

Questions remaining from hearing: Inquiry into legislation on altruistic surrogacy in NSW

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This response is made by Anita Stuhmcke and Jenni Millbank jointly in order to supplement our written submission.

1. Your submission states that a 'holistic approach' to the regulation of surrogacy' is necessary – can you elaborate on this point?

A holistic legal approach many things to many people. The thrust of the submission made by Professor Millbank and I is that a holistic approach to the regulation of surrogacy must involve seeing the practice as a means of family formation and thereby NOT approaching it (as has traditionally been done in jurisdictions with legislation) as a practice which simply requires 'for' or 'against' style regulation. This means that the regulation of surrogacy must not be approached in isolation as the practice cuts across issues of health, ethics, and family law. As noted in our submission the regulation of surrogacy across all Australian jurisdictions involves three interlinked dimensions of law:

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

The second aspect of a holistic approach is to note that the federal regulation of this area in Australia means that while the provision of surrogacy itself falls squarely within the purview of state and territory laws, the other dimensions of surrogacy law are not so clear cut. The second

dimension, the use of ARTs, involves the interplay of state law, federal health funding, and a range of ethics regulation from both government and industry bodies. The third dimension, parental status, involves the jurisdictions of both state and federal law in allocating parental status and parental responsibility, respectively.

The advantage of a holistic approach is that it focuses on the whole of the issue of surrogacy as a way of finding more healthy and sustainable solutions to legal problems. The whole picture of surrogacy includes more than just a focus on the issue of surrogacy. It is necessary for the New South Wales Government to be aware of a holistic approach to the regulation of surrogacy as in addition to the complex, shifting and inconsistent relationship between these three 'dimensions of law', the division of jurisdictions in Australia results in a fragmented approach to each dimension across the various state, territory and federal governments. This adds an additional issue of coherence in this complex area: the relationship *between* various jurisdictions, some of which regulate ART through proscriptive legislation and others of which rely upon ethics focused self-regulation through the health sector.¹

2. The *ART Act* makes all surrogacy agreements void. Do you have any comment to make about the retrospective application of this provision?

There is no requirement for the retrospective application of this provision given that Australian courts will not enforce a surrogacy agreement.

3. Your submission (p6) notes that the UK is of particular relevance in relation to expanding understandings of 'payment' with respect to altruism. Can you tell us how this issue is dealt with in the UK?

Surrogacy is legal in the UK with the main proviso being that no money other than 'reasonable expenses' should be paid to the surrogate. There is no strict definition as what constitutes 'reasonable expenses'. Such expenses would include costs incurred by the birth mother as a result of the pregnancy. It is our understanding that it is left up to the individuals involved in a surrogate arrangement to come to an agreement regarding these expenses and that expenses paid directly to the surrogate can range from 10000 to 15000 pounds (see <<http://www.surrogacy.org.uk/pdf/expenses.pdf>> at 1 April 2009).

¹ See Kerry Petersen, 'The Regulation of Assisted Reproductive Technology: A Comparative Study of Permissive and Prescriptive Laws and Policies' (2002) 9 *Journal of Law and Medicine* 483; Isabel Karpin & Belinda Bennett, 'Genetic Technologies and the Regulation of Reproductive Decision-Making in Australia' (2006) 14 *Journal of Law and Medicine* 127.

It is also noteworthy that a recent important case heard in the UK has retrospectively authorised payments to a foreign surrogate (see *Re X & Y (foreign surrogacy)* [2008] EWHC 3030 (Fam)). In this case an English couple entered into a surrogacy arrangement with a Ukrainian woman and paid her a lump sum of 25,000 euros - plus further monthly payments. The Court held that the Human Fertilisation and Embryology Act 1990 could apply even though the surrogacy happened abroad and the Court authorised the payments in this case.

4. Your submission (p4) refers to ancillary services such as advertising, facilitating or advising on arrangements'. Do you have any views on whether there should be any legal controls on such services?

There should be no controls upon such services.

5. Your submission (p8-9) argues that the only criteria for entering an altruistic surrogacy arrangement should be the requirement for counselling which is currently required by all RTAC accredited ART facilities. Are there any particular aspects of the counselling process or monitoring of ART clinics that may need to be improved?

As we are not counsellors we do not wish to answer a question which is better left to those in the practice or study of this area.

6. Your submission (p9-11) supports maintaining the existing legislation that sets out parenting presumptions for children born through ART and creating a 'transfer of parentage scheme'.

*** Your submission (p 11) mentions the WA Bill includes 'contact plans', can you tell us about these plans and whether you think they would be a useful inclusion in NSW?**

An approved contact plan is one approved by a court which sets out matters such as communication between the adult parties and the child and information sharing arrangements.

