

## Inquiry into surrogacy

- 1.1 On 2 December 2016 the House of Representatives Social Policy and Legal Affairs Committee (the Committee) adopted an inquiry referred by the Attorney-General into the regulatory and legislative aspects of international and domestic surrogacy arrangements. The inquiry was the sole recommendation of the Committee's previous report, *Roundtable on Surrogacy*, which was tabled in March 2015.<sup>1</sup>
- 1.2 The desire to be a parent is an instinct that is shared by many people from different backgrounds, however some may not find themselves in a position to form a family in the conventional way. Society now recognises many different forms of blended and adoptive families that are not based solely on genetic connections, expanding the models of family formation and familial relationships. In relation to surrogacy in particular, a child may be born as a result of the creating of an embryo through the contribution of sperm or egg from either the intended parents, surrogate or third party donors. The varied permutations of the source of genetic material that contribute to the biological makeup of a child sits alongside regulatory and legislative responses that make surrogacy a complex field of examination.
- 1.3 The Committee received 124 submissions from government organisations, academics, industry, interest and religious groups. In all, the Committee held six public hearings in Canberra, taking the opportunity to hear from key inquiry stakeholders.
- 1.4 A significant number of inquiry contributors, including some who provided oral evidence, were private individuals and families who outlined their experiences as intended parents who engaged in both commercial offshore and altruistic surrogacy, surrogate mothers,

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1 House of Representatives Standing Committee on Social Policy and Legal Affairs (March 2015) *Roundtable on Surrogacy*, p. 1.

relinquishing mothers, donor conceived children and adoptees. These heartfelt stories provided the inquiry with a backdrop of lived experience which was greatly appreciated by the Committee and formed the core of the Committee's deliberations in developing this report and associated recommendations.

- 1.5 The Committee's report considers the following matters:
- the harmonisation of Australian State and Territory surrogacy legislation,
  - international surrogacy and Australia's international obligations, and
  - the adequacy of information provided to those who pursue altruistic surrogacy in Australia.

## Terminology

- 1.6 In discussing surrogacy, the Committee is aware that the use of terminology is a sensitive matter for all stakeholders.<sup>2</sup> A number of inquiry contributors have commented on the use of terminology, however for the purposes of this report, the Committee has determined that terminology used will be consistent with that used in relevant Commonwealth legislation, guidelines or reports. Key definitions are as follows:
- **altruistic or uncompensated surrogacy:** the only fee, reward or other material benefit or advantage provided for is the reimbursement of a surrogate mother's surrogacy costs,
  - **commercial or compensated surrogacy:** where the surrogate mother is remunerated for financial gain or reward,
  - **commissioning or intended parent:** the person or persons who enter into a surrogacy arrangement for a woman to carry a child on behalf of the person or persons,
  - **parent:** the person/s who are identified as the legal guardian of a child under the law of a relevant State or Territory, and
  - **birth mother:** the woman who carries the child.

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2 See for example: House of Representatives Standing Committee on Social Policy and Legal Affairs (March 2015) *Roundtable on Surrogacy*, p. 3.

## Surrogacy law in Australian States and Territories

- 1.7 Broadly, surrogacy laws in Australia are regulated by individual States and Territories. The exception is the Northern Territory which relies on Commonwealth assisted reproductive technology guidelines. The Commonwealth itself does not play an explicit role in the regulation of surrogacy but instead engages with intended parents, surrogates and children through a range of social services and family law programs including Medicare.
- 1.8 This section will consider a number of issues:
- the surrogacy legislation of States and Territories, and
  - the harmonisation of State and Territory surrogacy legislation.

### State and Territory legislation

- 1.9 In each jurisdiction, the practice of commercial surrogacy is prohibited while legislation governing altruistic surrogacy varies widely in scope and application. Three jurisdictions (the ACT, Queensland and New South Wales) have legislation that incorporates extraterritorial provisions, banning the practice of international commercial surrogacy by residents of those jurisdictions.
- 1.10 The legislation of domestic jurisdictions can be summarised as follows:
- in the **Australian Capital Territory**, under the *Parentage Act 2004* (ACT), altruistic surrogacy is permitted while 'commercial substitute parent agreements' are prohibited. The legislation allows for same-sex couples to be parents of a surrogate child provided one of these individuals is a genetic parent. The legislation prohibits single people from being a surrogate parent,
  - in **Queensland**, the *Surrogacy Act 2010* (Qld) allows altruistic surrogacy arrangements while prohibiting commercial arrangements. Intended parents may be married, a de-facto couple (including same-sex couples) or a single person,
  - in **New South Wales**, the *Surrogacy Act 2010* (NSW) recognises certain surrogacy arrangements, prohibits commercial surrogacy arrangements, prohibits the advertising of surrogacy arrangements and provides for the status of children of surrogacy arrangements. The legislation allows same sex couples to be parties to an altruistic surrogacy,
  - in **Victoria**, surrogacy arrangements are regulated by the *Assisted Reproductive Treatment Act 2008* (Vic). Altruistic surrogacy arrangements are permitted and commercial surrogacy arrangements are prohibited.

All surrogacy arrangements must be approved by a Patient Review Panel. In seeking approval, the commissioning (intended) parent must be infertile, unable to carry a pregnancy or give birth or there is a likely medical risk to the mother or baby if a pregnancy occurs. Thus, single women and women in married, de facto or same-sex relationships who meet these criteria are eligible to apply to enter into an approved surrogacy arrangement,

- in **Tasmania**, surrogacy arrangements are regulated under the *Surrogacy Act 2012* (Tas). The legislation permits altruistic surrogacy arrangements and prohibits commercial surrogacy arrangements. There may be one or two intended parents under a surrogacy arrangement. Intended parents may be married, a de facto couple (including same-sex de facto couples) or a single person,
- in **South Australia**, surrogacy arrangements are regulated by the *Family Relationships Act 1975* (SA). The legislation allows for recognised surrogacy arrangements to be formed. The Act prohibits commercial surrogacy arrangements. Only married or de facto heterosexual infertile couples are able to enter into recognised surrogacy arrangements. Same-sex couples and single people are excluded,
- in **Western Australia**, surrogacy arrangements are regulated by the *Surrogacy Act 2008* (WA). The grant of a parentage order is contingent upon a surrogacy arrangement having been approved by the Western Australian Reproductive Technology Council. The arranged (intended) parent who may apply for parentage order must be infertile, unable to carry a pregnancy or give birth or there is a likely medical risk to the mother or baby if a pregnancy is carried out. Thus, a single woman or a woman who is married or in a de facto heterosexual relationship who meet these criteria are eligible to apply to enter into an approved surrogacy arrangement. Single men are excluded, as are same-sex couples, and
- in the **Northern Territory**, there are no laws concerning surrogacy.

1.11 The National Health and Medical Research Council (NHMRC) has also issued ethical guidelines in relation to assisted reproductive technology (ART).<sup>3</sup> Four States have enacted their own ART legislation - New South Wales, Victoria, South Australia and Western Australia. The NHRMC guidelines apply in jurisdictions without a legislative regime.

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3 National Medical Health and Research Council, *Assisted Reproductive Technology* (ART), <<https://www.nhmrc.gov.au/health-ethics/ethical-issues/assisted-reproductive-technology-art>>, viewed 12 April 2016.

## Harmonising State and Territory surrogacy legislation

- 1.12 The disparity in legislative regimes around Australia causes a range of inequities for those choosing to pursue domestic altruistic surrogacy.<sup>4</sup> These include minimal requirements on counselling and background checks in some jurisdictions.<sup>5</sup> Many inquiry participants also highlighted a number of discriminatory provisions that exist in relation to gender, marital status and sexual orientation.<sup>6</sup>
- 1.13 Evidence to the Committee points to some Australians choosing to access surrogacy arrangements in States and Territories that are more favourable than those in their home jurisdiction.<sup>7</sup>

### Committee comment

- 1.14 For many Australians, family formation can be a difficult and emotional journey. The desire to have a family can be complicated by many issues including age, infertility, being single or in a same-sex relationship.
- 1.15 Those that consider surrogacy as an option are often all too aware that Australian law permits only altruistic surrogacy. Attempts to engage in the practice can be cruelled by barriers including being unable to identify an appropriate altruistic surrogate in Australia because of prohibitions on advertising. Inconsistent regulatory barriers between jurisdictions also add to the strain.
- 1.16 Often exhausting their domestic options,<sup>8</sup> some Australians choose to bypass the domestic route in favour of pursuing their goal to have a family through offshore commercial surrogacy. This will be explored later in this report, however the Committee did receive significant evidence pointing to the desire of many Australians to procure surrogacy arrangements in Australia.
- 1.17 Submitters cited a range of reasons for wanting to source Australian-based surrogacy agreements including the proximity to family and support networks,<sup>9</sup> and reduced financial burden compared to offshore arrangements.<sup>10</sup>

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4 See for example: Chief Judge John Pascoe, *Submission 35*, p. 5; Castan Centre for Human Rights Law, *Submission 19*, p. 2; Stephen Page, *Submission 27*, p. 1.

5 See for example: Stephen Page, *Submission 27*, pp. 22-38.

6 See for example: Australian Human Rights Commission, *Submission 67*, p. 18; Alastair Lawrie, *Submission 56*, p. 2; NSW Gay & Lesbian Rights Lobby, *Submission 68*, p. 2.

7 See for example: Stephen Page, *Submission 27*, p. 38.

8 See for example: Name Withheld, *Submission 82*, p. 1.

9 See for example: Name Withheld, *Submission 105*, p. 1.

10 See for example: Name Withheld, *Submission 2*, p. 1.

- 1.18 In advocating for an improvement in how surrogacy is regulated in Australia, it was clear that a spectrum of views existed:
- those that believe that Australian jurisdictions should permit the full range of surrogacy arrangements to take place, including a regulated commercial system,<sup>11</sup>
  - those that viewed that there should be limited availability to a regulated version of commercial surrogacy or the imposition of a cap on payments,<sup>12</sup>
  - those who would prefer that only the current system of altruistic surrogacy continue,<sup>13</sup> and
  - those who consider that all forms of surrogacy should be prohibited altogether.<sup>14</sup>
- 1.19 In considering these divergent views, the Committee takes the position that even if a regulated system of commercial surrogacy could be implemented, the risk of exploitation of both surrogates and children remains significant. Therefore, the Committee strongly supports the current legislative position of Australian States and Territories that the practice of commercial surrogacy remains illegal in Australia.

### **Recommendation 1**

**The Committee recommends that the practice of commercial surrogacy remain illegal in Australia.**

- 1.20 The Committee contends however that altruistic surrogacy should be permitted in all States and Territories, although the disparate nature of surrogacy legislation in Australian States and Territories does little to assist the many Australians who aspire to be parents. It simply adds to the confusion, lessens the protections available to all parties and creates a culture of “jurisdiction shopping” to find the most suitable arrangements.<sup>15</sup> This is an issue that the Committee feels must be addressed.

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11 See for example: Castan Centre for Human Rights Law, *Submission 19*, p. 2.

12 See for example: Chief Justice Bryant, *Committee Hansard*, 18 March 2016, pp. 1-2; Families through Surrogacy, *Submission 20*, pp. 3 & 7.

13 See for example: Associate Professor Sonia Allan, *Submission 17*, p. 5.

14 See for example: Australian Christian Lobby, *Submission 39*, p. 15; Feminist International Network of Resistance to Reproductive and Genetic Engineering, *Submission 70*, p. 1.

15 See for example: Name Withheld, *Submission 82*, p. 1.

## Recommendation 2

The Committee recommends that the Australian Government, in conjunction with the Council of Australian Governments, consider the development of a model national law that facilitates altruistic surrogacy in Australia. The model law should have regard to the following four guiding principles:

- that the best interests of the child should be protected (including the child's safety and well-being and the child's right to know about their origins),
- that the surrogate mother is able to make a free and informed decision about whether to act as a surrogate,
- that sufficient regulatory protections are in place to protect the surrogate mother from exploitation, and
- that there is legal clarity about the parent-child relationships that result from the arrangement.

1.21 In developing a model national law the Committee believes that in the first instance, a model appropriate to all States and Territories must be devised by an experienced Australian Government entity taking into consideration the existing and diverse legislative regimes. The model should then be considered, refined and implemented by all jurisdictions.

### Development and adaptation of an appropriate model

1.22 The diverse nature of the legislative framework that regulates surrogacy in Australia introduces complexities where parties to an arrangement reside in different jurisdictions. This disparity also weakens the important protections that form part of some State and Territory legislative approaches. The Committee considers that a nationally consistent approach will ensure that Australians who seek altruistic surrogacy arrangements face fewer hurdles and there are greater protections for the resulting child and for all those who enter into such an arrangement.

### Standing Committee on Attorneys General discussion paper

1.23 In putting forward a proposal for the development of a model national law, the Committee considered the 2009 work of the Standing Committee on Attorneys General (SCAG) which considered some of the key principles that would need to inform a unified legislative approach. While disappointed that its work did not continue beyond that discussion paper, the Committee contends that the principles arising from both the SCAG discussion paper and the Committee's present inquiry warrant further

consideration and remain relevant in framing future domestic altruistic surrogacy laws.<sup>16</sup>

- 1.24 The discussion paper posed a number of issues for consideration including matters relating to:
- reimbursement of 'reasonable expenses' for the surrogate mother,
  - counselling,
  - the format of a surrogacy agreement,
  - the need for independent legal advice,
  - consent to and preconditions relating to parentage orders including mutual recognition of parentage orders across jurisdictions,
  - eligibility for parentage orders including for same-sex couples,
  - the presumption of the 'best interests of the child',
  - birth certificates,
  - free and informed consent of all parties concerned,
  - residency requirements,
  - eligibility for ART,
  - eligibility to act as a surrogate mother based on age and previous pregnancies,
  - approval process for surrogacy arrangements,
  - screening processes for all parties concerned,
  - the establishment of a national donor information register,
  - retrospective or transitional provisions,
  - advertising by intended parents, potential surrogates or clinics,
  - non-commercial brokerage by licensed ART clinics, and
  - parentage provisions under Commonwealth legislation.

### Development of a national model law

- 1.25 The Committee believes that the Australian Law Reform Commission (ALRC), with its strong background in legal policy development, would be a suitable body to develop a model national law that could be taken by the Commonwealth Attorney-General to the Council of Australian Governments (COAG) for review, adoption and implementation. This process would also allow for the consideration of the unique aspects of the

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16 Standing Committee of Attorneys-General, Australian Health Ministers' Conference, Community and Disability Services Ministers' Conference – Joint Working Group (2009) *A Proposal for a National Model to Harmonise Regulation of Surrogacy*.

individual legislative regimes of each State and Territory along with the reviews that many have undertaken to strengthen their positions.

- 1.26 From evidence received, the Committee has distilled a number of core issues that must underpin any model national law on altruistic surrogacy. These are set out below.

#### The best interests of the child

- 1.27 Ensuring that surrogacy arrangements uphold the principle of the best interests of the child was a sentiment expressed by a many contributors to the inquiry despite their differing perspective on surrogacy itself.
- 1.28 Some inquiry contributors suggested that a child born of a surrogacy arrangement should have a number of rights that are consistent with Australia's obligations under the *United Nations Convention of the Rights of the Child* (CROC) - of which ensuring the best interests of the child is a key principle.<sup>17</sup> Submitters noted that the suite of rights that all children should enjoy included knowing their ethnic and genetic origins;<sup>18</sup> and the right not to be exploited.<sup>19</sup>
- 1.29 The alternative view expressed was that surrogacy, in all its forms, does not consider a child's best interests at all. Rather, some inquiry contributors suggested that surrogacy focuses on the desire of adults to have children confuses a child as to their biological and social identity as a person; does not preserve 'family relations' as required by the CROC including that a child's interests are not served through having multiple 'parents' as a result of surrogacy arrangements; may deny the child the ability to have both a mother and a father; or may affect the child's mental health.<sup>20</sup>
- 1.30 Despite a range of views on surrogacy, it is clear that many inquiry stakeholders see the best interests of the child as a paramount consideration. In development of a future national model law on surrogacy, the Committee considers that the ALRC must establish this as a key principle.

#### Previous reviews of Australian surrogacy laws

- 1.31 In the period since 2009, some States and Territories have reviewed their own surrogacy legislation and practices, making amendments to improve their own system. While this report will not undertake an analysis of these, it is imperative that any future model bring to bear the perspectives

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17 Australian Christian Lobby, *Submission 39*, p. 5.

18 Stephen Page, *Submission 27*, p. 1.

19 Chief Judge John Pascoe, *Submission 35*, p. 7.

20 Australian Christian Lobby, *Submission 39*, pp. 5, 6-7, 11 & 16.

and experiences of the differing legislative regimes. The Committee believes that examination of these previous reviews, including a call for submissions from State and Territory jurisdictions will strengthen a national model law on surrogacy.

### Counselling

- 1.32 Many inquiry contributors provided evidence suggesting that there is a need for mandatory, independent and in-person counselling for all parties before entering into a surrogacy arrangement, during pregnancy, after the birth, and at relinquishment.<sup>21</sup> Counselling allows participants to explore ethical issues that may arise during the process including ‘...informed consent, psychological impacts, any issues arising from the birth of a child with disability, and how the child should be informed of the circumstances of their conception and birth’.<sup>22</sup>
- 1.33 Evidence to the Committee was that counselling at crucial stages during the surrogacy process is not mandatory in all jurisdictions.<sup>23</sup> Nor does it appear that those providing surrogacy counselling are required to have professional accreditation to perform their duties.<sup>24</sup>
- 1.34 A particular concern that was relayed to the Committee suggested that a number of women who have acted as surrogate mothers have suffered post-traumatic stress disorder following relinquishment of the child.<sup>25</sup>
- 1.35 In developing a future model national law on surrogacy, the Committee is of the view that the ALRC should mandate counselling at all stages of the process. Health professionals who conduct counselling play a significant role in the well-being of all participants in the process and as such some clarity on the required skills and qualifications is required.

### Background checks and screening

- 1.36 There is a need to ensure that as part of any surrogacy agreement all parties submit to background, medical and psychological screening. Evidence to the Committee suggested that not all States and Territories

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21 See for example: Stephen Page, *Submission 27*, p. 2; Miranda Montrone, Australian and New Zealand Infertility Counsellors Association, *Committee Hansard*, 18 March 2016, p. 20.

22 Sebastian Cordoba, Australian Association of Social Workers, *Committee Hansard*, 18 March 2016, p. 11.

23 See for example: Miranda Montrone, Australian and New Zealand Infertility Counsellors Association, *Committee Hansard*, 18 March 2016, p. 21.

24 See for example: Miranda Montrone, Australian and New Zealand Infertility Counsellors Association, *Committee Hansard*, 18 March 2016, p. 21.

25 See for example: Association of Relinquishing Mothers (Victoria), *Submission 28*, p. 1.

require comprehensive assessments of parties considering surrogacy and it is possible that this may lead to unforeseen difficulties.<sup>26</sup>

- 1.37 As identified later in this report, a number of cases have emerged of persons who have applied for and become surrogate parents of children born offshore despite convictions for serious offences against children.<sup>27</sup> Other contributors have noted that not all parties are transparent about their motives for entering into a surrogacy agreement or in some cases may not disclose matters, such as health considerations, which may affect another party's decision-making.<sup>28</sup>
- 1.38 Evidence to the Committee suggested that there is strong support for background checks, medical and psychological screening for all parties prior to entering into a surrogacy agreement.<sup>29</sup> In developing a future model national law on surrogacy, the Committee considers that compliance with each of these aspects be made a pre-requisite to the execution of any surrogacy agreement.
- 1.39 The Committee considers that all surrogacy agreements must include background, medical and psychological assessments for all parties. In particular, all parties must disclose any matter that may affect the future best interests of the child.

### Surrogacy agreements

- 1.40 Surrogacy agreements form the basis of relationships between all parties to an arrangement. While such agreements are not enforceable,<sup>30</sup> it is imperative that they clearly set out the range of matters that should be agreed to by all parties. Inquiry participants highlighted a number of aspects that should be a feature of surrogacy agreements:
- that agreements be evidenced in writing,<sup>31</sup>
  - that all parties procure independent legal advice prior to entering into an agreement,<sup>32</sup>
  - that the birth mother retains the right to make decision about her own health and that of the child which she carries,<sup>33</sup>

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26 Chief Judge John Pascoe, *Submission 35*, p. 21.

27 Chief Judge John Pascoe, *Submission 35*, p. 21.

28 See for example: Castan Centre for Human Rights Law, *Submission 19*, p. 20.

29 See for example: Stephen Page, *Submission 27*, p. 2; Families through Surrogacy, *Submission 20*, p. 1.

30 Chief Justice Diana Bryant, *Submission 42*, p. 3.

31 Stephen Page, *Submission 27*, p. 2.

32 See for example: Stephen Page, *Submission 27*, p. 2; Section 7 *Surrogacy Act 2008* (WA).

33 Stephen Page, *Submission 27*, p. 1.

- that the birth mother not be compelled to relinquish a child that she has given birth to,<sup>34</sup>
- counselling for all parties at all stages, including at relinquishment,<sup>35</sup>
- that consideration be given for coverage of the expenses of the birth mother,<sup>36</sup>
- that expectations regarding parentage determinations be included,<sup>37</sup> and
- that provisions be made for dispute resolution.

1.41 In considering a national model law, the Committee considers that the ALRC must consider the requirement that all parties to a surrogacy must enter into a written, non-binding agreement. The agreement must set out shared expectations of all parties including how disputes will be resolved and by whom, particularly where it is a matter concerning the best interests of the child. The Committee is also of the view that agreements must ensure that parties respect the birth mother's right to make decisions about her own health and that of the child.

#### Transfer of parental responsibility

- 1.42 Evidence to the Committee suggested that the processes by which parental responsibility is transferred from the birth mother to intended parents, and when this transfer should take place are complex and sometimes unclear.<sup>38</sup>
- 1.43 Parents are responsible for seeking parentage orders under relevant State and Territory legislation, and 'these laws provide for a transfer of legal parentage to the intended parents by the relevant State or Territory court where certain conditions apply'.<sup>39</sup> Where a child was born through an offshore commercial surrogacy agreement, intended parents are not eligible for a transfer of parentage through State and Territory courts as a result of the practice being prohibited.<sup>40</sup> In such cases, parents use the provisions under the *Family Law Act 1975* (Cth) to seek parentage orders.
- 1.44 The *Family Law Act 1975* (Cth) contains several specific provisions that deal with both children born of artificial conception procedures<sup>41</sup> and also

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34 Australian Christian Lobby, *Submission 39*, p. 16.

35 Chief Judge John Pascoe, *Submission 35*, p. 15.

36 Felicity Kennedy, *Submission 101*, p. 3.

37 Chief Judge John Pascoe, *Submission 35*, p. 17.

38 Name Withheld, *Submission 88*, p. 4; Victorian Gay & Lesbian Rights Lobby, *Submission 36*, p. 5.

39 Family Law Council (2013) *Report on Parentage and the Family Law Act*, p. 62.

40 Family Law Council (2013) *Report on Parentage and the Family Law Act*, p. 62.

41 Section 60H *Family Law Act* (Cth).

children born under surrogacy arrangements.<sup>42</sup> The latter section is designed to give effect to an order of a State or Territory court that has determined parentage for the purposes of the *Family Law Act 1975 (Cth)*.<sup>43</sup>

1.45 Evidence to the Committee provided some insight as to how a federal level court might interpret a surrogacy-related parentage case.<sup>44</sup> Chief Justice Diana Bryant of the Family Court of Australia advised the Committee that such cases often follow a similar pattern:

- the commissioning parents make an agreement whereby a woman, who is unrelated to the commissioning parents and is not known to them prior to the arrangement, becomes pregnant with an embryo created from the sperm of one of the intended parents and an egg obtained from another woman who is also unrelated and unknown to the intended parents,
- the explicit intention is for the child to be handed to the intended parents at birth and raised by them as their child, and
- by the time the case comes to court, the child has been in the care of the commissioning parents for some months and has had no contact with the birth mother or egg donor.<sup>45</sup>

1.46 A range of cases have come before federal level courts to determine parentage and in some matters the ‘best interests of the child’ was found to be a presumption that could override illegality. For example, in the case of *Ellison and Anor & Karnchanit*, Justice Ryan found that policy considerations, such as a State-based law deeming that offshore commercial surrogacy was illegal, should not be a barrier in awarding a parentage declaration in favour of a commissioning parent and that ‘the court really needs to take the children as it finds them’.<sup>46</sup>

1.47 The Committee believes that many of the principles espoused by the 2013 report of the Family Law Council, *Parentage and the Family Law Act* warrant both response and implementation.<sup>47</sup> A core element of that report proposed a Commonwealth Status of Children Act.<sup>48</sup> It was proposed that such legislation would aim to:

- ... provide a clear, accessible and consistent statement of the legal parentage of children for the purposes of all Commonwealth laws and for all courts exercising federal jurisdiction,

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42 Section HB *Family Law Act (Cth)*.

43 Chief Justice Diana Bryant, *Submission 42*, p. 6.

44 Chief Justice Diana Bryant, *Submission 42*, p. 6.

45 Chief Justice Diana Bryant, *Submission 42*, p. 6.

46 *Ellison and Anor & Karnchanit* (2012) FamCA 602, 87.

47 Family Law Council (2013) *Report on Parentage and the Family Law Act*.

48 Family Law Council (2013) *Report on Parentage and the Family Law Act*, p. 123.

- ... include all the current parentage provisions in Part VII Family Law Act, as amended, based on the recommendations in this report, and
- ... provide a mechanism for the family courts to transfer parentage in surrogacy arrangements.<sup>49</sup>

- 1.48 A number of Australian States and Territories also have in place a Status of Children Act which provides some protections with respect to parentage as a result of surrogacy.<sup>50</sup> For example the *Status of Children Act 1974* (Vic) makes a range of presumptions of parentage applicable to surrogacy arrangements that are legal in that State.
- 1.49 The Committee considers that as part of its deliberations, the ALRC should examine whether having a Commonwealth mechanism that provides clear criteria to define presumptions of parentage, including in relation to surrogacy-related cases, would clarify this matter.

#### Reimbursement for the birth mother

- 1.50 The issue of reimbursement for a birth mother, particularly for legal, medical and other expenses incurred as a consequence of the surrogacy has been raised by a range of stakeholders. It is argued that while State and Territory surrogacy legislation may make provision for reimbursement of 'reasonable expenses', and may set strict parameters on the definition,<sup>51</sup> these laws are not uniform across Australia.<sup>52</sup> Reimbursement should also be distinguished from commercial surrogacy, the latter of which relies on a monetary reward, as distinct from payment for expenses, being offered to the surrogate.
- 1.51 In terms of government assistance, a number of submissions have raised the issue of Medicare coverage for surrogates. It has been noted that Medicare coverage does not extend to IVF treatment if a surrogate is used.<sup>53</sup> The Australian Government's paid parental leave scheme does apply to women who are pregnant with a surrogate child.<sup>54</sup>
- 1.52 The Committee's view is that altruistic surrogates are not motivated by financial reward and while recommending that the current prohibition on

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49 Family Law Council (2013) *Report on Parentage and the Family Law Act*, p. 123.

50 Attorney-General's Department, *Submission 46*, p. 2.

51 Miranda Montrone, Australian and New Zealand Infertility Counsellors Association, *Committee Hansard*, 18 March 2016, Canberra, p. 19.

52 See for example: Section 6(3) *Surrogacy Act 2008* (WA); Western Australian Reproductive Technology Council, *Submission 25*, p. 3.

53 See for example: *Surrogacy Australia, Submission 32*, p. 5; Felicity Kennedy, *Submission 101*, p. 2; Name Withheld, *Submission 85*, p. 1; Natasha Ryan, Department of Health, *Committee Hansard*, 3 March 2016, Canberra, p. 12.

54 Barbara Bennett, Department of Social Services, *Committee Hansard*, 3 March 2016, Canberra, p. 11.

commercial surrogacy remain, the Committee argues that providing appropriate reimbursement for altruistic surrogates is a reasonable proposition.<sup>55</sup> It has also been noted that some surrogates may feel uncomfortable about claiming reimbursement for small expenses that seem trivial but can accumulate over time.<sup>56</sup>

- 1.53 It is for these reasons that the Committee believes that the ALRC should examine the issue of reimbursement as part of its investigation and define the parameters by which a national scheme could operate.

#### Register of surrogates and intended parents

- 1.54 One barrier evidenced by inquiry participants is the difficulty in either finding a surrogate or in offering to be a surrogate.<sup>57</sup> Most States and Territories currently prohibit advertising in relation to surrogacy and penalties may apply for such conduct.<sup>58</sup> Some exemptions to this do exist - Western Australia for example, permits advertising for altruistic surrogates.<sup>59</sup>
- 1.55 A number of inquiry contributors called for the development of mechanisms that would enable intended parents or those seeking to be surrogates to be placed in contact. It has been suggested that the lack of professional screening and matching services for surrogacy puts vulnerable women at risk.<sup>60</sup>
- 1.56 The Australian Human Rights Commission highlighted to the Committee South Australia's recent approach to the issue. In July 2015, the South Australian Government repealed its previous offences relating to advertising and 'replaced them with offences relating to brokering surrogacy contracts or inducing someone to enter a surrogacy contract for valuable consideration'.<sup>61</sup> The amendments also allow for the creation of a register containing the names of women willing to be surrogates, which may assist prospective intended parents. Importantly, the amendments also allow for the relevant Minister to prepare a State Framework for Altruistic Surrogacy which will contain information including:
- the requirements for entering into a surrogacy agreement,
  - the circumstances in which a person can lawfully arrange a surrogacy agreement on behalf of someone else,

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55 Stephen Page, *Submission 27*, p. 1.

56 Miranda Montrone, Australian and New Zealand Infertility Counsellors Association, *Committee Hansard*, 18 March 2016, Canberra, p. 19.

57 Law Council of Australia, *Submission 69*, p. 31.

58 Australian Human Rights Commission, *Submission 67*, p. 16.

59 Australian Human Rights Commission, *Submission 67*, p. 16.

60 Families through Surrogacy, *Submission 20*, p. 1.

61 Australian Human Rights Commission, *Submission 67*, p. 16.

- the circumstances in which a person can advertise for the services of a surrogate mother,
- details of how the register of women willing to act as a surrogate mother is to be kept and maintained, and
- information about how in vitro fertilisation procedures are able to be provided in respect of altruistic surrogacy.<sup>62</sup>

1.57 While it is likely to take some time for the impact of the South Australian amendments to become apparent, the Committee commends the South Australian Government for its initiative. The Committee considers that in developing a national model law, the ALRC must consider whether there is a need for a closed register of surrogates and intended parents, to be administered by a Government body, access to which may be granted following background checks, and medical and psychological screening.

#### Data collection

1.58 Data relating to the practice of surrogacy by Australians is not collected systematically due to the differing regulatory approaches in Australia. The Committee has received some evidence highlighting the numbers of Australians thought to engage in international commercial surrogacy each year through the Department of Immigration and Border Protection (DIBP),<sup>63</sup> but domestic prevalence is difficult to measure. Evidence to the Committee provided an insight into the deficiencies that exist:

... existing data is at best inadequate and lacks co-ordination between various state and territory departments, the Commonwealth and the courts. It is necessary to establish co-ordination between departments and to collect and maintain accurate statistics of commissioning parents leaving the country for the purposes of surrogacy, re-entering the country with children, legal orders to obtain legal parenthood, adoption by a non-biologically related partner as a distinct category of adoption data, citizenship, and custody when relationships break down.<sup>64</sup>

1.59 Inquiry participants pointed to the data collection methodologies overseas as providing a basis for obtaining prevalence data and conducting research into surrogacy outcomes.<sup>65</sup>

1.60 A range of inquiry contributors have called upon the Commonwealth to consider how surrogacy data could be more meaningfully collected for

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62 Australian Human Rights Commission, *Submission 67*, p. 16.

63 House of Representatives Standing Committee on Social Policy and Legal Affairs (March 2015) Roundtable on Surrogacy; International Social Service Australia, *Submission 37*, p. 8.

64 Dr Patricia Fronck and Professor Denise Cuthbert, *Submission 63*, p. 11.

65 Dr Mark Dodd, *Submission 3*, p. 1.

these purposes.<sup>66</sup> The Committee believes that such calls are not unreasonable, particularly if a national model law is to be instituted. In developing a national dataset on surrogacy, the Committee considers that the ALRC, should advise on both the types of data that should be collected and maintained. It should also determine whether the Commonwealth has the capacity to subsume the task into its established data collection framework. Mechanisms can then be instituted to enable data to be accessed by Commonwealth, State and Territory agencies for program and policy development and also by the wider academic and professional communities for research and analysis purposes.

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66 International Social Service, *Submission 37*, p. 8.

### **Recommendation 3**

The Committee recommends that the Attorney-General request the Australian Law Reform Commission (ALRC) to conduct a 12-month inquiry into the surrogacy laws of Australian States and Territories, with a view to developing a model national law on altruistic surrogacy. The Attorney-General should request that the ALRC consider:

- first and foremost, the best interests of the child,
- previous reviews of Australian surrogacy laws, including the 2009 report of the Standing Committee on Attorneys-General and the 2013 Family Law Council report on Parentage and the Family Law Act 1975,
- the need for State and Territory laws to be non-discriminatory,
- the need for mandatory, independent and in-person counselling for all parties before entering into a surrogacy arrangement, during pregnancy, after the birth, and at relinquishment,
- the need for background checks, medical and psychological screening, and independent legal advice for all parties entering into a surrogacy arrangement,
- the need for parties to enter into a non-binding surrogacy agreement which sets out shared expectations of all parties, including dispute resolution processes, and which ensures that parties respect the birth mother's right to make decisions about her own health and that of the child,
- the processes by which parental responsibility is transferred from the birth mother to intended parents, and when this transfer should take place,
- the need for adequate reimbursement for the birth mother for legal, medical and other expenses incurred as a consequence of the surrogacy,
- the need for a closed register of surrogates and intended parents, to be administered by a Government body, access to which may be granted following background checks, and medical and psychological screening, and
- whether States and Territories should keep standardised statistical information on families formed through surrogacy to enable long-term studies of surrogacy's effect on families.

- 1.61 The adequacy of information provided on children's birth certificates is an issue that has been raised by many inquiry contributors. It is clear that given different State and Territory legislation, birth certificates for donor-conceived children may not contain sufficiently detailed information for the child to later establish information on both their birth and genetic heritage.<sup>67</sup> Many inquiry contributors have suggested that all information relating to the circumstances of a child's birth, including whether the child was born via a surrogacy arrangement, should be a feature of birth certificates.<sup>68</sup>
- 1.62 Chief Judge John Pascoe of the Federal Circuit Court of Australia has highlighted some of the consequences of complete information not being provided on a birth certificate:
- In some jurisdictions, this has resulted in the child becoming stateless. In some jurisdictions, commissioning parents' names are not recorded on child's birth certificate, leading to difficulties in establishing parentage, nationality, and acquiring travel documents such as passports. Conversely, in other jurisdictions, the birth mother's name is purposely omitted in favour of the commissioning parents, creating difficulties in later identifying the surrogate mother if required. The difference between biological parentage and legal parentage is profound and information regarding both are required to satisfy the right of the child to know his or her parents.<sup>69</sup>
- 1.63 The Committee considers that children have the right to know and understand the circumstances of their birth and of their genetic heritage. This applies equally to all children, not just those born of surrogacy arrangements. In framing a national model law, the Committee considers that the ALRC should seek to determine the types of information that should be provided on birth certificates.

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67 Victorian Adoption Network for Information and Self Help, *Submission 44*, p. 9.

68 See for example: Chief Judge John Pascoe, *Submission 35*, pp. 25-26; Australian Christian Lobby, *Submission 39*, p. 10; Evelyn Robinson, *Submission 18*, pp. 1-2; Name Withheld, *Submission 83*, p. 2.

69 Chief Judge John Pascoe, *Submission 35*, pp. 25-26.

#### **Recommendation 4**

**The Committee recommends that the Attorney-General request that the Australian Law Reform Commission consider the issue of birth certificates as part of its inquiry as set out in Recommendation 3. In particular, the ALRC should consider whether a child's birth certificate should contain information on all gestational, genetic and intended parents, including a record that the child was born as a result of a surrogacy arrangement**

- 1.64 The Committee anticipates that the matters set out in recommendations three and four above will require significant and detailed examination on the part of the ALRC. In requesting that the ALRC develop a national model law on surrogacy, the Committee envisages that the Commonwealth Attorney-General should present the ALRC report to COAG for consideration and further consultation with all relevant State and Territory stakeholders. Following the conclusion of those consultations, the Attorney-General should commission the drafting of commensurate legislation for implementation in all jurisdictions as soon as is reasonably practicable.

#### **Recommendation 5**

**The Committee recommends that, within six months of the proposed report of the Australian Law Reform Commission being presented to the Attorney-General, the Attorney-General should request that the Council of Australian Governments (COAG) commit to the following actions:**

- **consultation with all Australian States and Territories in relation to the proposed model, and**
- **the development of national uniform legislation on altruistic surrogacy to be implemented in all Australian States and Territories.**

**The Committee considers that the deliberations by COAG should not exceed 12 months.**

## Adequacy of information on altruistic surrogacy

- 1.65 To access altruistic surrogacy in Australia, intended parents and surrogates are not only required to navigate complex State and Territory legislation, but they are also faced with limited and inconsistent information on which to base their decisions.<sup>70</sup> Often, those seeking altruistic surrogacy arrangements are left with inaccurate information or information aligned to commercial interests.<sup>71</sup> This may be one of the reasons why some choose to pursue offshore surrogacy. Chief Judge John Pascoe notes in his submission that anecdotal evidence suggests that:
- ... parties interested in surrogacy arrangements often approach agencies and lawyers in Australia and abroad to seek advice. Whilst agencies and lawyers in Australia usually have high ethical standards and point out the illegality of any such arrangement, overseas practitioners are not so scrupulous. I do not think it would be difficult for a person, informed by a foreign agency, to be confused and enter a surrogacy arrangement.<sup>72</sup>
- 1.66 A number of inquiry contributors have commended the legislative regime in Victoria which provides a strong information framework for those seeking altruistic surrogacy arrangements.<sup>73</sup> The Committee notes that until such time as a national model law on altruistic surrogacy can be adopted the rules in relation to surrogacy arrangements in all jurisdictions will remain complex and inconsistent.
- 1.67 To ensure that information is available to those seeking to make altruistic surrogacy arrangements, the Committee believes that the Australian Government should develop a website to consolidate relevant information. In developing a website, the Australian Government should ensure that it contains continually updated information on Commonwealth support and service provision including that provided through Medicare and the social security, welfare and child support mechanisms of the Commonwealth. It should also provide updated advice on the surrogacy framework, legislation and support services in each State and Territory.

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70 Chief Judge John Pascoe, *Submission 35*, p. 31.

71 Professor Mary Keyes, *Submission 54*, p. 7.

72 Chief Judge John Pascoe, *Submission 35*, p. 31.

73 Chief Judge John Pascoe, *Submission 35*, p. 31.

**Recommendation 6**

The Committee recommends that the Australian Government develop a website that provides advice and information for Australians considering domestic altruistic surrogacy. The website should include:

- clear advice on the role of Australian Government support and service provision for intended parents, surrogates and children including Medicare, social security & welfare payments, child support, paid parental leave,
- clear advice on surrogacy legislation in each Australian State and Territory, and
- clear advice on the support and services funded and provided for by each Australian State and Territory including relevant health, counselling and legal services available.

## International surrogacy and Australia's international obligations

1.68 This section will briefly consider the regulation of international surrogacy, and the risks to human rights that offshore commercial surrogacy may pose. It will outline Australia's obligations under international agreements and how they may be relevant to surrogacy, before considering the Commonwealth Government's policy response to offshore surrogacy.

### Australians and offshore commercial surrogacy

1.69 A large proportion of the Australians who have a child through surrogacy do so by entering into offshore commercial surrogacy arrangements. While it is not possible to determine exactly how many Australians do so each year, the Department of Immigration and Border Protection estimates that it deals with approximately 250 offshore surrogacy cases each year, a number that has held steady in recent years.<sup>74</sup>

1.70 Almost all Australians who go overseas to have a child through surrogacy enter into commercial surrogacy arrangements.<sup>75</sup> They do so in spite of laws that make it an offence in Queensland, New South Wales and the Australian Capital Territory.

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74 Frances Finney, Department of Immigration and Border Protection, *Committee Hansard*, Canberra, 2 March 2016, p. 2.

75 Australian Human Rights Commission, *Submission 67*, p. 4.

- 1.71 The evidence before the Committee indicates that the extra-territorial offences in these States have not deterred intended parents from accessing commercial surrogacy services, and no one has ever been prosecuted under those laws.<sup>76</sup>
- 1.72 The Committee received evidence from many Australians who have entered into surrogacy arrangements both in Australia and overseas. Their desire to be parents is powerful and in most cases they have come to surrogacy only after exhausting every other option available to them.<sup>77</sup>
- 1.73 The factors which lead people to pursue offshore commercial surrogacy arrangements are complex and each family or individual is faced with a unique set of circumstances. However, submissions from those who have made the choice to engage offshore commercial surrogacy services raised a number of common reasons for doing so.
- 1.74 Many submitters said that they considered offshore surrogacy because it was very difficult to find a woman to act as the birth mother in Australia. Intended parents attributed this difficulty to Australia's laws on commercial surrogacy and also to the prohibition on intended parents or prospective surrogates advertising.<sup>78</sup>
- 1.75 In addition, submitters said that they value the legal certainty that offshore commercial surrogacy arrangements can provide. In many overseas countries, surrogacy agreements are legally enforceable, and there are predictable outcomes in terms of parentage. By contrast, surrogacy agreements are not binding in Australia and establishing parentage relies on the consent of the surrogate.<sup>79</sup>
- 1.76 Some submitters said that they found the differences between State and Territory laws confusing, and that the different rules around compensation of surrogates caused uncertainty. Offshore commercial surrogacy was, by comparison, less difficult.<sup>80</sup>
- 1.77 Finally, some Australian jurisdictions prohibit same-sex attracted individuals or couples from engaging in domestic surrogacy. Offshore commercial surrogacy is often the only family formation option available to people affected by this prohibition.<sup>81</sup>

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76 Chief Justice Diana Bryant, *Submission 11*, p. 2; Chief Judge John Pascoe, *Submission 35*, p. 5; New South Wales Government, *Submission 66*, p. 10; Professor Jenni Millbank, *Committee Hansard*, 25 February 2016, pp. 4-5.

77 See, for example, *Submissions 101, 103, 77 and 32*.

78 See, for example, *Submissions 16, 71, 82, 85, 88, 89, 90*.

79 See, for example, *Submissions 32, 77, 87, 88, 101, and 120*.

80 See, for example, *Submissions 76, 82, 88, and 90*.

81 Name withheld, *Submission 105*.

## Surrogacy laws in comparable jurisdictions

- 1.78 The United States, Canada, New Zealand and the United Kingdom have cultural and economic similarities to Australia, but vary substantially in their approaches to surrogacy regulation. Canada and the United Kingdom, like Australia, prohibit commercial surrogacy, but unlike Australia have national surrogacy laws. The United States, by comparison, has a much more complex regulatory regime. This section will very briefly outline the laws in these countries.
- 1.79 Surrogacy laws in the United States vary greatly. Like Australia, the United States is a federation, and each State makes its own surrogacy laws. Some States permit altruistic but not commercial surrogacy, others prohibit surrogacy altogether and declare all surrogacy contracts void, and in others still, both commercial and altruistic surrogacy arrangements are permitted.
- 1.80 A database and interactive map showing laws in different American States is maintained by Creative Family Connections, an American law firm and surrogacy agency.<sup>82</sup>
- 1.81 American States which have 'surrogacy friendly' laws include California, Minnesota and Oregon. Submissions from Australians who have entered into commercial surrogacy arrangements in the United States spoke highly of the services offered in these states, particularly in relation to the certainty offered by the regulatory regime.<sup>83</sup>
- 1.82 The United States has been characterised as jurisdiction which generates good surrogacy outcomes.<sup>84</sup> It is argued that the medical system protects the birth mother's health and that the legal, economic and social conditions lower the risk of exploitation.<sup>85</sup>
- 1.83 California has a particularly long-standing surrogacy industry, room for which was created by a court decision in 1993 which affirmed the rights of intended parents in disputes over the parentage of children resulting from surrogacy arrangements.<sup>86</sup> Subsequent legislation and case law has confirmed the enforceability of surrogacy contracts and permits the

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82 Creative Family Connections, <<http://www.creativefamilyconnections.com>>, viewed 5 April 2016.

83 See *Submissions 94, 95 and 105*.

84 *Surrogacy Australia, Submission 32*, p. 7.

85 Castan Centre for Human Rights, *Submission 19*, p. 18.

86 *Johnson v. Calvert*, 5 Cal. 4th 1, 1993, <<http://law.justia.com/cases/california/supreme-court/4th/5/84.html>>, viewed 5 April 2016.

transfer of legal parentage to the intended parents prior to the birth of the child.<sup>87</sup>

- 1.84 However, concerns have been raised about the Californian system. Californian law permits people who donate genetic material to do so anonymously, which may prevent children from knowing their genetic history. Further, the light regulation of surrogacy in California risks giving unscrupulous individuals room to operate. The recent arrest and conviction of three people for running a 'baby-selling' ring highlight this risk.<sup>88</sup>
- 1.85 It has also been reported that the surrogacy industry in California targets low-income women disproportionately and that surrogates have been pressured to undergo 'selective reduction' (i.e. abortion) procedures against their will.<sup>89</sup>
- 1.86 By contrast, laws in the United Kingdom, Canada and New Zealand are comparatively simple. In the United Kingdom (UK) surrogacy is regulated by the *Surrogacy Arrangements Act 1983*. The Act prohibits commercial surrogacy. While altruistic surrogacy is permitted, agreements made prior to entering into surrogacy arrangements are not enforceable. Reimbursement for 'reasonable expenses' incurred by the birth mother is permitted. A 2015 report by Surrogacy UK notes that very few UK citizens travel overseas to enter into commercial surrogacy arrangements.<sup>90</sup>
- 1.87 In Canada, surrogacy is regulated at the national level rather than at the provincial level, via the *Assisted Human Reproduction Act 2004*. Under the Act, commercial surrogacy is prohibited, carrying substantial fines and terms of imprisonment.
- 1.88 Altruistic surrogacy is permitted, but remains tightly regulated. It is illegal for surrogates, intended parents or intermediaries to advertise in relation to surrogacy arrangements. The birth mother in an altruistic surrogacy arrangement may be reimbursed, but only for limited out of pocket expenses.
- 1.89 Similarly, altruistic surrogacy is permitted in New Zealand under the *Human Assisted Reproductive Technology Act 2004*. Commercial surrogacy is prohibited, but it is not a criminal offence to travel to another country to commission a commercial surrogacy arrangement.

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87 California Family Code, Section 7960-7962, <<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam&group=07001-08000&file=7960-7962>>, viewed 5 April 2016.

88 Associate Professor Sonia Allan, *Submission 17*, pp. 45-46.

89 LJ Good Centre for Bioethics, *Submission 30*, p. 3.

90 K Horsey, N Smith, S Norcross, L Ghevaert and S Jones, *Surrogacy in the UK: Myth busting and reform: report of the Surrogacy UK Working Group on Surrogacy Law Reform*, Surrogacy UK, November 2015.

- 1.90 The New Zealand Government has responded to the increasing number of its citizens seeking offshore commercial surrogacy by developing non-binding guidelines and applying existing domestic law, particularly the *Status of Children Act 1969*. The Government's process sets out steps for intended parents to follow while permitting the Government to ensure as much as possible that the rights of the child and the rights of the birth mother have been protected.<sup>91</sup>

## Surrogacy in other countries

- 1.91 While the United States has remained a relatively constant destination for Australians seeking offshore commercial surrogacy arrangements, many other countries provide surrogacy services to Australian citizens. Over the last decade, Australians have accessed surrogacy services in Thailand, India, Nepal, Cambodia and Mexico, and Ukraine, amongst other countries.

- 1.92 Professor Jenni Millbank from the University of Technology in Sydney told the Committee that there has been 'massive flux' in the number of Australians choosing particular destination countries as their surrogacy laws have changed:

What we see is a pattern where 10 years ago all the travel was to America, and then about seven or eight years ago there was a dramatic shift towards India – a huge spike for about five years with India. Then India's approach became discriminatory, and then exclusive – first of all of Australians who were not in a married relationship for two years, and then Australians altogether. Then you see this dramatic cliff of it dropping off with India and turning to Thailand instead. Then we had the baby Gammy scandal and Thailand closing down, then people turning towards Nepal and then Nepal closing down. Then it moves off to Mexico and then turns back to Ukraine, which has been around for quite a while but now looks more attractive. Greece is opening up, and a lot of people do fertility treatment in the US but surrogacy in Canada.<sup>92</sup>

- 1.93 Professor Millbank said that many surrogacy agencies could be characterised as 'cottage industry' providers who see themselves as 'providing an ethical service', but she also described the development of a transnational surrogacy industry with the capacity to transfer operations to 'friendlier' countries should the need arise:

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91 New Zealand Ministry of Social Development, *Submission 33*.

92 Professor Jenni Millbank, *Committee Hansard*, 25 February 2016, p. 5.

We also have, quite disturbingly, transnational surrogacy players developing ... we have multinational, multimillion dollar commercial players operating across nine or 10 jurisdictions flying women, eggs, surrogates, doctors and patients in and out of whichever jurisdiction is most porous for their commercial enterprise.<sup>93</sup>

- 1.94 The Department of Foreign Affairs and Trade (DFAT) shared Professor Millbank's view of a mobile transnational surrogacy industry:

We have also observed that the apparent mobility of the international surrogacy industry means that changes to laws or practice in one country will often result in the relocation of the business to a more hospitable jurisdiction, where the regulatory regime may be weaker.<sup>94</sup>

- 1.95 The Committee notes the incentive for commercial surrogacy firms to operate in lightly regulated and low-cost jurisdictions. The legal, economic and social conditions in these countries greatly increase the risk that the rights of the child, and of the birth mother, may be infringed.

- 1.96 Although the Committee has heard from a number of Australians who have had positive surrogacy experiences in these countries, most Australians will be familiar with what can happen when a surrogacy arrangement goes wrong. The widely reported cases of Baby Gammy, and the separated twins born in India are just two cases which illustrate these risks.<sup>95</sup>

- 1.97 Evidence to this inquiry has raised a number of specific concerns about international surrogacy. Firstly, light regulation can substantially increase the risk that the rights of the child may be infringed, in particular raising concerns about unethical surrogacy agencies effectively trafficking in children.<sup>96</sup> In addition, lack of or inconsistent record keeping of genetic information may deny children their right to know their genetic heritage and the circumstance of their birth. This is compounded by the fact that many jurisdictions, including the United States, permit donors of genetic material to remain anonymous.<sup>97</sup>

- 1.98 The birth mother may also be vulnerable to exploitation. Submitters raised serious concerns about potential lack of free and informed consent,

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93 Professor Jenni Millbank, *Committee Hansard*, 25 February 2016, p. 6.

94 William Mackenzie, *Committee Hansard*, 3 March 2016, p. 1.

95 Associate Professor Sonia Allan, *Submission 17*, pp. 39-41.

96 Australian Human Rights Commission, *Submission 67*, p. 3; *Slavery Links*, *Submission 59*.

97 Chief Judge John Pascoe, *Submission 35*, pp. 31-32; *FamilyVoice Australia*, *Submission 38*, pp. 6-7.

particularly arising from language barriers or the economic or educational situation of the birth mother.<sup>98</sup> The birth mother also faces health risks throughout her pregnancy and may face pressure to undergo risky procedures to which she may not otherwise consent. These can include multiple embryo transfers, caesarean deliveries timed to fit the travel schedule of the intended parents, or the 'selective reduction' (i.e. abortion) of fetuses.<sup>99</sup>

- 1.99 In countries with weak regulation of the surrogacy industry, intended parents also face a higher risk of exploitation. In such circumstances, surrogacy services paid for by Australian citizens may be delivered incompletely or not at all and there may be limited opportunities for redress.<sup>100</sup>
- 1.100 In response to these concerns, the Australian Human Rights Commission recommended that the Australian Government review the regulatory regimes of destination countries to determine whether the rights of the child and the birth mother are properly protected, to inform the Government's surrogacy policies.<sup>101</sup>

## International obligations

- 1.101 Australia is signatory to a number of international treaties and agreements which may be relevant to offshore commercial surrogacy. These include:
- the Convention on the Rights of the Child,
  - the International Covenant on Civil and Political Rights,
  - the International Covenant on Economic, Social and Cultural Rights, and
  - the Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime
- 1.102 According to the Attorney-General's Department, international agreements Australia has ratified may give rise to:
- obligations to protect children's rights, rights relating to protection against arbitrary and unlawful interferences with privacy and rights to respect for the family and rights relating to health and to

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98 Chief Judge John Pascoe, *Submission 35*, p. 11, Australian Human Rights Commission, *Submission 67*, pp. 33, Dr Patricia Fronck and Professor Denise Cuthbert, *Submission 63*, pp. 7-8.

99 Associate Professor Sonia Allan, *Submission 17*, pp. 20-22, Chief Judge John Pascoe, *Submission 35*, pp. 11-13, *Families through Surrogacy, Submission 20*, p. 2, Dr Patricia Fronck and Professor Denise Cuthbert, *Submission 63*, pp. 7-8.

100 *Families through Surrogacy, Submission 20*, p. 2.

101 Australian Human Rights Commission, *Submission 67*, pp. 30-35.

equality and non-discrimination. In addition, States Parties also have obligations to prevent exploitation and abuse of children, the sale of children and trafficking of women and children and to prevent and reduce statelessness.<sup>102</sup>

- 1.103 It is difficult to generalise about when or how these obligations may apply to offshore commercial surrogacy, since each individual's circumstances will vary. However, the Attorney-General's Department noted that, to the extent that offshore commercial surrogacy arrangements breach these international agreements, it is the destination country's responsibility to comply with them:

Australia's international human rights obligations only apply to people within its territory and subject to its jurisdiction ... Consistent with the principle of State sovereignty, the relevant international human rights obligations in respect of individuals involved in surrogacy will generally be those of the State in which the relevant practice occurs.<sup>103</sup>

- 1.104 The Committee notes that the Permanent Bureau of the Hague Conference on Private International Law has established an Experts Group on Parentage and Surrogacy, which met for the first time in February 2016. The Experts' Group will consider the private international law issues in relation to surrogacy with a view to a possible agreement which may regulate surrogacy at the international level. Chief Judge John Pascoe (who gave evidence before the Committee and made a submission to this inquiry) has been appointed as the Australian representative on the Experts' Group.<sup>104</sup>

## Federal Government regulation

- 1.105 The Commonwealth does not have a comprehensive framework to manage the risks associated with offshore surrogacy. According to the Australian Human Rights Commission:

At the Commonwealth level, there does not appear to be a policy in relation to international surrogacy (whether altruistic or commercial) and the default position is a laissez faire approach. Commonwealth agencies responsible for granting citizenship and passports are not required to, and do not, make decisions based on whether or not a child has been born as a result of a surrogacy agreement. This means that intended parents who engage in

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102 Attorney-General's Department, *Submission 46*, p. 3.

103 Attorney-General's Department, *Submission 46*, p. 4.

104 Attorney-General's Department, *Submission 46*, p. 4.

surrogacy overseas will typically be able to obtain citizenship and an Australian passport for their children which will allow the children to return to Australia.<sup>105</sup>

1.106 In its submission, the Department of Immigration and Border Protection (DIBP) noted that its primary involvement in relation to international surrogacy is in determining applications for citizenship by descent for children born through surrogacy arrangements. The Department noted that 'Australian citizenship laws apply universally to the children of an Australian parent'.<sup>106</sup>

1.107 As such, when determining an application for citizenship by descent, the *Migration Act 1958* does not give DIBP discretion to refuse a child's application for citizenship once it has been established that one of its parents is Australian.<sup>107</sup>

1.108 In the same vein, DFAT advised the Committee that Australian children are entitled to a passport regardless of whether they were born via a surrogacy arrangement:

Australian passport laws apply universally to child passport applications, no matter how the child came to be conceived. If a child is granted Australian citizenship, and meets the requirements of the Passports Act (that is, they meet citizenship, identity and consent requirements) they have a legal entitlement to an Australian passport.<sup>108</sup>

1.109 Both DIBP and DFAT provide advice to Australians considering offshore commercial surrogacy.<sup>109</sup> However, beyond the provision of this kind of advice, neither DIBP nor DFAT is able to take responsibility for identifying children born from surrogacy arrangements. As such, there is effectively no Commonwealth Government regulation in relation to cases of offshore commercial surrogacy involving Australians.

## Committee Comment

1.110 Offshore commercial surrogacy is an option considered by many Australians who are unable to have children naturally. Offshore surrogacy

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105 Australian Human Rights Commission, *Submission 67*, pp. 22-23.

106 Department of Immigration and Border Protection, *Submission 45*, p. 3.

107 Department of Immigration and Border Protection, *Submission 45*, pp. 3-4.

108 Department of Foreign Affairs and Trade, *Submission 47*, p. 3.

109 Department of Immigration and Border Protection, *Fact sheet – international surrogacy*, <<https://www.border.gov.au/about/corporate/information/fact-sheets/36a-surrogacy>>, viewed 8 April 2016. See also the Department of Foreign Affairs and Trade, *Smart Traveller, International Surrogacy*, <<https://smartraveller.gov.au/bulletins/surrogacy>>, viewed 8 April 2016.

can offer more certainty in relation to legal and parentage status than domestic altruistic surrogacy arrangements, and this is clearly regarded as a benefit by Australians seeking to use surrogacy services.

- 1.111 In addition, offshore commercial surrogacy may be the only option available to Australians considering surrogacy. Finding someone willing to be the birth mother to their child in altruistic surrogacy arrangements can be difficult. Moreover, some Australians do not meet the eligibility requirements in their State due to their sexuality or personal circumstances.
- 1.112 The Committee notes the objections of submitters who oppose all forms of surrogacy on ethical grounds. However, given that there is no reasonable prospect of a worldwide ban on commercial surrogacy in the near future, the Committee must focus on how the potential risks and harms of international commercial surrogacy can be minimised.
- 1.113 The evidence is clear that extra-territorial offences for engaging in commercial surrogacy have not worked to deter Australians from travelling overseas to use surrogacy services. In the absence of a consistent national ban, credibly enforced, there is little likelihood that this will change, and Australians will continue to use offshore commercial surrogacy services.
- 1.114 It is equally clear that some overseas jurisdictions pose a more serious risk of exploitation and human rights violation than others when it comes to surrogacy arrangements. In lightly regulated or less developed countries the risk of exploitation of birth mothers is much higher, particularly when the arrangements are truly commercial – that is, involving transnational surrogacy companies. The economic circumstances of the birth mother and the pressure she faces to meet the clinics’ and the intended parents’ expectations may give rise to serious concerns about the extent to which she can provide free and informed consent.
- 1.115 The risk of violating the rights of the child is also more acute in such jurisdictions. In extreme cases these arrangements can risk falling foul of the international prohibition on human trafficking. There are also risks of the child’s right to know their heritage and genetic background being violated. Commercial surrogacy arrangements in comparatively well-regulated countries are not free from these risks, though the risk appears to be substantially less acute in jurisdictions like the United States.
- 1.116 Clearly, the current Australian regulatory regime in relation to offshore commercial surrogacy is imperfect. The extra-territorial laws enacted by Queensland, New South Wales, and the Australian Capital Territory do not appear to be deterring people from travelling overseas for surrogacy. Further, the evidence provided to this inquiry by the Attorney-General’s

Department, DFAT and DIBP shows no desire to manage the approximately 250 Australian families who enter into offshore commercial surrogacy arrangements, even when they do so in high-risk jurisdictions. This situation is far from ideal.

- 1.117 Consequently it is the Committee's view that the Commonwealth Government should conduct a review of its current laws, regulations and policies as they relate to offshore surrogacy and consider additional options to identify ways in which it may better protect the rights of birth mothers and the children they carry on behalf of Australian citizens. The aim of the review should be to ensure that Australians who broker, facilitate or engage in offshore surrogacy arrangements are aware of the human rights risks those arrangements may pose.

## **Recommendation 7**

The Committee recommends that the Australian Government establish an interdepartmental taskforce (which should include eminent jurists with relevant expertise) to report in 12 months on ways to address the situation of Australians who choose enter into offshore surrogacy arrangements, with respect to:

- protecting the rights of the child, particularly their rights to be free from exploitation, to know their genetic heritage, to know the circumstances of their birth, and to have an ongoing relationship with their birth mother and any siblings or genetic donor/s,
- ensuring birth mothers give their free and informed consent and reducing the likelihood that they face exploitation,
- ensuring that Australians who enter into offshore surrogacy arrangements meet their responsibility to act in the best interest of all of their children, and
- considering whether it should be unlawful to engage in offshore surrogacy in any overseas jurisdiction where commercial surrogacy is prohibited.

While not condoning Australians' use of offshore surrogacy, the aim of the taskforce should be to ensure that where the regulatory, economic or social conditions in a particular jurisdiction give rise to an increased risk of exploitation or rights violations, Australians entering into or facilitating surrogacy arrangements in that jurisdiction are made aware of those risks, and are subject to a more stringent investigative process to ensure that the rights of the birth mother and the child have not been infringed.

- 1.118 Further, the Government should identify high-risk destination countries, and ensure that Australians who have chosen to ignore the higher risk of surrogacy arrangements are subject to a more stringent investigative process before parentage and passport or citizenship rights are assured. This is intended to reduce the likelihood that the rights of the child and the birth mother have been infringed.

### **Recommendation 8**

**The Committee recommends that the interdepartmental taskforce should undertake a systematic audit of surrogacy destination countries to assess the extent to which surrogacy practices in these countries meet the requirements laid out in recommendation 3. The Committee considers that this audit will assist in informing the Australian Government's response to the Australians who choose to enter into offshore surrogacy arrangements.**

### **Recommendation 9**

**The Committee recommends that the Australian Government introduce legislation to amend the *Migration Act 1958* such that Australian residents seeking a passport for a young child to return to Australia are subject to screening by Department of Immigration and Border Protection officials to determine whether they have breached Australian or international surrogacy laws while outside Australia, and that, where the Department is satisfied that breaches have occurred, the Minister for Immigration is given the authority to make determinations in the best interests of the child, including in relation to the custody of the child.**

- 1.119 The Committee also notes that the Permanent Bureau of the Hague Conference on Private International Law has established an Experts' Group on Parentage and Surrogacy, and that the Attorney-General has nominated Chief Judge John Pascoe AC CVO, Chief Judge of the Federal Circuit Court of Australia, to represent Australia on the Experts' Group.
- 1.120 The Committee commends the Attorney-General on the choice of Chief Judge Pascoe to represent Australia on the Experts' Group. He is an eminent jurist, a long-time advocate of human rights, and will bring a wealth of professional and personal expertise to the role.
- 1.121 Although the processes of international law are not rapid, the work of the Hague provides one of the best long-term prospects for meaningful regulation of international surrogacy. The Committee supports its work and trusts that it will lead to better protections for birth mothers and children born from surrogacy arrangements.

**Recommendation 10**

The Committee recommends that the Australian Government, in its representations to the Experts' Group on Parentage/Surrogacy at the Permanent Bureau of the Hague Conference on Private International Law should prioritise:

- the rights of the child, particularly their right to know their genetic heritage, to know the circumstances of their birth, and to have ongoing relationships with their birth mother and any siblings or genetic donor/s,
- the rights of surrogate mothers to be free from exploitation, and to only engage in surrogacy arrangements to which they give their free and free informed consent, and
- the development of an international convention dealing with the regulation of parentage and surrogacy.

George Christensen MP

Chair

19 April 2016

