

Standing Committee on Law and Justice

Legislation on altruistic surrogacy in NSW

Ordered to be printed 27 May 2009 according to Standing
Order 231

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice.

Legislation on altruistic surrogacy in NSW : [report] / Standing Committee on Law and Justice. [Sydney, N.S.W.] : the Committee, 2009. – xix – 173 p. ; 30 cm. (Report ; no. 38)

Chair: Christine Robertson, MLC.
“May 2009”.

ISBN 9781921286391

1. Surrogate mothers—New South Wales.
- I. Title
- II. Robertson, Christine.
- III. Series: New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice. Report ; no. 38

306.8743 (DDC22)

How to contact the Committee

Members of the Standing Committee on Law and Justice can be contacted through the Committee Secretariat. Written correspondence and enquiries should be directed to:

The Director

Standing Committee on Law and Justice

Legislative Council

Parliament House, Macquarie Street

Sydney New South Wales 2000

Internet www.parliament.nsw.gov.au

Email lawandjustice@parliament.nsw.gov.au

Telephone 02 9230 3534

Facsimile 02 9230 3416

Terms of reference

That the Standing Committee on Law and Justice inquire into and report on whether NSW legislation requires amendment to better deal with altruistic surrogacy and related matters and in particular:

- a. The role, if any, that the NSW Government should play in regulating altruistic surrogacy arrangements in NSW
- b. The criteria, if any, that the intended parent/s and/or birth parent/s should have to meet before entering into an altruistic surrogacy arrangement
- c. The legal rights and responsibilities that should be imposed upon the intended parent/s and/or birth parent/s
- d. The role that a genetic relationship between the child and the intended parent/s and/or birth parent/s should play in any altruistic surrogacy arrangement
- e. The legislative amendments that should be made to clarify the legal status of any child born of such an arrangement
- f. The rights that a child born through an altruistic surrogacy arrangement should have to access information relating to his or her genetic parentage, and who should hold this information
- g. The efficacy of surrogacy legislation in other jurisdictions and the possibility and desirability of working towards national consistency in legislation dealing with surrogacy
- h. The interplay between existing State and Federal legislation as it affects all individuals involved in, and affected by, surrogacy
- i. Any other relevant matter.¹

¹ LC Minutes No 63, 28 August 2008, Item 26, p 749

Committee membership

The Hon Christine Robertson MLC	Australian Labor Party	<i>Chair</i>
The Hon David Clarke MLC	Liberal Party	<i>Deputy Chair</i>
The Hon John Ajaka MLC	Liberal Party	
The Hon Greg Donnelly MLC	Australian Labor Party	
The Hon Amanda Fazio MLC	Australian Labor Party	
Ms Sylvia Hale MLC	The Greens	

Committee Secretariat

Ms Rachel Callinan, Director
Ms Merrin Thompson, A/Director
Mr Jonathan Clark, Principal Council Officer
Ms Christine Nguyen, Assistant Council Officer

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Chair's foreword

The practice of surrogacy, altruistic or commercial, is a contentious and divisive issue, one that gives rise to diverse and often irreconcilable views. Furthermore, these views are typically grounded in deeply held convictions about reproduction and family formation, and religious and ethical standpoints. I would like, at the outset, to acknowledge this diversity of views and the fact that the Committee itself is divided with regard to the views of its members.

In relation to regulation of the practice of altruistic surrogacy in NSW, it is unfortunately the case that whatever position the Government takes will be unpopular with some parties.

Currently, there is very limited regulation of the practice of altruistic surrogacy in NSW. The regulations that are either directly or indirectly related to surrogacy are contained in separate pieces of legislation, including the *Assisted Reproductive Technology Act 2007* (NSW), the *Status of Children Act 1996* (NSW), and the *Adoption Act 2000* (NSW). In addition, the National Health and Medical Research Council issues guidelines for artificial reproductive technology clinics, and individual clinics can develop their own internal guidelines applicable to surrogacy arrangements.

There was consensus amongst inquiry participants and the Committee that the best interests of the child were the paramount consideration in relation to the practice of surrogacy. In this respect, the Committee came to the view that its primary obligation is to protect the best interests of children who are born through surrogacy arrangements by removing, where possible, any disadvantage that may currently exist for them by virtue of being born through such an arrangement. To that end, the Committee has made recommendations to improve the process by which parties enter into surrogacy arrangements, by way of appropriate counselling and legal advice, and to facilitate the transferral of parentage from the birth parent(s) to the intending parent(s).

The Committee adopted the principal of minimal government intervention in the practice of altruistic surrogacy, focussing its recommendations on areas where it believes the process can be improved, rather than involving itself in establishing eligibility or suitability criteria. Decisions relating to the suitability of parties to enter into surrogacy arrangements are best left in the hands of counsellors and clinicians with experience in the field, to determine with regard to the particular individuals involved and the particular surrogacy arrangement they wish to enter into.

I would like to thank the many contributors to this inquiry, including my colleagues on the Committee, submission authors and witnesses at hearings, in particular the parents of children born through surrogacy arrangements who made submissions and gave evidence. I would like to also thank the Committee secretariat for their assistance in preparing this report.



Hon Christine Robertson MLC
Committee Chair

Executive summary

Introduction (Chapter 1)

There is limited regulation of the practice of surrogacy in NSW. The *Assisted Reproductive Technology Act 2007* (NSW), when it commences, will prohibit commercial surrogacy, make surrogacy agreements legally void and unenforceable, and require assisted reproductive technology (ART) clinics to store genetic information relating to conceptions in a central register. Other pieces of legislation that impact on the practice of surrogacy include the *Status of Children Act 1996* (NSW), under which there is a presumption of parentage in relation to children born through a 'fertilisation procedure' in favour of the birth mother, and the *Adoption Act 2000* (NSW), through which intending parents in a surrogacy arrangement may apply to adopt the child born through the arrangement and thereby become recognised as the legal parents of the child.

In addition, the National Health and Medical Research Council issues guidelines for ART clinics, and individual clinics can develop their own internal guidelines applicable to surrogacy arrangements.

The NSW Attorney General and Minister for Justice, the Hon John Hatzistergos MLC, referred this inquiry to the Standing Committee on Law and Justice on 22 July 2008. The terms of reference require the Committee to inquire into the role, if any, that the NSW Government should play in regulating altruistic surrogacy arrangements in NSW, the criteria that should be applied to parties to the arrangement, the legal rights and responsibilities of parties to the arrangement, including the child to be born through the arrangement, any legislative changes necessary to clarify the legal status of the child, and the interplay between state and federal legislation related to surrogacy.

Background (Chapter 2)

In Chapter 2 the Committee provides an overview of the practice of surrogacy, including an explanation of some key terms and concepts, and a summary of the regulatory position on surrogacy in other Australian states and territories and several overseas jurisdictions.

Surrogacy is the practice of a woman - the birth mother - becoming pregnant and bearing a child for another woman or couple - the intending parent(s) - under the agreement that responsibility for raising the child is to be transferred permanently to the intending parents after the birth of the child. In a majority of cases, conception is achieved through the use of an ART procedure.

The practice of surrogacy raises many issues, including the ethics of the practice, eligibility criteria that could be applied to parties wishing to enter into a surrogacy arrangement, processes for approving surrogacy arrangements, the legal enforceability of a surrogacy agreement, the transferral of legal parentage from the birth parent(s) to the intending parent(s), storage of and access to genetic information related to the arrangement, the permissibility of advertising and brokerage related to surrogacy, and issues related to the residency of parties to agreements. Where legislation exists in some jurisdictions, it addresses some or all of these issues.

The Australian Capital Territory was the first Australian jurisdiction to enact detailed legislation relating to surrogacy, followed more recently by Victoria and Western Australia. These three jurisdictions

recognise surrogacy agreements, preserve the presumption of parentage in favour of the birth mother, establish some criteria to be applied to parties to the agreement, and provide a mechanism for transferring parentage from the birth parent(s) to the intending parent(s). Queensland - the only state or territory where surrogacy is currently illegal - South Australia and Tasmania have all held parliamentary inquiries into the practice of surrogacy and are moving towards some form of surrogacy-specific legislation.

The Standing Committee of Attorneys-General (SCAG) released a discussion paper in January 2009 entitled 'A proposal for a national model to harmonise regulation of surrogacy' with a view to developing a 'national model law' regulating the practice of surrogacy.

In relation to overseas jurisdictions, Israel was the first country to enact detailed legislation regulating the practice of surrogacy. In the United States, regulation of surrogacy varies from state to state, with California being notable for permitting commercial surrogacy. In New Zealand, intending parents must apply to adopt the child born through the surrogacy arrangement, although the New Zealand Government has agreed with a New Zealand Law Commission report which describes adoption as an unsuitable way to transfer parentage in surrogacy arrangements and is giving consideration to an alternative mechanism. In the United Kingdom intending parents can seek a Parental Order to be granted full parent status of the child born through the surrogacy arrangement.

Beliefs and attitudes about the practice of surrogacy (Chapter 3)

The practice of surrogacy is a contentious one and gives rise to diverse and sometimes irreconcilable views. These views are often grounded in deeply held convictions about reproduction and family formation, and religious and ethical standpoints.

The Committee considers the views of those who support surrogacy in principle and those who oppose surrogacy in principle or believe that it should be carefully restricted. Those who supported surrogacy argued that it presented a viable and often last option to people experiencing fertility problems to have children. Those opposed to surrogacy, or who believed it should be carefully restricted, argued that it undermined the social constructs of motherhood and family, and commodified children by making them the subject of agreements or contracts.

A point of agreement on the issue of surrogacy is the paramountcy of the rights of the child. One point of difference is *when* to assert those rights. Those arguing that the rights of the child should be asserted pre-conception tended to oppose or have serious concerns about surrogacy on the grounds that it was contrary to the child's right to have a mother and a father, and impacted negatively on the wellbeing of the child to be born through the arrangements. Those arguing that the rights of the child should be asserted post-birth tended to focus on the practicalities of protecting the rights of the child who has been born through the agreement.

In relation to the wellbeing of surrogate children, the Committee examines the concerns raised by some inquiry participants in relation to the fact that the child is removed from its birth mother, is raised by 'non-biological' parents, may experience 'genealogical bewilderment' and is exposed to the health risks inherent in ART procedures. In addition, it was argued that research on outcomes for children born through surrogacy arrangements is limited and therefore the practice constitutes a form of unethical social experimentation. Other inquiry participants argued that it was the quality of the relationship that existed between parents and their child that impacted most on the child's wellbeing, not whether a

genetic or biological connection existed. Furthermore, it was argued that there are no negative health risks associated with the use of ART and that the limited research available on outcomes for children born through surrogacy arrangements indicates that there is no negative impact on their wellbeing, notwithstanding the fact that the research has longitudinal limitations.

In relation to birth mothers, a key issue is her ability to give informed consent to participate in the surrogacy arrangement and relinquish the child she will give birth to. Some inquiry participants raised concerns about the birth mother's ability to anticipate, prior to conceiving, how she will feel in nine months time about relinquishing a child she has carried and given birth to. There was also concern expressed about the possibility of emotional coercion, particularly if the birth mother is a close friend or relative of the intending parents. However, other inquiry participants argued that with appropriate preparation and counselling birth mothers are comfortable relinquishing the child and that failing to relinquish the child was not a common concern or reality for parties to surrogacy arrangements.

The Committee itself is divided in relation to the views of its members on the practice of surrogacy. However, it came to the view that children have been and will continue to be born through surrogacy arrangements and that its obligation is primarily to protect the rights of these children and to remove, where possible, any disadvantage that might exist for them by virtue of being born through a surrogacy arrangement. The Committee's focus, therefore, is on how this could be achieved through government regulation.

The role for the NSW Government in regulating altruistic surrogacy (Chapter 4)

The role, if any, for the NSW Government in regulating altruistic surrogacy can be described in terms of the areas within the practice of surrogacy that regulation could address, and the extent to which those areas could be regulated. In terms of potential areas for regulation, the surrogacy process falls into three more or less chronological stages: the entering into the agreement by parties and preparation in terms of information giving, assessment, counselling and advice; the provision of ART services to facilitate the agreement; and the transferral of parentage to the intending parents after birth. In terms of the extent of regulation, there are a range of options, from maintaining the current situation where the practice of surrogacy is regulated by a combination of state legislation, National Health and Medical Research Council guidelines, and clinics' internal guidelines, to regulating extensively, including establishing eligibility criteria for parties wishing to enter into surrogacy arrangements.

In addition, there is the interplay between state and federal legislation and the recent proposals from the SCAG with a view to developing uniform national legislation to consider.

The Committee received a range of views on regulating the practice of surrogacy, with some inquiry participants suggesting that the only regulation required was to ban the practice. Others suggested no or minimal additional regulation, arguing that existing legislation and guidelines were largely sufficient and that it was not the role of the state to interfere in an aspect of people's lives as personal as reproduction and family formation. Others argued for more extensive regulation establishing criteria to be applied to parties wishing to enter into surrogacy arrangements. There was strong support for new regulation establishing a transferral of parentage mechanism specific to surrogacy arrangements.

The Committee examined the range of views presented about government regulation and the majority of the Committee adopted the principle of imposing minimal regulation on the practice of surrogacy. The majority of the Committee notes in particular that decisions relating to the suitability of parties to

enter into surrogacy arrangements are best left in the hands of clinicians and counsellors with experience in the field, to be made with regard to the particular characteristics of the parties and the particular surrogacy arrangement they wish to enter into.

In relation to the aspects of the practice of altruistic surrogacy in NSW that the Committee believes does require regulation, the majority of the Committee is of the view that NSW should act in advance of the SCAG process aimed at developing uniform national legislation, as that process is likely to be a lengthy one.

Criteria for intending parents and birth mothers (Chapter 5)

There is a range of criteria that could potentially be applied to parties entering into surrogacy arrangements. These include that all parties receive pre-treatment counselling, assessment and legal advice, undergo criminal record checks, that a familial or close relationship exist between the birth mother and the intending parents, and that any ART treatment necessary be provided only by a registered clinic.

Further criteria that could be applied to the intending parents include that an infertility problem exists, they are of a certain age and have been in a relationship for a certain period of time, and that at least one of them has a genetic connection to the child. In addition, criteria could relate to whether the intending parent(s) are married, same-sex or single. Criteria that could be applied to the birth mother include her age and whether or not she has had previous children and/or completed her own family, and whether or not she has provided the egg used to conceive the child. This last criterion determines whether the surrogacy arrangement is a 'gestational' surrogacy – in which the birth mother's egg is not utilised – or 'traditional' surrogacy – in which the birth mother's egg is utilised.

The Committee examined the evidence relating to criteria with the principle of minimal government intervention, enunciated at the conclusion to chapter 4, in mind. The majority of the Committee is of the view that decisions relating to specific attributes of the individuals involved in the surrogacy arrangement or the type of surrogacy arrangement they wish to enter into are best made by those with the greatest knowledge and experience in this area, namely the clinicians and counsellors working in the field of surrogacy. Nevertheless, the Committee recommends that the NSW Government examine in detail the screening provisions contained in surrogacy legislation in other jurisdictions, both Australian and overseas

The Committee does see a role for the NSW Government in ensuring that the pre-treatment phase of the surrogacy process fully prepares and assesses parties wishing to proceed to ART treatment. To this end, the Committee recommends that there be an explicit requirement that the assessment of parties seeking ART treatment to facilitate a surrogacy arrangement is conducted by a counsellor who is independent of any ART clinic. This would remove any perceived or actual conflict of interest that may exist for ART clinics if they were to provide the assessment themselves. In addition, the Committee recommends that the need for a register of counsellors qualified to assess parties to surrogacy arrangements be examined, as this would assist parties to find an independent counsellor. Similarly, the Committee recommends that there be an explicit requirement that parties entering into surrogacy arrangements obtain independent legal advice.

Legal rights and responsibilities (Chapter 6)

The legal framework applicable to surrogacy arrangements in NSW exists in the *Assisted Reproductive Technology Act 2007* (NSW), which, when it commences, will prohibit commercial surrogacy, make surrogacy agreement legally void and unenforceable, and establish certain protocols around the storage of genetic information related to ART procedures, the *Status of Children Act 1996* (NSW), which accords parentage to the birth mother, and the *Adoption Act 2000* (NSW), which is the only means to have legal parentage transferred from the birth mother to the intending parents.

The Committee agrees with the principles underpinning the unenforceability of surrogacy agreements, particularly the importance of the birth mother retaining the right and opportunity to change her mind in regard to relinquishing the child to the intending parents. The Committee also agrees with the prohibition on commercial surrogacy, although it believes the definition of commercial surrogacy in the *Assisted Reproductive Technology Act 2007* (NSW) needs to be clarified with particular reference to the 'reasonable expenses' that could be legally reimbursed to a birth mother in an altruistic surrogacy arrangement. Accordingly, the Committee recommends that the Act be amended to clarify these terms.

With regard to advertising and brokerage in relation to surrogacy, the Committee notes that the *Assisted Reproductive Technology Act 2007* (NSW), when it commences, will prohibit advertising and brokerage activity in relation to commercial surrogacy, although it is silent on altruistic surrogacy. The Committee recommends that the *Assisted Reproductive Technology Act 2007* (NSW) be reviewed in relation to the prohibition on advertising and brokerage activity associated with surrogacy. The Committee further recommends that the NSW Government consider the desirability of establishing an independent, government appointed, expert review panel that would oversee surrogacy arrangements.

In regard to transferring legal parentage from the birth mother to the intending parents, there are clear limitations to the only existing option, that of adoption. These limitations are primarily related to the long waiting periods involved, during which the child born through the surrogacy arrangements is disadvantaged by the fact that the parents who are raising him or her are not recognised as his or her legal parents. This has negative repercussions in a number of areas, including medical treatment, access to entitlements such as Medicare, enrolling in schools and day care, applying for passports, and in relation to inheritance, child support and worker's compensation. The Committee believes this problem must be remedied and recommends a mechanism for transferring parentage specific to surrogacy arrangements be established, one that preserves the presumption of parentage in favour of the birth mother but allows intending parents to apply to the Supreme Court for full parentage after six weeks of the birth of the child born through the arrangement.

In relation to genetic information, there is evidence from the area of adoption and children conceived with donated gametes that it is important that children know the details of their genetic heritage. It is therefore important that genetic information relating to surrogacy arrangements is stored and that the child has access to that information. The Committee notes the advice it received that the genetic register that will be established by the *Assisted Reproductive Technology Act 2007* (NSW) will serve as a central register for genetic information relating to all conceptions utilising ART, including surrogacy arrangements.

At the same time, there are advantages to a child's birth certificate recording the names of the parents who are raising him or her, rather than his or her birth parents. Currently, the birth parents are

recorded on the birth certificate. If the intending parents succeed in adopting the child, a new birth certificate is issued noting them as the parents. The Committee recommends that when parentage is transferred to the intending parents, through the new mechanism recommended by the Committee, a new birth certificate is issued recording them as the parents. In this situation, as with adoption, the original birth certificate will be retained. The Committee recommends that the original birth certificate record the names of all parties to the arrangement, including the birth parent(s), the intending parent(s) and gamete donors where they exist.

The Committee notes the original and the new birth certificate, in combination with the genetic information related to the ART procedure used to facilitate the surrogacy arrangement, will provide children born through surrogacy arrangements with the full picture relating to their parentage and genetic heritage.

Summary of recommendations

- Recommendation 1** **76**
 That the NSW Government pursue an amendment to the *Assisted Reproductive Technology Act 2007* (NSW) to establish a requirement that parties seeking ART treatment to facilitate a surrogacy agreement are assessed for suitability by a counsellor who is independent of any ART clinic, that this assessment counselling must be taken into account by the clinic when determining whether to provide services to facilitate the surrogacy arrangement, and that the term ‘independent’ be defined for this purpose. The counselling standard should meet the requirements of the NHMRC guidelines.
- Recommendation 2** **76**
 That the NSW Government examine the need for a register of counsellors qualified to assess the suitability of parties wishing to implement surrogacy arrangements.
- Recommendation 3** **78**
 That the NSW Government seek to amend the *Assisted Reproductive Technology Act 2007* (NSW) to establish a requirement that all parties entering into a surrogacy arrangement should obtain independent legal advice from a lawyer who holds a full practising certificate from the Law Society of NSW, and that the lawyer issue a certificate stating that the legal advice has been provided.
- Recommendation 4** **93**
 That the NSW Government examine in detail the screening provisions contained in surrogacy legislation in other jurisdictions, both Australian and overseas.
- Recommendation 5** **101**
 That the NSW Government should consider the desirability of establishing an independent, government appointed, expert review panel that would oversee surrogacy arrangements.
- Recommendation 6** **101**
 That the NSW Government review the *Assisted Reproductive Technology Act 2007* (NSW) in relation to the prohibition on advertising and brokerage activity associated with surrogacy.
- Recommendation 7** **107**
 That the NSW Government seek to amend Part 4 of the *Assisted Reproductive Technology Act 2007* (NSW) to clarify the definition of commercial surrogacy and provide a clear indication of what reasonable expenses may be legally reimbursed to the birth mother in an altruistic surrogacy arrangement, and provide that any reimbursements must be verifiable and that any other payments or incentives are prohibited to discourage commercial surrogacy arrangements. Issues to be considered in this regard include medical, legal, travel, clothing and accommodation costs associated with the pregnancy, and income forgone by the birth mother as a result of becoming pregnant and giving birth.

Recommendation 8

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That the NSW Government pursue legislation establishing a transferral of parentage mechanism specifically for surrogacy arrangements, preserving the presumption of legal parentage on the birth of the child in favour of the birth mother, and allowing intending parents in a surrogacy arrangement to apply to the NSW Supreme Court, after six weeks of the birth of the child born through the arrangement, for full legal parentage of the child to be transferred to them. The fundamental requirement for the issue of a parentage order will be that such an order is in the child's best interest. The Court should continue to have its unfettered discretion to decide where lies the child's best interest.

That the legislation should also provide that the factors the court must consider when considering applications by intending parents in surrogacy arrangements for full legal parentage of the child born through the surrogacy arrangement to be transferred to them should include, but not be confined to:

- Evidence of a pre-conception surrogacy agreement
- Evidence that all parties have received independent legal advice
- Evidence that all parties have received appropriate counselling both prior to conception and the application to transfer parentage
- Evidence that all parties to the surrogacy agreement consented to the agreement upon entering into it, and still consent to it being implemented and parentage transferred to the intending parents
- Evidence the child is residing with the intending parents at the time of the application.

Recommendation 9

125

That the NSW Government pursue legislation requiring that the original birth certificate issued for a child born through a surrogacy arrangement record the names of all parties to the arrangement, including the birth parent(s), the intending parent(s) and gamete donors where they exist.

Recommendation 10

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That the NSW Government pursue legislation requiring that an amended birth certificate be issued for a child born through a surrogacy arrangement following the transferral of parentage to the intending parent(s) and that the amended birth certificate record the names of the intending parent(s) only and include a notation that an original birth certificate exists. The original birth certificate should be retained and made available to the child under the same requirements provided in the *Births, Deaths and Marriages Registration Act 1995* (NSW) relating to all birth certificates.

Acronyms

ACART	Advisory Committee on Assisted Reproductive Technology
ART	Assisted Reproductive Technology
AHEC	Australian Health Ethics Committee
CROC	Convention on the Rights of the Child
DoCS	Department of Community Services
FSA	Fertility Society of Australia
JAS-ANZ	Joint Accreditation System of Australia and New Zealand
NHMRC	National Health and Medical Research Council
RTAC	Reproductive Technology Accreditation Committee
SCAG	Standing Committee on Attorneys-General

Chapter 1 Introduction

This chapter gives an overview of the inquiry process, including the methods the Committee used to encourage participation by members of the public, government agencies and relevant organisations. It also includes a brief outline of the report structure.

Inquiry terms of reference

- 1.1 The terms of reference for the inquiry were referred to the Committee by the NSW Attorney General and Minister for Justice, the Hon John Hatzistergos MLC on 22 July 2008. The terms of reference are reproduced on page iv.

Conduct of the inquiry

Submissions

- 1.2 The Committee advertised a call for submissions in the *Sydney Morning Herald* and the *Daily Telegraph* in August 2008. A media release announcing the inquiry and the call for submissions was sent to all media outlets in NSW. The Committee also wrote to a large number of relevant stakeholder organisations and individuals inviting them to participate in the inquiry process. The closing date for submissions was 26 September 2008.
- 1.3 The Committee received a total of 40 submissions from government agencies, fertility clinics, a lawyer and a psychologist with experience facilitating altruistic surrogacy arrangements, community advocacy and support groups, religious and ethics organisations, academics and private citizens, including parents with children born through surrogacy arrangements.
- 1.4 A list of submissions is contained in Appendix 1. The submissions are available on the Committee's website: www.parliament.nsw.gov.au/lawandjustice.

Public hearings

- 1.5 The Committee held four public hearings at Parliament House on the 5 and 6 November 2008 and 18 and 19 March 2009. The Committee heard from a range of stakeholders, including the NSW Attorney General's Department, NSW Department of Community Services, NSW Health, Next Generation Fertility, Sydney IVF, the Catholic and Anglican Church Dioceses of Sydney, Australian Christian Lobby, Australian Family Association, Gay and Lesbian Rights Lobby, support groups, academics and parents with children born through surrogacy arrangements.
- 1.6 The Committee thanks all the individuals and organisations that made a submission or gave evidence during the inquiry.
- 1.7 A list of witnesses who appeared at the hearings is reproduced in Appendix 2. The transcripts of all hearings are available on the Committee's website.

Report structure

- 1.8** **Chapter 2** provides background information in relation to altruistic surrogacy, including definitions of key terms, an outline of the key issues and the way in which various Australian and overseas jurisdictions have approached the regulation of surrogacy.
- 1.9** **Chapter 3** examines the beliefs and attitudes towards altruistic surrogacy expressed during the inquiry, in relation to social constructs of motherhood and family, the rights of the parties involved in surrogacy arrangements, the paramountcy of the rights of the child, and the impact the practice of surrogacy has on the wellbeing of the child born through the arrangement, the birth mother and the intending parents.
- 1.10** **Chapter 4** addresses the issue of the need for government regulation of altruistic surrogacy in NSW, the extent of any regulation needed, the adequacy of existing guidelines provided by the National Health and Medical Research Council, the interplay between State and Federal legislation, and the recent proposal from the Standing Committee of Attorneys-General for nationally uniform legislation relating to altruistic surrogacy.
- 1.11** **Chapter 5** examines the eligibility criteria that could be applied to birth mothers and intending parents in surrogacy arrangements and the significance of the genetic connection that may or may not exist between the birth mother and/or the intending parent(s) and the child to be born through the arrangement.
- 1.12** **Chapter 6** examines the legal rights and responsibilities of parties to a surrogacy arrangement, including the unenforceability of the agreement that exists between the birth parent(s) and the intending parent(s) and the reimbursement of expenses to the birth mother. Considerable attention is also paid to the issue of transferring parentage from the birth mother to the intending parents in a surrogacy arrangement, and the proposed alternative to adoption for achieving this transferral of parentage. The issue of storing genetic information relating to surrogacy arrangements and recording parentage on the birth certificates of children born through surrogacy arrangements is also addressed. Finally, the issue of conscientious objection by medical practitioners opposed to surrogacy is discussed.

Chapter 2 Background

This chapter provides an overview of the practice of surrogacy. It begins with a definition of surrogacy, a discussion of relevant terminology, and a brief outline of the key issues raised during this inquiry in relation to the practice of surrogacy. This is followed by a summary of the regulatory position on surrogacy in Australian states and territories, including proposals from the Standing Committee of Attorneys-General, and several overseas jurisdictions.

Definition and terminology

- 2.1 Surrogacy is the practice of a woman becoming pregnant and bearing a child for another woman or couple under the agreement that responsibility for the upbringing of the child is to be permanently transferred to the other woman or couple after birth.² In some jurisdictions surrogacy is additionally defined as occurring only through the use of assisted reproduction procedures.³
- 2.2 The woman who gives birth to the child is referred to as the surrogate or birth mother. The woman or couple who intend to raise the child are referred to as the intending, arranged, substitute or commissioning parent(s). Throughout this report, except where quoting other sources, the terms birth mother and intending parent(s) are used.
- 2.3 Surrogacy arrangements may take a number of forms, depending on where the gametes – sperm and egg – come from. Gametes may be supplied by one or both of the intending parents, the birth mother and/or her partner, or by third party donors. A gestational surrogacy is one in which the birth mother has not provided her egg and is therefore not the genetic mother of the child. A traditional surrogacy is one in which the birth mother has provided her egg and therefore is the genetic mother of the child.
- 2.4 The birth mother may become pregnant naturally or through self-insemination. However, in the majority of cases, she conceives through the use of assisted reproductive technology (ART), examples of which are artificial insemination and in vitro fertilisation.
- 2.5 Surrogacy may be commercial or altruistic in nature. Commercial surrogacy, where the birth mother is paid a fee, is illegal in many jurisdictions. This prohibition is often based on an ethical opposition to the ‘commodification’ of children and the commercialisation of human reproductive processes, and the intention to protect economically disadvantaged women from exploitation. Altruistic surrogacy involves no fee payment, however the birth mother may be reimbursed for expenses associated with the pregnancy and birth, including loss of income.

² See for example, Australian Standing Committee of Attorneys-General, *A proposal for a national model to harmonise regulation of surrogacy*, p 2; *Assisted Reproductive Technology Act 2008* (NSW), s 42; *Assisted Reproductive Treatment Act 2008* (Vic), s 3; *Surrogacy Arrangements Act 1985* (UK), s 1 (2); New Zealand Law Commission, *New Issues in Parenthood*, Report 88, para 7.1

³ See for example *Assisted Human Reproduction Act 2004* (Can), s 3

Key issues in surrogacy

- 2.6** The following sections briefly outline key issues raised during the inquiry about the practice of surrogacy. In jurisdictions where legislation exists or is proposed to regulate the practice of surrogacy, some or all of these issues are addressed.

The beliefs and attitudes around surrogacy

- 2.7** Surrogacy is a contentious issue that invokes a variety of opinions and touches on deeply held beliefs relating to reproduction and family formation, and religious and ethical conviction. During the course of this inquiry the Committee heard from a number participants who were opposed to the practice surrogacy in principle as well as from some inquiry participants who supported its availability. Chapter 3 examines in detail the beliefs and attitudes expressed by inquiry participants on both sides of this argument.

Eligibility criteria

- 2.8** The eligibility, or suitability, criteria that could be applied to surrogacy arrangements may relate to the type of surrogacy, gestational or traditional, and the genetic relationship of the intending parents to the child. It has been argued that gestational surrogacy, where the birth mother is not genetically related to the child, reduces the likelihood that she will refuse to relinquish the child after birth. Similarly, it has been argued that a genetic relationship between one or both of the intending parents and the child increases their bond with and ‘claim’ on the child.
- 2.9** Other criteria may relate to the age of the birth mother and intending parent(s), whether or not the birth mother has previously given birth, and the criminal history of the parties to the surrogacy arrangement. Chapter 5 examines the criteria proposed during the inquiry that could be applied to surrogacy arrangements.

Access and approval processes

- 2.10** Some jurisdictions require approval by a panel that may consider the outcome of counselling processes and the issue of consent from all parties. There may also be further approval processes related to accessing ART to facilitate a surrogacy arrangement. Chapter 6 looks at the issue of approval by a regulatory body and chapters 4, 5 and 6 all address the issue of the adequacy of existing guidelines and clinics’ internal guidelines in regulating the practice of surrogacy.

Enforceability of surrogacy agreements

- 2.11** Parties to surrogacy agreements commonly enter into a written agreement that sets out the responsibilities and expectations of those parties. The enforceability of surrogacy agreements becomes an issue if either the birth mother or intending parent(s) change their mind during the pregnancy or after the birth. For example, the birth mother may refuse to relinquish the child after birth. Agreements may also include certain rights and restrictions in regard to medical decisions relating to the pregnancy and birth, and to conduct of the birth mother

during pregnancy that may impact on the health of the unborn child. Chapter 6 examines the issue of enforceability of surrogacy agreements and the rights of parties to surrogacy agreements.

Transferral of parentage

- 2.12** In most jurisdictions there is a legal presumption of parentage in favour of birth parent(s). In surrogacy arrangements the intending parent(s) naturally wish to be recognised as the legal parents of the child they are raising and must therefore seek to have parentage transferred to them. Mechanisms for the transferral of parentage include court orders and adoption. Some jurisdictions make special provisions for the transferral of parentage in surrogacy cases. Chapter 6 examines in detail the options available for intending parents to have legal parentage transferred to them after the birth of the child.

Access to genetic information

- 2.13** Children born through surrogacy arrangements can often have a complicated genetic heritage, and may not be genetically related to one or either of the intending parents in the arrangement. It is generally agreed that children have a right to know the details of their genetic heritage, emphasising the importance of recording and storing genetic information relating to surrogacy arrangements. This issue is addressed in Chapter 6.

Advertising and brokerage

- 2.14** Where surrogacy is legal the issue arises as to whether birth mothers and treatment providers related to the practice of surrogacy can advertise their availability. A further issue arises as to whether brokerage services introducing willing birth mothers to intending parent(s) are permitted, and if so are they permitted to charge a fee for their service. These issues are discussed in Chapter 6.

Residency

- 2.15** Australia is a federation of states and territories and the practice of surrogacy is now conducted on a nationwide basis. Issues around residency and interstate surrogate and clinic selection are discussed in Chapter 4.

Australian jurisdictions

- 2.16** In all Australian states and territories commercial surrogacy is illegal and surrogacy agreements are not legally enforceable.⁴ There is a presumption of parentage in favour of the birth mother. Consequently, in order for intending parents to be recognised as the legal parents of the child, a transfer of parentage must occur. Until recently this was usually accomplished

⁴ Northern Territory legislation is silent on the issue of enforceability of surrogacy agreements. In NSW, commercial surrogacy will be illegal once the *Assisted Reproductive Technology Act (2007)* is proclaimed.

through adoption, although in recent years some jurisdictions have established transferral of parentage mechanisms specific to surrogacy arrangements.

Australian Standing Committee of Attorneys-General discussion paper

- 2.17** In November 2006 the then Federal Attorney General, Phillip Ruddock announced that the Standing Committee of Attorneys-General (SCAG) had agreed to work towards harmonising surrogacy laws in Australia. Its aim is to address variation between states and territories regarding laws, or lack thereof, governing surrogacy, and the resulting practice of individuals travelling interstate to pursue surrogacy arrangements.
- 2.18** This action precipitated some jurisdictions, such as New South Wales, to act to examine the issue of regulating altruistic surrogacy, while other jurisdictions had already begun addressing the issue. The Australian Capital Territory had already enacted legislation.
- 2.19** In January 2009 the Standing Committee of Attorneys-General (SCAG) released a discussion paper entitled ‘A proposal for a national model to harmonise regulation of surrogacy.’ The paper does not represent the views of state governments but calls for submissions with a view to developing a ‘national model law’ regulating the practice of surrogacy.⁵
- 2.20** The paper contains proposals as to how certain aspects of surrogacy should be regulated, presents alternatives and raises issues for debate.
- 2.21** The principles underpinning the proposed model are identified as:
- Parentage orders are to be made in the best interests of the child
 - Intervention of the law in people’s private lives should be kept to a minimum
 - The model should seek to avoid legal dispute between the birth parent(s) and the intended parents.⁶
- 2.22** The areas addressed in the paper and the corresponding proposals made and/or issues raised are as follows:
- **Scope:** It is proposed that the model apply to situations where the surrogacy arrangement existed before the child was conceived, and that parentage orders be available without distinction based on the genetic relationship between the child and the birth mother or intending parents.⁷
 - **Commercial surrogacy:** It is proposed that commercial surrogacy be illegal on the basis that it ‘commodifies the child’ and ‘risks the exploitation of poor families for the benefit of rich ones.’⁸

⁵ Standing Committee of Attorneys-General, *A proposal for a national model to harmonise regulation of surrogacy*, (hereafter ‘SCAG proposal’) January 2009, p 2

⁶ SCAG proposal, January 2009, p 2

⁷ SCAG proposal, January 2009, p 3

⁸ SCAG proposal, January 2009, pp 4-5

- **Enforceability of agreements:** It is proposed that agreements be unenforceable and that intending parents have no legal recourse to sue the birth mother for ‘damages or for the delivery of the child into their care.’⁹
- **Reimbursement of expenses:** It is proposed that birth mothers be reimbursed for ‘losses and expenses.’ The issue is raised as to whether an agreement to reimburse a birth mother should be enforceable.¹⁰
- **Counselling:** It is proposed that all parties to a surrogacy arrangement must first undertake counselling ‘with counsellors who specialise in reproductive medical matters’ arranged through ‘an accredited assisted reproductive technology provider.’ The issue is raised as to whether further counselling after the birth of the child and prior to any application for parentage orders would be appropriate.¹¹
- **Surrogacy agreement:** It is proposed that surrogacy agreements must be made before the child is conceived. The issue is raised as to whether the agreement should be made in writing and be prepared by a lawyer.¹²
- **Parentage orders:** It is proposed that intended parents be able to apply for a parentage order once the birth mother hands the child to them. A parentage order, granted at the Court’s discretion applying the ‘best interests of the child standard’, would have a similar effect to an adoption order, that is, ‘once the order is made, the intended parents will be the child’s only legal parents, to the exclusion of the surrogate and her partner.’ It is further proposed that a new birth certificate be issued at this time, possibly recording the full details of the child’s birth history.¹³
- **Consent:** It is proposed that application for transferral of parentage be permitted only when the birth mother and intended parents consent. The issue is raised as to how the Court could be satisfied that consent is ‘informed and voluntary.’¹⁴
- **Same-sex couples:** There is no proposal made on this issue. Rather, the issue is raised as to whether individual jurisdictions should be free to retain and/or develop their own legislation in this area.¹⁵
- **Residency:** It is proposed that intended parents must be residents in the state or territory in which the application for parentage is being made.¹⁶
- **Access to ART:** There are two alternatives presented: 1) that certain criteria must be met by surrogacy applicants before ART can be utilised, or 2) that ART

⁹ SCAG proposal, January 2009, p 5

¹⁰ SCAG proposal, January 2009, p 5

¹¹ SCAG proposal, January 2009, p 6

¹² SCAG proposal, January 2009, p 7

¹³ SCAG proposal, January 2009, pp 8-11

¹⁴ SCAG proposal, January 2009, pp 11-12

¹⁵ SCAG proposal, January 2009, pp 13-14

¹⁶ SCAG proposal, January 2009, p 14

criteria applied to non-surrogacy cases be applied equally to surrogacy cases, with some modification (eg., requirement for infertility be applied to the intending mother, not the birth mother).¹⁷

- **Age criteria:** There is no proposal made on this issue. The issue is raised as to whether, in the absence of specific age criteria, counselling is sufficient to address eligibility factors which may be age related.¹⁸
- **Approval process:** There is no proposal made on this issue. It is noted that in Victoria and Western Australia approval must be given by a panel and council respectively.¹⁹
- **Screening (eg, for criminal offences):** There is no proposal made in this area. Various levels of intervention are discussed, from a reliance on counselling to identify issues, to the requirement for a criminal history or working-with-children check prior to counselling.²⁰
- **Donor register:** It is proposed that a ‘national donor information register’ be established along the lines of existing donor registers relating to ART generally.²¹
- **Retrospectivity:** It is proposed that that applications for parentage be permitted from people currently raising children in surrogacy arrangements providing there is evidence the agreement was made prior to conception, the child was voluntarily handed over and is currently living with the intending parents.²²
- **Advertising:** There is no proposal made on this issue. It is noted that if surrogacy and the provision of services related to surrogacy is legal then it could be argued that people should be able to advertise their willingness to participate and their services.²³
- **Brokerage:** It is proposed that it be unlawful to charge a fee for the service of locating a surrogate.²⁴
- **Mutual recognition of parentage orders:** It is proposed that a parentage order made in any Australian jurisdiction be recognised in all Australian jurisdictions.²⁵
- **Commonwealth issues:** It is noted that following amendments to the parentage presumptions in the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth), Commonwealth law will recognise the parents of

¹⁷ SCAG proposal, January 2009, pp 15-16

¹⁸ SCAG proposal, January 2009, pp 16-17

¹⁹ SCAG proposal, January 2009, p 17

²⁰ SCAG proposal, January 2009, pp 18-19

²¹ SCAG proposal, January 2009, p 20

²² SCAG proposal, January 2009, p 20

²³ SCAG proposal, January 2009, p 21

²⁴ SCAG proposal, January 2009, p 22

²⁵ SCAG proposal, January 2009, p 22

children born through surrogacy arrangements if parentage has been transferred to them under state or territory law.²⁶

- 2.23 Where relevant, the proposals and issues raised for discussion contained in the SCAG discussion paper have been referred to throughout the report.

Current situation in Australian states and territories

New South Wales

- 2.24 In New South Wales there is limited legislation related to surrogacy. When it commences, the *Assisted Reproductive Technology Act 2007* will prohibit commercial surrogacy and make altruistic surrogacy agreements legally unenforceable.²⁷ The Act was assented to on 7 December 2007, to commence on a date appointed by proclamation. The Committee was advised that minor amendments to the regulations arising from a consultation process are being finalised and the Act is anticipated to commence in July 2009.²⁸
- 2.25 Under the *Status of Children Act 1996* the presumption of parentage in relation to children conceived through a ‘fertilisation procedure’ is in favour of the birth mother. Her male partner, if married or in a de facto relationship, is presumed to be the parent of the child, provided he consented to the procedure, even if neither provided the gametes used in the procedure.²⁹ If the birth mother is in a de facto relationship with a woman, that woman is presumed to be the parent of the child providing she consented to the procedure.³⁰
- 2.26 Intending parents in a surrogacy arrangement can only be recognised as the legal parents of the child through adoption. Alternatively, intending parents may apply to the Family Court of Australia or the Federal Magistrates Court of Australia for a parenting order that may specify such things as with whom the child lives, responsibility for the day-to-day care of the child and the child’s development through education and sport, but does not confer full parental rights and responsibilities.³¹
- 2.27 As in other states and territories, some guidelines relevant to surrogacy arrangements in NSW are contained in the National Health and Medical Research Council (NHMRC) *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, the Reproductive Technology Accreditation Committee (RTAC) *Code of practice for assisted reproductive technology units*, and in internal guidelines developed by individual fertility clinics providing ART services.

²⁶ SCAG proposal, January 2009, p 22

²⁷ *Assisted Reproductive Technology Act 2007* (NSW), ss 43-45

²⁸ Mr Iain Martin, Manager, Legislation, New South Wales Department of Health, Evidence, 18 March 2009, p 2

²⁹ *Status of Children Act 1996* (NSW), s 14 (1)

³⁰ *Status of Children Act 1996* (NSW), s 14 (1A)

³¹ NSW Lawlink website,
<<http://www.lawlink.nsw.gov.au/lawlink/vaw/dvguidelines.nsf/pages/familyviolence#parent>>
(accessed 23 January 2009)

- 2.28** These guidelines relate to the delivery of fertility treatment generally. The RTAC code of practice describes an accreditation process for fertility clinics, while the NHMRC guidelines relate to the actual delivery of ART services. These guidelines are relevant to the practice of surrogacy to the extent that birth mothers utilise ART procedures to conceive.
- 2.29** A more detailed examination of the RTAC and NHMRC guidelines is contained in Chapter 3.

Australian Capital Territory

- 2.30** In the Australian Capital Territory (ACT) the practice of surrogacy has been regulated since 2004 primarily by the *Parentage Act 2004* (ACT) which provides for ‘substitute parent agreements.’
- 2.31** The Act addresses situations in which the birth mother in a surrogacy arrangement undergoes a ‘procedure’ in order to conceive, which includes artificial insemination, in vitro fertilisation or any other means of conceiving other than sexual intercourse.³² At birth there is a presumption of parentage in favour of the birth mother and her ‘domestic partner.’ The intending parents can then apply to the Supreme Court for a parentage order when the child is between the ages of six weeks and six months.³³
- 2.32** The Supreme Court can make a parentage order provided the procedure resulting in conception was carried out in the ACT, neither birth parents are the genetic parents of the child, at least one intending parent is a genetic parent of the child, a substitute parent agreement exists noting the intention of the intending parents to apply for a parentage order, and the intending parents live in the ACT.³⁴
- 2.33** The Court must be satisfied a parentage order in favour of the intending parents is in the best interests of the child and that both birth parents agree.³⁵ The Court must take into account whether the child currently resides with the intending parents, whether they are at least 18 years of age, whether payment other than for ‘expenses reasonably incurred’ has been made, and whether both birth and intending parents have received appropriate counselling and assessment from an ‘independent’ counselling service.³⁶
- 2.34** The counselling service is not considered independent if it is connected with the doctor who carried out the procedure resulting in conception, the institution where the procedure was carried out, or any other entity involved in carrying out the procedure.³⁷
- 2.35** It is illegal to advertise with the intention of ‘inducing’ someone to enter into a substitute parent agreement, to seek a birth mother or intending parents, or to declare a willingness or availability to enter into a substitute parent agreement.³⁸

³² *Parentage Act 2004* (ACT), s 11 (a)-(c)

³³ *Parentage Act 2004* (ACT), s 25 (1)-(3)

³⁴ *Parentage Act 2004* (ACT), s 24 (a)-(e)

³⁵ *Parentage Act 2004* (ACT), s 26 (1) (a) and (b)

³⁶ *Parentage Act 2004* (ACT), s 26 (3) (a), (b), (d) and (e)

³⁷ *Parentage Act 2004* (ACT), s 26 (5) (a)-(c)

Queensland

- 2.36** In Queensland altruistic surrogacy is illegal. However, this situation may change if the Queensland Government adopts the recommendations of the Queensland Parliament's Investigation into Altruistic Surrogacy Committee, which tabled its report in October 2008.
- 2.37** The Committee recommends the decriminalisation of altruistic surrogacy and the establishment of a 'Surrogacy Review Panel' with the authority to approve surrogacy arrangements, providing the intending parents are medically infertile or unable to carry a child, have participated in independent psychosocial and medical assessment, obtained independent legal advice and that there is no significant health risk to the birth mother. The Committee recommends a three-month cooling off period between approval from the Surrogacy Review Panel and the commencement of treatment.³⁹
- 2.38** The Committee further recommends that surrogacy agreements remain unenforceable, the presumption of parentage remain with the birth mother, and that a mechanism for the transferral of parentage be established allowing intending parents to assume parentage between four weeks and six months after birth, providing all parties have undertaken post-birth counselling, the child is residing with the intending parents and at least one intending parent is an Australian resident. A new birth certificate would be issued upon transferral of parentage recording the intending parents as the legal parents with the child able to access the original birth certificate upon reaching 18 years of age.⁴⁰ The Committee also recommends a central register be developed to store information about a child's genetic parentage.⁴¹
- 2.39** With regard to the genetic connections, the Committee concluded that gestational surrogacy where at least one intending parent was a genetic parent of the child was desirable. However, it acknowledges people's differing 'capacities and beliefs' in this area and recommends that surrogacy legislation is not prescriptive in relation to genetic connection and allows the use of the birth mother's egg, donor gametes and donor embryos.⁴²
- 2.40** The Committee recommends the payment of 'reasonable expenses' to the birth mother be permitted, as long there is no 'material gain' for her. It also recommends that advertising and brokerage for altruistic surrogacy be prohibited.⁴³
- 2.41** The Queensland Government tabled its response to the Investigation into Altruistic Surrogacy Committee's report on 23 April 2009, supporting the central recommendation that altruistic surrogacy be decriminalised in Queensland and that a mechanism be developed to transfer legal parentage from birth mothers to intending parents in surrogacy arrangements. In its

³⁸ *Parentage Act 2004* (ACT), s 43 (1) (a) and (b)

³⁹ Queensland Parliament, Investigation into Altruistic Surrogacy Committee, Report (hereafter 'Queensland Parliament Report'), October 2008, Recommendation 16

⁴⁰ Queensland Parliament Report, October 2008, Recommendations 11, 18, 19 and 21

⁴¹ Queensland Parliament Report, October 2008, Recommendation 22

⁴² Queensland Parliament Report, October 2008, Recommendation 10

⁴³ Queensland Parliament Report, October 2008, Recommendations 7 and 8

response, the Government stated that it intended to have legislation to this effect finalised by the end of 2009.⁴⁴

Victoria

- 2.42** In Victoria, the *Assisted Reproductive Treatment Act 2008* was assented to in December 2008. The Act was informed by a report from the Victorian Law Reform Commission, ‘Assisted Reproductive Technology (ART) and Adoption: Final Report,’ completed in June 2007.
- 2.43** The particular significance of the Act for surrogacy is that it removes the requirement that a woman accessing ART must be infertile. The Act therefore provides for birth mothers to utilise ART to implement surrogacy arrangements as approved by a Patient Review Panel. The Panel may approve a surrogacy arrangement only if the ‘commissioning parent’ is ‘unlikely’ to become pregnant or give birth, or, if the commissioning parent is a woman, pregnancy must be likely to place her or her baby’s health at risk.⁴⁵
- 2.44** The surrogate mother must be at least 25 years of age, have previously given birth to a live child and her egg must not be used in the conception of the child born through the surrogacy arrangement. All parties to the surrogacy agreement must receive counselling and legal advice.⁴⁶ Birth mothers may be reimbursed for costs actually incurred but must not received any ‘material benefit or advantage.’⁴⁷ It is illegal to advertise a willingness to participate in or broker a surrogacy arrangement.⁴⁸
- 2.45** In order to access ART, a criminal record check and child protection order check must be conducted on each party to the surrogacy agreement.⁴⁹ There is a ‘presumption against treatment’ if any party has a record of a sexual or violent offence or has had a child removed from their custody.⁵⁰ Where there is a presumption against treatment an application for review can be made to the Patient Review Panel.⁵¹
- 2.46** Presumption of parenthood in Victoria remains with the birth mother and her husband.⁵² Under the new *Assisted Reproductive Treatment Act 2008*, intending parents may apply to the Supreme Court for a transferral of parentage.⁵³

⁴⁴ Queensland Parliament, Government response to the report of the Investigation into Altruistic Surrogacy Committee, tabled 23 April 2009, p 1

⁴⁵ *Assisted Reproductive Treatment Act 2008* (Vic), s 40 (1) (a) (i) and (ii)

⁴⁶ *Assisted Reproductive Treatment Act 2008* (Vic), s 40 (1) (ab)-(c)

⁴⁷ *Assisted Reproductive Treatment Act 2008* (Vic), s 44

⁴⁸ *Assisted Reproductive Treatment Act 2008* (Vic), s 45

⁴⁹ *Assisted Reproductive Treatment Act 2008* (Vic), s 42 (a) and (b)

⁵⁰ *Assisted Reproductive Treatment Act 2008* (Vic), s 14 (1) (a) and (b)

⁵¹ *Assisted Reproductive Treatment Act 2008* (Vic), s 15

⁵² *Status of Children Act 1974* (Vic), s 5

⁵³ *Assisted Reproductive Treatment Act 2008* (Vic), s 140

- 2.47 ART providers must keep a register of genetic information to which children born through ART procedures can apply to have access.⁵⁴

South Australia

- 2.48 In South Australia the *Family Relationships Act 1975* makes surrogacy ‘contracts’ illegal.⁵⁵ However, it has been argued that a surrogacy ‘agreement’ is not a ‘contract’ and therefore altruistic surrogacy is not technically illegal.⁵⁶ The facilitation of surrogacy agreements seeking to use ART is further complicated by the requirement in South Australia that only married couples may utilise ART and one of them must be infertile.⁵⁷ This is unlikely to be the case for a willing birth mother. If a child is born to a surrogacy arrangement in South Australia the only way the intending parents can be recognised as the legal parents is through adoption.
- 2.49 In June 2006 the Statutes Amendment (Surrogacy) Bill was introduced to the Legislative Council. The Bill was withdrawn and referred to the Social Development Committee, which conducted an inquiry into gestational surrogacy, tabling its report in November 2007.⁵⁸
- 2.50 The Committee recommended that South Australian legislation be amended to permit non-commercial gestational surrogacy and allow a fertile woman to access ART if she is acting as a gestational surrogate.⁵⁹ The Committee also recommended a process for transferring parentage to intending parents without the need for them to adopt ‘their own genetic child.’⁶⁰ An abridged birth certificate recording the intending parents as legal parents would be issued for general use, while a detailed birth certificate listing intending parents, birth mother and the use of donor material would be available to the child on request.⁶¹
- 2.51 An amended Statutes Amendment (Surrogacy) Bill was reintroduced in September 2008 and is currently before the House of Assembly for its second reading. The Bill would amend the *Family Relationships Act 1975* to permit ‘recognised surrogacy agreements.’⁶² A recognised surrogacy agreement can exist between a birth mother and her husband, if married, and ‘commissioning parents’ who are married and have cohabitated for the five years preceding the agreement, providing all parties are at least 18 years of age. Furthermore, the birth mother must be a ‘prescribed relative’ of at least one of the commissioning parents or have a

⁵⁴ *Assisted Reproductive Treatment Act 2008* (Vic), s 49 and s 56 (1) (a)

⁵⁵ *Family Relationships Act 1975* (SA), s 10G (1)

⁵⁶ See for example, South Australia Legislative Council, Social Development Committee, *Inquiry into Gestational Surrogacy*, Report 26, November 2007, p 30; Redman J, ‘Weaving the legal maze of surrogacy in South Australia today,’ paper presented at the South Australian Council on Reproductive Technology Annual John Kerin Symposium, 31 March 2008, p 8

⁵⁷ *Reproductive Technology (Clinical Practices) Act 1988* (SA), s 13 (3) (b)

⁵⁸ South Australia Legislative Council, Social Development Committee, *Inquiry into Gestational Surrogacy*, Report 26 (hereafter ‘South Australian Legislative Council Report’), November 2007

⁵⁹ South Australia Legislative Council Report, November 2007, Recommendation 2 and 3 (a)

⁶⁰ South Australia Legislative Council Report, November 2007, Recommendation 1 (b)

⁶¹ South Australia Legislative Council Report, November 2007, Recommendation 1 (g) and (h)

⁶² Statutes Amendment (Surrogacy) Bill 2008 (SA), s 11

relationship with them that ‘appears to indicate that the surrogacy arrangements under [the] agreement have a reasonable prospect of success.’⁶³

- 2.52** The Bill further proposes that at least one commissioning parent must be a genetic parent to the child unless they provide a medical certificate stating they are either both infertile or there is some other reason it would be preferable not to use their genetic material. It would be a requirement that parties undergo counselling from a counselling service ‘that is independent of a person who holds a licence under ... the *Reproductive Technology (Clinical Practices) Act 1988*.’ In addition, recognised surrogacy agreements must be written, signed by all parties and ‘attested by a lawyer’s certificate.’ The birth mother may be reimbursed for expenses associated with the pregnancy and with the required counselling, medical and legal services.⁶⁴
- 2.53** With regard to transferral of parentage, the Bill proposes that intending parents may apply between six weeks and six months of the child’s birth for an order recognising them as the legal parents. The Court must take into account whether the child resides with the intending parents and whether they are ‘fit and proper persons to assume the role of parents of the child.’ If an order is made, the Registrar of Births, Deaths and Marriages records all details of the child, the birth parent(s) and the commissioning parents.⁶⁵ The child is entitled to a certificate recording these details once he or she reaches the age of 18.⁶⁶

Tasmania

- 2.54** Tasmanian legislation is silent on permitting altruistic surrogacy, although the *Surrogacy Contracts Act 1993* does prohibit the provision of technical or professional services to facilitate a surrogacy arrangement.⁶⁷
- 2.55** The Tasmanian Legislative Council Select Committee on Surrogacy reported on the regulation of surrogacy in Tasmania in July 2008. The Committee noted that the above prohibition prevented Tasmanian couples preparing to pursue lawful surrogacy arrangements in other states from accessing legal and psychological services in Tasmania.⁶⁸ Consequently, it recommended that ‘legal, psychiatric or psychological’ services be exempt from the prohibition.⁶⁹ The recommendations leave the prohibition otherwise intact, the Committee noting 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)*.’⁷⁰

⁶³ Statutes Amendment (Surrogacy) Bill 2008 (SA), s 12

⁶⁴ Statutes Amendment (Surrogacy) Bill 2008 (SA), s 12

⁶⁵ Statutes Amendment (Surrogacy) Bill 2008 (SA), s 12

⁶⁶ Statutes Amendment (Surrogacy) Bill 2008 (SA), s 17

⁶⁷ *Surrogacy Contracts Act 1993* (Tas), s 5

⁶⁸ Tasmania Legislative Council, Select Committee, *Report on Surrogacy* (hereafter ‘Tasmanian Legislative Council Report’), July 2008, p 18

⁶⁹ Tasmania Legislative Council Report, July 2008, Recommendation 1

⁷⁰ Tasmania Legislative Council Report, July 2008, p 22

- 2.56** The Committee recommended that the Tasmanian Government implement the recommendations of SCAG in relation to ‘the legal recognition of parentage achieved by surrogacy.’⁷¹
- 2.57** The Committee recommends that future legislation in Tasmania relating to surrogacy give authority to the Family Court to supervise and sanction ‘pre-conception altruistic surrogacy agreements’ and that parties to such agreements are to be at least 21 years of age and have undertaken ‘relevant recognised courses of therapeutic counselling and legal advice,’ with the birth mother having carried at least one previous child to term. Application to the Family Court for parentage is to be made within six weeks and six months of the child’s birth.⁷²
- 2.58** The Tasmanian Government tabled its response to the Legislative Council Select Committee on Surrogacy’s report on 28 October 2008, stating its support for each of the recommendations contained in the report.⁷³

Western Australia

- 2.59** In Western Australia, the *Surrogacy Act 2008* (WA) was assented to in December 2008. The Act allows the Reproductive Technology Council to approve surrogacy arrangements between birth parents and ‘arranged parents.’⁷⁴ Arranged parents must be unable to conceive or give birth or be likely to give birth to a child with a genetic abnormality.⁷⁵ The birth mother must be at least 25 years of age and, other than in exceptional circumstances, have previously given birth to a live child.⁷⁶ All parties must have received counselling and independent legal advice and the birth mother ‘must not yet have become pregnant under the arrangement.’⁷⁷
- 2.60** The agreement must be in writing and signed by the arranged parents, the birth parents and any egg or sperm donor and the spouse or de facto partner of a donor.⁷⁸ Although the surrogacy arrangement is not enforceable, an obligation under the arrangement to reimburse reasonable expenses can be.⁷⁹
- 2.61** The arranged parents can apply for a parentage order between 28 days and six months after birth if at least one of them is 25 years of age and they reside in Western Australia. They can apply as a couple if they are of opposite sex and married to or in a de facto relationship with

⁷¹ Tasmania Legislative Council Report, July 2008, Recommendation 2

⁷² Tasmania Legislative Council Report, July 2008, Recommendations 4-8

⁷³ Tasmanian Parliament, Government response to the Tasmania Legislative Council, Select Committee, *Report on Surrogacy*, tabled 28 October 2008

⁷⁴ *Surrogacy Act 2008* (WA), s 16

⁷⁵ *Surrogacy Act 2008* (WA), s 19 (2)

⁷⁶ *Surrogacy Act 2008* (WA), s 17 (a)

⁷⁷ *Surrogacy Act 2008* (WA), s 17 (c) and (e)

⁷⁸ *Surrogacy Act 2008* (WA), s 17 (b)

⁷⁹ *Surrogacy Act 2008* (WA), s 7

each other. Otherwise, one of the arranged parents, or the arranged parent if there is only one, can apply as an individual.⁸⁰

2.62 In addition to the above, the Court must be satisfied all parties have received further counselling and legal advice about the effect of the order and the birth parents consent to the order.⁸¹ The court may dispense the requirement that the birth parents consent if the birth mother is not a genetic parent of the child and at least one of the arranged parents is.⁸²

2.63 The child born to a surrogacy arrangement can have access to the record of the parentage order proceedings and their registration of birth.⁸³

Northern Territory

2.64 Northern Territory currently has no surrogacy legislation. A woman and her husband, if any, are presumed to be the legal parents of a child conceived through a ‘fertilisation procedure.’⁸⁴

Overseas jurisdictions

2.65 Surrogacy is practiced throughout the world. In some cultures, antecedents to the modern practice of surrogacy can be seen in the tradition of children being raised by non-biological parents who may be members of the genetic parents’ extended family. More recently, partly due to the advent of ART, many jurisdictions have begun regulating the practice of surrogacy to varying extents.

New Zealand

2.66 In New Zealand altruistic surrogacy is permitted while surrogacy agreements are not enforceable.⁸⁵

2.67 The Ethics Committee on Assisted Reproductive Technology may approve applications from persons wishing to utilise ART, including within the context of a surrogacy agreement.⁸⁶ The Ethics Committee is advised and follows guidelines issued by the Advisory Committee on Assisted Reproductive Technology (ACART).⁸⁷

2.68 The ACART has issued guidelines to the effect that at least one of the intending parents must be a genetic parent of the child, the intending mother must be infertile or have a medical

⁸⁰ *Surrogacy Act 2008* (WA), s 19 (1) and (2)

⁸¹ *Surrogacy Act 2008* (WA), s 21 (2) (b) and (c)

⁸² *Surrogacy Act 2008* (WA), s 21 (3) and (4)

⁸³ *Surrogacy Act 2008* (WA), s 37 (2) and s 38 (1)

⁸⁴ *Status of Children Act 2004* (NT), s 5C and s 5D

⁸⁵ *Human Assisted Reproductive Technology Act 2004* (NZ), s 14 (1)

⁸⁶ *Human Assisted Reproductive Technology Act 2004* (NZ), s 28 (1) (a)

⁸⁷ *Human Assisted Reproductive Technology Act 2004* (NZ), s 29 (a)

condition making pregnancy dangerous, and that each party to the agreement must receive independent medical and legal advice and counselling. The Ethics Committee must also determine that each party to the agreement has declared their intentions about the day-to-day care, guardianship and adoption of the child, and any ongoing contact.

- 2.69** In addition, the Ethics Committee must take into account whether the intending birth mother has completed her family and whether the relationship between her and the intending parents ‘safeguards the wellbeing of all parties and especially any resulting child.’⁸⁸
- 2.70** There is a presumption of parentage in favour of the birth mother. Intending parents must apply to adopt the child born through the surrogacy arrangement in order to have legal parentage transferred to them. In 2005, the New Zealand Law Commission recommended an alternative mechanism - an interim order transferring parenthood that can be applied for before the child is born. If 21 days after the child’s birth no petition to the contrary has been filed by the birth mother, the Family Court would be able to transfer legal parenthood to the intending parents. If no interim order has been made, the Family Court could transfer parenthood at any time between 21 days and six months after the child’s birth.⁸⁹
- 2.71** The New Zealand Government has agreed that adoption is an unsuitable way to transfer parentage in surrogacy arrangements and that families created through surrogacy arrangements should not be disadvantaged by uncertainty surrounding parenthood. It has agreed to give careful consideration to the Law Commission’s recommendations.⁹⁰

United Kingdom

- 2.72** The United Kingdom permits altruistic surrogacy and prohibits commercial surrogacy. Surrogacy agreements are unenforceable.⁹¹
- 2.73** It is illegal for intending parents or birth mothers to advertise their willingness to enter into a surrogacy arrangement.⁹² It is also illegal for a surrogacy brokerage service to charge a fee.⁹³
- 2.74** There is a presumption of parentage in favour of the birth mother and her husband, if she is married.⁹⁴ If the birth mother is not married, or her husband does not consent to the surrogacy arrangement, the intended father can be recognised as the legal parent provided he is the biological father of the child. If so, he can then have his partner, the intending mother, accorded parental responsibility as the child’s legal step-parent.⁹⁵

⁸⁸ Advisory Committee on Assisted Reproductive Technology, ‘Guidelines on Surrogacy Arrangements involving Providers of Fertility Services,’ November 2007

⁸⁹ New Zealand Law Commission, *New Issues in Parenthood*, Report 88, April 2005, Recommendation 15

⁹⁰ *Government response to Law Commission report on New Issues in Legal Parenthood*, paras 28-31

⁹¹ *Surrogacy Arrangements Act 1985* (UK), s 1A and s 2

⁹² *Surrogacy Arrangements Act 1985* (UK), s 3 (1) (a) and (b)

⁹³ *Surrogacy Arrangements Act 1985* (UK), s 2 (1) (a)-(c)

⁹⁴ *Human Fertilisation and Embryology Act 1990* (UK), s 27 and s 28

⁹⁵ Surrogacy UK website, <www.surrogacyuk.org/whatisurrogacyc.html> (accessed 21 January 2009)

- 2.75** In order for the intending mother to be granted full parent, rather than step-parent, status and to extinguish the parental responsibilities of the birth mother, or in situations where the birth mother has a consenting husband and therefore neither intending parent has legal parentage, a Parental Order must be sought to transfer parentage to the intending parents.
- 2.76** Parental orders are sought from a local family proceedings (magistrates) court and must be applied for within six months of the child's birth. Requirements include that the intending parents are married, residents of the United Kingdom, over 18 years of age, and that at least one of them is the biological parent of the child. Furthermore, the court making the order must be satisfied that no money, 'other than for expenses reasonably incurred,' has changed hands between intending and birth parent(s).⁹⁶
- 2.77** Intending parents who are not eligible to apply for a Parental Order must apply for adoption to be recognised as the legal parents of the child.⁹⁷

Canada

- 2.78** Canada permits altruistic surrogacy and prohibits commercial surrogacy.⁹⁸ The enforceability of surrogacy arrangements is determined by Canadian provincial and territorial legislation.⁹⁹ It is illegal to receive payment for the service of arranging a surrogacy agreement or to advertise such services.¹⁰⁰ Birth mothers must be at least 21 years of age.¹⁰¹
- 2.79** There is a presumption of parentage in favour of the birth mother. Mechanisms for the transferral of parentage vary between provinces and territories. For example, in Alberta, the intending mother will on application within 14 days of the child's birth be declared the mother of the child, provided she is the biological mother and the birth mother consents. A surrogacy agreement is not legally enforceable.¹⁰²
- 2.80** In Nova Scotia, parentage may be transferred to the intending parents provided the surrogacy agreement existed before conception, the birth mother consents, and one of the intending parents is a biological parent of the child.¹⁰³
- 2.81** The Uniform Law Conference of Canada has assigned a working group to develop recommendations for uniform laws across Canadian provinces and territories in the area of assisted human reproduction, including presumption and transferral of parentage relevant to surrogacy arrangements. The working group acknowledges that indicators of parentage include the act of birth, genetic relationship to the child and the intention to parent and that

⁹⁶ *Human Fertilisation and Embryology Act 1990* (UK), s 30 (1)-(7)

⁹⁷ Surrogacy UK website, <www.surrogacyuk.org/whatisurrogacy.html> (accessed 21 January 2009)

⁹⁸ *Assisted Human Reproduction Act 2004* (Can), s 6 (1)

⁹⁹ *Assisted Human Reproduction Act 2004* (Can), s 6 (5)

¹⁰⁰ *Assisted Human Reproduction Act 2004* (Can), s 6 (2) and (3)

¹⁰¹ *Assisted Human Reproduction Act 2004* (Can), s 6 (4)

¹⁰² *Family Law Act 2003* (Alberta), s 12 (2)-(7)

¹⁰³ Birth Registration Regulations 2007, s 5 (2) (b), (c) and (e)

parentage laws relating to surrogacy arrangements must balance these factors.¹⁰⁴ The working group proposes that birth mothers continue to be presumed the parent of the child and that her consent to relinquish must be obtained after the child is born. It discusses two options for proceeding from this point; 1) that parentage be transferred to both intending parents provided at least one of them is a biological parent of the child, otherwise they would need to apply to adopt the child, or 2) that the intention to parent the child be sufficient to transfer parentage to the intending parents.¹⁰⁵

- 2.82** The working group intends to present a draft Act at the 2009 Annual Meeting of the Uniform Law Conference of Canada.

United States

- 2.83** In the United States surrogacy is governed by state legislation, which varies from outright prohibition to allowing commercial surrogacy. The following sections describe the circumstances in a sample of four states illustrating different approaches to regulating the practice of surrogacy. Those states are Florida, which has specific legislation allowing surrogacy contracts; Minnesota, which is in the process of drafting surrogacy legislation; New York, where legislation is largely silent on surrogacy, particularly parentage issues, but where implementing surrogacy arrangements is made difficult in the courts; and California, where legislation is largely silent on surrogacy but where it is facilitated by the courts to the extent that commercial surrogacy is permitted and surrogacy contracts are legally enforceable.

Florida

- 2.84** Florida allows altruistic surrogacy and the reimbursement of expenses, including ‘reasonable living expenses’ to the birth mother. Gestational surrogacy ‘contracts’ are enforceable provided the intending parents are over 18 years of age and married, the birth mother is over 18, and the intending mother cannot carry a pregnancy to term or to do so would endanger the foetus. At least one of the intending parents must be a genetic parent of the child. If this is determined not to be the case, the gestational mother assumes parental rights. Otherwise, the intending parents must assume parental rights ‘regardless of any impairment in the child.’¹⁰⁶
- 2.85** Traditional surrogacy agreements in Florida are treated as ‘preplanned adoption agreements.’ The birth mother, or ‘volunteer mother,’ assumes parental rights if the agreement is terminated by the intending parents before transfer of custody of the child. She may also assume parental rights if she terminates the agreement within seven days of the child’s birth or if a court determines that the intending father is not the biological father. The intending father, provided he is the biological father, assumes parental rights if the agreement is terminated by any party.¹⁰⁷

¹⁰⁴ Uniform Law Conference of Canada, ‘Proceedings of Annual Meetings – 2008 Quebec City, QC, paras 21 and 22

¹⁰⁵ Uniform Law Conference of Canada, ‘Proceedings of Annual Meetings – 2008 Quebec City, QC, para 36 (1) and (2)

¹⁰⁶ Florida Statute 742.15 (1)-(4)

¹⁰⁷ Florida Statute 63.213 (2) (c) and (d)

Minnesota

- 2.86** In Minnesota the Gestational Surrogacy Bill 2008 passed the Senate and House but was vetoed by the Governor. The Bill sought to amend existing Minnesota statutes, which are silent on surrogacy. Currently, there is a presumption of parentage in favour of the woman who gives birth.¹⁰⁸ Where an artificial insemination procedure has been used, the woman's husband is treated in law as if he is the biological father of the child, irrespective of whether or not his sperm was used.¹⁰⁹ The husband can renounce his presumption of parentage and recognise another man as the child's biological father, who will then be presumed to be the legal parent of the child.¹¹⁰ The intended mother can then apply for step-parent adoption of the child to obtain parental rights.¹¹¹
- 2.87** The new Bill sought to establish a 'Gestational Carrier Contract' that would be legally enforceable. Intending parents would be recognised as the legal parents immediately upon the birth of the child.¹¹² Eligibility requirements for entering into a surrogacy agreement included that the birth mother must be at least 21 years of age, have given birth to at least one child and have completed a medical and mental health evaluation and obtained independent legal advice.¹¹³ Intended parents must have contributed at least one of the gametes used in conception and have had a 'medical need' to enter into a surrogacy arrangement.¹¹⁴
- 2.88** The Governor of Minnesota vetoed the Bill on the basis that it primarily protected the interests of the intending parents at the expense of the birth mother and child. He noted in particular that the Bill would infringe on the birth mother's right to make medical decisions during the pregnancy, failed to grant her the right to refuse a request from the intending parents that she terminate the pregnancy, and allowed intending parents to restrict her activities with the threat of legal action and damages claims. The Governor noted that the terms of a gestational carrier contract prevented the courts applying the 'best interests of the child' standard to the resolution of disputes. He noted also that the Bill allowed unlimited compensation to be paid to the birth mother and recommended instead that surrogacy arrangements be facilitated through donated services.¹¹⁵

¹⁰⁸ Minnesota Statute 257.54 (a)

¹⁰⁹ Minnesota Statute 257.56 (1)

¹¹⁰ Minnesota Statute 257.57 (1) and (1a)

¹¹¹ The American Surrogacy Centre website <www.surrogacy.com/legals/article/mnlaw.html> (accessed 22 January 2009)

¹¹² Gestational Surrogacy Bill 2008 (Minnesota) (1) (b) and (3) (b) (1)-(5), <www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S2965.2.html&session=ls85> (accessed 22 January 2009)

¹¹³ Gestational Surrogacy Bill 2008 (Minnesota) (4) (a) (1)-(5), <www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S2965.2.html&session=ls85> (accessed 22 January 2009)

¹¹⁴ Gestational Surrogacy Bill 2008 (Minnesota) (4) (b) (1) and (2), <www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S2965.2.html&session=ls85> (accessed 22 January 2009)

¹¹⁵ Office of Minnesota Governor Tim Pawlenty website, <www.governor.state.mn.us/stellent/groups/public/documents/web_content/prod008926.pdf> (accessed 22 January 2009)

New York

- 2.89** New York state legislation declares surrogate parenting contracts void and unenforceable and ‘contrary to the public policy of this state.’¹¹⁶ Nevertheless, altruistic surrogacy is not illegal, while commercial surrogacy is.¹¹⁷
- 2.90** A child born through artificial insemination is deemed to be the natural child of the woman who gave birth and her husband.¹¹⁸ Custody and parental rights determinations are guided by family law, not contract principles. Consequently, intending parents entering into surrogacy arrangements can have no certainty as to parentage outcomes.¹¹⁹ The courts have made some determinations that make the birth mother the legal mother where the genetic mother is an egg donor with no intention of raising the child, and others that make the genetic mother the legal mother where the birth mother was acting as a surrogate. In other cases, the courts have refused to determine maternity and await guidance from state legislature.¹²⁰

California

- 2.91** In California surrogacy is governed by case law rather than statute law.¹²¹ Commercial surrogacy is not prohibited. Californian courts have consistently upheld the intentions of intending and birth parents in relation to parenthood as expressed in surrogacy agreements. Consequently, there can be some certainty for parties entering into surrogacy agreements irrespective of where the genetic material comes from.¹²²
- 2.92** With regard to a custody dispute in the context of gestational surrogacy, the seminal case is *Johnson v Calvert (1993)* in the California Supreme Court. The Court ruled that the gestational surrogate had no claim to parental rights to the child, granting those rights to the intending parents. In so doing, the Supreme Court upheld the ruling of a lower court that held the surrogacy contract was legal and enforceable. The Court acknowledged that California’s *Uniform Parentage Act* recognised two means of determining maternity – genetic relationship and the act of giving birth. It reasoned however that ‘she who intended to bring about the birth of a child that she intended to raise as her own is the natural mother under California law.’¹²³
- 2.93** With regard to a custody dispute in the context of traditional surrogacy, the seminal case is *Buzzanca v. Buzzanca (1998)*. In this case, the egg came from the birth mother and the sperm

¹¹⁶ Domestic Relations Law (New York), Article 8 (122)

¹¹⁷ Domestic Relations Law (New York), Article 8 (123)

¹¹⁸ Domestic Relations Law (New York), Article 5 (73)

¹¹⁹ The American Surrogacy Centre website, <www.surrogacy.com/legals/article/nylaw.html> (accessed 22 January 2009)

¹²⁰ The American Surrogacy Centre website, <www.surrogacy.com/legals/article/nylaw.html> (accessed 22 January 2009)

¹²¹ The American Surrogacy Centre website, <www.surrogacy.com/legals/map.html> (accessed 23 January 2009)

¹²² The American Surrogacy Centre website, <www.surrogacy.com/legals/article/calaw.html> (accessed 23 January 2009)

¹²³ *Johnson v Calvert* (1993) 5 Cal.4th 84, 851 P.2d 776, para 6

from an anonymous donor. Neither intending parents were a genetic parent to the child. Nevertheless, the Court again ruled in favour of the intending parents awarding them parental rights.¹²⁴

Israel

- 2.94** In 1996 Israel drafted what is still amongst the most detailed legislation of any country regulating the practice of surrogacy.¹²⁵ The Israeli legislation is influenced by the beliefs of Judaism, which approve of the practice in principle. The earliest recorded case of surrogacy appears in the Bible (Genesis 16:2).¹²⁶ During the development of the Israeli legislation the Aloni Commission, established to consider the implications of fertility treatment involving *in vitro* fertilisation, argued that a woman's right to contract and receive reimbursement for her reproductive services empowered her, rather than exploited her.¹²⁷
- 2.95** A multidisciplinary Approving Committee may approve a surrogacy arrangement following extensive medical and psychological assessment of the parties involved. Other than in special cases, the Approving Committee will only approve gestational surrogacy where both gametes come from the commissioning couple, who must be married according to Israeli law. Third party sperm donation, in particular, is not allowed as this would result in an 'illegitimate' child according to Judaism. In addition, the surrogate mother must be single or divorced, or the child would also be considered illegitimate.
- 2.96** The surrogate mother must be anonymous and not a relative of either one of the parents. This criterion is intended to prevent familial pressure being applied to relatives to become surrogates.
- 2.97** The Approving Committee also supervises the payment of expenses to the surrogate mother, which can take the form of monthly payments to cover medical, insurance and legal costs as well as loss of time and income.
- 2.98** A social worker is the legal guardian of the child at birth. Within seven days the commissioning couple apply for adoption, which the court approves unless it finds doing so would be against the child's best interests.¹²⁸

¹²⁴ *Buzzanca v. Buzzanca*, 61 Cal. App. 4th 1410 (Cal. Ct. App. 4th 1998)

¹²⁵ Submission 29, Next Generation Fertility, p 3

¹²⁶ Benshushan A & Schenker J, 'Legitimizing surrogacy in Israel,' *Human Reproduction*, 1997, Vol 12, No 8, p 1834

¹²⁷ Submission 29, p 3

¹²⁸ Benshushan A & Schenker J, pp 1832-1834

Chapter 3 Beliefs and attitudes about the practice of surrogacy

This chapter discusses the beliefs, attitudes and arguments presented by inquiry participants in relation to the practice of surrogacy. The views expressed were diverse, but tended to polarise around an ‘in-principle’ support of or opposition to surrogacy, and were grounded in deeply held convictions relating to reproduction and family formation, and religious and ethical standpoints.

The Committee considers the range of views as they related to the social constructs of motherhood, fatherhood and family, the rights and wellbeing of children - such as the right of the child to have a mother and father, or otherwise - the rights of intending parents, and those of the birth mother. The Committee considers these views in some detail in recognition of their contribution to the Committee’s understanding of altruistic surrogacy and the fact that this parliamentary inquiry represents one of the few opportunities stakeholders and members of the community will have to participate in a public consultation process about the issue of altruistic surrogacy.

While there was a range of views expressed, varying between outright support and outright opposition to surrogacy, a majority of the views that could be termed ‘beliefs and attitudes’, and which are presented in this chapter, were in opposition to surrogacy in principle or believed that it should be carefully restricted. Those inquiry participants who supported the practice of surrogacy tended to focus on the practicalities of protecting the rights of children born through surrogacy arrangements. Consequently, the majority of their views are presented in chapters 4, 5 and 6.

Views on principle

- 3.1** The practice of surrogacy is a contentious issue, and a majority of inquiry participants expressed an ‘in-principle’ view, either in support of or opposition to it. Those supportive of surrogacy tended to focus on the viable and often last option it represents for people experiencing infertility problems to have children. Those opposed to surrogacy tended to focus on the potential harm caused to parties to a surrogacy arrangement and in particular to the child born through the arrangement.
- 3.2** This section is not intended to provide an exhaustive analysis of these views, but rather to indicate the starting point some inquiry participants used in expressing their views. A more detailed examination of those views is presented in the following sections.
- 3.3** A number of inquiry participants supported the practice of surrogacy in principle.
- 3.4** The Australian and New Zealand Infertility Counsellors’ Association noted that many people struggle to have children due to ‘medical infertility or health problems’ and that surrogacy offered a solution for those who ‘have been assessed to be able to appreciate and manage its unique demands.’¹²⁹

¹²⁹ Submission 34, Australian and New Zealand Infertility Counsellors' Association, p 3

3.5 Similarly, ACCESS Australia’s Infertility Network recommended that permitting surrogacy in a ‘controlled environment’ would ‘provide a successful option for women who for medical reasons are unable to carry a pregnancy safely.’¹³⁰ It suggested there was an increasing understanding in the community about surrogacy, as reflected in a 1994 Morgan Gallop Poll which found that ‘52 per cent of Australians approved of altruistic surrogacy being available for infertile married couples.’¹³¹ ACCESS argued that the law should reflect community attitudes:

If one purpose of the law is to reflect community attitudes then legislation should be flexible enough to allow couples considering surrogacy to proceed in a way which best meets their needs, while protecting the parties involved, especially the offspring.¹³²

3.6 Associate Professor Anita Stuhmcke, from the Faculty of Law at the University of Technology, Sydney, argued that the focus, in relation to parties wishing to enter into a surrogacy arrangement, should be on ‘promoting choice making, giving the structures to inform their decision making processes, rather than taking that right away from them.’¹³³

3.7 Some inquiry participants supported surrogacy in limited circumstances. For example, Revd Dr Andrew Ford from the Anglican Church Diocese of Sydney, whilst opposing surrogacy in general, suggested it could be appropriate in circumstances where there were unused embryos:

Imagine a couple involved in ART have a number of embryos but the woman, for whatever reason, through disease or some other condition, finds herself unable to carry those embryos to full term. Maybe in that situation—because you do have a child there in an embryo—surrogacy would be appropriate.¹³⁴

3.8 A large number of inquiry participants opposed surrogacy on principle.¹³⁵ Furthermore, some participants stated that the Government should play a role in discouraging the practice¹³⁶ or in fact prohibiting the practice.¹³⁷

¹³⁰ Submission 20, ACCESS Australia’s Infertility Network, p 2

¹³¹ Submission 20, p 8

¹³² Submission 20, p 8

¹³³ Associate Professor Anita Stuhmcke, Faculty of Law, University of Technology, Sydney, Evidence, 19 March 2009, p 6

¹³⁴ Revd Dr Andrew Ford, Anglican Church Diocese, Sydney, Evidence, 6 November 2009, p 3

¹³⁵ See for example Submission 21, Tangled Webs, p 1; Mr Timothy Cannon, Research Officer, Australian Family Association, Evidence, 6 November 2009, p 40; Mr Damien Tudehope, Legal Representative, Family Voice Australia, Evidence, 6 November 2009, p 37; Submission 6, VANISH, p 4; Submission 17, Wanda Skowronska, p 1; Revd Dr Andrew Ford, Anglican Church Diocese, Sydney, Evidence, 6 November 2009, p 2; Submission 14, Southern Cross Bioethics Centre, pp 2-3.

¹³⁶ See for example Submission 10, Catholic Archdiocese of Sydney, Life, Marriage and Family Centre, p 8; Submission 12, Queensland Bioethics Centre, p 10

¹³⁷ Mr Timothy Cannon, Research Officer, Australian Family Association, Evidence, 6 November 2009, p 42; Submission 30, Plunkett Centre for Ethics, p 3

3.9 Professor Margaret Somerville from the Centre for Medicine, Ethics and Law at McGill University in Montreal, Canada, stated that whilst surrogacy was not acceptable in principle, even if it was, the risks it poses outweigh any potential benefits:

My own view is that surrogacy is not ethically acceptable in principle, and that even if that were not the case its risks and harms, especially to children, to surrogate mothers, and to important societal values far outweigh any benefits or potential benefits, no matter how desperately people want to found a family and use a surrogate mother to do so, and how strong our compassion for them is.¹³⁸

3.10 Dr Bernadette Tobin, Director of the Plunkett Centre for Ethics, stated that surrogacy arrangements were intrinsically unjust, ‘whether or not the child is happy,’ because they harm and do wrong to the child born through the arrangement ‘by confusing his or her biological origins.’¹³⁹

3.11 Those inquiry participants who expressed an in-principle opposition to surrogacy raised a number of specific concerns in relation to the practice. These concerns related to the social construct of motherhood, fatherhood and family, the commodification of children, the rights of the child - such as the right of the child to have a mother and father - as opposed to the adults involved, the wellbeing of children born through surrogacy arrangements, the wellbeing of the birth mother and also the wellbeing of the intending parents. Other inquiry participants addressed some of these concerns and provided an alternative view. These issues are examined in the following sections of this chapter.

Social construct of motherhood, fatherhood and family

3.12 Some inquiry participants who were opposed to surrogacy were concerned that it undermined the integrity of familial relationships and forced the construction of new meanings for terms related to motherhood and family.

3.13 The Women’s Forum Australia argued that surrogacy undermined ‘the intrinsic meaning of motherhood by re-constructing motherhood as something that can be given away, a legal relationship based on whoever wants - or in the case of a dispute - wins the child.’¹⁴⁰ The Catholic Archdiocese of Sydney made a similar point, suggesting that altruistic surrogacy arrangements contributed to a ‘legal and cultural deconstruction of parenthood’ and a situation where family formation was dominated by the desires of adults.¹⁴¹

3.14 The Southern Cross Bioethics Centre stated that the unusual familial relationships arising from surrogacy arrangements mean that ‘the concepts of “mother”, “father”, “son” and “daughter” lose their established meaning and thus force the construction of new categories such as “gestational mother”, “surrogate mother”, “genetic mother” and so on.’¹⁴²

¹³⁸ Submission 4, Professor Margaret Somerville, McGill Centre for Medicine, Ethics and Law, p 2

¹³⁹ Answers to questions on notice taken during evidence 6 November 2009, Dr Bernadette Tobin, Director of the Plunkett Centre for Ethics, Question 3, p 3

¹⁴⁰ Submission 22, Women's Forum Australia, p 3

¹⁴¹ Submission 10, p 6

¹⁴² Submission 14, p 5

- 3.15** Mr Raymond Campbell, Director of the Queensland Bioethics Centre, noted that the Government's stance on surrogacy would 'impact upon society's understanding of marriage and upon parenting and on the place of the child in our society.'¹⁴³
- 3.16** Furthermore, some inquiry participants argued that surrogacy undermined the role of the family and its contribution to society.
- 3.17** For example, Mr Christopher Meney from the Catholic Archdiocese of Sydney described surrogacy as 'an invalid form of family formation which undermines the role and the ability of the natural family to contribute to the flourishing of persons, communities and societies.' Its effect, he stated, was to weaken 'the integrity and functionality of the family by confusing relationships between children and parents, as well as relationships between spouses and partners.'¹⁴⁴
- 3.18** Similarly, Mr Tim Cannon, Research Officer with the Australian Family Association, argued that surrogacy, through its impact on the relationship between children and parents, 'has a general detrimental effect on the integrity and stability of the family, which we hold to be the fundamental unit of society.'¹⁴⁵
- 3.19** Mr Meney was also concerned that support for surrogacy sent the wrong message to children born through traditional arrangements, by 'intimating to them and to wider society that biological intergenerational connectedness is not critical, it does not really matter that much.'¹⁴⁶
- 3.20** Associate Professor Nicholas Tonti-Filippini, Head of Bioethics at the John Paul II Institute for Marriage and Family, noted that Article 23 of the International Covenant on Civil and Political Rights 'holds that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state' and that surrogacy had the potential to impinge on that protection.¹⁴⁷
- 3.21** However, not all inquiry participants shared this concern that surrogacy threatened social constructs such as those relating to family. For example, ACCESS Australia's Fertility Network noted the view that the term 'parent' is a 'contested concept, one that has a fluid shifting meaning that is subject to disruptions' and that the definition of a parent should not be considered in isolation from 'a changing historical and social context.'¹⁴⁸

¹⁴³ Mr Raymond Campbell, Director, Queensland Bioethics Centre, Evidence, 18 March 2009, p 74

¹⁴⁴ Mr Christopher Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, Evidence, 6 November 2009, p 15

¹⁴⁵ Mr Timothy Cannon, Research Officer, Australian Family Association, Evidence, 6 November 2009, p 40

¹⁴⁶ Mr Meney, Evidence, 6 November 2009, pp 18-19

¹⁴⁷ Associate Professor Nicholas Tonti-Filippini, Head of Bioethics, John Paul II Institute for Marriage and Family, Evidence, 19 March 2009, p 26

¹⁴⁸ Submission 20, p 8, referring to Bainham, A, Sclater, S.D. and Richards, M. (eds.), *What is a Parent? A Socio-Legal Analysis* (London, Hart Publishing, 1999)

3.22 Governments, suggested ACCESS, tend to ‘idealise so-called “traditional” family structures to secure electoral support’ and should ‘accord some respect for the diversity in family formation that exists in multi-cultural and pluralistic countries.’¹⁴⁹ As an example of such an inclusive attitude ACCESS quoted from the 1997 annual report of The Human Fertilisation and Embryology Authority in the United Kingdom, which states:

Times change, and the medical and ethical worlds move on. We recognise the need regularly to update our views and advice.¹⁵⁰

Commodification of children and the right to have a child

3.23 Some inquiry participants argued that a surrogacy arrangement, whether commercial or not, commodified, or instrumentalised, children by making them the objects of contracts.

3.24 The Queensland Bioethics Centre argued that this commodification arises from the fact that ‘the child is the object of an arrangement aimed at fulfilling the needs of the commissioning parents.’¹⁵¹ The Catholic Archdiocese of Sydney also argued that surrogacy aimed to fulfil the needs of parents, and that it ‘overlooks the personal and cultural consequences of further commodifying children by making them the objects of formal contracts.’¹⁵²

3.25 Ms Linda Wright, a lawyer with experience in surrogacy arrangements, argued that it was when surrogacy arrangements were enforceable that the situation could be created where the child was viewed ‘as a commodity that is subject to a contract.’¹⁵³

3.26 It should be noted that the *Assisted Reproductive Technology Act 2007* (NSW), when it commences, will make surrogacy agreements legally void and unenforceable. The issue of the enforceability of surrogacy agreements is examined in more detail in Chapter 5.

3.27 A number of inquiry participants challenged the notion that parents had a ‘right’ to have a child, stating that no such right existed.¹⁵⁴

3.28 Associate Professor Tonti-Filippini noted that ‘the International Covenant on Civil and Political Rights ... does not recognise the right to a child.’¹⁵⁵

3.29 Both the Anglican and Catholic Church Dioceses of Sydney acknowledged the natural desire of parents to have children and the pain and suffering caused by infertility, but not the right to

¹⁴⁹ Submission 20, p 7

¹⁵⁰ Human Fertilisation and Embryology Authority (1997) *Sixth Annual Report*, quoted in Submission 20, p 7

¹⁵¹ Submission 12, p 5

¹⁵² Submission 10, p 5

¹⁵³ Ms Linda Wright, Lawyer, Evidence, 18 March 2009, p 23

¹⁵⁴ See for example Associate Professor Tonti-Filippini, Evidence, 19 March 2009, p 28; Submission 11, Australian Family Association, p 4; Submission 16, Family Life International, Australia Ltd, pp 1-2

¹⁵⁵ Associate Professor Tonti-Filippini, Evidence, 19 March 2009, p 26

have a child.¹⁵⁶ In this regard, Mr Meney stated that children were a ‘gift’ not an ‘entitlement.’¹⁵⁷ The Catholic Archdiocese of Sydney maintained that spouses only had the right to a child ‘by means which are respectful to the dignity of that child’¹⁵⁸ and that the Catechism of the Catholic Church accorded the child the right ‘to be the fruit of the specific act of the conjugal love of his parents.’¹⁵⁹

3.30 In their desperation to have children, argued the Queensland Bioethics Centre, an infertile couple ‘might consider all possible means’ and ‘may be tempted to bring a child into being which is not the fruit of their marriage and marital union.’¹⁶⁰

3.31 Ms Hannah Spanswick from VANISH Inc. argued that ‘the state does not owe anybody the right to a child’ and that ‘just because the technology is available ... does not necessarily compel any state to legislate in favour of it.’¹⁶¹

3.32 Mr Michael Sobb argued that ‘the most telling argument against an inalienable right to have children is the fact that nature obviously does not intend nor permit that to be an option for everyone,’¹⁶² while the Plunkett Centre for Ethics proposed that ‘the right to found a family should be limited by children's rights to have natural origins.’¹⁶³

3.33 However, Witness A, the father of a child born through a surrogacy arrangement, questioned whether infertile couples should simply have to accept ‘nature’s way’ and questioned the logic of opposing surrogacy whilst condoning other medical interventions:

In regard to the religious-based commentators and the ethicists, they seem to believe that surrogacy should not be permitted on the basis that it is not nature's way. Nature has given couples like us a particular life to live, if you like, and we should not interfere with that process; we should just accept it and get on with it. They do not seem to have any problem with medical interventions such as heart transplants, lung transplants or liver transplants, where many of the same kinds of issues may be at play. I feel that there is a great lack of logic in the position that says it is okay in some circumstances but when it comes to children it is not okay.¹⁶⁴

3.34 Associate Professor Anita Stuhmcke argued that women have a right to decide how they exercise their own reproductive capacity without interference from the state, provided that

¹⁵⁶ Submission 19, Anglican Church Diocese of Sydney, p 3; Revd Dr Ford, Evidence, 6 November 2009, p 7; Mr Meney, Evidence, 6 November 2009, p 14

¹⁵⁷ Mr Meney, Evidence, 6 November 2009, p 16

¹⁵⁸ Submission 10, p 2

¹⁵⁹ Catechism of the Catholic Church, n 2378, quoted in Submission 10, p 2

¹⁶⁰ Submission 12, p 12

¹⁶¹ Ms Hannah Spanswick, Secretary, VANISH Inc., Evidence, 6 November 2009, p 48

¹⁶² Submission 2, Mr Michael Sobb, p 7

¹⁶³ Submission 30, Plunkett Centre for Ethics, p 4

¹⁶⁴ Witness A, Evidence, 5 November 2009, pp 1-2

certain safeguards in terms of health and a system that supported informed decision-making were in place.¹⁶⁵

The rights and best interests of the child

- 3.35** There was consensus among inquiry participants that in relation to the practice of surrogacy the rights and best interests of the child should be paramount. For the purposes of this discussion there is a distinction drawn between the ‘rights or best interests’ of a child, on the one hand, and the ‘wellbeing’ of the child on the other. The connection many inquiry participants drew between the concepts was that the rights or best interests of the child to be born are not served by the practice of surrogacy because it impacts negatively on their wellbeing. Issues relating to the wellbeing of children born through surrogacy arrangements are discussed in a later section of this chapter.
- 3.36** This section examines how different inquiry participants began from a point of agreement – that the rights and best interests of the child should be paramount – but reached different conclusions about the practice of surrogacy depending on whether they felt the rights of the child should be asserted pre-conception or post-birth. It begins with a discussion of the rights of the child as expressed in the United Nations Convention on the Rights of the Child, a source from which a number of inquiry participants quoted.

United Nations Convention on the Rights of the Child

- 3.37** A number of inquiry participants cited the United Nations Convention on the Rights of the Child (CROC) in support of their view that the rights and best interests of the child should be paramount.¹⁶⁶ The CROC articles primarily referred to were articles 7.1, 8.1 and 9.1, which state the following:

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.

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.

Article 9.1

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review

¹⁶⁵ Associate Professor Stuhmcke, Evidence, 19 March 2009, p 6

¹⁶⁶ See for example Associate Professor Tonti-Filippini, Evidence, 19 March 2009, p 26; Submission 6, p 2; Mr Tudehope, Evidence, 6 November 2009, p 35; Ms Elizabeth Micklethwaite, Senior Research Officer, Australian Christian Lobby, Evidence, 6 November 2009, p 10

determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.¹⁶⁷

3.38 A number of inquiry participants argued the CROC supported their opposition to surrogacy, drawing attention in particular to articles 7.1, 8.1 and 9.1 according the child the right to be cared for by his or her parents, preserve his or her identity, and not to be separated from his or her parents unless such separation is necessary for the best interests of the child.¹⁶⁸

3.39 Ms Spanswick, from VANISH Inc., argued that the CROC was quite clear in stating that a child should be reared by its own parents:

The convention is quite clear, and irrespective of whether the child has been born as a result of surrogacy, the convention states that the child, wherever possible, will be reared by its parents ...¹⁶⁹

3.40 Similarly, Ms Elizabeth Micklethwaite, Senior Research Officer with the Australian Christian Lobby, drew attention to the CROC's reference to a child's right to 'know and be cared for by its own father and its own mother,' stating that by applying that principle she was led to conclude that 'the child's best interests are ... probably not served by surrogacy.'¹⁷⁰

3.41 Other inquiry participants addressed the question as to whether the CROC, drafted before the development of many of the technologies and procedures that have made surrogacy possible for infertile people, was relevant to the debate on surrogacy.

3.42 Mr Cannon maintained that surrogacy does breach the CROC, but agreed that 'at the time the Convention was drafted that question of who are a child's parents was clearly obvious because children were not conceived in any other way than by natural conception.' The advent of surrogacy, Mr Cannon continued, had complicated the issue of parenthood, and in particular motherhood.¹⁷¹

3.43 Dr Bernadette Tobin, Director of the Plunkett Centre for Ethics, also acknowledged that the CROC was written 'before not just surrogacy but before a whole lot of these assisted reproductive technology arrangements came into play.' Dr Tobin further acknowledged that she did not know what the framers of the CROC would now think, and that she was not making the assumption that the CROC referred to 'biological' as opposed to 'social' parents. However, Dr Tobin maintained that the terms in the CROC 'ought to be read in their most obvious, everyday, common or garden sense' and that if 'the natural meanings of the words [in

¹⁶⁷ United Nations Convention on the Rights of the Child, accessed 9 April 2009 <<http://www.unhcr.ch/html/menu3/b/k2CROC.htm>>

¹⁶⁸ See for example, Submission 30, p 4; Mr Tudehope, Evidence, 6 November 2009, p 35; Submission 31, John Paul II Institute for Marriage and Family, p 3

¹⁶⁹ Ms Spanswick, Evidence, 6 November 2009, p 52

¹⁷⁰ Ms Micklethwaite, Evidence, 6 November 2009, p 10

¹⁷¹ Mr Cannon, Evidence, 6 November 2009, p 41

the CROC] are taken seriously,' surrogacy threatened the rights of the child that the CROC sought to protect.¹⁷²

3.44 However, Mr John Longworth from the Family Issues Committee of the Law Society of NSW noting that the CROC was 'of an age that may not have contemplated the very complex issues' presented by surrogacy,¹⁷³ argued that any perceived conflict between the CROC and the practice of surrogacy would only have significance if the issues arising from surrogacy arrangements had been taken into account when the CROC was drafted.¹⁷⁴

3.45 Mr Longworth further noted that the definition of the word 'parent', when considering various pieces of legislation, was unclear:

Indeed, if I look at the raft of state and federal legislation, whether proposed, passed or not yet commenced and in operation, we can find quite a lot of conflicts just in the difference in, for example, the definition of a parent, let alone something quite as fundamental as what the United Nations was dealing with.¹⁷⁵

3.46 Similarly, Mr Ghassan Kassisieh, Policy and Development Coordinator with the Gay and Lesbian Rights Lobby, argued that the concept of 'family' had not been defined by the United Nations 'to take into account the fact that families are diverse across cultures and countries, and even within countries.' It would be wrong, Mr Ghassan continued, 'to construe a piece of international law so narrowly as not to reflect the fact that families change, and family situations and understanding of parenthood change as well.'¹⁷⁶

3.47 Ms Alexandra Harland, also from the Family Issues Committee of the Law Society of NSW, questioned applying the CROC, which takes a broad perspective on children's rights in general, to the matters in which individual children's rights are at issue:

... I do not think the [CROC] or any document like it is going to take you very far when you are looking at those particular individual rights. I think that is looking at it in a broader term and I think you have to look at individual circumstances.¹⁷⁷

Asserting the rights of the child pre-conception versus post-birth

3.48 Whilst there was consensus amongst inquiry participants that the rights of the child should be held paramount when considering the practice of surrogacy, there was disagreement as to *when* the rights of the child should be asserted. Some inquiry participants argued that the rights of

¹⁷² Dr Bernadette Tobin, Director, Plunkett Centre for Ethics, Evidence, 6 November 2009, p 27 and 30; Submission 30, Plunkett Centre for Ethics, p 4

¹⁷³ Mr John Longworth, Family Issues Committee, Law Society of New South Wales, Evidence, 5 November 2009, p 37

¹⁷⁴ Mr Longworth, Evidence, 5 November 2009, p 37

¹⁷⁵ Mr Longworth, Evidence, 5 November 2009, p 36

¹⁷⁶ Mr Ghassan Kassisieh, Policy and Development Coordinator, Gay and Lesbian Rights Lobby, Evidence, 6 November 2009, p 61

¹⁷⁷ Ms Alexandra Harland, Family Issues Committee, Law Society of New South Wales, Evidence, 5 November 2009, p 36

the child should be asserted pre-conception, and that doing so would lead to a rejection of surrogacy on the grounds that it was not in the best interests of the yet-to-be conceived child. Others accepted that children have been and would continue to be born through surrogacy arrangements and that the rights of these children should be protected, leading to a focus on the post-birth legal rights and responsibilities of the children and intending parents involved.

Asserting the rights of the child pre-conception

- 3.49** Mr Raymond Campbell, Director of the Queensland Bioethics Centre, suggested that a central challenge for the inquiry was to determine whether surrogacy was in the interests of the unborn child:

I think it is all very good to talk about how we protect the best interests of the child after surrogacy has occurred, but it appears to me that the central question for the inquiry is whether surrogacy is a good thing for a child and, depending on that answer, whether the Government should involve itself in regulating surrogacy in any way.¹⁷⁸

- 3.50** Mr Damien Tudehope, legal representative for Family Voice Australia, noted that some submissions to the inquiry were ‘made with the best interests of children in mind after the birth of the child,’ whereas to decide in advance ‘to deprive a child of a relationship with the person who has given nurture to that child for the first nine months of its life appears to me to be doing enormous damage and in fact almost, in my submission, would be an abuse of that child.’¹⁷⁹

- 3.51** Similarly, Mr Gerald Gleeson, Associate Professor at the Catholic University of Sydney, noted that surrogacy ‘is a practice we are setting up in advance. We are deliberately doing something that we know could well be detrimental to the child that is born.’¹⁸⁰

- 3.52** Professor Somerville from the McGill Centre for Medicine, Ethics and Law, raised the issue of ‘anticipated consent’, arguing that it is unethical to make a decision on behalf of someone unable to give consent, if it cannot be reasonably anticipated they would give consent if able to do so:

Anticipated consent requires that when a person seriously affected by a decision cannot give consent, we must ask whether we can reasonably anticipate they would consent if able to do so. If not, it’s unethical to proceed.¹⁸¹

- 3.53** Therefore, argued Professor Somerville, it is ethically necessary to listen to the experiences of people born through the reproductive arrangements under consideration. People born through arrangements utilising ‘new reproductive technologies’, reported Professor

¹⁷⁸ Mr Campbell, Evidence, 18 March 2009, p 74

¹⁷⁹ Mr Tudehope, Evidence, 6 November 2009, p 35

¹⁸⁰ Mr Gerald Gleeson, Associate Professor, Catholic Institute of Sydney, Evidence, 19 March 2009, p 14

¹⁸¹ Somerville M, ‘Brave New Babies: Children’s human rights with respect to their biological origins and family structure,’ Centre for Medicine, Ethics and Law, McGill University, Montreal, Canada, 2008, published as “From Homo sapiens to Techno sapiens: Children’s Human Rights to Natural Human Origins”, Proceedings, 14th World Congress on Reproductive Technologies, Montreal, 17th – 20th September, 2007, (hereafter ‘Somerville, 2007’) p 3

Somerville, describe feelings of loss of identity and question why they were born through such an arrangement:

They describe powerful feelings of loss of identity through not knowing one or both biological parents and their wider biological families, and describe themselves as “genetic orphans.” They ask, “How could anyone think they had the right to do this to me?”¹⁸²

- 3.54** The Plunkett Centre for Ethics compared the practice of deliberately creating a circumstance in which a child is removed from its biological parent to the practices that produced Australia’s indigenous ‘Stolen Generation’:

In reflecting on these practices, Australians cannot avoid recalling the horrors of past practices in relation to indigenous children.

In order to avoid intentionally facilitating injustice to to-be-born children, society ought not to be complicit in setting up such arrangements.¹⁸³

Comparison with adoption

- 3.55** A number of inquiry participants compared the practice of surrogacy to that of adoption in order to highlight the distinction between asserting the rights of the child pre-conception as opposed to post-birth. The point often made was that adoption *responds* to a situation, thereby serving the best interests of an existing child, whereas surrogacy *creates* a situation, one in which the best interests of the child-to-be-born are not served, but instead the intending parents’ needs are prioritised.¹⁸⁴
- 3.56** Mr Meney pointed out that adoptive parents ‘rescue an existing child into their family.’¹⁸⁵ Similarly, Ms Micklethwaite, from the Australian Christian Lobby, noted that where children are not raised by their ‘natural’ parents it is usually ‘a response to something that has gone wrong somehow, and it is wonderful that those individuals step in and provide that sacrificial loving care.’ However, Ms Micklethwaite stated, surrogacy involves ‘creating that situation in the first place ... and the ethical considerations around that are really quite different because you are responsible then for the situation that you create.’¹⁸⁶
- 3.57** Another point drawn from the comparison with adoption was that adoption focuses on the needs of the child whereas surrogacy focuses on the needs of the parents.¹⁸⁷
- 3.58** For example, Family Voice Australia argued that whilst adoption served the needs of adults unable to raise a child and adults willing to raise the child, these needs were secondary to the

¹⁸² Somerville, 2007, p 3

¹⁸³ Submission 30, p5

¹⁸⁴ See for example Mr Campbell, Evidence, 18 March 2009, p 78; Submission 4, p 5; Submission 22, p 3

¹⁸⁵ Mr Meney, Evidence, 6 November 2009, p 14

¹⁸⁶ Ms Micklethwaite, Evidence, 6 November 2009, p 11

¹⁸⁷ See for example Submission 16, Family Life International, Australia Ltd, pp 1-2; Revd Dr Ford, Evidence, 6 November 2009, p 2; Submission 6, p 2

best interests of the child. Surrogacy, it argued, reversed these concerns, ‘primarily [serving] the wishes of the commissioning parents (or parent) to procure a child by any means.’¹⁸⁸

3.59 Similarly, Ms Myfanwy Walker from TangledWebs Inc., described the focus on the parents’ needs in utilising ART procedures as a ‘reverse ethic’ in comparison to adoption:

With adoption the child is conceived and then provisions need to be made for the care of the child and the focus is always on the best interests and wellbeing of the child in relation to who is going to be the parent. With ART there are parents who want to be parents and the child is conceived because those people want to be parents. It is kind of a reverse ethic in that sense.¹⁸⁹

3.60 The Plunkett Centre for Ethics suggested that the ‘ethically and socially legitimate’ argument for the removal of children from their biological parents in the context of adoption could not be extrapolated to the context of surrogacy.¹⁹⁰

Asserting the rights of the child post-birth

3.61 Mr Longworth from the Law Society of NSW suggested that a more appropriate starting point when considering the rights of children in relation to altruistic surrogacy was to acknowledge that surrogacy was going to occur:

In a way I have a view ... that your starting position is, what is in the best interests of the child if surrogacy is going to occur? Should it be available? Well, it happens. It is like, should childbirth be available? Well, it happens.¹⁹¹

3.62 Similarly, Ms Harland, also from the Law Society of NSW, acknowledged that as a lawyer, her focus was ‘after the fact’ and on addressing the potential negative impact on the child of his or her primary carers not being recognised as the legal parents:

Probably the area that is easier for us to look at, which is probably the area we focus on, is after the fact. That is really looking at the consequences, accepting that the surrogacy arrangements have taken place. What happens to the child who is born of a surrogacy arrangement? What consequences could there be for that child through the non-recognition of people who are caring for that child?

...

... for example, that a hospital will not take any instruction from that person because that person does not have any legal status. Of course, that has an impact on that child.¹⁹²

3.63 Professor Jenni Millbank, from the Faculty of Law at the University of Technology, Sydney, argued that ‘it is in the best interests of the children to have a legal relationship, a relationship

¹⁸⁸ Submission 5, p 1

¹⁸⁹ Ms Myfanwy Walker, TangledWebs, Evidence, 18 March 2009, pp 32-33

¹⁹⁰ Submission 30, p5

¹⁹¹ Mr Longworth, Evidence, 5 November 2009, p 40

¹⁹² Ms Harland, Evidence, 5 November 2009, pp 40-41

of care and responsibility that is protected by law within the household in which they live with the intended parents who have brought them into the world.¹⁹³

- 3.64** The Gay and Lesbian Rights Lobby argued that it was ‘not in the best interests of prospective children to be born into a situation where the circumstances of their birth are questioned’ or ‘to be discriminated against by virtue of the marital status or sexual orientation of their parents.’ The ‘fundamental human right’ of equality before the law, it argued, ‘extends to children born through surrogacy, intended parents and surrogate mothers.’¹⁹⁴
- 3.65** In this regard, Ms Harland noted that the report of the Human Rights and Equal Opportunities Commission on same-sex entitlements released in 2007 ‘summarised those issues quite succinctly in saying that it is contrary to children's rights for them to have a family structure where both their parents are not recognised legally.’¹⁹⁵

Issues relating to the wellbeing of children born through surrogacy arrangements

- 3.66** As noted above, some inquiry participants argued that surrogacy was not in the best interests of children because it impacted negatively on their wellbeing. The concerns raised during the inquiry about the wellbeing of children born through surrogacy arrangements related to the separation of the child from its birth mother and being raised by non-biological parents, the complexity of the family structures produced by surrogacy and the experience of ‘genealogical bewilderment,’ the inherent health risks involved in utilising ART procedures, and the assertion that surrogacy is a form of social experimentation. These concerns are examined in the following sections.

Breaking the child’s bond with the birth mother

- 3.67** Some inquiry participants argued that an intrinsic element of every surrogacy arrangement, the separation of the child from its birth mother, is in itself harmful to the child.¹⁹⁶
- 3.68** For example the Catholic Archdiocese of Sydney argued that research on mother-child bonding gave grounds for concern for children born through surrogacy arrangements. ‘There is a ‘sensitive period’ after birth, it noted, ‘when mothers and newborns are uniquely designed to have close and intimate contact with each other.’ It acknowledged that mother-child bonding ‘is not a “now or never” reality, and “catch up bonding” is possible at later stages during the child’s development,’ but that ideally it was established from birth.¹⁹⁷
- 3.69** The Southern Cross Bioethics Centre cited research highlighting the ‘important biological bonds [that] are established between the mother and her foetus during pregnancy.’ These bonds are promoted, in part, by the release of the hormone oxytocin, which ‘plays a crucial role in priming the gestational mother to respond in accordance with her natural maternal

¹⁹³ Professor Millbank, Evidence, 5 November 2009, p 67

¹⁹⁴ Submission 25, p 5; Submission 25, p 11

¹⁹⁵ Ms Harland, Evidence, 5 November 2009, p 43

¹⁹⁶ See for example Submission 30, p 2; Submission 5, p 2

¹⁹⁷ Submission 10, p 3

instincts.’ The Southern Cross Bioethics Centre concluded that ‘at the very least, one ought to be concerned with any process that disrupts the important bonding between mother and child which begins during gestation, and continues after birth.’¹⁹⁸

- 3.70** Family Voice Australia stated that ‘doctors place the newborn on the mother’s womb after delivery, so as to restore its antenatal benchmarks which are stored and recorded for him as identity’ and emphasised the importance of the birth mother over the gamete donors in stating that ‘it is not gametes that the newborn recognises as mother, but the woman who bore him.’¹⁹⁹
- 3.71** TangledWebs Inc. equated the impact on the baby through being separated from the birth mother to the sense of loss experienced if ‘a baby loses its mother through death or abandonment.’²⁰⁰

Being raised by ‘non-biological’ parents

- 3.72** Some inquiry participants argued that being raised by non-biological parents was detrimental to the wellbeing of the child born through a surrogacy agreement. Contrary to this, others argued that the quality of the relationship between the child and its parents was more important than a biological or genetic connection.
- 3.73** It is noted that inquiry participants who raised this concern about children being raised by non-biological parents appear to use the term ‘biological parent’ to encompass both ‘genetic parent’ and ‘birth parent’. This use of terminology is unproblematic when referring to children conceived in the traditional sense, in which case the biological, genetic and birth parent(s) are the same. However, when referring to surrogacy arrangements the term ‘biological parent’ is not so easily interchangeable with the terms ‘genetic parent’ and ‘birth parent’, and may in different circumstances be taken to refer to either.
- 3.74** For example, in a gestational surrogacy arrangement where the gametes of the intending parents have been used to conceive the child, the intending mother is the genetic mother, and both she and the birth mother have some claim to being called the ‘biological’ mother in that they have both contributed to the creation of the new life.
- 3.75** Therefore, if an inquiry participant states that the wellbeing of a child is best served by being raised by his or her ‘biological parents,’ it may not be clear whether they mean the genetic parents – who may be the intending parents who have provided their gametes – or the birth parent(s), and therefore it may not be clear whether they are arguing that the benefit to the child arises from being raised by parents he or she is genetically related to, or from being raised by the mother who gave birth to him or her, and her partner. This point illustrates the complexity of surrogacy arrangements and the need to consistently apply terminology relating to the description of parties to avoid confusion.

¹⁹⁸ Submission 14, p 5

¹⁹⁹ Submission 5, p 3

²⁰⁰ Submission 21, Tangled Webs Inc., p 1

- 3.76** The Queensland Bioethics Centre promoted Professor Margaret Somerville’s views on the rights of children to know and be raised by their biological parents:
- [Children] have a right to know who their biological mother and biological father are and, unless the contrary is indicated as being in the ‘best interests’ of a particular child, to be reared by those parents. Surrogacy involving the use of donor gametes (whether the surrogate mother’s or not) is clearly in breach of this right.²⁰¹
- 3.77** Furthermore, the Centre notes, research from the USA demonstrates that ‘a family headed by two biological parents in a low-conflict marriage,’ is optimal for children, although the research referred to makes a comparison to ‘single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships’ rather than surrogate arrangements specifically.²⁰²
- 3.78** TangledWebs Inc. maintained that it was ‘cruel and wrong’ to create a child ‘with the intention of denying him/her a “whole” relationship with a “whole” mother.’²⁰³
- 3.79** The Australian Christian Lobby cited research stating that ‘young children without two biological parents are three times more likely to suffer behavioural problems such as attention deficit disorder or autism.’²⁰⁴
- 3.80** Dr Tobin maintained that whilst a variety of people can be ‘devoted, willing, committed, wise and humane in parenting’ the best interests of the child are ‘to be brought into being and gestated, born and raised by its biological father and its biological mother.’²⁰⁵
- 3.81** Ms Christine Whipp suggested that the evidence from children conceived with donated gametes indicated that ‘however exceptional the care lavished by the commissioning parents, those born through surrogacy will grow up realising that they were only a second best choice.’²⁰⁶
- 3.82** On the other hand, a number of inquiry participants argued that it was not the existence of a biological relationship with one’s parents that impacted most on children, but the nature of that relationship.
- 3.83** Mr Roderick Best, Director of Legal Services with the Department of Community Services, stated that he was not sure whether research necessarily established that the best interests of the child were to be with his or her birth mother, but rather, ‘the research establishes that a

²⁰¹ Submission 12, pp 5-6

²⁰² Maggie Gallagher, ‘How Does Marriage Protect Child Well-Being?’ in Robert George and Jean Elshtain (Eds) *The Meaning of Marriage: family, state, market and morals* (Dallas) Spence Publishing Company, 2006, quoted in Submission 12, p 4

²⁰³ Submission 21, p 1

²⁰⁴ Submission 15, Australian Christian Lobby, p 3

²⁰⁵ Dr Tobin, Evidence, 6 November 2009, p 28

²⁰⁶ Submission 7, Ms Christine Whipp, p 3

child needs a loving, caring, nurturing and long-term arrangement, and that can be with someone other than the birth mother.²⁰⁷

3.84 Ms Miranda Montrone, Psychologist and Family Therapist and Infertility Counsellor, with experience counselling parties to surrogacy arrangements, argued that the most important factor was the quality of the relationship children had with their parents, rather than biological connectedness. Ms Montrone stated that she was not aware of any evidence of problems in the relationships between children born of donated gametes and their non-biologically related parents. The best research in this area, suggested Ms Montrone, had been conducted by Professor Susan Golombok in Europe, and indicated no detriment to the parent-child relationship where donor gametes had been used.²⁰⁸

3.85 The Gay and Lesbian Rights Lobby also cited research by Professor Golombok that found ‘the quality of the relationship of the non-biological mother with her child was found to be no different to that of the related mother, indicating that the lack of genetic link did not affect her identity as a mother.’²⁰⁹ Furthermore, it referred to a 2007 Victorian Law Reform Commission report which stated that research by Golombok showed greater psychological wellbeing amongst parties to surrogacy arrangements as compared to natural conception families:

The differences that were identified between the surrogacy families and the other family types indicated greater psychological wellbeing and adaption to parenthood by mothers and fathers of children born through surrogacy arrangements than by the comparison group of natural-conception families, with the exception of emotional over involvement.²¹⁰

3.86 The Gay and Lesbian Rights Lobby suggested that the thought and preparation intending parents had to put into utilising a surrogacy arrangement may mean that were better prepared for parenthood:

... in some ways they are more ably prepared... for the care giving responsibilities that come with caring for a child ... as a result of the fact that people have given time to thinking about what this arrangement means for them ... In some ways they are going to be more prepared for having a child than the average Mary and Joe who decide to have a child without that help.²¹¹

²⁰⁷ Mr Roderick Best, Director, Legal Services, Department of Community Services, 5 November 2008, pp 15-16

²⁰⁸ Ms Miranda Montrone, Psychologist and Family Therapist and Infertility Counsellor, Evidence, 18 March 2009, p 46; Submission 32, p 5

²⁰⁹ Fional MacCallum, Emma Lycett, Clare Murray, Vsanti Jadva and Susan Golombok (2003) ‘Surrogacy: The Experience of Commissioning Couples,’ *Human Reproduction* 18(10): pp 1334-1342 quoted in Submission 25, p 8

²¹⁰ Victorian Law Reform Commission (VLRC) (2007) *Assisted Reproductive Technology and Adoption: Final Report*, Melbourne, VLRC at 9, referring to Susan Golombok, Clare Murray, Vasanti Jadva, Fiona MacCallum and Emma Lycett (2004) ‘Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life,’ *Developmental Psychology* 40(3):400 at 408, quoted in Submission 25, p 8

²¹¹ Mr Kassisieh, Evidence, 6 November 2009, pp 56-57

- 3.87** The Gay and Lesbian Rights Lobby concluded that ‘there is no empirical evidence to suggest a ‘crisis’ in child welfare outcomes for children born through surrogacy arrangements’ and that ‘a small body of emerging research has found that children born through surrogacy arrangements are psycho-socially well-adjusted.’²¹²
- 3.88** However, the Southern Cross Bioethics Centre warned against drawing such conclusions from Golombok’s studies, pointing out their limited longitudinal extent and the young age of many of the subjects:

... the studies are limited in their longitudinal extent and at this stage more research is required before one can be certain that the potential for harm is non-existent. ... it is uncertain as to whether children who have yet to reach adulthood are able to understand the issue of their unusual genealogy. Such is the nature and limitation of performing research using subjects under the age of twelve. It is therefore inaccurate to extrapolate from such studies that there is no negative impact on the welfare of the child.²¹³

- 3.89** The Women’s Forum Australia also noted that Golombok’s studies ‘have not followed surrogate children into adolescence and adulthood nor reviewed the experience of their families and birth mothers at this later stage.’²¹⁴ In addition, it questioned the validity of self-reporting from subjects who may be reluctant to criticize their own friends and family:

WFA questions the ability of research to detect the extent of harm resulting from surrogacy. Women and children involved in altruistic surrogacy may be especially unlikely to report any ill feelings, regret or harm. In a sense, they would be criticising their own friends and family, appearing to be regretful of the birth of a child that they now know and love, or perhaps (in the case of the child) hurting their own parents.²¹⁵

Complex family structures and ‘genealogical bewilderment’

- 3.90** The practice of surrogacy has the potential to create more complex family structures than typically occur in ‘traditional’ families, due to the fact that potentially six individuals could be considered a ‘parent’ to the child: the birth mother and her partner, the intending parents, and the sperm and egg donor if donated gametes are used.
- 3.91** A possible consequence related to this complexity, according to a number of inquiry participants, was the experience of ‘genealogical bewilderment.’
- 3.92** The Catholic Archdiocese of Sydney stated that ‘there is an increasing body of biographical accounts of how discontinuity between a child’s genetic parentage, gestational parentage or social parentage can result in an experience of “genealogical bewilderment”.’²¹⁶

²¹² Submission 25, pp 7-8

²¹³ Submission 14, p 10

²¹⁴ Submission 22, p 2

²¹⁵ Submission 22, p 2

²¹⁶ Submission 10, p 4

- 3.93** The term ‘genealogical bewilderment’ was coined by psychologist H J Sants in 1964 to describe the experience of adopted children who had ‘no or only uncertain knowledge of their natural parents.’ While Sants used the term in reference to adopted children, it was subsequently argued that the concept could be applied to donor offspring.²¹⁷
- 3.94** Sants’ definition emphasises that it is ‘not knowing’ one’s genealogy which can have a negative impact. Some inquiry participants specifically addressed this issue of ‘not knowing.’
- 3.95** Ms Megan Best from the Anglican Church Diocese of Sydney reported that in her experience this situation was likely to occur with surrogacy arrangements:
- ... we have the problem that it is possible that the child will grow up not knowing that their social mother is not their genetic mother. I can give you references that show that the majority of parents going into a surrogacy situation do not intend to tell their child about their origins if it can be avoided.²¹⁸
- 3.96** Family Voice Australia also highlighted the problem of secrecy surrounding genetic origins but suggested the problems may persist even after the truth was revealed:
- Recent accounts written by adults who were conceived as a result of donor insemination describe the profound problems of identity and belonging they experienced both as children and as adults. Some of these problems were related to secrecy - not being told the truth about their origins but intuiting that they were different. However, problems also persisted after the truth was revealed or discovered, including a longing to know the absent genetic parent.²¹⁹
- 3.97** Professor Somerville from the McGill Centre for Medicine, Ethics and Law, noted that children born through gamete donation or who are adopted, and do not know their genetic relatives, experience a sense of loss and disconnection:
- [Donor conceived adults] and adopted children tell us of their profound sense of loss of genetic identity and connection. They wonder: Do I have siblings or cousins? Who are they? What are they like? Are they “like me”? What could I learn about myself from them?²²⁰
- 3.98** Although Sants’ definition of genealogical bewilderment emphasised the fact of not knowing one’s genealogy, a number of inquiry participants suggested the phenomenon could arise simply from the complexity of family structures characteristic of surrogacy arrangements.²²¹
- 3.99** Other inquiry participants expressed concern that children born through surrogacy arrangements would experience confusion in developing their personal identity.²²²

²¹⁷ Lucy Firth, ‘Gamete Donation and Anonymity: The ethical and legal debate,’ *Human Reproduction*, Vol. 16, No. 5, 818-824, May 2001, <<http://humrep.oxfordjournals.org/cgi/content/full/16/5/818>> (accessed 14 April 2009)

²¹⁸ Ms Megan Best, Anglican Church Diocese, Sydney, Evidence, 6 November 2009, p 3

²¹⁹ Submission 5, p 2

²²⁰ Somerville 2007, p 3

²²¹ See for example Mr Meney, Evidence, 6 November 2009, p 15; Ms Spanswick, Evidence, 6 November 2009, p 47; Submission 15, p 6

- 3.100** Revd Dr Ford argued that the best interests of the child were served by minimising the number of parents he or she had and that a majority of children deviating from the norm of having one mother and one father would experience ‘confusion of identity.’²²³
- 3.101** TangledWebs Inc. argued that the impact on children born through surrogacy arrangements may not be immediately recognised, and that the ‘identity confusion, genealogical dislocation [and] complex family relationships’ that characterise adoption, would be seen in children born through surrogacy arrangements also.²²⁴
- 3.102** It should be noted that the concept of genealogical bewilderment has been questioned in ‘a review of empirical studies carried out in the 20 years since the publication of Sants’ paper [that] concluded that the existence of genealogical bewilderment amongst adoptees has not been upheld by subsequent research.’ The review authors argued that ‘where adoptive children are in loving homes there may be a desire for ancestral knowledge but this is not indicative of poor mental health.’²²⁵

Health risks through the use of ART

- 3.103** Some inquiry participants who opposed surrogacy expressed concern about the possible health risks associated with the use of ART.
- 3.104** The Southern Cross Bioethics Centre stated that since gestational surrogacy involved ART, ‘the health risks in ART are pertinent to surrogacy.’ It argued that ART lead to an increase in multiple births, which had a higher risk of premature delivery, and that between half and a third of infant mortality was due to complications arising from prematurity.²²⁶
- 3.105** The Catholic Archdiocese of Sydney also expressed concern about premature births and added further concerns about birth defects and complications associated with ART:

There is also a growing concern that that children born as a result of ART are at greater risk of some genetic defects. In an Australian study, 8.6% of children born by IVF had defects at birth, double that of the control group. A recent analysis of 25 scientific studies published in the British Medical Journal concludes that single pregnancies from assisted reproduction have a significantly worse perinatal result in relation to the normal population.²²⁷

- 3.106** However, Dr Kim Matthews, the Medical Director of Next Generation Fertility stated that pregnancies conceived through ART were highly monitored and did not present an increased risk:

²²² See for example Submission 21, Tangled Webs, p 1; Submission 12, p 5

²²³ Revd Dr Ford, Evidence, 6 November 2009, p 8

²²⁴ Submission 21, p 1

²²⁵ Lucy Firth, ‘Gamete Donation and Anonymity: The ethical and legal debate,’ Human Reproduction, Vol. 16, No. 5, 818-824, May 2001, <<http://humrep.oxfordjournals.org/cgi/content/full/16/5/818>> (accessed 14 April 2009)

²²⁶ Submission 14, p 6

²²⁷ Submission 10, p 3

... pregnancies that are actually conceived through reproductive technologies...are probably some of the most monitored pregnancies and outcomes in the world. There are over a million babies born from IVF worldwide and there has been lots of literature looking as to whether there is an increased risk from those procedures, obviously. The data all comes back very much in favour of the fact that there is not an increased risk.²²⁸

- 3.107** In relation to babies born with disabilities or malformations, Dr Matthews stated that there was no increased risk as compared to spontaneous conceptions and that the risk was the 'same risk as for a normal pregnancy.'²²⁹

Surrogacy as social experimentation

- 3.108** A number of inquiry participants were opposed to surrogacy on the grounds that the outcomes for children were largely unknown and it therefore constituted a form of social experimentation.²³⁰

- 3.109** In this respect, Mr Gerald Gleeson, Associate Professor with the Catholic Institute of Sydney, compared surrogacy to the issue of genetically modified food:

Think of the issue of genetically modified [GM] food. As far as I know there is not much evidence that GM food is doing any harm to anyone. However, many people think the risk down the track is not worth taking. It seems to me this is a similar situation. Yes, it might work out well but ... it is a risk, and it is a risk for the child.²³¹

- 3.110** Mr Raymond Campbell, Director of the Queensland Bioethics Centre, suggested that in the absence of 'scientific consensus' that harm would not result from surrogacy arrangements, the best approach was to follow 'a precautionary principle and seek to prevent the harm.'²³²

- 3.111** However Mr Kassisieh from the Gay and Lesbian Rights Lobby argued that the fact there was no body of research describing negative outcomes for children born through surrogacy arrangements meant there was no cause for alarm:

The other aspect is that the surrogacy research is still quite new and so it is an evolving area. That is why our position at this point is that there is no empirical basis to cause alarm about this procedure.²³³

- 3.112** Mr Best, from the Department of Community Services, proposed that the lack of an evidence base in relation to outcomes for children born through surrogacy arrangements suggested

²²⁸ Dr Matthews, Evidence, 5 November 2009, p 52

²²⁹ Dr Matthews, Evidence, 5 November 2009, p 52

²³⁰ See for example Submission 30, p 7; Submission 12, p 7; Submission 14, p 11; Professor Frame, Evidence, 6 November 2009, p 22; Mr Meney, Evidence, 6 November 2009, pp 15-16; Submission 11, p 5

²³¹ Mr Gleeson, Evidence, 19 March 2009, p 11

²³² Mr Campbell, Evidence, 18 March 2009, p 74

²³³ Mr Kassisieh, Evidence, 6 November 2009, p 56

flexibility was important so any regulations could be modified in the future as evidence became available:

I suppose my concern is that if we do not have an evidence base as to what we are doing, we need to be sufficiently flexible so that if the evidence and research comes out in the years to come as surrogates start to grow to adulthood and the like and we get some longitudinal studies, or whatever they might be, we have some flexibility in the arrangements so that we can build in different responses depending on the circumstances of the child.²³⁴

Issues relating to the birth mother

- 3.113** Some inquiry participants had concerns relating to the birth mother in a surrogacy arrangement, including about her motivation and ability to give informed consent, the possibility that she would fail to relinquish the child after birth, and the potential for psychological damage both to her and her family.

The birth mother's motivation

- 3.114** A few inquiry participants questioned the birth mother's motivation in entering into a surrogacy arrangement, suggesting her motivation might relate to complex underlying factors that compounded the already complex picture presented by surrogacy arrangements and potentially undermined the altruistic nature of the arrangement.
- 3.115** The Southern Cross Bioethics Centre stated that 'the decision to become a surrogate is based on a complex range of factors and psychological dispositions' and that it 'cannot always be taken for granted as purely altruistic.' It referred to research suggesting some women become surrogate mothers 'due to feelings of guilt about having had a previous abortion and/or having to give up a child for adoption.' One study indicated that from a group of potential surrogates 26 percent had previously had an abortion and 9 percent had given a child up for adoption. Other possible motives include low self-esteem and the desire to obtain the approval of others.²³⁵
- 3.116** Similarly, Ms Christine Whipp argued that 'the surrogate becomes the centre of the commissioning couples world, making [her] feel special.' It is the bond created between the surrogate and the intending parents that 'becomes so addictive.' Ms Whipp also referred to anecdotal evidence that 'egg donors for IVF have a previous history of an aborted pregnancy and it has been suggested that the wish to help other women to have a baby may be an act of atonement.'²³⁶
- 3.117** The Queensland Bioethics Centre suggested that a surrogate might also be motivated by the simple enjoyment of being pregnant.²³⁷

²³⁴ Mr Best, Evidence, 5 November 2008, p 16

²³⁵ Submission 14, pp 3-4

²³⁶ Submission 7, pp 1-2

²³⁷ Submission 12, p 8

Ability to give informed consent

- 3.118** A number of inquiry participants were concerned that the birth mother's ability to give informed consent could be compromised by the fact that she would be unable to predict how she might feel in the future, or by the possibility of emotional coercion.
- 3.119** Some participants questioned the birth mother's ability to give informed consent upon entering into a surrogacy arrangement, based on the fact she would be unable to categorically predict prior to conceiving how she would feel once she has given birth to the child.²³⁸
- 3.120** Family Voice Australia argued that the surrogate must make the decision to relinquish the child before she is subjected to the physiological changes that come with pregnancy and childbirth:

The formation of a profound bond between mother and child is a natural process that is stimulated by the hormone oxytocin associated with birth and breast feeding. Surrogacy involves making a decision when the woman is not subject to such influences - before the conception of the child - and then being required by the legal contract to carry out this decision when she is subject to these natural emotions.²³⁹

- 3.121** The Southern Cross Bioethics Centre questioned whether a birth mother can be fully apprised of the many consequences flowing from her decision to become a surrogate:

Can a potential surrogate mother be apprised of, process and understand all the details about pregnancy complications, risks associated with ART, psychological ramifications for herself, the child she may carry and others, the terms of a surrogacy contract and implications for future relational complexities, let alone the broader ethical implications for the community - about which she may have a genuine interest?²⁴⁰

- 3.122** Another concern expressed in relation to the birth mother giving informed consent was the potential for emotional coercion and other forms of exploitation.²⁴¹
- 3.123** The Southern Cross Bioethics Centre asked: 'Can a close relative or friend, viewed as a potential surrogate mother, provide genuine informed consent? Is she making an autonomous decision free from coercion, particularly in complex family contexts?'²⁴²
- 3.124** The Women's Forum Australia elaborated on this issue, questioning a potential surrogate's ability to act altruistically when there is a close relationship with the intending parents and arguing that emotional pressure may be implicit in such a relationship:

It is possible that surrogate mothers would experience significant emotional pressure to carry the pregnancy in the first place and secondly to relinquish the baby. Not

²³⁸ See for example Submission 15, p 4; Ms Best, Evidence, 6 November 2009, p 3; Submission 10, p 7

²³⁹ Submission 5, p 4

²⁴⁰ Submission 14, p 3

²⁴¹ See for example Ms Micklethwaite, Evidence, 6 November 2009, p 10; Submission 30, p 3; Submission 10, p 6

²⁴² Submission 14, p 3

necessarily deliberate coercion by others, but pressure or coercion implicit in the woman's circumstances, particularly since the surrogate mother is frequently a relative or friend of the commissioning couple. The risk is that some women might experience 'altruistic' surrogacy as a duty, belying the language of autonomy.²⁴³

- 3.125** The Women's Forum Australia suggested that this implicit pressure may exist in the form of the surrogate's fear that 'if [she] broke her promise to relinquish, she would risk the destruction of family relationships and friendships so essential to her social support, her history and her identity.' The Women's Forum Australia did not suggest the surrogate was incapable of choosing but emphasised the importance of acknowledging that 'the surrogate mother's decision always occurs within the context of powerful expectations of the commissioning parents for a child and the anticipation of the wider family and friends, all of whom are likely to have a close relationship with the surrogate herself.'²⁴⁴

Failure to relinquish

- 3.126** Several inquiry participants were concerned about the possibility that the birth mother may change her mind and fail to relinquish the child to the intending parents.

- 3.127** For example, the Women's Forum Australia noted that the bonds created between the birth mother and the child during pregnancy mean the risk of failure to relinquish exists:

There is a significant body of research to confirm the important psychological and physiological bonds that are created between the gestational mother and the foetus during pregnancy? This is also why surrogate mothers often grieve or have difficulty relinquishing the child.²⁴⁵

- 3.128** In terms of how often this might occur, Mr Best, from the Department of Community Services, referred to a study conducted in England in the 1990s that indicated approximately 5% of birth mothers changed their minds. However, Mr Best also stated that he was unsure how the study arrived at that figure since there was uncertainty regarding the level of surrogacy in England at that time.²⁴⁶

- 3.129** Mr David Norman, the father of a child born through a surrogacy arrangement, stated that to his knowledge and in the experience of the Canberra IVF clinic that facilitated their surrogacy arrangement there had never been a case in which the birth mother failed to relinquish the child.²⁴⁷

- 3.130** Likewise, Ms Montrone stated she had not heard of a situation in which the surrogate did not relinquish the child.²⁴⁸

²⁴³ Submission 22, p 2

²⁴⁴ Submission 22, p 3

²⁴⁵ Submission 22, p 3

²⁴⁶ Mr Best, Evidence, 5 November 2008, p 15

²⁴⁷ Mr Norman, Evidence, 5 November 2009, p 32

²⁴⁸ Ms Montrone, Evidence, 18 March 2009, p 40

- 3.131** Ms Sandra Dill, Chief Executive Officer of ACCESS Australia’s Fertility Network, reported that her own research involving interviews with 28 families involved in surrogacy arrangements indicated that failure to relinquish was not a significant concern for either party. Ms Dill stated that ‘the surrogates did not want to be a parent,’²⁴⁹ and that ‘none of the surrogates in the study expressed concerns about relinquishment.’²⁵⁰
- 3.132** Associate Professor Roger Cook, Director of the Psychology Clinic at Swinburne University of Technology, stated that the evidence did not support concerns about the birth mother failing to relinquish and that it was wrong to assume that surrogate mothers build strong attachments to the child they are carrying. Associate Professor Cook stated that ‘it needs to be kept in mind that surrogate women know clearly that they are not carrying their own child.’²⁵¹
- 3.133** Dr Matthews stated that in her experience surrogate mothers felt they were giving a gift to the intending parents, emphasising that proper preparation was important in reducing the likelihood that arrangements would founder:

... most [surrogates] are a relative or someone with whom they have a long-term relationship and ... feel that this is a gift that they are giving and they are purely carrying the pregnancy for the person. Therefore, if it is well worked before you start the process then your arrangements are less likely to fall through—if you have had all your proper counselling and things, and counselling during the pregnancy as well and also counselling after the pregnancy.²⁵²

Psychological damage to the birth mother and her family

- 3.134** A number of inquiry participants were concerned that the act of giving up the child she has carried, given birth to and formed a bond with, had the potential to cause psychological and emotional damage to the birth mother.²⁵³
- 3.135** The Southern Cross Bioethics Centre noted that ‘having to relinquish a child can be heart-wrenching’ adding that there was ‘evidence that surrogates may live with the psychological burden associated with giving up their gestational child for many years.’²⁵⁴
- 3.136** Ms Spanswick from VANISH argued that ‘irrespective of whether an arrangement is entered into ... you cannot exterminate or extinguish the physiological, and psychological and the emotional attachments that a woman has with her child’, noting that from her experience, mothers who had given away a child for adoption and subsequently had another child die, found the death of the child easier to deal with than the relinquishment for adoption. ‘The reason for that is that when a death occurs, there is some sense of finality.’²⁵⁵

²⁴⁹ Ms Dill, Evidence, 18 March 2009, p 73

²⁵⁰ Submission 20, p 11

²⁵¹ Submission 35, Associate Professor Roger Cook, p 2

²⁵² Dr Matthews, Evidence, 5 November 2009, pp 51-52

²⁵³ See for example Professor Frame, Evidence, 6 November 2009, p 23; Submission 7, p 2; Submission 10, p 7; Revd Dr Ford, Evidence, 6 November 2009, p 2; Submission 6, p 2

²⁵⁴ Submission 14, p 5

²⁵⁵ Ms Spanswick, Evidence, 6 November 2009, pp 48-49

- 3.137** However, Associate Professor Stuhmcke cautioned against drawing parallels between the experience of parties involved in adoption arrangements and those involved in surrogacy arrangements. Surrogacy was a unique form of family creation, Associate Professor Stuhmcke reasoned, and although it was tempting to compare it to adoption, the experience of a surrogate mother and a mother relinquishing her child for adoption were quite different, as evidenced in studies from the UK and USA.²⁵⁶
- 3.138** Associate Professor Cook stated that from his research relating to gestational surrogacy, birth mothers benefit from the ‘cognitive protection’ and ‘emotional cut-off’ arising from being very clear they are not carrying their own child:
- The very clear finding is that people who undertake this ... are very clear in their minds that there is a distinction between giving away a child that might have been formed from their own egg and one that has been formed from the gamete of the commissioning couple. So it is as if they have a cognitive protection, in a sense, about the situation in which they find themselves ... they do not have that sense of belonging to the embryo, if you like. There is a clear emotional cut-off from the connection to their embryo as it grows.²⁵⁷
- 3.139** Associate Professor Cook referred to the ‘preparation or a protocol of an assessment and counselling’ undertaken by potential surrogates that assisted them in making this distinction,²⁵⁸ stating that ‘this cognitive adaptation enabled them to develop effective emotional detachment and consequently there were no reports in our group of any relinquishment difficulties.’²⁵⁹
- 3.140** However, it was this notion of cognitive adaptation that was criticized by the Southern Cross Bioethics Centre who argued that ‘cognitive dissonance strategies’ were used to ‘subvert’ the birth mother’s natural intuitions. Surrogate mothers, it argued, were treated as a ‘means to an end’ and a ‘deceptive or underhanded’ process was employed ‘in order to make it easier for a surrogate to relinquish the child.’ This process amounted to ‘a form of objectification via self-deception.’²⁶⁰
- 3.141** Some inquiry participants argued that surrogacy also had the potential to harm a birth mother’s family. A birth mother’s existing children, suggested Family Voice Australia, ‘may well form a relationship with the new child in the surrogate mother's womb’ and subsequently grieve when the child is given away. In addition, they ‘may fear that they also may be given away.’²⁶¹
- 3.142** The Southern Cross Bioethics Centre argued that the birth mother’s own family is undermined when the commitment between a married couple to have children only with each other is broken.²⁶²

²⁵⁶ Associate Professor Stuhmcke, Evidence, 18 March 2009, pp 2-3

²⁵⁷ Professor Cook, Evidence, 19 March 2009, p 19

²⁵⁸ Professor Cook, Evidence, 19 March 2009, pp 22-23

²⁵⁹ Submission 35, pp 1-2

²⁶⁰ Submission 14, pp 7-8

²⁶¹ Submission 5, p 4

²⁶² Submission 12, p 8

Issues relating to the intending parents

- 3.143** A few inquiry participants noted that in addition to the potential for harm to the birth mother and her family, surrogacy arrangements had the potential to have a negative impact on the intending parents as well.
- 3.144** The Catholic Archdiocese of Sydney suggested that the commitment between the intending parents to only have children with each other is broken by surrogacy arrangements:
- It is a reproductive method that entails the dissociation of husband and wife by the intrusion of a person other than the couple (by means of the donation of a surrogate uterus, and possibly donor ovum) into what should be an exclusive relationship. In so doing, surrogacy betrays the spouses' "right to become a father and a mother only through each other."²⁶³
- 3.145** Mr Michael Sobb suggested that entering into a surrogacy arrangement could result in 'covert jealousy on the part of the infertile partner.'²⁶⁴
- 3.146** The Queensland Bioethics Centre suggested that an infertile woman may be 'subjected to pressure to consent to her husband conceiving a child with another woman' and that a child born through a surrogacy arrangement 'could well become a constant reminder to the wife of her inability to give her husband children.'²⁶⁵

Committee comment

- 3.147** The Committee notes that the practice of altruistic surrogacy is a contentious one, that community opinion is varied and that some opposing views are irreconcilable. The Committee acknowledges that the views expressed by inquiry participants were grounded in deeply held convictions and are valid and consistent within the context of those convictions. The Committee itself is divided in relation to the views of its members.
- 3.148** The Committee notes that from the range of views expressed there was consensus that the best interests of children born through surrogacy arrangements should be paramount. The Committee agrees with this consensus view and adopts this as its guiding principle.
- 3.149** The Committee also notes that this chapter has largely focused the views of those inquiry participants opposed to surrogacy. This is due to the fact that most views opposed to surrogacy were grounded in what could be termed 'beliefs and attitudes' and were therefore appropriately addressed in this chapter. Those inquiry participants who supported the practice of surrogacy tended to express their views less in terms of 'beliefs and attitudes' and more in terms of the practicalities of protecting the rights of children born through surrogacy agreements. Therefore, the views of these inquiry participants are presented in more detail in chapters 4, 5 and 6.

²⁶³ Submission 10, p 6 quoting the *Catechism of the Catholic Church*, n 2376

²⁶⁴ Submission 2, p 5

²⁶⁵ Submission 12, p 9

- 3.150** In relation to the issue of asserting the rights of the child pre-conception or post-birth, the Committee acknowledges that there is validity in both viewpoints. However, the Committee accepts that children have been and will continue to be born through surrogacy arrangements, irrespective of the actions of government, and that it has an obligation to protect the rights of those children by removing where possible any disadvantage that may exist for them by virtue of being born to a surrogacy arrangement.
- 3.151** The Committee acknowledges that there is limited research in the area of surrogacy and that there is some difficulty in extrapolating from research relating to adoption and donor conceived children. This difficulty arises in part because research from adoption often refers to the fact that adopted children are being raised by ‘non-biological’ parents, with the clear implication being that the adoptive parents are not genetically related to the child. However, in a surrogacy arrangement, the intending parents may indeed be genetically related to the child born through the arrangement. Therefore, the validity of any comparison between adoption and surrogacy is questionable.
- 3.152** Similarly, research about donor conceived children also often refers to the fact that the child is being raised by parents to whom he or she is not genetically related, and that the child does not have a relationship with the man and woman who donated the gametes used in his or her conception. In a surrogacy arrangement however, it may be the intending parents who have donated the gametes used. Again, the validity of any comparison between donor conceived children and children born through surrogacy arrangements is questionable.
- 3.153** The majority of the Committee notes that the research pertaining specifically to surrogacy arrangements does not indicate negative outcomes for the parties concerned, including the children born through the arrangement, notwithstanding the fact that there are longitudinal shortcomings to these studies at this point in time. The Committee believes that further longitudinal studies should be undertaken.
- 3.154** Other Committee members believe that a cautious approach should be adopted until such studies have been completed, including longitudinal research to properly assess the outcomes of surrogacy arrangements for children.
- 3.155** The minority of Committee members hold the view that there is a clear case against surrogacy as a matter of principle, and that the risks and harms to the individual and the common good far outweigh any benefits or potential benefits. These members are particularly concerned that the regulation of the practice of surrogacy implies that it is socially and legislatively condoned and that this will contribute to its normalisation and encouragement. Such an outcome, in their view, is not desirable. However, the majority of Committee members are persuaded that there is a clear case in favour of surrogacy. In addition, the majority of Committee members note the viable option surrogacy presents to people who may have no other means of having children, and particularly the opportunity it presents to couples to have a child they are genetically related to when this would be impossible by any other means.

Chapter 4 The role for the NSW Government in regulating altruistic surrogacy

This chapter looks at the role, if any, the NSW Government should play in regulating the practice of altruistic surrogacy. It begins with a brief look at information the Committee received indicating the number of altruistic surrogacy arrangements that occur in NSW each year. It then examines some general principles relating to government regulation, such as the role of the state in people's private lives, the educative function of regulation and the potential for regulation to be seen as an endorsement of the practices it seeks to regulate.

This is followed by a discussion of the extent to which the Government should regulate the practice of altruistic surrogacy, if any regulation is needed, the interplay between state and federal legislation relating to surrogacy, namely the impact of recent changes to the *Family Law Act 1975* (Cth), and the adequacy of existing guidelines for ART clinics facilitating surrogacy arrangement. Finally, the Committee considers the recent proposal for uniform national legislation put forward by the Standing Committee of Attorneys-General.

Incidence of altruistic surrogacy arrangements in NSW

- 4.1** During the inquiry the Committee received some evidence that gives a general indication as to the number of surrogacy arrangements occurring in NSW. A precise picture is not possible due to the fact that the Committee did not hear from all ART clinics facilitating surrogacy arrangements in NSW, and an unknown number of surrogacy arrangements are implemented without the use of an ART procedure.
- 4.2** Dr Kim Matthews from Next Generation Fertility clinic estimated that less than 100 surrogacy arrangements occurred in NSW each year.²⁶⁶
- 4.3** Associate Professor Anita Stuhmcke from the Faculty of Law at the University of Technology, Sydney, stated that she and her colleague, Professor Jenni Millbank, both of whom have had significant involvement in the issue of surrogacy, received about 80 inquiries over the last 18 months from members of the public who were considering surrogacy.
- 4.4** Dr Mark Bowman, Medical Director of Sydney IVF, one of the two largest providers of fertility treatment in NSW,²⁶⁷ stated that 'in the seven years we have been undertaking gestational surrogacy we have had 69 applications, so we are not dealing with high numbers.'²⁶⁸ It should be noted that Dr Bowman's involvement has been with gestational surrogacy arrangements in particular.

²⁶⁶ Answers to questions on notice taken during evidence 5 November 2008, Dr Kim Matthews, Medical Director, Next Generation Fertility, Questions 1 and 3, p 2

²⁶⁷ The other being IVF Australia, who also facilitate surrogacy arrangements.

²⁶⁸ Dr Mark Bowman, specialist gynaecologist and Medical Director, Sydney IVF, Evidence, 18 March 2009, p 53

The role of the state in people's private lives

4.5 Some inquiry participants questioned whether the state had any role to play in the regulating an aspect of people's lives as personal as reproduction and family formation, whereas others argued the state in fact had an obligation to become involved.

4.6 Professor Millbank, from the Faculty of Law at the University of Technology, Sydney, suggested that governments were not well placed to make decisions about family formation:

The decision to undertake surrogacy is one that concerns the participants most acutely, and governments are ill-placed to make decisions about who will make appropriate parents or what family forms should take.²⁶⁹

4.7 The Gay and Lesbian Rights Lobby argued that 'the benefits of regulation should be clearly justified by showing that regulations are likely to achieve their intended aims before private matters relating to reproduction and conception invite the interference of the state.'²⁷⁰

4.8 Dr Bowman, from Sydney IVF, questioned whether the Government had a role in determining who should have access to ART, making a comparison with Victoria:

Is it the role of government or legislation to tell people who should and should not seek professional opinion? ... Victoria has had restrictive laws and independent bodies telling IVF clinicians what they can and cannot do in certain circumstances. They have to apply to the Infertility Treatment Authority to be told what they can and cannot do. Above the Murray River we have not experienced that. I would argue that both societies effectively are travelling along okay.²⁷¹

4.9 Associate Professor Roger Cook, Director of the Psychology Clinic at Swinburne University of Technology, also questioned the validity of restricting access to ART based on value judgements, arguing that the same restrictions on family formation would not apply to couples conceiving children naturally:

Do we restrict [a fertile couple's] right to have that child when very often we know that perhaps they are not the sort of people who might pass whatever other constraints we put on people approaching assisted reproductive technology?²⁷²

4.10 However, the Plunkett Centre for Ethics maintained that the practice of surrogacy was the state's responsibility and that matters should not be left solely to the preferences of the adults involved:

These are not matters of 'private morality' which might be thought not to be the responsibility of the state ... Nor are they matters to be settled solely on the basis of

²⁶⁹ Submission 3, Professor Jenni Millbank and Associate Professor Anita Stuhmcke, p 8

²⁷⁰ Submission 25, Gay and Lesbian Rights Lobby, p 7

²⁷¹ Dr Bowman, Evidence, 18 March 2009, p 59

²⁷² Professor Roger Cook, Psychology Clinic, Swinburne University of Technology, Evidence, 19 March 2009, p 25

... preferences ... For one thing, those most affected - the to-be-born children - have no chance of expressing their preferences.²⁷³

4.11 Similarly, Revd Dr Andrew Ford from the Anglican Church Diocese of Sydney argued that ‘the state has an appropriate role ... to ensure that the conditions are created and exist in our midst for welcoming children in such a way that they can be born and reared in the best possible way.’²⁷⁴

4.12 On the other hand, Mr Roderick Best, Director of Legal Services, Department of Community Services, suggested that so long as the child that had been born was not at risk of harm the state need not be involved:

If the child is not at risk of harm and the state has not been involved—there has been no endorsement or support by the state of what has gone on—but the child is being raised properly, is healthy and well and everything else is okay, does the state need to worry that it was not involved? I do not think so.²⁷⁵

The possible effect of regulation

4.13 Dr Bernadette Tobin, Director of the Plunkett Centre for Ethics, argued that the law has an educative function and that people often decide what is right and wrong by reference to the law.²⁷⁶ Likewise, Associate Professor Gerald Gleeson suggested that ‘if there is a law saying something is permissible many people simply assume without any further inquiry that it is a good thing to do.’²⁷⁷

4.14 Applying this argument to the issue of surrogacy, some inquiry participants were concerned that government regulation of surrogacy would be perceived as government endorsement of surrogacy,²⁷⁸ with some arguing further that, on the contrary, the Government should discourage surrogacy.²⁷⁹

4.15 However, Ms Sandra Dill, Chief Executive Officer of ACCESS Australia’s Infertility Network, took the view that if legislation, whilst not prohibiting surrogacy, did not actually permit it, children born to surrogacy arrangements may feel a sense of shame that the Government did not approve the method of their conception:

²⁷³ Submission 30, Plunkett Centre for Ethics, p 2

²⁷⁴ Revd Dr Andrew Ford, Anglican Church Diocese, Sydney, Evidence, 6 November 2009, pp 1-2

²⁷⁵ Mr Roderick Best, Director, Legal Services, Department of Community Services, 5 November 2008, p 22

²⁷⁶ Dr Bernadette Tobin, Director, Plunkett Centre for Ethics, Evidence, 6 November 2009, p 29

²⁷⁷ Associate Professor Gerald Gleeson, Catholic Institute of Sydney, Evidence, 19 March 2009, p 11

²⁷⁸ See for example Submission 10, Catholic Archdiocese of Sydney, Life, Marriage and Family Centre, p 7; Ms Myfanwy Walker, TangledWebs, Evidence, 18 March 2009, p 30; Submission 12, Queensland Bioethics Centre, p 10

²⁷⁹ See for example Submission 12, p 10; Mr Christopher Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, Evidence, 6 November 2009, p 15; Mr Raymond Campbell, Director, Queensland Bioethics Centre, Evidence, 18 March 2009, p 75

... I am just a little uncomfortable with the idea that for those who have children in this way, when they grow up it was not prohibited that they be born in this way, but it was not really permitted either. There is some sort of sense of reserve. It would be nice if children were very clear about the fact that there is no sense of shame in this; that maybe there was a better way they could have been born. You know, the Government has not really allowed it; it has just turned the other way...²⁸⁰

- 4.16** In relation to the potential for legislation to label children born through surrogacy arrangements as an inferior class, Dr Tobin argued that ultimately legislating or not legislating will have some good effects and some bad effects and that ‘in the end we have to take a view about which set of good effect and bad effects we prefer.’²⁸¹

The extent of regulation required

- 4.17** The previous chapter examined the beliefs and attitudes towards surrogacy presented to the Committee, with a majority of inquiry participants expressing either their support for or opposition to the practice. However, in relation to the need for further regulation, inquiry participants did not fall so neatly into two categories. As will become evident from the following sections, of those inquiry participants opposed to surrogacy, some argued that no further regulation was required, while others argued the practice should be prohibited by new legislation. On the other hand, some inquiry participants opposed to surrogacy nevertheless accepted that the practice would continue and argued that parties’ rights should be protected by legislation. In addition, amongst those inquiry participants supportive of surrogacy there was a range of views about the extent to which the practice should be regulated.
- 4.18** In relation to the extent of any government regulation, the Committee received a number of suggested recommendations ranging from no or minimal additional regulation, to regulating only for a transferral of parentage mechanism, through to comprehensive regulation establishing eligibility criteria for parties to surrogacy arrangements.
- 4.19** The majority of inquiry participants who addressed the issue of government regulation favoured a minimalist approach in principle, particularly in relation to eligibility criteria for parties wishing to enter into a surrogacy arrangement, and there was strong support for legislation addressing the issue of transferral of legal parentage to the intending parents. This section examines inquiry participants views on the extent of government regulation required in general, while the specific issue of a transferral of parentage mechanism for surrogacy arrangements is examined in more detail in Chapter 5.
- 4.20** Mr Damien Tudehope, stated that the position of Family Voice Australia was that there should be no change to the law, that section 45 of the *Assisted Reproductive Technology Act 2007* (NSW) – which renders surrogacy agreements legally void – ‘is an appropriate provision and is one which probably best reflects what we would say is the current community attitude.’²⁸²

²⁸⁰ Ms Sandra Dill, Chief Executive Officer, Access Australia, Evidence, 18 March 2009, p 64

²⁸¹ Dr Tobin, Director, Evidence, 6 November 2009, p 29

²⁸² Mr Damien Tudehope, Legal Representative, Family Voice Australia, Evidence, 6 November 2009, p 34

4.21 Mr Tudehope further suggested that any extensive regime of regulation would lead to a great deal of testing of those laws in the courts:

[If we] introduce a whole regime of laws [they] would be tested by courts for the purposes of, I suppose, finding the nuances of the law, whether in fact we can discriminate against particular people in relation to who is able to avail themselves as surrogate parents and the like.²⁸³

4.22 Similarly, Revd Dr Ford cautioned that 'legislation will actually increase disputes and allow for litigation that does not happen now.'²⁸⁴

4.23 Professor Millbank pointed out that despite there being no legislation regarding surrogacy in NSW for the last 20 years, there was not currently a problem with surrogacy in this state, and that if there was, legislation was not necessarily the appropriate response:

I think we should really rethink the idea of whether or not there is actually a problem that needs a solution; whether legislation is the appropriate response if there is a problem; and, if there needs to be a form of regulation in order to prevent exploitative practices, for example, whether legislation is the right thing.²⁸⁵

4.24 Similarly, the Gay and Lesbian Rights Lobby argued that in the absence of any empirical evidence of adverse outcomes from surrogacy arrangements there was 'no demonstrated need for further regulating altruistic surrogacy in NSW beyond the terms of the *ART Act*.'²⁸⁶

4.25 Ms Leanne O'Shannessy, Director, Legal and Legislation, and General Counsel with NSW Health, urged the Committee to attempt to remedy any perceived problems with the practice of surrogacy in a 'minimalist fashion,' cautioning that 'if a regulation regime is too extreme it can stop the process.'²⁸⁷

4.26 Ms Linda Wright, a lawyer with experience in surrogacy arrangements, suggested that legislation limited in scope had a greater chance of being implemented:

Legislation both decriminalising and supporting surrogacy will have a far better chance of being passed if it is limited in its scope. Legislation too broad may be doomed to fail.²⁸⁸

4.27 Mr Paul Lewis from the Family Issues Committee of the Law Society of NSW suggested the *Parentage Act 2004* (ACT) provided a good example of a 'minimalist model that neither gives greater encouragement nor greater discouragement to altruistic surrogacy.'²⁸⁹

²⁸³ Mr Tudehope, Evidence, 6 November 2009, p 35

²⁸⁴ Revd Dr Ford, Evidence, 6 November 2009, pp 1-2

²⁸⁵ Professor Millbank, Evidence, 5 November 2009, p 57

²⁸⁶ Submission 25, p 13

²⁸⁷ Ms Leanne O'Shannessy, Director, Legal and Legislation, and General Counsel, New South Wales Health, Evidence, 18 March 2009, p 9

²⁸⁸ Submission 36, p 2 (Attachment)

²⁸⁹ Mr Paul Lewis, Family Issues Committee, Law Society of New South Wales, Evidence, 5 November 2009, p 44

- 4.28** Professor Millbank urged the Committee to restrict its recommendations regarding further legislation to transferring parentage to intending parents in order to protect the child's best interests, and in particular not to establish criteria for parties wishing to access ART or enter into a surrogacy agreement.²⁹⁰
- 4.29** In this respect, Professor Millbank cautioned against the temptation for legislators to become involved in 'devising ideal families' and warned against using general research as a basis for establishing criteria for specific cases:
- ... you might be able to say, for instance, generally that poor people with divorced parents make bad parents, but you still might have two people who are poor and who have divorced parents and who, when you individually assess their characteristics, would be excellent parents. That is why I do not think legislation should set down that kind of criteria.²⁹¹
- 4.30** Similarly, Witness A and Witness B, parents to two children born through surrogacy arrangements, argued that differences in each case made it difficult to set objective criteria for entry into surrogacy arrangements:
- It is difficult to set objective criteria to be met by the parties involved, as each arrangement is such a personal event and there are so many possible combinations of people and lifestyles that it would be impossible to be entirely prescriptive about this.²⁹²
- 4.31** Associate Professor Anita Stuhmcke from the Law Faculty at the University of Technology, Sydney, suggested the current lack of legislation in NSW regarding surrogacy was preferable to the legislative models in other Australian jurisdictions where 'prescriptive legislation does not work.' However, Associate Professor Stuhmcke also argued that there was a need for legislation to clarify the transferral of parentage to intending parents.²⁹³
- 4.32** Dr Bowman likewise argued against laws regulating what he described as 'clinical decision making' but that the 'legal ambiguity following the birth of the child that is where the processes, if there is a role for law, ought to be sorted.'²⁹⁴
- 4.33** In the same vein, Mr Iain Martin, Manager of Legislation with the NSW Health, suggested that one option available to the Government was to 'leave the practice [of surrogacy] alone and in the hands of the medical professionals who conduct it, but then simply legislate to regularise the familial arrangements that arise as a result.'²⁹⁵

²⁹⁰ Submission 3, Professor Jenni Millbank and Associate Professor Anita Stuhmcke, p 8

²⁹¹ Professor Millbank, Evidence, 5 November 2009, p 66

²⁹² Answers to questions on notice taken during evidence 5 November 2008, Witness A and Witness B, Question 5, p 3

²⁹³ Associate Professor Anita Stuhmcke, Faculty of Law, University of Technology, Evidence, 18 March 2009, p 2

²⁹⁴ Dr Mark Bowman, specialist gynaecologist and Medical Director, Sydney IVF, Evidence, 18 March 2009, p 54

²⁹⁵ Mr Iain Martin, Manager, Legislation, New South Wales Department of Health, Evidence, 18 March 2009, pp 6-7

- 4.34** Ms Miranda Montrone, Psychologist and Family Therapist and Infertility Counsellor with experience counselling parties to surrogacy arrangements, also noted that the practice of surrogacy ‘has worked quite well in NSW even though there has been no legislation’ but that it was now appropriate for the NSW Government to bring in regulations that would ‘facilitate birth certificates (and Medicare cards, passports etc) and parenting arrangements, and which would validate the actions of all involved in the surrogacy proposal: the commissioning or intended parents, and the surrogate and her partner, if she has one.’²⁹⁶
- 4.35** Other inquiry participants, however, recommended more extensive legislation, including establishing criteria for intending parents and birth mothers.
- 4.36** For example, the Australian and New Zealand Infertility Counsellors’ Association stated that it was ‘appropriate for Government to play a regulatory role in instances of altruistic surrogacy’ and that ‘by legislating that certain requirements be met prior to commencement or finalisation of the surrogacy arrangement’ it could ‘minimize any negative outcomes of the surrogacy arrangement.’²⁹⁷ Ms Montrone also noted that regulations establishing certain criteria would be helpful.²⁹⁸
- 4.37** Ms Wright noted the ‘commercial’ nature of fertility clinics, stating that whilst this was ‘not necessarily a pejorative term ... they are there to make a profit.’ Ms Wright suggested that there was a case for legislation establishing ‘basic criteria’ so that ‘there can be no rubberyess.’²⁹⁹
- 4.38** Next Generation Fertility stated that ‘the NSW Government should provide a regulatory role in the making and supervision of surrogacy arrangements in NSW.’³⁰⁰

The interplay between state and federal legislation in relation to surrogacy arrangements

- 4.39** The Committee received evidence about the effect of recent amendments to the *Family Law Act 1975* (Cth) in relation to recognition at a federal level of parentage of children born through surrogacy arrangements.
- 4.40** The *Family Law Amendment (De Facto Financial and Other Measures) Act 2008*, assented to on 21 November 2008, inserted a new section 60HB into the *Family Law Act*. Section 60HB, entitled ‘Children born under surrogacy arrangements’, reads as follows:

If a court has made an order under a prescribed law of a State or Territory to the effect that:

- (a) a child is the child of one or more persons; or

²⁹⁶ Submission 32, Ms Miranda Montrone, pp 2-3

²⁹⁷ Submission 34, Australian and New Zealand Infertility Counsellors' Association, p 1

²⁹⁸ Ms Miranda Montrone, Psychologist and Family Therapist and Infertility Counsellor, Evidence, 18 March 2009, p 43

²⁹⁹ Ms Linda Wright, Lawyer, Evidence, 18 March 2009, p 24

³⁰⁰ Submission 29, Next Generation Fertility, p 2

(b) each of one or more persons is a parent of a child;

then, for the purposes of this Act, the child is the child of each of those persons.³⁰¹

- 4.41** The effect of this amendment, explained Associate Professor Stuhmcke, is that any transfer of parentage in a surrogacy arrangement effected at state or territory level is mirrored in the *Family Law Act* and other pieces of federal law.³⁰²
- 4.42** Professor Millbank described the amendment as a ‘stepping back’ by federal law, allowing the states to act:
- Federal law is stepping back now and saying we will basically reflect the provisions of the states but it is the states, which have to do it. Once the states have done it, it will be mirrored in all federal law.³⁰³
- 4.43** Professor Millbank emphasised the opportunity this amendment presented to New South Wales, stating that the fact that state law will now take precedence over federal law in relation to children born through surrogacy arrangements ‘makes it even more important that New South Wales think about a parentage transfer process of whatever ilk.’³⁰⁴
- 4.44** Likewise, Mr Ghassan Kassisieh from the Gay and Lesbian Rights Lobby stated that ‘the beauty of the amendments being made at the federal level is that they confirm consistency once a state has actually instituted a surrogacy transfer scheme.’³⁰⁵
- 4.45** Both Professor Millbank and Mr Kassisieh noted in particular that recognition under federal law of legal parentage for intending parents in surrogacy arrangements would mean that one parent could obtain child support from the other in the event they separated.³⁰⁶

Existing guidelines and policies relating to altruistic surrogacy

- 4.46** The Committee heard evidence on the ability of existing guidelines that relate to the provision of ART services, to provide adequate regulation of the practice of altruistic surrogacy in NSW. The national guidelines include the National Health and Medical Research Council (NHMRC) *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*³⁰⁷ (hereafter referred to as the NHMRC guidelines), the Reproductive Technology Accreditation

³⁰¹ *Family Law Act 1975* (Cth), s 60HB (1)

³⁰² Associate Professor Stuhmcke, Evidence, 18 March 2009, p 9

³⁰³ Professor Millbank, Evidence, 5 November 2009, p 67

³⁰⁴ Professor Millbank, Evidence, 5 November 2009, p 67

³⁰⁵ Mr Kassisieh, Policy and Development Coordinator, Gay and Lesbian Rights Lobby, Evidence, 6 November 2009, p 60

³⁰⁶ Professor Millbank, Evidence, 5 November 2009, p 67; Mr Kassisieh, Evidence, 6 November 2009, p 60

³⁰⁷ National Health and Medical Research Council, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (hereafter ‘NHMRC Guidelines’), June 2007

Committee (RTAC) *Code of practice for assisted reproductive technology units*.³⁰⁸ Additionally, there are internal guidelines and policies developed by individual fertility clinics providing ART services.

4.47 This section begins by detailing what these guidelines are and how they are applied to the practice of altruistic surrogacy in NSW. Some inquiry participants argued that the existing guidelines are not adequate, drawing attention to the fact that fertility clinics have a potential conflict of interest by being involved in self-regulation and that they can come under considerable pressure to go outside guidelines. Other inquiry participants argued that the existing guidelines are adequate and that therefore further regulation of altruistic surrogacy is not required.

4.48 As noted in Chapter 2, the NHMRC and RTAC guidelines relate to the delivery of ART services generally. The RTAC code of practice relates to an accreditation process for fertility clinics. Its purpose is to:

- Promote continuous improvement in the quality of care offered to people accessing fertility treatment.
- Provide a framework and set criteria for the auditing process that leads to accreditation of organisations that deliver fertility services.
- Ensure the auditing process is carried out in an independent, non-adversarial and constructive manner.³⁰⁹

4.49 The NHMRC guidelines relate more specifically to the delivery of ART services. They address issues such as the use of gametes and donated embryos, the storage of gametes and embryos, information giving, counselling and consent, record keeping, sex selection and issues relating to quality assurance. They also provide ethical guidelines for research.

4.50 The above guidelines apply to surrogacy arrangements to the extent that birth mothers in surrogacy arrangements conceive via an ART procedure provided by a registered clinic. The only specific reference to the practice of surrogacy contained within the NHMRC guidelines states that it is ethically unacceptable for clinics to ‘undertake or facilitate commercial surrogacy arrangements’³¹⁰ and provide the following guidelines for ‘noncommercial’ surrogacy:

Noncommercial surrogacy (whether partial surrogacy or full surrogacy) is a controversial subject ... 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

³⁰⁸ Reproductive Technology Accreditation Committee, *Code of practice for assisted reproductive technology units*, May 2007

³⁰⁹ Reproductive Technology Accreditation Committee, *Code of practice for assisted reproductive technology units*, May 2007, p 4

³¹⁰ NHMRC Guidelines, June 2007, p 57

- have undertaken counselling to consider the social and psychosocial significance for the person born as a result of the arrangements, and for themselves.

Clinicians should not advertise a service to provide or facilitate surrogacy arrangements, nor receive a fee for services to facilitate surrogacy arrangements.³¹¹

- 4.51** Dr Kim Matthews, Medical Director at Next Generation Fertility, explained that the NHMRC, RTAC and the Fertility Society of Australia (FSA) collaborated on developing the current industry guidelines and that the guidelines covered research and clinical practices.³¹²
- 4.52** Dr Matthews further explained that the fertility industry had been at great pains to establish the accreditation process, according to which RTAC accreditation depended upon approval from FSA monitors who conduct an audit every three years. Dr Matthews advised that in April 2009 the accreditation authority would be transferred to an outside body, the Joint Accreditation System of Australia and New Zealand (JAS-ANZ), that which will conduct yearly audits.³¹³
- 4.53** Dr Bowman, Medical Director of Sydney IVF, also confirmed that RTAC accreditation 'is contingent upon you adhering to NHMRC ethical guidelines on assisted conception,' guidelines which applied to fertility procedures generally, including surrogacy arrangements.³¹⁴
- 4.54** In addition, Dr Bowman explained that clinics develop their own internal guidelines. In relation to surrogacy, Sydney IVF recognised the lack of clarity regarding the legal status of a child born to a surrogacy arrangement. Dr Bowman described the NHMRC guidelines 'woefully inadequate' in this respect.³¹⁵ In order to address this inadequacy, Sydney IVF developed its own guidelines:

We recognised along the way, of course, that there was no legal pathway for the transfer of custody and we also recognised that there were a number of parties in that relationship—most importantly the future child whose needs need to be addressed and fulfilled. So to that end Sydney IVF, with the help of its clinicians, established what we believe was a fairly rigorous and appropriate sort of policy of review and work-up for each individual case so that we could ensure that this essentially clinically-driven process was completed appropriately from a social and legal perspective as best we could do under the circumstances.³¹⁶

- 4.55** Sydney IVF's 'Policy on gestational surrogacy' outlines a protocol for reviewing surrogacy. The initial stage in the process involves the provision of information to parties and a meeting with a Sydney IVF doctor and counsellor to discuss treatment options and potential difficulties. This is followed by an assessment phase that includes reports from a Sydney IVF doctor, an independent specialist obstetrician, two independent psychiatrists, and a lawyer

³¹¹ NHMRC Guidelines, June 2007, p 57

³¹² Dr Matthews, Evidence, 5 November 2009, p 53

³¹³ Dr Matthews, Evidence, 5 November 2009, p 53

³¹⁴ Dr Bowman, Evidence, 18 March 2009, pp 56-57

³¹⁵ Dr Bowman, Evidence, 18 March 2009, p 58

³¹⁶ Dr Bowman, Evidence, 18 March 2009, p 51

skilled in family law. Sydney IVF's Surrogacy Review Panel then considers all the reports and any further advice it deems necessary and makes a decision as to whether to accept or reject the surrogacy arrangement.³¹⁷

- 4.56** Dr Bowman explained that Sydney IVF's Surrogacy Review Panel had been established to represent its Ethics Committee:

So the Ethics Committee came up with a general framework and structure of how we undertake treatment and each individual case is reviewed by the Surrogacy Review Panel representing the ethics committee.³¹⁸

- 4.57** Dr Kylie De Boer, General Manager of Sydney IVF, described the current make-up of the Ethics Committee as consisting of a chairperson, two laymen, a doctor familiar with the field, a counsellor, a minister of religion and a lawyer.³¹⁹ Dr Bowman stated that 'the Committee is constructed under National Health and Medical Research Council [NHMRC] guidelines for ethics committees in terms of representation.'³²⁰

- 4.58** On the subject of ethics committees, Associate Professor Nicholas Tonti-Filippini, Head of Bioethics at the John Paul II Institute for Marriage and Family expressed concern that 'there are no NHMRC guidelines for clinical ethics committees ... There are only guidelines for human research ethics committees.'³²¹

- 4.59** Associate Professor Tonti-Filippini stated that as a member of the Australian Health Ethics Committee he was closely involved in the regulation of human research ethics committees, which he described as 'well-regulated.' However, clinical ethics committees, stated Professor Tonti-Filippini, had no such regulation:

There are no regulations, no guidelines, no governance standards, no defined composition. There is absolutely nothing that says what they do, how they do it, and there is nothing that requires them to report. So there are absolutely no standards that apply to clinical ethics committees in this country. That is a huge gap that applies, but no government agency so far as opted to do anything about it.³²²

- 4.60** In the context of surrogacy and matters related to the welfare of children, Associate Professor Tonti-Filippini stated that it was inappropriate for a clinical ethics committee to be given decision making responsibility:

³¹⁷ Answers to questions on notice taken during evidence 18 March 2009, Dr Mark Bowman, Medical Director, Sydney IVF and Dr Kylie de Boer, General Manager, Sydney IVF, 'Policy on gestational surrogacy,' pp 12-14

³¹⁸ Dr Bowman, Evidence, 18 March 2009, p 52

³¹⁹ Dr Kylie De Boer, General Manager Sydney IVF, Evidence, 18 March 2009, p 52

³²⁰ Dr Bowman, Evidence, 18 March 2009, p 52

³²¹ Associate Professor Nicholas Tonti-Filippini, Head of Bioethics, John Paul II Institute for Marriage and Family, Evidence, 19 March 2009, p 31

³²² Associate Professor Tonti-Filippini, Evidence, 19 March 2009, p 31

I think it is quite inappropriate for a government or a Parliament to allocate to a body that is completely ungoverned, with no governance standards, no regulations, no guidelines and no defined composition, a responsibility such as this.³²³

- 4.61** Dr Bowman confirmed that Sydney IVF's Ethics Committee is a human research ethics committee, constituted under NHMRC guidelines and registered with the NHMRC. Its 'surrogacy review panel' operates within policy guidelines set by the Ethics Committee. Dr Bowman further stated that it was appropriate for the Ethics Committee to deal with clinical issues and that many clinics relied on an ethics committee to deal with both clinical and research issues:

... the constitution and membership of the Ethics Committee ... means that both research and clinical issues are appropriately dealt with by the Committee ... the issues regularly overlap with clinical issues and committee members have of broad knowledge of all aspects of assisted conception.

...

... Assisted conception centres generally rely on an Ethics Committee that deals with both research issues and clinical issues.³²⁴

The adequacy of existing guidelines and policies

- 4.62** Some inquiry participants questioned the appropriateness of self-regulation by fertility clinics in relation to surrogacy arrangements due to a possible conflict of interest, and in recognition of the fact there is often considerable pressure applied to approve surrogacy arrangements, while other inquiry participants argued the existing guidelines were adequate.
- 4.63** The Plunkett Centre for Ethics suggested there was a possible conflict of interest for the fertility industry who was an 'interested party' in the issue of surrogacy legislation and 'stands to gain more as laws become more permissive.' The Centre was not impugning the motives of practitioners but merely drawing attention to the potential for a conflict of interest:

This is not to impugn the motives of all who work in the fertility industry: it is just to remind the Committee of its social responsibility to take proper account of the possibility of conflict of interest in arguments advanced by anyone who stands to benefit, financially or 'professionally', from facilitating surrogacy arrangements.³²⁵

- 4.64** Ms Montrone stated that whilst traditionally clinics dealt with surrogacy cases that were 'extremely good proposals,' – which she described as being gestational surrogacy arrangements with both the egg and sperm donated by the intending parents, the birth mother being a relation or longstanding friend, and there being a serious condition affecting pregnancy for the intending mother, such as lack of a uterus – she was concerned that 'a more open situation' could result in clinics being pressured to consider less compelling cases, in which, for example, 'a couple ... does not have a uterus problem.' Ms Montrone further stated that 'patients who

³²³ Associate Professor Tonti-Filippini, Evidence, 19 March 2009, p 31

³²⁴ Email from Dr Mark Bowman, specialist gynaecologist and Medical Director, Sydney IVF, to Secretariat, 1 May 2009

³²⁵ Submission 30, p 3

are hurting tend to push the clinics' and that when pressure is applied clinics 'can experience difficulty in holding off.'³²⁶

4.65 Similarly, Professor Tom Frame, Director of St Mark's National Theological Centre, stated that during his time as a member of an ethics committee with oversight of a Canberra fertility clinic he witnessed 'bracket creep' in relation to guidelines, as a result of pressure to test 'every single guideline and limit that we had.' Professor Frame stated that he thought the pressure to push the boundaries came from 'the service provider' and that 'we would want to see [guidelines] actually in legislation rather than just guidelines to guide a committee that is exercising oversight.'³²⁷

4.66 Ms Elizabeth Micklethwaite, Senior Research Officer with the Australian Christian Lobby, favoured legislation in addition to guidelines relating only to ART clinics, in order to cover the period before and after the clinics' involvement:

Many of the other issues that crop up regarding surrogacy occur later in the process or need to occur earlier in the process in the parties deciding whether or not they should actually proceed down this route. So probably we would be favouring some sort of government regulation over and above just guidelines to ART clinics.³²⁸

4.67 The Queensland Commission for Children and Young People, addressing the situation in Queensland, which is similar to NSW in terms of lack of legislation around surrogacy, noted the reliance of clinics on the NHMRC guidelines. It further noted that a fertility clinic's 'primary purpose is to assist infertile couples [to] conceive' and this made it difficult for them to objectively assess 'a resulting child's best interests.' The Commission recommended that 'an impartial body should be allocated this responsibility to ensure the child's needs are considered fully and without the risk of conflict of interest.'³²⁹

4.68 Other inquiry participants, however, argued strongly that the existing guidelines were sufficient, and that there was no need for further legislation relating to ART and surrogacy arrangements.

4.69 For example, Sydney IVF described the clinical guidelines they operate under as 'robust and adequate.'³³⁰

4.70 The Gay and Lesbian Rights Lobby pointed out that 'the NHMRC Guidelines mandate that ART clinics must provide ready access to counselling before, during and after any ART procedure' and that this gave parties to surrogacy arrangements 'the opportunity to canvass all

³²⁶ Ms Montrone, Evidence, 18 March 2009, pp 39-40

³²⁷ Professor Thomas Frame, Director, St Mark's National Theological Centre, Evidence, 6 November 2009, p 23

³²⁸ Ms Elizabeth Micklethwaite, Senior Research Officer, Australian Christian Lobby, Evidence, 6 November 2009, p 10

³²⁹ Submission 9, Queensland Commission for Children and Young People, Advice to Altruistic Surrogacy Committee, Legislative Assembly of Queensland, p 5

³³⁰ Answers to questions on notice taken during evidence 18 March 2009, Dr Mark Bowman, Medical Director, Sydney IVF and Dr Kylie de Boer, General Manager, Sydney IVF, Question 2, p 1

the issues before embarking on a surrogacy arrangement and assists in ensuring informed consent before any procedure.³³¹

4.71 Witness A and Witness B gave their personal endorsement to the process they underwent at Sydney IVF:

We felt that the processes that Sydney IVF had in place were thorough, professional, relevant and appropriate. They gave all 4 of us a high degree of confidence that our “journey” would be handled in a caring and dedicated fashion, with our best interests at heart. We would recommend the Sydney IVF model as one worthy of consideration for a legislated template for all such surrogacy situations.³³²

4.72 Ms Dill argued that the relative flexibility of guidelines as opposed to legislation was an advantage when dealing with unusual circumstances, such as the sister of an intending parent not qualifying as birth mother due to the fact that she had not previously had children:

The inflexibility of the legislation is what concerned me in this instance. What if there was an unusual situation, an unusual family situation, where there was a sister who was willing to try to help her sister, and there was no-one else available? If that person was very carefully prepared and the tests that were able to be done were done, and she was able to give truly informed consent, would you then stick to the letter of the law and say, "No, you can't because you haven't had a child."³³³

4.73 Ms Dill also pointed out that fertility clinics had an interest in surrogacy arrangements working out well, and that ‘it would be bad for business if a surrogate case went wrong because it would just completely ruin it for them.’ Ms Dill was confident clinics would follow a ‘rigorous process’ as there as ‘no reason why a clinic would not do that because they want to be successful.’³³⁴

4.74 Professor Millbank described the guidelines in Australia as ‘very enforceable,’ noting that if the NHMRC guidelines were breached ‘fertility providers would not be able to claim Medicare for services they were providing.’³³⁵

4.75 Associate Professor Gleeson stated that ‘guidelines can be a better way of dealing with a lot of these things, rather than legislation’ and that whilst the present system was not fool-proof, ‘it seems to me that it is a more realistic and more appropriate way of trying to govern many of these issues, rather than bringing in the heavy hand of the law and the police.’³³⁶

4.76 Associate Professor Gleeson also noted that the Australian Health Ethics Committee (AHEC), the principle committee of the NHMRC which developed the Australian guidelines

³³¹ Submission 25, pp 11-12

³³² Answers to questions on notice taken during evidence 5 November 2008, Witness A and Witness B, Question 3, p 2

³³³ Ms Dill, Evidence, 18 March 2009, p 65

³³⁴ Ms Dill, Evidence, 18 March 2009, p 65

³³⁵ Professor Millbank, Evidence, 5 November 2009, p 63

³³⁶ Associate Professor Gerald Gleeson, Catholic Institute of Sydney, Evidence, 19 March 2009, p 12

relating to the use of ART, was ‘established by an Act of Parliament’ and its authority to develop ethical guidelines was contained in legislation:

So in the case of ethical guidelines, the only guidelines that can be issued by the NHMRC are those prepared by AHEC...The legislation said that whatever guidelines AHEC developed were the ones that had to be followed. So there was an AHEC process of development which included community consultation and so on.³³⁷

- 4.77** The Committee notes that the guidelines and policies developed by individual ART service providers are not legally enforceable and are subject to unilateral change by the providers.

Uniform national legislation

- 4.78** As noted in Chapter 2, the Standing Committee of Attorneys-General (SCAG) released a discussion paper in January 2009 entitled ‘A proposal for a national model to harmonise regulation of surrogacy’ as part of a process with a view to developing uniform national legislation regulating the practice of surrogacy. The paper called for submissions, with a closing date of 16 April 2009.
- 4.79** The SCAG discussion paper states that a principle underpinning the proposal is that intervention of the law in people’s private lives should be kept to a minimum. Proposals in the SCAG discussion paper include that birth mothers be reimbursed expenses, counselling for parties be mandatory and that intending parents be able to apply to be the only legal parents of the child born through the surrogacy arrangement and that a new birth certificate be issued at that time.
- 4.80** If national model legislation in relation to surrogacy arrangements were to be the outcome of the SCAG process, there is the potential that any legislation enacted by NSW in the meantime might be in conflict with that model legislation. The issue was raised, therefore, as to whether NSW should wait for the outcome of the SCAG process, or act in advance of it to address any needs that have been identified in relation to the regulation of altruistic surrogacy in NSW.
- 4.81** While most inquiry participants expressed their support for the concept of uniform national legislation, some expressed reservations about the time it might take for such legislation to become a reality and whether uniform national legislation is even possible given that some states have already enacted their own legislation.
- 4.82** Ms Montrone stated that it was very important to work towards nationally consistent legislation in relation to surrogacy to avoid parties having to travel interstate to implement surrogacy arrangements, which was a significant inconvenience for them and greatly increased their financial costs.³³⁸
- 4.83** Professor Frame, who had experience serving as a member of an ethics committee for a Canberra fertility clinic, also noted the inconvenience caused to intending parents who had to relocate away from their existing support networks to realise their surrogacy arrangements:

³³⁷ Associate Professor Gleeson, Evidence, 19 March 2009, p 12

³³⁸ Submission 32, p 6

I also believe strongly that uniform national legislation is highly desirable, as I have already seen many stressed couples around the country relocate to Canberra where I live to access services not available elsewhere. This has placed upon them another considerable burden. If they are committed to pursuing this option, I think we ought to say that they should have access to surrogacy services as near as possible to their usual place of residence and vital family support.³³⁹

- 4.84** In relation to the issue of timing, Mr Paul Lewis from the Law Society of New South Wales' Family Issues Committee, stated that 'I think in practice it could take quite a while to achieve.'³⁴⁰ Mr Lewis agreed that if a need for legislation relating to surrogacy arrangements was recognised, NSW should act soon rather than wait for uniform national legislation to be developed.³⁴¹
- 4.85** Mr John Longworth and Ms Alexandra Harland, also from the Law Society of New South Wales' Family Issues Committee, stated that they believed the SCAG process was going to be 'very difficult'³⁴² and agreed that it would take a long period of time.³⁴³
- 4.86** Ms Wright, a lawyer with experience in surrogacy arrangements, noted that given some states have already enacted legislation, or are proceeding down that path, it may prove 'quite difficult to persuade those states to amend legislation in such a way as to achieve complete consistency.'³⁴⁴
- 4.87** Mr Iain Martin, Manager of Legislation, NSW Health, also agreed that it there was little likelihood that states that had already gone down the path of legislating in the area of altruistic surrogacy would, in order to achieve national consistency, modify the boundaries they had established.³⁴⁵

Committee comment

- 4.88** The Committee notes that in terms of options for potential regulation, the surrogacy process can be delineated into three more or less chronological stages: 1) the entering into the agreement by parties, and the provision of information, assessment and counselling in relation to the particular surrogacy arrangement entered into, 2) the utilisation of ART to facilitate the surrogacy arrangement, and 3) the transferral of parentage to intending parents after the birth of the child.

³³⁹ Professor Frame, Evidence, 6 November 2009, p 22

³⁴⁰ Mr Lewis, Evidence, 5 November 2009, p 40

³⁴¹ Mr Lewis, Evidence, 5 November 2009, p 44

³⁴² Mr John Longworth, Family Issues Committee, Law Society of New South Wales, Evidence, 5 November 2009, p 40

³⁴³ Ms Alexandra Harland, Family Issues Committee, Law Society of New South Wales, Evidence, 5 November 2009, p 44

³⁴⁴ Answers to questions on notice taken during evidence 18 March 2009, Ms Linda Wright, Lawyer, Question 8, p 3

³⁴⁵ Mr Martin, Evidence, 18 March 2009, p 5

- 4.89** In regards to the first two stages of the surrogacy process, the Committee notes the principle espoused by many inquiry participants that the state should have minimal involvement in people's decisions regarding reproduction and family formation. The Committee also notes the principle adopted by the Standing Committee of Attorneys-General and enunciated in its discussion paper 'A proposal for a national model to harmonise regulation of surrogacy', that the intervention of the law in people's private lives should be kept to a minimum.
- 4.90** The majority of the Committee notes that if the Government were to establish eligibility criteria for parties to surrogacy arrangements, it could potentially be seen as inconsistent treatment by the Government of those parties, since the Government does not, and cannot, set such criteria for couples conceiving 'traditionally.' The majority of the Committee also notes the view expressed during the inquiry that ART clinics facilitating surrogacy arrangements are currently operating well and have adequate guidelines in the form of the National Health and Medical Research Council's, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, in combination with the internal guidelines developed by individual ART clinics. The other Committee members do not share these views. They note that eligibility criteria for parties to surrogacy arrangements are to be found throughout surrogacy legislation that has already been enacted in other Australian jurisdictions and overseas. Moreover, they express concern that the internal guidelines and policies of ART service providers are not legally enforceable and are subject to unilateral change by the providers.
- 4.91** The majority of the Committee believes that decisions regarding psychological preparedness of parties and the delivery of fertility treatment itself should be left largely in the hands of psychologists, psychiatrists, other counsellors and clinicians with relevant qualifications and experience in the field, to be made with regard to the individual characteristics and circumstances pertaining to particular surrogacy arrangements.
- 4.92** Therefore, the majority of the Committee adopts the principle that Government regulation of altruistic surrogacy in NSW should be kept to a minimum. The other Committee members believe that this minimalist approach is highly problematic because it fails to acknowledge and address a number of issues that arise from surrogacy.
- 4.93** Taking the principle that government regulation of altruistic surrogacy should be kept to a minimum as its starting point, the Committee has carefully considered all the issues presented to it during the inquiry to identify whether there are any aspects of the practice of altruistic surrogacy in NSW that do require government regulation. As noted above, not all Committee members accept the minimalist premise as being the correct starting point to examine the range of issues associated with surrogacy.
- 4.94** In this regard, whilst the Committee notes that the NHMRC guidelines address the issue of counselling for parties to surrogacy arrangements, stating in strong terms that clinics must make 'every effort' to ensure parties to surrogacy arrangements understand the ethical, social and legal implications and have received counselling in regard to the impact on themselves and the child born through the arrangement, it has some reservations that the guidelines are not explicit in requiring that counselling be provided independently of the clinic. A more detailed examination of this issue is contained in Chapter 5.
- 4.95** In relation to the third stage of the surrogacy process, the transferral of parentage to intending parents after the birth of the child, the Committee notes the views of a number of inquiry

participants that this is an area requiring government regulation. A detailed examination of the issue of a transferral of parentage mechanism for surrogacy arrangements is contained in Chapter 6.

- 4.96** The Committee also notes the process currently being undertaken by the Standing Committee of Attorneys-General with a view to developing a national model law. The Committee acknowledges the benefits of a nationally consistent approach to surrogacy, including reducing the need for intending parents to travel interstate to implement their surrogacy arrangements.
- 4.97** However, the majority of the Committee also acknowledges that it is likely to take a significant period of time to develop nationally consistent legislation in relation to surrogacy arrangements if national model legislation is proposed. Furthermore, given that some states have already enacted legislation and others are proceeding down that path, it may take some further time for states to modify their legislation to come into line with a proposed national model.
- 4.98** Therefore the majority of the Committee believes that any need for surrogacy legislation in NSW should be acted upon prior to the completion of the SCAG process.
- 4.99** Consequently, the majority of the Committee believes that the NSW Government should not await the outcome of the SGAC process before acting upon the findings and recommendations of this report. Where relevant in this report the majority of the Committee has paid due regard to the various elements of the proposal set out in the SCAG discussion paper, 'A proposal for a national model to harmonise regulation of surrogacy'. The other Committee members believe that NSW should wait for the outcome of the SCAG process that is currently underway before legislating further in the area of surrogacy. Furthermore, they are of the view that further regard should be given to certain elements of the SCAG discussion paper

Chapter 5 **Criteria for intending parents and birth mothers**

This chapter examines the evidence presented to the Committee regarding the criteria that could potentially be applied to intending parents and birth mothers to determine their eligibility and suitability for surrogacy arrangements. It begins by addressing criteria that could be applied generally to all parties and is followed by sections that address the criteria that could be applied specifically to the intending parents and specifically to the birth mother.

The majority of the Committee has approached its consideration of the issues in this chapter with the principle of minimal government intervention in mind, as stated at the conclusion to Chapter 4. The Committee's recommendations are confined to those areas where it considers the process could be improved, namely in relation to the pre-treatment counselling of parties. The Committee has not made recommendations relating to specific criteria concerning the characteristics of individuals wishing to enter into surrogacy arrangements. Some Committee members note that eligibility criteria for parties to surrogacy arrangements are to be found in current and proposed surrogacy legislation in other Australian jurisdictions. They are also commonly found in surrogacy legislation overseas.

Criteria applying to all parties

- 5.1 The Committee received evidence regarding criteria that could be applied generally to all parties to a surrogacy arrangement, including the need for counselling and legal advice, criminal record checks, and the use of registered ART clinics. In addition, evidence relating to the significance of the relationship between the birth mother and the intending parents is presented.

Counselling

- 5.2 This section examines the issue of counselling for parties to surrogacy agreements, beginning with the requirements outlined in the National Health and Medical Research Council (NHMRC) guidelines. This is followed by a discussion of the nature and purpose of existing counselling practices in the field of surrogacy, the distinction between 'counselling' and 'assessment,' and consideration of the need for the latter to be conducted independently of ART clinics.
- 5.3 As noted in Chapter 4, the NHMRC *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, require clinics to make every effort to ensure parties to surrogacy agreements 'have undertaken counselling to consider the social and psychosocial significance for the person born as a result of the arrangements, and for themselves.'³⁴⁶
- 5.4 In relation to counselling for people utilising fertility treatment generally, which will include birth mothers in surrogacy arrangements utilising ART, the NHMRC guidelines state that:

³⁴⁶ National Health and Medical Research Council, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, (hereafter 'NHMRC Guidelines') June 2007, p 57

Clinics must provide readily accessible services from accredited counsellors to support participants in making decisions about their treatment, before, during and after the procedures.³⁴⁷

5.5 The NHMRC guidelines further state that:

Clinics should therefore provide counselling services, with professionals who have appropriate training, skills, experience and accreditation necessary for their counselling role.³⁴⁸

5.6 In relation to the issues that should be covered in counselling, the NHMRC guidelines state:

The counselling services should:

- provide an opportunity to discuss and explore issues;
- explore the personal and social implications for the persons born and for the participants;
- provide personal and emotional support for participants, including help in dealing with unfavourable results;
- provide advice about additional services and support networks;
- reflect an integrated, multidisciplinary approach, including medical, nursing, scientific and counselling staff; and
- provide participants with information, when requested, about professional counsellors who are independent of the clinic.³⁴⁹

5.7 Of those inquiry participants who commented on this issue, all supported the need for counselling for all parties to a surrogacy arrangement, with a number emphasising the benefit of this occurring before parties entered into the agreement.³⁵⁰

5.8 Ms Miranda Montrone, Psychologist and Family Therapist and Infertility Counsellor stated that pre-treatment processes were essential and have been an important part of surrogacy arrangements so far:

Preliminary processes in surrogacy are essential, I believe, for thorough consideration by all involved. I believe that the comprehensive pre-treatment assessment processes ... have been instrumental in surrogacy being well managed so far.³⁵¹

³⁴⁷ NHMRC Guidelines, June 2007, p 43

³⁴⁸ NHMRC Guidelines, June 2007, p 43

³⁴⁹ NHMRC Guidelines, June 2007, p 43

³⁵⁰ See for example Submission 24, Law Society of NSW, p 2; Revd Dr Andrew Ford, Anglican Church Diocese, Sydney, Evidence, 6 November 2009, p 2; Submission 15, Australian Christian Lobby, p 8

³⁵¹ Ms Miranda Montrone, Psychologist and Family Therapist and Infertility Counsellor, Evidence, 18 March 2009, p 38

- 5.9 Ms Montrone further noted that pre-assessment counselling allowed parties to ‘change their minds without the dreadful rupturing of relationships.’³⁵²
- 5.10 The Queensland Commission for Children and Young People argued that preparatory counselling was critical in ensuring parties understood the implications of the proposed surrogacy arrangement, including the impact on the birth mother of relinquishing the child and the impact on the child him or herself.³⁵³
- 5.11 ACCESS Australia’s Infertility Network quoted from Masters research conducted by Ms Sandra Dill in which participants were asked whether counselling had ‘helped them understand the emotional challenges they were to face. Sixty eight per cent of responding intended mothers agreed or strongly agreed, as did 80 per cent of intended fathers and 87 per cent of surrogates.’³⁵⁴
- 5.12 The Australian and New Zealand Infertility Counsellors’ Association stated that in addition to the adults involved, all children born of surrogacy arrangements should have access to counselling.³⁵⁵

Existing counselling practices

- 5.13 The Committee was advised that the main ART clinic involved in surrogacy arrangements mentioned during the inquiry, Sydney IVF, do requires parties to an arrangement to undergo counselling and assessment.
- 5.14 Witness A and Witness B, parents of two children born through surrogacy arrangements, described the counselling process they and the birth mother and her partner underwent at Sydney IVF. It involved ‘extensive questionnaires and interviews ... focusing on many hypothetical outcomes of the surrogacy process.’ Witnesses A and B felt that the counselling process gave all parties ‘multiple opportunities to consider their own positions with respect to the process which [they] were about to undertake.’ The counsellors ‘then reported back to Sydney IVF on their findings and recommendations.’³⁵⁶
- 5.15 Mr David Norman, father to a child born through a surrogacy arrangement, addressed the issue of the birth mother failing to relinquish the child, describing the counselling process he and his wife undertook as having a number of ‘checks and balances.’ ‘Realistically,’ explained Mr Norman, ‘that is what that process is there for. That is why you spend thousands of dollars seeing a solicitor or a barrister and why you go and see a counsellor specialising in this kind of [arrangement].’ Both intending parents, the birth mother and her partner and the birth

³⁵² Ms Montrone, Evidence, 18 March 2009, p 38

³⁵³ Submission 9, Queensland Commission for Children and Young People, Advice to Altruistic Surrogacy Committee, Legislative Assembly of Queensland, p 6

³⁵⁴ Submission 20, ACCESS Australia’s Infertility Network, p 6

³⁵⁵ Submission 34, Australian and New Zealand Infertility Counsellors’ Association, p 1

³⁵⁶ Answers to questions on notice taken during evidence 5 November 2008, Witness A and Witness B, Question 2, p 2

mother's son were 'completely psychologically assessed' to ensure that the scenario in which the birth mother failed to relinquish the child did not occur.³⁵⁷

- 5.16** Dr Kim Matthews, Medical Director of Next Generation Fertility, reported that there was a disparity between the number of people presenting for consultation for a surrogacy agreement and the number of people who actually proceed with the surrogacy agreement, due to the amount of work and commitment involved. Dr Matthews stated that the consultation process can open up a 'Pandora's box' for many people, who subsequently decide not to proceed.³⁵⁸
- 5.17** Dr Matthews also stated that at Next Generation Fertility, in addition to pre-arrangement counselling, 'there are also requirements for counselling during the pregnancy and after the birth of the child.'³⁵⁹ Ms Montrone argued that counselling during and after the pregnancy was 'very helpful' because it dealt with 'real situations' rather than 'potential situations.'³⁶⁰
- 5.18** Dr Mark Bowman, Medical Director of Sydney IVF, stated that at Sydney IVF the focus of counselling was on 'determining ... the strength of the relationships between the commissioning couple and the proposed surrogate because of the legal uncertainty and difficulty if that relationship were to break down' rather than 'assessing parents for their capacity to parent per se.'³⁶¹
- 5.19** Ms Montrone provided a list of issues ART clinics required to be addressed during pre-surrogacy psychological assessment. The list included issues such as the strength of the relationship between intending and birth parents, psychological and marital stability of both couples, implications for existing children, a change of mind by any party during the process, failure to relinquish, and the refusal of intending parents to take on a disabled child. 'The assessment process' explained Ms Montrone, 'involves the commissioning couple or intending parents and the surrogate and her partner to attend on two separate occasions for 3 to 4 hours on each occasion.'³⁶²
- 5.20** Ms Montrone described the function of an assessment report in relation to the surrogacy process at an ART clinic as being used by the clinic's ethics committee to make its decision as to whether to proceed with fertility treatment or not.³⁶³

Counselling and assessment

- 5.21** Ms Montrone advised that there were two distinct types of counselling related to fertility treatment: on the one hand there is counselling aimed at providing information, discussing the

³⁵⁷ Mr David Norman, Evidence, 5 November 2009, p 26

³⁵⁸ Dr Kim Matthews, Medical Director, Next Generation Fertility, Evidence, 5 November 2009, p 51

³⁵⁹ Dr Matthews, Evidence, 5 November 2009, p 55

³⁶⁰ Ms Montrone, Evidence, 18 March 2009, p 42

³⁶¹ Dr Mark Bowman, specialist gynaecologist and Medical Director, Sydney IVF, Evidence, 18 March 2009, p 53

³⁶² Submission 32, Ms Miranda Montrone, pp 3-4

³⁶³ Ms Montrone, Evidence, 18 March 2009, p 38

implications of treatment, assisting in decision making and providing support, and on the other hand there is counselling aimed at assessing suitability.³⁶⁴

- 5.22** Associate Professor Roger Cook, Director of the Psychology Clinic at Swinburne University of Technology, argued that ‘psychological counselling and psychological assessment are not the same task and should not be undertaken by the same practitioner,’ explaining that patients may not wish to receive counselling from a psychologist or counsellor who will at another time provide a report which may or may not support their application for surrogacy.³⁶⁵
- 5.23** Associate Professor Cook suggested that a register of approved counsellors be established, for ‘people who may be trained in either social work, psychology or psychiatry, for example, who have undertaken some experience and some professional development in this area where they can be relied upon to provide good information.’³⁶⁶

Independence of assessment from ART clinics

- 5.24** A number of inquiry participants argued that counselling aimed at assessment should be provided independently of ART clinics.
- 5.25** For example, Ms Montrone stated that ‘an independent psychological assessment is an essential part of the informed consent process in altruistic surrogacy.’³⁶⁷
- 5.26** The Australian and New Zealand Infertility Counsellors' Association also highlight the need for independent assessment suggesting that ‘all parties (including partners) receive proper and independent biosocial and psychological assessment and counselling prior to commencement of the surrogacy arrangement.’³⁶⁸
- 5.27** Similarly, Associate Professor Cook recommended that all parties are ‘assessed by an independent psychologist.’³⁶⁹
- 5.28** Professor Jenni Millbank from the University of Technology, Sydney, Faculty of Law, commented that ‘it is very difficult for counsellors if their wages are being paid by a clinic to say, "Actually we are not really sure that this particular practice is that great for people.”’³⁷⁰
- 5.29** The Australian Christian Lobby argued that the independence of the counselling service would ensure that parties ‘did not work from the assumption that entering into the surrogacy arrangement is mere formality.’³⁷¹

³⁶⁴ Ms Montrone, Evidence, 18 March 2009, pp 37-38

³⁶⁵ Submission 35, Associate Professor Roger Cook, p 3

³⁶⁶ Professor Roger Cook, Psychology Clinic, Swinburne University of Technology, Evidence, 19 March 2009, p 22

³⁶⁷ Ms Montrone, Evidence, 18 March 2009, p 37

³⁶⁸ Submission 34, p 1

³⁶⁹ Submission 35, p 3

³⁷⁰ Professor Jenni Millbank, University of Technology, Sydney, Faculty of Law, Evidence, 5 November 2009, p 65

³⁷¹ Submission 15, Australian Christian Lobby, p 5

- 5.30** Sydney IVF's internal guidelines, 'Policy of gestational surrogacy', state that during its assessment of applications to facilitate surrogacy arrangements reports must be obtained from an 'independent' psychiatrist - meaning one who is not the treating psychiatrist for any of the parties involved - who assesses the mental health of the parties, and a psychiatrist external to Sydney IVF' who conducts a bio-social assessment of parties, including any children who are over the age of four.³⁷²
- 5.31** As noted in Chapter 2, in the Australian Capital Territory the *Parentage Act 2004* (ACT) requires that the court considering the transferral of parentage to the intending couple take into account whether parties were assessed by an 'independent' counselling service. The Act states that a counselling service is not considered 'independent' if it is connected with the doctor who carried out the procedure resulting in conception, the institution where the procedure was carried out, or any other entity involved in carrying out the procedure.

Committee comment

- 5.32** The Committee notes the importance of pre-treatment counselling in ensuring that parties to surrogacy arrangements make fully-informed decisions and have considered the wide-ranging implications of the surrogacy arrangement for themselves and for the child to be born through the arrangement. The Committee also notes that pre-treatment counselling provides parties to surrogacy arrangements with the time to change their minds before they commit to the arrangement.
- 5.33** As noted in Chapter 2, the Standing Committee of Attorneys-General discussion paper, 'A proposal for a national model to harmonise regulation of surrogacy', proposes that all parties to a surrogacy arrangement must first undertake counselling.
- 5.34** The Committee notes the distinction between counselling aimed at informing decision making and providing support (general counselling), as opposed to counselling aimed at assessing the suitability of parties for a surrogacy arrangement (assessment counselling). The Committee believes it is appropriate that general counselling be provided by ART clinics or a counsellor chosen by the parties involved.
- 5.35** However, the Committee agrees with inquiry participants who argued strongly that assessment should be conducted by a counsellor operating independently of the ART clinic providing the services to facilitate a particular surrogacy arrangement. This assessment should then be taken into account by the clinic when determining whether or not to provide treatment to facilitate the surrogacy. The requirement for independent assessment would address any perceived or actual conflict of interest for clinics conducting assessments for treatment they would then provide.
- 5.36** The Committee notes that counsellors and clinicians must sometimes deal with significant pressure from parties wishing to enter into surrogacy arrangements and that in this regard they would be assisted by a regime that required that a component in the pre-treatment assessment and counselling phase of the surrogacy process be provided independently of clinics.

³⁷² Answers to questions on notice taken during evidence 18 March 2009, Dr Mark Bowman, Medical Director, Sydney IVF and Dr Kylie de Boer, General Manager, Sydney IVF, 'Policy on gestational surrogacy', p 13

- 5.37** The Committee notes that Sydney IVF's internal guidelines require a report from at least one psychiatrist external to Sydney IVF. However, the Committee notes that these are internal guidelines developed by Sydney IVF and that other fertility clinics may not currently, or in the future, include the same requirement in their own internal guidelines.
- 5.38** Furthermore, the Committee notes, as in Chapter 4 of this report, that the NHMRC guidelines states that clinics 'must provide readily available services from accredited counsellors', that clinics 'should therefore provide counselling services, with professionals who have appropriate training...' and that the counselling services should 'provide participants with information, when requested, about professional counsellors who are independent of the clinic. The Committee believes that the combination of these statements does not explicitly require that counselling be provided independently of the clinic. Therefore, while a requirement for independent assessment may be contained in a particular fertility clinics' internal guidelines, it is not required by the NHMRC guidelines that sit above those internal guidelines.
- 5.39** The Committee recognises that the term 'independent,' in relation to a counsellor being independent of any ART clinic, will need to be carefully defined. Matters to consider in this regard include that the counsellor providing the assessment is not currently employed by the ART clinic that the parties are seeking to receive services from, or by the doctor who is to carry out the fertility procedure. The Committee further notes that the term 'counsellor' in this regard should include psychiatrists.
- 5.40** The Committee agrees with the suggestion that a publicly available register of counsellors with relevant expertise and experience in the area of surrogacy should exist, and that such a register would assist parties in obtaining independent counselling. The Committee acknowledges that this suggestion came from only one inquiry participant, but considers it particularly important in facilitating independent assessment of parties to surrogacy arrangements by assisting parties to contact independent counsellors. The Committee did not receive any evidence about whether or not a register currently exists that could be adapted for this purpose.
- 5.41** Therefore, the Committee advocates legislation requiring that assessment of parties to surrogacy arrangements be conducted by a counsellor who is independent of the ART clinic and defining 'independent' in this context, and that the need for a register of counsellors qualified to undertake such assessments be examined.
- 5.42** The Committee notes that a requirement for independent assessment of parties to surrogacy arrangements could be accomplished through an amendment to the *Assisted Reproductive Technology Act 2007* (NSW).³⁷³

³⁷³ *Assisted Reproductive Technology Act 2007* (NSW), s 12

Recommendation 1

That the NSW Government pursue an amendment to the *Assisted Reproductive Technology Act 2007* (NSW) to establish a requirement that parties seeking ART treatment to facilitate a surrogacy agreement are assessed for suitability by a counsellor who is independent of any ART clinic, that this assessment counselling must be taken into account by the clinic when determining whether to provide services to facilitate the surrogacy arrangement, and that the term ‘independent’ be defined for this purpose. The counselling standard should meet the requirements of the NHMRC guidelines.

Recommendation 2

That the NSW Government examine the need for a register of counsellors qualified to assess the suitability of parties wishing to implement surrogacy arrangements.

Legal advice

- 5.43** Legal advice forms another component of the pre-treatment preparation for parties to surrogacy arrangements. The Committee heard some views relating to the importance of legal advice and the nature of advice given and received from some inquiry participants with experience in surrogacy arrangements.
- 5.44** The Queensland Commission for Children and Young People recommended that parties ‘should be required to obtain independent legal advice’ and that advice ‘should be independently obtained by each party.’ This would ensure ‘all parties are clear about their respective legal and financial responsibilities for the child [and] avoid, or at least minimise, potential disputes or confusion regarding such matters upon the child's birth.’³⁷⁴
- 5.45** Sydney IVF’s internal guidelines, ‘Policy on gestational surrogacy’, state that a report from a lawyer specialising in family law is required as part of Sydney IVF’s assessment process:
- A report is required from one or more solicitors consulted by the parties who is a specialist in family law and familiar with the *Adoption Act*, the *Status of Children Act*, and the *Family Law Act*.³⁷⁵
- 5.46** The legal report required by Sydney IVF must outline the ‘legal rights, responsibilities and restrictions involved for the commissioning couple and for the surrogate, and their understanding and acceptance of these issues.’³⁷⁶ Additional requirements for the legal report are as follows:

³⁷⁴ Submission 9, pp 7-8

³⁷⁵ Answers to questions on notice taken during evidence 18 March 2009, Dr Mark Bowman, Medical Director, Sydney IVF and Dr Kylie de Boer, General Manager, Sydney IVF, ‘Policy on gestational surrogacy’, p 8

³⁷⁶ Answers to questions on notice taken during evidence 18 March 2009, Dr Mark Bowman, Medical Director, Sydney IVF and Dr Kylie de Boer, General Manager, Sydney IVF, ‘Policy on gestational surrogacy’, p 13

The report will include confirmation that the lawyer has recommended to all parties that they each seek separate legal advice and has notified them that he or she would not be able to give the separate advice to or act for any of the parties. The financial arrangements between the commissioning couple and the surrogate should be reported on, in particular the details of life and disability insurance in the event of unexpected complications during pregnancy or disability of the surrogate as a result of the pregnancy. Information that has been given and plans the commissioning couple have made to regularise the status of the child and to protect their parental rights as far as possible should be outlined. Information that has been given and plans made for the birth registration of the child should be ascertained.³⁷⁷

- 5.47** Witness A and Witness B, whose surrogacy arrangement was facilitated by Sydney IVF, stated that Sydney IVF ‘insisted that both couples receive separate independent legal advice’ and to that end Sydney IVF ‘provided a list of solicitors and barristers with some experience in this area of the law.’ The legal advice they received covered ‘various presumptions that the law made ... the implications that these presumptions created in the areas of inheritance, recognition of parenting activity, consent for medical intervention, overseas travel and the like’ as well as options for ‘achieving some degree of legal “parental status.”’³⁷⁸
- 5.48** Ms Linda Wright, a lawyer with experience in surrogacy arrangements, stated that in conjunction with Sydney IVF she had developed a ‘pro forma report’ that satisfied the requirements of Sydney IVF’s Ethics Committee. The report, Ms Wright explained, ‘has been modified over a number of years as the legislation has changed, and obviously it is tailored to each set of circumstances as it applies to the two couples.’³⁷⁹
- 5.49** Ms Wright noted that as legislation stood at present it was very important for intending couples to seek legal advice, but that if surrogacy legislation was consolidated under one Act setting out the procedures from beginning to end, such advice may become less necessary.³⁸⁰

Committee comment

- 5.50** The Committee acknowledges the importance of parties seeking legal advice prior to proceeding with a surrogacy agreement, particularly in relation to options for transferring of parentage to the intending parents following the birth of the child.
- 5.51** The Committee notes that Sydney IVF’s internal guidelines clearly require parties to surrogacy arrangements to get independent legal advice and provide some detail as to what that advice should cover. The Committee also notes that Sydney IVF providing a list of lawyers with experience in relevant areas of the law assisted Witness A and Witness B in obtaining relevant legal advice.

³⁷⁷ Answers to questions on notice taken during evidence 18 March 2009, Dr Mark Bowman, Medical Director, Sydney IVF and Dr Kylie de Boer, General Manager, Sydney IVF, ‘Policy on gestational surrogacy’, p 14

³⁷⁸ Answers to questions on notice taken during evidence 5 November 2008, Witness A and Witness B, Question 2, p 2 and Question 4, p 3

³⁷⁹ Ms Wright, Evidence, 18 March 2009, p 19

³⁸⁰ Ms Wright, Evidence, 18 March 2009, p 23

- 5.52** The Committee notes the guidelines developed by Sydney IVF as they relate to parties seeking and receiving independent legal advice, and although it received insufficient evidence to determine whether or not similar guidelines are in place in other ART clinics in NSW that facilitate surrogacy arrangements, it is satisfied that parties to surrogacy arrangements in NSW have sufficient options available to them to obtain adequate independent legal advice.
- 5.53** The Committee believes that all parties entering into a surrogacy agreement should obtain independent legal advice from a lawyer who holds a full practising certificate from the Law Society of NSW, and that the lawyer issue a certificate stating that the legal advice has been provided.
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Recommendation 3

That the NSW Government seek to amend the *Assisted Reproductive Technology Act 2007* (NSW) to establish a requirement that all parties entering into a surrogacy arrangement should obtain independent legal advice from a lawyer who holds a full practising certificate from the Law Society of NSW, and that the lawyer issue a certificate stating that the legal advice has been provided.

Relationship between birth mother and intending parents

- 5.53** The Committee heard views on the nature of the relationship between the birth mother and the intending parents, with some inquiry participants arguing that a close relationship was important, while others argued a close relationship could increase the risk of the birth mother being emotionally coerced to enter into and follow through with the surrogacy agreement, and that a family relationship had the potential to create problems associated with consanguinity.
- 5.54** A number of inquiry participants recommended that a birth mother should be a relative or close friend of the intending parents.
- 5.55** Ms Wright stated that in her work with couples seeking to access Sydney IVF services to facilitate surrogacy arrangements, one of the important considerations was the level of involvement the birth mother would have in the child's life. Ms Wright argued that a biological relationship or close friendship between the intending couple and the birth mother 'would be in the best interests of the child. If a child has questions, the birth parents are there to answer them.'³⁸¹ Ms Wright advised that at least one arrangement she was aware of was not approved by Sydney IVF's ethics committee on the grounds that the relationship between the intending couple and birth mother was not 'good enough or close enough.'³⁸²
- 5.56** The Australian Christian Lobby argued that the risk of failure to relinquish could be minimised if there was a familial or close long-term relationship between the intending parents and the birth mother since the birth mother could feel more confident of having ongoing contact with the child.³⁸³
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³⁸¹ Ms Wright, Evidence, 18 March 2009, p 25

³⁸² Ms Wright, Evidence, 18 March 2009, pp 25-26

³⁸³ Submission 15, p 4

- 5.57** ACCESS Australia’s Infertility Network suggested that the intending parents and birth mother should have an ‘existing relationship’ and be ‘committed to continuing an open association, even at some distance.’³⁸⁴
- 5.58** Both Professor Thomas Frame, Director of St Mark's National Theological Centre, and the Australian and New Zealand Infertility Counsellors' Association argued that a family, or close and ongoing, relationship between the intending parents and the birth mother was the best way to ensure the arrangement was altruistic.³⁸⁵
- 5.59** In this regard, Ms Elizabeth Micklethwaite, Senior Research Officer with the Australian Christian Lobby, argued that if the birth mother was previously unknown to the intending couple it raised the issue as to how the two parties could come into contact and took us ‘much closer to a situation of commercial surrogacy where you have agencies that introduce potential surrogates to potential commissioning parents.’³⁸⁶
- 5.60** It is clear, however, that intending parents and a birth mother previously unknown to each other can enter into a successful altruistic surrogacy arrangement. For example, Mr Mark Bartlett and Mr David Beasy, an Australian same-sex couple whose son was born through a surrogacy arrangement in New Zealand involving a New Zealand birth mother, explained that they met the birth mother initially via an Internet based forum, subsequently establishing a relationship through telephone conversations and several meetings in person, leading to a successful altruistic surrogacy arrangement.³⁸⁷
- 5.61** Some inquiry participants argued that it was the very closeness of a pre-existing relationship between intending parents and a birth mother that could undermine the altruistic nature of the agreement. This issue has also been addressed in Chapter 3 in the section dealing with the birth mother’s ability to give informed consent, paragraphs 3.122 to 3.125.
- 5.62** Mr Christopher Meney, Director of the Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, who was opposed to all forms of surrogacy, argued that ‘emotional coercion, however subtle, is a serious possibility when the potential surrogacy mother is a relative or close friend of the commissioning couple.’³⁸⁸
- 5.63** The Australian Christian Lobby, whilst suggesting that a close relationship between intending parents and birth mothers was optimal, nevertheless noted that it could ‘worsen problems of emotional manipulation if the surrogate feels unable to refuse the request, or knows that she risks an important relationship if she chooses to keep the child.’³⁸⁹

³⁸⁴ Submission 20, p 4

³⁸⁵ Professor Thomas Frame, Director, St Mark's National Theological Centre, Evidence, 6 November 2009, p 25; Submission 34, p 2

³⁸⁶ Ms Elizabeth Micklethwaite, Senior Research Officer, Australian Christian Lobby, Evidence, 6 November 2009, pp 11-12

³⁸⁷ Submission 38, Mr Mark Bartlett and Mr David Beasy, p 3

³⁸⁸ Mr Christopher Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, Evidence, 6 November 2009, p 15

³⁸⁹ Submission 15, p 4

- 5.64** A few inquiry participants commented on the genetic issues that could arise from too close a family relationship between the birth mother and the intending parent(s).
- 5.65** Mr John Longworth, Family Issues Committee, Law Society of New South Wales, noted that whilst a ‘closer family context’ provides the child a ‘safe landing place and environment to grow in,’ it also bought with it a greater potential for ‘closer genetic problems.’ Mr Longworth stated that ‘the wider you spread the relationships ... the genetic problem is safer.’³⁹⁰
- 5.66** Professor Margaret Somerville, Founding Director of the Centre for Medicine Ethics and Law at McGill University, Montreal, argued that ‘probably the strongest reason’ for rejecting surrogacy is that an altruistic surrogate is likely to be a close relative of one of the intending parents. ‘That means in a partial surrogacy that the child could be the biological child of its biological "aunt" and the aunt's brother-in-law.’ Furthermore, Professor Somerville noted, ‘if the surrogate were the sister of the commissioning father and the sister-in-law of the commissioning mother, in a partial surrogacy the child would be the child of a brother and sister. This relationship is, of course, genetically dangerous and constitutes a relationship that the crime of incest is meant to guard against.’³⁹¹
- 5.67** However, Dr Kim Matthews, the Medical Director of Next Generation Fertility stated that ‘the [NHMRC] guidelines are very strict about not entering into something that becomes a sibling combination.’³⁹²

Committee comment

- 5.68** The Committee acknowledges the different views in relation to the relationship between the birth mother and the intending parents. The majority of the Committee believes that counsellors and clinicians with experience in surrogacy arrangements are best placed to determine on a case by case basis if the particular relationship that exists between a birth mother and the intending parents strengthens or undermines the particular surrogacy arrangement. Therefore, the majority of the Committee does not feel it is necessary to make a recommendation on this issue. Some Committee members believe, however, that there may be valid reasons for legally prohibiting certain surrogacy arrangements.

Criminal record check

- 5.69** While some inquiry participants suggested that parties to surrogacy agreements should undergo criminal record checks, with an emphasis on sexual and violent offences and child protection orders, this suggestion was not supported by all participants who addressed this issue.
- 5.70** The NSW Government submission to the inquiry suggested a component of adoption legislation relevant to the practice of surrogacy was the requirement for parties to undergo a criminal record check.³⁹³

³⁹⁰ Mr John Longworth, Family Issues Committee, Law Society of New South Wales, Evidence, 5 November 2009, p 42

³⁹¹ Submission 4, Professor Margaret Somerville, McGill Centre for Medicine, Ethics and Law, p 3

³⁹² Dr Matthews, Evidence, 5 November 2009, p 54

- 5.71 The Queensland Commission for Children and Young People argued that ‘it must be a fundamental pre-requisite of protection of the child's welfare to ensure that his or her prospective parents have no record of child abuse or related criminal conduct’ including serious sexual or violent offences and being subject to a child protection order.³⁹⁴
- 5.72 The Australian and New Zealand Infertility Counsellors' Association also argued that ‘any parties convicted of sexual or violent offences, or subject to a child protection order should be excluded’ from surrogacy arrangements.³⁹⁵
- 5.73 On the other hand, Dr Bowman argued that whilst Sydney IVF sought to identify intending parent's ‘appropriateness in its broadest sense’ he questioned ‘why infertile couples should be selected for criminal checks while we do not take some sort of eugenic totalitarian approach to the whole of people trying to reproduce.’ He further stated that most professionals in the field were taken aback by the Victorian Government's recent decision to conduct criminal record checks on intending parents.³⁹⁶

Committee comment

- 5.74 The Committee notes the views of inquiry participants who advocate criminal record checks for parties to surrogacy arrangements and the exclusion of parties with previous convictions for certain offences.
- 5.75 However, the majority of the Committee concurs with the view of Dr Bowman, Medical Director of Sydney IVF, that applying such a criterion amounts to differential treatment of infertile couples since couples conceiving traditionally are not subject to criminal record checks. The Committee has not received sufficient information to make further comment on this issue.

Requirement to use ART through a registered clinic

- 5.76 The Committee received some evidence that ART treatment to facilitate surrogacy arrangements should be provided only by registered clinics, as this would assist in monitoring and in adherence to the guidelines applicable to registered clinics.
- 5.77 Ms Sandra Dill from ACCESS Australia's Infertility Network stated that ‘surrogacy should be provided in ART clinics licensed by the Reproductive Technology Accreditation Committee (RTAC)’ and that RTAC provides a ‘mechanism for comprehensive implications counselling for those considering gamete donation or surrogacy.’³⁹⁷
- 5.78 Associate Professor Cook also argued that surrogacy arrangements requiring ART should be facilitated through a registered clinic. Associate Professor Cook stated that he had a difficulty

³⁹³ Submission 28, NSW Government, p 1

³⁹⁴ Submission 9, p 8

³⁹⁵ Submission 34, p 2

³⁹⁶ Dr Bowman, Evidence, 18 March 2009, p 52

³⁹⁷ Answers to questions taken on notice during evidence, 18 March 2009, Ms Sandra Dill, Chief Executive Officer, Access Australia, Question 1, p 1

with unregistered practitioners ‘who do not have any obligation to provide any account of their treatment.’ Furthermore, Associate Professor Cook argued that registered clinics keep records that ‘are readily available to any panel or register or organisation the Government might set up to monitor what is happening in relation to assisted reproductive technology.’³⁹⁸

- 5.79** Ms Wright argued that a criterion requiring the birth mother to conceive through ART provided by a registered clinic meant that ‘monitoring and enforcement of the criteria would be intrinsically linked with the ethical requirements of the medical profession.’³⁹⁹

Committee comment

- 5.80** The Committee notes the advantages of ensuring birth mothers requiring ART to conceive be required to access such services through a clinic registered by the Reproductive Technology Accreditation Committee (RTAC), in relation to record keeping and monitoring and the fact that such clinics are subject to the ethical requirements laid down by the National Health and Medical Research Council.
- 5.81** The Committee particularly notes that a comprehensive register of genetic information relating to surrogacy arrangements, the importance of which is discussed in Chapter 6, would be more easily maintained if ART procedures were carried out by registered clinics.
- 5.82** However, the Committee received insufficient evidence to determine the prevalence of unregistered clinics facilitating surrogacy arrangements in NSW or whether the practice, if it exists, is problematic. Therefore, the Committee is unable to determine the need for a recommendation that all surrogacy arrangements requiring an ART procedure be conducted through a registered clinic. The Committee believes that the issue of the prevalence of unregistered clinics facilitating surrogacy arrangements in NSW is important and that more information about this matter needs to be collected by the NSW Government.

Criteria applying to intending parents

- 5.83** The Committee received evidence about criteria that could potentially be applied to intending parents. These criteria related to infertility, the age of the intending parents, the duration of their relationship, their genetic connection to the child, and access for single, unmarried and gay and lesbian couples. Inquiry participants expressed a variety of views about these potential criteria, and these views are examined in this section.

Infertility

- 5.84** ART clinics operate under a general principle that their services are directed towards individuals or couples who are experiencing infertility problems. In the context of surrogacy, the individual seeking to access ART is the birth mother, who is not herself presenting with an infertility problem, but who is instead seeking to solve the infertility problem of another couple. Therefore, in surrogacy arrangements, the focus in regard to infertility shifts from the birth mother to the intending parent(s).

³⁹⁸ Professor Cook, Evidence, 19 March 2009, p 22

³⁹⁹ Submission 36, p 2 (Attachment)

- 5.85** Amongst inquiry participants there was, on the whole, acceptance of the general principle that surrogacy should be limited to situations in which the intending mother was medically infertile or faced a serious health risk through becoming pregnant.⁴⁰⁰ Ms Wright suggested that the inclusion criteria should be expanded to include cases where the intending mother had ‘a genetic condition with possible serious health consequences for the child.’⁴⁰¹
- 5.86** Ms Sandra Dill, Chief Executive Officer of ACCESS Australia’s Infertility Network, stated that surrogacy was not appropriate where couples had simply failed at a few attempts at IVF. ‘You have a much better chance of having another few IVF attempts than you will through surrogacy,’ argued Ms Dill, ‘and surrogacy is problematic. It is a very complex and draining process.’⁴⁰²
- 5.87** Similarly, Dr Bowman from Sydney IVF expressed his concern that some people saw surrogacy as ‘the answer for all manner of infertility problems’ citing as an example multiple failed attempts at IVF, ‘which is almost invariably a problem of the hoped-to-be mother's eggs and almost never something to do with the woman's uterus.’ Dr Bowman stated that from his perspective there were primarily two conditions in which surrogacy was appropriate: ‘where the commissioning mother does not have a uterus or the commissioning mother has a medical condition that precludes her from safely carrying a pregnancy’, adding that a possible third condition was ‘where a commissioning mother has a uterus that is incapable of carrying a pregnancy.’⁴⁰³
- 5.88** Next Generation Fertility defined two categories of medical infertility: the first being the absence of a uterus, and the second being a pre-existing medical condition that poses a risk to the life of the woman if she were to become pregnant.⁴⁰⁴
- 5.89** Dr Matthews from Next Generation Fertility agreed that some cases that initially may appear to fall outside these categories, such as the risk of severe post-natal depression causing the mother to become suicidal, would need to be considered on a case-by-case basis.
- That fits into my second category where if the carrying of a pregnancy would be considered to be a life-threatening condition, if the postnatal depression was considered by her treating psychiatrist to be a life-threatening condition, then maybe you would have to look at that on an individual basis.⁴⁰⁵
- 5.90** Dr Matthews further agreed that if strict criteria were applied there was likely to be exceptions, ‘which is why we were talking about an individual basis ... because medicine is very like that.’⁴⁰⁶

⁴⁰⁰ See for example Submission 34, p 1; Submission 9, p 8; Submission 20, p 4

⁴⁰¹ Submission 36, p 2 (Attachment)

⁴⁰² Ms Sandra Dill, Chief Executive Officer, Access Australia, Evidence, 18 March 2009, p 66

⁴⁰³ Dr Bowman, Evidence, 18 March 2009, p 53

⁴⁰⁴ Submission 29, Next Generation Fertility, p 2

⁴⁰⁵ Dr Matthews, Evidence, 5 November 2009, pp 50-51

⁴⁰⁶ Dr Matthews, Evidence, 5 November 2009, pp 50-51

Social infertility

- 5.91** There was some discussion during the inquiry about whether people who are ‘socially infertile’ should be permitted to access ART services to facilitate surrogacy arrangements. ‘Social infertility,’ as opposed to ‘medical infertility,’ was a term used during the inquiry to describe same-sex couples who cannot conceive a child together despite there being no medical fertility issues for either partner as individuals.
- 5.92** Dr Bowman stated that at Sydney IVF they ‘have come to a very firm decision that we treat medical problems. For example, I have had one or two presentations of male same-sex relationships and I have told them that we do not treat that situation.’ Dr Bowman stated that ‘social childlessness’ in that situation is a result of people’s intentional choices.⁴⁰⁷
- 5.93** Dr Bernadette Tobin, Director of the Plunkett Centre for Ethics noted that in relation to the general principle that in vitro fertilisation only be available to infertile couples, the term ‘social infertility’ had been ‘invented’ in order for couples in a condition of social infertility to gain access to the procedure. ‘But in philosophy,’ Dr Tobin explained, ‘that is winning the argument by stipulation. It is just inventing a term in order to make your case by that term.’⁴⁰⁸
- 5.94** The issue of same-sex couples having access to surrogacy arrangements is discussed in more detail later in this chapter.

Age and duration of relationship

- 5.95** There was limited evidence received during the inquiry relating to the importance of the age of intending parents or the duration of their relationship.
- 5.96** The Australian and New Zealand Infertility Counsellors' Association argued that a minimum age of 25 was appropriate for intending parents and that the relationship ‘has been sustained for a period of at least 2 years.’⁴⁰⁹
- 5.97** The Queensland Commission for Children and Young People also suggested that intending couples ‘must have been married or in a relationship for at least two years (to demonstrate a stable family environment for the prospective child).’⁴¹⁰

The intending parents’ genetic connection to the child

- 5.98** The Committee heard evidence about the importance of the intending parents’ genetic connection to the child, with some inquiry participants arguing that surrogacy should be limited to arrangements in which there is a genetic connection between one or both intending parent(s) and the child – that is, one or both intending parents has provided the gamete(s) used.

⁴⁰⁷ Dr Bowman, Evidence, 18 March 2009, p 54

⁴⁰⁸ Dr Bernadette Tobin, Director, Plunkett Centre for Ethics, Evidence, 6 November 2009, p 30

⁴⁰⁹ Submission 34, p 1

⁴¹⁰ Submission 9, p 9

- 5.99** As noted in Chapter 2 the distinction between gestational and traditional surrogacy is based on whether or not the birth mother's egg is used. In gestational surrogacy both the intending mother and father may provide the gametes. In traditional surrogacy the intending father may provide the sperm. Alternatively, in either form of surrogacy, third parties may donate gametes and neither intending parent would be genetically related to the child.
- 5.100** Some inquiry participants argued that both intending parents should have a genetic connection to the child.⁴¹¹
- 5.101** Mr Raymond Campbell, Director of the Queensland Bioethics Centre, argued that if surrogacy were to be permitted it should be limited to the least complicated situation in which the intending parents are also the genetic parents, as this would minimise the potential for harm and confusion to the child.⁴¹²
- 5.102** Similarly, the Australian Christian Lobby argued that this ensured equal parenting and minimised the potential confusion experienced by the child:
- The implanted embryo must be produced from gametes derived from both the commissioning mother and commissioning father. This ensures the parents have an equal biological relationship with the child, which overcomes the possible emotional problems for the couple associated with unequal parenting and certainly protects the child against the confusion experienced by many donor-conceived offspring.⁴¹³
- 5.103** Dr Bowman, Medical Director of Sydney IVF, stated that the aim of his work involving 'genetic-based surrogacy' was to provide intending parents with a baby who was genetically theirs'.⁴¹⁴
- 5.104** The Australian and New Zealand Infertility Counsellors' Association argued that at least one intending parent should have a genetic connection to the child.⁴¹⁵
- 5.105** Other inquiry participants suggested that rather than being a strict criterion, it was 'preferable' if at least one intending parent had a genetic connection to the child.⁴¹⁶ This view was shared by ACCESS Australia's Infertility Network, which added that situations where both intending parents need to use donated gametes should not be excluded.⁴¹⁷
- 5.106** Some inquiry participants went further, arguing that there should be no emphasis on a genetic connection between either intending parent and the child.

⁴¹¹ See for example Ms Myfanwy Walker, TangledWebs, Evidence, 18 March 2009, p 33; Ms Elizabeth Micklethwaite, Senior Research Officer, Australian Christian Lobby, Evidence, 6 November 2009, p 10

⁴¹² Mr Raymond Campbell, Director, Queensland Bioethics Centre, Evidence, 18 March 2009, p 79

⁴¹³ Submission 15, p 8

⁴¹⁴ Dr Bowman, Evidence, 18 March 2009, p 51

⁴¹⁵ Submission 34, p 2

⁴¹⁶ See for example Submission 36, p 3 (Attachment); Submission 27, Ms Susan Mobbs, p 1; Submission 20, p 13

⁴¹⁷ Submission 20, p 13. See also Submission 9, p 10

- 5.107** In this regard, Professor Millbank and Associate Professor Anita Stuhmcke from the Law Faculty at the University of Technology, Sydney, argued that ‘there is no legal, empirical or social reason why genetics should be a limiting factor to the parties to surrogacy’ and that it was ‘undesirable that genetics play any part in determining access to surrogacy for either the commissioning couple or the surrogate.’⁴¹⁸
- 5.108** Professor Millbank commented that the *Parentage Act 2004* (ACT) ‘valorises genetic connectedness by only covering transfer [of parentage] if the gestational mother has no genetic connection and only one or more of the commissioning parents does have a genetic connection to the child.’ This model could be improved, argued Professor Millbank, by removing the focus on genetic connection.⁴¹⁹ This issue, and other issues relating to the transferral of parentage to intending parents, is examined in more detail in Chapter 6.
- 5.109** Associate Professor Stuhmcke argued that to distinguish between genetics and non-genetics would ‘drive people out of the system’ to the detriment of the child:
- It drives people away from assistance that the state can offer and I think, from that perspective, it means it can only ever be detrimental to the child. I do not think having those types of restrictions based on genetics is necessary to be helpful.⁴²⁰
- 5.110** Similarly, the Gay and Lesbian Rights Lobby argued that there could be genetic or medical reasons why intending couples may need to use donated gametes and that a child ‘should not be precluded from the legal recognition of their family because they are not genetically-related to their parents.’⁴²¹

Access for same-sex couples, unmarried couples and single people

- 5.111** In relation to access to surrogacy arrangements for same-sex couples, unmarried couples or single people, the Committee received some evidence that directly addressed these issues, and other evidence that can be brought to bear on these issues indirectly.
- 5.112** An example of the latter is the evidence from inquiry participants who argued that the best interests of the child were served by being born to and raised by married parents. As discussed in chapter 2, this view was often put forward in the context of opposition to surrogacy in principle - the emphasis being that the child should be conceived within a marriage⁴²² - rather than in the context of access criteria. It can be inferred that the same inquiry participants would be likely to oppose same-sex couples, unmarried couples and single people having access to arrangements.

⁴¹⁸ Submission 3, Professor Jenni Millbank and Associate Professor Anita Stuhmcke, p 10

⁴¹⁹ Professor Millbank, Evidence, 5 November 2009, p 62

⁴²⁰ Associate Professor Anita Stuhmcke, Faculty of Law, University of Technology, Evidence, 18 March 2009, p 9

⁴²¹ Submission 25, Gay and Lesbian Rights Lobby, p 25

⁴²² See for example Submission 10, Catholic Archdiocese of Sydney, Life, Marriage and Family Centre, p 2; Submission 19, Anglican Church Diocese of Sydney, p 3

- 5.113** Other inquiry participants addressed the issue of access for these couples and singles more directly.
- 5.114** In relation to access for same-sex couples, participants in this inquiry opposed to access to surrogacy for same-sex couples invariably argued that same-sex couples did not provide optimal parenting for children when compared to opposite-sex couples. They argued that a child's best interest is served by the presence of a mother and father in a permanent, preferably married, relationship. They also spoke about the unique nature of both mothering and fathering and the contributions they both make to the nurturing and development of children.
- 5.115** Other inquiry participants argued that it was not the gender of the parents that was important, but the manner in which they parented.
- 5.116** During this inquiry a separate inquiry by the Law and Justice Committee into adoption by same-sex couples in NSW was also conducted, the report for which is yet to be finalised. That inquiry examined in detail the same issues about same-sex parenting that have been raised during this inquiry in the context of surrogacy. These issues are not re-examined in this report.
- 5.117** In relation to access for unmarried couples, some inquiry participants argued that marriage provided a more stable family environment, and therefore it was not in the best interests of the child to allow de facto couples or single people to enter into surrogacy arrangements.
- 5.118** For example, The Australian Christian Lobby stated that a child in a surrogate arrangement 'will have the best chance of success with a mother and a father in a married relationship,' offering in support of this statistics showing that 43% of cohabitating parents had separated by the child's fifth birthday, compared to 8% of married parents.⁴²³ The Australian Christian Lobby did not indicate whether or not this research took into account the intention of the couples in each of these two groups in relation to having a child, or what effect the intention of having a child, as opposed to having one unintentionally, might have on the stability of the relationship. It is noted in this regard that intending couples in a surrogacy arrangement do form a clear intent to have a child.
- 5.119** Family Voice Australia stated that neither single people nor couples in de facto relationships should have access to surrogacy arrangements since 'marriage is the best environment for raising children.'⁴²⁴
- 5.120** Ms Linda Wright, Lawyer, noted that permitting access to surrogacy for single people in effect permitted access for same-sex couples who may claim to be single for the purposes of entering into a surrogacy arrangement and then resume their relationship once the child was born.⁴²⁵
- 5.121** However, as discussed in chapter 3, some inquiry participants emphasised that it is the functioning of the family and quality of the relationship that existed between a child and its parent(s) that had more impact on a child's wellbeing than the specific form of the family.

⁴²³ Submission 15, p 3

⁴²⁴ Submission 5, Family Voice Australia, p 7

⁴²⁵ Ms Wright, Evidence, 18 March 2009, p 23

- 5.122** Professor Millbank from the Law Faculty and the University of Technology, Sydney, stated that the sociological and psychological literature on family form and child's wellbeing 'conclusively demonstrate that it is family function and not family structure that determines children's wellbeing.'⁴²⁶ Professor Millbank elaborated, stating that the studies showed it was not the number or gender of parents, but the way they related to the child that was most important:

All of those major studies have shown that it is not whether there is one parent or two; it is not whether there are women or men. It is the way that parents relate to their children. It is having a warm, communicative, conflict-free environment, preferably one that involves a certain level of material comfort that relates to children's wellbeing.⁴²⁷

Committee comment

- 5.123** In relation to the criteria discussed above that could potentially be applied to intending parents, the majority of the Committee again refers to the principle of minimal government intervention enunciated at the conclusion to Chapter 4 and in the introduction to this chapter. The majority of the Committee is particularly cautious about making recommendations that the Government involve itself in setting criteria relating to the particular form families created through surrogacy arrangements should take.
- 5.124** Instead, the majority of the Committee again states its belief that counsellors and clinicians with experience in surrogacy arrangements are best placed to determine on a case-by-case basis if the particular characteristics of intending parents strengthen or undermine the particular surrogacy arrangement.
- 5.125** In relation to the genetic connection between the intending parent(s) and the child, the majority of the Committee notes that legislation requiring a genetic connection to exist would discriminate against intending parents who were unable to provide their gametes, or whose gametes were unsuitable for use. Surrogacy arrangements entered into by these intending parents using donated gametes would fall outside the regulatory regime covering ART clinics and the safeguards it provides. The majority of the Committee does not believe that the genetic connection between intending parents and the child to be born through the surrogacy arrangement should play a part in determining eligibility for surrogacy arrangements.
- 5.126** The majority of the Committee rejects calls from some inquiry participants to prohibit same-sex couples, unmarried couples and singles from utilising surrogacy arrangements, again preferring to leave this issue in the hands of counsellors and clinicians with experience in surrogacy arrangements. Other Committee members argued that surrogacy was morally wrong as a matter of principle. Moreover, it was not in a child's best interest to be placed in circumstances where they would not be raised with the presence of a mother and father in a permanent, preferably, married relationship.

⁴²⁶ Professor Millbank, Evidence, 5 November 2009, p 65

⁴²⁷ Professor Millbank, Evidence, 5 November 2009, p 65

Criteria applying to the birth mother

5.127 The Committee also received evidence about criteria that could potentially be applied to the birth mother. These criteria related to the age of the birth mother, whether or not she has had previous children and/or completed her own family, and the genetic connection she may or may not have with the child.

Age

5.128 The Committee received some evidence relating to an appropriate minimum age for the birth mother.

5.129 In this respect, it is important to note that the lower limit for the age of a birth mother utilising ART is in fact set at 18 by the *Assisted Reproductive Technology Act 2007 (NSW)*. Mr Iain Martin, Manager of Legislation, New South Wales Department of Health, confirmed that the Act ‘provides that a provider is not to give ART treatment to a child.’⁴²⁸

5.130 This age limit is in accordance with the recommendation from the Queensland Commission for Children and Young People that a birth mother be at least 18 years old.⁴²⁹

5.131 Sydney IVF require the birth mother to be over 21 years of age.⁴³⁰

5.132 The Australian and New Zealand Infertility Counsellors' Association and Professor Cook from Swinburne University of Technology suggested a minimum age limit of 25 was more appropriate.⁴³¹

5.133 In terms of a maximum age limit on birth mothers, Ms Dill from ACCESS Australia suggested any such limit would be arbitrary and questioned on what evidence one could base such a limit. Ms Dill stated that ‘we can get women who are in their early forties and who are in quite poor health compared with women who may be in their fifties,’ noting also that a birth mother needed only to carry the pregnancy safely and did not then have to raise the child.⁴³²

5.134 Dr Matthews from Next Generation Fertility noted that birth mothers could potentially come from a large age range, from a lower limit of 18, being the age at which a birth mother is considered an adult and can give consent, and an upper limit of 51, being the age beyond which fertility treatment is generally not offered due to the onset of menopause. Other than

⁴²⁸ Mr Iain Martin, Manager, Legislation, New South Wales Department of Health, Evidence, 18 March 2009, p 7

⁴²⁹ Submission 9, Queensland Commission for Children and Young People, (Advice to Altruistic Surrogacy Committee, Legislative Assembly of Queensland, p 8

⁴³⁰ Answers to questions on notice taken during evidence 18 March 2009, Dr Mark Bowman, Medical Director, Sydney IVF and Dr Kylie de Boer, General Manager, Sydney IVF, ‘Policy on gestational surrogacy’, p 10

⁴³¹ Submission 34, Australian and New Zealand Infertility Counsellors' Association, p 1; Professor Roger Cook, Psychology Clinic, Swinburne University of Technology, Evidence, 19 March 2009, p 21

⁴³² Ms Sandra Dill, Chief Executive Officer, Access Australia, Evidence, 18 March 2009, p 67

those guidelines, Dr Matthews argued that age criteria would not be helpful and that appropriate age should be considered on an individual basis.⁴³³

Previous children

- 5.135** A number of inquiry participants argued that a woman should have had at least one previous child, if not have completed her own family, before acting as a surrogate mother.⁴³⁴
- 5.136** For example, Associate Professor Cook supported the requirement in Victoria that a birth mother be the mother of a live child, arguing that it indicated ‘a sense of maturity and having experienced something of a relationship and a pregnancy and birth, all of which means the woman should be well informed about the process she is about to undertake.’⁴³⁵
- 5.137** Dr Matthews also argued that the surrogacy arrangement should not be the birth mother’s first birth as there were ‘increased complications in people’s first pregnancies, such as pregnancy-induced hypertension’ and that the birth mother should have completed her family due to the unpredictable nature of the birth process and the possibility the birth mother might lose her uterus due to complications.⁴³⁶
- 5.138** Sydney IVF require the birth mother to have a previous child who is at least two years of age at the time of the surrogacy arrangement.⁴³⁷
- 5.139** Some inquiry participants argued that having had previous children would also lessen the likelihood the birth mother would experience difficulty relinquishing the child.⁴³⁸
- 5.140** As the Australian Christian Lobby explained, ‘ensuring the surrogate mother has already given birth and raised children of her own also lessens the likelihood of complicated emotional attachments to the child born of the surrogacy arrangement.’⁴³⁹
- 5.141** Ms Dill stated that a birth mother should have had one previous child and preferably have completed her own family, but was concerned about the inflexibility of a legislated criterion to this effect, which may not accommodate unusual circumstances. For example, Ms Dill argued, legislation should not prevent a woman with no previous children acting as a surrogate for her sister if there was no-one else available.⁴⁴⁰

⁴³³ Dr Kim Matthews, Medical Director, Next Generation Fertility, Evidence, 5 November 2009, p 53

⁴³⁴ See for example Submission 36, p 2 (Attachment); Submission 34, p 1; Submission 27, Ms Susan Mobbs, p 1; Submission 20, p 4

⁴³⁵ Professor Cook, Evidence, 19 March 2009, p 21

⁴³⁶ Dr Matthews, Evidence, 5 November 2009, pp 52-53

⁴³⁷ Answers to questions on notice taken during evidence 18 March 2009, Dr Mark Bowman, Medical Director, Sydney IVF and Dr Kylie de Boer, General Manager, Sydney IVF, ‘Policy on gestational surrogacy’ p 10

⁴³⁸ Submission 9, p 8; Submission 36, p 2 (Attachment)

⁴³⁹ Submission 15, p 4

⁴⁴⁰ Ms Dill, Evidence, 18 March 2009, pp 65-66

The birth mother's genetic connection to the child (gestational surrogacy Vs traditional surrogacy)

- 5.142** As noted in Chapter 2, gestational surrogacy does not involve using the birth mother's egg, and therefore she does not have a direct genetic connection to the child.⁴⁴¹ Traditional surrogacy does involve using the birth mother's egg, in which case she is the genetic mother of the child. Gestational surrogacy is sometimes referred as 'full' surrogacy, and traditional surrogacy as 'partial' surrogacy.
- 5.143** This issue intersects with the discussion about the genetic connection between the intending parent(s) and the child earlier in this chapter, in that if the arrangement involves gestational surrogacy, both intending parents could be the genetic parents of the child, whereas if the arrangement involves traditional surrogacy, the intending father but not the intending mother could be the genetic parent of the child.
- 5.144** A number of inquiry participants did not support the availability of traditional surrogacy.⁴⁴²
- 5.145** Dr Bowman from Sydney IVF stated that 'we take a very firm stance that we do not undertake traditional surrogacy, in other words insemination of the surrogate such that the surrogate is then carrying a baby from her own egg.'⁴⁴³ Sydney IVF's guidelines, 'Policy on gestational surrogacy', state that 'experience with "traditional" surrogacy has shown it to be too hazardous for Sydney IVF to support', noting that there are emotional hazards for the birth mother associated with 'giving up the child with whom she has a genetic link.'⁴⁴⁴
- 5.146** Dr Matthews from Next Generation Fertility stated that 'it is with partial surrogacy that a lot of the arrangements have broken down.'⁴⁴⁵
- 5.147** However, some inquiry participants did support the availability of traditional surrogacy.⁴⁴⁶
- 5.148** Ms Montrone argued that the current situation in which clinics do not perform traditional surrogacy meant that some people were undertaking this form of surrogacy outside of clinics. Ms Montrone argued that it was preferable that these people had the option of having this form of surrogacy facilitated through a clinic where the pre-assessment processes had the effect of 'slowing it down, intensifying the discussion, and people have time to change their minds'.⁴⁴⁷

⁴⁴¹ Notwithstanding the indirect genetic connection she may have by virtue of being related to either of the intending parents who donated their gametes.

⁴⁴² See for example Ms Wright, Evidence, 18 March 2009, p 18; Dr Matthews, Evidence, 5 November 2009, p 50; Submission 34, p 1

⁴⁴³ Dr Bowman, Evidence, 18 March 2009, p 53

⁴⁴⁴ Answers to questions on notice taken during evidence 18 March 2009, Dr Mark Bowman, Medical Director, Sydney IVF and Dr Kylie de Boer, General Manager, Sydney IVF, 'Policy on gestational surrogacy', p 4

⁴⁴⁵ Dr Matthews, Evidence, 5 November 2009, p 54

⁴⁴⁶ See for example Submission 35, p3; Ms Dill, Evidence, 18 March 2009, p 69

⁴⁴⁷ Ms Montrone, Evidence, 18 March 2009, pp 40-41

- 5.149** Professor Millbank argued that research suggested the birth mother's interests were not furthered by drawing a distinction between gestational and traditional surrogacy:

If you look at recent studies of surrogacy done by Professor Susan Golombok in Britain...she actually found that the experience of surrogate mothers in relinquishing their child did not vary dramatically in the way they expressed that process in terms of their relationship to the foetus, their grief about relinquishment and so on, and did not have a strong correlation to whether they were genetically connected to the child. In terms of protecting the surrogate's interests I do not think we should be drawing a distinction.⁴⁴⁸

- 5.150** Mr Dean Murphy, Research Associate with the National Centre in HIV Social Research at the University of New South Wales, argued that a number of policies and procedures, including psychological screening and counselling, could be put in place to reduce the perceived increased risk of failure to relinquish if the birth mother's egg is used. This would avoid 'unnecessary, complex and expensive clinical procedures on the egg donor and surrogate when the surrogate and the intended parent(s) are willing to pursue a traditional surrogacy arrangement.'⁴⁴⁹

Committee comment

- 5.151** In relation to the criteria discussed above that could potentially be applied to the birth mother, the majority of the Committee again refers to the principle of minimal government intervention and reiterates its belief that counsellors and clinicians with experience in surrogacy arrangements are best placed to determine on a case by case basis if the particular characteristics of the birth mother strengthen or undermine the particular surrogacy arrangement.
- 5.152** In relation to the age of the birth mother, the Committee notes that a minimum age of 18 applies to birth mothers in surrogacy arrangements utilising ART by virtue of the fact that the *Assisted Reproductive Technology Act 2007* (NSW) prohibits the provision of an ART procedure to a child. The majority of the Committee is of the view that this provision is appropriate.
- 5.153** In relation to the birth mother having had previous children and/or completed her own family, the majority of the Committee notes that this would be a factor considered during the pre-treatment counselling process by counsellors determining the suitability of the particular birth mother for the particular surrogacy arrangement proposed.
- 5.154** Other Committee members believe that if the NSW Government is going to consider further legislative prescription with respect to surrogacy it should, like Western Australia and Victorian legislation, require the surrogate mother to be at least 25 years of age and to have previously carried a pregnancy and given birth.
- 5.155** In relation to the issue of the birth mother's genetic connection to the child, the Committee notes the various viewpoints presented. However, the majority of the Committee again refers to its principle of leaving decisions relating to particular characteristics of the birth mother and

⁴⁴⁸ Professor Millbank, Evidence, 5 November 2009, pp 62-63

⁴⁴⁹ Submission 23, University of New South Wales, National Centre in HIV Social Research, pp 4-5

the particular surrogacy arrangement of which she is a part in the hands of counsellors and clinicians with experience in surrogacy arrangements.

- 5.156** In relation to all the criteria considered in this chapter, the majority of the Committee has decided against making recommendations about criteria that refer to particular characteristics of the individuals involved, the relationship that may exist between individuals and the genetic connections between them and the child who is born through the surrogacy agreement. Instead the majority of the Committee has made recommendations where it considered the process through which surrogacy arrangements are facilitated could be improved, namely by requiring parties to undergo assessment by a counsellor independent of any ART clinic, by examining the need for a register of counsellors qualified to assess parties to surrogacy arrangements, and by requiring parties to obtain independent legal advice.
- 5.157** Some Committee members, however, believe that screening provisions contained in surrogacy legislation in other jurisdictions, both Australian and overseas, should be examined in detail by the NSW Government.

Recommendation 4

That the NSW Government examine in detail the screening provisions contained in surrogacy legislation in other jurisdictions, both Australian and overseas.

- 5.158** The majority of the Committee acknowledges that by leaving the criteria that should be applied to parties to surrogacy arrangements in the hands of individual clinics and the counsellors and clinicians involved in the field of surrogacy, the criteria thereby developed and applied may exclude some parties from utilising ART to facilitate their surrogacy arrangements. For example, the Committee notes that Sydney IVF's stance in not facilitating traditional surrogacy arrangements excludes arrangements in which the intending parents wish the birth mother's egg to be used in the conception of the child. However, the majority of the Committee believes individual clinics and practitioners should be free to apply the criteria they feel is appropriate. Furthermore, the majority of the Committee notes that parties to surrogacy arrangements who are unable to facilitate their arrangement through one clinic, have the opportunity to seek treatment at another clinic that may apply different criteria.

Chapter 6 Legal rights and responsibilities

In this chapter the Committee considers evidence relating to the legal rights and responsibilities of parties to surrogacy arrangements. Firstly, issues relating to surrogacy agreements themselves are discussed, including their unenforceability and the reimbursement of expenses to the birth mother. Then, the current options for intending parents seeking to be recognised as the legal parents of their child, and the limitations of these options, are examined. This is followed by a discussion of a proposed transfer of parentage mechanism specifically for surrogacy arrangements. Finally, evidence relating to storing and accessing genetic information related to surrogacy arrangements and the issue of conscientious objection for medical practitioners is discussed.

Surrogacy agreements

6.1 The Committee received evidence relating to the unenforceability of surrogacy agreements, possible oversight by a regulatory body, the rights of the parties to surrogacy agreements during the pregnancy and birth, and the use of advertising and brokerage services in relation to surrogacy agreements.

Unenforceability

6.2 As noted in Chapter 2, the *Assisted Reproductive Technology Act 2007* (NSW), when it commences, will make surrogacy agreements unenforceable. This means that no party to a surrogacy agreement will be able to legally compel another to fulfil their obligations under the agreement. In particular, the birth mother cannot be compelled to relinquish the child born through the agreement.

6.3 A large number of inquiry participants supported the principle that surrogacy agreements be legally unenforceable.⁴⁵⁰ For example, Ms Linda Wright, a lawyer with experience in surrogacy arrangements, stated that ‘a child is not a commodity to be traded and it should be open to the surrogate not to have to agree to transfer parentage to the commissioning parents.’⁴⁵¹

⁴⁵⁰ Associate Professor Nicholas Tonti-Filippini, Head of Bioethics, John Paul II Institute for Marriage and Family, Evidence, 19 March 2009, p 28; Ms Linda Wright, Lawyer, Evidence, 18 March 2009, p 19; Mr Ghassan Kassisieh, Policy and Development Coordinator, Gay and Lesbian Rights Lobby, Evidence, 6 November 2009, p 58; Ms Hannah Spanswick, Secretary, VANISH Inc., Evidence, 6 November 2009, p 51; Mr Timothy Cannon, Research Officer, Australian Family Association, Evidence, 6 November 2009, p 41; Dr Bernadette Tobin, Director, Plunkett Centre for Ethics, Evidence, 6 November 2009, p 28; Professor Thomas Frame, Director, St Mark's National Theological Centre, Evidence, 6 November 2009, p 25; Ms Elizabeth Micklethwaite, Senior Research Officer, Australian Christian Lobby, Evidence, 6 November 2009, p 10; Dr Megan Best, Anglican Church Diocese, Sydney, Evidence, 6 November 2009, p 4; Professor Jenni Millbank, University of Technology, Sydney, Faculty of Law, Evidence, 5 November 2009, p 59; Ms Alexandra Harland, Family Issues Committee, Law Society of New South Wales, Evidence, 5 November 2009, p 39; Submission 10, Catholic Archdiocese of Sydney, Life, Marriage and Family Centre, p 8; Submission 12, Queensland Bioethics Centre, p 10

⁴⁵¹ Submission 36, Ms Linda Wright, p 3 (Attachment)

- 6.4** Ms Miranda Montrone, Psychologist and Family Therapist and Infertility Counsellor, argued that the right to change her mind paradoxically helped a birth mother in becoming clear about her decision to relinquish the child to the intending parents:

I believe that the right to change her mind acts paradoxically as well as legally. Thus it reduces any implicit pressure or coercion on the surrogate, underlines the gift of helping to create life which the surrogate is making, and helps focus on the positive aspects such as the future child in the commissioning couple or intended parents' lives, rather than on the loss of a child the surrogate has carried. It also gives the surrogate implicit permission to have contact with the baby, initiated by her, particularly during the immediate post delivery period, when her body's sense of loss may be greatest.⁴⁵²

- 6.5** Even prior to the commencement of that Act, as noted by Mr Iain Martin, Manager of Legislation, NSW Department of Health, 'a court would generally not enforce such an agreement on the grounds of public policy and also in light of the irrebuttable presumption in section 14 of the *Status of Children Act*.' That presumption means the birth mother remains the legal mother of the child until a court process determines otherwise.⁴⁵³

- 6.6** Professor Jenni Millbank from the University of Technology, Sydney's Law Faculty, explained that even if surrogacy contracts were legally enforceable, a 'best interests inquiry' would always determine who was going to raise the child:

Even if you have a so-called enforceable contract about who was going to be a parent, and even if you transferred parentage according to that legal contract ... that would not determine who the child was going to live with if there was a dispute between the parents involved. You would still have a best interest inquiry.⁴⁵⁴

- 6.7** Similarly, Mr Roderick Best, Director of Legal Services, Department of Community Services, stated that from the Department's point of view, any contractual arrangement between adults would be overridden by a consideration of the relationship between the child and those caring for him or her. 'While all factors might need to be taken into account,' stated Mr Best, 'the actual relationship between the child and those who care for the child should be the paramount concern.'⁴⁵⁵

- 6.8** Some inquiry participants argued that surrogacy agreements should be enforceable to the extent of automatically transferring parentage to the intending couple on the condition certain pre-arrangement criteria had been met.

- 6.9** Dr Kim Matthews, Medical Director of Next Generation Fertility, agreed that if parties had received the necessary counselling, medical assessment and legal advice, an agreement could be drawn up prior to the birth of the child that once approved by the Supreme Court would automatically transfer parentage to the intending couple when the child was born. Dr

⁴⁵² Submission 32, Ms Miranda Montrone, p 4

⁴⁵³ Mr Iain Martin, Manager, Legislation, New South Wales Department of Health, Evidence, 18 March 2009, p 10

⁴⁵⁴ Professor Millbank, Evidence, 5 November 2009, p 59

⁴⁵⁵ Mr Roderick Best, Director, Legal Services, Department of Community Services, 5 November 2008, p 14

Matthews suggested that this would give intending parents some certainty and confidence entering into the surrogacy process and would help avoid situations in which the birth mother had to give consent for the child to receive medical treatment. Dr Matthews added that her preference was for arrangements in which the intending parents have donated both gametes.⁴⁵⁶

- 6.10** Witness A, father to two children born through surrogacy arrangements, argued that even if the intending parents had no genetic connection to the child, it was not unreasonable for the Supreme Court to approve a surrogacy arrangement in which the birth mother would be required to relinquish the child at birth to the intending parents. Witness A noted that the difference between a surrogacy arrangement and an adoption arrangement is that in the latter, the woman becomes pregnant and *then* decides to relinquish the child for adoption. With a surrogacy arrangement the birth mother becomes pregnant ‘specifically for the purpose of giving the child to the other party.’⁴⁵⁷
- 6.11** Mr David Norman, father to a child born through a surrogacy arrangement, also agreed that if certain pre-agreement conditions were met, including a report from the Department of Community Services, the Supreme Court should be able to make surrogacy agreements enforceable, transferring parentage to the intending parents on the birth of the child.⁴⁵⁸ In relation to the process he and his wife went through, Mr Norman stated that the surrogacy arrangement outlining what each of the parties had agreed to do was represented in a 15-page legal document. ‘It just seems a bit odd to us,’ commented Mr Norman, that we went through all of that process to get a legal document that was not worth the paper it was written on,’ meaning that if the birth mother decided not to relinquish the child, ‘we tear up this document—it does not mean a thing.’⁴⁵⁹

Approval by a regulatory body

- 6.12** Some inquiry participants advocated the need for a recognised surrogacy agreement to be approved by a regulatory body external to ART clinics. Others suggested this was not necessary, would be costly and lead to delays, and that an approval process involving an ethics committee and a clinic-based assessment was adequate.
- 6.13** In relation to the argument for a regulatory body external to ART clinics, Ms Montrone suggested that there should be legislation establishing an ‘external patient review tribunal’ to assess surrogacy cases. ‘We need to set up a framework rather than have just one layer,’ Ms Montrone argued, so that ‘each case is reviewed and considered externally by the state.’⁴⁶⁰
- 6.14** Similarly, the Queensland Commission for Children and Young People argued that surrogacy arrangements present ‘a unique set of circumstances requiring specialist regulation’ and

⁴⁵⁶ Dr Kim Matthews, Medical Director, Next Generation Fertility, Evidence, 5 November 2009, p 49

⁴⁵⁷ Witness A, Evidence, 5 November 2009, p 8

⁴⁵⁸ Mr David Norman, Evidence, 5 November 2009, p 29

⁴⁵⁹ Mr Norman, Evidence, 5 November 2009, p 30

⁴⁶⁰ Ms Miranda Montrone, Psychologist and Family Therapist and Infertility Counsellor, Evidence, 18 March 2009, pp 39-40

recommended that a regulatory body be responsible for processing surrogacy applications and overseeing their implementation.⁴⁶¹

- 6.15** The Commission had significant concerns about a process that did not require surrogacy arrangements to be ‘formally registered and requiring the parties to meet certain criteria.’ These concerns included that parties may not be required to consider the full implications of the agreement, increasing the likelihood of litigation following the child’s birth requiring resolution in the family court and leaving the child exposed and vulnerable in the meantime. The Commission also argued that it would be difficult to determine if alleged altruistic surrogacy arrangements were commercial if they proceeded privately without regulation.⁴⁶²
- 6.16** As noted in Chapter 2, Victoria, Western Australian and the Australian Capital Territory - three jurisdictions where surrogacy legislation has been enacted - recognise surrogacy agreements, with Victoria and Western Australia requiring that a regulatory body, namely the Patient Review Panel and Reproductive Technology Council respectively, approve them.
- 6.17** However, Ms Linda Wright, a lawyer with experience in surrogacy arrangements, stated that ‘the creation of another bureaucratic instrument, the cost, the intervention of government in an intensely personal part of people’s lives is one that needs to be carefully thought through.’ Ms Wright favored the situation where individual fertility clinic’s ethics committees had approval authority in relation to surrogacy arrangements.⁴⁶³
- 6.18** Sydney IVF stated that it had an appropriate internal policy for the assessment of applications for surrogacy and that establishing a regulatory body such as the Patient Review Panel which assesses applications for surrogacy in Victoria, would be ‘onerous and would lead to delays.’ Furthermore, it argued that there was no evidence such a body would improve clinical practice and it would be costly to the Government.⁴⁶⁴
- 6.19** ACCESS Australia’s Infertility Network argued that surrogacy arrangements should ‘be approved by a properly instituted ethics committee’ and subsequently be examined by a clinic-based ‘Surrogacy Review Panel’ which would seek further approval from the ethics committee ‘should additional ethical matters arise in a particular case.’⁴⁶⁵
- 6.20** Associate Professor Roger Cook from the Psychology Clinic at Swinburne University of Technology, also stated that clinics should develop protocols ‘involving their institutional ethics committees, for the approval of applications for treatment’.⁴⁶⁶

⁴⁶¹ Submission 9, Queensland Commission for Children and Young People, Advice to Altruistic Surrogacy Committee, Legislative Assembly of Queensland, p 3

⁴⁶² Submission 9, p 3

⁴⁶³ Answers to questions on notice taken during evidence 18 March 2009, Ms Linda Wright, Lawyer, Question 6, p 2

⁴⁶⁴ Answers to questions taken on notice during evidence 18 March 2009, Dr Mark Bowman, specialist gynaecologist and Medical Director, Sydney IVF and Dr Kylie De Boer, General Manager Sydney IVF, Question 3, p 1

⁴⁶⁵ Submission 20, ACCESS Australia’s Infertility Network, p 5

⁴⁶⁶ Submission 35, Associate Professor Roger Cook, p 3

- 6.21** The above proposals from ACCESS and Associate Professor Cook fit within existing National Health and Medical Research Council guidelines requiring clinics to have approval from a human research ethics committee for certain activities.

Rights of parties during the pregnancy and birth

- 6.22** The Committee received some evidence regarding the rights of parties in relation to medical decisions related to the pregnancy and birth as well as the conduct of the birth mother during the pregnancy.
- 6.23** In this regard, the Australian and New Zealand Infertility Counsellors' Association stated that as far as was reasonable the birth mother 'should have the right to request her preferred doctor/hospital for all treatment/antenatal/delivery services.'⁴⁶⁷
- 6.24** The Queensland Commission for Children and Young People argued that decisions on 'medical procedures and the general management of a surrogate pregnancy' should be made prior to conception, but that 'decisions involving critical medical intervention or procedures which could detrimentally impact on the surrogate mother's health and wellbeing, should be made by the surrogate mother.'⁴⁶⁸
- 6.25** The Law Society of NSW raised the issue of regulation controlling tortious actions arising from surrogacy arrangements, giving the example of a birth mother's drinking during the pregnancy affecting the health of the child:

Would the level of regulation control the rights of the parties to a contract or would there be another level of regulation, for example, in negligence if the birth mother drank during the pregnancy resulting in adverse health issues for the child. Could a child sue a commissioning parent for choosing a birth mother who had a known drinking problem? Hence is there to be regulation controlling tortious actions?⁴⁶⁹

Advertising and brokerage services

- 6.26** The Committee received some evidence regarding advertising and brokerage services related to surrogacy arrangements, including intending couples advertising for a birth mother, or organisations bringing together intending parents and willing birth mothers. Those inquiry participants who addressed this issue were, in general, opposed to such activities, in particular the charging of fees in relation to these services.
- 6.27** Mr Christopher Meney, Director of Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, argued in particular that intending couples should not be permitted to advertise for a birth mother:

⁴⁶⁷ Submission 34, Australian and New Zealand Infertility Counsellors' Association, p 2

⁴⁶⁸ Submission 9, p 12

⁴⁶⁹ Submission 24a, Law Society of NSW, p 2

We should not have any burgeoning industry and we should not have any possibility of people advertising for surrogates. We should have sanctions against people who engage in those sorts of practices.⁴⁷⁰

- 6.28** Ms Wright supported a prohibition on advertising and brokerage in relation to surrogacy arrangements, noting how this accorded with her view on the relationship that should exist between the intending parents and the birth mother:

I would support a prohibition on brokering and advertising. Given my view that one of the criteria for the surrogacy arrangement should be that the surrogate is either related to or has a long term friendship with the commissioning parents then such services should not be necessary in any event.⁴⁷¹

- 6.29** Revd Dr Andrew Ford, from the Anglican Church Diocese, Sydney, argued that ART clinics should not advertise their potential role in surrogacy arrangements, charge additional fees for surrogacy arrangements or perform the role of brokering surrogacy arrangements:

ART providers or other agencies that may be involved should be restricted from promoting, advertising or receiving additional fees in light of surrogacy arrangements for their services. Assisted reproductive technology [ART] providers should not have the role of the formation of surrogacy arrangements or the formation of relationships that would lead to surrogacy arrangements.⁴⁷²

Committee comment

- 6.30** The Committee notes that the *Assisted Reproductive Technology Act 2007* (NSW), when it commences, will make surrogacy agreements legally unenforceable. The Committee also notes, as in Chapter 2, that the SCAG discussion paper ‘A proposal for a national model to harmonise regulation of surrogacy’, proposes that surrogacy agreements be unenforceable.
- 6.31** The Committee agrees with the principles behind the unenforceability of surrogacy agreements, in particular the importance of the birth mother retaining the right and opportunity to change her mind in regard to relinquishing the child to the intending parents once the child is born.
- 6.32** The Committee therefore records its support for the unenforceability of surrogacy agreements and for section 45 of the *Assisted Reproductive Technology Act 2007* (NSW) which will make surrogacy agreements void.
- 6.33** In relation to the oversight of surrogacy arrangements by a regulatory body, the majority of the Committee, in line with its principle enunciated at the conclusion to Chapter 4 that the regulation of surrogacy should be left largely in the hands of practitioners in the field, does not believe a regulatory body is necessary. The majority of the Committee believes that surrogacy arrangements can be adequately supervised by ART clinics with the assistance of independent counsellors with experience in the field. The Committee further notes that the involvement of

⁴⁷⁰ Mr Christopher Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, Evidence, 6 November 2009, p 19

⁴⁷¹ Submission 36, p 5 (Attachment)

⁴⁷² Revd Dr Andrew Ford, Anglican Church Diocese, Sydney, Evidence, 6 November 2009, p 2

lawyers in the early stages of a surrogacy arrangement, which the Committee has recommended (Recommendation 3) be part of the surrogacy process, will ensure that all parties have a clear understanding of their legal rights and responsibilities.

Recommendation 5

That the NSW Government should consider the desirability of establishing an independent, government appointed, expert review panel that would oversee surrogacy arrangements.

- 6.34** The Committee notes it is particularly important to clarify the legal rights and responsibilities of parties in relation to conduct of the birth mother during pregnancy that could potentially be harmful to the unborn child. With regard to the rights of parties to surrogacy agreements to make medical decisions relating to the pregnancy and birth, the majority of the Committee believes this issue is best left in the hands of lawyers with experience in the field to clarify with the individuals involved in the surrogacy arrangement.
- 6.35** On the question of the rights of parties to surrogacy arrangements, other Committee members do not believe that these matters should be left up to the discretion of lawyers and the individuals involved in the surrogacy arrangements. A further examination of these important aspects of surrogacy should be initiated by the NSW Government.
- 6.36** In relation to advertising and brokerage in relation to surrogacy, the Committee notes that the *Assisted Reproductive Technology Act 2007* (NSW), when it commences, will prohibit advertising and brokerage activity in relation to commercial surrogacy, although it is silent on altruistic surrogacy. The Committee did not receive sufficient evidence to warrant making a specific recommendation in regard to advertising and brokerage services in relation to altruistic surrogacy. Some Committee members believe, however, that the *Assisted Reproductive Technology Act 2007* (NSW) should be amended to prohibit advertising and brokerage activity in relation to surrogacy, not just commercial surrogacy.

Recommendation 6

That the NSW Government review the *Assisted Reproductive Technology Act 2007* (NSW) in relation to the prohibition on advertising and brokerage activity associated with surrogacy.

Reimbursement of expenses to the birth mother

- 6.37** There was a considerable amount of evidence received during the inquiry relating to the reimbursement of expenses to the birth mother and how this sat within the current prohibition on commercial surrogacy. This section begins by presenting inquiry participant's views on commercial surrogacy and follows with an examination of the issue of what constitutes 'reasonable expenses' that may be reimbursed to the birth mother in an altruistic surrogacy arrangement.

Commercial surrogacy

- 6.38** Inquiry participants almost unanimously expressed their clear opposition to commercial surrogacy.⁴⁷³
- 6.39** For example, Associate Professor Nicholas Tonti-Filippini, Head of Bioethics at the John Paul II Institute for Marriage and Family, described commercial surrogacy as ‘economic exploitation’ noting that ‘in the areas where it happens the women who agree to be surrogates are nearly always economically disadvantaged.’ Associate Professor Tonti-Filippini added that the fact there was a contract to exchange the child rendered the child a ‘product or an object.’⁴⁷⁴
- 6.40** Professor Margaret Somerville from the Centre for Medicine, Ethics and Law at McGill University in Montreal, argued that ‘commercial surrogacy commodifies, objectifies and reifies the transmission of human life from one generation to the next and fails to uphold respect for the passing on of life’ noting that in developing countries it tended to ‘exploit very poor and desperate women, who have no other means of support.’⁴⁷⁵
- 6.41** Associate Professor Cook argued that altruism and volunteerism were encouraged within, and suited, Australian culture and, in the context of surrogacy arrangements, should be preserved.⁴⁷⁶
- 6.42** However, Associate Professor Anita Stuhmcke, from the Law Faculty at the University of Technology, Sydney, suggested that commercial surrogacy should not be opposed simply based on a rejection of the negative connotations of the word ‘commercial’ in favour of the positive connotations of the word ‘altruistic’:
- ... we start from the premise that somehow altruism equates with everything that is good, that if a person is performing a service and it is labelled an altruistic service, it is done for love. That equates with the reasoning that it is positive. If we label something as commercial, we tend to equate that with motivations that might be for money, and when we look at that and try to mix money with family we have an emotional response to that which is negative. I think those two labels, to start with, are not helpful ...⁴⁷⁷
- 6.43** Professor Millbank made the same point, referring to the ‘dichotomous view of surrogacy and reproduction as being either wholly virtuous and emotional or sullied by commercial practices and extreme exploitation,’ adding that the division between altruistic and commercial

⁴⁷³ See for example Witness A, Evidence, 5 November 2009, p 8; Witness B, Evidence, 5 November 2009, p 8; Mr Paul Lewis, Family Issues Committee, Law Society of New South Wales, Evidence, 5 November 2009, p 38; Mr Norman, Evidence, 5 November 2009, p 25; Submission 19, Anglican Church Diocese of Sydney, p 1

⁴⁷⁴ Associate Professor Tonti-Filippini, Evidence, 19 March 2009, p 29

⁴⁷⁵ Submission 4, Professor Margaret Somerville, McGill Centre for Medicine, Ethics and Law, p 4

⁴⁷⁶ Professor Roger Cook, Psychology Clinic, Swinburne University of Technology, Evidence, 19 March 2009, p 24

⁴⁷⁷ Associate Professor Anita Stuhmcke, Faculty of Law, University of Technology, Evidence, 18 March 2009, p 3

surrogacy was not as clear as the terminology employed made it appear. Furthermore, Professor Millbank argued, ‘sometimes it can be just as exploitative to not allow recompense for someone's reproductive labour as it would to have a free for all kind of situation.’⁴⁷⁸

- 6.44** Associate Professor Stuhmcke stated that she was not opposed to a birth mother being paid a fee for her services provided there was a regime in place that allowed certain potential surrogates to be excluded and that the best interests of the child and the issue of consent were tested:

[A] New South Wales resident advertises that she is available for \$65,000? In my opinion, if you set the regime up in such a way that you have steps by which to catch people who we might not think should engage in these arrangements—for example, counselling would be one of the concepts that I would encourage—if you then have the test at the end, which talks about the best interests of the child and consent, I personally do not have an issue with that.⁴⁷⁹

Defining ‘reasonable expenses’

- 6.45** The *Assisted Reproductive Technology Act 2007* (NSW) defines commercial surrogacy as ‘a surrogacy agreement involving a fee or reward to the woman who gives birth, or intends to give birth, to the child that is the subject of the agreement.’⁴⁸⁰ The Committee received evidence that this definition is ineffective in distinguishing commercial surrogacy from the reimbursement of reasonable expenses to the birth mother in an altruistic surrogacy arrangement. There was concern that this lack of clarity could lead to altruistic surrogacy arrangements in which expenses were reimbursed to the birth mother contravening the prohibition on commercial surrogacy.
- 6.46** Some participants made suggestions as to what should constitute reasonable expenses while others cautioned that any definition was going to be difficult to apply in practice.
- 6.47** Mr Iain Martin, Manager of Legislation, New South Wales Department of Health, stated that the definition of commercial surrogacy in the *Assisted Reproductive Technology Act 2007* (NSW) is intended to describe an arrangement through which the birth mother is placed ‘in a financially or materially better position than she would have been but for the arrangement.’ Mr Martin further explained that ‘anything that puts [the birth mother] in a better position or makes it look like being a surrogate is now her occupation for which she is remunerated may fall foul of that concept.’⁴⁸¹
- 6.48** Ms Wright stated that in most of the arrangements for which she had provided legal advice it was a requirement ‘that the commissioning parents provide an undertaking to meet all the expenses of the surrogate’. Ms Wright further stated that ‘the undertaking must be in writing

⁴⁷⁸ Professor Millbank, Evidence, 5 November 2009, p 57

⁴⁷⁹ Associate Professor Stuhmcke, Evidence, 18 March 2009, p 5

⁴⁸⁰ *Assisted Reproductive Technology Act 2007* (NSW), s 42

⁴⁸¹ Mr Iain Martin, Manager, Legislation, New South Wales Department of Health, Evidence, 18 March 2009, p 16

and acknowledged in writing by the surrogate.⁴⁸² In terms of the advice she offers to clients about what constitutes reasonable expenses, Ms Wright stated that she indicated medical, legal and travel expenses, lost wages and maternity clothes were 'legitimate reimbursement of expenses', adding that this sort of reimbursement was 'not putting the birth mother or her partner in a financial position better than they would have been in had they not undergone the surrogacy.'⁴⁸³

- 6.49** Mr Norman, father to a child born through a surrogacy arrangement, stated that he and his wife met all medical expenses of the birth parents and compensated them for the time they took off work to attend counselling sessions. Mr Norman estimated they paid the birth mother \$7,500 for the time she took off work leading up to and following the birth.⁴⁸⁴
- 6.50** Whilst the above evidence from Ms Wright and Mr Norman indicates birth mothers in altruistic surrogacy arrangements are commonly being reimbursed for reasonable expenses, some inquiry participants argued that the *Assisted Reproductive Technology Act 2007* (NSW), when it commences, will not provide a clear enough definition of commercial surrogacy or give sufficient guidance as to what constitutes reasonable expenses.
- 6.51** Professor Millbank stated that that the current definition was not at all clear, drawing attention in particular to the unhelpful nature of the phrase 'fee or reward.' Professor Millbank argued that 'if you are prohibiting something I think you should be clear about what it is you are prohibiting.'⁴⁸⁵
- 6.52** The Gay and Lesbian Rights Lobby argued that the current definition 'leaves some ambiguity on whether medical expenses and other reasonable expenses paid on behalf of the surrogate mother by the commissioning couple' would be prohibited, and that the Act should clearly stipulate whether such expenses could be reimbursed within the context of an altruistic arrangement.⁴⁸⁶
- 6.53** A number of other inquiry participants supported the proposition that 'reasonable expenses' or 'out-of-pocket' expenses should be reimbursed to the birth mother by the intending parents.⁴⁸⁷
- 6.54** Amongst those inquiry participants who suggested what should constitute the birth mother's 'reasonable expenses' there was some agreement it should include medical, legal and travel expenses associated with the pregnancy and birth, and compensation for wages lost due to

⁴⁸² Submission 36, pp 4-5 (Attachment)

⁴⁸³ Ms Wright, Evidence, 18 March 2009, p 21

⁴⁸⁴ Mr Norman, Evidence, 5 November 2009, p 34

⁴⁸⁵ Professor Millbank, Evidence, 5 November 2009, pp 58-59

⁴⁸⁶ Submission 25, Gay and Lesbian Rights Lobby, pp 18-19

⁴⁸⁷ See for example Submission 35, p 4; Submission 34, p 2; Submission 32, p 5; Submission 23; University of New South Wales, National Centre in HIV Social Research, p 5; Submission 3, Professor Jenni Millbank and Associate Professor Anita Stuhmcke, p 7; Submission 5, Family Voice Australia, p 8; Submission 20, p 6

time off work.⁴⁸⁸ Other suggestions included maternity clothes,⁴⁸⁹ health and death and disability insurance,⁴⁹⁰ child minding expenses for the birth mother's existing children, if any,⁴⁹¹ and postnatal mental health expenses for up to one year.⁴⁹²

6.55 Another issue that was raised in relation to payments made to the birth mother was the Federal Government's Baby Bonus.

6.56 In this regard, Ms Wright suggested the Committee should look at the payment of the Baby Bonus to a birth mother, stating that in many of cases she dealt with, the birth mother received the Baby Bonus but then passed it on to the intending parents. The receiving of the Baby Bonus, argued Ms Wright, could potentially be construed as the receiving of a benefit, and therefore contravene section 43(c) of the *Assisted Reproductive Technology Act 2007* (NSW) - which states that a person must not 'accept any benefit under a commercial surrogacy agreement...' Ms Wright stated that 'my concern was that that was getting a little bit close to the realm of commercial surrogacy,' adding that in the cases she had dealt with, if a birth mother accepted the Baby Bonus it was only a 'fleeting' acceptance before being given to the intending parents.⁴⁹³

6.57 Some inquiry participants argued that there were inherent difficulties in attempting to distinguish commercial surrogacy from the reimbursement of reasonable expenses, particularly where the payment was compensation for lost wages or pain and suffering rather than an identifiable out-of-pocket expense, and that furthermore it was difficult to police.

6.58 For example, Associate Professor Stuhmcke noted that once payment to the birth mother was acknowledged in principle, it became difficult to draw the line and address issues such as the birth mother's pain and suffering:

... if we start to recognise there is some form of payment involved, where does the line start and stop?

...

... are we then talking about expenses for things like pain and suffering? Are we going to incorporate a payment to a woman for something whereby we recognise that childbirth and what she is going through is a difficult process?⁴⁹⁴

6.59 The Southern Cross Bioethics Centre argued that it was difficult to quantify costs associated with lost time, lost income and psychological distress. In relation to lost income, it noted the risk of exploitation of those from lower socioeconomic classes due to the fact that higher

⁴⁸⁸ Ms Wright, Evidence, 18 March 2009, p 21; Submission 35, p 4; Submission 23, p 5; Submission 20, p 6

⁴⁸⁹ Ms Wright, Evidence, 18 March 2009, p 21; Mr Martin, Evidence, 18 March 2009, p 16

⁴⁹⁰ Submission 36 pp 4-5(Attachment); Submission 20, p 6

⁴⁹¹ Submission 20, p 6

⁴⁹² Submission 34, p 2

⁴⁹³ Ms Wright, Evidence, 18 March 2009, p 21

⁴⁹⁴ Associate Professor Stuhmcke, Evidence, 18 March 2009, p 3

income earners would receive greater compensation than lower income earners ‘when both undergo the same procedure.’ Alternatively, if an average wage rate was used to calculate lost income, this would represent a ‘windfall’ for lower income earners and a disincentive for higher income earners.⁴⁹⁵

- 6.60** Professor Tom Frame, Director of St Mark's National Theological Centre, stated that during his time as a member of an ethics committee for a Canberra fertility clinic, the committee was troubled by the fact that they could not police potentially commercial elements of surrogacy arrangements. Professor Frame offered the example of a new car for the birth mother being justified on the grounds that it assisted her attending medical appointments, or a new room in the birth mother’s house to be used for relaxation during the pregnancy. ‘I think we all took the view,’ Professor Frame stated, ‘despite the fact that we got people to sign statutory declarations, that it was almost impossible to regulate or prevent the commercialism of the arrangement in some way.’⁴⁹⁶

Committee comment

- 6.61** The Committee records its opposition to commercial surrogacy and confirms its support for the current prohibition on commercial surrogacy contained in section 43 of the *Assisted Reproductive Technology Act 2007* (NSW).
- 6.62** The Committee agrees with inquiry participants who argue that the definition of commercial surrogacy contained in the *Assisted Reproductive Technology Act 2007* (NSW) is inadequate in distinguishing commercial surrogacy from the reimbursement of reasonable expenses to the birth mother in an altruistic surrogacy agreement and does not provide any guidance for parties to surrogacy arrangements as to what would constitute reasonable expenses.
- 6.63** The Committee believes that a legislative amendment should be pursued to define as clearly as possible what constitutes reasonable expenses that can legitimately be reimbursed to a birth mother in an altruistic surrogacy arrangement and which prevents, as far as possible, circumvention of the prohibition on commercial surrogacy. Issues to be considered in this regard include medical, legal, travel, clothing and accommodation costs associated with the pregnancy, income forgone by the birth mother as a result of becoming pregnant and giving birth. Other Committee members are further concerned that the dichotomy between commercial and altruistic surrogacy, based on the question of fee and reward, is not as clear as it may seem. Moreover, it is acknowledged that the question of ‘reasonable expenses’ cannot be left up to the discretion of parties because of the potential to blur the difference between altruistic and commercial surrogacy arrangements. Accordingly, the NSW Government must ensure that any reimbursements should be minimised and any payments or incentives forbidden.

⁴⁹⁵ Submission 14, Southern Cross Bioethics Centre, pp 10-11

⁴⁹⁶ Professor Frame, Evidence, 6 November 2009, p 23

Recommendation 7

That the NSW Government seek to amend Part 4 of the *Assisted Reproductive Technology Act 2007* (NSW) to clarify the definition of commercial surrogacy and provide a clear indication of what reasonable expenses may be legally reimbursed to the birth mother in an altruistic surrogacy arrangement, and provide that any reimbursements must be verifiable and that any other payments or incentives are prohibited to discourage commercial surrogacy arrangements. Issues to be considered in this regard include medical, legal, travel, clothing and accommodation costs associated with the pregnancy, and income forgone by the birth mother as a result of becoming pregnant and giving birth.

Parentage presumptions and the transferral of parentage

- 6.64** The Committee received a considerable amount of evidence in relation to parentage presumptions and the transferral of parentage in a surrogacy arrangement from the birth parent(s) to the intending parent(s). This section looks at the current situation in NSW in which the birth parent(s) are presumed the legal parents at birth, and full parentage can only be accorded to intending parents through the process of adoption. A lesser degree of parental rights and responsibilities can be conferred by a court in the form of a parenting order.
- 6.65** The Committee heard evidence that this current situation is unsatisfactory for both birth and intending parents. The primary complaints were the limited parentage status conferred by a parenting order and the lengthy delays involved in the adoption process, during which the child is disadvantaged by the fact that his or her parents are not legally recognised as parents. A suggested remedy for this problem was proposed in the form of a transferral of parentage mechanism specifically for surrogacy arrangements, which would expedite the transferral of legal parentage to intending parents.

Current situation in NSW

- 6.66** As noted in Chapter 2, the *Status of Children Act 1996* (NSW) makes a presumption of parenthood in relation to children conceived through a ‘fertilisation procedure’ in favour of the birth mother and her partner, if married or in a de facto relationship, even if they provided neither of the gametes utilised. In other words, in the context of a surrogacy arrangement, this presumption means that the birth mother and her partner, who when the arrangement was made did not intend to raise the child, are legally recognised as the child’s parents when he or she is born, whilst the intending parents, who may also be the genetic parents and who under the arrangement do intend to raise the child, are not so recognised.
- 6.67** Intending parents can pursue two options in order to be accorded parental rights in relation to the child: they can apply for parenting orders giving them limited rights, and/or they can apply to adopt the child and be granted full parenting rights and responsibilities.
- 6.68** The two processes are not mutually exclusive, and intending parents are able to apply for a parenting order to have some rights and responsibilities in relation to their child while the often lengthy adoption process is worked through.

- 6.69** Mr Roderick Best, Director of Legal Services at the Department of Community Services, explained that parenting orders ‘provide the intending parents the rights and powers at law that are available to legal parents while allowing time for the relationships and understandings to be established that will support a future application for adoption.’⁴⁹⁷
- 6.70** A detailed discussion of parenting orders and adoption, and the limitations of both in the context of surrogacy arrangements, is presented in the following sections of this chapter.

Parenting orders

- 6.71** As noted in Chapter 2, intending parents can apply for parenting orders at the federal level to the Family Court of Australia⁴⁹⁸ or the equivalent court of jurisdiction.
- 6.72** Mr Best stated that whilst federal laws exist to establish some parenting rights, the power to confer other parenting rights resides with the states. As a result, parenting orders do not give parents decision-making rights about all aspects of their child’s lives.⁴⁹⁹
- 6.73** Ms Kathrina Lo, Director of Legislation, Policy and Criminal Law Review at the NSW Attorney General’s Department, explained that parenting orders from the Family Court ‘regularise the relationship between the intended parents and the child’ by recognising where the child is living and that ‘for all intents and purposes the intended parents are looking after that child, bringing up that child and making decisions in relation to the care of that child.’⁵⁰⁰

Limitations of parenting orders

- 6.74** Some inquiry participants noted the limitation of parenting orders, particularly for intending parents in surrogacy arrangements.
- 6.75** Ms Wright stated that in her experience the process of applying for and being granted parenting orders took approximately two and a half months, agreeing that in the interim the child existed in a legal ‘limbo’. The cause of this delay, explained Ms Wright, arose from the fact that parenting orders technically existed to transfer rights from parents to ‘non-parents’ and a mediation and counselling process was required, ‘even if there is consent by both parties.’⁵⁰¹
- 6.76** The Australian Human Rights Commission, in its 2007 report, *Same-Sex: Same Entitlements*, stated that one limitation of parenting orders is that their primary purpose ‘is to address disputes between separating parents, rather than affirm the intention of parents who are in a

⁴⁹⁷ Answers to questions on notice taken during evidence 5 November 2008, Mr Roderick Best, Director, Legal Services, Department of Community Services, Question 1, pp 1-2

⁴⁹⁸ Legal Aid NSW website
<<http://www.legalaid.nsw.gov.au/data/portal/00000005/public/88165001155879084234.doc>>
(accessed 29 April 2009)

⁴⁹⁹ Mr Best, Director, Evidence, 5 November 2008, pp 20-21

⁵⁰⁰ Ms Kathrina Lo, Director, Legislation, Policy and Criminal Law Review, NSW Attorney General’s Department, Evidence, 5 November 2008, p 11

⁵⁰¹ Ms Wright, Evidence, 18 March 2009, p 27

couple.’ It noted further limitations, namely that parenting orders did not confer parental status for the purpose of federal laws other than the *Family Law Act*, could be challenged at any time, expired when the child turned 18 and cost between \$3,000 and \$6,000 to apply for.⁵⁰²

- 6.77** The Gay and Lesbian Rights Lobby also noted that parenting orders did not ‘flow through to other areas of law’ and in particular leave unresolved the question of who is a parent under State intestacy and compensation law, and do not affect the interpretation of the terms ‘parent’ and ‘child’ under federal superannuation and tax law. The Gay and Lesbian Rights Lobby conclude that ‘parenting orders are most appropriate for people with a significant but limited role in the child's life, but are manifestly inadequate for primary carers.’⁵⁰³
- 6.78** Witness A and Witness B, parents to two children born through surrogacy arrangements, stated that they did not seek a parenting order for ‘largely emotional’ reasons, including that they would allow them simply to ‘act like a parent’ rather than give them ‘absolute clarity that [they] were now the parents’, but also because they felt there was some risk they would not be granted the parenting order and end up without the recognition they sought.⁵⁰⁴

Adoption

- 6.79** The only option for intending parents in NSW seeking full legal parentage of a child born through a surrogacy arrangement is to apply to adopt the child under State legislation, namely the *Adoption Act 2000* (NSW).
- 6.80** As Mr Roderick Best from the Department of Community Services (DoCS) noted, intending parents in surrogacy arrangements seek to have the child legally recognised as a ‘permanent part of their family’ and that in the absence of any legislation relating specifically to surrogacy arrangements ‘the only way at law in NSW for intending parents with a child to whom they have not given birth to do this is for the child to be adopted.’⁵⁰⁵
- 6.81** Mr Best explained that in the context of a surrogacy arrangement the adoption process at this time in NSW involves the consent of DoCS. Intending parents apply through DoCS’s Adoption and Permanent Care Services (APCS) by stating their intention to adopt an identified child. APCS then forwarded to them information on adoption and arranged ‘an assessment of the situation of the child by a Contracted Adoption Assessor’, after which DoCS made a decision ‘as to whether it will support adoption as appropriate for the particular child.’⁵⁰⁶ Mr Best stated that applications by intending parents to adopt children born through surrogacy arrangements are treated in the same way as any other applications.⁵⁰⁷

⁵⁰² Australian Human Rights Commission, *Same-Sex: Same Entitlements*, Final Report, 2007, pp 103-104

⁵⁰³ Submission 25, p 24

⁵⁰⁴ Witness A and Witness B, Evidence, 5 November 2009, p 8

⁵⁰⁵ Answers to questions on notice taken during evidence 5 November 2008, Mr Best, Question 1, p 1

⁵⁰⁶ Answers to questions on notice taken during evidence 5 November 2008, Mr Best, Question 1, pp 1-2

⁵⁰⁷ Answers to questions on notice taken during evidence 5 November 2008, Mr Best, Question 1, p 3

- 6.82** The particular circumstances of each surrogacy arrangement will, explained Mr Best, determine how the adoption process proceeds. For example, if the birth mother has no partner and the intending father has provided genetic material, he will be presumed to be the child's father. In this instance, his wife could then apply for a 'stepparent adoption'.⁵⁰⁸ She must have relationship of at least two years with the child before the adoption can proceed,⁵⁰⁹ although until recent amendments this period was five years.
- 6.83** Alternatively, explained Mr Best, if either intending parent is related to the birth mother or her partner, adoption can be sought under the 'relative adoption' category.⁵¹⁰ In this instance the relative adoptive parents must have a relationship of at least two years with the child, although until recent amendments this period was also five years.⁵¹¹
- 6.84** Mr Norman, father to a child born through a surrogacy arrangement, described he and his wife's experience of the adoption process in their attempts to adopt their daughter, saying that initially they received conflicting advice on how soon they could adopt. The legal advice they received prior to the surrogacy arrangement being carried out was that they could adopt their daughter 'within a short period after the birth.' However, once their daughter was born they were advised by DoCS that their daughter could not be put up for adoption without a 'Section 21 certificate'.⁵¹²
- 6.85** A Section 21 certificate, explained Mr Norman, relates to DoCS's assessment of he and his wife's suitability as parents, an assessment not carried out until their daughter was five or six years of age. Mr Norman described the assessment as involving a home visit, criminal record check and a check of bank records:

They come into your house and they check out that you have got a bedroom for them and they fingerprint us and they do criminal checks; they check bank records and they go through and make sure that we are going to be suitable people to bring up a child ...⁵¹³

Limitations of the adoption process

- 6.86** The Committee received a considerable amount of evidence on the limitations of the adoption process as a means for intending parents to gain legal parentage of their children born through surrogacy arrangements. Some comments related to the uncertainty that the process would produce the desired outcome. Others related to the fact that certain categories of people were excluded from the adoption process. However, most comments related to the lengthy time periods involved before the adoption process is finalised. During this time the parents raising the child are not recognised as the legal parents and consequently their decision making

⁵⁰⁸ Answers to questions on notice taken during evidence 5 November 2008, Mr Best, Question 1, pp 1-2

⁵⁰⁹ *Adoption Amendment Act 2008* (NSW), Sch 1 [7]

⁵¹⁰ Answers to questions on notice taken during evidence 5 November 2008, Mr Best, Question 1, pp 1-2

⁵¹¹ *Adoption Amendment Act 2008* (NSW), Sch 1 [6]

⁵¹² Mr Norman, Evidence, 5 November 2009, p 27

⁵¹³ Mr Norman, Evidence, 5 November 2009, pp 25-26

capacity and ability to access services in relation to the child are diminished. In addition, some inquiry participants noted that the current situation is potentially against the interests of the birth parent(s), who might find themselves with obligations towards a child they never intended to have responsibility for.

- 6.87** Witness B, mother to a surrogate child, described the years involved in adopting their first surrogate child as ‘very agonising because we did not have any way of knowing how it would end up.’⁵¹⁴ Witness A, the child’s father, also described it as ‘a very anxious time’ and stated that there was a very real risk the court would not approve the adoption, in which case DoCS had the option of intervening, declaring the arrangement ‘dysfunctional’ and taking their child away.⁵¹⁵
- 6.88** ACCESS Australia’s Infertility Network, referring to 2007 University of Western Sydney, School of Law Masters research by Ms Sandra Dill noted that three families interviewed as part of that research ‘were so concerned about the uncertainty of being recognised as the legal parents of their genetic child that they paid significant amounts to take their embryos overseas where this could be finalised in a court before returning home.’⁵¹⁶
- 6.89** In relation to categories of people being excluded from the adoption process, the Committee heard evidence that the exclusion arises from the fact that private adoptions, in which applicants seek to adopt an identified child – as opposed to applying to adopt a child sourced by an adoption agency – are only permitted in NSW if one of the adoptive parents is related to the child.
- 6.90** The Women’s Forum Australia noted that ‘adoption is usually not an option because private adoption in NSW is not allowed unless one of the adopting parents is a relative of the child which will not be the case in all surrogacy arrangements.’⁵¹⁷
- 6.91** Likewise, Next Generation Fertility noted that current legislation ‘makes it an offence to negotiate a private adoption for a non related child’ and that ‘adoption processes are generally linked to whether the adopting parents have a genetic link to the child.’⁵¹⁸
- 6.92** Similarly, the Gay and Lesbian Rights Lobby noted that ‘privately arranged’ adoptions are only permitted when one of the adopting parents is related to the child, effectively restricting adoption in surrogacy arrangements to those in which the birth mother is related to one of the intending parents.⁵¹⁹
- 6.93** The Gay and Lesbian Rights Lobby further noted that adoption, whilst available to heterosexual couples and single lesbians or gay men, was not available to same-sex couples.⁵²⁰ Mr Dean Murphy from the University of New South Wales’ National Centre in HIV Social

⁵¹⁴ Witness B, Evidence, 5 November 2009, p 2

⁵¹⁵ Witness A, Evidence, 5 November 2009, p 3

⁵¹⁶ Submission 20, p 9

⁵¹⁷ Submission 22, Women's Forum Australia, p 4

⁵¹⁸ Submission 29, Next Generation Fertility, pp 2-3

⁵¹⁹ Submission 25, p 23

⁵²⁰ Submission 25, p 23

Research commented that as a result of restrictive policies related to adoption and ART, 'gay individuals or couples are often forced interstate or overseas to pursue parenting.'⁵²¹

6.94 The majority of criticism of the adoption process as a means of transferring parentage in surrogacy arrangements was aimed at the lengthy delays involved during which the parents raising the child are not legally recognised as the child's parents.

6.95 Ms Wright described the 'very odd' situation arising in surrogacy arrangements whereby the birth parent(s) had legal parentage and not the couple raising the child:

... you have the non-rebuttable presumption that the birth mother is the mother of the child, the non-rebuttable presumption that her male partner ... is the other parent of the child where they have consented to that assisted reproductive procedure, regardless of the genetic make-up of the child. What that means is that where the agreement between the commissioning parents and their surrogate and her partner is followed through with the transfer of the care of the child following the birth, you have a very odd situation where the child who is usually genetically related to at least one of the commissioning parents is not regarded at law as their child.⁵²²

6.96 The fact that the parents who are raising the child during this time are not recognised as the legal parents has an impact in areas such as medical treatment for the child, registering with Medicare and health funds, applications for things such as passports or school that require a birth certificate specifying the child's parents, and inheritance, child support and workers compensation.

6.97 ACCESS Australia's Infertility Network noted that while the birth mother remains the legal parent of the child, her permission must be sought before certain medical procedures can be carried out.⁵²³ Witness B, mother to a surrogate child, elaborated, explaining that if her child needed elective surgery the birth mother would have to be in attendance to give her permission.⁵²⁴

6.98 Services requiring the presentation of a birth certificate were also impacted by the fact that the intending parents were not named on the birth certificate prior to the finalisation of the adoption procedure.

6.99 Ms Susan Mobbs, an intending mother in a surrogacy arrangement, stated that there would be difficulties getting a passport for her child. Similarly, Witness B stated that they did not have a passport for their surrogate son and consequently could not travel overseas with him.

6.100 Ms Miranda Montrone, a psychologist with experience in surrogacy arrangements, noted that intending parents could not have their child's name added to their Medicare card, causing difficulty in accessing medical treatment such as immunisations.⁵²⁵ Mr Norman, father to a

⁵²¹ Submission 23, p 1

⁵²² Ms Wright, Evidence, 18 March 2009, p 18

⁵²³ Submission 20, p 3

⁵²⁴ Witness B, Evidence, 5 November 2009, p 6

⁵²⁵ Submission 32, pp 5-6

child born through a surrogacy arrangement, also stated that he could not add his child to his or his wife's Medicare card, and furthermore could not have her added to their health fund.⁵²⁶

- 6.101** Some inquiry participants also commented on the need for clarity about legal parentage when enrolling children in school or day care.⁵²⁷ ACCESS Australia's Infertility Network noted the anxiety of one surrogate parent at having to explain the circumstances of her son's birth on presenting his birth certificate to enrol him in school, 'at a time when normality and regularity are in high demand.'⁵²⁸ Witness B stated that when registering her child at preschool, school or day care, there was a need to explain the fact that the child's birth certificate recorded the birth mother's name as the parent. Witness A stated that the effect of this was that 'people look at our children differently. They must look at them differently to begin with ...'⁵²⁹
- 6.102** The Gay and Lesbian Rights Lobby explained that not recognising the intending parents as the legal parents also disadvantaged children in relation to inheritance, 'children are not automatically entitled to inherit property and superannuation upon the death of their non-legal parent(s).'⁵³⁰ Ms Wright, a lawyer with experience in surrogacy arrangements, noted that a surrogate child had a claim on the birth parent(s) estate whilst he or she remained legally their child, and that conversely, intending parents wishing to leave their estate to the child had to name the child, rather than use the term 'my child' as the child would not be legally recognised as theirs.⁵³¹
- 6.103** Professor Millbank noted that another area of difficulty was child support in that children could be excluded from a child support regime if their parents separated before they were legally recognised as parents.⁵³²
- 6.104** The Gay and Lesbian Rights Lobby also pointed out that a child being raised by 'non-legal' parents 'has no right to workers' compensation if their non-legal parent dies or is seriously injured at work.'⁵³³
- 6.105** In addition to disadvantages to intending parents and the child, some inquiry participants noted that the current situation did not serve the best interests of birth parent(s) who entered into surrogacy arrangements without any intention of having responsibilities related to being the legal parent of the child.
- 6.106** In this regard, Mr Norman stated that during the period before he and his wife were recognised as the legal parents of their child, if both of them died the child would become the

⁵²⁶ Mr Norman, Evidence, 5 November 2009, pp 25-26

⁵²⁷ Submission 32, pp 5-6; Ms Sandra Dill, Chief Executive Officer, Access Australia, Evidence, 18 March 2009, p 67

⁵²⁸ Submission 20, p 4

⁵²⁹ Witness A and Witness B, Evidence, 5 November 2009, p 5

⁵³⁰ Submission 25, p 20

⁵³¹ Ms Wright, Evidence, 18 March 2009, p 20

⁵³² Professor Millbank, Evidence, 5 November 2009, p 67

⁵³³ Submission 25, p 20

responsibility of the legal parents – that is, the birth parents – a responsibility they did not wish to have.⁵³⁴

6.107 ACCESS Australia’s Infertility Network noted that the current arrangement made the birth mother’s husband the legal father, ‘when he has had no part in the conception, gestation or birth of the child.’⁵³⁵

6.108 Ms Wright noted that in the situation in which the child remains with the birth mother, and she separates from her partner who is legally recognized as the father, she may find herself unable to gain child support from him. This is due to the fact that although there is an irrebuttable presumption under the *Status of Children Act* that the birth mother’s partner is the legal father of the child, under the *Child Support Act* this presumption is rebuttable. In this case the birth mother would have to apply to have the genetic father of the child declared the legal father and liable for child support.⁵³⁶

6.109 Another potential difficulty for the birth mother involving child support was described by Mr Mark Bartlett and Mr David Beasy, an Australian same-sex couple whose son was born through a surrogacy arrangement in New Zealand involving a New Zealand birth mother. Mr Bartlett and Mr Beasy explained that if they applied for Family Assistance payments in Australia, the relevant Australian Government agency could apply to have the New Zealand birth mother pay child support.⁵³⁷

6.110 Mr Best from DoCS stated that DoCS itself did not consider the adoption process to be appropriate for transferring parentage in surrogacy arrangements and that it did not provide what intending parents were seeking. Intending parents wanted an arrangement, explained Mr Best, ‘that will be in place almost immediately upon birth.’ Referring to the recent amendments to the *Adoption Act* that have reduced delays from five years to two years, Mr Best commented that ‘it will still be far in excess of what surrogate parents would be expecting’.⁵³⁸

6.111 Mr Best further explained that adoption involved finding carers to meet the needs of an existing child, with the process necessarily extended in order to incorporate ‘events happening over time to address identified priorities of an adoption process.’ Mr Best commented that it ‘is not ideal to apply legislation created for one purpose to another purpose which is quite different’ and that ‘DoCS should not be involved with children yet to be born except where it is clear that those children will be at risk – once born.’⁵³⁹

⁵³⁴ Mr Norman, Evidence, 5 November 2009, pp 25-26

⁵³⁵ Submission 20, p 2

⁵³⁶ Ms Wright, Evidence, 18 March 2009, p 20

⁵³⁷ Submission 38, Mark Bartlett and Mr David Beasy, p 3

⁵³⁸ Mr Best, Director, Evidence 5 November 2008, p 17

⁵³⁹ Answers to questions on notice taken during evidence 5 November 2008, Mr Best, Question 1, pp 2-3

A transferral of parentage mechanism specifically for surrogacy arrangements

- 6.112** The preceding sections discussed the limitations of the two available options intending parents have in NSW to be granted parental rights and responsibilities - parenting orders and adoption – and the inadequacy of these in the context of surrogacy arrangements. This section looks at a proposed remedy for this situation, namely a transferral of parentage mechanism specifically for surrogacy arrangements, whereby intending parents could apply to the Supreme Court within a specified time frame and subject to the court’s consideration of certain factors, be granted full parental rights in relation to the child.
- 6.113** As outlined above, transferral of parentage is necessary in surrogacy arrangements due to the fact that the presumption of parentage at the birth of the child is in favour of the birth parent(s).
- 6.114** The majority of inquiry participants who commented on this issue, including those favouring a transferral of parentage mechanism for surrogacy arrangements, supported the current presumption of parentage in favour of the birth parent(s).⁵⁴⁰
- 6.115** For example, Professor Millbank argued that retaining the presumption of parentage in favour of the birth mother in a surrogacy arrangement gave her the opportunity to change her mind after the birth of child. Professor Millbank, whilst acknowledging the interest of the intending parents, who have invested emotionally, financially and may have provided one or both of the gametes used, nevertheless argued that they were outweighed by the interests of the birth mother ‘because her reproductive labour is more intense.’ For this reason, concluded Professor Millbank, ‘I think models of transferred post-birth, that allow a cooling-off period, are really important.’⁵⁴¹
- 6.116** A few inquiry participants, however, recommended that in the context of surrogacy agreements the presumption of parentage should be changed to be in favour of the intending parents.⁵⁴²
- 6.117** Dr Kim Matthews from Next Generation Fertility argued that this should be the case only in relation to gestational surrogacy arrangements in which the intending parents had provided all the genetic material.
- 6.118** The Queensland Commission for Children and Young People suggested that in the context of surrogacy arrangements parentage should be based on ‘intent’ rather than the child’s ‘biology.’ Ascribing parentage to the birth parents who do not intend to raise the child, argued the Commission, ‘does not automatically promote a child’s stability and security’, whereas a presumption in favour of the intending parents would be ‘in line with all of the parties’ original intentions’ promoting clarity about legal rights and responsibilities and avoiding confusion and the increased likelihood of litigation.⁵⁴³

⁵⁴⁰ See for example Associate Professor Stuhmcke, Evidence, 18 March 2009, p 9; Mr Kassisieh, Evidence, 6 November 2009, p 58; Revd Dr Ford, Evidence, 6 November 2009, p 2; Submission 31, John Paul II Institute for Marriage and Family, p 4 Submission 22, p 4; Submission 12, p 11

⁵⁴¹ Professor Millbank, Evidence, 5 November 2009, p 60

⁵⁴² Submission 24, Law Society of NSW, p 2; Submission 29, Next Generation Fertility, p 3

⁵⁴³ Submission 9, p 11

- 6.119** Notwithstanding some differing views on the presumption of parentage, a large number of inquiry participants supported the establishment of a transferral of parentage mechanism for surrogacy arrangements.⁵⁴⁴
- 6.120** Mr Best from the Department of Community Services stated that a better system than adoption was needed in order to recognise intending parents as the legal parents from the time of the child's birth 'particularly the arrangement where genetically both gametes are coming from the caring adults' agreeing that providing certain criteria had been met prior to the birth, intending parents should be immediately recognised on the child's birth certificate.⁵⁴⁵

Time frame

- 6.121** The Committee heard evidence that transferral of parentage from the birth parent(s) to the intending parents should have temporal limits, with a window of time defined before and after which applications would not be permitted, thereby allowing a cooling off period for the birth mother to change her mind, and a maximum period acknowledging the child's need for stability and the intending parents need for clarity.
- 6.122** The most common time-frame suggested was between six weeks and six months.⁵⁴⁶
- 6.123** Mr Best recommended that the principles applying to the time-frame for adoption be applied, that is, that the birth mother has 30 days before she must confirm her intention to relinquish the child, and a further 30 days in which she can revoke her consent.⁵⁴⁷ Family Voice Australia recommended that the same time frame be applied.⁵⁴⁸
- 6.124** As noted in Chapter 2, the Australian Capital Territory allows intending parents to apply for transfer of parentage between six weeks and six months after the birth of the child, with South Australia considering legislation stipulating the same time frame. Western Australian legislation allows a time frame of between four weeks and six months, and Queensland is considering a recommendation for the same time frame to apply in that state.

Factors for the court to consider

- 6.125** Some inquiry participants suggested factors the court should take into account when deliberating on the application by intending parents for legal parentage of the child.
- 6.126** Both Ms Sandra Dill from ACCESS Australia's Infertility Network and Ms Wright proposed that one factor for the court to consider would be the existence of a surrogacy agreement,

⁵⁴⁴ See for example Submission 18, Mr David Norman, p 1; Answers to questions on notice taken during evidence 5 November 2008, Witness A and Witness B, Question 1, p 1; Associate Professor Stuhmcke, Evidence, 18 March 2009, p 8; Ms Wright, Evidence, 18 March 2009, p 17; Mr Kassisieh, Evidence, 6 November 2009, p 54; Submission 35, p 4; Submission 32, p 4; Submission 27, p 2; Submission 22, p 4; Submission 3, p 8

⁵⁴⁵ Mr Best, Evidence, 5 November 2008, p 17

⁵⁴⁶ Dr Megan Best, Anglican Church Diocese, Sydney, Evidence, 6 November 2009, p 5; Professor Millbank, Evidence, 5 November 2009, p 61 Submission 27, p 1; Submission 20, p 10

⁵⁴⁷ Mr Best, Evidence, 5 November 2008, p 19

⁵⁴⁸ Submission 5, p 7

notwithstanding the fact that the agreement is legally unenforceable.⁵⁴⁹ Ms Wright argued that a recognised surrogacy agreement would ‘help streamline any Court process for the transfer of parentage.’⁵⁵⁰

- 6.127** It is noted that in Victoria, Western Australian and the Australian Capital Territory – three jurisdictions where surrogacy legislation has been enacted – transferral of parentage to intending parents is contingent upon there being evidence of a surrogacy agreement between parties. In addition, Western Australia require the court to be satisfied that all parties have received appropriate counselling before parentage can be transferred.
- 6.128** ACCESS Australia’s Infertility Network and Ms Wright also suggested that the consent of the birth parent(s) should be confirmed.⁵⁵¹
- 6.129** Professor Millbank suggested ‘some form of assessment of the adults involved and their capabilities’ was required.⁵⁵² Likewise, Ms Wright suggested that a counselling report covering issues such as ‘relationship between commissioning parents and surrogate parents and proposals for ongoing contact and communication’ should be considered.⁵⁵³
- 6.130** Professor Millbank also suggested the child should be living with the intending parents and that a regime of contact with the birth parent(s) be provided.⁵⁵⁴ ACCESS Australia’s Infertility Network also recommended that the child living with the intending parents be a criterion for the transferral of parentage.⁵⁵⁵
- 6.131** There was some discussion about whether the genetic connection between the intending parents and the child should be considered at the transferal of parentage stage. A majority of views expressed during the inquiry in relation to genetic connectedness were expressed in the context of entering into a surrogacy arrangement, and whether or not there should be some restriction placed on parties based on their genetic connection to the yet-to-be-born child. However, some inquiry participants also raised the issue specifically in connection with the post-birth transferal of parentage stage.
- 6.132** Some inquiry participants supported the transferral of parentage only if the intending parents were also the genetic parents of the child.⁵⁵⁶
- 6.133** For example, Mr Raymond Campbell, Director of the Queensland Bioethics Centre stated that genetic connectedness between the intending parents and the child should be required for transferring parentage, and that if it did not exist the child should be put up for adoption and

⁵⁴⁹ Ms Dill, Evidence, 18 March 2009, p 68; Ms Wright, Evidence, 18 March 2009, p 19

⁵⁵⁰ Answers to questions on notice taken during evidence 18 March 2009, Ms Linda Wright, Lawyer, Question 7, p 2

⁵⁵¹ Submission 20, p 10; Submission 36, p 4 (Attachment)

⁵⁵² Professor Millbank, Evidence, 5 November 2009, p 61

⁵⁵³ Submission 36, p 4 (Attachment)

⁵⁵⁴ Professor Millbank, Evidence, 5 November 2009, p 63

⁵⁵⁵ Submission 20, p 10

⁵⁵⁶ Submission 20, p 2; Revd Dr Ford, Evidence, 6 November 2009, pp 4-5

the intending parents ‘join the queue’, although it would be relevant to consider the birth mother’s preference in regards to where the child went.⁵⁵⁷

6.134 However, Ms Wright argued that it would be ‘be very unfair to discriminate at the end of the procedure between genetic relationship and non-genetic relationship.’⁵⁵⁸

6.135 Likewise, Professor Millbank stated that ‘I do not think that the commissioning couple who are both using their gametes should be privileged over a commissioning couple where there is only one of their gametes involved.’⁵⁵⁹

6.136 Mr Paul Lewis from the Law Society of New South Wales’ Family Issues Committee, urged caution when considering factors related to the ‘nature and nurture’ argument:

Potentially it is the nature and nurture argument in another guise though, and I would be pretty cautious about taking a differential approach based on the genetic material, because you might really be elevating nature above nurturing. That does not seem to sit well.⁵⁶⁰

6.137 As noted in Chapter 2, the Standing Committee of Attorneys-General discussion paper, ‘A proposal for a national model to harmonise regulation of surrogacy’, proposes that legal parentage be available to intending parents without distinction based on the genetic connection they have with the child born through the surrogacy arrangement.

6.138 In contrast, legislation in the ACT requires at least one intending parent to be a genetic parent of the child before parentage can be transferred. In Queensland, the Investigation into Altruistic Surrogacy Committee has recommended that surrogacy legislation not be prescriptive in relation to genetic connectedness, and in South Australia the Statutes Amendment (Surrogacy) Bill 2008 proposes that at least one intending parent be a genetic parent of the child unless both intending parents are infertile or there is some reason it would be preferable not to use their gametes. In Western Australia, genetic connectedness only plays a part to the extent that the court considering transferral of parentage can dispense with the requirement that the birth parents consent if the birth mother is not a genetic parent of the child and at least one intending parent is.

Committee comment

6.139 The Committee notes the clear inadequacy of both parenting orders and the adoption process in meeting the needs of parties to surrogacy arrangements in terms of legal parentage. In particular, the adoption process negatively impacts on the intending parents’ ability to provide for, nurture and support their children to the same extent that legally recognised parents are able to do for their children. This discrepancy arises from the fact that intending parents are not able to gain legal recognition as parents through the adoption process for a number of years – previously five years, and after recent amendments to the *Adoption Act*, two years.

⁵⁵⁷ Mr Campbell, Evidence, 18 March 2009, p 77

⁵⁵⁸ Ms Wright, Evidence, 18 March 2009, p 18

⁵⁵⁹ Professor Millbank, Evidence, 5 November 2009, p 60

⁵⁶⁰ Mr Lewis, Evidence, 5 November 2009, p 44

- 6.140** The Committee acknowledges the significant distress caused to intending parents through the delays inherent in the adoption process and the fact that the outcome is uncertain.
- 6.141** The Committee notes that disadvantages and difficulties occur for intending parents and their children in the areas of medical treatment, access to entitlements such as Medicare, enrolling in schools and day care and applying for passports, child support, inheritance and workers' compensation.
- 6.142** In addition, the Committee notes that the presumption of parentage and the length of time the adoption process takes has the potential to disadvantage birth parent(s) by conferring on them legal rights and responsibilities in relation to the child that they do not wish to have, and which by virtue of entering into a surrogacy agreement have agreed to relinquish and transfer to the intending parents.
- 6.143** The Committee agrees with inquiry participants who argued for a transferral of parentage mechanism specific to surrogacy arrangements as a remedy for the disadvantage to intending parents and children arising from the use of adoption as a means of achieving full legal parentage.
- 6.144** The Committee notes, as in Chapter 2, that the Standing Committee of Attorneys-General discussion paper, 'A proposal for a national model to harmonise regulation of surrogacy', proposes that intending parents in surrogacy arrangements be able to apply for legal parentage of the child born through the arrangement after the birth mother has relinquished the child. Victoria, Western Australia and the ACT have enacted legislation providing a transferral of parentage mechanism specific to surrogacy arrangements. In South Australia, Queensland and Tasmania, parliamentary committees have recommended some mechanism for transferring parentage in surrogacy arrangements.
- 6.145** The Committee also notes, as in Chapter 4, that recent amendments to the *Family Law Act 1975*, namely the insertion of a new section 60HB, *Children born under surrogacy arrangements*, present NSW with the opportunity to establish a transferral of parentage mechanism for surrogacy arrangements that will grant intending parents legal parentage recognised at a federal level as well.
- 6.146** The Committee believes the presumption of parentage should remain with the birth parent(s) in order to preserve the right of the birth parent(s) to change their mind about relinquishing the child to the intending parents and to avoid legal complications in the event they decide to do so.
- 6.147** In relation to the time period after the birth of the child in which intending parents must apply for transferral of parentage, the Committee notes that amongst inquiry participants who addressed this issue the most common time frame suggested was between six weeks and six months. The Committee also notes that where legislation has been enacted or recommended in other states, the time frame is either four weeks to six months or six weeks to six months after the birth of the child.
- 6.148** The Committee believes that relevant factors for the court to consider when intending parents apply to become the legal parents of the child include evidence of a pre-conception surrogacy agreement, evidence that all parties have received independent legal advice, evidence that all parties have received appropriate counselling both prior to conception and the application to

transfer parentage, evidence that all parties to the surrogacy agreement consented to the agreement upon entering into it, and still consent to it being implemented and parentage transferred to the intending parents, and evidence the child is residing with the intending parents at the time of the application.

- 6.149** The majority of the Committee agrees with inquiry participants who argued that there should not be differential treatment for parties at the transferral of parentage stage based on the genetic connection between the intending parents and the child born through the surrogacy arrangement. In this regard, the majority of the Committee notes its previous comments in Chapter 5 in relation to a genetic connection between intending parents and child being considered pre-conception when parties are entering into the agreement. The majority of the Committee commented that legislation requiring a genetic connection to exist would discriminate against intending parents who were unable to provide their gametes, or whose gametes were unsuitable for use.
- 6.150** Similarly, legislation requiring the genetic connection between intending parents and the child born through the surrogacy arrangement to be considered at the transferral of parentage stage has the potential to discriminate against the same intending parents. The Committee believes that if intending parents have been assessed as suitable and the particular surrogacy arrangement they have entered into has been approved by the fertility clinic providing the ART treatment, it would be unfair to deny these parents access to a transferral of parentage mechanism made available to other intending parents.
- 6.151** Therefore, the Committee recommends that the NSW Government pursue legislation establishing a transferral of parentage mechanism specific to surrogacy arrangements, preserving the presumption of parentage in favour of the birth mother, and allowing intending parents to apply to the Supreme Court after six weeks of the birth of the child born through the arrangement for full legal parentage of the child. The fundamental requirement for the issue of a parentage order will be that such an order is in the child's best interest. The Court should continue to have its unfettered discretion to decide where lies the child's best interest.
- 6.152** The factors the court should be required to consider upon application by the intending parents in a surrogacy arrangement for transferral of parentage should include evidence of a pre-conception surrogacy agreement, evidence that all parties have received independent legal advice, evidence that all parties have received appropriate counselling both prior to conception and the application to transfer parentage, evidence that all parties to the surrogacy agreement consented to the agreement upon entering into it, and still consent to it being implemented and parentage transferred to the intending parents, and evidence that the child is residing with the intending parents at the time of the application.
- 6.153** A minority of Committee members believe that an additional factor for the Court to consider is the right of the child to be raised by a mother and father in a married relationship.

Recommendation 8

That the NSW Government pursue legislation establishing a transferral of parentage mechanism specifically for surrogacy arrangements, preserving the presumption of legal parentage on the birth of the child in favour of the birth mother, and allowing intending parents in a surrogacy arrangement to apply to the NSW Supreme Court, after six weeks of the birth of the child born through the arrangement, for full legal parentage of the child to be transferred to them. The fundamental requirement for the issue of a parentage order will be that such an order is in the child's best interest. The Court should continue to have its unfettered discretion to decide where lies the child's best interest.

That the legislation should also provide that the factors the court must consider when considering applications by intending parents in surrogacy arrangements for full legal parentage of the child born through the surrogacy arrangement to be transferred to them should include, but not be confined to:

- Evidence of a pre-conception surrogacy agreement
- Evidence that all parties have received independent legal advice
- Evidence that all parties have received appropriate counselling both prior to conception and the application to transfer parentage
- Evidence that all parties to the surrogacy agreement consented to the agreement upon entering into it, and still consent to it being implemented and parentage transferred to the intending parents
- Evidence the child is residing with the intending parents at the time of the application.

Genetic information and the format of birth certificates

6.154 The Committee received evidence relating to the importance to children born through surrogacy arrangements of knowing the nature of their genetic origins and the identity of gamete donors. It should be noted that this issue overlaps with the issue discussed in Chapter 3 relating to 'genealogical bewilderment' and the potential damage caused to children born through ART procedures by not knowing their genetic heritage.

6.155 A number of inquiry participants noted the importance of storing genetic information relating to surrogacy arrangements and making that information available to the child. For this purpose, a central register for surrogacy was proposed. In this regard, the suitability of the register which is to be established pursuant to the *Assisted Reproductive Technology Act 2007* (NSW) was discussed.

6.156 A closely related issue is that of birth certificates and the information that is recorded on them. A number of inquiry participants suggested who out of the various parties to a surrogacy arrangement should be recorded on the birth certificate as the parents of the child.

The importance of knowing genetic origins

- 6.157** Several inquiry participants emphasised the importance to the child of a surrogacy arrangement in knowing the nature of his or her genetic origins,⁵⁶¹ with some claiming this was a right of the child.⁵⁶²
- 6.158** ACCESS Australia's Infertility Network explained that right was reflected in the NHMRC ethical guidelines, which state that children born through ART procedures 'are entitled to know their genetic parents.'⁵⁶³
- 6.159** Mr Best stated that 'the research is still clear that the child is still benefited and has a better life as a consequence of knowing what the arrangements were around his or her parenting.' This information was important to an individual, argued Mr Best, 'for the purposes of their own identity and procreation.'⁵⁶⁴
- 6.160** Mr Ghassan Kassisieh from the Gay and Lesbian Rights Lobby noted the importance of genetic information in the context of medical procedures the child might undergo during its lifetime, for example in establishing blood types and ensuring compatibility for organ donation.⁵⁶⁵
- 6.161** Similarly, Mr Norman, father to a child born through a surrogacy arrangement, noted that efforts to trace a potentially genetically based medical condition in his child would be hampered by the absence of genetic information.⁵⁶⁶
- 6.162** The Australian Christian Lobby noted the dangers that could arise if genetic origins are not disclosed, and therefore a person may not know who they are related to. It noted a case reported in *The Australian* in 2008 in which twins separated at birth later met without knowing their genetic connection, fell in love and married, only to subsequently discover their sibling relationship.⁵⁶⁷

Storing genetic information

- 6.163** To facilitate the child of a surrogacy arrangement knowing his or her genetic origins, a number of inquiry participants suggested a register, or central storage regime of some type, should be utilised.⁵⁶⁸

⁵⁶¹ See for example Submission 3, p 12; Ms Wright, Evidence, 18 March 2009, p 21; Mr Meney, Evidence, 6 November 2009, p 17; Submission 33, Infertility Treatment Authority, Victoria, p 3; Submission 24, p 2; Submission 15, pp 6-7

⁵⁶² Submission 33, p 1; Submission 9, p 11; Submission 27, p 2

⁵⁶³ Submission 20, p 5

⁵⁶⁴ Mr Best, Director, Evidence, 5 November 2008, p 18

⁵⁶⁵ Mr Kassisieh, Evidence, 6 November 2009, p 63

⁵⁶⁶ Mr Norman, Evidence, 5 November 2009, pp 27-28

⁵⁶⁷ Submission 15, p 7

⁵⁶⁸ See for example Mr Norman, Evidence, 5 November 2009, p 31; Submission 9, p 12; Submission 33, p 4; Submission 24, p 2; Submission 27, p 2

- 6.164** The NSW Government suggested that relevant components of the regulatory framework for adoption that could be considered in relation to surrogacy included ‘provisions concerning adopted children’s access to information on their genetic parents and siblings’ and ‘penalties for misleading children about their genetic parentage consistent with the *Assisted Reproductive Technology Act 2007* (NSW).⁵⁶⁹
- 6.165** Mr Iain Martin, Manager of Legislation at NSW Health, stated that one of the important elements of the *Assisted Reproductive Technology Act 2007* (NSW) was that it would, when it commences, require ART providers ‘to collect and retain and provide information to the central register. That information will then be available to the offspring and the participants at certain points in time of the process.’⁵⁷⁰
- 6.166** Professor Millbank also noted that the *Assisted Reproductive Technology Act 2007* (NSW) would establish a compulsory register for all births utilising ART in NSW. Children born through surrogacy, noted Professor Millbank, ‘would thus be absorbed into that regime.’⁵⁷¹
- 6.167** Next Generation Fertility also referred to the register to be established by the *Assisted Reproductive Technology Act 2007* (NSW) suggesting that the same principles be applied to recording information about surrogacy arrangements:

It is submitted that the principle that underpins the creation of a central ART Register in the *Assisted Reproductive Technology Act 2007* (NSW) should apply to the recording of genetic parenting information for the purposes of storing and allowing access to children created through a surrogacy arrangement. It is submitted that the information should be stored in the form of a register under the control of the Director General, NSW Health.⁵⁷²

Information recorded on birth certificates

- 6.168** The Committee received a variety of views about what information should be recorded on the birth certificate of a child born through a surrogacy arrangement in relation to who the child’s parents are, with some inquiry participants arguing both the birth parent(s) and the intending parents should be named, some arguing that the intending parents only should be named, and others arguing that if only one set of parents are named the birth certificate should contain an indication that further information can be found elsewhere.
- 6.169** Currently, the birth parents – who are the presumed legal parents, as discussed earlier in this chapter – are recorded on the birth certificate when the child is born. In the case of adoption, the names of the adoptive parents replace the birth parents on an amended birth certificate, the original being retained and available to the child at the age of 18. In the case of parenting orders being granted, the birth parents remain on the birth certificate and a copy of the parenting order is attached.

⁵⁶⁹ Submission 28, p 1

⁵⁷⁰ Mr Martin, Evidence, 18 March 2009, p 3

⁵⁷¹ Submission 3, p 12

⁵⁷² Submission 29, p 3

- 6.170** Dr Bernadette Tobin, Director of the Plunkett Centre for Ethics, argued that it was in the interests of the child's welfare and in avoiding confusion to record all parties to the surrogacy arrangement on the birth certificate. Likewise, Associate Professor Nicholas Tonti-Filippini, Head of Bioethics at the John Paul II Institute for Marriage and Family, argued that there should never be secrecy surrounding the child's parenting and that 'birth certificates should contain all known information.'⁵⁷³
- 6.171** Other inquiry participants argued that in the context of a surrogacy arrangement, it was appropriate that only the intending parents be recorded on the birth certificate.⁵⁷⁴
- 6.172** In this regard, Ms Wright, a lawyer with experience in surrogacy arrangements, argued that this should occur when parentage is transferred to the intending parents, in which case the original birth certificate would be retained, as with adoption. Ms Wright noted that the virtue of only having the intending parents on the birth certificate was that it avoided the possibility of 'unnecessary questions and possibly ridicule' for the child.⁵⁷⁵
- 6.173** Mr Kassisieh from the Gay and Lesbian Rights Lobby also advocated a birth certificate showing the intending parents, and therefore reflecting the family structure around the child, for 'day-to-day use' such as medical purposes and child-care enrolments, with the original birth certificate being retained.⁵⁷⁶
- 6.174** Some inquiry participants recommended that the birth certificate should contain an indication that there is more information available elsewhere, this information detailing the full parenting arrangement.⁵⁷⁷
- 6.175** For example, Ms Montrone, a psychologist with experience in surrogacy arrangements, argued that only the intending parents should be recorded on the birth certificate with an indication that there is additional information available:

I believe that the birth certificate for a child born of surrogacy treatment should indicate the commissioning couple or intended parents as the parents, but that there should be an indication on this birth certificate that there is additional information available.⁵⁷⁸

Committee comment

- 6.176** The Committee agrees with inquiry participants who emphasised the importance of recording and storage of genetic information relating to surrogacy arrangements and of a child born through a surrogacy arrangement having access to this information.

⁵⁷³ Associate Professor Tonti-Filippini, Evidence, 19 March 2009, p 29

⁵⁷⁴ See for example Witness B, Evidence, 5 November 2009, p 5; Ms Montrone, Evidence, 18 March 2009, p 43; Mr Norman, Evidence, 5 November 2009, pp 27-28

⁵⁷⁵ Ms Wright, Evidence, 18 March 2009, p 21

⁵⁷⁶ Mr Kassisieh, Evidence, 6 November 2009, p 60

⁵⁷⁷ Revd Dr Ford, Evidence, 6 November 2009, pp 2-3; Submission 15, p 7; Submission 20, p 11

⁵⁷⁸ Submission 32, p 6

- 6.177** The Committee notes the advice it received that the register of genetic information that will be established by the *Assisted Reproductive Technology Act 2007* (NSW) will serve as a central register for the storage of genetic information relating to all births utilising ART, including surrogacy arrangements. The Committee considers this register to be particularly appropriate in light of the fact that the vast majority of surrogacy arrangements utilise ART treatment and will therefore be facilitated by ART clinics.
- 6.178** The Committee notes that the ‘ART donor register’ to be established by the *Assisted Reproductive Technology Act 2007* (NSW) will contain the following information:
- donors of gametes
 - women undergoing ART treatment using a donated gamete
 - offspring born as a result of ART treatment using donated gamete.⁵⁷⁹
- 6.179** The Committee notes that this information relating to the ART procedure, in combination with the original and amended birth certificates (see recommendation below) will provide children born through surrogacy arrangements with the full picture relating to their parentage and genetic heritage.
- 6.180** The Committee notes the importance of information regarding parenthood that is recorded on a child’s birth certificate. Once legal parentage has been transferred to the intending parents through the new process recommended by the Committee, a new birth certificate should be produced identifying them, and only them, as the parents of the child and noting that an original birth certificate exists. In this instance, the original birth certificate should be retained and made available to the child under the same requirements provided in the *Births, Deaths and Marriages Registration Act 1995* (NSW) relating to all birth certificates.
- 6.181** In addition, the majority of Committee members believe that for a child born as a result of a surrogacy arrangement it is in their best interest that their original birth certificate records all the parties to the arrangement, including gamete donors where they exist.
- 6.182** By following this procedure, the Committee believes the child’s amended birth certificate will reflect the family structure around them and facilitate such things as enrolment for Medicare, in schools and day care, and application for passports, and avoid attracting unwanted attention to the fact that the child was born through a surrogacy arrangement. In addition, the preservation of the original birth certificate ensures that the child, upon accessing that birth certificate, will have all the necessary information relating to the surrogacy arrangement through which they were conceived and born.

Recommendation 9

That the NSW Government pursue legislation requiring that the original birth certificate issued for a child born through a surrogacy arrangement record the names of all parties to the arrangement, including the birth parent(s), the intending parent(s) and gamete donors where they exist.

⁵⁷⁹ *Assisted Reproductive Technology Act 2007* (NSW), s 33 (2) (a) – (c)

Recommendation 10

That the NSW Government pursue legislation requiring that an amended birth certificate be issued for a child born through a surrogacy arrangement following the transferral of parentage to the intending parent(s) and that the amended birth certificate record the names of the intending parent(s) only and include a notation that an original birth certificate exists. The original birth certificate should be retained and made available to the child under the same requirements provided in the *Births, Deaths and Marriages Registration Act 1995* (NSW) relating to all birth certificates.

Conscientious objection

6.183 The Committee received some evidence relating to the right to conscientious objection for medical practitioners who may disagree with the practice of surrogacy. Those inquiry participants who addressed this issue supported the right for practitioners to conscientiously object to participating in surrogacy arrangements.⁵⁸⁰

6.184 Dr Tobin from the Plunkett Centre for Ethics explained that the NHMRC guidelines already contain a 'very robust conscientious objection clause' and recommended that it apply to surrogacy arrangements.⁵⁸¹

6.185 The conscientious objection clause in the NHMRC *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* is as follows:

Conscientious objectors are not obliged to be involved in the procedures or programs to which they object. If any member of staff or student expresses a conscientious objection to the treatment of any individual patient or to any ART procedures conducted by the clinic, the clinic must allow him or her to withdraw from involvement in the procedure or program to which he or she objects. Clinics must also ensure that staff and students are not disadvantaged because of a conscientious objection.⁵⁸²

6.186 Mr Iain Martin, Manager, Legislation, New South Wales Department of Health, noted that there were already general provisions in the NSW Medical Board's Code of Professional Conduct for medical practitioners to refrain from participating in practices they object to:

There is generally no obligation on medical practitioners to participate, in a broad sense, in practises they object to. The medical board's code of conduct for medical practitioners expressly provides that medical practitioners, where they have a particular objection to a certain type of procedure, should not be involved in that

⁵⁸⁰ See for example Mr Timothy Cannon, Research Officer, Australian Family Association, Evidence, 6 November 2009, p 41; Mr Damien Tudehope, Legal Representative, Family Voice Australia, Evidence, 6 November 2009, p 38; Mr Meney, Evidence, 6 November 2009, p 19; Professor Frame, Evidence, 6 November 2009, p 26

⁵⁸¹ Dr Tobin, Evidence, 6 November 2009, p 32

⁵⁸² National Health and Medical Research Council, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (hereafter 'NHMRC Guidelines'), June 2007, p 23

procedure, should not seek to influence a patient, and should, where appropriate, refer them on to another practitioner.⁵⁸³

- 6.187** Mr Martin further noted that the field of surrogacy treatment was a highly specialised one and that ‘it is unlikely that there would be medical practitioners, nurses and other health care workers working in those settings if they in fact object to what is going on in those settings.’⁵⁸⁴
- 6.188** Ms Leanne O’Shannessy, Director of Legal and Legislation, and General Counsel, New South Wales Health, also noted the fact that health professionals are not obliged to provide treatment they do not wish to be involved in providing, adding that it might be problematic to legislate a conscientious object clause. ‘It is not something we have ever legislated for in relation to any procedure,’ explained Ms O’Shannessy, noting that ‘there are issues about emergency situations where you would draw the line.’⁵⁸⁵

Committee comment

- 6.189** The Committee notes the general provision for medical practitioners to refrain from providing treatment they conscientiously object to, as explained by representatives from NSW Health. The Committee further notes the provision in the National Health and Medical Research Council, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, that practitioners in the field of artificial reproductive technology ‘are not obliged to be involved in the procedures or programs to which they object,’ and that they are not to be disadvantaged by exercising their right to conscientious objection.⁵⁸⁶
- 6.190** The Committee notes that the International Covenant on Civil and Political Rights 1966 contains a specific right with respect to freedom of conscience. Australia is a signatory to this Covenant. That right is recognised as a fundamental right and not a subsidiary right. Some Committee members therefore believe that the *Assisted Reproductive Technology Act 2007* (NSW) should be amended to incorporate a conscientious objection provision for practitioners and employees in the assisted reproductive industry so that they are not obliged to be involved in procedures and programmes to which they object, and that they will not be disadvantaged by exercising their right to conscientious objection.

⁵⁸³ Mr Martin, Evidence, 18 March 2009, p 14. NSW Medical Board’s Code of Professional Conduct, available at < <http://www.nswmb.org.au/index.pl?page=44>>

⁵⁸⁴ Mr Martin, Evidence, 18 March 2009, p 14

⁵⁸⁵ Ms Leanne O’Shannessy, Director, Legal and Legislation, and General Counsel, New South Wales Health, Evidence, 18 March 2009, p 14

⁵⁸⁶ NHMRC Guidelines, June 2007, p 65

Appendix 1 Submissions

No	Author
1	St Mark's National Theological Centre
2	Mr Michael Sobb
3	Faculty of Law, University of Technology Sydney
4	McGill Centre for Medicine, Ethics and Law
5	Family Voice Australia
6	VANISH Inc.
7	Mrs Christine Whipp
8	Australian Human Rights Commission
9	Queensland Commission for Children and Young People
10	Marriage and Family Office, Catholic Diocese of Sydney
11	Australian Family Association (NSW)
12	Queensland Bioethics Centre
13	Confidential
14	Southern Cross Bioethics Institute
15	Australian Christian Lobby
16	Family Life International
17	Ms Wanda Skowronska
18	Mr David Norman
19	Anglican Church Diocese of Sydney
20	ACCESS Australian Infertility Network
21	Tangled Webs Australia
22	Women's Forum Australia
23	University of New South Wales, National Centre in HIV Social Research
24	The Law Society of New South Wales
25	Gay and Lesbian Rights Lobby
26	Ms Michelle Evans
27	Ms Susan Mobbs
28	Department of Premier and Cabinet, New South Wales Government
29	Next Generation Fertility
30	Plunkett Centre for Ethics
31	John Paul II Institute for Marriage and Family
32	Ms Miranda Montrone

No	Author
33	Infertility Treatment Authority
34	Australian and New Zealand Infertility Counsellors' Association
35	Swinburne University of Technology, Psychology Clinic
36	Ms Linda Wright
37	Name suppressed
38	Mr Mark Bartlett & Mr David Beasy
39	Catholic Institute of Sydney
40	Mr Jack & Mrs Nanette Blair

Appendix 2 Witnesses at hearings

Date	Name	Position and organisation	
5 November 2008 Room 814/815 Parliament House	Ms Kathrina Lo	Director, Legislation, Policy and Criminal Law Review Division, Attorney-General's Department	
	Ms Sophie Nevell	Senior Policy Advisor, Legislation, Policy and Criminal Law Review Division, Attorney-General's Department	
	Mr Roderick Best	Director, Legal Services, Department of Community Services	
	Mr David Norman		
	Mrs Denise Norman		
	Mr John Longsworth	Member, Family Issues Committee, Law Society of NSW	
	Ms Alexandra Harland	Member, Family Issues Committee, Law Society of NSW	
	Mr Paul Lewis	Member, Family Issues Committee, Law Society of NSW	
	In camera witness A		
	In camera witness B		
	Dr Kim Matthews	Medical Director, Next Generation Fertility	
	Professor Jenni Millbank	Professor, Faculty of Law, University of Technology Sydney	
	6 November 2008 Room 814/815 Parliament House	Revd Dr Andrew Ford	Member of Social Issues Executive, Anglican Church, Diocese of Sydney
		Dr Megan Best	Member of Social Issues Executive, Anglican Church, Diocese of Sydney
Ms Beth Micklethwaite		Senior Research Officer, Australian Christian Lobby	
Mr Benjamin Williams		Research Officer, Australian Christian Lobby	
Mr Christopher Meney		Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney	
Professor Tom Frame		Director, St Marks National Theological Centre	
Dr Bernadette Tobin		Director, Plunkett Centre for Ethics	
Mr Damien Tudehope		Legal Representative and Spokesperson, Family Voice Australia	
Mr Tim Cannon		Research Officer, Australian Family Association	
Ms Hannah Spanswick		Board Member, VANISH Inc.	
Mr Ghassan Kassisieh	Policy and Development Coordinator, Gay and Lesbian Rights Lobby		

Date	Name	Position and organisation
18 March 2009	Ms Leanne O'Shannessy	Director, Legal and Legislation, and General Counsel, NSW Department of Health
Jubilee Room		
Parliament House	Mr Iain Martin	Manager, Legislation, NSW Department of Health
	Ms Linda Wright	Lawyer
	Ms Myfanwy Walker	Public Officer, TangledWebs Inc.
	Ms Miranda Montrone	Psychologist, Family Therapist and Infertility Counsellor
	Dr Mark Bowman	Medical Director, Sydney IVF
	Dr Kylie De Boer	General Manager, Sydney IVF
	Ms Sandra Dill AM	Chief Executive Officer, ACCESS Australia's National Infertility Network
	Mr Raymond Campbell	Director, Queensland Bioethics Centre
19 March 2009	Associate Professor Anita Stuhmcke	Associate Professor, Faculty of Law, University of Technology Sydney
Jubilee Room		
Parliament House	Associate Professor Gerry Gleeson	Professor of Philosophy, Catholic Institute of Sydney
	Associate Professor Roger Cook	Counselling and Clinical Psychologist and Director, Psychology Clinic, Swinburne University of Technology Victoria
	Associate Professor Nicholas Tonti-Filippini	Associate Dean (Teaching, Learning and Research) and Head of Bioethics, John Paul II Institute for Marriage and Family, Melbourne

Appendix 3 Tabled documents

- 1 Document titled 'Canberra Fertility Centre: Surrogacy information pack', tabled by Mr David Norman, 5 November 2008
- 2 Possible Questions: Answers to questions on notice, tabled by Mr David Norman, 5 November 2008
- 3 Document titled 'From 'bundle of joy' to a person with sorrow: Disfranchised grief for donor-conceived adult', by Joanna Rose, University of Technology, Applied Ethics Seminar Series, 2001, tabled by Mr Tim Cannon, Australian Family Association, 6 November 2008
- 4 Confidential document, tendered by Dr Kylie De Boer, General Manager, Sydney IVF, 18 March 2009
- 5 Confidential document, tendered by Ms Linda Wright, Lawyer, 18 March 2009

Appendix 4 Minutes

Minutes No. 15

Monday 4 August 2008

Room 1102, Parliament House, Sydney at 11am

1. Members present

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Ajaka

Mr Donnelly

Ms Fazio

2. Apologies

Ms Hale

3. Minutes

Resolved, on the motion of Mr Ajaka: That draft Minutes No. 14 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence:

Received

- ***

Proposed terms of reference:

- 31 July 2008 – From the Hon John Hatzistergos MLC, Attorney General, to the Chair, proposing terms of reference in regard to legislation on altruistic surrogacy in NSW.

Sent

- ***

5. ***

6. Receipt of terms of reference for an inquiry into legislation regarding altruistic surrogacy in NSW

The Chair tabled the terms of reference for an inquiry into legislation regarding altruistic surrogacy in NSW, received from the Attorney General the Hon John Hatzistergos MLC:

Whether NSW legislation requires amendment to better deal with altruistic surrogacy and related matters and in particular:

- a. *What role, if any, should the NSW Government play in regulating altruistic surrogacy arrangements in NSW?*
- b. *What criteria, if any, should the intended parent/s and/or birth parent/s have to meet before entering into an altruistic surrogacy arrangement?*
- c. *What legal rights and responsibilities should be imposed upon the intended parent/s and/or birth parent/s?*

- d. *What role should a genetic relationship between the child and the intended parent/s and/or birth parent/s play in any altruistic surrogacy arrangement?*
- e. *What legislative amendments should be made to clarify the legal status of any child born of such an arrangement?*
- f. *What rights should a child born through an altruistic surrogacy arrangement have to access information relating to his or her genetic parentage? Who should hold this information?*
- g. *The efficacy of surrogacy legislation in other jurisdictions and the possibility and desirability of working towards national consistency in legislation dealing with surrogacy*
- h. *The interplay between existing State and Federal legislation as it affects all individuals involved in, and affected by, surrogacy*
- i. *Any other relevant matter relating to surrogacy.*

The Chair tabled proposed minor amendments to the terms of reference, in accordance with paragraph 5(2) of the resolution establishing the Committee.

Adoption of terms of reference

Resolved, on the motion of Ms Fazio: That the Committee adopt the following amended terms of reference received from the Attorney General on 31 July 2008, for an inquiry into the need for legislation regarding altruistic surrogacy in NSW:

That the Standing Committee on Law and Justice inquire into and report on whether NSW legislation requires amendment to better deal with altruistic surrogacy and related matters and in particular:

- a. *The role, if any, that the NSW Government should play in regulating altruistic surrogacy arrangements in NSW*
- b. *The criteria, if any, that the intended parent/s and/or birth parent/s should have to meet before entering into an altruistic surrogacy arrangement*
- c. *The legal rights and responsibilities that should be imposed upon the intended parent/s and/or birth parent/s*
- d. *The role that a genetic relationship between the child and the intended parent/s and/or birth parent/s should play in any altruistic surrogacy arrangement*
- e. *The legislative amendments that should be made to clarify the legal status of any child born of such an arrangement*
- f. *The rights that a child born through an altruistic surrogacy arrangement should have to access information relating to his or her genetic parentage, and who should hold this information*
- g. *The efficacy of surrogacy legislation in other jurisdictions and the possibility and desirability of working towards national consistency in legislation dealing with surrogacy*
- h. *The interplay between existing State and Federal legislation as it affects all individuals involved in, and affected by, surrogacy*
- i. *Any other relevant matter.*

Reporting terms of reference to the House

Resolved, on the motion of Ms Fazio: That, in accordance with paragraph 5(2) of the resolution establishing the Standing Committees dated 10 May 2007, the Chair inform the House of the receipt of the terms of reference from the Attorney General for an inquiry into altruistic surrogacy.

Adoption of time line

Resolved, on the motion of Mr Ajaka: That the Committee adopt the following time line, subject to any changes necessary and determined by the Chair in consultation with the Committee:

- Advertising call for submissions – Wednesday 13 August
- Close of submissions – Friday 26 Sept
- Hearings – 3-7 November
- Reporting date – March 2009.

Advertising inquiry and call for submissions

Resolved, on the motion of Mr Ajaka: That the inquiry and the call for submissions be advertised at the earliest opportunity, with a closing date of 26 September 2008, in the Sydney Morning Herald and Daily Telegraph.

Press release

Resolved, on the motion of Ms Fazio: That a press release announcing the commencement of the Inquiry and the call for submissions be distributed to media outlets throughout NSW to coincide with the advertisements.

Invitations to stakeholders to make a submission

Resolved, on the motion of Ms Fazio: That the Committee write to the following stakeholders identified by the Secretariat, as well as any additional stakeholders identified by Committee members and notified to the Secretariat by COB Friday 8 August, informing them of the Inquiry and inviting them to make a submission:

- Attorney General's Department
- Department of Community Services
- NSW Health
- NSW Commission for Children and Young People
- Law Society of NSW
- NSW Bar Association
- Family Court of Australia
- NSW Law Reform Commission
- Australian Medical Association NSW
- National Health and Medical Research Council (guidelines for medical ethics committees)
- Fertility Society of Australia (representing clinicians, researchers, consumers and counsellors involved in reproductive medicine)
- Fertility clinics eg. Westmead Fertility Centre (Westmead Hospital non-profit), Sydney IVF (commercial), Next Generation Fertility (owned by clinicians)
- Professor Jenni Millbank, UTS (family and reproductive law)
- Associate Professor Anita Stuhmcke, UTS (biomedical law and ethics)
- St James Ethics Centre
- Public Interest Advocacy Centre
- Religious groups eg. Catholic Church, Anglican Church, Uniting Church, Islamic Council NSW, Hindu Council, Jewish Board of Deputies NSW, Buddhist Council NSW, NSW Ecumenical Council, Festival of Light

- Right to Life Australia
- Donor Conception Support Group (support for donor conceived families, donors or adult donor offspring)

Resolved, on the motion of Mr Ajaka: That a list of any additional stakeholders identified by Committee members be circulated to the Committee.

7. General business

8. Adjournment

The Committee adjourned at 11.25am.

Madeleine Foley

Clerk to the Committee

Minutes No. 17

Wednesday 24 September 2008

Members Lounge, Parliament House, Sydney at 1:00 pm

1. Members present

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Donnelly

Mr Ajaka

Ms Fazio

Ms Hale

2. Minutes

Resolved, on the motion of Mr Clarke: That draft Minutes No. 16 be confirmed.

3. Publication of correspondence

The Committee noted the following items of correspondence received:

- 9 September 2008 - From the Hon Kerry Shine MP, Attorney General and Minister for Justice Queensland, to the Chair, advising that the Queensland Parliamentary Select Committees' Investigation into Altruistic Surrogacy is due to report on 30 September 2008, and the Committee's correspondence has been forwarded to Hon Margaret Keech MP, Minister for Child Safety and Minister for Women for consideration and a direct reply.
- 12 September 2008 - Ms Angela Filipello, Principal Registrar of the Family Court of Australia, to the Chair, advising that the Court's Law Reform Committee has considered the inquiry and will not make a submission on behalf of the Court.

4. Inquiry into legislation on altruistic surrogacy in NSW

4.1 Publication of submissions

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of Submissions No. 1-6.

4.2 Witnesses

Resolved, on the motion of Mr Clarke: That the following organisations be invited to appear at a hearing for the inquiry:

- Attorney General's Department
- NSW Health
- Department of Community Services
- Commission for Children and Young People
- Law Society of NSW.

Resolved, on the motion of Mr Clarke: That a further deliberative meeting be scheduled to finalise remaining witnesses once further submissions have been received.

Resolved, on the motion of Mr Ajaka: That a letter inviting a submission addressing the scenarios of a surrogate mother with an intellectual disability and a surrogate child born with a disability be sent to the Department of Ageing, Disability and Home Care and the NSW Council for Intellectual Disability.

Resolved, on the motion of Ms Hale: That a letter be sent to Family Planning NSW inviting it to make a submission to the Inquiry.

5. Adjournment

The Committee adjourned at 1.15 pm *sine die*.

Merrin Thompson
Clerk to the Committee

Minutes No. 18

Wednesday 22 October 2008

Members Lounge, Parliament House, Sydney at 1:00 pm

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Fazio
Ms Hale

2. Minutes

Resolved, on the motion of Mr Ajaka: That draft Minutes No. 17 be confirmed.

3. Publication of correspondence

The Committee noted the following items of correspondence received and sent:

Received

- 29 September 2008 - From Hon Rob Hulls MP, Attorney-General of Victoria, to Chair, advising that he will not make a submission to the altruistic surrogacy inquiry and advising that the Assisted Reproductive Treatment Bill was introduced into the Victorian Parliament on 9 September 2008.

- 29 September 2008 - From Dr Clive Morris, Chief Knowledge and Development Officer, National Health and Medical Research Council (NHMRC), to Chair re invitation to make a submission to altruistic surrogacy inquiry.
- 7 October 2008 - From Hon Margaret Keech MP, Minister for Child Safety and Minister for Women, Queensland, to Chair, advising that the Investigation into Altruistic Surrogacy Committee is due to make its recommendations to the Queensland Government on 30 September 2008 and that the Queensland Government will not make a submission to the Committee's inquiry.
- 13 October 2008 – From Ms Renee Leon on behalf of Simon Corbell MLA, Attorney-General, ACT Government, Department of Justice and Community Safety, to the Chair, providing general information about the ACT's Parentage Act 2004 and advising that the ACT Government will not make a submission to the altruistic surrogacy inquiry.

Sent

- 25 September 2008 - From Chair to Mr Brendan O'Reilly, Director-General, Department of Ageing, Disability and Home Care, inviting a submission to the altruistic surrogacy inquiry addressing the scenarios of a surrogate mother with an intellectual disability and a surrogate child born with a disability.
- 25 September 2008 - From Chair to Ms Carol Berry, Executive Officer, NSW Council for Intellectual Disability, inviting a submission to the altruistic surrogacy inquiry addressing the scenarios of a surrogate mother with an intellectual disability and a surrogate child born with a disability.
- 24 September 2008 – From Chair to Ms Ann Brassil, Chief Executive Officer, Family Planning NSW, inviting a submission to the altruistic surrogacy inquiry.

4. Inquiry into legislation on altruistic surrogacy in NSW

4.1 Publication of submissions

Resolved, on the motion of Mr Ajaka: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of Submissions No. 7-12 and 14-30 be made public, subject to the Secretariat ascertaining the preference of the author of Submission 27 regarding the confidentiality of her submission.

Resolved, on the motion of Ms Hale: That Submission 13 be kept confidential at the request of the submission maker.

4.2 Witnesses

Resolved, on the motion of Mr Clarke: That the Secretariat invite the following individuals and organisations to appear at a hearing for the inquiry, whilst grouping religious/ethics organisations and assisted reproductive technology providers into panels, with the agreement of those organisations:

- Professor Jenni Millbank and Associate Professor Anita Stuhmcke, Faculty of Law, University of Technology Sydney
- Norman family
- Authors of confidential Submission 13
- Anglican Church Diocese of Sydney
- Australian Christian Lobby
- Family Voice Australia
- Life, Marriage and Family Centre, Catholic Archdiocese of Sydney
- Professor Tom Frame, St Mark's National Theological Centre, Charles Sturt University
- Plunkett Centre for Ethics

- Next Generation Fertility
- Sydney IVF
- Gay and Lesbian Rights Lobby
- Australian Family Association (NSW)
- VANISH
- ACCESS Australia's National Infertility Network
- Family Planning NSW
- Australian Medical Association

Resolved, on the motion of Mr Donnelly: That at its next meeting the Committee consider inviting the authors of Submissions 7, 14, 17 and 22 to appear at a hearing.

Resolved, on the motion of Mr Clarke: That consideration of further witnesses be left in the hands of the Chair, in consultation with Committee members.

4.3 Additional hearing date

Resolved on the motion of Ms Fazio: That the Committee conduct an additional half or full day of hearings.

5. Adjournment

The Committee adjourned at 1.20 pm until 27 October 2008.

Merrin Thompson
Clerk to the Committee

Minutes No. 20

Wednesday 5 November 2008

Room 814/815, Parliament House, Sydney at 9.00 am

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Hale
Ms Fazio

2. Minutes

Resolved, on the motion of Mr Donnelly: That Minutes No. 18 and 19 be confirmed.

3. ***

4. Deliberative meeting - Inquiry into legislation on altruistic surrogacy in NSW

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and standing order 223(1), the Committee authorise the publication of Submissions No. 32-34.

Resolved, on the motion of Mr Ajaka: That the Committee take in camera evidence from the authors of Submission No. 13.

5. Public hearing - Inquiry into legislation on altruistic surrogacy in NSW

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Ms Kathrina Lo, Director, Legislation, Policy and Criminal Law Review Division, Attorney-General's Department
- Ms Sophie Nevell, Senior Policy Advisor, Legislation, Policy and Criminal Law Review Division, Attorney-General's Department.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Rod Best, Director, Legal Services, Department of Community Services.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr David Norman, Parent of surrogate child
- Mrs Denise Norman, Parent of surrogate child.

Mr Norman tendered the following documents:

- Canberra Fertility Centre: Surrogacy Information Pack, September 2004
- 'Possible questions: David and Denise Norman'.

The evidence concluded and the witnesses withdrew

The following witnesses were sworn and examined:

- Mr John Longworth, Member, Family Issues Committee, Law Society of NSW
- Ms Alexandra Harland, Member, Family Issues Committee, Law Society of NSW
- Mr Paul Lewis, Member, Family Issues Committee, Law Society of NSW.

The evidence concluded and the witnesses withdrew.

6. In camera hearing – Inquiry into legislation on altruistic surrogacy in NSW

Resolved, on the motion of Ms Fazio: That the Committee proceed to take evidence from Witness A and Witness B in camera.

The media and the public withdrew.

The Committee proceeded to take in camera evidence.

The following witnesses were sworn and examined:

- Witness A
- Witness B.

Persons present other than the Committee:

- Ms Merrin Thompson, Clerk to the Committee
- Mr Jonathan Clark, Committee secretariat
- Ms Christine Nguyen, Committee secretariat
- Ms Kate Mihaljek, Committee secretariat
- Hansard reporters.

The evidence concluded and the witnesses withdrew.

7. Public hearing - Inquiry into legislation on altruistic surrogacy in NSW

Resolved, on the motion of Ms Fazio: That the hearing resume in public.

The public and the media were readmitted.

The following witness was sworn and examined:

- Dr Kim Matthews, Medical Director, Next Generation Fertility.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Professor Jenni Millbank, Professor, Faculty of Law, University of Technology, Sydney.

The evidence concluded and the witness withdrew.

The public hearing concluded at 5.15 pm. The public and the media withdrew.

8. Deliberative meeting - Inquiry into legislation on altruistic surrogacy in NSW

8.1 Publication of tabled documents

Resolved, on the motion of Mr Donnelly: That according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975, and standing order 223(1), the Committee authorise the publication of the document tendered during the public hearing, Canberra Fertility Centre: Surrogacy Information Pack, September 2004.

Resolved, on the motion of Mr Donnelly: That according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975, and standing order 223(1), the Committee authorise the partial publication of the document tendered during the public hearing, 'Possible questions: Witness A and B', with certain information suppressed at the request of the author.

8.2 Publication of in camera transcript

Resolved, on the motion of Mr Ajaka: That, in the public interest and according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975, and standing order 223(2), the Committee

authorise the partial publication of the in camera transcript of evidence of Witnesses A and B on 5 November 2008, with all identifying information removed.

9. Adjournment

The Committee adjourned at 5.20pm until 6 November 2008.

Merrin Thompson
Clerk to the Committee

Minutes No. 21

Thursday 6 November 2008

Room 814/815, Parliament House, Sydney at 9.00 am

1. Members present

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Donnelly

Mr Ajaka

Ms Hale

2. Apologies

Ms Fazio

3. Public hearing - Inquiry into legislation on altruistic surrogacy in NSW

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Dr Andrew Ford, Member, Social Issues Executive, Anglican Church Diocese of Sydney
- Dr Megan Best, Member, Social Issues Executive, Anglican Church Diocese of Sydney.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Beth Micklethwaite, Senior Research Officer, Australian Christian Lobby
- Mr Benjamin Williams, Research Officer, Australian Christian Lobby.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Christopher Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Professor Tom Frame, Director, St Marks National Theological Centre.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Dr Bernadette Tobin, Director, Plunkett Centre for Ethics.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Damien Tudehope, Legal Representative, Family Voice Australia.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Tim Cannon, Research Officer, Australian Family Association.

Mr Tim Cannon tendered the following document:

- 'From 'bundle of joy' to a person with sorrow: Disenfranchised grief for the donor-conceived adult', Applied Ethics Seminar, Queensland University of Technology, 2001.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Hannah Spanswick, Secretary, VANISH.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Ghassan Kassisieh, Policy and Development Coordinator, Gay and Lesbian Rights Lobby.

The evidence concluded and the witness withdrew.

The public hearing concluded at 3:30 pm. The public and the media withdrew.

4. Deliberative meeting - Inquiry into legislation on altruistic surrogacy in NSW

4.1 Publication of tabled documents

Resolved, on the motion of Ms Hale: That according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, and standing order 223(1), the Committee authorise the publication of the document tendered during the public hearing, 'From 'bundle of joy' to a person with sorrow: Disenfranchised grief for the donor-conceived adult', Applied Ethics Seminar, Queensland University of Technology, 2001.

5. Adjournment

The Committee adjourned at 3.45 pm.

Merrin Thompson
Clerk to the Committee

Minutes No. 22

Wednesday 26 November 2008

Members' Lounge, Parliament House, Sydney at 1.00 pm

1. Members present

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Donnelly

Mr Ajaka

Ms Hale

Ms Fazio

2. Minutes

Resolved, on the motion of Mr Ajaka: That draft Minutes No. 20 and 21 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence received:

- ***
- 6 November 2008 – From Australian Medical Association to Secretariat, declining invitation to provide a witness for the altruistic surrogacy inquiry, but offering to answer questions arising from the hearings.
- 13 November 2008 – From Ms Mary Joseph, Research and Project Officer, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, to Secretariat, providing answers to questions on notice for the altruistic surrogacy inquiry.
- ***

4. ***

5. Inquiry into legislation on altruistic surrogacy in NSW

5.1 Publication of answers to questions on notice

Resolved, on the motion of Ms Fazio: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of answers to questions taken on notice provided by Ms Mary Joseph, Research and Project Officer, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney.

5.2 Publication of submissions

Resolved, on the motion of Mr Ajaka: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of Submissions No. 35 and 36.

6. Adjournment

The Committee adjourned at 1:16 pm until Thursday 27 November 2008.

Merrin Thompson
Clerk to the Committee

Minutes No. 24

Monday 1 December 2008

Room 1102, Parliament House, Sydney at 9.00am

1. Members presentMs Robertson (*Chair*)Mr Clarke (*Deputy Chair*)

Mr Ajaka

Ms Hale

Ms Fazio

2. Apologies

Mr Donnelly

3. Minutes

Resolved, on the motion of Ms Hale: That Draft Minutes No. 22 and 23 be confirmed.

4. *****5. Correspondence**

The Committee noted the following items of correspondence:

Received

- 28 November 2008 – From Professor Tom Frame, St Mark's National Theological Centre to Chair enclosing answers to questions on notice.

Sent

- ***

6. Inquiry into legislation on altruistic surrogacy in NSW**6.1 Consideration of publication of answers to questions on notice**

Resolved, on the motion of Ms Fazio: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of answers to questions on notice received from Professor Tom Frame, St Mark's Theological Centre.

6.2 Consideration of proposed time line for remainder of the Inquiry

Resolved, on the motion of Ms Hale: That the Committee adopt the following time line, subject to any changes necessary and determined by the Chair in consultation with the Committee:

- 18/19 March 09 Hearings
- 11 May Chair's draft
- 18 May Report deliberative and tabling.

7. Adjournment

The Committee adjourned at 9.55 am until the first hearing for the Inquiry into adoption by same sex couples on a date in February to be confirmed by the Secretariat in consultation with the Committee.

Rachel Callinan
Clerk to the Committee

Minutes No. 26

Tuesday 24 February 2009

Jubilee Room, Parliament House, Sydney at 9.00 am

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Hale
Ms Fazio
Revd Nile (as a participating Member from 3:00 pm)

2. Minutes

Resolved, on the motion of Ms Hale: That Minutes No. 24 and 25 be confirmed.

3. ***

4. Inquiry into legislation on altruistic surrogacy in NSW

4.1 Correspondence

The Committee noted the following items of correspondence received:

- 1 December 2008 – Answers to QON from Prof Millbank, University of Sydney.
- 2 December 2008 – Answers to QON from Dr Matthews, Next Gen. Fertility.
- 2 December 2008 – Answers to QON from Mr Kassisieh, GLRL.
- 2 December 2008 – Answers to QON from Mr Cannon, Australian Family Association, with two additional articles for committee information.
- 2 December 2008 – Answers to QON from Mr Best, Dept of Community Services.
- 8 December 2008 – Answers to QON from Ms Micklethwaite, Australian Christian Lobby, with five additional articles for committee information.
- 9 December 2008 – Answers to QON from Ms H Spanswick, VANISH.
- 15 December 2008 – Answers to QON from Dr Tobin, Plunkett Centre for Ethics.
- 14 January 2009 – Answers to QON from Ms Kathrina Lo, Director, Legislation, Policy and Criminal Law Review, NSW Attorney General's Department.
- 29 January 2009 – Answers to QON from Ms Watts, Anglican Church Diocese Syd.

4.2 Publication of answers to questions on notice

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(2), the Committee authorise the publication of the answers to questions on notice received from witnesses appearing at the November hearings for the Inquiry into altruistic surrogacy (as in para 4.1).

4.3 Publication of submission

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(2), the Committee authorise the publication of Submission 37, with name suppressed at the request of the author.

5. ***

6. Adjournment

The Committee adjourned at 5.18 pm until 9:00 am Wednesday 25 February 2009.

Rachel Callinan
Clerk to the Committee

Minutes No. 27

Wednesday 25 February 2009

Room 814/815, Parliament House, Sydney at 9.06 am

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Hale
Ms Fazio (12:10 pm)

2. ***

3. ***

4. ***

5. ***

6. ***

7. ***

8. Inquiry into legislation on altruistic surrogacy in NSW

8.1 Further witnesses

Resolved, on the motion of Ms Fazio: That the Committee invite the following witnesses to give evidence, along with any others determined by the Secretariat in consultation with the Chair:

- Ms Miranda Montrone, Infertility Counsellor
- Ms Linda Wright, Lawyer practicing in the area
- Dr Simon Longstaff, Executive Director, St James Centre for Ethics
- Revd Dorothy McRae-McMahon, Retired Uniting Church Minister
- Associate Professor Roger Cook, Fellow of the Australian Psychological Society.

Resolved, on the motion of Ms Fazio: That Committee Members forward suggestions for any further witnesses to the Secretariat by COB Wednesday 4 March 2009.

9. Adjournment

The Committee adjourned at 5.25pm until 18 March 2009.

Merrin Thompson
Clerk to the Committee

Minutes No. 28

Wednesday 18 March 2009

Jubilee Room, Parliament House, Sydney at 9.00 am

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Hale
Ms Fazio (10:10 am)

2. Public hearing – Inquiry into legislation on altruistic surrogacy in NSW

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses from NSW Health were sworn and examined:

- Ms Leanne O’Shannessy, Director, Legal and Legislation, and General Counsel
- Mr Iain Martin, Manager, Legislation.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Ms Linda Wright, Lawyer.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined via teleconference:

- Ms Myfanwy Walker, Public Officer, TangledWebs.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Miranda Montrone, Psychologist, Family Therapist and Infertility Counsellor.

The evidence concluded and the witness withdrew.

The following witnesses from Sydney IVF were sworn and examined:

- Dr Mark Bowman, Medical Director
- Dr Kylie De Boer, General Manager.

Dr Kylie De Boer tendered a document to the Committee.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Ms Sandra Dill AM, Chief Executive Officer, ACCESS Infertility Network.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined via teleconference:

- Mr Ray Campbell, Director, Queensland Bioethics Centre.

The evidence concluded and the witness withdrew.

The public hearing concluded at 5.15 pm. The public and the media withdrew.

3. Adjournment

The Committee adjourned at 5.20 pm until 19 March 2009.

Rachel Callinan
Clerk to the Committee

Minutes No. 29

Thursday 19 March 2009

Jubilee Room, Parliament House, Sydney at 9.00 am

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Hale
Ms Fazio (9:30 am)

2. Public hearing – Inquiry into legislation on altruistic surrogacy in NSW

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- Associate Professor Anita Stuhmcke, Faculty of Law, University of Technology Sydney.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Professor Gerry Gleeson, Professor of Philosophy, Catholic Institute of Sydney.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined via teleconference:

- Associate Professor Roger Cook, Counselling and Clinical Psychologist and Director, Psychology Clinic, Swinburne University of Technology, Victoria.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined via teleconference:

- Associate Professor Nicholas Tonti-Filippini, Associate Dean (Teaching, Learning and Research) and Head of Bioethics, John Paul II Institute for Marriage and Family.

The evidence concluded and the witness withdrew.

The public hearing concluded at 12:15 pm. The public and the media withdrew.

3. Deliberative meeting

3.1 Minutes

Resolved, on the motion of Mr Ajaka: That Minutes No. 26 and 27 be confirmed.

3.2 ***

3.3 Publication of documents

Resolved, on the motion of Ms Fazio: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of:

- ***
- ***
- Submissions 38 and 39 to the Inquiry into legislation on altruistic surrogacy.
- Transcripts of evidence from 18 and 19 March 2009 for the Inquiry into legislation on altruistic surrogacy.
- ***

3.4 Other matters

Resolved, on the motion of Ms Fazio: That the Committee write to the Standing Committee of Attorney's General (SCAG) to advise, in relation to its consultation into a proposal for a national model to harmonise regulation of surrogacy, that the Committee is in the process of completing its Inquiry into legislation on altruistic surrogacy and expects to table its report in the Legislative Council at the end of May 2009 and that a copy of the report will be forwarded to SCAG at that time.

3.5 ***

4. ***

5. ***

6. Adjournment

The Committee adjourned at 6.00 pm until 23 April 2009.

Rachel Callinan
Clerk to the Committee

Minutes No. 30

Thursday 23 April 2009

Room 1102, Parliament House, Sydney at 9.25 am

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Hale
Ms Fazio

2. Minutes

Resolved, on the motion of Ms Hale: That draft Minutes No. 28 and 29 be confirmed.

3. Inquiry into legislation on altruistic surrogacy in NSW

3.1 Correspondence

Resolved, on the motion of Ms Fazio: That the following items of correspondence be noted:

Received

- 27 March 2009 – Answers to QON from Ms Linda Wright
- 1 April 2009 – Answers to QON from Mr Ray Campbell, Queensland Bioethics Centre
- 2 April 2009 – Answers to QON from Revd. Dr Ford, Anglican Church, Sydney
- 6 April 2009 – Answers to QON from Ms Myfanwy Walker, TangledWebs Inc.
- 6 April 2009 – Answers to QON from Associate Professor Anita Stuhmcke
- 6 April 2009 – Answers to QON from Ms Miranda Montrone
- 9 April 2009 – Answers to QON from NSW Department of Health
- 14 April 2009 – From Associate Professor Roger Cook, providing further information.
- 15 April 2009 – Answers to QON from Family Voice Australia.
- 17 April 2009 – Answers to QON from Access, Australia's Infertility Network.

Sent

- 24 March 2009 – From Chair to Mr Glanfield AM, Secretary to SCAG, advising that the Committee is completing its inquiry into altruistic surrogacy and will forward a copy of the report to the SCAG secretariat when it is tabled.

3.2 Publication of answers to questions on notice

Resolved, on the motion of Mr Ajaka: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of the answers to questions on notice received from witnesses appearing at Committee's hearings on 18 and 19 March 2009.

3.3 Publication of submission

Resolved, on the motion of Mr Ajaka: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of Submission 40 to the Inquiry into legislation on altruistic surrogacy in NSW.

4. ***

5. ***

6. Adjournment

The Committee adjourned at 11.00am until 9.00am 18 May 2009.

Rachel Callinan

Clerk to the Committee

Draft Minutes No. 31

Monday 18 May 2009

Room 1102, Parliament House, Sydney at 9.25 am

1. Members present

Ms Robertson (Chair)

Mr Clarke (Deputy Chair)

Mr Donnelly

Mr Ajaka

Ms Hale

Ms Fazio

2. Minutes

Resolved, on the motion of Mr Ajaka: That draft Minutes No. 30, as amended, be confirmed.

3. ***

4. ***

5. Inquiry into legislation on altruistic surrogacy in NSW

5.1 Correspondence

Resolved, on the motion of Ms Fazio: That the following item of correspondence be noted:

Received

- 1 May 2009 – Email from Dr Bowman, Medical Director, Sydney IVF, to secretariat, in response to request to clarify oral evidence.

5.2 Consideration of the Chair's draft report

The Chair tabled her draft report titled 'Legislation on altruistic surrogacy in NSW', Report 38, which, having been previously circulated, was taken as being read.

The Committee proceeded to consider the draft report in detail.

Chapter 1 read.

Resolved, on the motion of Mr Ajaka: That Chapter 1 be adopted.

Chapter 2 read.

Mr Donnelly moved: That paragraph 2.7 be amended by inserting the words 'including the right of a child to have a mother and father' in the first sentence after the word 'formation'.

Resolved, on the motion of Mr Ajaka: That the motion of Mr Donnelly be amended by omitting the word 'including' and inserting instead 'such as', and inserting the words 'or otherwise' after 'father'.

Original question, as amended, put.

The Committee divided.

Ayes: Mr Ajaka, Mr Clarke, Mr Donnelly

Noes: Ms Fazio, Ms Hale, Ms Robertson.

Question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Donnelly: That after paragraph 2.14 a new paragraph 2.15 under the heading 'Residency' be inserted as follows:

Australia is a federation of states and territories and the practice of surrogacy is now conducted on a nationwide basis. Issues around residency and interstate surrogate and clinic selection are discussed in Chapter 4.

Resolved, on the motion of Ms Hale: That Chapter 2, as amended, be adopted.

Chapter 3 read.

Resolved, on the motion of Mr Ajaka: That the second introductory paragraph be amended by inserting the word 'fatherhood' after the word 'motherhood' in the first sentence.

Resolved, on the motion of Ms Hale: That the second introductory paragraph be amended by omitting the words 'the rights of intending parents,' after the word 'family' in the first sentence, and inserting them after the word 'children,' in that sentence.

Resolved, on the motion of Mr Donnelly: That the second introductory paragraph be amended by inserting the words ', such as the right of the child to have a mother and father, or otherwise' after the word 'children' in the first sentence.

Resolved, on the motion of Mr Donnelly: That the third introductory paragraph be amended by omitting the words 'While there were views expressed both in support of and in opposition to surrogacy' and inserting instead 'While there was a range of views expressed, varying between outright support and

outright opposition to surrogacy' and by inserting the words 'in principle or believed that it should be carefully restricted' at the end of the first sentence.

Resolved, on the motion of Mr Ajaka: That paragraph 3.11 be amended by inserting the word 'fatherhood' after the word 'motherhood' in the second sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 3.11 be amended by inserting the words 'such as the right of the child to have a mother and father' after the word 'child' in the second sentence.

Resolved, on the motion of Ms Hale: That the heading 'Social constructs of motherhood and family' on page 25 be omitted and the heading 'Social constructs of motherhood, fatherhood and family' be inserted instead.

Resolved, on the motion of Mr Donnelly: That paragraph 3.75 be amended by inserting as the final sentence the words 'This point illustrates the complexity of surrogacy arrangements and the need to consistently apply terminology relating to the description of parties to avoid confusion.'

Ms Fazio moved: That paragraph 3.141 be deleted.

Question put.

The Committee divided.

Ayes: Ms Fazio, Ms Hale

Noes: Mr Ajaka, Mr Clarke, Mr Donnelly, Ms Robertson.

Question resolved in the negative.

Resolved, on the motion of Ms Hale: That the final sentences of paragraph 3.151 and 3.152 be amended by omitting the word 'undermined' and inserting instead the word 'questionable'.

Resolved, on the motion of Mr Donnelly: That paragraph 3.153 be amended by omitting the words 'The Committee does note' and inserting instead the words "The majority of the Committee notes'.

Resolved, on the motion of Ms Hale: That paragraph 3.153 be amended by inserting as the final sentence the words 'The Committee believes that further longitudinal studies should be undertaken.'

Mr Donnelly moved: That paragraph 3.153 be amended by inserting as the final sentence the words 'Other Committee members believe that a cautious approach should be adopted. They believe that there is a need for longitudinal research to be conducted to properly assess the outcomes of surrogacy arrangements on children.'

Resolved, on the motion of Ms Hale: That the motion of Mr Donnelly be amended by omitting the words after 'That' and inserting instead the words 'a new paragraph be inserted after paragraph 3.153 to read 'Other Committee members believe that a cautious approach should be adopted until such studies have been completed, including longitudinal research to properly assess the outcomes of surrogacy arrangements for children.'"

Original question, as amended, put and passed.

Resolved, on the motion of Mr Donnelly: That paragraph 3.154 be amended by inserting the words 'majority of the' before the word 'Committee' in the first and second sentences.

Resolved on the motion of Mr Ajaka: That paragraph 3.154 be amended by omitting the following complete paragraph:

In summary, the majority of the Committee is not persuaded there is a clear case against surrogacy on the grounds that it is not in the best interests of the child born through the arrangement. In addition, the majority of the Committee notes the viable option surrogacy presents to people who may have no other means of having children, and particularly the opportunity it present to couples to have a child they are genetically related to when this would be impossible by any other means.

and inserting instead:

The minority of Committee members hold the view that there is a clear case against surrogacy as a matter of principle, and that the risks and harms to the individual and the common good far outweigh any benefits or potential benefits. These members are particularly concerned that the regulation of the practice of surrogacy implies that it is socially and legislatively condoned and that this will contribute to its normalisation and encouragement. Such an outcome, in their view, is not desirable. However, the majority of Committee members are persuaded that there is a clear case in favour of surrogacy. In addition, the majority of Committee members note the viable option surrogacy presents to people who may have no other means of having children, and particularly the opportunity it presents to couples to have a child they are genetically related to when this would be impossible by any other means.

Resolved, on the motion of Mr Ajaka: That Chapter 3, as amended, be adopted.

Chapter 4 read.

Resolved, on the motion of Mr Donnelly: That following paragraph 4.76 a new paragraph 4.77 be inserted as follows:

The Committee notes that the guidelines and policies developed by individual ART service providers are not legally enforceable and are subject to unilateral change by the providers.

Resolved, on the motion of Mr Donnelly: That paragraph 4.89 be amended by inserting the words 'majority of the' before the word 'Committee' in the first and second sentences.

Resolved, on the motion of Mr Donnelly: That paragraph 4.89 be amended by inserting as the final sentence the words 'The other Committee members do not share these views. They note that eligibility criteria for parties to surrogacy arrangements are to be found throughout surrogacy legislation that has already been enacted in other Australian jurisdictions and overseas. Moreover, they express concern that the internal guidelines and policies of ART service providers are not legally enforceable and are subject to unilateral change by the providers.'

Resolved, on the motion of Mr Donnelly: That paragraphs 4.90 and 4.91 be amended by inserting the words 'majority of the' before the word 'Committee'.

Resolved, on the motion of Mr Donnelly: That paragraph 4.91 be amended by inserting as the final sentence the words 'The other Committee members believe that this minimalist approach is highly problematic because it fails to acknowledge and address a number of issues that arise from surrogacy.'

Resolved, on the motion of Mr Donnelly: That paragraph 4.92 be amended by omitting the words 'this principle' and inserting instead the words 'the principle that government regulation of altruistic surrogacy should be kept to a minimum'.

Resolved, on the motion of Mr Donnelly: That paragraph 4.92 be amended by inserting as the final sentence the words ‘As noted above, not all Committee members accept the minimalist premise as being the correct starting point to examine the range of issues associated with surrogacy.’

Resolved, on the motion of Mr Donnelly: That the first sentence of paragraph 4.96, the first sentence of paragraph 4.97 and the first and second sentences of paragraph 4.98 be amended by inserting the words ‘majority of the’ before the word ‘Committee.’

Resolved, on the motion of Mr Donnelly: That paragraph 4.98 be amended by inserting as the final sentence the words ‘The other Committee members believe that NSW should wait for the outcome of the SCAG process that is currently underway before legislating further in the area of surrogacy. Furthermore, they are of the view that further regard should be given to certain elements of the SCAG discussion paper.’

Resolved, on the motion of Ms Fazio: That Chapter 4, as amended, be adopted.

Chapter 5 read.

Resolved, on the motion of Mr Donnelly: That the second introductory paragraph be amended by inserting the words ‘majority of the’ before the word ‘Committee.’

Resolved, on the motion of Mr Donnelly: That the second introductory paragraph be amended by inserting as the final sentence the words ‘Some Committee members note that eligibility criteria for parties to surrogacy arrangements are to be found in current and proposed surrogacy legislation in other Australian jurisdictions. They are also commonly found in surrogacy legislation overseas.’

Resolved, on the motion of Mr Ajaka: That paragraph 5.34 be amended by omitting the word ‘and’ in the first sentence after the word ‘support’ and inserting instead the words ‘(general counselling), as opposed to’, inserting the words ‘(assessment counselling)’ after the word ‘arrangement’, inserting the word ‘general’ before the word ‘counselling’ in the second sentence, and omitting the words ‘aimed at informing decision making and providing support’ after the word ‘counselling’ in the second sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 5.38 be amended by inserting the words ‘of this report’ after the words ‘Chapter 4’.

Resolved, on the motion of Mr Ajaka: That Recommendation 1 be amended by inserting the word ‘counselling’ after the word ‘assessment’.

Resolved, on the motion of Mr Donnelly: That Recommendation 1 be amended by inserting as the final sentence the words ‘The counselling standard should meet the requirements of the NHMRC guidelines.’

Resolved, on the motion of Mr Ajaka: That Recommendation 1, as amended, be adopted.

Resolved, on the motion of Ms Hale: That Recommendation 2 be adopted.

Resolved, on the motion of Mr Ajaka: That paragraph 5.52 be amended by omitting the word ‘commends’ and inserting instead the word ‘notes’ and by inserting the word ‘independent’ in the last line before the words ‘legal advice.’

Resolved, on the motion of Ms Hale: That paragraph 5.53, as follows, be deleted:

The Committee notes that if the NSW Government adopts the recommendations made in Chapter 6 in relation to the reimbursement of reasonable expenses to the birth mother, and in

relation to a transferral of parentage scheme specific to surrogacy arrangements, the legal situation in relation to surrogacy which has hitherto been very complicated, will be considerably clearer.

Resolved, on the motion of Mr Donnelly: That following paragraph 5.52 a new paragraph be inserted as follows:

The Committee believes that all parties entering into a surrogacy agreement should obtain independent legal advice.

Resolved, on the motion of Mr Donnelly: That following paragraph 5.53 a new Recommendation be inserted as follows:

That the NSW Government seek to amend the *Assisted Reproductive Technology Act 2007* (NSW) to establish a requirement that all parties entering into a surrogacy agreement should obtain independent legal advice.

Resolved, on the motion of Mr Ajaka: That the Committee secretariat determine whether the word 'certified' or another suitable word, should be inserted in Recommendation 3 before the words 'legal advice.'

Resolved, on the motion of Mr Donnelly: That the Committee secretariat circulates Recommendation 3 to Committee members for their comments prior to inclusion in the final report.

Resolved, on the motion of Mr Donnelly: That paragraph 5.69 be amended by inserting the words 'majority of the' before the word 'Committee' in the second and third sentences.

Resolved, on the motion of Mr Donnelly: That paragraph 5.69 be amended by inserting as the final sentence the words 'Some Committee members believe, however, that there may be valid reasons for legally prohibiting certain surrogacy arrangements.'

Resolved, on the motion of Mr Donnelly: That paragraph 5.76 be amended by inserting the words 'majority of the' before the word 'Committee' in the first sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 5.83 be amended by inserting as the final sentence the words 'The Committee believes that the issue of the prevalence of unregistered clinics facilitating surrogacy arrangements in NSW is important and that more information about this matter needs to be collected by the NSW Government.'

Resolved, on the motion of Mr Donnelly: That paragraph 5.115 be amended by inserting as the final sentence the words 'They argued that a child's best interest is served by the presence of a mother and father in a permanent, preferably married, relationship. They also spoke about the unique nature of both mothering and fathering and the contributions they both make to the nurturing and development of children.'

Resolved, on the motion of Mr Donnelly: That paragraphs 5.124, 5.125, 5.126 and 5.127 be amended by inserting the words 'majority of the' before the word 'Committee' each time it appears.

Resolved, on the motion of Mr Donnelly: That paragraph 5.127 be amended by inserting as the final sentence the words 'Other Committee members argued that surrogacy was morally wrong as a matter of principle. Moreover, it was not in a child's best interest to be placed in circumstances where they would not be raised with the presence of a mother and father in a permanent, preferably, married relationship.'

Resolved, on the motion of Mr Donnelly: That paragraph 5.152, the second sentence of paragraph 5.153, paragraph 5.154, the second sentence of paragraph 5.155, paragraph 5.156 and the first, third and fourth sentences of paragraph 5.157 be amended by inserting the words 'majority of the' before the word 'Committee'.

Resolved, on the motion of Mr Donnelly: That following paragraph 5.154 a new paragraph be inserted as follows:

Other Committee members believe that if the NSW Government is going to consider further legislative prescription with respect to surrogacy it should, like Western Australia and Victorian legislation, require the surrogate mother to be at least 25 years of age and to have previously carried a pregnancy and given birth.'

Mr Donnelly moved: That following paragraph 5.155 a new Recommendation be inserted as follows:

That the NSW Government seek to amend the *Assisted Reproductive Technology Act 2007* (NSW) to require a surrogate mother to be at least 25 years of age and to have previously carried a pregnancy and given birth.

Question put.

The Committee divided.

Ayes: Mr Clarke, Mr Donnelly

Noes: Mr Ajaka, Ms Fazio, Ms Hale, Ms Robertson.

Question resolved in the negative.

Resolved, on the motion of Mr Ajaka: That paragraph 5.156 be amended by omitting the word 'and' after the word 'clinic' in the second last line and by inserting the words 'and by requiring parties to obtain independent legal advice' at the end of the last sentence.

Resolved, on the motion of Mr Donnelly: That following paragraph 5.156 a new paragraph be inserted as follows:

Some Committee members, however, believe that screening provisions contained in surrogacy legislation in other jurisdictions, both Australian and overseas, should be examined in detail by the NSW Government.

Resolved, on the motion of Mr Donnelly: That following the new paragraph inserted, by amendment, after paragraph 5.156 a new Recommendation be inserted as follows:

That the NSW Government examine in detail the screening provisions contained in surrogacy legislation in other jurisdictions, both Australian and overseas.

Resolved, on the motion of Ms Fazio: That Chapter 5, as amended, be adopted.

Chapter 6 read.

Resolved, on the motion of Mr Donnelly: That paragraph 6.33 be amended by inserting the words 'majority of the' before the word 'Committee' in the first and second sentences.

Resolved, on the motion of Mr Ajaka: That paragraph 6.33 be amended by omitting the words 'appears to the Committee to be a reasonably common practice' in the third sentence, and inserting instead the words 'the Committee has recommended (Recommendation 3) be part of the surrogacy process'.

Mr Donnelly moved: That paragraph 6.33 be amended by inserting as the final sentence the words 'Other Committee members believe that in light of legislative developments in other Australian jurisdictions, the NSW Government should consider establishing an independent, government appointed, expert review panel that would oversee surrogacy arrangements.'

Question put.

The Committee divided.

Ayes: Mr Ajaka, Mr Clarke, Mr Donnelly

Noes: Ms Fazio, Ms Hale, Ms Robertson.

Question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Donnelly: That following paragraph 6.33 a new Recommendation be inserted as follows:

That the NSW Government should consider the desirability of establishing an independent, government appointed, expert review panel that would oversee surrogacy arrangements.

Resolved, on the motion of Mr Donnelly: That paragraph 6.34 be amended by inserting the words 'majority of the' before the word 'Committee' in the first sentence.

Resolved, on the motion of Ms Hale that paragraph 6.34 be amended by reversing the order of the two sentences it contains.

Resolved, on the motion of Mr Donnelly: That following paragraph 6.34 a new paragraph be inserted as follows:

On the question of the rights of parties to surrogacy arrangements, other Committee members do not believe that these matters should be left up to the discretion of lawyers and the individuals involved in the surrogacy arrangements. A further examination of these important aspects of surrogacy should be initiated by the NSW Government.

Mr Donnelly moved: That following the new paragraph inserted, by amendment, after paragraph 6.34 a new Recommendation be inserted as follows:

That the NSW Government conduct an examination of the rights of parties to surrogacy agreements giving particular attention to provisions within legislation in Australian and overseas jurisdictions that deal with these issues.

Question put and negatived.

Resolved, on the motion of Mr Donnelly: That paragraph 6.35 be amended by inserting as the final sentence the words 'Some Committee members believe, however, that the *Assisted Reproductive Technology Act 2007* (NSW) should be amended to prohibit advertising and brokerage activity in relation to surrogacy, not just commercial surrogacy.'

Resolved, on the motion of Mr Donnelly: That following paragraph 6.35 a new Recommendation be inserted as follows:

That the NSW Government review the *Assisted Reproductive Technology Act 2007* (NSW) in relation to the prohibition on advertising and brokerage activity associated with surrogacy.

Resolved, on the motion of Mr Ajaka: That paragraph 6.62 be amended by inserting the words ‘and which prevents, as far as possible, circumvention of the prohibition on commercial surrogacy’ following the word ‘arrangement’ at the end of the first sentence.

Resolved, on the motion of Mr Ajaka: That paragraph 6.62 be amended by deleting the words ‘and the issue of a payment to the birth mother in recognition of the ‘pain and suffering’ experienced during pregnancy and birth’ following the words ‘giving birth’.

Resolved, on the motion of Mr Donnelly: That paragraph 6.62 be amended by inserting as the final sentence the words ‘Other Committee members are further concerned that the dichotomy between commercial and altruistic surrogacy, based on the question of fee and reward, is not as clear as it may seem. Moreover, it is acknowledged that the question of ‘reasonable expenses’ cannot be left up to the discretion of parties because of the potential to blur the difference between altruistic and commercial surrogacy arrangements. Accordingly, the NSW Government must ensure that any reimbursements should be minimised and any payments or incentives forbidden.’

Resolved, on the motion of Mr Donnelly: That Recommendation 3 be amended by inserting the words ‘, and provide that any reimbursements must be verifiable and that any other payments or incentives are prohibited to discourage commercial surrogacy arrangements’ following the word ‘arrangement’ at the end of the first sentence.

Ms Fazio moved: That following paragraph 6.65 a new Recommendation be inserted as follows:

That the NSW Government amend the *Status of Children Act 1996* (NSW) to remove the presumption of parenthood in relation to children conceived through a surrogacy arrangement from the birth mother and her partner in favour of the commissioning parents.

Question put.

The Committee divided.

Ayes: Ms Fazio

Noes: Mr Ajaka, Mr Clarke, Mr Donnelly, Ms Hale, Ms Robertson.

Question resolved in the negative.

Resolved, on the motion of Mr Ajaka: That paragraph 6.70 be amended by omitting the words ‘Federal Magistrates Court of Australia’ and inserting instead the words ‘equivalent court of jurisdiction’.

Resolved, on the motion of Mr Donnelly: That paragraph 6.147 be amended by inserting the words ‘evidence that all parties have received independent legal advice’ after the words ‘pre-conception surrogacy agreement’.

Resolved, on the motion of Mr Donnelly: That paragraph 6.147 be amended by inserting the words ‘both prior to conception and the application to transfer parentage’ after the word ‘counselling’.

Resolved, on the motion of Mr Donnelly: That paragraph 6.148 be amended by inserting the words ‘majority of the’ before the word ‘Committee’.

Resolved, on the motion of Mr Donnelly: That paragraph 6.150 be amended by inserting as the final two sentences the words ‘The fundamental requirement for the issue of a parentage order will be that such an order is in the child’s best interest. The Court should continue to have its unfettered discretion to decide where lies the child’s best interest.’

Resolved, on the motion of Mr Ajaka: That paragraph 6.150 be amended by omitting the words ‘within six weeks to six months after’ and inserting instead the words ‘after six weeks of’.

Mr Donnelly moved: That paragraph 6.151 be amended by inserting the words ‘consideration of the right of the child to be raised by a mother and father in a married relationship’ after the word ‘include’.

Question put.

The Committee divided.

Ayes: Mr Clarke, Mr Donnelly

Noes: Mr Ajaka, Ms Fazio, Ms Hale, Ms Robertson.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That paragraph 6.151 be amended by inserting the words ‘evidence that all parties have received independent legal advice’ after the words ‘pre-conception surrogacy agreement’.

Mr Donnelly moved: That paragraph 6.151 be amended by inserting the words ‘both prior to conception and the application to transfer parentage’ after the word ‘counselling’.

Question put and resolved in the affirmative.

On the question being put, Ms Fazio, being the only member voting for the noes, asked for her vote to be recorded in the minutes.

Resolved, on the motion of Mr Clarke: That following paragraph 6.151 a new paragraph be inserted as follows:

A minority of Committee members believe that an additional factor for the Court to consider is the right of the child to be raised by a mother and father in a married relationship.

Ms Fazio moved: That Recommendation 4 be amended by omitting the words ‘preserving the presumption of legal parentage on the birth of a child in favour of the birth mother, and’.

Question put.

The Committee divided.

Ayes: Ms Fazio

Noes: Mr Ajaka, Mr Clarke, Mr Donnelly, Ms Hale, Ms Robertson.

Question resolved in the negative.

Resolved on the motion of Mr Ajaka: That Recommendation 4 be amended to reflect the resolutions relating to paragraphs 6.150 and 6.151.

Mr Donnelly moved: That Recommendation 4 be amended by inserting as the first dot point the words 'Consideration of the right of a child to be raised by a mother and father in a married relationship'.

Question put.

The Committee divided.

Ayes: Mr Clarke, Mr Donnelly

Noes: Mr Ajaka, Ms Fazio, Ms Hale, Ms Robertson

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That Recommendation 4 be amended by inserting as a new dot point the words 'Evidence that all parties have received independent legal advice.'

Mr Donnelly moved: That Recommendation 4 be amended by inserting the words 'both prior to conception and the application to transfer parentage' after the word 'counselling' in the second dot point.

Question put and resolved in the affirmative.

On the question being put, Ms Fazio, being the only member voting for the noes, asked for her vote to be recorded in the minutes.

Resolved, on the motion of Ms Hale: That paragraph 6.153 be amended by inserting the words 'for surrogacy' after the word 'register' in the second sentence, putting a full stop after the word 'proposed', omitting the following word 'and' and inserting instead the words 'In this regard', and by inserting the words 'which is' after the words 'suitability of the register'.

Resolved, on the motion of Mr Donnelly: That paragraph 6.178 be amended by omitting the entire paragraph as follows:

The Committee notes the importance of information regarding parenthood that is recorded on a child's birth certificate. The Committee believes that the principles and practices relating to the adoption process can be applied to surrogacy arrangements, in that once legal parentage has been transferred to the intending parents through the new process recommended by the Committee, a new birth certificate should be produced noting them as the parents of the child. In this instance, as with adoption, the original birth certificate should be retained and made available to the child under the same conditions that apply in the context of adoption.

and inserting instead:

The Committee notes the importance of information regarding parenthood that is recorded on a child's birth certificate. Once legal parentage has been transferred to the intending parents through the new process recommended by the Committee, a new birth certificate should be produced identifying them, and only them, as the parents of the child and noting that an original birth certificate exists. In this instance, the original birth certificate should be retained and made available to the child under the same requirements provided in the *Births, Deaths and Marriages Registration Act 1995* (NSW) relating to all birth certificates.

Mr Donnelly moved that: That following the paragraph inserted by amendment at 6.177, a new paragraph be inserted as follows:

In addition, the majority of Committee members believe that for a child born as a result of a surrogacy agreement it is in their best interest that their original birth certificate records all the parties to the arrangement, including gamete donors where they exist.

Question put and resolved in the affirmative.

On the question being put, Ms Fazio, being the only member voting for the noes, asked for her vote to be recorded in the minutes.

Resolved, on the motion of Mr Donnelly: That paragraph 6.180 be amended by omitting the entire paragraph as follows:

Therefore, the Committee recommends that when parentage is transferred to intending parents in a surrogacy arrangement, an amended birth certificate be issued noting them and only them as the legal parents of the child. The original birth certificate should be retained and access be governed by the same requirements relating to original birth certificates in the context of adoption.

Resolved on the motion of Mr Donnelly: That following paragraph 6.180 a new recommendation be inserted as follows:

That the NSW Government pursue legislation requiring that the original birth certificate issued for a child born through a surrogacy arrangement record the names of all parties to the arrangement, including the birth parent(s), the intending parent(s) and gamete donors where they exist.

Resolved on the motion of Mr Donnelly: That Recommendation 5 be amended by omitting the following sentences:

That the NSW Government pursue legislation requiring an amended birth certificate to be issued when legal parentage is transferred to intending parents in a surrogacy arrangement, with the amended birth certificate noting the intending parents and only the intending parents as the parent of the child born through the surrogacy arrangement. The original birth should be retained with access to it governed by the same requirements as govern access to original birth certificates in the context of adoption.

and inserting instead:

That the NSW Government pursue legislation requiring that an amended birth certificate be issued for a child born through a surrogacy arrangement following the transferral of parentage to the intending parent(s) and that the amended birth certificate record the names of the intending parents only and include a notation that an original birth certificate exists. The original birth certificate should be retained and made available to the child under the same requirements provided in the *Births, Deaths and Marriages Registration Act 1995* (NSW) relating to all birth certificates.

Mr Donnelly moved: That following Recommendation 5 a new paragraph under the heading 'Residency' be inserted as follows:

Australia is a federation of states and territories and the practice of surrogacy is now conducted on a nationwide basis. Interstate surrogate and clinic shopping are not seen as desirable practices by the Committee.

Question put.

The Committee divided.

Ayes: Mr Clarke, Mr Donnelly

Noes: Mr Ajaka, Ms Fazio, Ms Hale, Ms Robertson.

Question resolved in the negative.

Mr Donnelly moved: That following Recommendation 5 a new recommendation be inserted as follows:

That the NSW Government amend the *Assisted Reproductive Technology Act 2007* (NSW) to require the intended parents and surrogate mother to ordinarily reside in New South Wales.

Question put.

The Committee divided.

Ayes: Mr Clarke, Mr Donnelly

Noes: Mr Ajaka, Ms Fazio, Ms Hale, Ms Robertson.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That following paragraph 6.187 and new paragraph be inserted as follows:

The Committee notes that the International Covenant on Civil and Political Rights 1966 contains a specific right with respect to freedom of conscience. Australia is a signatory to this Covenant. That right is recognised as a fundamental right and not a subsidiary right. Some Committee members therefore believe that the *Assisted Reproductive Technology Act 2007* (NSW) should be amended to incorporate a conscientious objection provision for practitioners and employees in the assisted reproductive industry so that they are not obliged to be involved in procedures and programmes to which they object, and that they will not be disadvantaged by exercising their right to conscientious objection.

Mr Donnelly moved: That following paragraph 6.187 a new recommendation be inserted as follows:

That the NSW Government, in accordance with current industry practice, will amend the *Assisted Reproductive Technology Act 2007* (NSW) to incorporate a conscientious objection provision for practitioners and employees in the assisted reproductive technology industry so that they are not obliged to be involved in procedures and programmes to which they object, and that they will not be disadvantaged by exercising their right to conscientious objection.

Question put.

The Committee divided.

Ayes: Mr Clarke, Mr Donnelly

Noes: Mr Ajaka, Ms Fazio, Ms Hale, Ms Robertson.

Question resolved in the negative.

Mr Ajaka moved: That following paragraph 6.187 a new recommendation be inserted as follows:

That the NSW Government, in accordance with current industry practice, give consideration to amending the *Assisted Reproductive Technology Act 2007* (NSW) to incorporate a conscientious objection provision for practitioners and employees in the assisted reproductive technology industry so that they are not obliged to be involved in procedures and programmes to which they object, and that they will not be disadvantaged by exercising their right to conscientious objection.

Question put.

The Committee divided.

Ayes: Mr Ajaka, Mr Clarke, Mr Donnelly

Noes: Ms Fazio, Ms Hale, Ms Robertson.

Question resolved in the negative on casting vote of the Chair.

Resolved, on the motion of Ms Hale: That Chapter 6, as amended be adopted.

Resolved, on the motion of Ms Fazio: That the executive summary be amended by the Secretariat to reflect the amendments made to the body of the report and be adopted.

Resolved, on the motion of Mr Ajaka: That the Committee Secretariat correct any typographical and grammatical errors in the report prior to tabling.

Resolved, on the motion of Ms Fazio: That the draft report, as amended, be the report of the Committee presented to the House, together with transcripts of evidence, submissions, tabled documents, minutes of proceedings, answers to questions on notice and correspondence relating to the inquiry, in accordance with Standing Order 231.

Resolved, on the motion of Ms Fazio: That dissenting statements be submitted to the secretariat within 24 hours after members are provided with a copy of the Draft Minutes No. 31.

6. General business

7. Next meeting

The Committee adjourned at 5:15 PM *sine die*.

Rachel Callinan
Clerk to the Committee

Appendix 5 Dissenting statements

DISSENTING STATEMENT – HON AMANDA FAZIO MLC

Paragraph 3.141 should have been deleted from the report.

I do not support the comments included in paragraph 3.141 as I consider that the Committee did not obtain evidence from any other sources to support the propositions put forward by Family Voice Australia (formerly *The Festival of Light*). The portion of the submission from which this assertion was taken was not referenced to any reputable research and therefore has, I believe, been given credibility that it does not deserve.

The presumption of legal parentage being given to the birth mother.

I do not support the continued presumption of legal parentage being given to the birth mother in respect of children born as a result of surrogacy arrangements. The Committee received a great deal of evidence that was compelling that this one factor caused the most angst to the parents of children born through surrogacy.

They currently have to legally adopt their children as if they had no role in the children being brought into existence. I believe that rather than recommending a transferral of parentage mechanism, the Committee should have supported my proposals to have the presumption in favour of birth mothers removed.

Further the Committee should have supported my amendments that the report include a recommendation:

That the NSW Government amend the Status of Children Act 1996 (NSW) to remove the presumption of parenthood in relation to children conceived through a surrogacy arrangement from the birth mother and her partner in favour of the commissioning parents.

As well, Recommendation 4 should have amended be deleting:

“preserving the presumption of legal parentage on the birth of a child in favour of the birth mother, and”

Information to be contained on the original birth certificate issued to a child born by surrogacy

I am completely opposed to the inclusion of the requirement outlined in paragraph 6.181 and Recommendation 5 *that the original birth certificate for a child born through a surrogacy arrangement record the names of all parties to the arrangement, including the birth parent(s), the intending parent(s) and gamete donors where they exist.*

This position is not compatible with the Regulatory Impact Statement for the Assisted Reproductive Technology Regulation 2008 and circumvents the safe guards referred to in the Impact Statement. Such unregulated and unfettered access to information for children born of surrogacy when they reach the age of 18 years, has the potential of breach the privacy of many individuals involved and could lead to tragic unforeseen consequences for the children and the gamete donors. For these very reasons, the

information made available to children who have been adopted is regulated and a Reunion and Information Register exists.

Hon Amanda Fazio MLC

DISSENTING STATEMENT – GREG DONNELLY

Surrogacy should be seen for what it is – an unwarranted social experiment that poses real risks for the individuals who are born from such arrangements, those involved in commissioning and participating in the arrangements, and for society as a whole. I believe that to ignore the risks and indeed the emerging evidence about the negative consequences associated with surrogacy is to ignore the truth about the nature of the practice itself, along with a range of difficulties and problems that it creates.

The range and depth of arguments that were presented to the inquiry in opposition to surrogacy in principle were compelling and persuasive. They included:

- Adult(s) do not have a right to a child. Children are the subjects not the objects or rights;
- Children have a right to be born and raised by their biological mother and father who are in a permanent, preferably married, relationship. Surrogacy denies children this right;
- The intrinsic nature of motherhood and fatherhood is deconstructed by surrogacy;
- Surrogacy arrangements commonly involve assisted reproductive technology which carries additional health risks to the child;
- There is no conclusive empirical evidence about the immediate and long term effects of surrogacy upon children. Therefore governments are obliged to take a cautious and considered approach to the practice.
- It is not possible to maintain the clear distinction between altruistic and commercial surrogacy arrangements; and
- We are now passing through the period where the first generation of children born of artificial reproductive technology, including surrogacy, are entering adulthood. Increasingly those born from such arrangements are articulating and expressing their concerns about the practice and its impact on them.

With governments charged with the responsibility to act for and on behalf of the common good, it seems that great care must be taken with respect to legislating and regulating in the area of surrogacy, given what is at stake now and into the future.

Surrogacy by its very nature is profoundly human and profoundly personal. It is critical therefore that the interests of children are accorded proper weight and consideration and are not subjugated by the desires of adults.

For this reason, the taking of a “hands-off”, minimalist approach to surrogacy as advocated by this report may not be the best starting point to examine the range of issues associated with the practice. The practice of surrogacy raises a number of serious issues. Leaving many of those issues to the “parties” and the service provider and embracing a market based model is not likely to protect the interests of children. It must be said that children born of such arrangements have not had, nor will they ever have, any say about a range of significant issues that profoundly impact on them.

It is my view that the Committee could, and indeed, should have looked at in a lot more detail the current and proposed surrogacy laws and regulations that operate in other Australian jurisdictions and overseas. That detailed analysis would have created a far more complete framework from which to propose amendments to NSW surrogacy laws.

With respect to Recommendation 6, it is important to note that it was developed in response to some Committee members suggesting that there should be a complete prohibition with respect to advertising and brokerage activity associated with all surrogacy arrangements. The current prohibition in NSW only

relates to commercial surrogacy. In calling on the NSW Government to review the current prohibition, the Committee is not suggesting that the prohibition should be lifted. It is my view that the NSW Government should review the *Assisted Reproductive Technology Act 2007* (NSW) to prohibit advertising and brokerage activity with respect to all surrogacy arrangements.

Given the importance of conscientious objection rights, the NSW Government should, in accordance with current industry practice, amend the *Assisted Reproductive Technology Act 2007* (NSW) to incorporate a conscientious objection provision for practitioners and employees in the ART industry so that they are not obliged to be involved in procedures and programmes to which the object, and that they will not be disadvantaged by exercising the right to conscientious objection. The assisted reproductive technology industry in NSW operates under NHMRC *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research*. Those guidelines contain a strong conscientious objection provision. Such a protection should be expressly covered by state legislation.

Surrogacy by its very nature is problematic for a range of reasons and therefore no government should directly or indirectly support the practice. Indeed, there are compelling arguments that government should do what it can to discourage the practice. It is particularly important that any regulation of the practice is done in such a way as to not imply that surrogacy is socially or legislatively condoned. The government must be careful not to act in such a way that would lead to the normalisation and encouragement of surrogacy. Such an outcome would not be desirable.

Hon Greg Donnelly MLC

