* 13.

[2] See Jenni Millbank, 'The Recognition of Lesbian and Gay Families in Australian Law: Part 2 Children' (2006) 34 *Federal Law Review* 205 at 232-258.

[3] See eg *Re Patrick* (2002) 28 FamLR 579; *Re Mark* (2004) 31 FamLR 162; *Re B and J* (1996) 21 FamLR 186 and commentary including Millbank, *ibid*, Adiva Sifris, 'Known Semen Donors: To Be or Not To Be a Parent' (2005) 13 *Journal of Law and Medicine* 230. Note that in a recent case the Federal Magistrate's Court held that the parental status granted by new laws in the Northern Territory (and also in Western Australia and the ACT) to the second female parent in lesbian families formed through ART did *not* carry through to the *Family Law Act 1975* (Cth): *H and J* [2006] FMCA fam 514. A further issue of inconsistency is raised by provisions in the ACT for the transfer of parental status from surrogate to commissioning parents under the *Parentage Act 2004* (ACT) div 2.5, see Millbank, *id* at 214-216.

[4] See eg the Australian Medical Association, *Position Statement on Reproductive Health and Reproductive Technology* (2005), which acknowledges that doctors may assist in surrogacy arrangements in jurisdictions where this is lawful: http://www.ama.com.au/web.nsf/doc/SHED-5HY5U7 (accessed 2 February 2007). See also National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (June 2007) 13.2

including for unexplained infertility.[5] The increasing usage of donor eggs and embryos broadens the potential number of genetic, legal and social parents in ART parentage arrangements.[6] The use of fertility facilities by intended parents from other jurisdictions, as well as donor gametes from elsewhere, expands and complicates the range of applicable (and potentially conflicting) rules.

In order to achieve clarity the regulation of surrogacy must not be approached in isolation. This is because surrogacy cuts across issues of health, ethics, and family law. Indeed, the regulation of surrogacy across all Australian jurisdictions involves three interlinked dimensions of law:

- Surrogacy itself, including questions of the legality and enforceability of agreements, whether payment is permitted or prohibited, and controls on ancillary services such as advertising, facilitating or advising on arrangements;
- The use of assisted reproductive technologies (ART) to facilitate surrogacy, including donor insemination, the retrieval and use of donor ovum and/or in vitro fertilisation (IVF);
- The allocation of parental status of the resulting child or children (including adoption) and regimes for the collection and disclosure of genetic parentage where this differs from legal parentage.

While the regulation of the provision of surrogacy itself falls squarely within the purview of state and territory laws, the other dimensions of surrogacy law are not so clear cut. The second dimension, the use of ARTs, involves the interplay of state law, federal health funding, and a range of ethics regulation from both government and industry bodies. The third dimension, parental status, involves the jurisdictions of both state and federal law in allocating parental status and parental responsibility, respectively.

It is necessary for the Queensland Government to be aware of a holistic approach to the regulation of surrogacy as in addition to the complex, shifting and inconsistent relationship between these three 'dimensions of law', the division of jurisdictions in Australia results in a fragmented approach to each dimension across the various state, territory and federal governments. This adds an additional issue of coherence in this complex area: the relationship *between* various jurisdictions, some of which regulate ART through proscriptive legislation and others of which rely upon ethics focused self-regulation through the health sector.[7] Further, there is increasing disparity between jurisdictions in respect of parental

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[5] Advisory Committee on Assisted Reproductive Technology (NZ), *Guidelines on Surrogacy Arrangements involving Providers of Fertility Services* (November 2007); VLRC above note **Error! Bookmark not defined.** recommendation 99 also encompasses this possibility.

[6] See Maggie Kirkman, 'Genetic Connection and Relationships in Narratives of Donor-Assisted Conception' (2004) 2 *Australian Journal of Emerging Technologies and Society* 1.

[7] See Kerry Petersen, 'The Regulation of Assisted Reproductive Technology: A Comparative Study of Permissive and Prescriptive Laws and Policies' (2002) 9 *Journal of Law and Medicine* 483; Isabel Karpin & Belinda Bennett, 'Genetic Technologies and the Regulation of Reproductive Decision-Making in Australia' (2006) 14 *Journal of Law and Medicine* 127.

status; for example reforms in Western Australia, the NT and ACT in recent years extend parental status to same-sex partners of parents conceiving through the use of ART, and by the end of 2008 this will extend to Victoria and NSW also.

Adoption law cannot be used to transfer parental status from surrogate to commissioning parents.[8] However, in the ACT parental status may be transferred to commissioning parents in surrogacy arrangements through a new form of court process that is not adoption.[9] This approach will be followed in Victoria and similar legislation is under debate in Western Australia and South Australia.[10]

Finally, there are marked disparities between Australian jurisdictions in terms of the collection of, and provisions for the release of, information about children's genetic heritage where this differs from their legal parentage.[11]

In considering the range of possible approaches to the regulation of altruistic surrogacy in Queensland it may also be useful to compare the approaches of the various states and territories, as well as comparable jurisdictions which have recently undertaken comprehensive reviews of one or more of the legal dimensions of the field, in particular Canada,[12] New Zealand[13] and the United Kingdom.[14] The United Kingdom is of particular relevance in relation to expanding understandings of 'payment' with respect to altruism.

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[8] 'Direct' or 'private' adoptions is available in some states if the adoptive parent is a 'relative' of the child and so is only available in NSW if for example the surrogate is the sister of one of intended mother.

[9] *Parentage Act 2004* (ACT) ss 24, 26.

[10] Western Australia has a Bill currently before parliamentary committee: *Surrogacy Bill 2007* (WA), while South Australia responded to the Statutes Amendment (Surrogacy) Bill 2006 (SA) (a private member's Bill) with a Parliamentary Committee recommending a broad range of reforms: Social Development Committee, *Inquiry into Gestational Surrogacy*, 26th Report (2007). See also Victorian Law Reform Commission (VLRC), *Assisted Reproductive Technology & Adoption*, Final Report (2007). These proposals vary widely in their approach to parentage.

[11] See eg Stella Tarrant, 'State Secrets: Access to Information under the Human Reproductive Technology Act 1991 (WA)' (2002) 9 *Journal of Law and Medicine* 336; VLRC above note **Error! Bookmark not defined.**, Chapter 15.

[12] The *Assisted Human Reproduction Act* 2005 created a new government agency, Assisted Human Reproduction Canada: see http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/2006/2006_133bk3_e.html (accessed 20 February 2007). For a discussion of the decade long Canadian process, see Francine Manseau, 'Canada's Proposal for Legislation on Assisted Human Reproduction' in Gunning & Szoke, note 6.

[13] See Rosemary De Luca, 'The New Zealand Way: ART Within an Ethical Framework' in Gunning & Szoke, note 6. See also Law Commission of New Zealand, *New Issues in Legal Parenthood*, Report 88 (2005) and New Zealand Ministry of Justice, *Response to New Issues in Legal Parenthood* (2006).

[14] See HFEA, *SEED Report: A Report on the Human Fertilisation & Embryology Authority's Review of Sperm, Egg and Embryo Donation in the United Kingdom* (2005); UK Department of Health, Human Tissue and Embryos Draft Bill May 2007; Joint Parliamentary Committee Report on the Bill, August 2007.

While we support this review of Queensland's draconian criminal proscriptions on surrogacy, we note that this legal regulation of surrogacy is an extremely complex area. In addition to the issues raised above in any review of altruistic surrogacy it will be necessary at minimum to recognize the interplay between Queensland and Commonwealth laws (especially the definition of parent and child) and between Queensland law and ethical guidelines (particularly in relation to ART clinics and the use of donor gametes).

We propose that the ACT model for entering into surrogacy arrangement and overall regimes for transfer of parental status represents the best model in Australian law at this time, with the qualification that restricting eligibility for transfer of status to non-genetically connected surrogates and genetically connected commissioning parents is not justified by reference either to the sociological research on families formed through surrogacy or by reference to the unmet legal needs of children born into such families. The proposed Victorian approach, which allows for transfer of status based on the twin principles of informed consent and child's best interests inquiry, is preferred.

Issues for comment:

1. **Should the legal restrictions and criminal penalties against altruistic surrogacy be removed from the *Surrogate Parenthood Act 1988* (Qld)?**

Yes. Since the issue of surrogacy was first raised at a national level in the late 1980s there has been consistent recognition by law reform bodies and by state and federal governments that there is a need for a national uniform approach in this area. Regardless of the fact that this suggested harmonisation of Australian laws has not occurred (and in this sense Queensland is no different from other state jurisdictions in adopting its own legislative framework to regulate the practice of surrogacy) Queensland is 'out of step' on the issue of the total criminalization of the practice of altruistic surrogacy.

There are therefore at least four reasons why the legal restrictions and criminal penalties against altruistic surrogacy should be removed:

1. Queensland is clearly 'out of step' with comparable jurisdictions due to its proscription of altruistic surrogacy. As a matter of public policy it seems illogical that one Australian state would choose offences such as 3 years imprisonment in altruistic surrogacy while all other Australian states and territories accept the practice as lawful. Non commercial surrogacy is also lawful in Canada, the UK and New Zealand.
2. Within Queensland the operation of altruistic surrogacy laws with respect to the laying of criminal charges is clearly discretionary. It is perhaps testimony to the mismatch between penalty and reality when discretion is exercised not to lay charges in high profile national cases shown on the *ABC Australian Story* and legal cases such as *re Evelyn* where the couple who commissioned the birth of the child were from Queensland.
3. It is also clear from the Queensland experience that altruistic surrogacy will occur regardless of criminal sanctions. The benefit in decriminalizing the practice will be to remove the stigma of the law from such arrangements and to allow for greater

transparency and ethical or regulatory safeguards, and to prevent jurisdiction-hopping or black market practices.

4. A holistic approach across all Australian jurisdictions is desirable: the removal criminal proscriptions in Queensland will bring harmonisation of Australian laws one step closer. In particular Queensland's approach stands in the way of a nationally consistent approach to the parentage of children born through surrogacy. The ACT has allowed for transfer of parentage since 1994 and such legislation is currently in Committee stage in Western Australia, and due to be introduced by Victoria later this year.

2. **Should the Queensland Government play a role in regulating altruistic surrogacy arrangements in Queensland?**

At this point in time we would suggest the first stage of reform is to amend the existing laws which criminalise both commercial and altruistic surrogacy to allow altruistic surrogacy. In addition that law should give guidance on reasonable expenses and what they can cover. We would not suggest that such laws should institution some form of licensing system or sanction regulatory frameworks around ART to directly or indirectly regulate who uses ART for surrogacy.

We would also recommend that Queensland introduce transfer of parentage provisions as children are arguably best protected where laws make the identity and responsibility of their parents clear before birth. To clarify such provisions (covered elsewhere in this submission) will allow be a great incentive to intending surrogacy participants to abide by law.

3. **What other issues should be addressed by the Government?**

See above.

4. **What criteria, if any, should the commissioning parent/s and/or surrogate have to meet before entering into an altruistic surrogacy arrangement?**
5. **Should criteria for commissioning parents be similar to that for adoptive parents?**

The use of criteria for commissioning parent(s) and surrogates should be limited to a requirement for counselling. Apart from this there should not be 'limitations' in the form of criteria placed upon access to surrogacy. This means that the criteria for commissioning parents should NOT replicate those for adoptive parents in Queensland as outlined in the issues Paper on page 6.

The adoption model is not the appropriate comparator with surrogacy; both the state interest and the child's interests differ markedly across these two contexts. With adoption an existing child is in the care of the state which must then chose the most suitable parent to care for her. The child exists, has interests that can be assessed, and that state stands in the position of legal guardian and is required to make such judgments. In surrogacy arrangements there is an attempt to conceive a child within a particular family formation, there is no child yet in existence and there are two or more adults who are genetic or social parents. As in other family forms, it is the intended parents who are best placed to make judgments about their interests and needs and any attempt of the state to do so will be crudely fashioned, inefficient and too often influenced by inappropriate stereotypes.

The reason for the singular criteria of counselling is that the other suggested criteria in the Issues Paper (pages 5 and 6) are based:

Firstly, upon a lack of empirical evidence as to whether such criteria are necessary and, if necessary, whether they are appropriate and adapted.

Secondly, upon discriminatory models of family and widely discredited notions of 'appropriate' parents.

Thirdly, upon notions of biology being the significant factor in parenting.

Fourthly, upon limiting access to 'fertility' where this concept is undefined (we would suggest here that narrowly defined medical infertility be rejected as a criteria for surrogacy).

Further, we agree with the Issues Paper that the monitoring of any criteria apart from counselling is difficult and further note that in the current regulatory environment of ART in Queensland will be enforced at the level of the ART clinic rather than by a State regulatory body. Indeed, apart from the criteria listed not being appropriate and difficult to enforce it must be recognised that if unable to meet their desire for a family in Australia that Australian couples – of any composition (gay/heterosexual/single) – will, if able to afford to do so, travel to the United States where they can engage a commercial surrogate.

A further and perhaps unintended consequence of imposing the forms of criteria suggested in the Issues Paper is to return to the situation that Queensland is now in with respect to altruistic surrogacy and that is to reinforce what the state desires onto a family. The criteria listed seem to be the reverse of much more progressive moves occurring in Victoria and South Australia.

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

6. **What role should a genetic relationship between the child and the commissioning parent/s and/or surrogate play in an altruistic surrogacy arrangement?**
7. **Should at least one of the commissioning parents have a genetic relationship with the child?**
8. **Should the surrogate be able to use her gametes or should she have no genetic relationship to the child?**

We note here that the Issues Paper has conflated two distinct issues: one being entry into surrogacy arrangements themselves, and the other being the transfer of parentage of children once they are born. Page 5 of the Issues Paper misleadingly states that the ACT requires one commissioning parent to be genetically connected to the child. This is true of the parentage transfer regime in the ACT but there is no such restriction on the *actual practise* of surrogacy in the ACT, nor has there ever been.

We recommend that there be no direct legal regulation of the practise of surrogacy beyond proscription of commercial gain and clarification of reasonable expenses.

The law has departed from biology being an exclusive determination of parenthood. It is well accepted that biological ties do not ensure good parenting. To take this a step further, parentage should not be limited by nor determined through reproductive method.

There is no legal, empirical or social reason why genetics should be a limiting factor the parties to surrogacy. Children do not control how they are born. It therefore seems inconsistent to apply biology as a factor in limiting who may choose surrogacy as a method to have a child. Such criterion focuses not upon the interests of children but rather upon the preconceived and somewhat stereotypical notions of the needs of the state and of the 'ideal' family form. The error in adopting such criteria would be in trying to fit a form of assisted reproductive technology into existing notions of 'natural' family creation. It also is a retrograde move in relation to the law. Indeed, in legal decisions in Australia such as *Re Evelyn* (in a custody dispute arising following the completion of a surrogacy arrangement) the issue of the biological connection was not seen as relevant to determining the best interests of the child.[15]

It is undesirable that genetics play any part in determining access to surrogacy for either the commissioning couple or the surrogate. Instead the focus of the Queensland government should be upon the more important issue of determining access to genetic information for any child born of such an arrangement. The issue of genetics is important in relation to the wider legal responsibility of the State to keep registers of the biological lineage of children born through arrangements such as adoption and surrogacy. Registers are important for children who wish to have some access to parentage and genetic make-up. Apart from this issue genetics is a redundant issue with respect to surrogacy.

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

10. **Should the definition of altruistic surrogacy only include pre-conception agreements?**

11. **If infertility or health risk to the mother or child is a criteria for surrogacy, how should these criteria be defined?**

Altruistic surrogacy must include some payment of expenses. This is a difficult area as the line between commercial and altruistic is difficult to draw (and indeed it is ethically arguable as to whether one should be drawn at all).[16] At minimum, out-of-pocket costs should be

[15] See also US decisions on 'intent based parenting' in surrogacy arrangements <http://www.surrogacy.com/legals/jaycee/jaycee.html>

[16] See for example, Stuhmcke A 'For Love or Money: The Legal Regulation of Surrogate Motherhood' Law - Murdoch University Electronic Journal of Law, vol 3, no 1, (May 1996)

paid to the surrogate mother together with legal advice and income protection etc as stated in the Issues Paper on page 10. It is arguably also be desirable to include a form of payment to recognize a loss of opportunity for earnings to be either gained or increased during that period of the surrogate's life when the surrogacy is in preparation and the pregnancy occurs. It can often be a period of years (especially where IVF is involved) that the life of the surrogate will be impinged upon. Such a step is in line with developments in the United Kingdom.[17]

A few further points in relation to the above questions:

- Maintaining the status quo in Queensland is undesirable for children born of surrogacy arrangements and adult parties. It drives the practice underground[18] this may create a child who is unaware of their parents and creates a lack of certainty surrounding their legal parents.

- The definition of surrogacy should not just include pre-conception agreements. This recommendation is based upon a holistic view of Australian regulation of surrogacy where state definitions generally cover agreements entered into during the course of a pregnancy as well as pre-conception.

- Narrowly defined clinical infertility should not be a criteria of access for surrogacy if access to ART is subject to regulation. We recommend the VLRC approach to defining infertility, which is to take people in the social as well as the medical situation in which they find themselves in terms of their reproductive opportunities.

- Health risks to children are critical and this would mandate at most prohibition and at least counselling for commissioning parent(s) who are at risk of passing on genetic health problems to children born through surrogacy.

- A requirement of 18 years of age for adult parties to surrogacy would be in keeping with most consent requirements with respect to health treatment – particularly given the uncertainty surrounding notions of benefit with respect to surrogate mothers. A more arbitrary age cut off of 25 years should be rejected as again there is a lack of empirical evidence to support such a cut off. Counselling again should be a more effective tool in ensuring that informed consent is given by parties than mandating an arbitrary age limit (other than 18years).

12. How well does the transfer of legal parentage in a surrogacy arrangement fit with contemporary approaches in family law and adoption?

13. How important is it for there to be a mechanism for the transfer of legal parentage that is specific to surrogacy arrangements? What would this be?

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http://www.murdoch.edu.au/elaw/issues/v3n1/stuhmck1.txt.

[17] Actual payment is illegal in the UK but it is not unusual for surrogates to receive £10,000 in expenses. http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=480230&in_page_id=1770 6 September 2007.

[18] Indeed, again anecdotally, the simplest method of performing surrogacy illegally is for the woman giving birth to swap her Medicare card with the commissioning mother during her hospital stay.

14. **What are the consequences for children born of a surrogacy arrangement in Queensland of maintaining the status quo?**

15. **Should the surrogate's rights be automatically recorded as the child's parent on the birth certificate and to approve legal transfer after birth remain if she has no genetic connection to the child?**

With very few exceptions, the focus of earlier inquiry with respect to the regulation of surrogacy has largely been whether and how to prohibit the practice of surrogacy (generally with the conclusion that commercial surrogacy should be proscribed but that altruistic surrogacy, while discouraged, should be permitted within strictly circumscribed limits). This has meant that most previous reviews have not, for example, considered the issue of whether and how distinct records of both legal and genetic parentage of children be kept and under what circumstances and to whom this information may be released.[19] Moreover even recent inquiries which have begun a more integrated examination of the other dimensions of surrogacy - the regulation of ART and questions of parentage[20] - have not explored the inter-relation of their own laws with comparable rules in other Australian jurisdictions. This is particularly so on the issue of parentage, where portability and consistency of status is absolutely vital.

We strongly support a transfer of parentage scheme for children born through surrogacy. As with the regime in the ACT and under consideration in WA and proposed in Victoria, this should be based on the twin principles of informed consent and child's best interests. The parentage of the child at birth should be consistent with all other children born through ART; that a default position in which the birth mother and her partner are the legal parents until and unless a transfer is effected. A transfer regime should focus on the child's need to have a legal relationship with her primary caregivers/residential parents and not be restricted by any requirement of genetic connection. Transfer should take place within set time (in the ACT this is between 6 weeks and 6 months, but could be up to the age of 1 year) and can only occur if the child is residing with the commissioning parents and a best interests inquiry has been undertaken. WA has the additional ability to consider and register contact plans if the parties envisage that is to be some form of ongoing contact between the surrogate and child.

16. **What rights should a child born through an altruistic surrogacy agreement have to access information relating to his/her genetic parentage? Who should hold this information?**

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[19] For exceptions see: VLRC (2007), above note **Error! Bookmark not defined.**; Law Commission of New Zealand, *New Issues in Legal Parenthood*, Report 88 (2005).

[20] The recent inquiry of the Victorian Law Reform Commission is an exception to this trend in that it has examined all three dimensions. However, by reason of its focus on Victorian law, the inquiry was not able to the inter-relation of laws across all Australian jurisdictions. Nor did the Report depart from the underlying regulatory model in use in Victoria.

Children born through a surrogacy arrangement should be able to access information concerning their genetic parentage and/or birth parent. The more complex point is how to achieve this outcome. We suggest there are is a range of issues which need to be identified and addressed here such as:

(1) Should the information be non-identifying with an option to contact genetic donors (similarly to the regime adopted for adoption throughout Australian jurisdictions)?

(2) Should the provision and access to information be mandatory?

(3) Where should the information be held? A State based register such as Births Deaths and Marriages?

(4) Should variations on birth certificates be allowed?

Apart from the comments we have made above in relation to parentage we believe that this is a wider issue which, although raised by the Inquiry, deserves separate investigation and attention.

Conclusion

We would like to thank the Inquiry for the invitation to contribute into the brief for law reform with respect to altruistic surrogacy.

While we have made above comment on the broader concepts raised in the Issues Paper we would like to confine our final recommendation to the essence of the Inquiry and **recommend that the practise of altruistic surrogacy be decriminalised in Queensland.**