

# **Discussion Paper**

## **A conversation about surrogacy in the Northern Territory**

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**NT Department of Health  
NT Department of the Attorney-General and Justice**

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## Key Terms:

**Surrogate** - The woman who gives birth to the child in a surrogacy arrangement is known as the **surrogate**.

**Surrogacy** - refers to an arrangement for a woman to become pregnant and give birth to a child for another couple or single person, with the intention of giving that child to the couple or person once the child is born.

**Partial surrogacy** - If the surrogate's ovum (egg) is used to conceive the child, it is known as '**partial surrogacy**'.

**Gestational surrogacy** - If the surrogate mother is implanted with an embryo created with an ovum from another woman (either the commissioning mother or a donor) it is known as '**gestational surrogacy**'.

**Intended parent(s) or Commissioning parent(s)** - The couple or person to whom the child is intended to be given after birth is referred to as '**commissioning**' or '**intended parent(s)**'.

**Parentage order** - a legal order actioned by a court to transfer parentage from the surrogate mother to the intended parents.

**Altruistic surrogacy** – see below definition of 'Non-commercial surrogacy'.

**ART** - means assisted reproductive technology.

**Commercial surrogacy** - is when a woman enters into an agreement or contract with a person or persons to become pregnant, carry the pregnancy and give birth to a child for the other person or persons and charges a fee, or accepts payment or other forms of valuable consideration for this act. **This form of surrogacy agreement is prohibited in Australia.**

**Non-commercial surrogacy**, or '**altruistic surrogacy**' - is when a woman agrees to become pregnant, carry the pregnancy and give birth to a child for another person or persons without charging a fee or accepting payment. This form of surrogacy agreement is lawful in Australia if certain conditions are satisfied. The reimbursement of reasonable medical and/or other costs incurred by the surrogate mother may be permitted.

**Parental Responsibility Order** - is an order that can be obtained from the Family Court of Australia or Federal Circuit Court of Australia pursuant to s 61D of the Commonwealth Family Law Act 1975 (Cth) that confers parental responsibility for a child on a person. This type of order can confer all the duties, powers, responsibilities and authority which, by law, parents have in relation to children, but it does not confer or declare legal parentage. The federal courts do not have general power to confer parentage in relation to children born under a surrogacy agreement as this power is held by the States.

## 1 INTRODUCTION

The Northern Territory (NT) is the only jurisdiction in Australia without legislation governing surrogacy. Territorians therefore are unable to access surrogacy in the NT.

There have been a number of representations from community members for legislation to be introduced to enable surrogacy arrangements in the NT.

The Northern Territory Government is interested in hearing local views on the need for NT legislation for surrogacy.

## 2 DISCUSSION

Laws relating to surrogacy vary across Australian states and territories. Attempts to harmonise surrogacy legislation nationally over the last 12 years have not been successful. Although surrogacy has occurred throughout history, the issue remains debated and seen by some as having significant ethical, social and legal implications.

Surrogacy refers to an arrangement for a woman to become pregnant and give birth to a child for another couple or single person, with the intention of giving the child to the couple or person once the child is born.

Australian jurisdictions with specific legislation permit altruistic surrogacy, where the surrogate receives no financial benefit or reward or commercial surrogacy. **Commercial surrogacy where a financial benefit is received by the surrogate, is prohibited in Australia.**

Introduction of surrogacy legislation in the NT may need to consider assisted reproductive technology (ART), including the use of in-vitro fertilization (IVF) for surrogacy. ART is a highly specialized service covering a wide spectrum of technologies. The NT has no legislation pertaining to ART.

### **Principles of surrogacy**

Generally, state and territory laws governing surrogacy share a common set of principles:

- The wellbeing and best interests of the child born from a surrogacy arrangement are paramount
- Intended parents are not able to conceive or carry a baby
- The surrogacy arrangement is not enforceable; however, some rights are enforceable

- A woman's decision to be a surrogate is made freely and without any form of coercion or pressure
- The surrogacy must be altruistic, meaning a surrogate cannot be paid for carrying a baby for somebody else
- Commercial surrogacy is illegal
- A parentage order, a legal order actioned by a court, must be made to transfer parentage from surrogate mother to intended parents.

It is critical for these principles to be considered when drafting legislation for surrogacy in the NT.

## **Eligibility**

Laws governing eligibility to enter into surrogacy arrangements vary across Australian state and territories. In some instances, any person, regardless of sex, relationship status or sexual orientation can be an intended parent, however this is not the case in all jurisdictions. In relation to a surrogate mother or partner, some jurisdictions require the surrogate to be a certain age and to have previously given birth. All jurisdictions, with the exception of the ACT, require intended parents to have a medical need to access surrogacy arrangements. Tasmania stipulates there must be either a medical or social need for the surrogacy arrangement.

Most states and territories require each of the affected parties to undertake counselling about the surrogacy arrangement and for affected parties to have received independent legal advice. The issue of criminal history checks for affected parties has also been publicly debated. Victoria is the only jurisdiction with regulations requiring a criminal history check and child protection order check for all parties involved in the surrogacy arrangement.

## **Recognition of legal parentage**

The recognition of legal parentage because of surrogacy is critical to mitigate the presumption of parentage that otherwise falls with the 'birth mother'. The NT does not have legislation allowing for parenting orders in surrogacy arrangements. Without a parentage order (application to the court) the intended families cannot apply to the Registrar of Births, Deaths and Marriages to issue a new birth certificate naming the intended parents as the parents of the child.

In the NT, and in equivalent legislation in other jurisdictions, the *Status of Children Act 1978* provides for general rules of maternity and paternity, including that a 'woman who gives birth to a child is, for all purposes, the mother of the child, notwithstanding that the

child was conceived by the fertilization of an ovum taken from another woman' (Section 5C). Except for the NT, various forms of state and territory legislation provide mechanisms for the intended parents to obtain a 'parentage order'.

Generally, the surrogate mother cannot be compelled to hand the child to the intended parents as a court will require the surrogate mother to consent to the making of a parentage order. Without laws governing parentage orders in the NT, the intended parent would have to pursue alternative legal arrangements that would not result in granting parental status. For example, an application for adoption may provide an order for legal parentage but not for parental status.

Access to birth records by surrogate children, intended parent or other affected parties is another key aspect of surrogacy legislation in most states and territories. In some instances, laws permit access to information on birth certificates and birth records.

### **Rights and protections of surrogate children**

Surrogacy arrangements raise several human rights issues; the rights and protections of children are particularly important. The *Convention on the Rights of the Child* (CRC) is the primary human rights treaty on children's rights. The CRC recognises children have the same human rights as adults, while also needing special protection due to their vulnerability. Article 3 of the CRC draws attention to the obligation to ensure the best interest of the child is at the forefront of decisions or actions relating to them.

Ensuring the rights of children born to surrogate mothers must be at the heart of any discussions about surrogacy in the NT.

## **3 CURRENT NATIONAL SURROGACY LAWS and GUIDELINES**

The laws affecting surrogacy vary across states and territories.

The *Family Law Act 1975* (Commonwealth) is relevant to determining legal parentage at the national level. The Commonwealth Government however lacks the power to legislate with respect to surrogacy. Section 60 (H) sets out persons who are considered parents of children born to ART.

There are two sets of Commonwealth legislation *Research Involving Human Embryos Act 2002* and the *Prohibition of Human Cloning Act 2002* providing a regulatory framework related to ART. These include prohibition of human cloning, and regulations regarding the use of excess human embryos created through ART.

The National Health and Medical Research Council (NHMRC) published the *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research 2007* (the guidelines) which underpin the regulation of ART practice within Australia. All Australian ART clinics must be accredited by the *Reproductive Technology Accreditation Committee* (RTAC). Accreditation requires ART clinics to comply with ART laws and the guidelines.

#### 4 HOW AUSTRALIAN JURISDICTIONS REGULATE SURROGACY

| State      | Primary Legislation                             | Supporting Legislation                          |
|------------|---|---|
| <b>NSW</b> | <i>Surrogacy Act 2010</i>                       | <i>Status of Children Act 1974</i>              |
| <b>VIC</b> | <i>Assisted Reproductive Treatment Act 2008</i> |   |
| <b>Qld</b> | <i>Surrogacy Act 2010</i>                       | <i>Status of Children Act 1978</i>              |
| <b>ACT</b> | <i>Parentage Act 2004</i>                       |   |
| <b>WA</b>  | <i>Surrogacy Act 2008</i>                       |   |
| <b>SA</b>  | <i>Family Relationships Act 1975</i>            | <i>Assisted Reproductive Treatment Act 1987</i> |
| <b>TAS</b> | <i>Surrogacy Act 2012</i>                       | <i>Status of Children Act 1974</i>              |
| <b>NT</b>  | --  | --  |

Source: Victorian Assisted Reproductive Treatment Authority (VARTA)

#### 5 HAVE YOUR SAY

WHAT ARE YOUR VIEWS ON THE NEED FOR NORTHERN TERRITORY LEGISLATION FOR SURROGACY?





## 6 REFERENCES and USEFUL WEBSITES

This discussion paper was informed by the extensive work undertaken taken to date by Australian states and territories and organisations established to support surrogacy arrangements. The following list is not an exhaustive list of these parties:

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