



THIRTY-SEVENTH PARLIAMENT

REPORT 12
STANDING COMMITTEE ON LEGISLATION
IN RELATION TO THE
SURROGACY BILL 2007

Presented by Hon Graham Giffard MLC (Chair)

May 2008

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“4. Legislation Committee

- 4.1 *A Legislation Committee* is established.
- 4.2 The Committee consists of 5 members.
- 4.3 The functions of the Committee are to consider and report on any Bill referred by the House or under SO 125A.
- 4.4 Unless otherwise ordered any amendment recommended by the Committee must be consistent with the policy of a Bill.”

Members as at the time of this inquiry:

Hon Graham Giffard MLC (Chair)	Hon Peter Collier MLC
Hon Giz Watson MLC (Deputy Chair)	Hon Sally Talbot MLC
Hon Ken Baston MLC	Hon Kate Doust MLC (participating member in accordance with Standing Order 326)

Staff as at the time of this inquiry:

Mark Warner, Committee Clerk	Amanda Gillingham, Advisory Officer (General)
------------------------------	--

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

lcco@parliament.wa.gov.au

Website: <http://www.parliament.wa.gov.au>

ISBN 1 921243 62 7

GLOSSARY AND ACRONYMS

Altruistic surrogacy	A surrogacy arrangement where the surrogate mother receives no payment or the reimbursement of reasonably incurred expenses only.
ART	Assisted reproductive technology.
Bill	Surrogacy Bill 2007.
Brazier Report	M Brazier, A Campbell and S Golombok, <i>Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation: Report of the Review Team</i> , 1998.
CEO	Chief Executive Officer of the Department of Health WA
Commercial surrogacy	A surrogacy arrangement where the surrogate mother is paid a fee by the intending parents.
Committee	Standing Committee on Legislation
Department	Department of Health WA
Draft Directions	Department of Health WA, draft <i>Directions on Surrogacy</i> .
Gametes	Sperm and/or ova.
Gestational surrogacy	Where a surrogate mother is not the genetic mother of the child (her egg is not used to conceive the child).
Partial surrogacy	Where a surrogate mother is also the genetic mother of the child (her egg is used to conceive the child).
<i>Re Evelyn</i>	<i>Re Evelyn</i> No. B.R. 7321 of 1997 (unreported).
RTC	WA Reproductive Technology Council.
Surrogacy	Where a woman becomes pregnant with the intention of relinquishing the child to another person or couple.
VLRC	Victorian Law Reform Commission.
VLRC Report	Victorian Law Reform Commission, <i>Assisted Reproductive Technology & Adoption: Final Report</i> , 2007.

CONTENTS

GLOSSARY AND ACRONYMS	I
RECOMMENDATIONS	I
RECOMMENDATIONS	I
REPORT.....	1
1 REFERRAL.....	1
2 INQUIRY PROCEDURE	1
3 SCOPE OF THIS REPORT.....	2
4 BACKGROUND TO THE SURROGACY BILL 2007	2
Definition of surrogacy	2
Purpose of the Bill.....	2
The need for surrogacy legislation	3
Legal parentage	5
Surrogacy legislation in other jurisdictions.....	6
Victoria (Vic)	6
Australian Capital Territory (ACT).....	8
New South Wales (NSW).....	10
Queensland (Qld)	11
South Australia (SA)	11
Tasmania (Tas).....	12
Recent developments in Australia	12
United Kingdom (UK).....	13
United States (US).....	14
Florida	15
Washington.....	16
Incidence of surrogacy	16
Adoption.....	17
Surrogacy outcomes.....	18
“Unsuccessful” surrogacy outcomes	20
Supplementary Notice Paper No. 190 Issue No. 2.....	20
5 SCOPE OF THE BILL.....	21
6 CLAUSE 6: MEANING OF SURROGACY ARRANGEMENT THAT IS FOR REWARD	24
Reasonable expenses.....	24
Committee comment	27
7 CLAUSE 7, SURROGACY ARRANGEMENT NOT BINDING.....	28
Reasonable expenses.....	29
Exception to non-binding nature of surrogacy agreements.....	30
8 CLAUSE 13: CHILD’S BEST INTERESTS PARAMOUNT	31
Committee comment	33
9 CLAUSE 14: DEFINITION OF BIRTH PARENTS	34
10 CLAUSE 15: CIRCUMSTANCES FOR SEEKING PARENTAGE ORDER.....	34

Eligibility criteria for seeking a parentage order	34
Committee comment	35
Expansion of eligibility criteria to include problems with carrying a child to term.....	36
Private surrogacy arrangements.....	37
Where can reproductive technology occur?.....	37
Method of conception and eligibility criteria to apply for a parentage order.....	38
Committee comment	40
11 ELIGIBILITY AND ACCESS CRITERIA	41
Requirement that birth mother has previously given birth	42
Committee comment	43
Age requirements.....	43
Committee comment	43
Arranged parents.....	44
Surrogate mother.....	44
Surrogacy Review Panel to approve surrogacy arrangements.....	45
The need for preparation and assessment	46
Psychosocial preparation.....	48
Implications counselling	49
Independent psychological assessment	51
Written agreement.....	51
Medical assessments	52
Committee comment	53
12 CLAUSE 16. APPLYING FOR A PARENTAGE ORDER	53
13 CLAUSE 17. COURT MAY MAKE PARENTAGE ORDER	56
Committee comment	58
14 CLAUSE 18 CONTENTS OF APPROVED PLAN	58
15 CLAUSE 20 MULTIPLE BIRTHS	59
16 CLAUSE 23 DISCHARGE OF PARENTAGE ORDER.....	59
Committee comment	59
17 DIVISION 3, ACCESS TO INFORMATION.....	59
APPENDIX 1 LIST OF WRITTEN SUBMISSIONS	61
APPENDIX 2 SUPPLEMENTARY NOTICE PAPER NO. 190 ISSUE NO. 2.....	65
APPENDIX 3 DRAFT DIRECTIONS ON SURROGACY	69

RECOMMENDATIONS FOR THE
REPORT OF THE STANDING COMMITTEE ON LEGISLATION
IN RELATION TO THE
SURROGACY BILL 2007

RECOMMENDATIONS

1 Recommendations are grouped as they appear in the text at the page number indicated:

Page 24

Recommendation 1: The Committee recommends that the Surrogacy Bill 2007 and the *Human Reproductive Technology Act 1991* be amended to include an explicit provision to enable the CEO to make directions in relation to surrogacy.

Page 28

Recommendation 2: The Committee recommends that the Surrogacy Bill 2007 be amended to limit reasonable expenses to costs incurred in the following categories:

- any reasonable medical expenses associated with the pregnancy which are not otherwise provided for through Medicare, private health insurance or any other benefit;
- health, disability and life insurance during the course of the pregnancy;
- in the absence of any entitlement to paid maternity or other leave, lost earnings up to a maximum period of two months;
- any additional lost earnings or medical expenses incurred as a result of special circumstances arising during pregnancy;
- reasonable post-natal medical expenses;
- reasonable pre- and post-natal psychological counselling expenses related to the surrogacy arrangement; and
- reasonable legal, advisory or assessment expenses associated with the surrogacy arrangement.

Page 30

Recommendation 3: The Committee recommends that clause 7 of the Surrogacy Bill 2007 be amended so that the payment or reimbursement of reasonable expenses is enforceable.

Page 31

Recommendation 4: The Committee recommends that clause 7 of the Surrogacy Bill 2007 be amended to include a caveat that, subject to clause 17, a surrogacy arrangement is not enforceable.

Page 34

Recommendation 5: The Committee recommends that a definition of genetic parent in the following proposed terms is included in the Surrogacy Bill 2007:

“genetic parent” of a child means a person who is genetically related to the child by having contributed genetic material to the conception of the child.

Page 36

Recommendation 6: The Committee recommends that section 15(2) of the Surrogacy Bill 2007 is amended to contain the detail of the definition of “eligible couple” and “eligible person” rather than a reference to the *Human Reproductive Technology Act 1991*.

Page 37

Recommendation 7: The Committee recommends that the definition of “eligible couple” and “eligible person” is amended in the terms proposed in Supplementary Notice Paper No. 190, Issue No. 2 to include:

“a woman who is unable to give birth to a child due to medical reasons”.

Page 45

Recommendation 8: A majority of the Committee (comprising Hons Graham Giffard, Ken Baston and Peter Collier MLCs) recommend that clause 15(2) of the Surrogacy Bill 2007 be further amended to include a minimum age requirement of 21 years for an “eligible couple”, an “eligible person” and “eligible surrogate”.

A minority of the Committee (comprising Hons Sally Talbot and Giz Watson MLCs) consider that the current minimum age requirement of 18 is acceptable.

The definition of “eligible surrogate” should include that the woman has preferably experienced a live birth prior to entering into the surrogacy arrangement.

Page 46

Recommendation 9: The Committee recommends that Clause 15(1) of the Surrogacy Bill 2007 be amended to include a new subclause:

“(c) the surrogacy arrangement was approved by a Surrogacy Review Panel, established by the Reproductive Technology Council before a child is conceived for the purposes of a surrogacy arrangement.”

and that the Bill be amended to include any necessary consequential amendments to the *Human Reproductive Technology Act 1991*.

Page 53

Recommendation 10: The Committee recommends that the Surrogacy Bill 2007 be amended to provide that a Surrogacy Review Panel must not approve an application unless:

- a) the arrangement is set out in a written agreement signed by the parties;
- b) the parties to the agreement have undertaken appropriate counselling regarding the implications of the surrogacy arrangement;
- c) the parties to the agreement have undertaken an independent psychological assessment and a medical assessment;
- d) the parties to the agreement have received independent legal advice; and
- e) there has been a minimum three-month cooling off period following completion of the above-mentioned requirements and prior to treatment.

Page 56

Recommendation 11: The Committee recommends that clause 16 of the Surrogacy Bill 2007 be amended to include a subclause that explicitly states that the parents of a child born to a surrogacy arrangement prior to commencement of this legislation may, if the requirements of section 17 have been met, apply for a parentage order within 12 months of the commencement of the legislation.

Page 60

Recommendation 12: The Committee recommends that clauses 35, 36 and 37 of the Bill be amended to provide access to information from 16 years of age.

REPORT OF THE STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

SURROGACY BILL 2007

1 REFERRAL

1.1 On 14 November 2007, the Legislative Council referred the Surrogacy Bill 2007 (**Bill**) to the Standing Committee on Legislation (**Committee**) for inquiry with a reporting deadline of 10 April 2008.¹

1.2 On 3 April 2008 the Committee sought and obtained an extension of its reporting deadline to 8 May 2008.²

2 INQUIRY PROCEDURE

2.1 The Committee sought written submissions on the Bill by:

- placing the details of the inquiry on the Parliament's website (www.parliament.wa.gov.au); and
- advertising the details of the inquiry in *The West Australian* newspaper on 1 December 2007.

2.2 The eighteen written submissions received by the Committee are listed at **Appendix 1**.

2.3 Public hearings were held with:

- Ms Daphne Andersen (Senior Legal Officer), Ms Jenny O'Callaghan (Senior Policy Officer) and Dr Nyaree Jacobsen (Senior Policy Officer) from the Department of Health WA on 14 February 2008.
- Dr Joseph Parkinson (Director) from the L J Goody Bioethics Centre on 20 February 2008.
- Mrs Suzanne Midford (approved counsellor), Ms Iolanda Rodino (approved counsellor) and Ms Antonia Cliss (approved counsellor) on 20 February 2008.

¹ Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 November 2007, p7078.

² *Ibid*, 3 April 2008, p1742.

- Dr Brenda McGivern (Member) from the Reproductive Technology Council on 20 February 2008.
 - Ms Daphne Andersen (Senior Legal Adviser), Ms Jenny O’Callaghan (Senior Policy Officer) and Dr Nyaree Jacobsen (Senior Policy Officer) from the Department of Health WA on 27 January 2008.
- 2.4 The Committee extends its appreciation to the individuals and organisations that provided evidence and information as part of the inquiry.
- 2.5 In accordance with Standing Order 326, Hon Kate Doust MLC participated in committee proceedings but did not vote on any of the recommendations.

3 SCOPE OF THIS REPORT

- 3.1 While the Committee has considered all of the provisions of the Bill, due to the limited reporting timeframe the report focuses only on specific issues and clauses identified by the Committee in the Second Reading debate and issues raised in submissions.

4 BACKGROUND TO THE SURROGACY BILL 2007

Definition of surrogacy

- 4.1 A surrogacy arrangement is an agreement between intended parents (the ‘arranged parents’) and a woman who agrees to become pregnant with an intention to relinquish the child to them.
- 4.2 In gestational or full surrogacy, the child is conceived from gametes from the arranged parent(s) and/or a donor or donors. Whereas a gestational surrogate is not the genetic mother of the child, in partial surrogacy (where the surrogate’s egg is used and sperm from the arranged father or a donor) the surrogate mother is also the biological mother of the child.
- 4.3 Surrogacy arrangements where the surrogate mother receives no payment from the intended parents, or reimbursement of expenses only, is known as altruistic surrogacy. In a commercial surrogacy arrangement (which is illegal in Australia) a fee will be paid to the surrogate.

Purpose of the Bill

- 4.4 The Committee heard evidence from the Department of Health WA (**Department**) regarding the social and legal issues the Bill sought to address:

Surrogacy currently happens in WA in an unregulated way. There are a number of problems with the current situation. People are not

*prevented from entering into private arrangements, and they may go into those arrangements without the counselling and preparation that means that all parties have a common understanding of the issues that are associated with surrogacy. This gives the potential for greater levels of dispute between parties ... Because IVF cannot be used for surrogacy in WA, the birth mother will always be the genetic mother of the child in private arrangements. There is a view that this is not the most desirable arrangement in relation surrogacy. There is no mechanism for ensuring that arranged parents are legally recognised as the parents for the child they are raising. That is the position that we started with; that is the problem that we are trying to address with the bill.*³

- 4.5 Submissions to the Committee demonstrate a polarity of opinion regarding surrogacy. While some submissions express ethical concerns about the practice of surrogacy,⁴ the Committee also received submissions that expressed strong support for making surrogacy more accessible and enabling the legal transfer of parentage following the birth of a child.⁵

The need for surrogacy legislation

- 4.6 Assisted reproductive technology (ART) has opened up surrogacy as an option for couples who have been unable to have children due to infertility or other medical or social reasons. The limited number of babies available for adoption means that, for some people, surrogacy may be the only option.

- 4.7 According to the Second Reading Speech:

*the demand for surrogacy has increased since the 1970's with the decline in the number of babies available for adoption and the increased availability of assisted reproductive technology. The use of artificial reproductive technology has increased options for conception in connection with surrogacy and allows the creation of embryos that are genetically related to the arranged parents.*⁶

³ Ms Daphne Anderson, Senior Legal Officer, Department of Health WA, *Transcript of Evidence*, 14 February 2008, pp1-2.

⁴ See for example, Submission No 4 from the Australian Christian Lobby, Submission No 8 from the Festival of Light, Submission No 10 from the Knights of the Southern Cross and Submission No 13 from Hon Helen Morton MLC.

⁵ For example, Submission No 6 from Ms Julie McLean, Submission No 7 from Andrew and Michelle Webber, Submission No 15 from Ms Christine Lewis and Submission No 17 from Access: Australia's National Infertility Network.

⁶ Hon Sue Ellery, Minister for Child Protection, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 18 September 2007, p5066.

4.8 While surrogacy may enable infertile couples to have a child that is genetically related to one or both of the intended parents, there is no legal mechanism for them to be legally recognised as the child's parents. Clearly this will not deter all childless couples (private arrangements currently occur) however the inability to obtain legal parentage is a significant issue for intending parents when considering surrogacy as an option.

4.9 The accessibility of surrogacy in Western Australia is directly and indirectly limited by legislation related to access to assisted reproductive technology treatment, legal parentage and artificial conception, and adoption. According to the Second Reading Speech:

The Human Reproductive Technology Act regulates access to invitro fertilisation procedures and currently restricts access to IVF in connection with surrogacy. The Artificial Conception Act provides for the legal parentage of all children born as a result of assisted reproductive technology - ART - and means that the birth parents of a child, rather than the parents who intend to raise the child, are legally recognised as the parents. The Adoption Act effectively restricts adoption as a method for arranged parents to be legally recognised as the parents of a child born under a surrogacy arrangement.⁷

4.10 The practical consequence of the current legislative framework is that it would be difficult for a potential surrogate to access assisted reproduction treatment in order to become pregnant (she would need to be infertile herself) and there is currently no legal mechanism to transfer parentage from the birth parents to the arranging parents once the child is born.

4.11 A legislative review conducted for the Victorian Law Reform Commission (VLRC) notes that surrogacy legislation often reflects ambivalence about the issue:

It is clear that many legislators have reservations about the practice. In consequence, the laws they have made combine an unwillingness to give effect to surrogacy arrangements with a recognition that these arrangements will continue to be made. The resulting laws, while refusing to sanction surrogacy agreements, acknowledge that answers must be given to the question of the parentage of a child born following such an agreement.⁸

⁷ Ibid, p5067.

⁸ Professor J Seymour and S Magri, *A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review*, Victorian Law Reform Commission, Melbourne, 2004, p50.

- 4.12 Corresponding to the VLRC's observation, evidence from the Department to the Committee intimated that regulatory control of surrogacy should not be equated with endorsement of such arrangements:

I guess in general the approach is that we are not really trying to encourage surrogacy. ... We are saying, "We want to regulate it. We want to control it. We want to make sure that if it is done, it is done properly. We do not want to prohibit it completely, but we want to make sure that it is done in a responsible way."⁹

Legal parentage

- 4.13 In Western Australia, the legal parentage of children born through artificial fertilisation is determined by the *Artificial Conception Act 1985*.

- 4.14 The Rule relating to maternity is outlined in section 5(1):

Where a woman undergoes an artificial fertilisation procedure in consequence of which she becomes pregnant and the ovum used for the purposes of the procedure was taken from some other woman, then for the purposes of the law of the State, the pregnant woman is the mother of any child born as a result of the pregnancy.

- 4.15 The Rule relating to paternity in section 6(1) provides that:

Where a married woman undergoes, with the consent of her husband, an artificial fertilisation procedure in consequence of which she becomes pregnant, then for the purposes of the law of the State, the husband –

(a) shall be conclusively presumed to have caused the pregnancy; and

(b) is the father of any child born as a result of the pregnancy.

- 4.16 Section 6A outlines the Rule relating to parentage in same sex de facto relationships:

Where a woman who is in a de facto relationship with another woman undergoes, with the consent of her de facto partner, an artificial fertilisation procedure in consequence of which she becomes pregnant, then for the purposes of the law of the State, the de facto partner of the pregnant woman -

⁹ Ms Daphne Anderson, Senior Legal Officer, Department of Health WA, *Transcript of Evidence*, 14 February 2008, p7.

(a) shall be conclusively presumed to be a parent of the unborn child;
and

(b) is a parent of any child born as a result of the pregnancy.

4.17 Simply put, these rules mean that the birth parents are the legal parents of a child born through assisted reproductive technology.

Surrogacy legislation in other jurisdictions

4.18 All five Australian states prohibit commercial surrogacy.

Victoria (Vic)

4.19 According to the *Infertility Treatment Act 1995* (Vic) surrogacy agreements are void and cannot be enforced in court.¹⁰ It is also illegal to “make, give or receive or agree to make, give or receive a payment or reward in relation to or under a surrogacy agreement or an arrangement to act as a surrogate mother.”¹¹ While the legislation does not specifically prohibit altruistic surrogacy where no payment is made, such agreements have no legal force.¹²

4.20 The Victorian Law Reform Commission’s 2007 comprehensive review of Assisted Reproductive Technology (ART) and Adoption (**VLRC Report**) recommended that access to ART services be provided to potential surrogates. Recommendations in relation to the regulation of surrogacy include:¹³

4.20.1 Surrogacy agreements should continue to be void however where parties to a surrogacy arrangement have agreed to the reimbursement of prescribed payments, that part of the agreement should be enforceable.¹⁴

4.20.2 Commercial surrogacy should not be permitted however reimbursement of prescribed payments actually incurred should be permitted.¹⁵

4.20.3 The County Court should be empowered to make substitute parentage orders subject to certain conditions:¹⁶

¹⁰ Section 61 *Infertility Treatment Act 1995* (Vic).

¹¹ Section 59, *Ibid.*

¹² Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Position Paper Three: Surrogacy*, Melbourne, 2005, p10.

¹³ Recommendations 99 to 130 specifically deal with surrogacy. See Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Final Report*, VLRC, Melbourne, 2007, pp14-16.

¹⁴ *Ibid.*, Recommendation 122, p16.

¹⁵ *Ibid.*, Recommendations 119 and 120, p16.

¹⁶ *Ibid.*, Recommendation 123, p16.

-
- The court is satisfied it would be in the best interests of the child.
 - The application was made no earlier than 28 days and no later than six months after the birth of the child.
 - At the time of the application, the child is living with the applicant/s.
 - The applicants have met the eligibility criteria for entering into a surrogacy arrangement.
 - The surrogate mother has not received any material advantage from the arrangement.
 - The surrogate mother freely consents to the making of the order.

4.20.4 Prescribed payments should be limited to reasonable medical expenses, lost earnings up to a maximum of two months in the absence of paid maternity leave, any additional lost earnings or medical expenses incurred as a result of special circumstances and reasonable legal expenses.¹⁷

4.20.5 A woman intending to act as a surrogate should not be subject to the requirement that she is infertile.¹⁸

4.20.6 A woman intending to act as a surrogate should be at least 25 years old and in assessing whether she is able to give informed consent, consideration should be given to whether she has already experienced pregnancy and childbirth, however, this should not be a prerequisite.¹⁹

4.20.7 Partial surrogacy should be permitted where the surrogate mother's egg is used in the conception of the child.²⁰

4.20.8 While a genetic connection between the child and commissioning parent/s is preferred, people who are unable to contribute their own gametes should also be able to commission a surrogacy arrangement.²¹

4.20.9 Regulations should specify issues to be addressed during counselling.²²

¹⁷ Ibid, Recommendation 121, p16.

¹⁸ Ibid, Recommendation 112, p15. Access to ART is currently restricted to infertile couples - the effect of the recommendation will be that the eligibility criteria will be applied to the arranged parents rather than the birth mother.

¹⁹ Ibid, Recommendations 114 and 115, p15.

²⁰ Ibid, Recommendation 116, p15.

²¹ Ibid, Recommendation 118, p15.

²² Ibid, Recommendation 105, p15.

- 4.20.10 The court should have the discretion to make parentage orders in favour of people who already have children through surrogacy arrangements if certain requirements are met.²³
- 4.21 The VLRC carefully considered the question of whether partial surrogacy and/or surrogacy using donor gametes should be permitted and concluded that it was “*difficult to generalise about the value of genetic connections in family relationships.*”²⁴
- 4.22 Consequently the VLRC recommended that partial surrogacy should be permitted but that “*caution needs to be exercised because there is limited research on outcomes for children and surrogates in these situations.*”²⁵
- 4.23 The Commission noted that research indicated that a genetic connection between the child and arranging parents is preferable however it was considered that this should not exclude those people who were unable to provide their own gametes but were otherwise eligible for ART.²⁶
- 4.24 The VLRC concluded that surrogacy should be carefully regulated and that:
- [e]ven if the law permits gestational but not partial surrogacy, the surrogate should retain the right to refuse to consent to the transfer of parentage of the child upon birth.*²⁷

Australian Capital Territory (ACT)

- 4.25 Provisions in Part 4 of the *Parentage Act 2004* (ACT) make commercial surrogacy (where payment is made other than for expenses) an offence.²⁸ Altruistic surrogacy, known as ‘substitute parent’ agreements, are not illegal, but have “*no legal validity except to establish the circumstances in which a parentage order can be made.*”²⁹
- 4.26 According to the Explanatory Statement for the *Parentage Bill 2003*, “[s]ubstitute parent agreements of all kinds are discouraged” however “[a]llowance is made for a limited number of altruistic surrogacy agreements to be given effect through a court

²³ Ibid, Recommendation 127, p16.

²⁴ Ibid, p177.

²⁵ Ibid, p178.

²⁶ Ibid, p178.

²⁷ Ibid, p178.

²⁸ Sections 40 to 45, *Parentage Act 2004* (ACT).

²⁹ Explanatory Statement, *Parentage Bill 2003* (ACT), p8.

*order transferring the parentage of a child from the birth parents to the commissioning parents.*³⁰

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

- procure someone to enter into a surrogacy agreement with a third person;³¹
- advertise in relation to surrogacy agreements;³² or
- intentionally provide technical or professional services to facilitate a pregnancy for the purposes of a commercial surrogacy agreement.³³

4.28 Unlike other states, the ACT enables legal parentage to be transferred to the commissioning parents of a non-commercial surrogacy agreement if certain conditions are met:³⁴

- the child was conceived as a result of ART carried out in the ACT;
- neither the surrogate or her partner is a genetic parent of the child;
- a least one of the commissioning parents is a genetic parent of the child; and
- the commissioning parents live in the ACT.³⁵

4.29 The Supreme Court must make the parentage order if it is satisfied that:³⁶

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

4.30 A parentage order has essentially the same legal effect as an adoption order.³⁷

³⁰ Ibid, p8.

³¹ Section 42, *Parentage Act 2004* (ACT).

³² Section 43, Ibid.

³³ Section 44, Ibid.

³⁴ Professor J Seymour and S Magri, *A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review*, Victorian Law Reform Commission, Melbourne, 2004, p49.

³⁵ Section 24, *Parentage Act 2004* (ACT).

³⁶ Section 26, Ibid.

³⁷ Explanatory Statement, *Parentage Bill 2003* (ACT), p10.

New South Wales (NSW)

- 4.31 Until recently there was no legislation in NSW in relation to surrogacy. The purpose of the *Assisted Reproductive Technology Act 2007* (NSW) includes the regulation of ART services and service providers and the establishment of an ART register.³⁸
- 4.32 Part 4 of the Act prohibits commercial surrogacy and its solicitation,³⁹ and makes surrogacy agreements void.⁴⁰
- 4.33 Parental status is determined according to the *Status of Children Act 1996* (NSW). Presumptions of parentage arising out of the use of fertilisation procedures at section 14 of the Act set out certain irrebuttable presumptions:
- The husband of a woman who has undergone a fertilisation procedure (with her husband's consent) is presumed to be the father of the child even if he did not provide any or all of the sperm used in the procedure⁴¹ and the woman is presumed to be the mother even if she did not provide the ovum used in the procedure.⁴²
 - A man who provides sperm for an insemination to a woman who is not his wife is presumed not to be the father.⁴³
 - If a woman becomes pregnant following a fertilisation procedure using a donated ovum, the woman who donated the ovum is presumed not to be the mother of the child.⁴⁴
- 4.34 Adoption by the arranging parents to obtain parental status is generally not an option as privately arranged adoptions are illegal in NSW⁴⁵ and a surrogacy agreement that presumes later adoption of the child may involve serious breaches of the *Adoption Act*

³⁸ Explanatory Note, *Assisted Reproductive Technology Bill 2007* (NSW)

³⁹ Sections 43 and 44, *Assisted Reproductive Technology Act 2007* (NSW).

⁴⁰ Section 45, *Ibid.*

⁴¹ Section 14(1)(A), *Status of Children Act 1996* (NSW).

⁴² Section 14(1)(b), *Ibid.*

⁴³ Section 14(2), *Ibid.*

⁴⁴ Section 14(3), *Ibid.*

⁴⁵ NSW Dept of Community Services website,

[Http://www.community.nsw.gov.au/DOCS/STANDARD/PC_101072.HTML](http://www.community.nsw.gov.au/DOCS/STANDARD/PC_101072.HTML), (viewed on 23/1/2008).

2000.⁴⁶ An option available to arranging parents is to apply to the Family Court for parental responsibility orders.⁴⁷

Queensland (Qld)

- 4.35 The *Surrogate Parenthood Act 1988* (Qld) makes both altruistic and commercial surrogacy arrangements illegal.⁴⁸
- 4.36 The parentage of children born through ART procedures is determined in accordance with the *Status of Children Act 1988* (Qld).
- 4.37 The presumptions are similar to those in the NSW Act. Where a woman has undergone an ART procedure with the consent of her husband, the husband is presumed to be the father of the child and the donor of semen shall be presumed not to be the father.⁴⁹ Following a fertilisation procedure where a donated ovum is used and semen from the husband or from donated sperm, the married woman shall be presumed to be the mother. The donor of the ovum is presumed not to be the mother. The husband shall be presumed to be the father whether or not he provided the sperm and the sperm donor (if any) shall be presumed not to be the father.⁵⁰

South Australia (SA)

- 4.38 According to the *Family Relationships Act 1975* (SA) both a surrogacy contract and a procreation contract is illegal and void.⁵¹
- 4.39 The legal parentage of a child born as a result of ART is determined in accordance with the *Family Relationships Act 1975* (SA) which provides that the woman who gives birth to a child is the mother, regardless of whether donated ovum was used.⁵² The donor is not regarded the mother.⁵³ Where a married woman undergoes a fertilisation procedure with the consent of her husband, the husband is presumed to be the father of the child.⁵⁴ The donor of the sperm is not regarded as the father.⁵⁵

⁴⁶ NSW Law Reform Commission, Report 81: *Review of the Adoption of Children Act 1965* (NSW), 1997, paragraph 11.18.

⁴⁷ NSW Dept of Community Services website, [Http://www.community.nsw.gov.au/DOCS/STANDARD/PC_101088.HTML](http://www.community.nsw.gov.au/DOCS/STANDARD/PC_101088.HTML), (viewed on 23/1/2008).

⁴⁸ Section 3, *Surrogate Parenthood Act 1988* (Qld).

⁴⁹ Sections 15 and 16, *Status of Children Act 1988* (Qld).

⁵⁰ Section 17, *Ibid.*

⁵¹ Section 10G, *Family Relationships Act 1975* (SA).

⁵² Section 10C, *Ibid.*

⁵³ Section 10E, *Ibid.*

⁵⁴ Section 10D, *Ibid.*

⁵⁵ Section 10E, *Ibid.*

Tasmania (Tas)

- 4.40 Under the *Surrogacy Contracts Act 1993* (Tas), surrogacy contracts are “void and unenforceable”.⁵⁶ It is an offence to “make or receive, or agree to make or receive, a payment or reward in relation to a surrogacy contract”⁵⁷ and it is illegal to “provide any technical or professional services in relation to achieving a pregnancy” for the purposes of a surrogacy contract.⁵⁸
- 4.41 The legal parentage of children born as a result of assisted reproductive technology is determined in accordance with the *Status of Children Act 1974* (Tas) which provides that when a woman becomes pregnant following a fertilisation procedure, she and her husband or partner are considered to be the legal parents of the child born as a result of the pregnancy. Any donor of sperm or ovum is not considered a legal parent.⁵⁹

Recent developments in Australia

- 4.42 The Committee notes that both the Queensland and Tasmanian Parliaments currently have select committees investigating surrogacy.
- 4.43 Additionally, a recent Communique of the Standing Committee of Attorneys-General noted that Ministers agreed to develop uniform legislation in relation to “legal recognition of parentage achieved by surrogacy arrangements”.⁶⁰ The Standing Committee also approved release of a consultation paper.
- 4.44 The Ministers agreed in principle that elements of the legislation should include:
- commercial surrogacy to remain illegal;
 - altruistic surrogacy arrangements will be legal but unenforceable;
 - informed consent required from all parties;
 - mandatory specialist counselling; and
 - a court order will recognise the intended parents as the legal parents if all legal prerequisites are met and it is in the best interests of the child.⁶¹

⁵⁶ Section 7, *Surrogacy Contracts Act 1993* (Tas).

⁵⁷ Section 4, *Ibid.*

⁵⁸ Section 5, *Ibid.*

⁵⁹ Section 10C, *Status of Children Act 1974* (Tas).

⁶⁰ Standing Committee of Attorneys-General, Communique, 28 March 2008. Available at <http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsfPage/RWPA7434F9ED00CDACBCA25741A003910D7>, (viewed on 22 April 2008).

⁶¹ *Ibid.*

United Kingdom (UK)

4.45 According to the *Surrogacy Arrangements Act 1985* (UK), surrogacy arrangements are not enforceable.⁶² While the legislation prohibits commercial surrogacy, the primary intention seems to be to prevent commercial brokerage of surrogacy since intending parents and surrogates do not commit an offence if they participate in commercial surrogacy negotiations or arrangements.⁶³

4.46 A 1998 review of surrogacy arrangements in the UK (**Brazier Report**) noted that:

*No criminal offence is committed by either the surrogate mother or the commissioning couple if payments are made to the surrogate mother over and above the reimbursement of genuine expenses. In principle, such additional payments may prevent the commissioning couple from obtaining a parental order under Section 30 of the Human Fertilisation and Embryology Act 1990, or an adoption order under the terms of the Adoption Act 1976.*⁶⁴

4.47 Despite a requirement that the court must be satisfied that only reasonably incurred expenses have been paid in relation to the surrogacy arrangement before a parental order is made, the Brazier Report makes the comment that “*we are not aware of any case in which an application has been refused on the grounds that an unacceptably large sum of money has been paid to the surrogate mother by the commissioning couple.*”⁶⁵

4.48 Legal parentage in the UK is determined in accordance with the *Human Fertilisation and Embryology Act 1990* (UK) which provides that the birth parents (assuming the woman’s husband or partner have consented to the procedure) are the legal parents of a child born as a result of assisted reproductive technology.⁶⁶

4.49 The circumstances in which a court may make a parental order to transfer legal parentage to gamete donors (commissioning parents) include:⁶⁷

⁶² Section 1A, *Surrogacy Arrangements Act 1985* (UK).

⁶³ Ibid, Section 2.

⁶⁴ M Brazier, A Campbell and S Golombok *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation: Report of the Review Team*, Department of Health, UK, 1998, p43. Available at <http://www.dh.gov.uk> (viewed on 24 January 2008). According to section 30(7) of the *Human Fertilisation and Embryology Act 1990*, in making a parental order, the court must be satisfied that: “*no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or the wife ...*”

⁶⁵ Ibid, p43.

⁶⁶ Section 27, *Human Fertilisation and Embryology Act 1990* (UK).

⁶⁷ Ibid, Section 30.

- the gametes of at least one of the commissioning parents is used in the conception of the child;
- the child is living with the commissioning parents at the time of the application and when the order is made;
- the arranging parents are at least eighteen years of age at the time the order is made;
- the birth parents have freely consented to the making of the order; and
- payment of reasonably incurred expenses only have been paid in relation to the arrangement.

4.50 A Government review of the 1990 Act which commenced in 2004 has culminated in the *Human Fertilisation and Embryology Bill* currently before the UK Parliament. In relation to surrogacy, clause 54 of the Bill extends eligibility criteria for a parental order (referred to as ‘fast track adoption’) to include, in addition to married couples, civil partners, unmarried opposite-sex couples or same-sex couples.⁶⁸

United States (US)

4.51 Not all jurisdictions within the US have enacted surrogacy legislation, and of those that have, different approaches have been adopted that range from making surrogacy contracts illegal, to enabling the legal recognition of intended parents.⁶⁹

4.52 A significant obstacle in attempting to legally enforce surrogacy contracts in states that have not enacted surrogacy legislation is state adoption law. Adoption regulation usually prohibits payment for adoption and requires a cooling off period following the child’s birth to enable the birth mother to reconsider her decision. In the *In re Baby M* case, the New Jersey Supreme Court found that a surrogacy contract was void because it did not include a cooling off period following the birth of the child. The contract was also found to be coercive in that it required the surrogate to agree to relinquish the child before it was even conceived.⁷⁰

4.53 Further examples of surrogacy regulation in the United States are outlined below.

⁶⁸ *Human Fertilisation and Embryology Bill 2007 (UK)*, Explanatory Notes to Bill, p33.

⁶⁹ J K and J C Ciccarelli, ‘The Legal Aspects of Parental Rights in Assisted Reproductive Technology’, *Journal of Social Issues*, Vol 61, No 1, 2005, p129.

⁷⁰ H Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, *Northwestern University Law Review*, Vol 100, No 1, 2006, pp475-476.

Florida

4.54 Surrogacy law in Florida enables a commissioning couple and a surrogate to enter into a “*binding and enforceable gestational surrogacy contract*” if a commissioning mother cannot carry a baby to term without risk to herself or the fetus. The surrogate must be 18 years of age or older and the commissioning couple must be married and at least 18 years of age.⁷¹

4.55 The contract must only allow for payment of “*reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartal, and postpartal periods.*”⁷²

4.56 Additional requirements to be included in a gestational surrogacy contract are:

(a) The commissioning couple agrees that the gestational surrogate shall be the sole source of consent with respect to clinical intervention and management of the pregnancy.

(b) The gestational surrogate agrees to submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health.

(c) Except as provided in paragraph (e), the gestational surrogate agrees to relinquish any parental rights upon the child’s birth and to proceed with the judicial proceedings prescribed under s.742.16.

(d) Except as provided in paragraph (e), the commissioning couple agrees to accept custody of and to assume full parental rights and responsibilities for the child immediately upon the child’s birth, regardless of any impairment of the child.

*(e) The gestational surrogate agrees to assume parental rights and responsibilities for the child born to her if it is determined that neither member of the commissioning couple is the genetic parent of the child.*⁷³

4.57 Within three days of the child’s birth, the commissioning couple must apply to the court for an “*expedited affirmation of parental status*”. If the court determines that a “*binding and enforceable*” gestational surrogacy contract exists and that at least one of the commissioning couple is a genetic parent of the child, the court will grant legal

⁷¹ Fla Stat. s742.15(1) and (2).

⁷² Fla Stat. s742.15(4).

⁷³ Fla Stat. s742.15(3).

parentage to the commissioning couple. A new birth certificate will be issued and the original birth certificate will be sealed.⁷⁴

Washington

4.58 Washington has adopted a version of the *Uniform Parentage Act 2002* which makes commercial surrogacy contracts “void and unenforceable and as “contrary to public policy”.⁷⁵ Contravention of the legislation constitutes a “gross misdemeanor.”⁷⁶

4.59 A “surrogate parentage contract” is defined as:

*a contract, agreement, or arrangement in which a female, not married to the contributor of the sperm, agrees to conceive a child through natural or artificial insemination or in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental rights to the child.*⁷⁷

4.60 In the event of a dispute regarding custody of a child born as a result of a surrogacy arrangement, the legislation provides that “*the party having physical custody of the child may retain physical custody of the child until the superior court orders otherwise.*”⁷⁸

Arizona

4.61 Arizona law prohibits all surrogacy contracts.⁷⁹

4.62 In situations where a child is born as a result of a surrogacy arrangement, the surrogate mother is deemed to be the legal mother of the child and “*is entitled to custody of that child.*”⁸⁰

Incidence of surrogacy

4.63 The incidence of surrogacy is difficult to estimate and the observations of the VLRC in relation to the situation in Victoria equally apply to Western Australia:

⁷⁴ Fla Stat. s742.16.

⁷⁵ RCW 26.26.240.

⁷⁶ RCW 26.26.250.

⁷⁷ RCW 26.26.210(4). According to RCW 26.26.210(2), a “Surrogate gestation” means “*the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female.*”

⁷⁸ RCW 26.26.260.

⁷⁹ ARS 25.218(A).

⁸⁰ ARS 25.218(B).

*We do not know how frequently surrogacy arrangements involving self-insemination occur in Victoria. No treatment procedures involving surrogates are being carried out in clinics in Victoria because of the eligibility requirements imposed by the present law. As a result, some people may decide not to continue their efforts to have a child, while others will travel interstate and overseas to pursue surrogacy arrangements.*⁸¹

- 4.64 For the same reasons that we are unsure about the frequency of surrogacy, it is difficult to estimate the likely demand for such arrangements if restrictions were to be lifted. Experience indicates the numbers will be small⁸² and evidence to the Committee from Mrs Suzanne Midford, approved counsellor under the *WA Human Reproductive Technology Act 1991*, provides an estimation of “six to 12 maybe” cases per annum in Western Australia.⁸³

Adoption

- 4.65 The Committee understands that the limited number of available babies for adoption means that it is not a realistic option for many infertile couples:

*There is a very tiny number of local children available for adoption. It has been plummeting; it is probably less than 10, unless they are special needs. In fact it is probably a lot less than 10 per annum in Western Australia, and international adoption is extremely difficult to organise. It is exceptionally costly, so it is very difficult for people.*⁸⁴

- 4.66 Evidence from Ms Antonia Clissa, approved counsellor, suggested that for some childless couples surrogacy may be the preferred option:

*My view is that people want to have a baby; they want babies. There are not babies to be adopted. ... last time I heard there were about six Western Australian babies available. They do not want a special needs child. They do not want an older child. There are probably those available for adoption, but people want actually to have a baby and preferably one that they are biologically related to...*⁸⁵

⁸¹ Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Position Paper Three: Surrogacy*, Melbourne, 2005, p13.

⁸² For example, at Bourn Hall Clinic in Cambridge, gestational surrogacy cases count for <1% of assisted reproductive treatment cycles in P Brinsden, ‘Gestational surrogacy’, *Human Reproduction Update*, Vol. 9, No 5, Sep 2003, p489.

⁸³ Ms Suzanne Midford, Approved Counsellor, Perth Psychological Services, *Transcript of Evidence*, 20 February 2008, p16.

⁸⁴ *Ibid*, p17.

⁸⁵ Ms Antonia Clissa, Approved Counsellor, *Transcript of Evidence*, 20 February 2008, p17.

- 4.67 The Committee understands that overseas adoption is difficult and expensive and the difficulties experienced by Ms Christine Lewis in seeking to adopt a child are outlined in her submission:

I attended an adoption information seminar by the DOCS and was told that a reasonable time frame to expect between starting the adoption process and adopting a child would be five years! 2 years for the assessment and approval process by DOCS and China is currently taking up to 3 years to place a child with a family once they receive a file.⁸⁶

Surrogacy outcomes

- 4.68 There is limited empirical research on surrogacy outcomes in terms of the ‘success’ (or failure) of the arrangement for the parties involved or in relation to outcomes for children born through surrogacy. To date, most of the studies undertaken have been reasonably small and limited to very young children.⁸⁷ It has been noted that:

In spite of the reassuring studies that have been carried out on the effects of surrogacy on the host and on the commissioning couples, further large follow-up studies are required, especially on the long-term effects on the children born as a result of surrogacy arrangements.⁸⁸

- 4.69 A statement on surrogacy by the Task Force on Ethics and Law from the European Society of Human Reproduction and Embryology (ESHRE) reported on the evidence in relation to the psychosocial aspects of surrogacy for the parties involved:

The commissioning parents. Within the appropriate context (implication counselling, screening protocols of all parties involved), it is generally experienced as a positive procedure by the commissioning parents, which is understandable as it is their only chance to become parents. However, on some occasions major (legal and psychological) problems arise. The procedure is also likely to be less problematic when both commissioning parents have a genetic link with the offspring.

Surrogates. Surrogate women do not generally experience major problems under the same conditions mentioned above (appropriate counselling and careful selection of candidates). Nevertheless, some

⁸⁶ Submission No 15 from Ms Christine Lewis, p3.

⁸⁷ Dr R McNair, *Outcomes for Children Born of ART in a Diverse Range of Families*, Victorian Law Reform Commission, Melbourne, 2004, p47.

⁸⁸ P Brinsden, ‘Gestational surrogacy’, *Human Reproduction Update*, Vol. 9, No.5, Sep 2003, p487.

of them experience psychological problems at the moment they relinquish the child, and there have been reports of exceptional cases where the surrogate woman decides to keep the child.

The surrogates children. The available information is extremely limited. The psychological consequences for the surrogate's child(ren) of giving away the newborn birth sibling are unknown.

The prospective child of commissioning parents. Again the available information is extremely limited; some risks are known (risk of rejection or risk of being the object of a conflict between the parties), others are not known as long-term follow-up studies have only just started.⁸⁹

4.70 The Committee received only three submissions (one being a private submission) from people with direct experience of surrogacy,⁹⁰ all of which indicated a positive outcome for the parties to the arrangement albeit with concerns about the lack of legal recognition for the arranged parents.

4.71 Ms Julie McLean has borne three children for two couples as a gestational surrogate and believes gestational surrogacy should be legalised throughout Australia with the birth parents recognised as the child's parents on the birth certificate. Her experience as a surrogate has been overwhelmingly positive:

For me, Gestational Surrogacy has been nothing but wonderful! I researched, thought thoroughly, and made sure I was 100% comfortable about my decision, and am proud to say that as a Gestational Surrogate, I have never had any regrets or negative thoughts. I am more supportive of Gestational Surrogacy than ever before, knowing how much joy it can bring to so many people's lives.⁹¹

⁸⁹ ESHRE Task Force on Ethics and Law including F Shenfield, G Pennings, J Cohen, P Devroey, G de Wert and B Tarlatzis, 'ESHRE Task Force on Ethics and Law 10: Surrogacy', *Human Reproduction*, Vol 20, No 10, 2005, p2706.

⁹⁰ Submission No 6 from Ms Julie Mclean, submission No 7 from Andrew and Michelle Webber and one private submission.

⁹¹ Submission No 6 from Ms Julie Mclean, p1.

“Unsuccessful” surrogacy outcomes

- 4.72 The number of surrogacy arrangements that have unsuccessful outcomes is not known, however, in the UK it has been estimated that the surrogate mother refused to relinquish the child in approximately 4-5 per cent of cases.⁹²
- 4.73 There are various risks associated with surrogacy arrangements. The VLRC notes that:

In contrast to the Kirkman case and the positive results reported in the UK studies, there have been cases in which significant difficulties have arisen in the course of the arrangement. Problems can occur if the surrogate decides she does not want to relinquish the child, if the commissioning couple decides they do not want the child because, for example, he or she is born with a disability, or if the parties have different views about how the pregnancy and childbirth should be managed. Another risk is that the surrogate has been coerced into carrying the child on behalf of a family member or friend and is not acting autonomously.⁹³

- 4.74 In Australia, the *Re Evelyn* case, involving a disputed private surrogacy arrangement, was litigated in the Family Court and appealed (unsuccessfully) to the High Court of Australia.⁹⁴
- 4.75 The case clearly illustrates the problems that may arise when parties enter into surrogacy arrangements in the absence of appropriate regulation. In particular, it illustrates the potential for complications to arise when parties are not properly assessed and counselled prior to entering into such arrangements and the grief that may be caused if the birth mother regrets giving up the child or fails to give up the child.

Supplementary Notice Paper No. 190 Issue No. 2

- 4.76 The Committee was aware of the proposed amendments to clauses 18 and 46 of the Bill contained in Supplementary Notice Paper No. 190 Issue No. 2, dated 14 November 2007. The document is attached to this Report as **Appendix 2**.

⁹² M Brazier, A Campbell and S Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation: Report of the Review Team*, Department of Health, London, 1998, p26. Available at <http://www.dh.gov.uk> (viewed on 24 January 2008).

⁹³ Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Position Paper Three: Surrogacy*, Melbourne, 2005, p6.

⁹⁴ *Re Evelyn* No. B.R. 7321 of 1997 (unreported). For analysis of the *Re Evelyn* case, see M Otlowski, 'Reflections on Australia's First Litigated Surrogacy Case', *Medical Law Review*, 7, 1; Spring 1999, pp38 - 57.

- 4.77 The amendments proposed in the Supplementary Notice Paper are considered within the body of the report.

5 SCOPE OF THE BILL

- 5.1 The Committee notes that *Directions on Surrogacy (draft Directions)*, currently in draft form, will be issued by the Chief Executive Officer (CEO) of the Department to “set the standards of practice for surrogacy under the *Human Reproductive Technology Act 1991*”.⁹⁵ A copy of the draft Directions is attached at **Appendix 3**. The introduction to the draft Directions states that:

*The purpose of these directions is to set the criteria that clinics should adopt in deciding whether artificial fertilisation procedures may be provided in connection with a surrogacy arrangement.*⁹⁶

- 5.2 The extent of surrogacy regulation not addressed in the legislation (but to a large extent in the draft Directions) was specifically raised as a matter of concern in submissions to the Committee from the L J Goody Bioethics Centre,⁹⁷ the Australian Christian Lobby,⁹⁸ the Knights of the Southern Cross⁹⁹ and evidence from the Reproductive Technology Council.
- 5.3 For example, the written *Supplement to Oral Submissions made to the Legislative Council Committee* from Dr Brenda McGivern, Member of the WA Reproductive Technology Council (RTC), observes that:

*the Bill is notable for the matters it excludes. ... it is specifically contemplated that the regulation of surrogacy will include a range of matters that will be dealt with in directions made by the CEO (the executive) under the HRT Act.*¹⁰⁰

- 5.4 Dr McGivern points out that “[s]urrogacy arrangements dependant on unassisted conception will not be covered by the HRT Act, and hence by the directions (indeed, this kind of surrogacy arrangement would remain largely unregulated)” and that “access to assisted reproductive technology services to facilitate surrogacy arrangements is not covered by the Bill at all.”¹⁰¹

⁹⁵ Department of Health WA, draft *Directions on Surrogacy*, 2007.

⁹⁶ Ibid, p5.

⁹⁷ Submission No 5 from L J Goody Bioethics Centre.

⁹⁸ Submission No 4 from the Australian Christian Lobby.

⁹⁹ Submission No 10 from the Knights of the Southern Cross.

¹⁰⁰ Dr Brenda McGivern, Member, Reproductive Technology Council, *Supplement to Oral Submissions made to the Legislative Council Committee*, p2.

¹⁰¹ Ibid, pp2-3.

- 5.5 According to Dr McGivern, a practical consequence for the RTC in relation to the administration and regulation of surrogacy is that:

*Any lack of clarity, for example, is going to impact directly on the ability to implement and oversee matters falling under the directions. Perhaps importantly, included in that are areas which may or may not be described as areas of policy. I suppose here I would flag the issues of access and eligibility. Whereas directions, it seems, have previously taken the role of dealing with matters of process and detail under a policy framework given by legislation, the question that arises is whether eligibility and access are in fact issues of process or policy. I am really raising that as an issue only by way of then saying that the council has to deal with any lack of clarity by way of looking for policy to guide that, and if that is in fact a matter of policy, it does not appear to be reflected in legislation. We do not have Parliament's views or direction on that.*¹⁰²

- 5.6 The Committee has identified certain issues relating to the current scope of the Bill and the reliance on directions as a means of regulation.

- 5.7 Evidence from the Department indicates an assumption that surrogacy arrangements will necessarily involve reproductive technology. This assumption leads to the conclusion that the regulation of surrogacy, to a large extent, can be achieved simply by linking it to regulation of treatment provided under the *Human Reproductive Technology Act 1991*:

*The provision of treatment in connection with the surrogacy arrangement is all governed by the Reproductive Technology Act. That is the way all reproductive technology is regulated. To the extent that we are dealing here with providing reproductive technology services for the purposes of something else, we are looking at regulation. We do not want to duplicate. Basically, we have a system that is up and running and regulates all reproductive technology services. We are not wanting to have something separate and aside from that. We are trying to build on what is there and what is currently operating effectively.*¹⁰³

- 5.8 A significant problem with this approach is that not all surrogacy arrangements necessarily involve reproductive technology and the Bill does not limit surrogacy arrangements to those that do. The *Human Reproductive Technology Act 1991* was

¹⁰² Dr Brenda McGivern, Member, Reproductive Technology Council, *Transcript of Evidence*, 20 February 2008, p2.

¹⁰³ Ms Daphne Andersen, Senior Legal Adviser, Department of Health WA, *Transcript of Evidence*, 27 February 2008, p4.

not developed to deal with surrogacy and attempts to make surrogacy 'fit' is bound to be problematic.

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

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

Because surrogacy involves the relinquishment of a baby by the woman who gives birth to it, the commission views it as having important similarities to adoption.¹⁰⁴

- 5.10 Evidence from the Department quoted previously (see paragraph 4.4) indicates that a central purpose of the Bill is to regulate surrogacy and provide for the necessary preparation and counselling of the parties to prevent, as far as possible, subsequent disputes. However, the Committee is not convinced that the Bill actually achieves this goal. Rather, key elements are devolved to the executive in the form of directions that are not subject to parliamentary scrutiny. The following extract of evidence illustrates the Committee's concerns:

CHAIR: ... *From the Committee's point of view, Parliaments and governments are ultimately held responsible for the legislation they pass and we are being asked to pass legislation that will then allow these details to be changed without any reference back to the Parliament by any disallowable instrument or appeal or regs. That is why we are fleshing out with you the best place to put these things. ...*

Ms Anderson: *I suppose the response, in general, is to say that the Human Reproductive Technology Act has established the Reproductive Technology Council with expertise in this area and given it the role of overseeing the general practice of reproductive technology. It has set up a scheme that reproductive technology*

¹⁰⁴ Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Final Report*, Melbourne, 2007, pp172-3.

*operates under, and we have adopted that same scheme in relation to this bill because we see the parallels between this and normal reproductive technology services are very great.*¹⁰⁵

- 5.11 Specific aspects of surrogacy regulation that the Committee considers should be provided for in the Bill (rather than in the form of directions) are discussed later in the report.
- 5.12 The Committee also notes that the Bill does not include a provision that empowers the CEO to give directions in relation to surrogacy. The Committee considers this should be made explicit in the Bill.

Recommendation 1: The Committee recommends that the Surrogacy Bill 2007 and the Human Reproductive Technology Act 1991 be amended to include an explicit provision to enable the CEO to make directions in relation to surrogacy.

6 CLAUSE 6: MEANING OF SURROGACY ARRANGEMENT THAT IS FOR REWARD

Reasonable expenses

- 6.1 Clause 6 of the Bill defines a “*surrogacy arrangement that is for reward*” as one that provides for “*any payment or valuable consideration*” other than for “*reasonable expenses*”. Reasonable expenses includes costs associated with the pregnancy or birth (including treatment aimed at achieving pregnancy) as well as expenses related to assessments or advice in relation to the surrogacy arrangement.
- 6.2 According to the Explanatory Memorandum, reasonable expenses may include a range of medical and ancillary costs depending on particular circumstances:

*The intention is that the birth mother should not receive a material benefit or advantage because of her involvement in the surrogacy arrangement, but that she should not be out of pocket for expenses reasonably incurred by her because of the arrangement. Reasonable expenses associated with the pregnancy could include such things as the payment for medical expenses including private health insurance cover, payment of travel or childcare expenses or lost earnings incurred in connection with receiving treatment or because of the pregnancy or birth, purchase of pregnancy clothing and payment for life insurance coverage during the pregnancy.*¹⁰⁶

¹⁰⁵ Ms Daphne Anderson, Senior Legal Adviser, Department of Health, *Transcript of Evidence*, 27 February 2008, p8.

¹⁰⁶ Explanatory Memorandum to the Surrogacy Bill 2007, pp2-3.

6.3 Bearing in mind that a fundamental objective of the legislation is to make commercial surrogacy illegal while allowing for altruistic surrogacy in certain circumstances, the Committee considered the question of whether the term “reasonable expenses” would sufficiently confine expenses in a way that is consistent with the concept of altruistic surrogacy.

6.4 The Committee notes the following comment from the Brazier report:

*Undefined, expenses can “disguise” an almost limitless and unprovable range of payments. It should perhaps also be noted that it is not reasonable in a common law jurisdiction to expect courts post facto to develop regulation of surrogacy practice when Parliament has not done so itself.*¹⁰⁷

6.5 Similar concerns were raised in submissions to the Committee. The Festival of Light Australia points out that:

*There is no definition or guidance given in the Bill as to what might count as a “reasonable expense associated with the pregnancy or birth”.*¹⁰⁸

6.6 The Committee recognises the possibility that if legal payments are too loosely defined, surrogacy arrangements may take on a commercial aspect. Mary Warnock, who chaired the UK’s Committee of Enquiry into Human Fertilisation and Embryology in 1984 (the Warnock Report) notes in a later publication that:

*the expenses that may accrue from pregnancy are not so easy to calculate. There may be loss of earnings, there will certainly be new clothes, and there will be equipment for the baby when it is born. ‘Expenses’ might turn into something pretty substantial.*¹⁰⁹

6.7 The submission from the Knights of the Southern Cross (WA) expresses concern that a broad interpretation of reasonable payments may change the nature of a surrogacy arrangement:

On the one hand it might seem reasonable to pay someone for their lost earnings by virtue of the pregnancy, but on the other hand, such

¹⁰⁷ M Brazier, A Campbell and S Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation: Report of the Review Team*, Department of Health, London, 1998, p19. Available at <http://www.dh.gov.uk> (viewed on 24 January 2008).

¹⁰⁸ Submission No 8 from the Festival of Light Australia, p11.

¹⁰⁹ M Warnock, *Making Babies: is there a right to have children?*, Oxford University Press, Oxford, 2002, p91.

*payments have the potential to amount to commercial surrogacy by default.*¹¹⁰

- 6.8 The VLRC Report makes comment that the authors' initial view was that in order to avoid the possibility of "*commercial surrogacy by default*", all payments for lost earnings should be excluded from surrogacy arrangements. However:

*during the course of our review, we were alerted to situations where it may be in the best interests of the child and the surrogate mother for the surrogate not to work during pregnancy. If there are medical complications during pregnancy, she may be advised to rest for health reasons and this could cause financial hardship. Allowing payment for loss of earnings could avoid a situation where a child is put at risk because of the potential for financial hardship faced by a surrogate mother.*¹¹¹

- 6.9 The VLRC's final recommendations included a restriction on expenses to prescribed payments in the following categories:

- *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.*
- *any 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 mother has been advised by her doctor that she should stop working earlier than anticipated.*
- *any reasonable legal expenses associated with the surrogacy arrangement.*¹¹²

- 6.10 Evidence from the Department in relation to the Victorian approach of prescribing categories of expenses indicated that while prescribing *types* of expenses may be considered appropriate, prescribing maximum *fees* would not adequately take into account individual circumstances:

¹¹⁰ Submission No 10 from Knights of the Southern Cross (WA) Inc., p17.

¹¹¹ Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Final Report*, Melbourne, 2007, p181.

¹¹² *Ibid*, Recommendation 121, p16.

*I think providing for reasonable expenses to be allowed is one approach to putting a limit on what expenses are, and prescribing expenses is a different approach to it. ... “Reasonable expenses” or “reasonable” is a well-used legal principle in a lot of legislation and allows a consideration of expenses in the context of the parties and the actual expenses that they have incurred. If the question was looking at saying “these types of expenses can be permitted”, that is one approach, and I guess that could be conceded, but I would have a problem saying that. Often when you look at “prescribed” it is an amount, so a prescribed fee. If you said a fee of \$500, or a limit of, you end up with difficulties that do not allow you to take into account the actual expenses or the circumstances of the parties.*¹¹³

Committee comment

- 6.11 The Committee agrees that payments made in connection with surrogacy arrangements may be adequately contained without recourse to the prescription of fees. However, the Committee also considers that the Victorian approach of prescribing *categories* of expenses enables a degree of flexibility that can properly take into account personal circumstances while providing clear parameters in relation to what is considered reasonable.
- 6.12 The Committee recognises that there are risks associated with pregnancy and childbirth and that some women will experience physical or psychological complications as a result. In addition to the expenses recommended by the Commission, the Committee considers that provision for payment of expenses related to counselling and postnatal medical care and the cost of medical, life and disability insurance for the term of the pregnancy would be reasonable.
- 6.13 Medicare benefits are not currently payable in relation to assisted reproductive services for the purpose of a surrogacy arrangement¹¹⁴ and the Committee has written to the responsible Federal Minister to inquire whether this situation is likely to be reviewed in the near future.

¹¹³ Ms Daphne Andersen, Senior Legal Adviser, Department of Health WA, *Transcript of Evidence*, 14 February 2008, pp3-4.

¹¹⁴ See the explanatory notes to Category T1.4, “Assisted Reproductive Services” in the *Medicare Benefits Schedule* available at <http://www9.health.gov.au/mbs/fullDisplay.cfm?type=note&qt=NoteID&q=T1.4> (viewed on 9 April 2008).

Recommendation 2: The Committee recommends that the Surrogacy Bill 2007 be amended to limit reasonable expenses to costs incurred in the following categories:

- any reasonable medical expenses associated with the pregnancy which are not otherwise provided for through Medicare, private health insurance or any other benefit;
- health, disability and life insurance during the course of the pregnancy;
- in the absence of any entitlement to paid maternity or other leave, lost earnings up to a maximum period of two months;
- any additional lost earnings or medical expenses incurred as a result of special circumstances arising during pregnancy;
- reasonable post-natal medical expenses;
- reasonable pre- and post-natal psychological counselling expenses related to the surrogacy arrangement; and
- reasonable legal, advisory or assessment expenses associated with the surrogacy arrangement.

7 CLAUSE 7, SURROGACY ARRANGEMENT NOT BINDING

7.1 Clause 7 of the Bill provides that:

A surrogacy arrangement is not enforceable.

7.2 A fundamental policy decision reflected in the legislation is that surrogacy arrangements are not binding however in certain circumstance (outlined in clause 17) the court may enforce a surrogacy arrangement without the birth parent's consent. In its evidence to the Committee, the Department provided the following background information:

*All other jurisdictions provide that surrogacy arrangements should not be enforceable. To provide that a contract was enforceable detracts from the principle that the interests of the child rather than the terms of the contract should be what is paramount in deciding where the child should live, and contracts for personal services are not enforceable by way of specific performance.*¹¹⁵

7.3 The question of whether surrogacy arrangements should or should not be enforceable was raised in some submissions and the Committee recognises that for many arranged parents this is a critical issue. However, this is a matter of policy that is beyond the terms of reference of this inquiry.

- 7.4 That being said, the Committee has identified two important issues relating to the operation of this clause – the payment of reasonable expenses and an apparent exception to the non-enforceable nature of surrogacy agreements. These issues are discussed below.

Reasonable expenses

- 7.5 A non-binding surrogacy arrangement raises a significant issue in relation to reimbursement of reasonable expenses.
- 7.6 The Committee is of the view that the operation of this clause as it relates to reasonable expenses could result in a situation where one or another of the parties to a surrogacy arrangement suffers a disadvantage. Similar concerns were raised in submissions to the Committee.
- 7.7 The submission from L J Goody Bioethics Centre identified this aspect of the Bill as problematic:

So under the Bill as it stands an arranged couple could undertake to pay the birth mother's reasonable expenses as they are incurred, but the birth mother could still refuse to give them the child at the end of the process. Clause 7 could be interpreted to mean that the arranged parents have no legal avenue to recover their costs.

This anomaly could be avoided by exempting 'recovery of reasonable expenses' from the meaning of clause 7.¹¹⁶

- 7.8 The Committee considers that a separation of reasonable expenses from the non-enforceable nature of an agreement need not conflict with the underlying rationale for maintaining that surrogacy arrangements should not be binding.
- 7.9 The submission from the Reproductive Technology Council points out that:

Council is aware that this issue has been of concern to other jurisdictions in Australia that are considering introducing surrogacy legislation. There is some argument to recognising a distinction between the enforcement of the parentage of a child born from a surrogacy arrangement with the enforcement of any financial component of an arrangement. ... An amendment to Clause 7

¹¹⁵ Ms Daphne Andersen, Senior Legal Adviser, Department of Health WA, *Transcript of Evidence*, 14 February 2008, p4.

¹¹⁶ Submission No 5 from L J Goody Bioethics Centre, p3.

*addressing this issue may be appropriate to consider under the principles of justice and equity.*¹¹⁷

- 7.10 The Committee notes that the VLRC review of surrogacy reached the same conclusion:

*Surrogacy agreements should continue to be void. However where parties to a surrogacy arrangement have agreed to the reimbursement of prescribed payments, that part of the agreement should be enforceable.*¹¹⁸

- 7.11 It is also noted that in evidence to the Committee, the Department indicated general support for an appropriate amendment to address this issue:

*Making payment of reasonable agreed expenses enforceable is in line with the recommendations from the VLRC report, which is recommendation 122 of that, and it is a matter that could be considered for inclusion in the bill. That seems reasonable.*¹¹⁹

Recommendation 3: The Committee recommends that clause 7 of the Surrogacy Bill 2007 be amended so that the payment or reimbursement of reasonable expenses is enforceable.

Exception to non-binding nature of surrogacy agreements

- 7.12 Clause 17 of the Bill enables the court, in making a parentage order, to dispense with certain requirements – notably a birth mother’s consent - in certain circumstances.

- 7.13 The Committee understands that the practical result of this provision is to confer a degree of enforceability on *some* surrogacy arrangements on the basis of genetic relatedness. If not for a surrogacy arrangement, a birth mother would not be required to relinquish a child born as a result of assisted reproductive technology using donor gametes.¹²⁰

¹¹⁷ Submission No 18 from the Reproductive Technology Council, p2.

¹¹⁸ Recommendation 122 of Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Final Report*, Melbourne, 2007, p182.

¹¹⁹ Ms Daphne Andersen, Senior Legal Adviser, Department of Health WA, *Transcript of Evidence*, 14 February 2008, p4.

¹²⁰ Sections 5, 6 and 7 of the *Artificial Conception Act 1985*. When donated ovum and/or sperm are used in an artificial fertilisation procedure, the birth mother and father are the legal the parents of the child.

- 7.14 Consequently, the Committee is of the view that there are exceptions to the non-enforceable nature of surrogacy arrangements outlined in the Bill and this should be reflected in clause 7.

Recommendation 4: The Committee recommends that clause 7 of the Surrogacy Bill 2007 be amended to include a caveat that, subject to clause 17, a surrogacy arrangement is not enforceable.

8 CLAUSE 13: CHILD'S BEST INTERESTS PARAMOUNT

- 8.1 The Committee notes that clause 13(2) derives from an amendment made in the Legislative Assembly.
- 8.2 Clause 13 requires the court to consider the child's best interests as paramount when deciding whether to make a parentage order (a court order which transfers legal parentage from the birth parents to the arranged parents). Additionally, clause 13(2) states:

For the purposes of this Act it is presumed to be in the best interests of the child for the arranged parents to be the parents of the child, unless there is evidence to the contrary.

- 8.3 The Department provided the following explanation to the Committee in response to questions about the effect of clause 13(2):

Just by way of background, I think you probably know that clause 13(2) was introduced by way of amendment in the Legislative Assembly. The member who moved the amendment was seeking to give some greater certainty to arranged parents and to provide some guidance to the court in finely balanced circumstances. I think that was, you know, really looking at – if you have got something finely balanced, then you can tip one way or the other on the basis of that. It is not intended to say that highly unsuitable or obviously unsuitable arranged parents are going to be given a parentage order. The amendment does not make the surrogacy arrangement enforceable, which I think is one of the suggestions in the way the question is asked, and the court is still required to consider the best interests of the child as paramount.¹²¹

¹²¹ Ms Daphne Andersen, Senior Legal Adviser, Department of Health WA, *Transcript of Evidence*, 14 February 2008, p9.

- 8.4 The presumption contained in clause 13(2) was the subject of conflicting opinions in submissions and evidence received by the Committee. For example, evidence provided by Dr Joseph Parkinson from the L J Goody Bioethics Centre was that the inclusion of the presumption constituted an improvement to the Bill:

*Insofar as the whole thrust of a surrogacy arrangement is geared to the arranged parents becoming parents and is being driven by their desire to be parents and the whole concept of surrogacy rests on the possibility of the birth mother being able to give up the child, it seems obvious to me that the presumption is always, and ought always to be, that the arranged parents should be considered the best people to raise the child. The whole process is predicated on that. I do not think that was clear in earlier drafts of the bill. I think that this clause clarifies that quite well.*¹²²

- 8.5 In contrast, the submission from the Festival of Light Australia pointed out that:

the meaning of “best interests of the child” is not to have its established meaning in international and family law. Rather it is to be interpreted by clause 13(2) to include a presumption in favour of the arranged parents being the parents of the child, unless there is evidence to the contrary.

This provision is contrary to Principle 6 of the Declaration on the Rights of the Child which states that:

“The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstance, be separated from his mother.”

*The desire of the arranging parents to acquire a child does not amount to “exceptional circumstances” as envisioned by this Principle.*¹²³

- 8.6 For the above reasons, the Festival of Light considered that the court should “*be unrestrained in determining the best interests of the child.*”¹²⁴

¹²² Dr Joseph Parkinson, Director, L J Goody Bioethics Centre, *Transcript of Evidence*, 20 February 2008, p2.

¹²³ Submission No 8 from the Festival of Light Australia, p3.

¹²⁴ *Ibid*, p3.

Committee comment

- 8.7 The presumption contained in clause 13(2) (that the best interests of the child are for the arranged parents to be the parents unless there is evidence to the contrary) is linked to the exception to the non-binding nature of surrogacy agreements identified by the Committee and discussed in paragraphs 7.12 to 7.14.
- 8.8 In effect, clause 13(1) provides that the paramount consideration when making a decision concerning a parentage order is the best interests of the child. However, clause 13(2) provides that the best interests of the child is presumed to be, in the absence of evidence to the contrary, the arranged parents being the parents, arguably defining the terms in clause 13(1) in a way that favours the arranged parents.
- 8.9 Clause 13(2) dictates how the court will consider the paramount question of the best interests of the child. Prior to clause 13(2) being inserted, clause 13 required no presumption prior to considering the evidence. The Court was to consider all evidence before it, give all evidence appropriate weight, and then determine one paramount question – the best interests of the child.
- 8.10 The presumption in clause 13(2) changes how the court is to determine parentage orders. Clause 13(2) requires the court to presume, as a starting point, that it is in the best interests of the child for the arranged parents to be the parents of the child unless there is evidence to the contrary. The onus is on a party, most likely the birth mother, to adduce evidence to rebut the presumption. Clause 13(2) places arranging parents in a favourable position to seek parenting orders and the contesting party in an unfavourable evidentiary position (and they have the onus of rebutting the presumption). Clause 13(2) effectively operates to define what the best interests of the child is - unless evidence to the contrary is adduced.
- 8.11 It is not for the Committee to consider the merits of the presumptive clause, only its operational effect. It could be implied (perhaps not intentionally) from the Department's evidence (see paragraph 8.3) that the presumption only operates in "*finely balanced*" cases. This is not the case. While clause 13(2) will certainly effectively favour the arranging parents in finely balanced cases, the clause 13(2) presumption, and the onus on a party to rebut the presumption, applies to all cases.
- 8.12 The Committee notes that clause 13(2) provides that "*For the purposes of this Act*" the presumption applies. Clause 13(2) is therefore stated as applying to the entire Bill rather than to clause 13(1) or the circumstances identified in clause 17(5) which, by operation of the provisions of the Act, it will apply to.
- 8.13 It is difficult to see what other provisions of the Bill clause 13(2) may in effect apply to, however it is a broad statement of application that could apply to other (unintended) parts of the Bill.

8.14 The Committee notes that clause 13(2) of the Bill may be contentious.

9 CLAUSE 14: DEFINITION OF BIRTH PARENTS

9.1 Clause 14 includes a definition of “*birth parents*” and the Explanatory Memorandum provides the following background information:

*The birth parents are the parents who are recognised by the law as being the parents of a child at the time of the child’s birth. The Artificial Conception Act 1985 provides that the woman who gives birth to a child following an artificial fertilisation procedure is the mother of the child and the mother’s consenting husband or de-facto partner is a parent of the child.*¹²⁵

9.2 The submissions from the Reproductive Technology Council¹²⁶ and the L J Goody Bioethics Centre suggest that the meaning of “genetic parent” should be defined in the Bill. The latter submission points out that clause 17 gives the Family Court “*considerable discretion when a child is genetically related to the arranged parents but not to the birth mother*” but ‘genetic parent’ is not defined in the Bill.¹²⁷ A suggested definition of genetic parent is proposed:

*“genetic parent” of a child means a person who is genetically related to the child by having contributed genetic material to the conception of the child.*¹²⁸

Recommendation 5: The Committee recommends that a definition of genetic parent in the following proposed terms is included in the Surrogacy Bill 2007:

“genetic parent” of a child means a person who is genetically related to the child by having contributed genetic material to the conception of the child.

10 CLAUSE 15: CIRCUMSTANCES FOR SEEKING PARENTAGE ORDER

Eligibility criteria for seeking a parentage order

10.1 Arranged parents may make an application for a parentage order if they reside in Western Australia and if, at the time the surrogacy arrangement was made, they are an “*eligible couple*” or “*eligible person*”. Eligibility is defined in clause 15(2) as having

¹²⁵ Explanatory Memorandum to the Surrogacy Bill 2007, p6.

¹²⁶ Submission No 18 from the Reproductive Technology Council, p2.

¹²⁷ Submission No 5 from L J Goody Bioethics Centre, p6.

¹²⁸ Ibid, p6.

“the attributes” required by section 23(1) of the *Human Reproductive Technology Act 1991*.

10.2 The Committee notes that there is no section 23(1) of the *Human Reproductive Technology Act 1991* and assumes the correct reference is section 23(a).

10.3 Section 23(a) of the *Human Reproductive Technology Act 1991* provides that:

An in vitro fertilisation procedure may be carried out where -

(a) it would be likely to benefit -

(i) persons who, as a couple, are unable to conceive a child due to medical reasons;

(ia) a woman who is unable to conceive a child due to medical reasons; or

(ii) a couple or a woman whose child would otherwise be likely to be affected by a genetic abnormality or a disease;

10.4 According to the Explanatory Memorandum:

This means that parentage orders will be available where surrogacy has been undertaken because of medical problems.

Directions under the HRT Act will provide for a detailed assessment and preparation process that must be undertaken prior to use of reproductive technology in connection with a surrogacy arrangement.¹²⁹

Committee comment

10.5 It is not apparent to the Committee why the definition of “eligible couple” and “eligible person” is not detailed in the Bill itself rather than as a reference to “*the attributes*” described in section 23 of the *Human Reproductive Technology Act 1991*.

10.6 The Committee understands that aspects of surrogacy regulation are inextricably linked to the *Human Reproductive Technology Act 1991* however the Bill is not limited to arrangements that make use of assisted reproductive technology. Consequently, the Committee considers it appropriate that the definition of eligible persons is outlined in full in the Bill.

¹²⁹ Explanatory Memorandum to the Surrogacy Bill 2007, p6.

Recommendation 6: The Committee recommends that section 15(2) of the Surrogacy Bill 2007 is amended to contain the detail of the definition of “eligible couple” and “eligible person” rather than a reference to the *Human Reproductive Technology Act 1991*.

Expansion of eligibility criteria to include problems with carrying a child to term

- 10.7 The Committee understands that the criteria for eligibility for treatment required by the *Human Reproductive Technology Act 1991* is limited to infertility or the risk of passing on a genetic disorder. However, the Committee heard evidence that in addition to these problems, potential arranged parents may include women who are able to conceive but are unable to safely carry and/or deliver a baby without serious risk to themselves or the baby.
- 10.8 The submission from Andrew and Michelle Weber explained that Michelle has cystic fibrosis and that:

Our understanding of our situation is that we may well have been able to conceive but it would have been life threatening for Michelle to carry the child to term.

We also do not fall into the category of having a child likely to be affected by a genetic disorder because with cystic fibrosis, Andrew would have to have been a carrier for there to be any risk of passing on the disease. As Andrew was not a carrier, this was not a problem ...¹³⁰

- 10.9 The Department indicated to the Committee in evidence that an appropriate amendment to expand the eligibility criteria to include women who cannot safely carry or deliver a child would be acceptable:

Section 23 of the Human Reproductive Technology Act sets out that IVF procedures may be carried out where it would be likely to benefit a couple or a woman who is unable to conceive a child due to medical reasons. It would be reasonable to extend this to allow surrogacy to be used where a woman is able to conceive a child but unable to

¹³⁰ Submission No 7 from Andrew and Michelle Weber, p2.

*carry the child to term because of medical reasons; so, there is no problem with that expansion.*¹³¹

- 10.10 The Committee notes the proposed amendment to clause 46 in Supplementary Notice Paper No. 190, Issue No. 2, that recommends that the definition of “eligible couple” and “eligible person” in section 23 of the *Human Reproductive Technology Act 1991* is expanded to include, for the purposes of a surrogacy arrangement, women who are unable to safely carry and/or deliver a baby without serious risk to themselves or the baby.

Recommendation 7: The Committee recommends that the definition of “eligible couple” and “eligible person” is amended in the terms proposed in Supplementary Notice Paper No. 190, Issue No. 2 to include:

“a woman who is unable to give birth to a child due to medical reasons”.

Private surrogacy arrangements

- 10.11 The Explanatory Memorandum for the Bill refers to a “*detailed assessment and preparation process*” to be outlined in Directions issued under the *Human Reproductive Technology Act 1991*.¹³² Since the Directions only apply to licensees of clinics that provide reproductive technology, the assessment and preparation process will not apply to people who undertake private surrogacy arrangements without the involvement of a licensed clinic or an exempt medical practitioner.
- 10.12 Arranged parents in these situations will still be able to apply for a parentage order if they have the “*attributes*” (infertility or likely to pass on a genetic disorder) required by section 23 of the *Human Reproductive Technology Act 1991* at the time the arrangement was entered into.

Where can reproductive technology occur?

- 10.13 The Committee heard evidence from the Department that all human reproductive technology, including artificial insemination, must be carried out by a licensed clinic or an exempt medical practitioner:

The Human Reproductive Technology Act provides that it is an offence to undertake any artificial fertilisation procedures, which

¹³¹ Ms Daphne Andersen, Senior Legal Adviser, Department of Health WA, *Transcript of Evidence*, 14 February 2008, p9.

¹³² Explanatory Memorandum to the Surrogacy Bill 2007, p1.

*includes artificial insemination ...except pursuant to a licence or exemption under the HRT Act. It was done this way in part to provide some protection for people who may want to use that form of treatment; that they can get sperm that has been quarantined; that, you know, there are safety issues associated with it. What can sometimes happen is that the clinic or an exempt practitioner, who is a doctor who has got a special exemption under the legislation, can supervise the artificial insemination to the extent that they can provide the sperm and instructions about how it is to be used and allow the people who are going to use it to go home and use it themselves in accordance with those instructions. That is under supervision.*¹³³

10.14 In cases where artificial insemination is undertaken outside the clinic environment, there is a requirement for overall supervision and direction of the process by an exempt practitioner. Consequently, the requirements of the *Human Reproductive Technology Act 1991* and its Directions apply.

10.15 The Department explained in evidence to the Committee that:

*If they do it under supervision – they do it at home but it is under supervision – in all of those cases the directions still have to be complied with. The licensee or the exempt practitioner cannot provide any services in connection with the surrogacy arrangement unless the directions have been complied with and there has been an approval process undertaken.*¹³⁴

Method of conception and eligibility criteria to apply for a parentage order

10.16 Arranged parents of a surrogacy arrangement undertaken without involvement of a licensed clinic may be eligible to apply for a parentage order. The Department gave evidence to the Committee in relation to this question:

If the arranged parents met the eligibility requirements for IVF – so they were infertile; unable to conceive a child themselves – but used natural conception methods, they would be able to apply for a parentage order. Yes, that would mean that they had not gone through that process, but the court does have the capacity to look at requiring further investigation in those cases and also for counselling and legal advice to be undertaken, and there would have to be

¹³³ Ms Daphne Andersen, Senior Legal Adviser, Department of Health WA, *Transcript of Evidence*, 14 February 2008, pp9-10.

¹³⁴ Ibid, p10.

*evidence that they were medically infertile at the time all of that occurred.*¹³⁵

- 10.17 The lack of regulation in relation to some surrogacy arrangements is identified in the submission from the L J Goody Bioethics Centre:

the parentage order process will not require parties to have received appropriate counselling, or medical or legal advice regarding surrogacy itself, or its possible present or future impact on the parties themselves, on their existing children, and on the child who is to be the subject of the surrogacy arrangement.

Both the Explanatory Memorandum and Second Reading Speech indicate that these important matters relating to surrogacy arrangements will be regulated by Directions issued under the Human Reproductive Technology Act 1991 (HRT Act).

*But not all surrogacy arrangements will in fact be regulated, because under the Bill as it stands and despite clear implications to the contrary in the Second Reading Speech, not all surrogacy arrangements need involve the use of assisted reproductive technology.*¹³⁶

- 10.18 The L J Goody Bioethics Centre perceive certain dangers in allowing some arrangements to be excluded from the assessment and preparation process:

It is clearly in everyone's best interests (not least the child to be conceived) that all parties to a surrogacy arrangement receive comprehensive psychological, legal and medical advice before entering a surrogacy arrangement.

*But the Bill can only guarantee prior counselling and other advice when conception occurs through the use of assisted reproductive technology and the surrogacy arrangement therefore falls under proposed Directions to be issued under the HRT Act. Where conception occurs naturally there will be no guarantee that, prior to entering a surrogacy arrangement, parties will receive the benefits of any 'detailed assessment and preparation process' to assist them make informed, balanced and just decisions with regard to the surrogacy itself.*¹³⁷

¹³⁵ Ibid, p10.

¹³⁶ Submission No 5 from L J Goody Bioethics Centre, p4.

¹³⁷ Ibid, p5.

- 10.19 To overcome these problems, the submission suggests that the Bill should be amended to include a requirement that the child's conception is by means of reproductive technology.¹³⁸
- 10.20 The Committee notes that other jurisdictions have grappled with the difficult issue of whether legal surrogacy should be restricted to licensed clinics.
- 10.21 For example, a 2007 report on gestational surrogacy by the Social Development Committee of the South Australian Parliament reached the conclusion that parties to a private surrogacy arrangement should be encouraged to access appropriate preparation and assessment services:

*The Committee heard that it is not possible to prevent those individuals who do not require reproductive technology to enter into private surrogate arrangements outside of licensed fertility clinics. However, the Committee does not consider that this is sufficient enough reason to exclude the practice of traditional surrogacy in new legislation. By doing so, the committee considers it will encourage couples to access proper screening and counselling services.*¹³⁹

- 10.22 The Brazier report which reviewed surrogacy arrangements in the UK rejected the idea of making it mandatory for parties to a surrogacy arrangement to use a licensed clinic. It was thought that private arrangements may continue to occur for various reasons and that:

*Surrogacy must be approached on its very special facts. If a child is born as a result of surrogacy, however flawed ethically or socially the initial arrangement may have been, the child's welfare must be the highest priority. If the child has been entrusted to the commissioning couple, forcing the surrogate to take the child back or taking him or her into care may not promote their welfare; nor will criminalising a child's parents (including the surrogate).*¹⁴⁰

Committee comment

- 10.23 The Committee acknowledges that not all surrogacy arrangements will involve the use of IVF and that some people may choose not to conceive with the assistance of a licensed clinic. However, the Committee is of the view that in order for the State to sanction a surrogacy arrangement, certain counselling and assessment procedures

¹³⁸ Ibid, p5.

¹³⁹ Parliament of South Australia, Legislative Council, Social Development Committee, Report 26, *Inquiry into Gestational Surrogacy*, 13 November 2007, p64.

¹⁴⁰ M Brazier, A Campbell and S Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation: Report of the Review Team*, Department of Health, UK, 1998, p42. Available at <http://www.dh.gov.uk> (viewed on 24 January 2008).

should occur before assisted reproductive technology treatment is provided. These procedures should be in addition to the requirements provided by clause 17 for counselling and legal advice about the proposed order.

- 10.24 It appears that problems with surrogacy arrangements and legal disputes may be more likely to occur with cases of ‘natural surrogacy’ whereas “*serious clinical, ethical or legal problems*” are rare in gestational surrogacy arrangements undertaken in licensed clinics.¹⁴¹ Private arrangements may be more vulnerable to problems because:

*they are unsupervised by clinicians, counsellors and lawyers, whereas all gestational surrogacy arrangements require the active participation of these professionals.*¹⁴²

- 10.25 The VLRC, in considering the question of eligibility and assessment criteria for surrogacy candidates, pointed out that some people may consider the imposition of eligibility criteria for access to ART as discriminatory, since parents who choose to conceive naturally are not assessed. However:

*it is important to distinguish between the role of a State in each of these scenarios and its concomitant responsibilities. The State plays no active role in facilitating natural births. ... In the context of ART, however, the State plays a significant role in facilitating and enabling a woman to give birth to a child.*¹⁴³

- 10.26 Clause 17(2)(e) requires that a child has been in the “*day to day care*” of the arranged parents from the time an application for a parentage order is made. As noted in the Brazier report, “[d]isturbing that arrangement itself has welfare implications for the child” and “*any attempt retrospectively to evaluate the surrogacy arrangement*” is problematic.¹⁴⁴

11 ELIGIBILITY AND ACCESS CRITERIA

- 11.1 The Glover report on reproductive technologies, prepared for the European Union in 1989, reflects on the complexity and significance of the issues surrounding the regulation of new and emerging technologies:

These techniques are helping to shape the society we live in, and in turn their development is influenced by the social choices we make.

¹⁴¹ P Brinsden, ‘Gestational surrogacy’, *Human Reproduction Update*, Vol. 9, No. 5, Sep 2003, p487.

¹⁴² Ibid, p487.

¹⁴³ J Tobin, *The Convention on the rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction*, Victorian Law Reform Commission, Melbourne, 2004, pp22-23.

¹⁴⁴ M Brazier, A Campbell and S Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation: Report of the Review Team*, Department of Health, UK, 1998, p21. Available at <http://www.dh.gov.uk> (viewed on 24 January 2008).

*Because of some of the possible longer-term implications of these developing technologies, a coherent social response to them is exceptionally important.*¹⁴⁵

- 11.2 Consideration of the Department's draft *Directions on Surrogacy* drew the Committee's attention to aspects of surrogacy regulation that are not included in the Bill but will be regulated through Directions to licensees by the Department.
- 11.3 The Committee understands that the only eligibility criteria for surrogacy provided for in the Bill itself is that the arranging parent(s) reside in Western Australia and that they are an "eligible" person or couple in accordance with section 23 of the *Human Reproductive Technology Act 1991*.

Committee comment

- 11.4 In the Committee's view, the determination of eligibility, preparation and assessment criteria in relation to surrogacy arrangements are significant considerations that warrant parliamentary input and scrutiny. Specific criteria and processes that the Committee considers should be provided for in the Bill are discussed below.

Requirement that birth mother has previously given birth

- 11.5 There is a lack of consensus regarding the necessity of a potential surrogate having previously given birth. The Committee heard evidence from Mrs Suzanne Midford, approved counsellor, on this issue:

*We believe it is imperative that the surrogate be able to give her informed consent freely and without coercion. To that end we have serious concerns that an 18-year old is expected to do this; therefore, we recommend that the birth mother, to be a surrogate, must have a live child and preferably have completed her family before she is considered as a potential surrogate. We are not suggesting an age change but that [she has previously given birth to a live child]. We also recommend that where a prospective surrogate has not completed her family or has suffered a maternal loss, that she is required to undertake a psychiatric assessment because this is known to be a potential risk.*¹⁴⁶

- 11.6 Ms Iolanda Rodino, approved counsellor, explained that a "live birth" is an important distinction because:

¹⁴⁵ J Glover, *Fertility and the Family: The Glover Report on Reproductive Technologies to the European Commission*, Fourth Estate, London, 1989, p20.

¹⁴⁶ Mrs Suzanne Midford, Approved Counsellor, *Transcript of Evidence*, 20 February 2008, p2.

*We would want a woman who has had a live birth, because pregnancy loss will put the woman at risk of adverse psychological outcomes. We would also encourage women to have completed their families. We do not know what kind of adverse reaction may occur per pregnancy, both medically or emotionally, and whether this places the birth mother at risk of things that she may not be aware she is consenting to. It is about a true sense of understanding this process, they have had a live birth, they know what it is like to have a baby, they know what the postnatal period is like, we know how they responded during that postnatal period and the attachments they formed with the child. There is no point down the track, having completed their family, being at risk of adverse medical events. Women could lose their own uterus as a surrogate.*¹⁴⁷

11.7 The VLRC also considered this question and concluded that:

*although it is desirable that the intending surrogate has experienced pregnancy and childbirth, this should not be a steadfast requirement. Exceptions should be allowed where it is apparent that the surrogate understands the implications of the arrangement, and is able to make an informed decision.*¹⁴⁸

Committee comment

11.8 The Committee considers it preferable for a surrogate to have experienced a live birth prior to entering into a surrogacy arrangement, but accepts that there may be some situations where a woman chooses to proceed anyway, with a full understanding of the risks. Mandatory counselling and other assessment procedures will assist in both informing the potential surrogate and alerting the Surrogacy Review Panel to issues that may make the woman ineligible for treatment.

Age requirements

Committee comment

11.9 In view of the complexity and significance of the issues surrounding surrogacy, the Committee considers that minimum age limits should apply however the Committee could not agree whether the current age requirement of 18 years was appropriate.

¹⁴⁷ Ms Iolanda Rodino, Approved Counsellor, *Transcript of Evidence*, 20 February 2008, p10.

¹⁴⁸ Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Final Report*, Melbourne, 2007, p176.

Arranged parents

- 11.10 Although it is unlikely that potential arranging parents will be as young as 18 years of age, in some situations a couple will be aware of fertility or child bearing issues at an early age. There are some concerns that young people may not have the necessary maturity to deal with the complexities of surrogacy.
- 11.11 A majority of the Committee (comprising Hons Graham Giffard, Ken Baston, Peter Collier and participating member Hon Kate Doust MLCs) consider that there should be a minimum age requirement of 21 years for arranged parents.
- 11.12 However, a minority of the Committee (comprising Hons Sally Talbot and Giz Watson MLCs) consider that the existing provisions in relation to eligibility and counselling will result in individual cases being assessed on their merits.

Surrogate mother

- 11.13 The Committee notes the view of the VLRC:

*The commission's view is that a woman intending to act as a surrogate should be at least 25 years old. A woman acting as a surrogate requires a sufficient level of maturity to be able to understand the implications of entering into the arrangement. Becoming a surrogate should not be seen as the mere exercise of a legal right attained on turning 18, but rather a decision that requires a level of maturity that most people have not developed at that age. It is worth noting in this context that although people become legal adults at 18, the United Nations' definition youth extends to anyone under 25. Requiring the surrogate to be at least 25 years old may also act as an additional protection against any unequal bargaining power between her and the commissioning parents.*¹⁴⁹

- 11.14 The Committee were divided on the appropriate minimum age for a surrogate mother.
- 11.15 Four members (comprising Hons Graham Giffard, Ken Baston, Peter Collier and participating member Hon Kate Doust MLCs), considered that a minimum age of 21 years for a surrogate mother would be appropriate given the significance of the decision, while two members (comprising Hons Sally Talbot and Giz Watson MLCs) considered 18 years of age sufficient given that other assessment and preparation processes should successfully screen out unsuitable applicants.

¹⁴⁹ Ibid, p176.

Recommendation 8: A majority of the Committee (comprising Hons Graham Giffard, Ken Baston and Peter Collier MLCs) recommend that clause 15(2) of the Surrogacy Bill 2007 be further amended to include a minimum age requirement of 21 years for an “eligible couple”, an “eligible person” and “eligible surrogate”.

A minority of the Committee (comprising Hons Sally Talbot and Giz Watson MLCs) consider that the current minimum age requirement of 18 is acceptable.

The definition of “eligible surrogate” should include that the woman has preferably experienced a live birth prior to entering into the surrogacy arrangement.

Surrogacy Review Panel to approve surrogacy arrangements

- 11.16 The Committee notes that the draft *Directions on Surrogacy* contain a requirement for applications to be approved by a Surrogacy Review Panel to be established by each clinic. The Committee considers that the establishment of a committee with decision-making powers should be provided for in the legislation.
- 11.17 Additionally, the Committee is firmly of the view that a panel or committee whose role it is to assess applications for assisted reproductive technology treatment in association with a surrogacy arrangement should be independent of the clinic that will provide the treatment.
- 11.18 The importance of an independent review of surrogacy arrangements prior to the provision of treatment has been recognised. The Committee notes the comments by Mr Peter Brinsden, Medical Director of Bourn Hall Clinic in Cambridge and renowned for his work in reproductive technology:

*The support and advice of an independent ethics committee is of inestimable value in guiding a clinic. ... their independent review of the surrogacy arrangements does help to prevent many of the complications that could arise from treatment.*¹⁵⁰

- 11.19 The VLRC report similarly recommended that treatment for the purposes of a surrogacy arrangement be approved by a clinical ethics committee established by licensed clinics.¹⁵¹ However, the VLRC, while recognising the benefit of clinical ethics committees, also observe that there is a “scarcity of guidance and support for clinical ethics committees” and recommend that training and support will be required

¹⁵⁰ P Brinsden, ‘Gestational surrogacy’, *Human Reproduction Update*, Vol. 9, No. 5, Sep 2003, p489.

¹⁵¹ Recommendation 108, Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Final Report*, Melbourne, 2007, p176.

in addition to a review of their operations by the Infertility Treatment Authority after five years.¹⁵²

11.20 Given the need for independence from the clinicians providing treatment, resourcing issues in relation to clinical ethics committees and an expected small number of surrogacy cases (“*perhaps six to 12 maybe*”)¹⁵³ each year in Western Australia, the Committee considers that approval of applications should be conducted by a review panel/committee established by the Reproductive Technology Council (RTC).

11.21 The Committee notes that the Department does not support establishment of a Surrogacy Review Panel by the RTC because:

*It would be a departure from the existing scope of the RTC to be making decisions about the provision of clinical services in individual cases.*¹⁵⁴

11.22 The Committee does not find the Department’s argument compelling and considers that appropriate amendment could be made to the *Human Reproductive Technology Act 1991* if necessary, to enable the RTC to establish a Surrogacy Review Panel.

Recommendation 9: The Committee recommends that Clause 15(1) of the Surrogacy Bill 2007 be amended to include a new subclause:

“(c) the surrogacy arrangement was approved by a Surrogacy Review Panel, established by the Reproductive Technology Council before a child is conceived for the purposes of a surrogacy arrangement.”

and that the Bill be amended to include any necessary consequential amendments to the *Human Reproductive Technology Act 1991*.

The need for preparation and assessment

11.23 Historically, surrogacy did not involve advanced medical technology and was, as a result, a mostly private matter. Advances in assisted reproductive technology have served to open up surrogacy as an option for more infertile couples however the accompanying regulation of surrogacy arrangements is still relatively new. As a

¹⁵² Ibid, Recommendations 2-9, p63.

¹⁵³ Mrs Suzanne Midford, Approved Counsellor, *Transcript of Evidence*, 20 February 2008, p16.

¹⁵⁴ Email correspondence from Ms Daphne Anderson, Assistant Parliamentary Counsel, 27 March 2008.

result, empirical evidence about the impact of surrogacy on the parties involved or on the long-term effects on children born as a result of surrogacy arrangements is limited:

*Small studies have shown that the children of surrogacy arrangements are psycho-socially well adjusted, however, these studies to date have involved only preschool aged children. We must rely then on the experiences and plans of the parents as a proxy for predicting child outcomes.*¹⁵⁵

- 11.24 In relation to the psychological issues surrounding surrogacy, limited research and experience in the area means that it is difficult to be certain how to assess and screen for arrangements that are likely to be problematic:

*Little is known about the impact of surrogacy on the parties concerned either during the process of securing the arrangement, the pregnancy, or the hoped for birth of the child. There has been no research evaluating any possible longer term effects. Little is known of the nature of either the relationship between surrogates and commissioning couples or the form of relationship which is most (or least) desirable. At present it is only possible to speculate about the circumstances under which surrogates might experience problems.*¹⁵⁶

- 11.25 Despite the newness of surrogacy research, clinical experience and academic research has provided some insight into circumstances and issues that are likely to be influential in terms of outcomes:

*The motives of the surrogate, her support network and her attachment to the unborn child during pregnancy are all likely to be factors of importance.*¹⁵⁷

- 11.26 Clinicians and researchers agree that appropriate screening, preparation and counselling is essential to minimize the risk of harm to the parties involved. Experience shows that successful surrogacy arrangements are:

largely influenced by satisfaction with the relationship between the surrogate and the commissioning couple, which in turn is largely determined by the extent to which expectations about this relationship are met. Therefore, counsellors need to provide accurate information to participants about all phases of the surrogacy process and

¹⁵⁵ Dr R McNair, *Outcomes for Children Born of ART in a Diverse Range of Families*, Victorian Law Reform Commission, Melbourne, 2004, p47.

¹⁵⁶ R Edelmann, 'Surrogacy: the psychological issues', *Journal of Reproductive and Infant Psychology*, Vol 22, No 2, May 2004, p133.

¹⁵⁷ *Ibid*, p133.

*determine during screening that the parties have adequate personal resources and support networks to withstand the stress and disapproval that engaging in this process may engender. Moreover, it is important that counsellors and other mental health professionals with knowledge of the potential pitfalls of surrogacy arrangements be available to participants at all stages (pre-contract, during pregnancy, post-birth, and long term).*¹⁵⁸

- 11.27 The Committee heard evidence from Ms Antonia Clissa, approved counsellor, that “essential” elements of the preparation and assessment process would include the following:

*[The arranged parents and the surrogate] would have the psychosocial report from probably the clinic counsellor, the psychometric assessment from the independent clinical psychologist, the legal report that they have each been to see a lawyer and understand exactly what is to be undertaken, and also a medical report.*¹⁵⁹

- 11.28 The purpose of each stage of the counselling and assessment process is outlined below.

Psychosocial preparation

- 11.29 Mrs Suzanne Midford, approved counsellor, gave evidence to the Committee that ‘psychosocial preparation’ involves counselling to help people:

*understand exactly what surrogacy is in terms of relationships, what it means to them as a person and what it means to their partner and their children.*¹⁶⁰

- 11.30 Psychosocial preparation must be undertaken by the arranged parents, the surrogate, the surrogate’s partner (if any) and her children:

The thrust of the psychosocial preparation that happens in IVF counselling consists of a battery of questions in relation to surrogacy that raises issues for people. That may take three or four sessions, and that would be separate to the psychometric testing. It would involve all parties, including children over the age of four. If the surrogate has children or any party to the recipient has children, they

¹⁵⁸ J Ciccarelli and L Beckman, ‘Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy’, *Journal of Social Issues*, Vol 61, No 1, 2005, pp39-40.

¹⁵⁹ Ms Antonia Clissa, Approved Counsellor, *Transcript of Evidence*, 20 February 2008, p14.

¹⁶⁰ Mrs Suzanne Midford, Approved Counsellor, *Transcript of Evidence*, 20 February 2008, p11.

*would also be involved in the psychosocial preparation. It involves all the parties who will potentially be affected in that family.*¹⁶¹

- 11.31 The importance of psychosocial preparation prior to any assisted reproductive technology procedure for the purpose of a surrogacy arrangement was explained to the Committee:

CHAIR: You said that that should be enforceable. Is that prior to the procedure? When you say enforceable, do you mean mandated?

Ms Clissa: Yes, it is mandatory counselling.

CHAIR: Would you envisage that that would occur prior to that procedure?

*Mrs Midford: Yes, because people will drop out. That sort of psychosocial preparation is consistent with what happens with adoption, fostering and donor counselling.*¹⁶²

Implications counselling

- 11.32 The Committee heard evidence from Ms Iolanda Rodino, approved counsellor, that implications counselling is:

*a form of counselling that occurs in all of your infertility clinics when you have either standard IVF or donor-related counselling sessions. The kinds of questions that might occur... includes looking at how long they have thought about pursuing the kind of treatment, whom they have talked to about this treatment, what issues they may present with in regard to the decisions regarding the treatment. It talks about some legal aspects that we draw from the relevant acts in regard to their treatments. We talk about very much, importantly, in these sessions the best interests of the child ...*¹⁶³

- 11.33 Further detail regarding the content of implications counselling is provided in the draft *Directions on Surrogacy* issued by the Department:

a) the eligibility of the parties to undertake the practice of surrogacy;

b) the motivation of the parties to pursue surrogacy;

¹⁶¹ Ms Antonia Clissa, Approved Counsellor, *Transcript of Evidence*, 20 February 2008, p11.

¹⁶² Ms Antonia Clissa and Mrs Suzanne Midford, Approved Counsellors, *Transcript of Evidence*, 20 February 2008, pp11-12.

¹⁶³ Ms Iolanda Rodino, Approved Counsellor, *Transcript of Evidence*, 20 February, p12.

- c) whether the parties are freely considering this practice and/or whether any party feels coerced or pressured to participate;*
- d) whether, and to what extent, arranged parents should have input on aspects of the birth mother's lifestyle and behaviour during pregnancy;*
- e) whether prenatal testing will be considered and how the birth mother will address a situation where a serious defect of the foetus is found;*
- f) identification of costs associated with the pregnancy and the birth that would be reimbursed to the birth parent(s);*
- g) whether the arranged parents are to be present at the child's birth and the timing of their taking over the care of the child, including the process of separation of birth parent(s) from the child;*
- h) how the birth of a child born with a disability would be dealt with;*
- i) how the death or separation of the arranged parent(s) before the child's birth would impact on the arrangement;*
- j) what information will be given to the child about the circumstances of birth and when it will be given;*
- k) what communication is proposed between the child and the birth family during childhood and how any proposed contact is to be managed;*
- l) the likely effects of surrogacy on other children of the birth parent(s), and the involvement of those children in the process in ways appropriate to their age and maturity;*
- m) the likely effects of the surrogacy on the birth mother's husband or defacto partner (if any), including consideration of how surrogacy may impact on the relationship;*
- n) the emotional, social and financial costs associated with the birth parent(s) changing their minds and keeping the child;*
- o) the attitude towards, and impact of, surrogacy on the extended families of both the birth parent(s) and arranged parents;*
- p) the level of support networks for the parties during the process of surrogacy and enhancing if required; and*

*q) methods of conflict resolution.*¹⁶⁴

Independent psychological assessment

- 11.34 In her evidence to the Committee, Mrs Suzanne Midford, approved counsellor, explained that an independent psychological assessment, including ‘psychometric testing’, is part of the screening process undertaken by arranged parents and surrogates. The aim of the assessment is to identify any psychological issues that may affect a person’s ability to make an informed decision.¹⁶⁵
- 11.35 Psychometric testing, undertaken by a clinical psychologist, provides an “*objective measure*” for assessment so that if treatment for the purposes of a surrogacy arrangement is subsequently not approved, “*there are specific reasons*” for the decision.¹⁶⁶
- 11.36 Mrs Antonia Clissa, approved counsellor, explained to the Committee in evidence that it is preferable for psychological assessments in surrogacy cases to be provided by an independent clinical psychologist:

*Currently, counselling for IVF patients is carried out by the clinic counsellor. What we are recommending is that it actually be an independent external party not employed by the clinic; so it is actually an independent psychometric assessment ...*¹⁶⁷

- 11.37 A requirement that independent counsellors provide psychological assessments is preferable in the view of the counsellors who gave evidence to the Committee because “*not all of the clinics employ people who would be able to give ... psychometric testing*”¹⁶⁸ and because such an objective, external assessment will mean that “*there is no confusion for either the people involved - that there is ... any pressure on them to come to a particular conclusion*”.¹⁶⁹

Written agreement

- 11.38 The Committee notes that paragraph 4.4 of the draft *Directions on Surrogacy* outlines requirements for a surrogacy arrangement that must be met before an arrangement can be approved by a Surrogacy Review Committee. The requirements are:
- the arrangement is set out in a written agreement signed by the parties;

¹⁶⁴ Department of Health WA, draft *Directions on Surrogacy*, 2007, pp9-10.

¹⁶⁵ Mrs Suzanne Midford, Approved Counsellor, *Transcript of Evidence*, 20 February 2008, p11.

¹⁶⁶ Ms Antonia Clissa, Approved Counsellor, *Transcript of Evidence*, 20 February 2008, pp4-5.

¹⁶⁷ *Ibid*, p3.

¹⁶⁸ *Ibid*, p4.

¹⁶⁹ Mrs Suzanne Midford, Approved Counsellor, *Transcript of Evidence*, 20 February 2008, p4.

- the agreement outlines the expenses to be paid by the arranged parents; and
- the agreement contains a proposed communication plan in relation to the child and the birth mother and her family, as well as any other matters agreed by the parties regarding the upbringing of the child.¹⁷⁰

11.39 The Committee heard evidence from approved counsellors that payment of expenses and future communication are important issues that are discussed during the counselling and preparation process.

11.40 Mrs Suzanne Midford, approved counsellor, gave evidence in relation to the issues that arose in the *Re Evelyn* case, which in her opinion, were largely due to inadequate communication between the parties and a failure to reach agreement on key aspects of the arrangement before the baby was conceived:

After that case, in particular, my whole view changed, because it became really clear to me that surrogacy legislation was really important, because the only way that you could help people to avoid those kinds of things was by having a prescribed pathway by which they could actually examine and be – I want to say “forced” but it is not right – but a process that actually facilitated them considering very important issues, because they are for-life issues; they are not about just giving birth to a child.¹⁷¹

11.41 A written agreement is an important component of the assessment information to be considered by the Surrogacy Review Panel in approving surrogacy arrangements. It will provide an indication that the parties have discussed and reached agreement on key aspects of the surrogacy arrangement prior to conception of a child.

11.42 The written agreement will serve as a preliminary draft for a communication plan that will later be approved by the court (‘approved plan’) in making a parentage order.

Medical assessments

11.43 The draft *Directions on Surrogacy* provide for medical assessments of the arranged parent(s), the birth mother and the donor of gametes as part of the screening process.

11.44 The purpose of these assessments are:¹⁷²

¹⁷⁰ Department of Health WA, draft *Directions on Surrogacy*, p8.

¹⁷¹ Mrs Suzanne Midford, Approved Counsellor, *Transcript of Evidence*, 20 February 2008, p13.

¹⁷² Department of Health WA, draft *Directions on Surrogacy*, p11.

11.44.1 In relation to the arranged parent(s), “*to assess eligibility for access to a surrogacy arrangement and to report on any medical condition that may affect the capacity of the arranged parent(s) to care for a child*”.

11.44.2 In relation to the birth mother, “*to assess her medical suitability to undertake the surrogacy arrangement*”.

11.44.3 In relation to a donor of gametes, “*to assess medical suitability as a gamete donor and to report on any medical condition that may pose a risk to the birth mother or a resulting child.*”

Committee comment

11.45 The counselling and assessment requirements outlined in paragraphs 11.26 to 11.41 are provided for in the draft *Directions on Surrogacy*. The Committee supports these requirements and is of the view that they should be required by statute. Accordingly, the Committee makes the following recommendation:

Recommendation 10: The Committee recommends that the Surrogacy Bill 2007 be amended to provide that a Surrogacy Review Panel must not approve an application unless:

- a) the arrangement is set out in a written agreement signed by the parties;**
- b) the parties to the agreement have undertaken appropriate counselling regarding the implications of the surrogacy arrangement;**
- c) the parties to the agreement have undertaken an independent psychological assessment and a medical assessment;**
- d) the parties to the agreement have received independent legal advice; and**
- e) there has been a minimum three-month cooling off period following completion of the above-mentioned requirements and prior to treatment.**

12 CLAUSE 16. APPLYING FOR A PARENTAGE ORDER

12.1 Clause 16 provides that a minimum of 28 days must elapse since the child’s birth and a maximum of six months (except in exceptional circumstances) for an application for a parentage order to be lodged with the court.

12.2 According to the Explanatory Memorandum:

An application for a parentage order cannot be made until the child is at least 28 days old. This gives the birth parents time to consider the

decision of consenting to the making of the order following the birth of the child.

*An order for a parentage order should be made before the child is 6 months old. It is considered to be generally in the interests of the child that the legal status of the parents is established early. A discretion is given to the court to extend this time as there may be exceptional circumstances where an application was not made within 6 months of the child's birth but where the best interests would be met by the making of an order. This would allow the court to make a parentage order in respect of a child born more than 6 months before the commencement of the Act if other requirements are met.*¹⁷³

- 12.3 The Department explained to the Committee that it is envisioned that the child of a surrogacy arrangement will be living with the arranged parents before an application for a parentage order is sought and clause 43 of the Bill (“*Children and Community Services Act 2004 amended*”) enables the child to be legally cared for by the arranged parents for a period of up to one year.¹⁷⁴

- 12.4 In relation to the 28-day minimum period before an application can be made to the court, the Department explained that:

*A lot of surrogacy historically has been based on a position that birth mothers should be able to change their minds, that there should not be a situation where a birth mother, and that like adoption, the immediate time after giving birth is not the best time to be requiring people to make those decisions. That requiring a period of time before they can make an application means that those decisions will be made in a more considered way. That is the rationale behind it. I think the position is slightly - the amendments made in the lower house in relation to the capacity for the Family court to dispense with the mother's consent in certain circumstances does modify that position, but I think we are still expecting that in most cases the birth mother will consent to the application, and that she should just basically have some time before she is forced to go through that legal process.*¹⁷⁵

- 12.5 Leave of the court for an extension to the maximum six month time limit for lodging an application may be granted in “*exceptional circumstances*” and the Committee

¹⁷³ Explanatory Memorandum to the Surrogacy Bill 2007, p7.

¹⁷⁴ Ms Daphne Andersen, Senior Legal Adviser, Department of Health, *Transcript of Evidence*, 14 February 2008, p13.

¹⁷⁵ *Ibid*, p14.

understands from the Department's evidence that the term is intended to provide for two different sets of circumstances.

- 12.6 Firstly, according to the Department's evidence, provision for 'exceptional circumstances' allows for:

*a little bit of discretion with the court in cases in which a clear injustice would result. It might be that there has been serious illness in the birth mother's family or the arranged parents' family. ... There are a range of exceptional circumstances such as that.*¹⁷⁶

- 12.7 Secondly, the Department confirmed to the Committee in evidence that it is intended that 'exceptional circumstances' will also capture those cases of existing children born of a surrogacy arrangement prior to the enactment of this legislation (see below). The Committee notes that the VLRC similarly recommended that the court should have the discretion to make parentage orders in favour of people who already have children through surrogacy arrangements if certain requirements are met.¹⁷⁷

- 12.8 Setting aside other considerations, the Committee is concerned that the operation of clause 16(3) may not necessarily achieve the Government's intention of enabling arranged parents of children born through earlier surrogacy arrangements to successfully apply for a parentage order. The following exchange with the Department representative explains the basis of the Committee's concerns:

Ms Anderson: *Yes. It is expected that existing children will be able to apply for parentage orders and that is on the basis of exceptional circumstances, the exceptional circumstance being that there was no legislation in place when the child was born.*

CHAIR: *... our concern is that can you be confident that a legislative expression of "exceptional circumstances" is actually going to create that gateway for people? Are the courts going to interpret that? How can we be confident that a court is going to understand that "exceptional circumstances" means quite ordinary circumstances that actually just occurred three years ago? How on earth is that going to be regarded as an exceptional circumstance?*

Ms O'Callaghan: *I guess the thing is that this is about surrogacy; this is not about an adoption or a situation where the non-biological parents are caring for a child. I think when you look at that, a deliberate arrangement has been entered into, the act was not in*

¹⁷⁶ Ibid, p15.

¹⁷⁷ Recommendation 127 of Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Final Report*, Melbourne, 2007, p190.

place; therefore, a parentage order could not have been sought. That is clearly an exceptional -

CHAIR: *I understand that a parentage order could not have been sought, but, frankly, you said at the very beginning that these things happen. They are happening and we know they are happening. We are trying to give some proper legal framework to what has actually been going on, so my question is: what is exceptional about the fact that they have been doing it outside a legal framework? Can you be confident that the courts will take the view that you do?*¹⁷⁸

- 12.9 It is self evident that the parents of children already born as a result of surrogacy arrangements cannot be required to undergo pre-treatment counselling and assessment prior to making an application for a parentage order. However, in order to ensure that basic eligibility criteria are applied in these circumstances, the Committee considers it appropriate that the requirements of clause 17 apply.

Recommendation 11: The Committee recommends that clause 16 of the Surrogacy Bill 2007 be amended to include a subclause that explicitly states that the parents of a child born to a surrogacy arrangement prior to commencement of this legislation may, if the requirements of section 17 have been met, apply for a parentage order within 12 months of the commencement of the legislation.

13 CLAUSE 17. COURT MAY MAKE PARENTAGE ORDER

- 13.1 Before making a parentage order, the court must satisfy itself that certain requirements have been met. These requirements are:
- a) the eligibility requirements outlined in clause 15 exist (that the arranged parent(s) reside in Western Australia and are an eligible couple or person);
 - b) the child's birth parents and the arranged parents have received counselling about the effect of the proposed parentage order;
 - c) the child's birth parents and the arranged parents have received independent legal advice about the effect of the proposed parentage order;
 - d) the child's birth parents consent to the parentage order;
 - e) the child has been in the care of the arranged parents since the application for the parentage order was made; and

¹⁷⁸ Ms Daphne Andersen (Senior Legal Officer) and Ms Jenny O'Callaghan (Senior Policy Officer), Department of Health WA, *Transcript of Evidence*, 14 February 2008, pp16-17.

- f) the birth parents and the arranged parents have agreed to an appropriate plan to be approved by the court.
- 13.2 However, in certain circumstances (outlined in clause 17(4) and (5)) the court may dispense with the requirement for the birth parents to consent to the parentage order, to have received counseling and legal advice about its effect and to have agreed to an appropriate plan. Those circumstances are:
- if the birth parent is deceased, incapacitated or unable to be contacted, or
 - if the birth mother is not a genetic parent of the child and at least one of the arranged parents is a genetic parent.
- 13.3 The effect of clause 17(4) and (5) is that in situations where a surrogate is not genetically related to the child, but one or both of the arranging parents are, the court may decide to make a parentage order even if the surrogate has changed her mind about the arrangement and refuses to consent to the order.
- 13.4 Such a scenario may occur when an embryo derived from the arranging parent's gametes is implanted in the surrogate, or when an embryo is derived from the arranging father's sperm and an egg donated by a woman other than the surrogate.
- 13.5 In these situations, the court *may* dispense with the birth mother's consent but it is not required to do so. While the court's discretion to make a decision based on the best interests of the child is maintained, the Committee notes that clause 13(2) of the Bill provides clear direction to the court in this regard with the presumption that "*it is presumed to be in the best interests of the child for the arranged parents to be the parents of the child, unless there is evidence to the contrary.*"
- 13.6 The Committee understands that clauses 13(2), 17(4) and (5) are intended to provide a degree of certainty for the arranged parents however this aspect of the Bill is contentious and some jurisdictions have taken a different approach and require the birth mother's consent in all circumstances.
- 13.7 The VLRC, for example, concluded that even in cases of gestational surrogacy (where the surrogate is not a genetic parent of the child):
- the surrogate should retain the right to refuse to consent to the transfer of parentage of the child upon birth.*¹⁷⁹
- 13.8 Similarly, in the ACT, section 26 of the *Parentage Act 2004* (ACT) requires that both birth parents freely consent to the transfer of parentage and this requirement can only be dispensed with by the court if the birth parent is incapacitated, deceased or not able

¹⁷⁹ Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Final Report*, Melbourne, 2007, p178.

to be contacted.¹⁸⁰ The Explanatory Statement to the bill explains that in all cases, including gestational surrogacy arrangements, the woman who gives birth to a child is presumed to be the child's mother:

*If gametes from the commissioning couple are used to achieve the pregnancy those people will be conclusively presumed not to be the parents of the child (clause 11) because they will be gamete donors in a procedure in which a third person bears the child.*¹⁸¹

- 13.9 The Committee notes that opinions expressed in the submissions in relation to this matter reflect the difficulty in obtaining consensus on such a difficult issue.
- 13.10 The submission from the L J Goody Bioethics Centre considers the insertion of clauses 13(2) and 17(5) as resulting in “*significant improvements*” to the Bill¹⁸² and the submission from Ms Julie Mclean (who has been a gestational surrogate) expressed the view that the biological parents of a child should be named on the birth certificate rather than the birth mother.¹⁸³
- 13.11 In contrast, the submission from the Festival of Light Australia argues that clause 17 of the Bill is “*in blatant violation of Principle 6 of the Declaration the Rights of the Child*” and “*contradicts clause 7 of the Bill which provides that “A surrogacy arrangement is not enforceable.”*”¹⁸⁴

Committee comment

The Committee has already observed that clause 17 provides an exception to clause 7 and enables the court to enforce a surrogacy arrangement.

14 CLAUSE 18 CONTENTS OF APPROVED PLAN

- 14.1 The Committee notes Supplementary Notice Paper No. 190, Issue No. 2 which recommends that an approved plan be approved by the Reproductive Technology Council prior to commencement of a pregnancy.
- 14.2 Reference is made to Committee Recommendation 10 which provides that a surrogacy agreement must be considered by the Surrogacy Review Panel.

¹⁸⁰ Section 26, *Parentage Act 2004* (ACT).

¹⁸¹ Explanatory Statement to the *Parentage Bill 2003* (ACT), p9.

¹⁸² Submission No 5 from L J Goody Bioethics Centre, p6.

¹⁸³ Submission No 6 from Ms Julie Mclean, p1.

¹⁸⁴ Submission No 8 from the Festival of Light Australia, p7.

15 CLAUSE 20 MULTIPLE BIRTHS

- 15.1 Difficulties arising from multiple births were raised in the submission from Knights of the Southern Cross.¹⁸⁵ The Committee considers the meaning and application of clause 20 to be clear - that is, that siblings of the **same** pregnancy will not be separated.

16 CLAUSE 23 DISCHARGE OF PARENTAGE ORDER

- 16.1 The Committee sought clarification from the Department regarding the reason that birth parents or intended parents could not make an application directly to the court for discharge of a parentage order. Clause 23 provides that such an application must be made by the Attorney General, the CEO, the chief executive officer of the department that administers the *Adoption Act 1994* or from the child whose parentage was transferred once they reach 18 years of age. The Department explained in evidence that:

*this is modelled on the Adoption Act provision. The intent is to give some level of finality to the order. You do not want people being able to come back – either the arranged parents or the birth parents – on any regular basis to ask for this matter to be reviewed.*¹⁸⁶

Committee comment

- 16.2 The Committee considers the above-stated principle to be sound.

17 DIVISION 3, ACCESS TO INFORMATION

- 17.1 Division 3 provides for access to information including court records and the registration of birth. The Department explained in evidence to the Committee that children born of a surrogacy arrangement will have access to donor information in accordance with the *Human Reproductive Technology Act 1991*:

The way that information is recorded is that the information is collected from the clinics and maintained on a register that the Department of Health maintains, and at age 16 a child has a right to access identifying information about any donor who contributed to their genetic make-up, or any other participant in the procedure. In this case, they would have access to information about the birth mother, although it is more likely that other avenues would be used. The bill provides for access to court records when parentage orders are made, and birth records, as a separate thing in addition to the

¹⁸⁵ Submission No 10 from Knights of the Southern Cross (WA) Inc, p20.

¹⁸⁶ Ms Daphne Andersen, Senior Legal Adviser, Department of Health, *Transcript of Evidence*, 14 February 2008, p22.

donor information that would be available from the reproductive technology register.

In addition to it being a matter of right from age 16, there is the capacity for all the parties to agree to exchange identifying information. A parent can consent on behalf of a minor child. That information could be provided prior to the child reaching the age of 16 if everyone agreed.¹⁸⁷

- 17.2 The Committee notes that clause 35 (which provides for access to a portion of the registration of birth that does not refer to the parentage order), clause 36 (relating to access to information if a person is deceased) and clause 37 (if an adult child cannot be contacted) specifies that the child or other person seeking information must be 18 years of age to access information.

Committee comment

- 17.3 The Committee considers that the age requirement in relation to access of information should be consistent with the *Human Reproductive Technology Act 1991* which provides for access to donor information at 16 years of age.

Recommendation 12: The Committee recommends that clauses 35, 36 and 37 of the Bill be amended to provide access to information from 16 years of age.



Hon Graham Giffard MLC
Chair

8 May 2008

¹⁸⁷ Ibid, p23.

APPENDIX 1
LIST OF WRITTEN SUBMISSIONS

APPENDIX 1

LIST OF WRITTEN SUBMISSIONS

From	Date	Number
Private	01/12/07	1
Associate Professor Roger Hart	03/01/08	2
Rosemary Keenan	21/01/08	3
Michelle Pearse, Australian Christian Lobby	16/01/08	4
Rev Dr Joseph Parkinson, LJ Goody Bioethics Centre	22/01/08	5
Julie McLean	24/01/08	6
Andrew and Michele Webber	25/01/06	7
Dr David Phillips, Festival of Light	27/01/08	8
Dr Roger Hart, Public Fertility Clinic, King Edward Memorial Hospital	02/08/08	9
Chris Hunt, Knights of the Southern Cross	31/01/08	10
Suzanne Midford, Iolanda Rodino, Deborah Foster Gaitskell, Margaret Van Keppel, Patrice Wringe, Antonia Clissa	30/01/08	11
Private	01/02/08	12
Hon Helen Morton MLC	01/02/08	13
Dr Lucy Williams, Concept Fertility Clinic	01/02/08	14
Christine Lewis	05/02/08	15
Terry Murphy, Department for Child Protection	29/01/08	16
Sandra K Dill, Access	06/02/08	17
CA Michael, Reproductive Technology Council	05/02/08	18

APPENDIX 2
SUPPLEMENTARY NOTICE PAPER NO. 190 ISSUE NO. 2

APPENDIX 2
SUPPLEMENTARY NOTICE PAPER NO. 190 ISSUE NO. 2

WESTERN AUSTRALIA

LCCO

Supplementary Notice Paper No. 190
Issue No. 2

WEDNESDAY, 14 NOVEMBER 2007

SURROGACY BILL 2007 [1-2]

When in committee on the *Surrogacy Bill 2007*:

Clause 18

Hon Barbara Scott: To move -

2/18 Page 9, after line 21 — To insert —

“

- (3) The plan must be approved by the Reproductive Technology Council prior to the commencement of the pregnancy.

”.

Clause 46

Hon Giz Watson: To move -

1/46 Page 30, after line 16 — To insert —

“

(b) in paragraph (a) —

(i) by deleting “or” at the end of subparagraph (ia);

(ii) by inserting after subparagraph (ii) —

“

or

(iii) a woman who is unable to give birth to a child due to medical reasons and is a party to a surrogacy arrangement (as defined in section 3 of the *Surrogacy Act 2007*) that is lawful;

APPENDIX 3
DRAFT DIRECTIONS ON SURROGACY

APPENDIX 3

DRAFT DIRECTIONS ON SURROGACY

HUMAN REPRODUCTIVE TECHNOLOGY ACT 1991

DIRECTIONS ON SURROGACY

**Given by the Chief Executive Officer of the Department of Health
to set the standards of practice for surrogacy
under the
Human Reproductive Technology Act 1991
on the advice of the
WA Reproductive Technology Council**

HUMAN REPRODUCTIVE TECHNOLOGY ACT 1991

DIRECTIONS ON SURROGACY

**Given by the Chief Executive Officer of the Department of Health
to set the standards of practice for surrogacy
under the
Human Reproductive Technology Act 1991
on the advice of the
WA Reproductive Technology Council**

Part 1	Application of directions
Part 2	Welfare of the child
Part 3	Assessing surrogacy application
Part 4	Eligibility
Part 5	Information
Part 6	Preparation
Part 7	Investigation
Part 8	Consent
Part 9	Ongoing counselling and support
Part 10	Records and Reporting

Table of Contents

INTRODUCTION TO THE DIRECTIONS.....	75
INTERPRETATION.....	76
PART 1: APPLICATION OF DIRECTIONS.....	76
1.1 APPLICATION OF THESE DIRECTIONS	76
1.2 APPLICATION OF DIRECTIONS ISSUED 30 NOVEMBER 2004	76
1.3 EXEMPT PRACTITIONERS	77
PART 2: WELFARE OF THE CHILD	77
2.1 WELFARE OF THE CHILD	77
2.2 HARM MINIMISATION	77
PART 3: ASSESSING SURROGACY APPLICATIONS.....	77
3.1 CLINIC SURROGACY REVIEW COMMITTEE/PANEL	77
3.2 MEMBERSHIP OF CLINIC SURROGACY REVIEW COMMITTEE/PANEL	77
3.3 PROCEDURES OF CLINIC SURROGACY REVIEW COMMITTEE/PANEL	77
3.4 ASSESSING APPLICATION	78
3.5 PROVISION OF ARTIFICIAL FERTILISATION PROCEDURES	78
PART 4 ELIGIBILITY.....	78
4.1 REQUIREMENTS FOR ARRANGED PARENT(S)	78
4.2 REQUIREMENTS FOR BIRTH MOTHER AND HER HUSBAND OR DEFACTO PARTNER (IF ANY)	78
4.3 REQUIREMENTS FOR GAMETE DONORS	79
4.4 REQUIREMENTS FOR THE SURROGACY ARRANGEMENT	79
4.5 PROVISION OF SURROGATES	79
4.6 ROLE OF THE CLINIC IN INTRODUCING ARRANGED PARENTS AND BIRTH MOTHERS	79
PART 5: INFORMATION	79
5.1 ADDITIONAL INFORMATION TO BE PROVIDED FOR SURROGACY ARRANGEMENTS	79
PART 6: PREPARATION.....	80
6.1 CLINIC SURROGACY COORDINATOR	80
6.2 ROLE OF CLINIC SURROGACY COORDINATOR	80
6.3 IMPLICATION COUNSELLING	80
6.4 LEGAL ADVICE	81
6.5 EVIDENCE OF MEETING THE REQUIRED PREPARATION	81
6.6 COOLING OFF PERIOD	81

PART 7: INVESTIGATIONS	81
7.1 INVESTIGATIONS	81
7.2 MEDICAL ASSESSMENT OF ARRANGED PARENT(S)	81
7.3 MEDICAL ASSESSMENT OF BIRTH MOTHER	81
7.4 MEDICAL ASSESSMENT OF DONOR OF GAMETES	81
7.5 PSYCHOLOGICAL ASSESSMENT OF ARRANGED PARENT(S)	82
7.6 PSYCHOLOGICAL ASSESSMENT OF BIRTH MOTHER AND HER IMMEDIATE FAMILY	82
7.7 WORKING WITH CHILDREN CHECK OF ARRANGED PARENT(S)	82
PART 8: CONSENT	82
8.1 CONSENT TO SURROGACY ARRANGEMENT	82
PART 9 ONGOING COUNSELLING AND SUPPORT	82
9.1 COUNSELLING AND SUPPORT SERVICES TO BE AVAILABLE	82
9.2 COUNSELLING REQUIREMENTS DURING ANY PREGNANCY	82
PART 10 RECORDS AND REPORTING.....	83
10.1 ADDITIONAL RECORDS TO BE KEPT BY LICENSEES	83
THE LICENSEE IS TO ENSURE THAT COPIES OF ALL DOCUMENTATION REQUIRED BEFORE A SURROGACY ARRANGEMENT IS INCLUDED IN THE FILE OF THE RELEVANT PARTICIPANT.	83
10.2 REPORTING TO THE CHIEF EXECUTIVE OFFICER OF THE DEPARTMENT OF HEALTH ON EACH ARTIFICIAL FERTILISATION PROCEDURE	83
10.3 ANNUAL REPORTING	83

Introduction to the directions

The *Surrogacy Act 2007* came into effect on ??? . The Surrogacy Act prohibits certain activities in relation to surrogacy arrangements that have a commercial aspect. It also provides for the transfer of parentage from birth parents to arranged parents in certain circumstances.

Amendments to the *Human Reproductive Technology Act 1991* (the HRT Act) are included in the legislation to ensure that IVF services can be provided in connection with surrogacy arrangements where the arranged parents meet the criteria in section 23 of the HRT Act.

The purpose of these directions is to set the criteria that clinics should adopt in deciding whether artificial fertilisation procedures may be provided in connection with a surrogacy arrangement.

Guiding Principles

The guiding principles that should be considered in dealing with any surrogacy arrangement are that the interests of a child born as part of a surrogacy arrangement are paramount, and that preparation and assessment should be undertaken with the aim of harm minimization for all the parties to the arrangement.

All constructive comments on these directions are welcome and may be addressed to:

The Executive Officer, Western Australian Reproductive Technology Council
189 Royal Street **Phone:** (08) 9222 4260
EAST PERTH 6004. **Fax:** (08) 9222 4236

Interpretation

Unless otherwise provided, all words and phrases in these directions have the same meaning as the *Human Reproductive Technology Act 1991* or the *Surrogacy Act 2007*:

“**arranged parent(s)**” means the person or persons who are intending to raise a child born as the result of a surrogacy arrangement;

“**artificial fertilisation procedure**” means any artificial insemination procedure or in vitro fertilisation procedure;

“**ART Directions**” means the Directions under the *Human Reproductive Technology Act 1991* issued by the Chief Executive Officer of the Department of Health and published in the Government Gazette of 30 November 2004;

“**approved counsellor**” means a counsellor who has been assessed by the Council as meeting the requirements set out in Part 1 of Schedule 4;

“**birth mother**” means the woman who seeks to become pregnant and give birth to a child under a surrogacy arrangement;

“**Council**” means the Reproductive Technology Council;

“**embryo**” means human embryo;

“**exempt practitioner**” means a medical practitioner who is exempted under section 28 of the HRT Act from the requirement to hold a licence to carry out artificial insemination procedures;

“**gametes**” means human eggs or human sperm;

“**IVF**” means in vitro fertilisation;

“**required**” means required by the HRT Act;

“**surrogacy arrangement**” has the meaning set out in section 3 of the Surrogacy Act;

“**the HRT Act**” includes the *Human Reproductive Technology Act 1991* (as amended), regulations made under that Act and such directions as are published in the *Gazette* under that Act.

Part 1: Application of Directions

1.1 Application of these Directions

These directions apply to all surrogacy arrangements that involve the use of artificial fertilisation procedures.

1.2 Application of Directions issued 30 November 2004

Directions issued by the Chief Executive Officer of the Department of Health and published in the Government Gazette of 30 November 2004 apply to all artificial fertilisation procedures undertaken in connection with a surrogacy arrangement.

1.3 Exempt Practitioners

An exempt practitioner must not provide artificial fertilisation procedures in connection with a surrogacy arrangement unless the arrangement has been approved by a surrogacy review committee/panel established by a licensed clinic in accordance with these directions.

Part 2: Welfare of the child

2.1 Welfare of the Child

When considering the use of an artificial fertilisation procedure in connection with a surrogacy arrangement the licensee must ensure that the welfare of any resulting child or children is the paramount consideration and that the welfare of any existing child of the birth mother or the arranged parent(s) is taken into account.

2.2 Harm Minimisation

When considering the use of an artificial fertilisation procedure in connection with a surrogacy arrangement the licensee must ensure that the risk of physical, social and psychological harm to any of the parties to the arrangement is minimised.

Part 3: Assessing surrogacy applications

3.1 Clinic Surrogacy Review Committee/Panel

Each clinic that offers artificial fertilisation procedures in connection with a surrogacy arrangement must establish a clinic Surrogacy Review Committee/Panel to assess surrogacy applications.

3.2 Membership of clinic Surrogacy Review Committee/Panel

A clinic Surrogacy Review Committee/Panel is to consist of the following persons, each of whom must have been approved by the Council:

- (a) the clinic Surrogacy Supervisor appointed under paragraph 6.1;
- (b) an IVF doctor not involved in providing services to the parties to the surrogacy arrangement;
- (c) an independent clinical psychologist with child development expertise;
- (d) a person who is either a human ethicist;
- (e) a person who has extensive experience in child welfare or child protection;
- (f) a legal practitioner with experience in Family Law.

Additional members with relevant expertise may be appointed with the approval of the Council.

3.3 Procedures of Clinic Surrogacy Review Committee/Panel

A clinic Surrogacy Review Committee/Panel is to set out the procedures that it will adopt in assessing an application for approval of a surrogacy arrangement and the procedures for reviewing a decision about an application in a document that has been approved by the Council.

3.4 Assessing application

A clinic Surrogacy Review Committee/Panel is to assess each application for a surrogacy arrangement. A surrogacy arrangement is not to be approved unless:

- (a) the eligibility criteria in part 4 have been met;
- (b) the arrangement (including the communication plan provided for in paragraph 4.4) is considered to be in the best interests of a child that may be born as part of the arrangement;
- (c) the arrangement minimises the risk of harm to the parties to the arrangement.

3.5 Provision of artificial fertilisation procedures

The licensee is to ensure that all applications for surrogacy have been approved by a Surrogacy Review Committee/Panel prior to the provision of artificial fertilisation procedures in connection with the surrogacy arrangement.

Part 4 Eligibility

4.1 Requirements for arranged parent(s)

The eligibility requirements to be met by intended arranged parent(s) are:

- (a) The arranged mother must be unable to carry a child for medical reasons;
- (b) Each of the arranged parent(s) must be over the age of 18;
- (c) If IVF is to be used in connection with the surrogacy arrangement the arranged parent(s) must meet the criteria in section 23 of the *Human Reproductive Technology Act 1991*;
- (d) No payment other than the costs associated with the artificial fertilisation procedure, the assessment and preparation in relation to the surrogacy arrangement and the pregnancy and birth is to be made by or on behalf of the arranged parent(s);
- (e) Each of the arranged parent(s) must have completed the preparation process set out in Part 6;
- (f) The investigations required under Part 7 must not indicate a cause for concern that the arranged parents or a resulting or existing child would be exposed to risk.

4.2 Requirements for birth mother and her husband or defacto partner (if any)

The requirements to be met by the birth mother and her husband or defacto partner (if any) are:

- (a) The birth mother must be aged 18 or over;
- (b) The birth mother must previously have given birth to a child;
- (c) No payment other than the costs associated with the artificial fertilisation procedure, the assessment and preparation in relation to the surrogacy arrangement and the pregnancy and birth are to be paid to the birth mother or her husband or defacto partner;
- (d) The birth mother must not have been coerced or pressured to participate in the arrangement;
- (e) The birth mother and her husband or de-facto partner (if any) must have completed the preparation process set out in Part 6;
- (f) The investigations required under Part 7 must not indicate a cause for concern that the birth mother and her husband or de-facto partner (if any), or a resulting or existing child would be exposed to risk.

4.3 Requirements for gamete donors

If a surrogacy arrangement involves the use of gametes or embryos that have been donated by a person other than the arranged parent(s) or the birth mother and her husband or de-facto partner (if any), the requirements to be met by the donor(s) are:

- (a) Each donor must be over the age of 18;
- (b) Each donor and his or her spouse or de-facto partner must have completed the preparation process set out in Part 6;
- (c) The investigations required under Part 7 must not indicate a concern that the birth mother or a resulting child would be exposed to risk.

4.4 Requirements for the surrogacy arrangement

The requirements for the surrogacy arrangement are:

- (a) the arrangement must be set out in a written agreement signed by the arranged parent(s), the birth mother and her husband or defacto partner (if any), the donor of any gametes or embryos to be used in connection with the surrogacy arrangement and the spouse or defacto partner of a gamete donor;
- (b) the agreement must set out the expenses that the arranged parent(s) are to meet in respect of the arrangement;
- (c) the agreement must contain a plan setting out the proposed communication between any child and the birth mother, her family or any other person and any other matters relevant to the upbringing of the child that are agreed by the parties.

4.5 Provision of surrogates

It is expected that in most cases the arranged parent(s) would be responsible for identifying a possible birth mother.

4.6 Role of the clinic in introducing arranged parents and birth mothers

The licensee may introduce a potential birth mother to arranged parents, but should not actively recruit women who may be willing to undertake a surrogacy arrangement for arranged parents and must not derive any financial benefit for introducing the participants in a surrogacy arrangement.

Part 5: Information

5.1 Additional information to be provided for surrogacy arrangements

In addition to information about the artificial fertilisation procedures to be undertaken as required by the ART Directions, the licensee must ensure that proposed participants in surrogacy arrangements are given oral explanations supported by relevant written material in a form approved by Council before the preparation and investigations outlined in Parts 6 and 7 is commenced, including:

- (a) information about the assessment process to be undertaken by the clinic in connection with the surrogacy arrangement;
- (b) the effect of the *Artificial Conception Act 1985*;
- (c) the effect of the Surrogacy Act;
- (d) rights of donors, participants and children born as a result of a surrogacy arrangement to access identifying and non-identifying information in accordance with the HRT Act and the Surrogacy Act;
- (e) the medical and social implications in relation to surrogacy and for children born as a result of the donation.

Part 6: Preparation

6.1 Clinic Surrogacy Coordinator

Each clinic that offers artificial fertilisation procedures in connection with a surrogacy arrangement is to appoint a person to be the Surrogacy Coordinator. The person appointed must be an approved counsellor employed at the clinic.

6.2 Role of clinic Surrogacy Coordinator

The clinic Surrogacy Coordinator must ensure that the parties to any proposed surrogacy arrangement are provided with all the necessary information about the process of assessment and approval of surrogacy arrangements and to be the primary contact point for inquiries about surrogacy arrangements.

6.3 Implication Counselling

The clinic Surrogacy Coordinator must ensure that the birth mother, her husband or defacto spouse (if any), the arranged parent(s), the donor of any gametes or embryos to be used in a procedure (if any) and the spouse or defacto partner of any donor complete implications counselling provided by an approved counsellor (who may be the Surrogacy Coordinator) that covers the following issues:

- (a) the eligibility of the parties to undertake the practice of surrogacy;
- (b) the motivation of the parties to pursue surrogacy;
- (c) whether the parties are freely considering this practice and/or whether any party feels coerced or pressured to participate;
- (d) whether, and to what extent, arranged parents should have input on aspects of the birth mother's lifestyle and behaviour during pregnancy;
- (e) whether prenatal testing will be considered and how the birth mother will address a situation where a serious defect of the foetus is found;
- (f) identification of costs associated with the pregnancy and the birth that would be reimbursed to the birth parent(s);
- (g) whether the arranged parents are to be present at the child's birth and the timing of their taking over the care of the child, including the process of separation of birth parent(s) from the child;
- (h) how the birth of a child born with a disability would be dealt with;
- (i) how the death or separation of the arranged parent(s) before the child's birth would impact on the arrangement;
- (j) what information will be given to the child about the circumstances of birth and when it will be given;
- (k) what communication is proposed between the child and the birth family during childhood and how any proposed contact is to be managed;
- (l) the likely effects of surrogacy on other children of the birth parent(s), and the involvement of those children in the process in ways appropriate to their age and maturity;
- (m) the likely effects of the surrogacy on the birth mother's husband or defacto partner (if any), including consideration of how surrogacy may impact on the relationship;
- (n) the emotional, social and financial costs associated with the birth parent(s) changing their minds and keeping the child;
- (o) the attitude towards, and impact of, surrogacy on the extended families of both the birth parent(s) and arranged parents;
- (p) the level of support networks for the parties during the process of surrogacy and enhancing if required; and
- (q) methods of conflict resolution.

6.4 Legal advice

The clinic Surrogacy Coordinator must ensure that the birth mother and her husband or defacto partner (if any) the arranged parents the donor of any gametes or embryos to be used in a procedure (if any) and the spouse or defacto partner of any donor obtain independent legal advice that covers the following issues:

- (a) the legal status of the birth parent(s) and the arranged parents at the birth of a child, including advice about the effect of the *Artificial Conception Act 1985*;
- (b) the legal effect of a surrogacy arrangement;
- (c) the legal avenues available to transfer legal parenting responsibility to the arranged parents;
- (d) statutory rights of access to identifying information for participants in the surrogacy arrangement.

6.5 Evidence of meeting the required preparation

The clinic Surrogacy Coordinator must obtain written confirmation of completion from each of the persons who provided implications counselling or legal advice to the parties.

6.6 Cooling off period

An application to the clinic Surrogacy Review Committee/Panel for approval of a surrogacy arrangement must not be made until a period of three months has elapsed since the implication counselling set out in paragraph 6.3 has been completed for all parties.

Part 7: Investigations

7.1 Investigations

The clinic Surrogacy Coordinator must ensure that the investigations that are set out in this Part are undertaken before an application is made for approval of a surrogacy arrangement.

7.2 Medical assessment of arranged parent(s)

A medical practitioner is to examine the arranged parent(s) to assess eligibility for access to a surrogacy arrangement and to report on any medical condition that may affect the capacity of the arranged parent(s) to care for a child. The medical practitioner is to prepare a report on the assessment in a form approved by the Council.

7.3 Medical assessment of birth mother

A medical practitioner is to examine the birth mother to assess her medical suitability to undertake the surrogacy arrangement. The medical practitioner is to prepare a report on the assessment in a form approved by the Council.

7.4 Medical assessment of donor of gametes

A medical practitioner is to examine the donor of any gametes or embryos to be used in a surrogacy arrangement to assess medical suitability as a gamete donor and to report on any medical condition that may pose a risk to the birth mother or a resulting child. The medical practitioner is to prepare a report on the assessment in a form approved by the Council.

7.5 Psychological assessment of arranged parent(s)

An independent clinical psychologist is to undertake assessment and appropriate psychological testing of the suitability of the arranged parent(s) to take part in a surrogacy arrangement and to care for a child born as a result of a surrogacy arrangement. The assessment is to include any existing child of the arranged parent(s) who is over the age of 4 years. The clinical psychologist is to prepare a report on the assessment in a form approved by the Council.

7.6 Psychological assessment of birth mother and her immediate family

An independent clinical psychologist is to undertake assessment and appropriate psychological testing of the suitability of the intended birth mother and her husband or defacto partner (if any) to take part in a surrogacy arrangement. The assessment is to include any existing child of the birth mother and/or her husband or defacto partner (if any) who is over the age of 4 years. The clinical psychologist is to prepare a report on the assessment in a form approved by the Council.

7.7 Working with children check of arranged parent(s)

Each arranged parent(s), the birth mother and her husband or defacto partner (if any) is required to obtain a Working with Children Card issued by the Department for Community Development.

Part 8: Consent

8.1 Consent to surrogacy arrangement

Any person to whom the licence applies who proposes to carry out, or to direct the carrying out, of an artificial fertilisation procedure in connection with a surrogacy arrangement must, at the time of or immediately prior to the artificial fertilisation procedure, ensure that effective consent to the proposed surrogacy arrangement, is given by:

- (a) the birth mother;
- (b) the arranged parent(s);
- (c) any person who has provided gametes to be used in the procedure;
- (d) the spouse or de facto spouse (if any) of each person specified in paragraph (a) or (c).

Part 9 Ongoing counselling and support

9.1 Counselling and support services to be available

The clinic Surrogacy Coordinator is to ensure that the parties have access to counselling and support services in connection with a surrogacy:

- (a) following a decision by the Clinic Surrogacy Review Committee/Panel;
- (b) during reproductive technology treatment;
- (c) following a decision to discontinue reproductive technology treatment;
- (d) during any pregnancy; and
- (e) following the birth of any child.

9.2 Counselling requirements during any pregnancy

In the event of a pregnancy in connection with a surrogacy arrangement, the clinic Surrogacy Coordinator must ensure that the arranged parent(s), the birth mother and her husband or defacto partner (if any) attend joint counselling at 20 weeks gestation, at 34 weeks gestation and within 14 days after the birth of the child.

Part 10 Records and Reporting

10.1 Additional records to be kept by licensees

The licensee is to ensure that copies of all documentation required before a surrogacy arrangement is included in the file of the relevant participant.

10.2 Reporting to the Chief Executive Officer of the Department of Health on each artificial fertilisation procedure

The licensee must provide to the Chief Executive Officer of the Department of Health for inclusion in the registers the information set out in Table 1 that is relevant to each artificial fertilisation procedure undertaken in connection with a surrogacy arrangement.

TABLE 1

10.3 Annual reporting

The licensee must submit an annual report including the information relating to surrogacy set out in Table 2 to the Chief Executive Officer of the Department of Health by 31 July each year relating to the previous financial year.

TABLE 2