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Surrogacy in Queensland: Should Altruism be a crime?

Abstract
Surrogacy has been defined as an arrangement in which 'a woman who is, or is to become, pregnant agrees to permanently surrender the child to another person or couple who will be the child's parent or parents'. Surrogacy is not a new concept, but rather is believed to be the oldest alternative to a male and female partner conceiving a child by sexual intercourse. Incidences of surrogacy are noted as far back as the Bible, the most renowned being Sarah who proposed that her husband Abram father a child by her handmaid. More recently, high profile cases such as Hollywood actor Denis Quaid and Victorian politician Stephen Conroy have shown that surrogacy continues to be a viable alternative for infertile couples.

Keywords
surrogacy, surrogacy agreements, altruistic surrogacy

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SURROGACY IN QUEENSLAND: SHOULD ALTRUISM BE A CRIME?

CATHERINE BROWN,* LINDY WILLMOTT# AND BEN WHITE^

1 Introduction

Surrogacy has been defined as an arrangement in which 'a woman who is, or is to become, pregnant agrees to permanently surrender the child to another person or couple who will be the child's parent or parents'.[1] Surrogacy is not a new concept, but rather is believed to be the oldest alternative to a male and female partner conceiving a child by sexual intercourse.[2] Incidences of surrogacy are noted as far back as the Bible, the most renowned being Sarah who proposed that her husband Abram father a child by her handmaid.[3] More recently, high profile cases such as Hollywood actor Denis Quaid[4] and Victorian politician Stephen Conroy[5] have shown that surrogacy continues to be a viable alternative for infertile couples.

This article examines the law relating to altruistic surrogacy in Queensland. At present, the *Surrogate Parenthood Act 1988* (Qld)

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1 Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Final Report (2007), 160.

2 Anita Stuhmcke, 'Surrogate Motherhood: The Legal Position in Australia' (1994) 2(2) *Journal of Law and Medicine* 116.

3 Genesis 16, English Revised Edition, <http://erv.scripturetext.com/genesis/16.htm>, accessed 12 April 2008.

4 'Surrogate Quaid twins arrive', *The Daily Telegraph*, 13 November 2007, <http://www.news.com.au/dailytelegraph/story/0,22049,22750123-5001026,00.html>.

5 Sue Dunlevy, 'MP's secret surrogate baby', *The Daily Telegraph*, 7 November 2006, <http://www.news.com.au/dailytelegraph/story/0,22049,20711530-5006009,00.html>.

prohibits not only commercial surrogacies but also those carried out on an altruistic basis. The result of this is that Queensland is the only Australian State or Territory that imposes criminal sanctions on those involved in altruistic surrogacies.[6]

This is despite reviews conducted both before and after the enactment of the *Surrogate Parenthood Act 1988* (Qld) recommending against such a position. In 1984, the Demack Report concluded that while surrogacy arrangements were contrary to public policy and, therefore, should be void and legally unenforceable, 'it would not be desirable … to make surrogacy arrangements criminal offences, because … their unenforceability would probably suffice to prevent the widespread encouragement of surrogate motherhood arrangements'.[7]

Ten years after the enactment of the *Surrogate Parenthood Act 1988* (Qld), a Taskforce on Women and the Criminal Code[8] was established to examine the impact of the *Criminal Code* (Qld) on women in Queensland. The Taskforce recognised the complexity of the matters that arise in relation to surrogacy, and that community views on this issue tend to be polarised. However, its final report concluded that '[d]espite the inherent complexities in, and social discomfort with, surrogacy arrangements, criminal prohibition, as we have now, is not the solution'.[9] In addition, the Taskforce argued that the current legislative regime would place 'families and friends into the criminal justice system when they are engaged in an intensely private and

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6 Part 2 of this article reviews the legal position in the various Australian States and Territories.

7 Report of the Special Committee Appointed by the Queensland Government to Enquire into the Laws Relating to Artificial Insemination, In Vitro Fertilization and Other Related Matters, 1984, (known as the 'Demack Report') in New South Wales Law Reform Commission, *Artificial Conception: Surrogate Motherhood*, Discussion Paper 18 (1988), [4.13]. This finding was in relation to surrogacy in general rather than just altruistic surrogacies.

8 The Taskforce was established by the then Queensland Minister for Justice and Attorney-General, the Hon Matt Foley MP, and the then Minister for Women's Policy, the Hon Judy Spence MP.

9 Queensland Government, *Report of the Taskforce on Women and the Criminal Code* (2000), 298.

personal matter'.[10] On this basis, the Taskforce recommended that the law be amended to decriminalise altruistic surrogacy.[11]

It may be, however, that change is on the horizon because for the first time in two decades, altruistic surrogacy is back on the agenda of the Queensland Government. In February 2008, the Legislative Assembly of Queensland resolved to establish a Select Committee, chaired by the Hon Linda Lavarch MP, to investigate and report on altruistic surrogacy in Queensland. The terms of reference of the Committee include the preliminary issue of whether altruistic surrogacy should be decriminalised.[12] If that question is answered in the affirmative, there are six other issues that the Committee is asked to consider about the nature of regulation of altruistic surrogacies. These issues include any criteria that the commissioning parents or surrogate would need to fulfil prior to entering into such an arrangement, the role of any genetic relationship between the child and the commissioning parents or surrogate, and any access to information that a child should have to his or her genetic parentage.

The purpose of this article is to consider the threshold issue to be addressed by the Lavarch Committee: whether altruistic surrogacy should be decriminalised in Queensland. The authors argue that it should be, and advance five arguments in favour of this position.

First, the criminalisation of altruistic surrogacy cannot be justified as there is insufficient evidence to suggest that this practice results in harm to others. This argument is premised on the liberalist view that the criminal law should be used only to prohibit behaviour that results in harm and not to enforce a particular moral point of view.[13] Secondly, the current state of the law may criminalise some forms of the practice of Kupai Omasker that occurs in some Indigenous communities in Queensland, despite the fact that these customary practices are recognised and facilitated by Commonwealth legislation.[14] Thirdly, despite the evidence that surrogacies occur not infrequently, there

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10 Ibid, 298.

11 Ibid, 300.

12 For the Committee's terms of reference, see http://www.parliament.qld.gov.au/view/committees/committees.asp?area=SURROGACY&LIndex=13&SubArea=SURROGACY.

13 Andreas Schloenhardt, *Queensland Criminal Law* (2008), 21.

14 *Family Law Act 1975* (Cth), s 61F.

appears to be little enthusiasm to prosecute alleged offenders and, if prosecutions are successful, only lenient penalties tend to be imposed. Fourthly, criminalisation of altruistic surrogacy seems to be out of step with national and international norms. In this context, the recent reviews that have been conducted throughout Australia and the recommendations flowing from these reviews will be considered, as well as some of the overseas experiences. Finally, while concerns about commercial surrogacies are shared by the broader community, public opinion does not appear to support the criminalisation of altruistic arrangements.

These arguments in favour of decriminalising altruistic surrogacy will be examined further below, but first this article reviews the law in each of the Australian jurisdictions.

2 Australian Surrogacy Law

This part of the article describes the existing surrogacy laws that operate in all Australian jurisdictions. A table summarising the relevant law in each jurisdiction, along with any reviews and reform proposals carried out appears in Appendix 1.

The Commonwealth does not have constitutional power to legislate on surrogacy, so legislative power for this area remains with the States. As is often the case, therefore, there is no uniformity of regulation throughout Australia. Some jurisdictions have enacted legislation, with different models being used in different jurisdictions, and others rely solely on the common law.[15]

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[15] Clinics that use artificial reproductive technology to facilitate surrogacy must also comply with the *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2007) that have been drafted by the National Health and Medical Research Council. While not legally authoritative, clinics must comply with these guidelines for accreditation purposes. The guidelines state that it is 'ethically unacceptable to undertake or facilitate surrogate pregnancy for commercial purposes' (at [13.1]). In jurisdictions where altruistic surrogacy is not prohibited, the guidelines require that clinics do not facilitate surrogacy arrangements unless they have ensured all participants have a clear understanding of the ethical, social and legal implications of the arrangement and undertake appropriate counselling (at [13.2]). Clinicians are not to advertise or receive a fee for services for facilitating surrogacy arrangements (at [13.2.1]).

2.1 Statutory jurisdictions

At the time of writing, legislation governing surrogacy is in operation in five Australian jurisdictions: Queensland, the Australian Capital Territory (ACT), Victoria, Tasmania and South Australia. In addition, legislation was recently enacted in New South Wales but the Act is yet to commence operation.[16] Legislation has been drafted in Western Australia which, if passed, will see the introduction of a legislative framework in relation to surrogacy arrangements.[17] Legislation to amend the existing legislative framework has also been drafted and introduced into Parliament in South Australia.[18]

The legislation (or proposed legislation) in all jurisdictions have some common elements. These include:

- surrogacy agreements, whether commercial or altruistic, are void or unenforceable;[19]
- entry into an altruistic surrogacy is generally not prohibited;[20]
- entry into a commercial surrogacy is prohibited;[21]

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16 *Assisted Reproductive Technology Act 2007* (NSW). The Act was assented to on 26 February 2008 and to commence by proclamation on the basis that a lengthy and detailed implementation period is required so that the New South Wales Department of Health can consult with stakeholders on regulations under the Act, particularly as they relate to development of donor registers and stakeholder rights and obligations.

17 Surrogacy Bill 2007 (WA), which was introduced in the Western Australian Legislative Assembly on 1 March 2007. The bill was tabled with the Legislative Council on 18 September 2007 and referred to the Standing Committee on Legislation on 14 November 2007.

18 Statutes Amendment (Surrogacy) Bill 2008 (SA), introduced in the South Australian Legislative Council on 13 February 2008.

19 *Surrogate Parenthood Act 1988* (Qld), s 4; *Infertility Act 1995* (Vic), s 61; *Surrogacy Contracts Act 1993* (Tas), s 7; *Family Relationships Act 1975* (SA), s 10G; *Parentage Act 2004* (ACT), s 31. See also *Assisted Reproductive Technology Act 2007* (NSW), s 45; Surrogacy Bill 2007 (WA), s 7.

20 Compare *Surrogate Parenthood Act 1988* (Qld), s 4 (altruistic surrogacy is prohibited) and *Family Relationships Act 1975* (SA), s 10G (altruistic surrogacy is illegal, but no penalty attaches for breach of this provision).

21 *Surrogate Parenthood Act 1988* (Qld), s 3; *Infertility Act 1995* (Vic), s 59; *Surrogacy Contracts Act 1993* (Tas), s 4; *Family Relationships Act 1975* (SA), s 10G; *Parentage Act 2004* (ACT), s 41. See also *Assisted Reproductive Technology Act 2007* (NSW), s 43; Surrogacy Bill 2007 (WA), s 8. (In most jurisdictions

- facilitating surrogacies (for reward) is prohibited;[22]
- advertising surrogacy services is prohibited;[23]
- providing technical services is sometimes prohibited.[24]

Despite the common themes in the various statutes, there are also some important differences in the regulatory regimes. The legislation in the ACT, the *Parentage Act 2004* (ACT), is the most progressive of all Acts passed to date because it facilitates practical aspects of a surrogacy arrangement. Provided specified conditions are met, commissioning parents can make an application to the Supreme Court to become registered as the child's legal parents.[25] Equivalent provisions do not exist in other jurisdictions, though a Report of the Social Development Committee of the South Australian Parliament has recently recommended the enactment of legislation that allows a court to make a parenting order in certain circumstances.[26]

Queensland lies at the other end of the spectrum in that it prohibits both commercial and altruistic surrogacy. This means that entry into an altruistic agreement, or even an offer to enter such an agreement, can expose an individual to criminal sanction. The penalties imposed by the

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entry into the agreement is prohibited, although sometimes the penalty attaches to the giving or receipt of payment rather than entry into the agreement.)

22 *Surrogate Parenthood Act 1988* (Qld), s 3; *Infertility Act 1995* (Vic), s 59; *Surrogacy Contracts Act 1993* (Tas), s 4; *Family Relationships Act 1975* (SA), s 10H; *Parentage Act 2004* (ACT), s 42. See also *Assisted Reproductive Technology Act 2007* (NSW), s 43; Surrogacy Bill 2007 (WA), s 9.

23 *Surrogate Parenthood Act 1988* (Qld), s 3; *Infertility Act 1995* (Vic), s 60; *Surrogacy Contracts Act 1993* (Tas), s 6; *Family Relationships Act 1975* (SA), s 10H; *Parentage Act 2004* (ACT), s 43. See also *Assisted Reproductive Technology Act 2007* (NSW), s 44; Surrogacy Bill 2007 (WA), s 10.

24 *Surrogacy Contracts Act 1993* (Tas), s 6 (for both commercial and altruistic surrogacies); *Parentage Act 2004* (ACT), s 44 (for commercial surrogacies only). See also Surrogacy Bill 2007 (WA), s 11 (for commercial surrogacies only). Although not expressly prohibited in Queensland, the definition of 'prescribed contract' in *Surrogate Parenthood Act 1988* (Qld), s 2 may be broad enough to encompass technical services.

25 *Parentage Act 2004* (ACT), pt 2 div 2.5.

26 Social Development Committee, Parliament of South Australia, *Inquiry into Gestational Surrogacy*, tabled with the Legislative Council (13 November 2007), 39-40.

legislation are significant, being a maximum of $7,500 or three years imprisonment.[27] Further, the legislation provides that a Queensland resident who contravenes the Act will commit an offence irrespective of where the surrogacy agreement was entered into.[28] Therefore, even if all aspects of the surrogacy occur in a jurisdiction in which such actions are lawful, the resident will have breached the Queensland legislation and committed a criminal offence.

2.2 Non-statutory jurisdictions

At the time of writing, surrogacy arrangements entered into in New South Wales, Western Australia and the Northern Territory are governed by the common law. An individual or couple is not prohibited, therefore, from entering into a surrogacy arrangement. If a dispute arises and a party takes legal action to enforce the agreement, traditional common law principles will be relevant. For example, if payment is not forthcoming under a commercial surrogacy contract, courts may need to determine whether such a contract is enforceable, or is void or illegal on grounds of public policy.[29]

From this review of the law that will govern surrogacy arrangements in Australia, it is clear that there are a number of differences across the various jurisdictions. However, one common element that is present in nearly all States and Territories is that the law does not criminalise altruistic surrogacies. The one exception to this is Queensland, which stands alone in imposing criminal sanctions on individuals who are involved in surrogacies undertaken on an altruistic basis.

3 The Case for Decriminalisation of Altruistic Surrogacy

The threshold issue for the Lavarch Committee to determine is whether altruistic surrogacies should continue to attract criminal sanctions. The authors strongly submit that they should not, and examine below five reasons why the legislation needs to be reformed in this regard.

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27 *Surrogate Parenthood Act 1988* (Qld) s 3(1), *Penalties and Sentences Act 1992* (Qld) s 5(1)(b).

28 *Surrogate Parenthood Act 1988* (Qld) s 3(2). There is a strong argument that the attempted extra-territorial application of this section is constitutionally invalid, however, this issue is beyond the scope of this article.

29 For a more detailed consideration of how issues relating to surrogacy arrangements may be decided in common law jurisdictions, see L Willmott, 'Surrogacy: Ill-conceived Rights' (2002) 10 *Journal of Law and Medicine* 198.

3.1 Lack of empirical evidence of harm

Liberal theories on criminal law state that criminal punishment is an interference with individual autonomy and is only justified when the imposition of that punishment is necessary to prevent harm.[30] The harm principle states that '[t]he only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others'.[31] On this basis, the criminal law should not impose punishment on behaviour that does not cause harm.

The result of this analysis in this context is that for Queensland legislation to continue to criminalise altruistic surrogacies, it is necessary for there to be demonstrated evidence of harm that results from this practice. The types of harm that are usually asserted as justifying legislating against surrogacy are the possible harm that will be caused to the child, the surrogate mother or the commissioning parents. However, given the need to demonstrate harm before invoking the criminal law, the question needs to be asked whether there is any empirical foundation to these concerns. Despite the paucity of data about the extent to which surrogacy takes place in Australia, there have been a number of empirical studies, both in Australia and overseas, that have examined the practice of surrogacy and whether it causes any harm.

It is noted at this point that a consideration of 'harm' in the surrogacy context is complicated by the fact that there are two distinct kinds of surrogacy arrangements: commercial and altruistic. Each raises quite different considerations in relation to 'harm'. The Lavarch Committee's mandate relates only to altruistic surrogacies and so this article will focus on the empirical evidence applicable to this kind of surrogacy.

Harm to the surrogate

One argument often posited for prohibiting surrogacy is that the practice is inherently exploitative of women.[32] For example, women

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30 See J S Mill, *On Liberty and Other Essays* (1991).

31 J S Mill, 'On Liberty and Other Writings' in Donald A Dripps, 'The Liberal Critique of the Harm Principle' (1998) 17(2) *Criminal Justice Ethics* 3, 3.

32 Penne Watson Janu, 'The case for discouragement of surrogacy arrangements' (1996) 4(1) *Journal of Law and Medicine* 72. Many authors argue that such a position is paternalistic. Goold, for example, suggests that there may be 'some cause to doubt women's capacity to competently choose

seeking the approval of others, such as family or friends, may offer to carry a child for another. It is also suggested that, in the emotionally-charged context of surrogacy, any consent to be a surrogate, will not be an informed one.[33] However, the argument that a surrogacy arrangement causes this kind of harm to a surrogate is not empirically supported by the research conducted to date.

One study of 34 surrogate mothers in the United Kingdom concluded that the women involved did not generally experience difficulties in their relationships with the commissioning parents or with relinquishing the child at birth. Furthermore, there was no evidence that surrogate mothers suffered any psychological problems as the result of entering into the surrogacy arrangement.[34]

Research on the experience of surrogate mothers has also been carried out in Australia, albeit on a more limited basis. One study examined the experiences of 13 women who acted as surrogate mothers and concluded that:[35]

> ... the surrogates did not feel they had been coerced or victimised as a result of the arrangement, but rather that the surrogacy process had strengthened existing relationships with the commissioning parents. All surrogates 'cognitively adapted' to think of the child they were gestating as the child of the commissioning parents.

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surrogacy' but argues that 'these doubts are not sufficient to justify overriding a woman's choice, both because of the presumption of respecting autonomy and the potentially weak connections between women's reactions to surrogacy generally and the subjective experience of a particular surrogate': Imogen Goold, 'Surrogacy: Is There a Case for Legal Prohibition?' (2004) 12(2) *Journal of Law and Medicine* 205, 210.

[33] See, for example, S Dodds and K Jones, 'Surrogacy and Autonomy' in Imogen Goold, 'Surrogacy: Is There a Case for Legal Prohibition?' (2004) 12(2) *Journal of Law and Medicine* 205, 209.

[34] Vasanti Jadva et al, 'Surrogacy: The Experiences of Surrogate Mothers' (2003) 18(10) *Human Reproduction* 2196.

[35] Gina Goble, 'Carrying Someone Else's Baby: A Qualitative Study of the Psychological and Social Experiences of Women who Undertake Gestational Surrogacy' (2005) in Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Final Report (2007), 161.

This researcher was also of the view that individuals who decide to participate in surrogacy arrangements had special qualities that enabled them to manage the experience.[36]

Harm to the commissioning parents

The issue of potential harm in relation to the commissioning parents has also been the subject of some empirical research. In the United Kingdom, a study of 42 couples was undertaken one year after the birth of the child to examine the experience of the commissioning parents. The study concluded that the commissioning parents had not found the experience difficult, and that relationships between the commissioning couple and surrogate mother were generally positive, regardless of whether the parties were known to each other prior to the birth. In addition, the study found that these relationships were generally maintained after the birth of the child.[37]

Harm to the child

Other studies have considered the impact of surrogacy on the child who is the subject of such an arrangement. A common argument of those opposed to this practice is that the child may be psychologically damaged by being born as a result of a surrogacy arrangement.[38] However, empirical research and anecdotal evidence do not support this view. One study compared the parent-child relationship and other factors over a two year period of children born as a result of a surrogacy arrangement with children born through natural conception. After studying the child during the first year of life, the research found there was a 'greater psychological well-being and adaption to parenthood by mothers and fathers of children born through surrogacy arrangements than by natural-conception'.[39] Such a finding would tend to suggest a positive rather than a negative outcome for the child. The results of the study after a two year period continued to be positive in relation to the experiences of parents who became so through

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36 Ibid.

37 Fiona MacCallum et al, 'Surrogacy: The Experience of Commissioning Couples' (2003) 18(6) *Human Reproduction* 1334.

38 Susan Golombok et al, 'Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life' (2004) 40(3) *Developmental Psychology* 400.

39 Ibid, 400.

surrogacy.[40] It was also concluded that the socio-emotional and cognitive development of children born as a result of a surrogacy arrangement did not differ from that of children born through natural conception.[41]

The most famous surrogacy case in Australia involved two sisters, Maggie and Linda Kirkman. Maggie and her husband were unable to conceive and carry a child, so Linda was implanted with an embryo formed from Maggie's egg and donor sperm. The resulting child, Alice Kirkman, has spoken about her experience as a surrogate child in the following terms:[42]

> Do I feel like something that's been manufactured? No, I don't. All I feel is that my parents couldn't make their own bundle of expense (aka bundle of joy), so they got scientists to do it for them. The genetics matter less than the relationships when it comes to mum, dad and child.

Evidence of positive relationships generally

In jurisdictions where surrogacy is permitted**,** research suggests that the surrogacy experience can, in fact, be a positive one for those involved. For example, in one Californian study, interviews were conducted with surrogate mothers, commissioning parents and agencies involved in arranging surrogacies.[43] This research suggested that a particular closeness or 'sacred trust' often developed between the commissioning couple and the surrogate mother which resulted in a positive experience for all involved:[44]

> The bonds formed between commissioning couples, especially the commissioning mother, and surrogates helped to minimize

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40 Susan Golombok et al, 'Surrogacy families: parental functioning, parent-child relationships and children's psychological development at age 2' (2006) 47(2) *Journal of Child Psychology and Psychiatry* 213.

41 Ibid.

42 Maggie Kirkman and Alice Kirkman, 'Sister-to-Sister Gestational "Surrogacy" 13 Years On: A Narrative of Parenthood' (2002) in Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Final Report (2007), 162.

43 Elizabeth FS Roberts (ed), *'Native' Narratives of Connectedness*, Cyborg Babies: From Techno-Sex to Techno-Tots (1998). In California, surrogacy arrangements are legally recognised and facilitated by specialist agencies.

44 Ibid, 197.

> the distance between couple, surrogate, and the experience of pregnancy, as well as allowing couples to be more directly involved in the 'baby making'.

One surrogate commented on the closeness between the commissioning couple and surrogate, stating:[45]

> Making a baby is a beautiful and sacred thing. You pick somebody off the street who needs cash, they're not going to honor baby or you. If someone says, 'I'm going to make this baby for you,' it's as sacred of a trust as you can make.

Other research conducted in the United States involved case studies of surrogacy arrangements in infertility clinics.[46] One case study involved an altruistic surrogacy in which the sister of the commissioning parents agreed to be the surrogate mother of their genetic child. The researcher commented on how readily the parties involved adapted to the surrogate relationship:[47]

> ... it is as if [the surrogate mother] is completely transparent to kinship – kin passes straight through her without involving her – she doesn't become the mother through gestating the baby, and she is not in the room as [the commissioning father's] sister; she is a step in a procedure for [the commissioning parents] ... Again I am in for a surprise about the plasticity of kinship and heredity.

In particular, this researcher observed the way in which the two women involved bonded throughout the experience, stating they were 'in this together' during the embryo transfer, and later referring to the surrogate mother as 'Auntie'.[48]

Other studies suggest that surrogacy brings many positive 'transformative effects' between the women involved, such as where one party is motivated by the other to pursue further education or

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45 Ibid, 198.

46 Charis M Cussins (ed), *Quit Sniveling, Cryo-Baby. We'll Work Out Which One's Your Mama!*, Cyborg Babies: From Techno-Sex to Techno-Tots (1998).

47 Ibid, 49-50.

48 Ibid, 49-50.

career advances while the other is motivated to de-emphasising career choices for parenthood.[49]

A failure to demonstrate harm

The Australian research undertaken to date on the impact of surrogacy arrangements on surrogates, commissioning parents and the child is extremely limited. There is a wider body of research available overseas although it too is limited in that there has been very little examination of the long-term impact of surrogacy on the child born as a result. For this reason, the Victorian Law Reform Commission stated that 'the outcomes for children and surrogate mothers have not been researched in enough detail to justify allowing surrogacy arrangements to occur without careful scrutiny'.[50]

However, those asserting that altruistic surrogacy should continue to be criminalised have failed to discharge the onus of demonstrating the harm the criminal law is intervening to prevent. Liberal theories on criminal law state that criminal punishment is only permitted where its imposition is necessary to prevent harm.[51] Indeed, on the contrary, the limited findings to date suggest that surrogacy may in fact lead to positive outcomes for the people involved. In these circumstances, the ongoing criminalisation of altruistic surrogacy cannot be sustained.

3.2 Cultural practices of some Indigenous communities

Laws that criminalise particular cultural practices must be closely scrutinised. In Queensland, a customary form of adoption exists in the Torres Strait Island where a woman, regardless of whether she is single or not, may give her children to other members of her extended family to raise.[52] The practice, known as Kupai Omasker, involves a permanent transfer of the child of one family to another by mutual consent of those families.[53] The practice is 'characterised by notions of reciprocity and

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[49] Lori Andrews, 'Alternative Modes of Reproduction' in Christopher Heath Wellman (eds), *A Companion to Applied Ethics* (2003), 373.

[50] Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Final Report (2007), 168.

[51] See J S Mill, *On Liberty and Other Essays* (1991).

[52] New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report 81 (1997), [9.66].

[53] Peter Bartholomew, *Recognition given to aspects of indigenous customary law in Queensland* (1998), 37.

obligation' and provides 'stability to Torres Strait Islander society by developing bonds between families'.[54]

Problems can arise in the surrogacy context, however, because some forms of this practice are likely to be prohibited by the *Surrogate Parenthood Act 1988* (Qld).[55] For example, an agreement reached prior to the birth of a child between a woman and another couple for the couple to raise the child is likely to be a 'prescribed contract' under the Act.[56]

The criminalisation of this practice sits uncomfortably with developments at Commonwealth level. In 2004, Kupai Omasker was subject to a review by the Family Law Council.[57] Recommendations were made that the *Family Law Act 1975* (Cth) be amended to acknowledge that 'children of indigenous origins have a right, in community with other members of their group, to enjoy their own culture'[58] and to recognise the traditional adoption practices of the Torres Strait Islanders. These recommendations are now reflected in section 61F of the *Family Law Act 1975* (Cth) which states that the court must have regard to any kinship obligations, and child rearing practices, of the child's Aboriginal or Torres Strait Islander culture when making orders about parenting responsibility.

It is argued that the likely criminalisation of some forms of Kupai Omasker by the *Surrogate Parenthood Act 1988* (Qld) is clearly undesirable, and that this is particularly so given that the practice has been examined and then formally recognised in the *Family Law Act 1975* (Cth). The decriminalisation of altruistic surrogacy would help avoid the situation described by the Taskforce on Women and the Criminal Code where:[59]

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54 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report 81 (1997), [9.66]-[9.67].

55 Queensland Government, *Report of the Taskforce on Women and the Criminal Code* (2000), 373.

56 *Surrogate Parenthood Act 1988* (Qld), s 2.

57 Family Law Council, *Response to the Pathways Report: Recommendation 22 – Recognition of traditional Aboriginal and Torres Strait Islander child-rearing practices* (2004).

58 Ibid, 8.

59 Queensland Government, *Report of the Taskforce on Women and the Criminal Code* (2000), 373.

> … women and families in the Torres Strait are being placed in the invidious position of breaching certain laws when they are engaged in a practice that they see as an essential part of their society.

3.3 Apparent lack of criminal prosecutions

While it is difficult to obtain accurate information about the number of prosecutions brought against individuals entering or offering to enter into surrogacy arrangements in Queensland, it appears that only a handful of individuals have been prosecuted. Further, of those matters that have proceeded to hearing, it appears that the individuals involved have been treated very leniently by the courts. The authors are aware only of the following prosecutions relating to surrogacy that have occurred in Queensland:[60]

- In 1991, two women were charged with offences under the *Surrogate Parenthood Act 1988* (Qld). They entered guilty pleas, and the Magistrate discharged them without recording a conviction.[61]
- In 1993, women were charged with falsifying a birth certificate as well as with offences under the *Surrogate Parenthood Act 1988* (Qld). The matter was heard in the Ipswich District Court where the women entered guilty pleas in relation to falsifying the birth certificate. The Judge placed the women on a six month good behaviour bond, and recommended that the charges under the *Surrogate Parenthood Act 1988* (Qld) should not proceed.[62]
- In 1993, a medical practitioner was fined $2,000 and placed on a two year good behaviour bond for facilitating an altruistic surrogacy.[63]

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[60] As the authors are relying on brief reports of these cases in secondary material, in some cases it is unclear whether they involve altruistic or commercial surrogacy arrangements. In addition to the cases listed, a Rockhampton woman was placed on a $2,000 good behaviour bond in 2001 for breaching the *Surrogate Parenthood Act 1988* (Qld). However, this case clearly involved entering into a commercial surrogacy arrangement and so is not considered further in this article: see 'Baby buyer placed on good behaviour bond' *Australian Associated Press*, 22 January 2001.

[61] Women's Legal Service, 'Rougher than Usual Handling: Women and the Criminal Justice System', 152.

[62] Ibid.

[63] Penne Watson Janu, 'Surrogacy Arrangements in Australia: Analysis of the Legal Framework' (1995) 9 *Australian Journal of Family Law* 1, 7-8.

In last of these matters, the Magistrate was quoted as stating the following when addressing the accused:[64]

> There could be nothing, in my view, so abhorrent as trading in babies. Some might say not even abortion but where babies become chattels to be sold at will. But I am satisfied that that was not your motivation. You seem to have acted very much with the interests of another person ... at heart. However, the law prohibits your activities ... It is my view clearly that a custodial sentence is not warranted in the particular circumstances.

It is suggested that the very small number of prosecutions for offences under the *Surrogate Parenthood Act 1988* (Qld) is not due to surrogacy being an isolated occurrence. Although it is difficult to obtain data about the extent to which surrogacy arrangements are entered into, or offers to carry a baby for another are made, it is likely that the practice occurs not infrequently. The basis for this claim is three-fold. First, as described above, practices that would fall within the *Surrogate Parenthood Act 1988* (Qld) are part of how family life is ordered in some Indigenous communities. There is no reason to believe that such practices ceased simply because of the passing of the Queensland legislation. Indeed, the recent amendments to the *Family Law Act 1975* (Cth) discussed above that acknowledge the practice of Kupai Omasker suggest otherwise.

Secondly, over the past decades, there have been not infrequent media reports of surrogacy arrangements occurring. For example, there were a number of media reports about a case involving a Queensland couple who were litigating as to the residence of a child born through an altruistic surrogacy arrangement.[65] Yet, the authors are unaware of any charges being laid against the commissioning parents for breach of the Queensland legislation. Finally, the report prepared by the Women's Legal Service, *Rougher than Usual Handling: Women and the Criminal*

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[64] *R v White* (Unreported, Magistrates Court, Mossman, Criminal Jurisdiction, 25 October 1993) in Anita Stuhmcke, 'For Love or Money: The Legal Regulation of Surrogate Motherhood' (1996) 3(1) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v3n1/stuhmck1.html> at 6 January 2008, [28].

[65] *Re Evelyn* (1998) 23 Fam LR 53.

Justice System, indicates that a number of women approach the Service seeking advice about surrogacy.[66] The report suggests that many of the women who seek advice are already pregnant. It is likely that, prior to obtaining legal advice, at least some of these women will have had discussions about entering into surrogacy agreements, which, in itself, could constitute a breach of the legislation.

One conclusion that could be drawn from this analysis is that surrogacy arrangements are occurring far more frequently than prosecutions are being brought. Another conclusion is that clear and public breaches of the law, for example, where litigation is brought acknowledging the surrogacy, are not leading to criminal prosecutions. When these conclusions are added to the very lenient judicial response to altruistic surrogacy described above, it can be argued that the criminal justice system does not take this crime seriously. This is perhaps a reflection of community values that this conduct does not involve such moral culpability as to warrant imposing criminal sanctions. In these circumstances, continued criminalisation of altruistic surrogacy is not sustainable.

3.4 National and international norms

A major consideration for the Lavarch Committee in its deliberations should be national and international norms in relation to the regulation of altruistic surrogacy.

Australian norms

The various surrogacy legislation enacted in Australia was described in Part 2 of this article. When the relevant legislation commences operation in New South Wales and Western Australia, Queensland will be the only one of seven statutory jurisdictions that criminalises entry into altruistic surrogacy.

A plethora of reviews of the practice and regulation of surrogacy arrangements have been undertaken since Queensland passed its legislation in 1988. None of those reviews have suggested that the appropriate way forward would be to adopt the Queensland model of criminalising altruistic surrogacy. A brief overview of some of the reviews undertaken in New South Wales, South Australia and Western

[66] Women's Legal Service, 'Rougher than Usual Handling: Women and the Criminal Justice System', 151.

Australia provide some insight as to the norms that apply to surrogacy regulation in this country.[67]

New South Wales

In 1988, the New South Wales Law Reform Commission undertook an extensive review of the social, legal and ethical issues related to surrogacy as part of its review of the law relating to artificial conception. The Commission's main recommendations included:

- the welfare of the child should be the paramount consideration and should prevail over the interests of the adults involved in the surrogacy arrangement;
- surrogate motherhood should be discouraged by all practicable legal and social means; and
- entering into a commercial surrogacy agreement should be illegal.[68]

In 2007, legislation governing assisted reproductive technologies was enacted by the New South Wales Government.[69] Although the legislation ultimately drafted did not purport to regulate altruistic

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[67] The Victorian Law Reform Commission recently considered aspects of assisted reproductive technologies and, in particular, the eligibility criteria for accessing this treatment. Surrogacy was one of the technologies considered in this review. Despite originally inviting comment from the public about whether altruistic surrogacy should continue to be allowed, this inquiry was beyond the scope of the Commission's reference and in a later position paper, the Commission resiled from this line of inquiry. The final report of the Commission, therefore, did not comment on the appropriateness or otherwise of regulating altruistic surrogacy: Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Final Report* (2007). For comment on the Commission's inquiry in this regard, see Lindy Willmott 'Surrogacy: ART's Forgotten Child' (2006) 29 *University of New South Wales Law Journal* 227.

[68] New South Wales Law Reform Commission, *Artificial Conception: Surrogate Motherhood*, Report 60 (1988) ch 4.

[69] The passage of this legislation was lengthy. The 1988 New South Wales Law Reform Commission report on surrogacy was followed in 1997 by a discussion paper issued by the New South Wales Department of Health. After an extensive public consultation process, a draft bill was eventually tabled in Parliament in 2003, however, this bill ultimately lapsed. The aim of the draft exposure bill was to prohibit commercial surrogacy and make agreements for surrogacy arrangements void.

surrogacy arrangements, such practices were not criminalised, a view that was supported by extensive public consultation.[70]

South Australia

The Social Development Committee of the South Australian Parliament undertook a full inquiry into surrogacy arrangements and tabled its findings in the Legislative Council.[71] In undertaking this inquiry, the Committee invited submissions from various representatives of the community, including members of the medical and allied health professions, lobby groups, research organisations, religious groups, bioethics organisations and parties who had been directly involved in surrogacy arrangements.[72] The Committee also attempted to obtain empirical data on the incidence of surrogacy, although this proved to be difficult given that no systemic data on this matter is collected. However, one psychologist informed the Committee that during a 10 year period she had counselled 47 surrogacy cases, of which 45 were gestational surrogacies.[73]

Evidence presented to the Committee indicated various levels of support for surrogacy and a view that 'women are autonomous beings who are generally able to fully and freely consent to this process'.[74] The Committee stated that:[75]

> ... the current legal situation in which some Australian jurisdictions allow surrogacy to occur while others prohibit its use is unsustainable. Evidence presented to the Inquiry indicates that in states where surrogacy is not permitted, couples travel to other jurisdictions to undertake the procedure. It is clear from the evidence presented that as things stand couples have and will continue to travel interstate to pursue gestational surrogacy arrangements. The Committee considers

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70 Details of the results of the Commission's public consultation are considered further in Part 3.5 below.

71 Social Development Committee, Parliament of South Australia, *Inquiry into Gestational Surrogacy*, tabled with the Legislative Council (13 November 2007).

72 Ibid, 9.

73 Ibid, 16.

74 Ibid, 54.

75 Ibid, 63.

> that this situation is untenable and strengthens the case for legislative reform.

Thus, the Committee concluded that a Bill should be introduced to permit medically-indicated altruistic gestational surrogacy in South Australia. The Bill was tabled on 13 February 2008. If passed, the Bill will amend the *Family Relationships Act 1975* (SA), the *Births, Deaths and Marriages Registration Act 1996* (SA) and the *Reproductive Technology (Clinical Practices) Act 1988* (SA) to recognise and facilitate altruistic gestational surrogacy arrangements.

Western Australia

In 1997, a Select Committee of the Western Australian Parliament was established to review the *Human Reproductive Technology Act 1991* (WA).[76] The terms of reference were subsequently amended to include surrogacy.[77] In its final report, the majority of the Committee was of the view that altruistic surrogacy should be permitted in Western Australia, provided that some genetic material belonged to the commissioning parents.[78] The Committee also supported the use of IVF surrogacy arrangements.[79] The recommendations of the Select Committee included that the best interests of the child be paramount in any future surrogacy.[80]

These recommendations were finally adopted in the Surrogacy Bill 2007 (WA). The Bill was introduced into the Western Australian Legislative Assembly on 1 March 2007 and referred to the Standing Committee on Legislation on 14 November 2007. The aim of the legislation is to:[81]

> ... balance and protect the interests of all parties to surrogacy arrangements by providing a framework for the best interests of the child to be paramount in any decision about surrogacy and legal parentage, requiring careful preparation and

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76 Western Australia, Legislative Assembly, *Select Committee on the Human Reproductive Technology Act 1991: Report*, 1999.

77 Ibid, xlii.

78 Ibid, 268, 270.

79 Ibid, 268.

80 Ibid, 260.

81 Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 March 2007, 194 (JA McGinty).

> assessment of the parties and preventing surrogacy for commercial gain.

On introducing the Bill, the Hon Jim McGinty MLA observed that, in 1988, a previous Select Committee had recommended that surrogacy be discouraged. He noted, however, that '[t]hinking on surrogacy has come a long way in the past 19 years'.[82] Thus, the legislation, if passed, will allow for the use of assisted reproductive technologies in altruistic surrogacy arrangements.

International norms

There are a variety of regulatory models operating in overseas jurisdictions,[83] however, it is generally the case that altruistic surrogacies are permitted. This is the position in the United Kingdom where the *Surrogacy Arrangements Act 1985* and *Human Fertilisation and Embryology Act 1990*[84] facilitate the courts making a parentage order in favour of commissioning parents under an altruistic surrogacy arrangement, provided certain conditions are met. Altruistic surrogacy is also permitted in a number of jurisdictions in the United States[85] and Canada,[86] as well as in New Zealand.[87]

3.5 Public opinion

There has been only limited empirical research carried out in Australia about public opinion on surrogacy. However, the research that does

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82 Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 March 2007, 193 (JA McGinty).

83 For a discussion of some of these models, see Rakhi Ruparelia, 'Giving away the "gift of life": Surrogacy and the Canadian *Assisted Human Reproduction Act*' (2007) 23 *Canadian Journal of Family Law* 11, 20-25.

84 This legislation is currently subject to proposed amendment by the Human Fertilisation and Embryology Bill 2008 (UK).

85 For a useful review of surrogacy law in the various United States jurisdictions, see John Seymour and Sonia Magri, *ART, Surrogacy and Legal Parentage: A Comparative Legislative Review*, Victorian Law Reform Commission (2004).

86 See *Assisted Human Reproduction Act 2004* (Canada), which is discussed in Rakhi Ruparelia, 'Giving away the "gift of life": Surrogacy and the Canadian *Assisted Human Reproduction Act*' (2007) 23 *Canadian Journal of Family Law* 11, 21-24.

87 *Human Assisted Reproductive Technology Act 2004* (NZ) s 14.

exist indicates general acceptance of surrogacy as a method for overcoming infertility.[88]

When conducting its review into surrogacy, the New South Wales Law Reform Commission surveyed 2476 members of the Australian public (aged 14 years or over) on various aspects of surrogacy, including:

- general attitudes to surrogate motherhood itself;
- payment of the surrogate mother;
- involvement of intermediaries in surrogacy arrangements;
- enforcement of such arrangements,
- disclosure of the identity of the surrogate mother;
- availability of surrogacy arrangements to persons other than married couples; and
- availability of surrogacy arrangements for reasons other than medical difficulties with conceiving or carrying a child.[89]
- The research participants were surveyed over two consecutive weekends at randomly selected cluster points throughout Australia's city and country areas. The results were then analysed according to a number of demographic and other relevant factors. Overall, 51% of the population surveyed did not object to surrogacy while 16% indicated that they either needed more information or did not have an opinion on the issue.[90] Interestingly, when questioned as to whether surrogacy should involve payment, only 17% of the people surveyed were of the view that there should be no payment made to the surrogate mother. In fact, 40% of the people surveyed supported payment of the surrogate mother's medical expenses and a fee as agreed between the parties to the arrangement, while 34% believed this payment should be confined to medical expenses only.[91]

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88 See, for example, Social Development Committee, Parliament of South Australia, *Inquiry into Gestational Surrogacy*, tabled with the Legislative Council (13 November 2007).

89 New South Wales Law Reform Commission, *Surrogate Motherhood: Australian Public Opinion*, Research Report 2 (1987) [1.6].

90 Ibid, [2.4]

91 Ibid, [3.2]-[3.5].

The results indicated that not only are the majority of those surveyed not opposed to surrogacy generally, many consider some level of payment to the surrogate to be acceptable. The overall tenor of the research certainly did not support the criminalisation of altruistic surrogacy.[92]

4 Conclusion

The prevalence of surrogacy in Queensland (or indeed Australia) is difficult to determine. There is certainly some evidence in the form of media reports, academic literature and limited empirical research to indicate that the practice occurs. Yet, in Queensland, those involved, or who offer to be involved, in an altruistic surrogacy arrangement are at risk of criminal prosecution.

The authors have argued that this is untenable for five reasons. First, the available empirical evidence does not reveal that altruistic surrogacy harms the people involved in such an arrangement. (Rather, the limited research conducted to date tends to suggest altruistic surrogacy may in fact result in positive outcomes.) In the absence of a demonstrated harm to others, a liberal democratic society should not criminalise altruistic surrogacy. As Cook and Sclater point out:[93]

> There are dangers … when public policy and legislation are driven by ideological preconceptions, uninformed by the reality check of empirical data and the evidence of representative experience. The growth of evidence-based medicine should be paralleled by evidence-based social policy and legislation.

Secondly, the practice of Kupai Omasker, which occurs in some Indigenous communities in Queensland, is likely to involve some altruistic surrogacies that are in breach of the *Surrogate Parenthood Act 1988* (Qld). It is undesirable to criminalise elements of a culturally accepted practice such as this, particularly given that Kupai Omasker is

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92 As there were not significant variances between the views expressed in each of the Australian jurisdictions, it is likely that this research is representative of the views held by Queenslanders: New South Wales Law Reform Commission, *Surrogate Motherhood: Australian Public Opinion*, Research Report 2 (1987) [2.7].

93 Rachel Cook and Shelley Day Sclater, 'Book Review: Surrogate Motherhood: International Perspectives' (2005) 1 *Medical Law Review* 116, 124.

recognised and even facilitated at the Commonwealth level through the *Family Law Act 1975* (Cth).

Thirdly, breaches of Queensland's surrogacy legislation do not appear to be rigorously pursued and prosecuted. Further, even when prosecutions are successful, the penalties imposed by the courts for altruistic surrogacies are extremely lenient. This suggests that the regulation of altruistic surrogacies should not occur within the criminal justice system and so the practice is not one that should be criminalised.

Fourthly, criminalisation of altruistic surrogacy is starkly in contrast to national and international norms. While other jurisdictions are moving towards better accommodating altruistic surrogacy arrangements, for example, by facilitating the registration of commissioning parents as legal parents, Queensland still criminalises such activity. Finally, it appears that the imposition of criminal sanctions for individuals who turn to surrogacy to assist with problems of infertility is not supported by the public at large.

There is currently a climate of change on the issue of surrogacy within Australia. As this article has outlined, surrogacy legislation has been reviewed recently in New South Wales, Victoria, South Australia and Western Australia, with Tasmania announcing a review in April 2008.[94] Surrogacy is also on the Commonwealth agenda, with the implementation of uniform surrogacy laws being considered at a meeting of the Standing Committee of Attorneys-General in March 2008.[95] There is a clear and deliberate policy shift towards regulating

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[94] The Victorian Law Reform Commission has reviewed aspects of surrogacy as part of its review of assisted reproductive technology: Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Final Report (2007); New South Wales has recently enacted legislation: *Assisted Reproductive Technology Act 2007* (NSW); Western Australia has recently introduced its Surrogacy Bill 2007 (WA) which has been referred to the Standing Committee on Legislation with the tabling of its final report expected on 8 May 2008; South Australia has tabled a bill as a result of the recommendations of its Parliament's Social Development Committee: Social Development Committee, Parliament of South Australia, *Inquiry into Gestational Surrogacy*, tabled with the Legislative Council (13 November 2007); Tasmania established a Select Committee to review its surrogacy laws on 1 April 2008: <http://www.parliament.tas.gov.au/ctee/surrogacy.htm>.

[95] The issues agreed to by the Standing Committee of Attorneys-General is available at:

altruistic surrogacy arrangements so that the process is more coherent and sensible for individuals throughout Australia who must resort to surrogacy to overcome infertility.

It is in this environment that the Lavarch Committee will undertake its review of the *Surrogate Parenthood Act 1988* (Qld). While there are some legally and ethically complex issues that fall within the Committee's terms of reference, the authors contend that the threshold question before the Committee, whether altruistic surrogacy should be decriminalised, is not a difficult one. The answer is a categorical 'yes'.

<http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/RWPA7434F9ED00CDACBCA25741A003910D7>

Appendix 1

Jurisdiction	***Legislation***	***Current legal position***	***Recent reform or reviews***
Queensland	*Surrogate Parenthood Act 1988* (Qld)	Prohibits all forms of surrogacy and imposes criminal penalties for breach of prohibitions (s 3). All surrogacy agreements (whether commercial or altruistic) are void (s 4). Legislation purports to have extraterritorial operation (s 3(2)).	Select Committee established by Legislative Assembly of Queensland to investigate and report on altruistic surrogacy in Queensland.
New South Wales	No legislation	Surrogacy (both altruistic and commercial) regulated by common law.	*Assisted Reproductive Technology Act 2007* (NSW) enacted but not yet commenced. The legislation prohibits commercial surrogacy (s 43) but does not deal with altruistic surrogacy. All surrogacy agreements are void (s 45).
Victoria	*Infertility Treatment Act 1995* (Vic)	Commercial surrogacy prohibited and penalties imposed (s 59). Altruistic surrogacy not dealt with; however surrogacy agreements (whether commercial or altruistic) are void (s 61).	Law relating to altruistic surrogacy under review by Government following report of Victorian Law Reform Commission. Recommendations include continued prohibition of commercial surrogacy; parentage under altruistic surrogacy to be facilitated; and all surrogacy agreements remain void except that agreements involving

Jurisdiction	*Legislation*	*Current legal position*	*Recent reform or reviews*
			reimbursement of certain prescribed expenses will be enforced to the extent of the payment of those expenses.
South Australia	*Family Relationships Act 1975* (SA)	Commercial surrogacy prohibited and penalties imposed (ss 10G, 10H). Altruistic surrogacy also prohibited but no penalties imposed (s 10G). Surrogacy agreements are void (s 10G).	Law relating to gestational surrogacy under review. Statutes Amendment (Surrogacy) Bill 2008 tabled with Legislative Council following recommendations by the Social Development Committee. The bill proposes to amend the current legislation to legalise altruistic and gestational surrogacy arrangements. It will also facilitate the transfer of parentage in certain circumstances, such as where both the commissioning parents are infertile and have been living in a heterosexual married or de facto relationship for a period of 5 years, and all parties have received appropriate counselling (cl 12 inserting new ss 10HA to 10HH).
Western Australia	No legislation	Surrogacy (both altruistic and commercial) regulated by common law.	Surrogacy Bill 2007 introduced to Legislative Assembly on 1 March

Jurisdiction	***Legislation***	***Current legal position***	***Recent reform or reviews***
			2007; referred to Standing Committee on Legislation on 14 November 2007. If enacted, commercial surrogacy will be criminalised (cl 8). Surrogacy arrangements are not enforceable (cl 7). However, the bill provides for transfer of parentage of a child born under altruistic surrogacy arrangements in certain circumstances, such as at least one commissioning parent is eligible for an IVF procedure and the surrogate parent/s have had appropriate counselling and legal advice (Part 3 generally). The bill also provides for access to information (cls 29 – 37).
Australian Capital Territory	*Parentage Act 2004* (ACT)	Commercial surrogacy prohibited and penalties imposed (s 41); parentage under altruistic surrogacy facilitated (Div 2.5). Surrogacy agreements are void (s 31).	Nil, however, legislation follows relatively recent reform.
Tasmania	*Surrogacy Contracts Act 1993* (Tas)	Commercial surrogacy prohibited and penalties imposed (s 4). Altruistic surrogacy not dealt with; however facilitation of all	Select Committee of Legislative Council established on 1 April 2008 to review surrogacy laws.

Jurisdiction	*Legislation*	*Current legal position*	*Recent reform or reviews*
		surrogacy arrangements prohibited (s 4). Surrogacy agreements are void (s 7).	
Northern Territory	No legislation	Surrogacy (both altruistic and commercial) regulated by common law.	Nil