

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NSW

Organisation: Gay and Lesbian Rights Lobby

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Gay & Lesbian Rights Lobby

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NEW SOUTH WALES

SUBMISSION OF THE GAY & LESBIAN RIGHTS LOBBY (NSW)

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About the Gay & Lesbian Rights Lobby

Established in 1988, the Gay & Lesbian Rights Lobby (GLRL) is the peak representative organisation for lesbian and gay rights in New South Wales (NSW). Our mission is to achieve legal equality and social justice for lesbians and gay men.

The GLRL has a strong history in legislative relationship reform. In NSW, we led the process for the recognition of same sex de facto relationships, which led to the passage of the *Property (Relationships) Amendment Act 1999* and subsequent amendments. The GLRL was also successful in campaigning for the equalisation of the age of consent in NSW for gay men in 2003 and the first recognition of same-sex partners in federal superannuation law in 2004. In 2006, we conducted one of the largest consultations on same-sex relationship recognition in Australia, with over 1,300 gay, lesbian, bisexual and transgender people in metropolitan, regional and rural NSW. The final report published in 2007, *All Love is Equal ...Isn't It?*, highlighted the broad community need and desire for same-sex relationship recognition and equality.

The rights and recognition of children raised by lesbians and gay men have also been a strong focus in our work for over ten years. In 2002, we launched *Meet the Parents*, a review of social research on same-sex families. From 2001 to 2003, we conducted a comprehensive consultation with lesbian and gay parents that led to the law reform recommendations outlined in our 2003 report, *And Then ... The Bride Changed Nappies*. The major recommendations from our report were endorsed by the NSW Law Reform Commission's report, *Relationships* (No. 113), and enacted into law under the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW). We continue to work towards the outstanding recommendations.

ABBREVIATIONS

| | |
|------------------|---|
| ART | assisted reproductive technology |
| ART Act | <i>Assisted Reproductive Technology Act 2007</i> (NSW) |
| CRC | Convention on the Rights of the Child |
| FLA | <i>Family Law Act 1975</i> (Cth) |
| GLRL | Gay & Lesbian Rights Lobby (NSW) |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR Rights | International Covenant on Economic, Social and Cultural Rights |
| IVF | in-vitro fertilisation |
| NHMRC | National Health and Medical Research Council |
| NHMRC Guidelines | <i>Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research Use</i> (2007) |
| VLRC | Victorian Law Reform Commission |

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INTRODUCTION

The Gay & Lesbian Rights Lobby (GLRL) welcomes the opportunity to provide a submission for the *Inquiry into Altruistic Surrogacy*. Our submission is divided into two parts:

- **Part One:**
 - **Section A: Is there a need for regulation?** Section A of part one considers part A of the terms of reference, and discusses whether any regulation is required in relation to surrogacy in New South Wales (NSW). The GLRL believes that any regulation must be clearly justified and likely to achieve its intended purpose before private matters relating to reproduction and conception invite the interference of the State.
 - **Section B: A regulatory framework.** If the Committee decides to pursue a regulatory framework, section B of part one considers on what terms the process of regulation should proceed. This section addresses parts B and D of the terms of reference.
- **Part Two: The legal recognition of families formed through surrogacy.** Part two considers the legal status of children, surrogate mothers and intended parent(s) after the birth of a child through a surrogacy arrangement. We discuss the recognition of legal parentage, the consistency of recognition under state and territory laws and a child's ability to access information in relation to their genetic heritage. This section addresses parts C, D, E and H of the terms of reference.

Our submission is guided by some leading human rights principles. Namely, our submission recognises that the **best interests of the child should be the paramount consideration** for any regulation of surrogacy arrangements in NSW.¹ We strongly believe that the best interests of children should be determined in reference to robust empirical evidence rather than anecdotal or stereotypical notions of parenthood or family. Anything less would rob children of a real and fair analysis of what is in their best interests and has the potential to harm rather than support children's welfare.

¹ See Convention on the Rights of the Child (CRC), Art 3(1).

In addition to the paramount consideration for the best interests of the child, other important human rights principles that guide our submission and recommendations include:

- **The right to equality before the law.**² This right extends to children born through surrogacy, intended parents and surrogate mothers. The right to be equal before the law is a fundamental human right which complements the best interests of children. For example, the right to equality before the law recognises that it is not in the best interests of children to be discriminated against by virtue of the marital status or sexual orientation of their parents.³
- **The right to health.**⁴ Issues concerning access to assisted means of conception are intricately connected with issues of health and welfare for children and surrogate mothers in particular. Access to medical assistance (where desired) without fear of criminal sanction or stigma surrounding the circumstances of a pregnancy should be an important consideration in the regulatory response (if any) to altruistic surrogacy in NSW.
- **The right to privacy.**⁵ Issues concerning the conception of children are issues of a particularly private nature, which go to the core of intimate relationships. The right to privacy is not diminished just because a couple is infertile and seeks external assistance in having a child. The right to privacy is also important for a child born through surrogacy arrangements, to determine when circumstances surrounding their conception are disclosed to outsiders – for example, whether their genetic history is only available to them or to others via their birth certificate. Of course, the right to privacy must be balanced with other rights, including the importance of protecting the best interests of children. Nevertheless, the right to privacy should signal an initial reluctance for state interference unless a persuasive case to regulate and interfere with personal privacy can be made, *and* such interference achieves its intended purpose of securing, foremost, the best outcome for children, but also for surrogate mothers and intended parents.

² International Covenant on Civil and Political Rights (ICCPR), Art 26.

³ In particular, see CRC, Art 2; ICCPR, Art 24(1).

⁴ International Covenant on Economic, Social and Cultural Rights (ICESCR), Art 12.

⁵ ICCPR, Art 17.

These fundamental human rights principles have found expression in the first recommendation from the Victorian Law Reform Commission's (VLRC) final report into *Assisted Reproductive Technology & Adoption*. The VLRC recommended the following objects guide the carrying out of assisted reproductive technology:

- The welfare and interests of children to be born as a result of the use of assisted reproductive technology are paramount.
- At no time should the use of reproductive technology be for the purpose of exploiting (in trade or otherwise) either the reproductive capabilities of men and women or the children born as a result of the use of such technology.
- All children born as a result of the use of donated gametes have a right to information about their genetic parents.
- The health and wellbeing of people undergoing assisted reproductive treatment procedures must be protected at all times.
- People seeking to undergo assisted reproductive treatment procedures must not be discriminated against on the basis of their sexual orientation, marital status, race or religion.⁶

Taken together, our guiding principles and the VLRC's proposed objects emphasise the need for an empirically-based, human rights-aligned and workable response to regulating surrogacy in NSW which ensures the best interests of children foremost, but also protects the rights of surrogate mothers and intended parents.

The GLRL would be pleased to assist the inquiry further at the request of the Committee, by appearing at a public hearing or providing further information.

⁶ Victorian Law Reform Commission (VLRC) (2007) *Assisted Reproductive Technology & Adoption: Final Report*, Melbourne: VLRC at 9.

PART ONE – SECTION A: IS THERE A NEED FOR REGULATION?

The GLRL notes that part A of the terms of reference directly address *if any* regulation of altruistic surrogacy in NSW is desirable. The terms of reference clearly state:

The role, if any, that the NSW Government should play in regulating altruistic surrogacy arrangements in NSW [our emphasis].

We believe the words – ‘if any’ – should be given considerable weight and consideration. 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.

In light of the discussion about whether any regulation is necessary, we note the following:

- **There is no empirical evidence to suggest a ‘crisis’ in child welfare outcomes for children born through surrogacy arrangements.** A small body of emerging research has found that children born through surrogacy arrangements are psycho-socially well-adjusted.⁷ Concerns about a high likelihood of non-relinquishment by surrogate mothers have also been quelled by a small number of Australian and international studies.

A study in the United Kingdom (UK) involving 42 heterosexual families created through surrogacy, found that there was ‘minimal conflict between commissioning parents and the surrogate mothers’ – a key marker of positive child welfare outcomes.⁸ Most of the babies had been handed over to the intended parents within one day of the birth, with only one mother and one surrogate mother expressing slight doubts during the handover period.⁹ Many of the surrogate mothers (both known and unknown to the couple before the surrogacy arrangement) were intended to have a future role in the child’s life ‘(such as aunt, family friend, godmother)’, as the intended ‘parents ... felt the child would benefit’ from the

⁷ Dr Ruth McNair (2004) *Outcomes for Children Born of A.R.T. in a Diverse Range of Families* (occasional paper), Melbourne: VLRC at 7. This occasional paper formed part of the VLRC inquiry into *Assisted Reproductive Technology & Adoption*, see n6 above.

⁸ Fiona MacCallum, Emma Lycett, Clare Murray, Vasanti Jadvā & Susan Golombok (2003) ‘Surrogacy: The Experience of Commissioning Couples’, *Human Reproduction* 18(10): 1334-1342; cited in McNair, n7 above, at 47.

⁹ Ibid.

contact.¹⁰ All the intended parents in the study intended to tell the child about the circumstances of their conception before the child reached 5 years of age; openness being a 'further marker of positive child outcomes'.¹¹ Furthermore, 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.¹²

Another UK study focusing on the parent-child relationship between the child and their intended parents (in the first year of the child's life) also found that there may be greater psychological wellbeing and adaption to parenthood by families created through surrogacy. The Victorian Law Reform Commission said the research showed:

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.¹³

A submission to the Queensland inquiry into surrogacy by Access Australia noted a recent Australian study surveying 28 surrogate families.¹⁴ Questionnaires were sent to 60 individuals, comprising 23 intended mothers, 23 intended fathers and 14 gestational surrogate mothers (with an 84% response rate). The study found that:

23% of males and 33% of females were concerned that the surrogate would regret her decision, while none of the surrogates in the study expressed concerns about relinquishment.¹⁵

¹⁰ Ibid.

¹¹ Id, at 48.

¹² Ibid.

¹³ Susan Golombok, Clare Murray, Vasanti Jadva, Fiona McCallum & Emma Lycett (2004) 'Families Created through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life', *Developmental Psychology* 40(3):400 at 408; Cited in VLRC, n6 above, at 161.

¹⁴ Cited in Access Australia (2008) *Written submission 110*, Investigation into Altruistic Surrogacy Select Committee, Brisbane: Parliament of Queensland
<www.parliament.qld.gov.au/view/committees/documents/SURROGACY/Submissions/Sub%20110.pdf> [Accessed 4 August 2008].

¹⁵ Ibid.

This suggests that the possibility of non-relinquishment by the surrogate mother after the birth of the child may be a concern held by some intended parents – although not necessarily by surrogate mothers.

This finding is supported by further research by Australian psychologist and surrogacy researcher, Associate Professor Roger Cook from the Swinburne University of Technology. Associate Professor Cook stated in his submission to the Queensland inquiry that his research suggested:

[Surrogate mothers] were able to make a strong cognitive distinction between the baby that they might have for another woman and those that they had already had to form their own families. They were able to state unequivocally that the commissioning couples were the true parents and that the role of the surrogate mother was to help another woman by carrying the baby through a pregnancy. This cognitive adaptation enabled them to develop effective emotional detachment and consequently there were no reports in our group of any relinquishment difficulties.¹⁶

Some children born through surrogacy arrangements have also spoken about their experiences. In 1995, at the age of 7, Alice Kirkman – ‘Australia’s first child of gestational surrogacy’¹⁷ – had the following to say about her upbringing:

I am seven years old and it is amazing I was born. My family is the best family ever, but my mum and dad are the best. I am glad that I am alive and I am lucky to be alive.¹⁸

At 14, Alice Kirkman further reflected:

The genetics matter less than the relationships when it comes to mum, dad and child. Being born by donor insemination (DI) and IVF surrogacy causes much less trauma than being adopted, I think ... I knew that both my parents did want me, and that Linda [surrogate mother], my aunt, was just helping them.¹⁹

¹⁶ Associate Professor Roger Cook PhD FAPS (2008) *Written submission 99*, Investigation into Altruistic Surrogacy Select Committee, Brisbane: Parliament of Queensland, <www.parliament.qld.gov.au/view/committees/documents/SURROGACY/Submissions/Sub%2099.pdf> [Accessed 4 August 2008].

¹⁷ McNair, n7 above, at 46.

¹⁸ Sandra Dill (2006) ‘No Fairytale, Just Another Family’, *Sydney Morning Herald*, November 8, <www.smh.com.au/news/opinion/no-fairytale-just-another-family/2006/11/07/1162661681284.html> [Accessed 4 August 2008].

¹⁹ Alice Kirkman (2005) ‘Take One Egg’, *Good Weekend* (Melbourne), March 5, 47-48; cited in VLRC (2005) ‘Position Paper Three: Surrogacy’, *Assisted Reproductive Technology & Adoption*, Melbourne: VLRC at 6.

Whilst research in the area of surrogacy is still emerging, there is no empirical evidence at present to suggest any cause for alarm in relation to child welfare outcomes or outcomes for surrogate mothers and intended parents. This is despite no legislative regulation of surrogacy in NSW before 2007, and only the criminalisation of commercial surrogacy last year.²⁰ Any moves to further regulate surrogacy in NSW should only progress if a need for regulation can be demonstrated and justified.

- **The number of children born through surrogacy arrangements in Australia appears to be very low.** In its parliamentary inquiry into surrogacy, the South Australian Social Development Committee reported that, although precise statistical information was difficult to obtain, the number of children born through surrogacy arrangements each year in Australia appears to be very low.²¹ The South Australian Inquiry heard evidence from a psychologist specialising in infertility and assisted reproductive technology (ART) who reported that, over a 10-year period, she had only given advice in 47 cases involving surrogacy.²² Overseas, the numbers of surrogacy procedures also appears to be very low. From 1997 to 2003, New Zealand recorded only 5 live births from clinical surrogacy arrangements.²³ In the United Kingdom, around 35 IVF surrogacy procedures are performed each year.²⁴ Although relatively low numbers of surrogacy cases do not necessarily mean that regulation is unwarranted, it certainly calls for the incidence of surrogacy to be kept in perspective. Thousands more children are born through sexual intercourse, yet there is no similar campaign to regulate family formation through sexual intercourse (nor should there be). We contend that ethical ART should not be treated differently and regulation, if any is introduced at all, should take a measured approach to protect the best interests of children, as well as the right to health, privacy and equality before the law.

²⁰ *Assisted Reproductive Technology Act 2007* (NSW), ss 43-44.

²¹ South Australian Social Development Committee (2007) *Inquiry into Gestational Surrogacy*, Adelaide: Parliament of South Australia at 16.

²² Written submission by Miranda Montrone. Cited in SA Social Development Committee, n21 above, at 16.

²³ National Ethics Committee on Assisted Human Reproduction (2005) *Guidelines on IVF Surrogacy*, <www.newhealth.govt.nz/acart/documents/ivf-surrogacy/pdf> [Accessed 21 May 2007]; as cited in SA Social Development Committee, n21 above, at 16.

²⁴ <www.ivf-fertility.com/surrogacy/index/php> [Accessed 22 May 2007]; as cited in SA Social Development Committee, n21 above, at 16.

- At present in NSW, surrogacy has been effectively regulated by the National Health and Medical Research Council (NHMRC) Guidelines²⁵. This has enabled access to treatment and support for intended parents and surrogate mothers in order to make informed choices. Until 2007, NSW had no legislative regulation of surrogacy until commercial surrogacy was criminalised by the *Assisted Reproductive Technology Act 2007* (NSW) ('ART Act'). Before this time, the provision of ART services in relation to surrogacy was wholly regulated by the NHMRC Guidelines (which prohibited commercial surrogacy in any case²⁶).²⁷ Despite the permissive legislative framework in NSW there is no evidence of any surrogacy-led 'baby boom' – even though Australians have travelled from interstate to have their treatment conducted in our jurisdiction.²⁸ Further, there has been no demonstrated crisis in child welfare outcomes or negative outcomes for prospective surrogate mothers and intended parents.

In fact, it is arguable that for those people who are determined to have a baby, NSW provides a jurisdiction where access to fertility treatment and medical support is neither criminalised nor stigmatised. Therefore, intended parents and prospective surrogate mothers are able to make informed choices about their fertility and family formation, confident in the knowledge that their health and welfare inquiries would not fall foul of the law or disapproving attitudes. By contrast, the Tasmanian inquiry into surrogacy was 'alarmed' to note that one interpretation of Tasmanian law on surrogacy may in fact criminalise access to legal and psychological services for couples preparing to enter a lawful surrogacy arrangement interstate.²⁹ The Tasmanian example demonstrates that criminalising or stigmatising all, or some aspects, of the surrogacy process may simply prohibit access to medical, psychological and legal support services for intended parents and surrogate mothers because of fear of criminal sanction or disapproval. It is not in the best interests of prospective children to be born into a situation where the circumstances of their birth are questioned, nor does it further the health and welfare of the prospective surrogate mother or intended parents.

²⁵ National Health and Medical Research Council (NHMRC) (2007) *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research Use*, Canberra: NHMRC. <www.nhmrc.gov.au/publications/synopses/_files/e78.pdf> [Accessed October 1 2008].

²⁶ NHMRC Guidelines at [13.1]-[13.2]. *Id.*, at 57.

²⁷ SA Social Development Committee, n21 above, at 23.

²⁸ *Id.*, at 26.

²⁹ Tasmanian Legislative Council Select Committee (2008) *Surrogacy*, Hobart: Parliament of Tasmania at 18.

Importantly, if no further regulation is introduced, surrogacy will continue to be effectively regulated by the NHMRC Guidelines and, once it commences, the ART Act. In particular, the NHMRC Guidelines mandate that ART clinics **must** provide ready access to counselling before, during and after any ART procedure.³⁰ This gives prospective surrogate mothers and intended parents the opportunity to canvass all the issues before embarking on a surrogacy arrangement and assists in ensuring informed consent before any procedure. Further regulation in NSW, if pursued at all, should only aim to *improve* access to medical, psychological and legal services associated with surrogacy to ensure the best outcome for children, prospective surrogate mothers and intended parents.

- **The cost associated with pursuing surrogacy appears to be prohibitive for people from lower socio-economic status.** Research has suggested that parents who commission surrogacy arrangements tend to come from higher socio-economic statuses.³¹ Overregulation of altruistic surrogacy may exacerbate the costs, effectively discriminating against people from lower socio-economic statuses from being able to pursue surrogacy as an option for family formation.
- **Restrictive regulation may invite determined intended parents to ‘forum shop’ overseas.** It is clear that some overseas jurisdictions have very permissive surrogacy schemes. If NSW overly regulates altruistic surrogacy it could have the reverse effect of encouraging intended parents to ‘forum shop’ for more permissive jurisdictions overseas. This has already been in the case in the Australian experience, with intended parents from other Australian states seeking treatment in NSW fertility clinics because of restrictive jurisdictions elsewhere. This has been to the detriment of access to health and welfare services, as residents of one state are travelling extraordinary distances to have treatment in more permissive jurisdictions.³²

‘Forum shopping’ may also prohibit a child’s ability to access information about their genetic heritage or the practicality of establishing a contact relationship with the surrogate mother. Some preliminary research indicates that intended parents and surrogate mothers wish for the child to know about their conception, and many families created through surrogacy encourage a close contact relationship between

³⁰ NHMRC Guidelines at [9.3]. See NHMRC, n25 above, at 43-44.

³¹ McNair, n7 above, at 47. See also Tas Legislative Council Select Committee, n29 above, at 22.

³² SA Social Development Committee, n21 above, at 25-7.

the child and his or her surrogate mother.³³ Restrictive regulation which discourages localised surrogacy options may restrict the opportunity for these contact relationships to continue on a regular basis, particularly if the surrogate mother resides overseas. A permissive surrogacy scheme in NSW could also allow families to have access to the donor registry established by the ART Act, giving children the ability to access their genetic heritage later in life (that is, if their parents have not already disclosed such details).

The absence of empirical evidence suggesting the existence of adverse outcomes for children, surrogate mothers or intended parents following surrogacy arrangements, leads the GLRL to the view that there has been, to date, no demonstrated need for further regulating altruistic surrogacy in NSW beyond the terms of the ART Act. The NHMRC Guidelines provide a rigorous ethical framework which promotes access to counselling and ensures informed consent for all parties in a prospective surrogacy agreement. The Guidelines provide a framework for navigating complex social, moral, legal and medical questions of an extremely intimate nature in a sensitive and enabling environment, in a way which a blunt instrument of statutory regulation would not be able to accomplish. Furthermore, the commencement of a donor registry under the ART Act would also ensure that children born through surrogacy arrangements would be able to access information about their biological heritage, if their parents have not already given them access to such information.

Recommendation 1:

On the basis of available empirical evidence, the GLRL believes the current statutory and ethical frameworks for regulating altruistic surrogacy in NSW are adequate. The GLRL does not recommend any further regulation in the area of surrogacy.

³³ McNair, n7 above, at 47.

PART ONE – SECTION B: A REGULATORY FRAMEWORK

If the Committee forms that view that legislative regulation is necessary, the GLRL believes that regulation:

- Should not discriminate on the basis of sexual orientation in relation to eligibility criteria,
- Should clearly stipulate which expenses relating to pregnancy may be reimbursed to the surrogate mother by the intended parents.

1.1 CRITERIA FOR ELIGIBILITY AND SEXUAL ORIENTATION

Surrogacy has always been available to gay and lesbian people in NSW. Furthermore, there is no prohibition on access to ART for lesbians in NSW.³⁴ Therefore, the GLRL strongly opposes any new legislation which discriminates on the basis of sexual orientation.

Over the last 25 years there has been a raft of legislative reform which has removed legal discrimination against lesbians and gay men, including:

- The prohibition of discrimination on the basis of homosexuality in 1982,³⁵
- The decriminalisation of male homosexuality in 1984,³⁶
- The first comprehensive recognition of same-sex de facto relationships in 1999,³⁷
- The equalisation of the age of consent for gay men in 2003,³⁸
- The affording of parental status for co-mothers in lesbian-led families in 2008,³⁹ and
- The prohibition of discrimination on the basis of marital or domestic status (including same-sex de facto couples) in 2008.⁴⁰

³⁴ *Assisted Reproductive Act 2007* (NSW), s 4. The definition of 'spouse' includes a same-sex de facto partner.

³⁵ *Anti-Discrimination Act 1977* (NSW), Part 4C.

³⁶ *Crimes (Amendment) Act 1984* (NSW).

³⁷ *Property (Relationships) Legislation Amendment Act 1999* (NSW).

³⁸ *Crimes Amendments (Sexual Offences) Act 2003* (NSW).

³⁹ *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW), amending the *Status of Children Act 1996* (NSW), s 14(1A).

The introduction of new laws which entrench discrimination in relation to surrogacy would be an extraordinarily backwards step for the human rights of lesbians and gay men in NSW.

1.1.1 WHAT DOES THE RESEARCH SAY ABOUT CHILDREN OF LESBIAN AND GAY PARENTS?

1.1.1.1 LESBIAN AND GAY PARENTS

The GLRL believes there is absolutely no empirical basis upon which to discriminate against lesbians and gay men in relation to surrogacy. A comprehensive review of social science and psychological research has demonstrated that children raised by lesbians and gay men are just as happy and well-adjusted as children raised in other familial structures.⁴¹ A wide body of research documents that the sexuality of a child's parents bears no detriment on the welfare and development of the child.⁴²

Children raised by gays and lesbians show no discernible differences with regards to:

- Levels of happiness, satisfaction with life and social adjustment,
- Teasing or ostracism, quality of friendships, popularity, sociability or social acceptance,
- Anxiety or depression, psychiatric state or levels of self esteem,
- Moral and cognitive development,
- Gender/sex role identification, or
- Sexual orientation.⁴³

In some cases, children parented by same-sex couples have even demonstrated better development outcomes (than those raised in other familial structures). Some research suggests that children benefit from seeing a more equitable division of paid and unpaid

⁴⁰ Id, amending the *Anti-Discrimination Act 1977* (NSW), s 4 (definition of 'marital or domestic status').

⁴¹ Jenni Millbank (2002) *Meet the Parents: A Review of the Research on Lesbian and Gay Families*, Sydney: GLRL at 37-50.

⁴² Charlotte Patterson (2000) 'Family Relationships of Lesbians and Gay Men', *Journal of Marriage and the Family* 62: 1052 at 1064.

⁴³ Mike Allan & Nancy Burrell (1996) 'Comparing the Impact of Homosexual and Heterosexual Parents of Children: Meta-Analysis of Existing Research', *Journal of Homosexuality* 32(2): 19; Charlotte Patterson (1992) 'Children of Lesbian and Gay Parents', *Child Development* 63: 1025; Fiona Tasker & Susan Golombok (1996) 'Do Parents Influence the Sexual Orientation of their Children? Findings from a Longitudinal Study of Lesbian Families', *Developmental Psychology* 32: 3; Fiona Tasker & Susan Golombok (1997) *Growing Up in a Lesbian Family*, New York: Guildford Press

domestic labour characteristic of same-sex partnerships. Children may also develop more empathetic attitudes towards other social difference.⁴⁴ Lesbian and gay parents have also been found to use less physical discipline than other parents.⁴⁵

The longevity and academic rigour of the GLRL's research review is further demonstrated by a two reports commissioned by the Canadian Department of Justice and the Victorian Law Reform Commission. The authors of the Canadian report highlighted that 'some of the most methodologically sound studies' have conclusively found that children parented by gay or lesbian parents were not disadvantaged in their social competence or development.⁴⁶ In addition, the findings of the Victorian Law Reform Commission's occasional paper into outcomes for children born through ART confirm that there are no negative emotional, psychological or behavioural development differences for lesbian and gay families.⁴⁷ (We have attached the VLRC Occasional paper as an appendix to our submission.)

The Canadian Department of Justice report further highlighted that although there were preliminary findings to suggest young people with lesbian or gay parents experienced 'possibly more' homophobic discrimination, the children did not demonstrate any difference in peer acceptance or social adjustment at school in comparison to heterosexually-parented children.⁴⁸ These findings suggest that children parented by gays and lesbians are good at building resilience to homophobic discrimination; an explanation also offered by the VLRC Report.⁴⁹

What the research ultimately highlights is that legislation which fosters discriminatory attitudes against lesbian and gay families hurts children in these families. No child should be legally or socially victimised because of their familial structure. There is simply no empirical basis to deny lesbians and gay men equality before the law in relation to parenting-related legislation.

⁴⁴ Lisa Saffron (1998) 'Raising Children in an Age of Diversity – Advantages of Having a Lesbian Mother' in Gillian Dunne (ed) *Living Difference: Lesbian Perspectives on Work and Family Life*, New York: Harrington Park Press at 37; Charlotte Patterson & Raymond Chan (1997) 'Gay Fathers' in Michael Lamb, *The Role of the Father in Child Development*, 3rd edition, New York: Wiley at 254-255.

⁴⁵ Suzanne Johnson & Elizabeth O'Connor (2001) *Lesbian and Gay Parents: The National Lesbian and Gay Family Study*, San Francisco: American Psychological Association.

⁴⁶ Paul Hastings, Johanna Vyncke, Caroline Sullivan, Kelly McShane, Michael Benibgui & William Utendale (2006) *Children's Development of Social Competence Across Family Types*, Canada: Department of Justice, at 34.

⁴⁷ McNair, n7 above, at 49-66.

⁴⁸ Hastings et al, n46 above, at 36.

⁴⁹ McNair, n7 above, at 62-63.

1.1.1.2 GAY FATHERS IN PARTICULAR

Whilst theoretically surrogacy may be pursued by both lesbians and gay men, in reality surrogacy is likely to be an issue that impacts gay men more than lesbians. Surrogacy is one of the only methods by which gay male couples may consider becoming full-time parents to a child.

Whilst approximately 20 per cent of lesbians are currently parenting, smaller proportions (5-10 per cent) of gay men are parenting.⁵⁰ Where gay men are parenting, they are more likely to do so in co-parenting arrangements with a child's mother(s) or as parents/step-parents to children from previous relationships.⁵¹ However, there is some evidence of a small number of gay men who have successfully pursued a surrogacy arrangement.⁵²

Legal discrimination against gay fathers seriously compromises the ability for gay fathers to provide for the best interests of their children. Legal discrimination also fosters social prejudice and misinformation about gay men. In particular, gay men are concerned about the incorrect and highly offensive association sometimes made between homosexuality and paedophilia. This stereotype, that gay men are more prone to child abuse, could not be further from the truth.

Research which has concentrated on gay male parenting has revealed that there is no detrimental impact on children raised in such gay male families and that 'parenting roles of gay fathers appear to encompass the full range required by children'.⁵³ Such research has also revealed that having gay fathers can be beneficial to children because 'gay fathers [have] greater control and limit setting, and therefore [are] more likely than heterosexual fathers to show authoritative patterns of parenting, which benefit children'.⁵⁴

Perpetuating false and offensive stereotypes against gay men through legal discrimination, harms not only children in male same-sex families and their gay fathers – but all gay men who contribute in various fields of endeavour as teachers, youth workers, mentors and role models for young people in NSW.

⁵⁰ Australian Bureau of Statistics (2005) *Year Book Australia*, 'Same-Sex Couple Families' at 142; Millbank, n41 above, at 21.

⁵¹ McNair, n7 above, at 64. See also Kirsty Machon & Naomi Sharp (2001) *Gay and Lesbian Parenting Consultations Report*, Sydney: Gay & Lesbian Rights Lobby at 27-30.

⁵² For example, *Re Mark* [2003] FamCA 822 concerned a gay family created through surrogacy.

⁵³ Louise Silverstein & Carl Auerbach (1999) 'Deconstructing the Essential father' *American Psychologist* 54: 397-407; cited in McNair, n7 above, at 65.

⁵⁴ Daniel McPherson (1994) 'Gay Parenting Couples: Parenting Arrangements, Arrangement Satisfaction and Relationship Satisfaction', *Dissertation Abstracts International: Section B: The Sciences and Engineering* 54: 3859; cited in McNair, n7 above, at 65.

Recommendation 2:

Any legislation introduced in relation to surrogacy must not discriminate on the basis of sexual orientation.

1.2 MEDICAL AND OTHER REASONABLE EXPENSES

The ART Act outlawed entering into, or soliciting, a commercial surrogacy arrangement.⁵⁵ A commercial surrogacy arrangement is defined to mean:

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.⁵⁶

The definition of commercial surrogacy adopted by the ART Act leaves some ambiguity on whether medical expenses and other reasonable expenses paid on behalf of the surrogate mother by the commissioning couple will fall under the definition of commercial surrogacy.

The Victorian Law Reform Commission expressly stipulated a limited range of expenses which should be permitted as reimbursements to the surrogate mother, including:

- Any reasonable medical expenses associated with the pregnancy which are not otherwise provided for through Medicare, private health insurance or any other benefit,
- In the absence of any entitlement to paid maternity or other leave, lost earnings up to a maximum period of two months,
- Additional lost earnings or medical expenses incurred as a result of special circumstances arising during pregnancy or immediately after birth, for example, where the surrogate has been advised by her doctor that she should stop working earlier than anticipated,
- Any reasonable legal expenses associated with the surrogacy arrangement.⁵⁷

Where the line is drawn between *commercial* surrogacy and *expenses relating to* altruistic surrogacy is not sufficiently expressed by the ART Act. As the ART Act proscribes an offence for commercial surrogacy, including a maximum 2 year imprisonment and/or a significant penalty, it is imperative that the law clearly states what will be regarded as an offence.

⁵⁵ *Assisted Reproductive Technology Act 2007* (NSW), ss 43 & 44.

⁵⁶ *Id.*, s 42.

⁵⁷ VLRC, n12 above, at 181.

Recommendation 3:

The ART Act or regulations should clearly stipulate which medical and/or other reasonable expenses may be reimbursed to surrogate mothers following an altruistic surrogacy arrangement.

Recommendation 4:

The Department of Health should educate the community, including gay men and lesbian, on their rights and responsibilities in relation to surrogacy.

This information should also be provided to parties who wish to enter into a surrogacy agreement during any counselling sessions.

PART TWO: THE LEGAL RECOGNITION OF FAMILIES FORMED THROUGH SURROGACY

Families created through surrogacy face great uncertainty in relation to the legal recognition of the relationship between the child born through the surrogacy arrangement and his or her intended parents.

The lack of legal recognition between a child and his or her intended parent(s) results in many disadvantages for a child and his or her family, including:

- **Parental authority.** Non-legal parents are denied the power to consent to their child's medical treatment, take a child to hospital, sign school permission notes, and interact with child care centres and schools without a parenting order (or consent from the surrogate mother).
- **Custody and contact.** The legal non-recognition of a parent complicates the situation in relation to custody and contact upon the death of a parent or a breakdown in the parental relationship.
- **Inheritance.** Children are not automatically entitled to inherit property and superannuation upon the death of their non-legal parent(s).
- **Entitlements and responsibilities conferred to parents and children under state (and federal) legislation.** Non-legal parents are denied the rights and responsibilities given to legally-recognised parents under state legislation. For example, a child has no right to workers' compensation if their non-legal parent dies or is seriously injured at work. Although the NSW Government has no control over federal legislation, parents of children born through surrogacy in NSW are also inadequately recognised in a whole gamete of federal areas. These include uncertainty in the recognition of parental status for the purposes of family law and child support.

The GLRL strongly believes that all children should be given the same rights and recognition regardless of the manner in which they were conceived. Therefore, the GLRL believes that legislation should be introduced to ensure that children born via surrogacy are given the same recognition and rights as all other children born in NSW.

We support a transferral of parentage scheme, based largely on the ACT *Parentage Act 2004* (ACT), which enables a consenting surrogate mother to relinquish her parental rights in favour of the intended parent(s).

We further outline the issues below.

2.1 LEGAL PARENTAGE UNDER STATE LAW

2.1.1 WHO ARE THE LEGAL PARENTS UNDER STATE LAW?

When a child is conceived through sexual intercourse, the biological mother and biological father of the child will be the parents of that child.⁵⁸

Conversely, section 14 of the *Status of Children Act 1996* (NSW) sets out a number of irrebuttable presumptions as to the parentage of a child born as a result of ART. These presumptions have recently been amended by the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW) and no longer discriminate on the basis of sexual orientation.

Consequently, when a woman has undergone a procedure as a result of which she has become pregnant, the following presumptions exist:

- The woman who has become pregnant is presumed to be the mother of the child even if she did not provide the ovum used in the procedure.⁵⁹
- The husband or de-facto partner (whether of the same or opposite sex) will be presumed to be the parent of the child, so long as he or she consented to the procedure.⁶⁰
- A sperm donor who is not the husband or male de-facto partner of the birth mother is presumed not to be the parent of the child.⁶¹
- An ovum donor who is not the female de-facto partner of the birth mother is presumed not to be the parent of the child.⁶²

These parentage presumptions result in the surrogate mother and her consenting partner (if any) being recognised as the legal parents of the child. Thus, the intended parents (whether or not they provide their own gametes) are presumed to have no legal relationship with their child.

The GLRL believes this is the preferred starting point as it ensures a surrogate mother's rights as a birth parent are not unwittingly removed without her consent. However, there

⁵⁸ *ND v BM* [2003] FamCA 469.

⁵⁹ *Status of Children Act 1996* (NSW), ss 14(1)(b) & 14(1A)(b).

⁶⁰ *Id*, ss 14(1)(a) & 14(1A)(a).

⁶¹ *Id*, s 14(2).

⁶² *Id*, s 14(3).

must be a mechanism to allow a consenting surrogate mother to relinquish her parental rights to the intended parent(s) following a successful surrogacy arrangement.

We will now discuss the current options and their limitations – then recommend our preferred model.

2.1.2 CURRENT OPTIONS FOR THE LEGAL RECOGNITION OF THE INTENDED PARENTS

In NSW, there are limited options for intended parent(s) who are seeking to have a child through surrogacy to gain legal parental recognition over the child born through a surrogacy arrangement. Due to discriminatory adoption laws in NSW, same-sex couples have even fewer options.

The two options generally available are to:

- Apply for a **parenting order** from the Family Court which gives limited parental rights.⁶³ This is available to heterosexual and same-sex couples.⁶⁴
- In very limited circumstances, **adopt the child**. However, privately-arranged adoptions are not permitted in NSW, except:
 - After five years⁶⁵, where one of the adopting parents is a relative of the child.⁶⁶ Thus adoption will only be available to the intended parents if the surrogate mother is a relative⁶⁷ of the intended parent(s), or
 - Possibly, upon the discretion of the Director-General.⁶⁸

Note: This option is available to heterosexual couples or individual lesbians and gay men, but not same-sex couples.

2.1.2.1 PARENTING ORDERS

Seeking a parenting order from the Family Court of Australia is a method which intended parent(s) may seek to have some form of legal recognition for a child born through surrogacy. This is because any person with an interest in the 'care, welfare or development' of a child can approach the Court⁶⁹ and the Court can make orders in favour of any person.⁷⁰

⁶³ A parenting order ceases when the child reaches the age of 18 and does not necessarily impact on State areas of law.

⁶⁴ See *King & Tamsin* [2008] FamCA 309 (heterosexual couple) and *Re Mark* [2003] FamCA 822 (gay male couple).

⁶⁵ This may be reduced to 2 years if the Adoption Amendment Bill 2008 (NSW) is passed.

⁶⁶ *Adoption Act 2000* (NSW), s 29.

⁶⁷ 'Relative' is defined in the *Adoption Act* as 'a grandparent, son, daughter, grandchild, brother, sister, uncle or aunt of a person: (a) whether the relationship is of the whole blood or half blood or by marriage, and (b) whether or not the relationship depends on the adoption of a person.'

⁶⁸ *Adoption Act*, s 11(1)(a).

⁶⁹ *Family Law Act 1975* (Cth) ('FLA'), s 65C.

Thus, there is no need for a biological or legal relationship to have standing to seek a parenting order. Parenting orders recognise a person 'significant to the care of a child' with respect to specific issues, including parental responsibility.

However, unlike legal presumptions and adoption, parenting orders do not confer full legal parentage and they can be difficult to obtain, due to cost and other barriers.⁷¹ Even if obtained, parenting orders are limited by the following issues:

- They cease when the child reaches 18,
- They do not flow through to other areas of law, and so for example leave unaffected the question of who is a 'parent' under intestacy or compensation law at state level,
- They do not have any impact upon the interpretation of 'parent' or 'child' in other federal legislation in areas such as superannuation or taxation.⁷²

Consequently 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.

2.1.2.2 ADOPTION

Adoption is a wholly unsatisfactory solution for children born through surrogacy, particularly for lesbian and gay parents. Firstly, adoption would generally only be available where the surrogate mother was a relative of the intended parent(s), and the child has had a relationship with his or her parent(s) for at least five⁷³ years.⁷⁴ This would mean a child who was not born to a relative of the intended parent(s) could not generally be adopted at all.⁷⁵ Furthermore, even if the surrogate mother is a relative, the intended parent(s) would generally be required to pursue a parenting order for the first five years of their child's life and then a further adoption order. The costs in legal fees and court processes alone make this solution wholly unsatisfactory.

⁷⁰ FLA, s 65D(1).

⁷¹ Human Rights and Equal Opportunity Commission (HREOC) (2007) *Same-Sex: Same Entitlement – National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, Sydney: HREOC at 97, 101-104.

⁷² See Jenni Millbank (2006) 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review* 34(2): 206 at 248.

⁷³ Note the Adoption Amendment Bill 2008 (NSW) would reduce this period to 2 years.

⁷⁴ *Adoption Act 2000* (NSW), s 29.

⁷⁵ There is a question over whether the Director-General can also exercise discretion under section 11(1)(a) of the *Adoption Act* to allow an adoption.

Secondly, and importantly, the *Adoption Act* is the only piece of legislation in NSW which continues to discriminate against same-sex couples. NSW is in the illogical and ridiculous predicament that individual lesbians and gay men are eligible to apply for adoption, but same-sex couples are not. Despite repeated calls, including recommendations by the NSW Law Reform Commission and the Human Rights and Equal Opportunity Commission, this legal discrimination is yet to be addressed.

2.1.3 THE NEED FOR A LEGAL MECHANISM TO TRANSFER PARENTAGE

The GLRL strongly believes that the present legal situation for children born through surrogacy is wholly inadequate. There must be a legal mechanism to allow a consenting surrogate mother the ability to relinquish her parental rights to the intended parent(s) following a successful surrogacy arrangement.

We recommend that the transfer occur by court order (similar to the ACT⁷⁶) according to the following two principles:

- The Court is satisfied that the order would be in the best interests of the child, and
- The surrogate mother freely consents to the court being made.

However, unlike the ACT model, the GLRL does not believe there should be a requirement that either of the intended parent(s) be biologically related to the child. This is because it is possible that the intended parent(s) may use external donated gametes (including, both sperm and an egg) for the conception of the child for a variety of reasons, including genetic or medical reasons. A child should not be precluded from the legal recognition of their family because they are not genetically-related to their parents.

To ensure stability for a child, the GLRL also recommends that applications for a surrogacy parentage order should be made limited to (up to) one year from the birth of the child. However, it may be necessary to provide a mechanism by which children born already born (and who would not satisfy the one-year time limit) may also benefit from a parentage order, so long as their surrogate mother consents and such an order would be in their best interests.

Recommendation 5:

Introduce a legal mechanism for the transferral of legal parentage from the surrogate mother to the intended parent(s) by court order where:

- (a) The Court is satisfied that the order would be in the best interests of the child, and**
- (b) The surrogate mother has freely consented to the court being made.**

⁷⁶ *Parentage Act 2004 (ACT)*, Division 2.4

This legal mechanism should be available up to one year from the birth of the child. However, a transitional provision may be required for children who are already born and who otherwise not satisfy the one-year time limit.

2.2 RECOGNISING CHILDREN UNDER FEDERAL LAW

2.2.1.1 PROPOSED AMENDMENTS TO THE FAMILY LAW ACT 1975 (CTH) ('FLA')

The recognition of child-parent relationships under federal law is currently an area of significant reform. There is currently a Bill before the Commonwealth parliament which will amend the definition of a 'parent' for children born through surrogacy for the purposes of the FLA.⁷⁷ If this Bill is passed, a new **Section 60HB** of the FLA will provide automatic recognition to prescribed state or territory surrogacy parentage transferral schemes (such as the scheme under the *Parentage Act 2004* (ACT)).

This will ensure intended parent(s) who have been awarded legal parentage through a state-based surrogacy order, will be automatically recognised as a 'parent' for the purposes of family law. However, for this recognition to take effect throughout federal law, the Commonwealth must refer all federal definitions of 'child' and 'parent' back to the FLA definition. The GLRL has strongly advocated for this reform at the federal level because it will ensure a greater harmonisation between state and federal law in relation to parentage recognition, as well as a greater consistency *within* federal law as to who is a 'parent' for the purposes of federal entitlements and benefits.

However, there are four key hurdles at present:

- Firstly, is ensuring the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) is passed intact and without amendment,
- Secondly, is establishing a surrogacy transferral of parentage scheme in NSW (see **recommendation 5** above),
- Thirdly, is ensuring the NSW parentage scheme is prescribed under the FLA, and
- Fourthly, ensuring the Commonwealth government reflect the definition of 'parent' in the FLA in all commonwealth laws.

Notwithstanding these hurdles, if all the four measures listed above are achieved, children born through surrogacy in NSW, who have had a surrogacy parentage order made in

⁷⁷ Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth).

relation to them, will benefit from equal and automatic legal recognition for all state and federal law purposes.

Recommendation 6:

If the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) is passed in its current form, the NSW Government should seek the Commonwealth Government's support to ensure that:

- (a) The NSW surrogacy parentage scheme (in recommendation 5 above) is promptly prescribed under the *Family Law Act*, and**
- (a) All federal legislation reflects the definition of 'parent' in the *Family Law Act*.**