Surrogacy and ART

1. Introduction
   1. Regulation of ART and surrogacy technologies is not uniform throughout Australia
   2. Vic, WA and SA have enacted such legislation covering infertility and reproductive technology however these regimes are far from perfect and are considerably different from the UK and US approaches.
   3. Legal challenges include: (NOTE the new laws proposed in this area)
      1. Access to technology by single mothers and same sex couples
      2. Same-sex couples have used anti-discrimination legislation to establish a cause of action for equal to services by same-sex couples

**NOTE:** Cloning and embryotic stem cell research laws ARE uniform

1. ART in QLD
   1. QLD at present has no legislation covering the use of ART and relies on professional guidelines.
   2. What is ART?
      1. ART includes a range of methods which are used to circumvent human infertility such as:
         1. IVF (egg and sperm combined outside of the body and transferred into a woman if it forms into an embryo)
         2. FET (frozen embryo transfer)
         3. ICSI (single sperm is injected directly into an egg)
         4. GIFT (Gamete Intra-Fallopian Transfer where an egg retrieved from the body of a woman and sperm obtained from a male are both inserted back into the fallopian tube of a woman, with the aim to achieve fertilisation (and then pregnancy) within the body of the woman)
         5. AI (artificial insemination where sperm introduced into a woman without sex)
         6. PRD: (Pre- implantation genetic diagnosis can be combined with ART)
      2. Over the last two decades these procedures have become more accepted within society as a medical treatment for infertility. Although these procedures are legally unregulated in QLD the NHMRC has developed guidelines which cover some issues in relation to the provision of services and are complied with by clinics, however many matters are still left unregulated such as access to ART and PRD.
   3. Factors to consider (NHMRC guidelines)
      1. Welfare of the potential child is the paramount consideration
      2. ART procedures must be respectful of all people involved
      3. Provide information and counselling
      4. Obtain free and voluntary consent in writing of all parties involved
         1. To the use of gametes/embryos
         2. To the release of their identity to any persons conceived using those gametes/embryos
      5. Maintain privacy and confidentiality
         1. HOWEVER: Children conceived by use of ART retain the right to knowledge of their genetic parents
      6. Clinics must limit the amount of children born from one gamete donor so those children
         1. do not have multiple siblings
         2. risk inadvertently having a sexual relationship with a close genetic relative
      7. Posthumous use of gametes
         1. Is allowed where
            1. a deceased person has left clearly expressed and witnessed directions consenting to the use of his or her gametes; or
            2. a person in a post coma unresponsive state (‘vegetative state’) prepared clearly expressed and witnessed directions, before he or she entered the coma, consenting to the use of his or her gametes; or
            3. a dying person prepares clearly expressed and witnessed directions consenting to the use, after death, of his or her gametes; and
         2. the prospective parent received counselling about the consequences of such use; and
         3. the use does not diminish the fulfilment of the right of any child who may be born to knowledge of his or her biological parents.
         4. CASE: Diane Blood requested sperm to be taken from her comatose husband in 1995 in order to conceive – was successful.
      8. Sex selection
         1. Not allowed unless it is to avoid a serious genetic disease
   4. Access to ART
      1. Reproduction is now a viable option for infertile women in heterosexual relationships, single women, women beyond child-bearing age and same sex couples wishing to have children. However due to the lack of legal regulation on who can access these treatments has given rise to several disputes where clinics have refused treatment based on:
      2. the marital status of the mother,
      3. risk or presence of disease or disability, and
      4. sexual preference of the potential mother

**SAME-SEX COUPLES AND SINGLE WOMEN**

1. Same sex couples and single women have attempted to use anti-discrimination legislation to found a cause of action against clinics who refuse to offer them treatment however this approach has not met with judicial approval (*JM v QFG*).

*JM v QFG (2000)*

* + *Lesbian woman, JM, who was in 4 year relationship with another woman was denied access to a fertility clinic in Qld*
  + *JM took action against the clinic asserting a breach of the Antidiscrimination Act 1991 (Qld) for discriminating against her on the basis of her sexuality*
  + *Case originally heard before Anti-D tribunal, which found there WAS discrimination*
  + *QSC overturned this, holding that the HCP had not discriminated against JM on the basis of her sexuality, but on the basis she was not medically infertile*
  + *When remitted back to the tribunal for determination of ‘reasonableness’, it was found that the conduct of the HCP WAS reasonable: the clinic followed the NHMRC guidelines and the Qld Health Policy, which included recommendations to follow the Denmack proposals which focused delivery of ART to those with genetic disorders or who were infertile*
  + *Also, the clinic had advertised to its sperm donors that the gametes would be used to assist infertile heterosexual couples – this added to the reasonableness*
* *So, clinics in Qld following Denmack report will require participants to be genetically diseased or clinically infertile. ‘Clinically infertile’ requires an inability to get pregnant after a 12 month period of unprotected heterosexual sex.*
* *The JM decision shows that clinics imposing criteria that can only be met by heterosexual couples are justified in doing so, even if only relying on outdated (1984) recommendations*
* *The Victorian Law Reform Commission’s report on ART stated that having a marital status requirement is inconsistent with principles of non-discrimination and bears no relationship to the health and wellbeing of children, which should be the primary concern of ART. They suggested that a broader definition of infertility be implemented, which assessed the woman’s infertility in the circumstances in which she finds herself (eg single, married, same-sex etc).*
  1. Who is the Legal Parent?
     1. Under section 15-18 of the *Status of Children Act 1978* the legal parent of a child is the woman who gives birth regardless of the child’s genetic origins.
     2. There are issues of consent
        1. Whoever is the partner of the woman who gives birth is generally assumed to be the father
        2. If he has not consented to this then he is not the father ss15-20
        3. Lesbians can now both be recognised as parents
           1. See the discussion paper in notes

1. PGD: Pre-implantation genetic diagnosis
   1. PGD is a technology that allows parents who have an existing sick child to create a genetically matched child to assist treating the sick one. The creation of such saviour siblings raises many legal, social and ethical issues, which are now beginning to be addressed, as does the possibility for future misuse of the technology to create ‘designer’ babies.
   2. NHMRC Guidelines
      1. PGD must not be used for:
         1. Prevention of conditions that do not seriously harm the person to be born;
         2. Selection of the sex of an embryo except to reduce the risk of transmission of a serious genetic condition; or
         3. Selection in favour of a genetic defect or disability in the person to be born.
         4. Creation of a child with compatible tissue for use by another person except where that person is a sibling (provided advice has been sought from an ethics committee) and where
            1. The use of PGD will not adversely affect the welfare and interests of the child who may be born;
            2. The medical condition of the sibling to be treated is life-threatening;
            3. Other means to manage the medical condition are not available; and
            4. The wish of the parents to have another child as an addition to their family and not merely as a source of tissue
   3. NEED FOR REFORM
      1. QLD at present has no legislation covering the use of ART and relies heavily on professional guidelines.
         1. ART
            1. 1983 Committee recommended that the qld gov establish regulation of ART however no specific legislation has been enacted and professionals now heavily rely on guidelines issued by the NHRMC.
            2. However these guidelines are simply that – guidelines and infringement does not impose legal liability.

Guidelines do not impose eligibility criteria on who may access treatment services

Qld gov needs to consider whether the restrictive definition of infertility is a justifiable criterion to be imposed on persons seeking ART – particularly as it prevents homosexual persons from accessing this technology

SURROGACY

1. Surrogacy has been defined as “a clear agreement (formal or informal) between a surrogate and commissioning parent/s for the surrogate to bear a child for the commissioning parent/s and permanently transfer responsibility for child’s care and upbringing to them,”
   1. Types of Surrogacy
      1. There are two types of surrogacy:
         1. Full/gestational (via IVF) and
            1. (surrogate has no genetic identity with surrogate mother)
         2. Partial surrogacy
            1. (child has genetic identity with carrying mother, used half of their genetics)
      2. Surrogacy is either commercial or altruistic:
         1. Altruistic (between close friends)
         2. Commercial (for money)
   2. Legal Status of surrogacy agreements
      1. Other Jurisdictions
         1. In Vic, SA, Tas, ACT
            1. Any form of surrogacy agreement is regarded as void.
            2. Facilitating surrogacy is prohibited
            3. Advertising surrogacy services is prohibited
         2. In WA and NT the validity of surrogacy agreements is determined by reference to common law principles. Persons are not prohibited form entering into a surrogacy arrangement however the contract itself may be void under common law principles of contract
         3. NSW legislation on the issue has not yet come into effect.
         4. Qld
            1. Most Australian jurisdictions distinguish between commercial and altruistic surrogacy agreements however Qld law currently prohibits any form of surrogacy – both civilly and criminally and is the only state to do so despite recommendations against such a position.
            2. Under the SP Act

Any form of surrogacy agreement is regarded as void (s4)

Facilitating surrogacy is prohibited (s3)

Advertising surrogacy services is prohibited (s3)

* + - * 1. All jurisdictions permit altruistic surrogacy however the legislation in Queensland prohibits all such agreements and makes both acts of surrogacy a criminal offence (s3(1) SPA).

Qld is the only jurisdiction to make altruistic surrogacy a criminal offence whether occurring in Qld or elsewhere. Altruistic surrogacy is a criminal offence punishable by 3 years imprisonment or a $7500 penalty (s3 SPA).

* 1. However – in a recent report on altruistic surrogacy by the Qld Gov it was determined that the government should develop a legislative regulatory framework decriminalising altruistic surrogacy.
     1. SEE REPORT – IT IS PRINTED AND BEHIND THESE NOTES
     2. **Recommendations**
        1. It was recommended by the committee that altruistic surrogacy be defined as a clear arrangement, whether formal or informal, agreed preconception between consenting adults for the birth mother to bear a child for the intending parent/s and to permanently transfer the responsibility for the child’s care and upbringing to the intending parent/s after the child’s birth (p33 Report)
        2. Reasonable Expenses
           1. Permits reasonable expenses for altruistic surrogacy as long as there is no material gain for the birth mother;

1. Defines categories of permitted expenses as follows: medical, legal, counselling, travel/accommodation, childcare and insurance costs and lost earnings which are directly attributable to the altruistic surrogacy arrangement and not covered by existing entitlements or benefits.
   * + - 1. Paid maternity leave will be limited to a maximum of two months associated with the birth and additional leave during pregnancy where medically indicated; and
         2. Clarifies that payment of reasonable expenses is not enforceable as part of altruistic surrogacy arrangements.
2. Advertising
   * + - 1. Prohibitions on advertising and brokerage for altruistic surrogacy
3. Parentage
   * + - 1. birth mother is automatically recognised as the legal parent irrespective of her or the intending parents’ genetic relationship with the child
4. Criteria Eligibility
   * + - 1. The intending parents and the birth mother and her partner have the capacity to enter an arrangement; have participated in independent psychosocial and medical assessment; and have obtained separate legal advice from a qualified lawyer;
         2. Intending parents demonstrate a need for surrogacy (due to medical infertility or an inability to carry a child or identified health risk) and at least one intending parent is an Australian resident; and
         3. The proposed pregnancy poses no significant health risk to the birth mother and she has experienced a previous successful pregnancy
5. Agreements
   * + - 1. Government should ensure altruistic surrogacy arrangements remain unenforceable under State law – however are not unlawful – just cannot be enforced
6. Birth Certificates
   * + - 1. Provides for the re-registration of births after approval of the transfer of legal parentage in altruistic surrogacy cases with the issue of a new birth certificate recording the names of intending parents as the child’s legal parents;
         2. Ensures that when children born of altruistic surrogacy with a re-registered birth certificate turn 18 years they can access their original birth certificates; and
7. DISPUTES
   1. Disputes can arise where the surrogate mother refuses to give the child to the commissioning parents after birth
   2. Appropriate court is the family court
   3. In determining disputes the best interests of the child are the paramount consideration (*Baby Cotton; Re Evelyn; Baby M*).
   4. It should be noted that although a surrogacy agreement is a contract there are NO contractual rights over the child as there is no property rights over body parts, especially a child.
   5. Who is the Legal Parent
      1. Under section 15-18 of the *Status of Children Act 1978* the legal parent of a child is the woman who gives birth regardless of the child’s genetic origins. This principle was upheld in *Re Evelyn* where an Australian court determined the surrogate mother was the appropriate person to care for the child. On appeal it was held ‘there is no presumption in favour of the natural parent. Each case must be decided on its facts, according to the child's best interests.’

***Baby Cotton (UK)***

* *First case to come before UK Courts*
* *Held: the issue to be determined was what was in the best interests of the child*
* *The Commissioning parents were determined the suitable parents and granted care and control of the baby to them*

**RESIDENCY DISPUTES**

* Here there is a dispute regarding the custody of the child. In Australia the relevant court to determine such disputes is the Family Court pursuant to the provisions of the ***Family Law Act 1975***.
* The Family Court of Australia has been used in surrogacy cases to resolve disputes over a child’s residency after birth. Commissioning parents may also access family law parenting orders, which detail, for example, who a child lives with, contact and day-to-day care arrangements and approaches to a child’s welfare and development.
* Parenting orders do not, however, change the legal status of the birth parent or surrogate.
* The court considered a similar situation in the case of ***Re Evelyn.***

***Re Evelyn (QLD case)***

* *Both couples were best friends, surrogate mother S offered to bear the child for friend Q who she knew was incapable of bearing a child, she approached them*
* *S was inseminated with sperm of Mr Q (child half S and half Q)*
* *Surrogates partner was a doctor, she went to term and had child*
* *S initially agree to hand child over to commissioning parents*
* *After a few months she was genuinely upset and went and took baby back from Q’s house*
* *What can law do – it has to be best interests of the child*
* *Here best interests of child would be fulfilled if it stayed with birth and biological mother – the Q’s were hostile towards the S’s and any contact arrangement would have been difficult for S to see her daughter, whereas the S’s were not hostile towards Q’s and fully supported a contact arrangement*
* *Both set of adults were capable of providing a very high standard of care for Evelyn*
* *HELD: Evelyn live with the Ss; that the Ss have responsibility for Evelyn's day to day care, welfare and development; that the Ss and the Qs share responsibility for Evelyn's long term care, welfare and development; and that the Qs have defined contact with Evelyn*
* *There is no presumption in favour of the natural parent. Each case must be decided on its facts, according to the child's best interests. In the present case, the judge gave the biological mother a preferential position, but only on the evidence before him as to the particular circumstances of the case*
  1. Ethical arguments

**FOR**

* 1. Personal liberty of consenting adults;
     1. Prohibition offended the perceived right of adults to make their own reproductive choices freely and without undue interference from government
     2. A woman’s right to privacy and self-determination demands her ability to choose whether to act as a surrogate mother
     3. Legislation preventing her from making such a choice is paternalistic and inappropriate
  2. The importance of providing a last resort for some people to have a child:
     1. Provides a solution for infertile couples who can now attain the goal of having a family
     2. Denies perhaps the only option otherwise available for some people to have children
  3. Positive outcomes demonstrated by available research studies
     1. Legislation cannot be justified as there is insufficient evidence to suggest altruistic surrogacy causes harm to another (20 BLR 2008 p3)
     2. Potential for harm to the parents, birth mother, child has not been supported by empirical studies and research in other jurisdictions suggest surrogacy creates positive relationships (20 BLR 2008 p8-11)
  4. There is a lack of criminal prosecutions
  5. Public opinion is in favour of altruistic surrogacy agreements
  6. International and national norms suggest Qld legislation is behind the times
  7. Prohibition had the negative impact of stigmatising people who sought to have a family through altruistic surrogacy.
  8. Prohibition forces people to go overseas, interstate and underground which could lead to exploitation of and unnecessary health risks for those involved

**AGAINST**

1. Where inappropriate parents utilise the process
2. Risk to the mother
   1. It was dehumanising to use and pay another human being to reproduce
   2. Surrogacy is emotionally exploitative of women particularly where intrafamilial
   3. Need to birth mother from coercion, exploitation and physical and psychological harm.
   4. Women in a lower socio-economic class are likely to become surrogates while commissioning parents are richer
   5. The devaluation of motherhood by fragmenting into different roles (pregnancy and child-rearing)
3. Risk to the child
   1. A child may suffer psychological difficulties later in life from being separated from the birth mother, as well as knowing that the birth mother conceived and carried him or her with no intention of ever keeping the child
   2. Rupturing the unborn child’s bond with the gestational mother which “…affects the child [as well as the birth mother] biologically and psychologically” and was also seen as a “violation of a child’s natural rights”
   3. Resulting “genetic bewilderment” or “blurred family relationships and disruption to relationship links between marriage, conception, gestation, birth and motherhood, which were important to human identity
   4. Potential rejection of a child born with a disability or a multiple birth or the ‘wrong sex’
   5. Potential grief and anxiety experienced by the birth mother’s existing children who may “helplessly watch as their baby brother or sister disappears from the family
4. Babies must not be used as commodities;
   1. Surrogacy promotes the suggestion that a child is no more than property to be bought and sold
5. Undermining the traditional paradigm of family
   1. the prohibition on all forms of surrogacy protected the integrity of the family

**POLICY ARGUMENTS FOR AND AGAINST SURROGACY**

###### Exploitative of women

* Emotionally particularly if the arrangement is an interfamilial one. It is also emotionally exploitive in regards to the pain endured by the surrogate mother in relinquishing the child.
* Woman with low self-esteem may be inclined to enter into an arrangement to obtain approval of others and provide themselves with a sense of worth. Applies to both commercial and altruistic surrogacies, but maybe particular common where surrogacy is for a friend/family member
* Any consent given by a potential surrogate mother cannot be regarded as a real consent. In relation to commercial surrogacy, the mother being motivated by factors other than her own or any future child’s best interests. In terms of altruistic surrogacy, the surrogate mother is faced with a very difficult decision and may not be able to make an independent decision due to the pressure of other couple.
* In commercial surrogacy, arrangement is likely to involve 2 classes of people. The surrogate mother is likely to be from a more poor background, motivated to provide service only for reasons of financial reward

HOWEVER

* Legn that prohibits altruistic arrangements on the basis that the potential surrogate mother would be unable to come to an informed and independent decision, underestimates a woman’s autonomy and adopts an unnecessarily paternalistic position in relation to women’s decision-making abilities
* Any legitimate fear that duress might come to bear in this type of arrangement could be met with a standard requirement for expert counselling of all parties as a prerequisite to entering into a surrogacy agreement

**Surrogacy not in best interests of child**

* Surrogacy promotes the suggestion that a child is no more than property to be bought and sold
* The process of surrogacy is driven by the desire of an infertile couple to experience a more rounded and complete life, rather than the best interest of child
* A child may suffer from psychological difficulties later in life from being separated from the birth mother, as well as knowing that the birth mother conceived and carried him or her with no intention of ever keeping the child

HOWEVER

* These problems are most likely to be dealt with in a satisfactory way where the child is in a supportive environment in which the appropriate mechanisms are in place to explain the situation to the child.
* A surrogate arrangement may have all the positive benefits that are associated with an ‘extended family’. Much of the arguments against surrogacy appear to proceed on the basis that the whole relationship will be dysfunctional.

**Devalue mothering role**

* Surrogacy breaks the mothering role up into parts- gestation function and the parenting role. The worth of surrogate mother is reduced to her ability to reproduce.
* This maybe harmful to community’s perception of the mothering role, being one that encompasses both the reproductive process and the ongoing parenting role

HOWEVER

* There are many instances in which a mother has not undertaken the ‘entire process’ of mothering. Eg some women require the donation of ovum to reproduce; others may for a variety of reasons be unable to raise the child and adopt out. In these situations, the role is broken into stages but can hardly be said to devalue the MR.

**Detrimental to notions of family**

* Traditionally, children are born into families where father and mother are married and the child of the union is the biological child of the parents, the mother having carried the baby for the duration of the pregnancy
* Argument is that it surrogacy may distort this traditional notion of “family”

HOWEVER

* In contemporary Australia, the notion of family extends well beyond the traditional notion of family. This argument is outdated and denies the fact that the notion of family now encompasses a much more broad and diverse range of situations.
* The legal definition of family is also now not as narrow as the traditional notion of family.
* Perhaps the strongest argument in favour of surrogacy is that it enables couples who are unable to produce a child the opportunity to have a family. If mechanisms are put in place where this process can not be exploited, such a people are deserved of other means in which they can enjoy a family.

**WHAT RIGHTS SHOULD A CHILD (born of ART or Surrogacy) HAVE TO ACCESS INFORMATION?**

Universally, consideration of the ‘best interests of the child’ includes a child’s right to access information in relation to his/her genetic origins and the circumstances of his/her birth. Article 8 of the United Nations Convention on the Rights of the Child provides that a child has the right to “preserve his or her identity, including nationality, name and family relations as recognized by law”; and that: Where a child is illegally deprived of some or all of the elements of his or her identity, ..[states].. shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

In Queensland, a child’s right to access information about donors is currently addressed by an NHMRC guideline, which requires fertility clinics to “Uphold the right to knowledge of genetic parents and siblings”. Under this guideline, a person cannot become a donor unless they consent to the release of identifying information to children conceived using their genetic material:

Clinics must collect the following information from donors:

* name, previous name (if any), date of birth, and most recent address;
* details of past medical history, family history, genetic test results; and
* physical characteristics

At 18 years of age, a child born of ART procedures, is entitled to:

* all information regarding their medical and family history;
* identifying information about the donor and the number and sex of other persons conceived using genetic material from the same donor, the number of families involved and any information that siblings have consented to release

NHMRC guidelines require that fertility clinics store the information relating to ART procedures indefinitely. This includes the full names and contact details of all participants and the names of children born of ART procedures.