

## FAMILY LAW PRACTITIONERS ASSOCIATION OF WESTERN AUSTRALIA (INC)

### SUBMISSION TO ASSOCIATE PROFESSOR MS. SONIA ALLEN FOR THE INDEPENDENT REVIEW OF THE WESTERN AUSTRALIAN *HUMAN REPRODUCTIVE TECHNOLOGY ACT 1991 (HRT Act) AND THE SURROGACY ACT 2008*

#### OVERVIEW

1. The Family Law Practitioners' Association of Western Australia (Inc.) ('the Association') provides the following submissions to Associate Professor Ms Sonia Allen concerning her independent review into the operation and effectiveness of the Western Australian *Human Reproductive Technology Act 1991 ('HRT Act')* and *Surrogacy Act 2008 (WA)*.
2. The Association provides the Independent Reviewer, Ms Allen, with targeted submissions as to the specific terms of reference which affect the Association members and constituents. The Association supports legislative amendment to both the HRT Act and the *Surrogacy Act 2008 (WA)* in the manner referred to herein.
3. Specifically, the Association provides submissions in relation to the following issues concerning the HRT Act:-
  - 3.1. the posthumous collection, storage and use of gametes, embryos, including the consent required, conditions for use, and any impact on other legislations such as the *Human Tissue and Transplant Act 1982 (WA)*, *Artificial Conception Act 1985 (WA)*, *Births Deaths and Marriages Registration Act 1998 (WA)*, *Administration Act 1903 (WA)* and *Family Provision Act 1972(WA)*.
  - 3.2. The rights to storage of gametes and embryos and:-
    - 3.2.1. Respective rights upon separation or divorce, or on the death or the physical or mental incapacity of an individual, or one or both members of a couple;
    - 3.2.2. Rights of third parties such as subsequent spouses, and the rights of other relatives in relation to stored gametes and embryos.
  - 3.3. The impact of the HRT Act of relevant Commonwealth and State legislation, and aspects of legislation of other jurisdictions which could be incorporated into the HRT Act.
  - 3.4. The management of information and the Reproductive Technology Registers, including:-
    - 3.4.1. Confidentiality of information;
    - 3.4.2. Access to information about donation, genetic parentage and donor conception; and
    - 3.4.3. The voluntary register (donor-assisted conception)
4. Further, the Association provides submissions in relation to the following issues concerning the Surrogacy Act:-
  - 4.1. The interaction with the HRT Act;
    - 4.1.1. The impact of the *Surrogacy Act 2008 (WA)* of relevant Commonwealth and State legislation and aspects of legislation of other jurisdictions, which could be incorporated into the Act, including consideration of harmonisation of domestic surrogacy legislation;

- 4.1.2. The need for continued prohibition on commercial surrogacy and a comparative analysis of commercial surrogacy in other jurisdictions; and
- 4.1.3. Whether there should be a process of review or appeal of decisions made (by Council) under the *Surrogacy Act 2008 (WA)*.

### **Validity Generally**

5. In August 2017, Regulation 5 of the *Sex Discrimination Regulations 1984 (Cth)* was repealed. That regulation provided exemptions for sex discrimination under the HRT Act and the *Surrogacy Act 2008 (WA)*.
6. Absent the exemption under section 40(2B) of the *Sex Discrimination Act 1984 (Cth)*, any provisions under the *Surrogacy Act 2008 (WA)* or HRT Act which discriminate on the basis of sexual orientation are inconsistent with section 5A of the *Sex Discrimination Act 1984 (Cth)* and therefore those provisions are, the Association submits, invalid pursuant to section 109 of the *Commonwealth of Australia Constitution Act 1901* (“the Constitution”).
7. Further, section 6 of the *Artificial Conception Act 1985 (WA)* breaches the provisions of Section 109 of the Constitution.
8. Such discrimination on the grounds of gender and sexual orientation cannot be justified since the passage of the *Marriage Equality Act* in late 2017.

### **The posthumous collection, storage and use of gametes, embryos, including the consent required, conditions for use, and any impact on other legislations**

9. The *Human Tissue and Transplant Act 1982 (WA)* (“HTT Act”) provides for the donation of Human Tissue in the event of death.
10. Section 22 of that Act provides for the posthumous extraction of tissue from bodies in a hospital if for scientific, medical or research purposes.
11. Prior to 2013, an urgent application was required to the Supreme Court for an Order enabling the extraction of sperm under the Act.
12. In *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C*<sup>1</sup> Justice Edelman held that the process available by virtue of Section 22 did not require the leave of the Court, but rather the use to which the extracted material could be put did require direction.
13. However, there is currently no legislative framework which permits the use of gametes if the gamete provider is deceased.
14. In fact, pursuant to a Direction issued by the Chief Executive Officer of the Department of Health pursuant to the HRT Act, it is not lawful to knowingly use or authorise the use of gametes after the death of the gamete provider within Western Australia
15. However, the export of the gametes extracted pursuant to Section 22 of the HTT Act is not an issue with which the Reproductive Technology Council of Western Australia has a proper interest<sup>2</sup> on the basis that this was not donated tissue, but rather tissue properly extracted after death.
16. The Association recommends that consideration be given to:
  - 16.1. a review of the current direction of the CEO of the Department of Health as to the posthumous use of the gametes; and,

<sup>1</sup> [2013] WASC 3; particularly paragraph 23

<sup>2</sup> *GLS & Russell-Weisz* [2018] WASC 79

- 16.2. the adoption of a set of guidelines to be applied in cases where application is made for the post-humous use of those gametes.

**Rights to storage of gametes and embryos including: -**

- (a) **Rights upon separation or divorce, or the death or the physical or mental incapacity of an individual, or one or both members of a couple; and**
- (b) **Rights of third parties such as subsequent spouses, and the rights of other relatives.**
17. Currently, the HRT Act fails to provide a form of consent which requires parties to consider the vicissitudes of life namely separation, divorce, permanent disability and disablement, or death.
18. Further, the HRT Act fails to provide a legislative framework on the ownership of genetic material following the vicissitudes referred to above.
19. In Family Court Decisions *G & G*<sup>3</sup> and *Piccolo*<sup>4</sup>, an issue arose as to the manner in which embryos created during an intact marriage should be dealt with in the event of divorce.
20. In *G*:
- 20.1. The parties had, during their marriage, arranged for the production of embryos using genetic material from each of them.
- 20.2. The parties had a written agreement with the fertility agreement to the effect that in the event of separation or divorce, the embryos would be allowed to succumb.
- 20.3. At the time of separation, the parties had not used the embryos, which remained in storage at the clinic.
- 20.4. Upon separation the husband sought to retain the embryos.
- 20.5. The wife opposed the application.
- 20.6. In making its decision, the Court looked for the common intention of the parties, and held that the parties' written agreement with the service provider, and the opposition of the wife, that the embryos should be allowed to succumb.
- 20.7. The matter was dealt with by the court by reference to Section 114 of the *Family Law Act 1975* (Cth).
21. In *Piccolo*:
- 21.1. The parties had, during their marriage, undergone a surrogacy arrangement in British Columbia, Canada.
- 21.2. There was one child born of the arrangement, in 2012, and the fertility clinic held two further embryos in storage.
- 21.3. The embryos contained the genetic material of the father and an egg donor.
- 21.4. The parties' written agreement with the fertility clinic included provision for the ownership of the remaining embryos in the event of divorce, namely:
- 21.5. That the parties were to provide a form of consent as to the transfer of ownership in the event of divorce; and,
- 21.6. The laws of British Columbia were to govern any dispute as to the interpretation of the agreement.

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<sup>3</sup> [2007] FCWA 80

<sup>4</sup> [2017] FCWA 167

- 21.7. The *Assisted Human Reproduction Act 2004* (BC) (the AHRA) provides, at Section 8(3), that in the event of divorce and non-agreement as to the future of the embryos, ownership of any genetic material will pass to either of the parties pursuant to an agreement between them. In the absence of agreement, or renewal of the storage contract each year, ownership of the embryos would revert to the clinic and they would be enabled to succumb.
- 21.8. The AHRA is supported by Regulations as to the administration of the Act.
- 21.8.1. Section 8(3) of the AHRA provides
- No person shall make use of an in vitro embryo for any purpose unless the donor has given written consent, in accordance with the regulations, to its use for that purpose.
- 21.8.2. Regulation 10(3) of the AHRR provides
- In the case of an in vitro embryo created using human reproductive material from only one of the individuals in the couple that was the donor of the embryo at the time it was created, that individual becomes the donor of the embryo under paragraph (1)(a) if, before the use of the embryo, the individual is no longer a spouse or common-law partner in the couple.
- 21.8.3. The AHRA provides that the cryo-preserved embryos held by the VFC cannot be used without the consent of the donors to the production of the embryos. The AHRR provides that where only one party to a relationship has provided the genetic material to the production of the embryos, and the relationship has broken down, then the donor only is required to give consent to the use of the embryos.
- 21.9. In determining the matter, Justice O'Brien found that the Agreement between the parties to submit to BC Law, and the application of Regulation 10(3), meant that in the absence of agreement to the contrary, ownership of the embryos passed to the husband as he was the only party who could give the necessary consent for the use of the embryos.
22. There is no equivalent to Section 8 or Reg 10 of the AHRA in any legislation in Australia.

### **Recommendation**

23. Consideration be given to the adoption of Regulations like those in the AHRA and AHRR as it relates to the ownership of genetic material on separation and/or divorce in Western Australia.
24. Consideration be given to the adoption of a form of consent which requires all involved parties to consider, and give consent too, the arrangements nominated in the event of separation, permanent disability of disablement or death.

### **The management of information including the confidentiality of same and the access to information about donation, genetic parentage and donor conception.**

25. At present, there is voluntary register for donor assisted conceptions<sup>5</sup> which is not necessary to join.
26. The current mechanism for sharing of information is possible where both the donor child and the donor parent have given their consent to a linking on the voluntary register.

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<sup>5</sup> [http://www.healthywa.health.wa.gov.au/Articles/S\\_T/The-Voluntary-Register](http://www.healthywa.health.wa.gov.au/Articles/S_T/The-Voluntary-Register) - accessed on 3 April 2018

27. The Association recognises that the path to finding information about their genetic background by a child born of a donor conception is governed by the voluntary nature of the donor register and the willingness of the donor and the child to share information.
28. The Association notes there may be very good reasons, including the sharing of medical information, that may make a more formal register appropriate, albeit with some controls over access to that information by each party.

## **THE SURROGACY ACT**

### **Validity**

29. As the Association refers to above in relation to the HRT Act, in August 2017, Regulation 5 of the *Sex Discrimination Regulations* 1984 (Cth) was repealed. That regulation provided exemptions for sex discrimination under the HRT Act and the Surrogacy Act.
30. Absent the exemption under section 40(2B) of the *Sex Discrimination Act* 1984 (Cth), any provisions under the *Surrogacy Act* 2008 (WA) or HRT Act which discriminate on the basis of sexual orientation are inconsistent with section 5A of the *Sex Discrimination Act* 1984 (Cth) and therefore those provisions are, the Association submits, invalid pursuant to section 109 of the Constitution.

### **Access to Surrogacy**

#### *Same Sex Couples & LGBTI*

31. The Association submits that allowing same sex couples to access surrogacy arrangements on the same terms as heterosexual couples is consistent with Australia's human rights obligations.
32. The exclusion of access to surrogacy on the basis of sexual orientation or marital status is inconsistent with Australia's international private law obligations and Federal discrimination laws.
33. The Association refers specifically to International Covenant on Civil and Political Rights:-  
Article 2:
  1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
  2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
  3. Each State Party to the present Covenant undertakes:
    - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
    - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

34. In 2013, the *Sex Discrimination Act* (Cth) was amended to provide protection against discrimination on the basis of sexual orientation, gender identity and intersex status. At the same time, subsection 40(2B) was inserted to provide an exemption for conduct that would otherwise be discrimination on the grounds of sexual orientation (section 5A), if the conduct is in direct compliance with a Commonwealth, State or Territory law prescribed by regulations.
35. At the time of the 2014 review of the *Surrogacy Act 2008* (WA), there existed an exemption under the Sex Discrimination Regulations.
36. Compilation 7 of the *Sex Discrimination Regulations 1984* (Cth) at regulation 5 provided<sup>6</sup>:

**5. Exemption for things done in direct compliance with prescribed laws**

- (1) For the purposes of subsection 40(2B) of the Act, the following laws are prescribed:

- (a) the *Human Reproductive Technology Act 1991* (WA);
- (b) the *Surrogacy Act 2008* (WA).

Note: Subsection 40(2B) provides for an exemption, in relation to anything done by a person in direct compliance with a prescribed law, from Divisions 1 and 2 of Part II (prohibition of discrimination) of the Act, as applying by reference to:

- (a) section 5A (sexual orientation); or
- (b) section 5B (gender identity); or
- (c) section 5C (intersex status).

- (2) **This regulation is repealed at the start of 1 August 2017.**

(Emphasis added)

37. The Explanatory Memorandum to the *Sex Discrimination Amendment (Exemptions) Regulation 2016* made specific reference to Western Australia as follows:

The Legislative Instrument extends the prescription of two specific Western Australian Acts (the *Human Reproductive Technology Act 1991* (WA), and *Surrogacy Act 2008* (WA)) for a further period, until 31 July 2017. This means that anything done by a

<sup>6</sup> Compilation 7 was registered on 22 September 2016. Previous compilations provided a more general exemption to the states: r. 5: “Exemption for things done in compliance with prescribed laws (1) For subsection 40(2B) of the Act, all laws of the States and the Territories, as in force on [date], are prescribed”.

person in direct compliance with those Acts will be exempted from the protection from discrimination on the grounds of sexual orientation, gender identity or intersex status in the Sex Discrimination Act during this period.

Western Australia has indicated that a further extension of time is required to facilitate the amendment of the Human Reproductive Technology Act and Surrogacy Act. The amendment is therefore aimed at achieving the legitimate objective of providing additional time for Western Australia to amend laws to ensure consistency with the new grounds of protection against discrimination.

The limitation is based on reasonable and objective criteria as it only extends two prescribed laws in force at 1 August 2013, which ensures any laws passed after that date must comply with the existing protections from discrimination on the grounds of sexual orientation, gender identity and intersex status. The limitation is proportionate as it is for a short time period, and no more restrictive than required. A period of less than 12 months may not be sufficient to allow Western Australia time to amend its laws. The Government does not propose any further extensions of this exemption after 31 July 2017.

38. As from 1 August 2017, Regulation 5 of the *Sex Discrimination Regulations* 1984 (Cth) was repealed.
39. South Australia has enacted the *Statutes Amendment (Surrogacy Eligibility) Act* 2017, which, among other revisions and reforms, made surrogacy available to same-sex couples.
40. It is now the case that Western Australia is the only jurisdiction in Australia<sup>7</sup> which requires that arranged parents are heterosexual.
41. The Association submits that, pursuant to section 109 of the Constitution, any provisions which discriminate on the basis of sexual orientation are invalid because of their inconsistency with federal legislation.

#### *Single Men*

42. Surrogacy is available for single women in all states except South Australia.
43. It is not available to single men in Western Australia, South Australia or the ACT.
44. Surrogacy being accessible only to couples (whether heterosexual or same-sex) may be discrimination on the basis of marital status.
45. Refusal of access to IVF has been considered by the Supreme Court in Victoria and found to be discrimination on the basis of marital status and in contravention with section 22 of the *Sex Discrimination Act* 1984 (Cth)<sup>8</sup>
46. Access to surrogacy for single women has been debated in the state parliament in some depth<sup>9</sup>. There were numerous unsuccessful attempts to amend the Bill through 2007 and 2008 in order to exclude single women from being eligible to be intended parents<sup>10</sup>.

<sup>7</sup> that legislates regarding surrogacy. No legislation exists in the Northern Territory

<sup>8</sup> *McBain v State of Victoria* [2000] FCA 1009, per Sundberg, J

<sup>9</sup> Parliamentary Debates, Legislative Assembly, 4 September 2007, 4765–78. See also Western Australia, Parliamentary Debates, Legislative Council, 19 June 2008, 4173–82.

<sup>10</sup> Per Jenni Millbank, “*The New Surrogacy Parentage Laws in Australia: Cautions regulation or ‘25 Brick Walls’?*” Melbourne University Law Review Volume 35, footnote 97

47. The Association submits that, pursuant to (and consistent with) Section 109 of the Constitution, any provisions which discriminate on the basis of marital status are invalid because of their inconsistency with federal legislation.

*Advertising Willingness to Enter into a Surrogacy Arrangement*

48. All states in Australia which have surrogacy legislation prohibit advertising willingness to enter into a commercial surrogacy arrangement or publishing with the intention of inducing a person to enter into a commercial arrangement.
49. In New South Wales<sup>11</sup>, South Australia<sup>12</sup>, Tasmania<sup>13</sup>, and Western Australia<sup>14</sup> either permit or do not prohibit advertising willingness to enter into an altruistic arrangement.
50. There are a number of member-only online forums, such as closed Facebook groups and Families through Surrogacy which enable potential surrogates and intending parents to connect or publish their willingness to enter into a surrogacy arrangement.
51. Direction 9 of the *Surrogacy Directions 2009 (WA)* prohibits a clinic from actively recruiting a woman to be a birth mother but does permit a licence to introduce a prospective birth mother who has approached the licensee to prospective arranged parents. There does not appear to be any guidance as to the meaning of 'actively recruit'.
52. The Association's submission is that consideration should be given to the establishment of a central register of women willing to act as a surrogate mother.

**The impact of the Surrogacy Act of relevant Commonwealth and State legislation and aspects of legislation of other jurisdictions, which could be incorporated into the Act, including consideration of harmonisation of domestic surrogacy legislation;**

53. Currently, there are inconsistencies in the *Family Law Act 1975 (Cth)* and the *Family Court Act 1997 (WA)* as they each relate to the presumptions of parentage.
54. Section 60H of the *Family Law Act 1975 (Cth)* provides that where a child is born by way of any artificial reproductive process:
- 54.1. The woman who gives birth to the child is presumed to be the child's mother;
- 54.2. If the woman was married or in a de facto relationship, then her husband or partner is the father of the child;
- 54.3. The man who provides the sperm for the process is presumed not to be the father of the child;
55. Section 69VA of the *Family Law Act 1975 (Cth)* provides for the court to make a Declaration as to parentage of a child.
56. The difficulty is that a strict reading of Section 60H (1)(d) precludes the Court from applying the presumption that the sperm donor father is a parent, even if the intention was for the child to become a member of the sperm donor's family.
57. The Court has used many approaches to address this issue, particularly in cases where there has been an informal surrogacy arrangement.

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<sup>11</sup> S10(2) *Surrogacy Act 2012 (NSW)*

<sup>12</sup> S10FB *Family Relationships Act 1975 (SA)* provides for establishment of a Surrogate Register of women willing to act as a surrogate mother.

<sup>13</sup> The *Surrogacy Act 2012 (TAS)* is silent on advertising willingness to enter into an altruistic arrangement but advertising for commercial arrangements is captured and therefore prohibited by s41(2)

<sup>14</sup> S10 of the *Surrogacy Act 2008 (WA)* includes an offence for publishing willingness to enter into a surrogacy arrangement that is for reward but is silent on advertising willingness to enter into an altruistic arrangement



58. In *Farnell & Chanbua*<sup>15</sup>, the Court came to the view that in situations where there has been either an informal surrogacy or ART process in Australia, or where, as in that case, the child is born of an international commercial surrogacy, Section 69VA of the FLA cannot be relied upon to seek a parentage Order on behalf of the sperm donor father.
59. One of the issues identified in *Farnell* was the inconsistency between the concept of “parenthood” and “family member” for the purposes of citizenship by descent, and the *Family Law Act 1975 (Cth) /Artificial Conception Act 1985 (WA)* concept of the same terms (see paragraphs 340, 350 in particular).
60. The Court in *Farnell* provided a useful summary of cases to that date as to the approach of Courts to the issue of parentage<sup>16</sup>, including the approach of Justice Crisford in *Blake*<sup>17</sup> where Her Honour had noted the difficulties presented by Section 60H of the *Family Law Act 1975 (Cth)* and Sections 6 – 7 of the *Artificial Conception Act 1985 (WA)* but had made an Order declaring the sperm donor father of the child in question to be a parent of the child.
61. *Farnell* fell for determination under the *Family Court Act 1997 (WA)*, as the Applicants were not married to the surrogate or her partner.
62. The *Family Court Act 1997 (WA)* is silent as to the presumptions of parentage in cases of artificial reproductive processes.
63. Instead the parentage of a child born of such process of a de facto couple in Western Australia is determined by reference to the *Artificial Conception Act 1985 (WA)*.
64. Section 6 of the *Artificial Conception Act 1985 (WA)* provides that where a woman undergoes an artificial fertilisation process with the consent of her husband (defined in Section 3 to include a de facto husband) then the husband (including any de facto husband) is the father of the child.
65. Section 7(2) of the *Artificial Conception Act 1985 (WA)* provides that where a man (not the woman’s husband or de facto husband) provides sperm for the purposes of the procedure that man:
- 65.1. is conclusively presumed not to have caused the pregnancy; and,
- 65.2. is not the father of any child born as a result of the pregnancy.
66. “Parent” means mother or father, and in some circumstances a step-parent.
67. The Association’s position is that there will be benefit in a consistent approach to the issue of parentage between:
- 67.1. The *Family Law Act 1975 (Cth)*;
- 67.2. The *Family Court Act 1997 (WA)*; and,
- 67.3. The *Artificial Conception Act 1985 (WA)*
68. Attached is a summary of the legislative framework as to surrogacy.

<sup>15</sup> [2016] FCWA 17, see also see also *Bernieris & Anor, Dhovel & Anor* (2017) 93-793 – where adoptive step parents unsuccessfully appealed a decision by the Federal Circuit Court to not make a declaration that the step parent was entitled to a parentage Order by virtue of Section 69VA of the Act

<sup>16</sup> See in particular the decisions in *Dudley & Chedi* [2011] FamCA 502 (per Ryan J) and *Dennis & Anor & Pradchapet* [2011] FamCA 123 (per Watts J) – these cases involved three children of the same couple, born of two surrogates in Thailand on the same day and – where a parentage Order was made by Ryan J as it related to two of the children, Watts J refused to make a parentage Order as it related to the third child, on the basis that Section 69VA did not allow such a Order to be made

<sup>17</sup> *Blake & Anor* [2013] FCWA 1

### **Whether there should be a process of review or appeal of decisions made (by the Reproductive Technology Council, “RTC”) under the Surrogacy Act**

69. At present the only avenue of review of a decision of the RTC is by way of Judicial Review of a decision to the Supreme Court, and expensive and often prohibitive process.
70. The RTC is not required by law to provide either an opportunity to be heard before a decision is made, or to give substantial reasons for that decision.
71. The Association’s submission is that consideration should be given to the establishment of a cost-effective avenue for review of a decision of the RTC.
72. WA already has an established State Administrative Tribunal tasked with consideration of complex social issues, such as the protection of vulnerable persons, guardianship and financial management.
73. Both the SAT and the Administrative Appeals Tribunal have avenues for Appeal on questions of law to an appropriate Court.
74. Consideration should be given to a similar review process being implemented in respect to decisions of the RTC.
75. At present, the HRT Act only provides an avenue for review of RTC Decisions which relate to “a decision to suspend or revoke a licence under section 53ZG — the person who was the licence holder immediately before the suspension or revocation”<sup>18</sup>. The *Surrogacy Act 2008 (WA)* is silent about a review or appeal of a decision by the RTC to refuse approval of a Surrogacy Arrangement Application.
76. Victoria is the only other state which has a government body which oversees the surrogacy process and which provides for a pre-approval of a surrogacy arrangement before treatment begins.
77. The *Assisted Reproductive Treatment Act 2008 (VIC)* contains detailed provisions about the process of making an application to VART and it provides a means of seeking a review of a VARTA decision.
78. The Association recommends a similar process be implemented in Western Australia for the review of decisions of the RTC and in particular with reference to Sections 89 to 98 of the *Assisted Reproductive Treatment Act 2008 (VIC)*.

### **The Cost of Surrogacy**

79. The current provisions of the *Surrogacy Act 2008 (WA)* create a system of philanthropic surrogacy rather than altruistic surrogacy.
80. This was not the intention of the legislators.
81. In the Explanatory Memorandum<sup>19</sup> it is stated that:

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

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<sup>18</sup> S53ZL(e)

<sup>19</sup> *Explanatory Memorandum Surrogacy Bill 2008 (WA)*, page 2

*pregnancy clothing and payment for life insurance coverage during the pregnancy*".

82. In the second reading speech, the limit on reimbursement of expenses was described as follows:

"Regulation of surrogacy arrangements: The bill provides for a range of offences in connection with surrogacy arrangements. These are —

making a surrogacy arrangement that provides for payment or other reward to the birth mother, apart from payment of reasonable expenses of types set out in the bill that are incurred in connection with the conception, pregnancy and birth of the child"<sup>20</sup>

83. On the one hand, Parliament made clear that the birth mother should not be out of pocket; but on the other, immediately limited her 'reasonable expenses' to those associated with the conception, pregnancy or birth.
84. All states in Australia which have legislation provide some guidance as to the 'reasonable expenses' which can be claimed.
85. Some legislation provides guidance or examples of expenses that are deemed 'reasonable', others are not specific (NS). The table below is an adaptation of the one provided in a paper by Stephen Page and Alexandra Harland, as she then was<sup>21</sup>

State	Reference limited to birth mother's reasonable expenses	Medical expenses (surrogate)	Medical expenses (child)	Health insurance (surrogate)*	Disability insurance (surrogate)*	Life insurance (surrogate)*	Counselling expenses	Legal expenses	Lost income - limited to 2 months around birth or for medical reasons	Other reasonable costs
ACT	✗	✓	✓	NS	NS	NS	NS	NS	NS	✓
NSW	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
QLD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
SA	✓	✓	✓	NS	NS	NS	✓	✓	NS	✓
VIC	✓	✓	✓	✓	NS	NS	NS	✓	NS	✓
TAS	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓
WA	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓

86. Currently, two possible consequences may flow from an arrangement which provides for expenses which go beyond the definition of 'reasonable':

86.1. either those provisions would be void or voidable and therefore not recoverable as part of the only enforceable provisions of the arrangement; or

86.2. the parties to the arrangement may be deemed to have entered into a commercial arrangement, thereby committing a criminal offence.

87. Examples of expenses which might be deemed to go beyond the defined 'reasonable expenses' under the *Surrogacy Act 2008 (WA)*:

87.1. Loss of annual leave for either the birth mother or the birth father;

<sup>20</sup> Extract from Hansard [COUNCIL - Wednesday, 12 November 2008] p153b-155a Hon Norman Moore, pg. 2

<sup>21</sup> *Tiptoe through the minefield: A State by State comparison of Surrogacy laws in Australia* (2011) 1 Fam L Rev 198. Alexandra Harland was appointed as a Judge of the Federal Circuit Court of Australia in April 2013. Statutory references within the table are: *Parentage Act 2004 (ACT)* s40; *Surrogacy Act 2010 (NSW)* s7, 8, 9; *Surrogacy Act 2010 (QLD)* s10,11; *Family Relationships Act 1975 (SA)* s10HA(2a)(i); *Assisted Reproductive Treatment Act 2008 (VIC)*, s 44; *Status of Children Act 1974 (VIC)*, ss 22(1)(d), 22(4); *Assisted Reproductive Treatment Regulations 2009 (VIC)* - reg 10; *Surrogacy Act 2012 (TAS)* s9; *Surrogacy Act 2008 (WA)* s6

- 87.2. Loss of income;
  - 87.3. Child care cover while the birth mother attends appointments;
  - 87.4. Home help – cleaner/housekeeper, au pair, nanny;
  - 87.5. Alternative therapy costs – pregnancy massage, attendance on complimentary medical services such as nutritionist, ante-natal classes, pregnancy exercise classes etc;
  - 87.6. Post-birth support – psychological, medical, physical;
  - 87.7. Travel costs for birth family if birth mother travels long distances for treatments or birth; and
  - 87.8. Business class travel, 5-star accommodation (there may be a subjective test of what is ‘reasonable’)
88. Post-birth complications from pregnancy could include, for the birth mother, conditions related to the:
- 88.1. Cardiac system;
  - 88.2. Respiratory system;
  - 88.3. Liver and Alimentary Tract;
  - 88.4. Obstetric Disorders;
  - 88.5. Urinary System;
  - 88.6. Hematologic;
  - 88.7. Endocrine System;
  - 88.8. Venereal Disease;
  - 88.9. Viral Infections;
  - 88.10. Bacterial Infections;
  - 88.11. Collagen Diseases;
  - 88.12. Diseases of the Skin;
  - 88.13. Diseases of the Nervous System;
  - 88.14. Psychological well-being of the birth mother such as post-natal depression;
  - 88.15. Psychological well-being of the birth mother’s children or partner arising from the surrogacy arrangement; and
  - 88.16. Miscellaneous Complications.

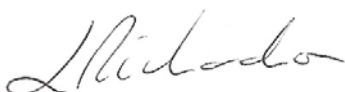
### **The Need for Continued Prohibition of Commercial Surrogacy**

- 89. All states in Australia prohibit commercial surrogacy.
- 90. The Association supports a continued prohibition on commercial surrogacy, provided that this does not have the inadvertent effect of exploiting ‘altruistic’ surrogates who engage in approved domestic arrangements.
- 91. The Association’s position is that, for the reasons set out above:
  - 91.1. the current surrogacy legislation in WA requires amendment to ensure consistency and compliance with obligations not to discriminate against persons by reason of gender, sexual orientation or any other reason; and,
  - 91.2. may require amendment to provide clarity of the expenses that can legitimately be met by the intended parents under a surrogacy arrangement without risk of offending the non-commercial nature of a surrogacy.

92. The use of the term “commercial” when describing a surrogacy arrangement has the potential to divert attention from the reality of:
- 92.1. a potential surrogate being unclear as to the legitimate payments she might expect; and,
  - 92.2. a potential intended family being unclear as to the expenses they should reasonably be expected to meet.
93. Currently reimbursement to a potential surrogate mother for lost wages, time off work or unanticipated health issues arising from the pregnancy are not adequately dealt with by the legislation.
94. Clarification of these issues does not mean that the surrogacy process should or will descend into a commercial arrangement. It will provide greater guidance to parties who are involved in the process.

### **Recognition of overseas surrogacy arrangements**

95. The Family Court of Australia has recently been asked to make Orders either:
- 95.1. pursuant to the Hague Convention on Recognition and Enforcement of Foreign Judgments (the Convention) recognising parenting and parentage Orders made in foreign States in surrogacy arrangements; or
  - 95.2. under Section 70G, 70h and 70J of the *Family Law Act 1975* (Cth) (providing for the registration of overseas child orders<sup>22</sup>).
96. This process is considered by the Association to be somewhat protective of the integrity of the overseas arrangements:
- 96.1. to register under the Convention, the originating State must be a party to the Convention;
  - 96.2. to secure an Order under the *Family Law Act 1975* (Cth) the Court must be satisfied that the Orders are in the best interests of the child



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 3 April 2018

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<sup>22</sup> See for instance *Carlton & Bisset* (2013) 49 FamLR 503, *Re Grosvenor* [2016] FamCA 366 and *Halvard & Anor* [2016] FamCA 1051

## ANNEXURE 1

<p><b>New South Wales</b></p>	<p><b><i>Surrogacy Act 2010</i></b></p> <ul style="list-style-type: none"> <li>• Commercial surrogacy, advertising for surrogate prohibited</li> <li>• Intended parents can be married, de facto (including same sex) or single</li> <li>• Surrogate and intended parents must be at least 25 years (can be lowered to 18 for intended parents in exceptional circumstances)</li> <li>• Intended parents must be NSW resident, surrogate need not be</li> <li>• Surrogate/birth mother (and partner) is parent until parentage order is made</li> </ul>	<ul style="list-style-type: none"> <li>• Section 10</li> <li>• Section 5(6)</li> <li>• Sections 27 to 29</li> <li>• Section 32</li> <li>• Section 39</li> </ul>
<p><b>Victoria</b></p>	<p><b><i>Assisted Reproductive Treatment Act 2008</i></b></p> <ul style="list-style-type: none"> <li>• Commercial surrogacy and advertising for surrogate or to be surrogate prohibited</li> <li>• Intended mother must be infertile, unable to carry pregnancy/give birth or at medical risk from pregnancy</li> <li>• Intended parents can be married, de facto (including same sex) or single</li> <li>• Surrogate must be at least 25 years and intended parents at least 18 years</li> <li>• Fertility treatment must occur in Victoria – intended parents must be Victorian residents, surrogate need not be</li> <li>• Surrogate/ birth mother (and partner) is presumed to be parent until parentage order is made</li> </ul>	<ul style="list-style-type: none"> <li>• Section 45</li> <li>• Section 40</li> <li>• Section 40(1)(b)</li> <li>• Section 40</li> <li>• Section 19 <i>Status of Children Act 1974</i> (Vic)</li> </ul>
<p><b>Queensland</b></p>	<p><b><i>Surrogacy Act 2010</i></b></p> <ul style="list-style-type: none"> <li>• Commercial surrogacy and advertising for/as surrogate prohibited</li> <li>• Intended parents can be married, de facto (including same sex) or single</li> <li>• Surrogate and partner and intending parents must be 25 years (except in exceptional circumstances)</li> </ul>	<ul style="list-style-type: none"> <li>• Section 7(1)</li> <li>• Section 22(f),(g) and 23</li> <li>• Section 22(g)</li> <li>• Section 17</li> </ul>

	<ul style="list-style-type: none"> <li>• Fertility doctor and surrogate can be outside jurisdiction – intending parents must be resident in Queensland</li> <li>• Surrogate (and partner) is parent until parentage order is made</li> </ul>	
<b>South Australia</b>	<p><b><i>Family Relationships Act 1975</i></b></p> <ul style="list-style-type: none"> <li>• Commercial surrogacy and advertising for/as surrogate prohibited</li> <li>• Surrogacy available only to married or de facto heterosexual couples in relationship for three years – i.e. not available to singles</li> <li>• Surrogate (and partner) and intended parent/s must be at least 18 years</li> <li>• Intended parents, but not surrogate, must be residents of SA</li> <li>• Surrogate (and partner) is parent until parentage order is made</li> </ul>	<ul style="list-style-type: none"> <li>• Section 10H</li> <li>• Section 10HA</li> <li>• Section 10HA</li> <li>• Section 10HA</li> <li>• Sections 7, 8, 10C, 10D and 10E</li> </ul>
<b>Western Australia</b>	<p><b><i>Surrogacy Act 2008</i></b></p> <ul style="list-style-type: none"> <li>• Surrogacy arrangement must be approved by WA Reproductive Technology Council</li> <li>• Commercial surrogacy prohibited and advertising to be a surrogate is an offence</li> <li>• Intended parents can be married, heterosexual couple or single woman (single men and homosexual couples excluded)</li> <li>• Intended mother must be infertile, unable to carry pregnancy/give birth or medical risk to mother or child from pregnancy</li> <li>• Surrogate generally required to have previously given birth to live child</li> <li>• Surrogate or surrogate's partner must be over 25, intended parents must be over 18 years</li> <li>• Intended parents must be resident in WA but surrogate need not</li> <li>• Surrogate (and partner) is parent until parentage order is made</li> </ul>	<ul style="list-style-type: none"> <li>• Section 16</li> <li>• Sections 8 and 10</li> <li>• Sections 17 to 19</li> <li>• Section 17</li> <li>• Sections 17 – 19</li> <li>• Section 17</li> <li>• Sections 7 to 5</li> </ul>
<b>Tasmania</b>	<p><b><i>Surrogacy Act 2012</i></b></p>	<ul style="list-style-type: none"> <li>• Section 5</li> </ul>

	<ul style="list-style-type: none"> <li>• Intended parents can be married, de facto (including same sex) or single</li> <li>• Intended parents and surrogate must be ordinarily resident in Tasmania</li> <li>• Surrogate must be 25 years and the intended parent/s at least 21 years</li> <li>• Commercial surrogacy prohibited and advertising to be a surrogate is an offence</li> <li>• Surrogate (and partner) is parent until parentage order is made</li> </ul>	<ul style="list-style-type: none"> <li>• Section 16(f)</li> <li>• Section 16</li> <li>• Section 41</li> <li>• Section 26</li> </ul>
<b>Australian Capital Territory</b>	<p><b><i>Parentage Act 2004</i></b></p> <ul style="list-style-type: none"> <li>• Altruistic surrogacy available to married or de facto couples only</li> <li>• Commercial surrogacy prohibited and advertising to be a surrogate is an offence</li> <li>• Same sex parents able to be parents of a child providing one is the child's genetic parent</li> <li>• Surrogate and both intended parents must be 18 years</li> <li>• Intended parents must be resident of ACT but surrogate need not</li> <li>• Surrogate (and partner) is parent until parentage order is made</li> </ul>	<ul style="list-style-type: none"> <li>• Section 24</li> <li>• Section 43</li> <li>• Section 24</li> <li>• Sections 7, 8, 9 and 11</li> </ul>
<b>New South Wales</b>	<p><i>Surrogacy Act 2010</i></p> <p><i>Types of Surrogacy Arrangements</i></p> <ul style="list-style-type: none"> <li>• <i>Pre-conception surrogacy arrangement - where woman agrees to become (or to try to become) pregnant and transfer parentage</i></li> <li>• <i>Post-conception surrogacy arrangement - where a woman agrees that parentage of a child be transferred to another person/s</i></li> <li>• <i>Commercial surrogacy arrangement - Where a consensual transfer of parentage occurs for the provision of a fee, reward or other material benefit/advantage</i></li> <li>• <i>Altruistic surrogacy arrangement - Where only costs of surrogacy are reimbursed</i></li> </ul>	<p>Section</p> <p>Section 5</p> <p>Section 5</p> <p>Section 9(1)</p>



	<p><i>Compensation available</i></p> <ul style="list-style-type: none"> <li><i>Obligation to pay/reimburse mothers' surrogacy costs is enforceable only in cases of preconception surrogacy arrangements</i></li> </ul> <p><i>Mandatory preconditions to making a parentage order</i></p> <ul style="list-style-type: none"> <li><i>Best interests of the child are paramount</i></li> <li><i>Surrogacy arrangement may only be altruistic</i></li> <li><i>The surrogacy arrangement must be a pre-conception surrogacy arrangement</i></li> <li><i>Intended parent must be single or part of a (married or de facto) couple</i></li> <li><i>The child must be under 18 and the court must take into account any views of a sufficiently mature child</i></li> <li><i>Birth mother and intended parent/s must be at least 18 at time of agreement</i></li> <li><i>Intended parents under 25 must demonstrate sufficient maturity to understand social and psychological implications of parentage order</i></li> </ul> <p><i>Discretionary preconditions to making parentage order</i></p> <ul style="list-style-type: none"> <li><i>Birth mother to be at least 25 at time of agreement</i></li> <li><i>Medical or social need for surrogacy</i></li> <li><i>The birth parent and each intended parent consents</i></li> <li><i>The applicants live in NSW</i></li> <li><i>The child lives with the applicant parents</i></li> <li><i>A written surrogacy arrangement exists</i></li> <li><i>Each of the parties has obtained counselling and legal advice</i></li> <li><i>Information for Central Register provided</i></li> <li><i>Birth of the child has been registered</i></li> </ul>	<p>Section 9(2)</p> <p>Sections 6(2)) and 7</p> <p>Section 22</p> <p>Section 23</p> <p>Section 24</p> <p>Section 25</p> <p>Section 26</p> <p>Sections 27 and 28</p> <p>Section 29</p> <p>Section 27</p> <p>Section 30</p> <p>Section 31</p> <p>Section 32</p> <p>Section 33</p> <p>Section 34</p> <p>Sections 35 and 36</p> <p>Section 37</p> <p>Section 38</p>
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<p><b>Victoria</b></p>	<p><i>Assisted Reproductive Treatment Act 2008</i></p> <p><i>Types of surrogacy arrangements</i></p> <ul style="list-style-type: none"> <li>• <i>Assisted Reproductive Treatment (ART) - registered ART provider may carry out procedure per surrogacy arrangement once approved by the Patient Review Panel</i></li> </ul> <p><i>Compensation available</i></p> <ul style="list-style-type: none"> <li>• <i>Aside from prescribed costs incurred as a direct consequence of surrogacy arrangement, surrogate can receive no material benefit or advantage</i></li> </ul> <p><i>Preconditions to surrogacy arrangement</i></p> <ul style="list-style-type: none"> <li>• <i>All parties have received counselling</i></li> <li>• <i>Patient Review Panel must be satisfied a doctor is of the view that the intended parent is unlikely to become pregnant or carry a child to term or that pregnancy creates a life risk for the mother or child</i></li> <li>• <i>Patient Review Panel must be satisfied that surrogate is at least 25, has previously given birth and is not the biological mother</i></li> </ul> <p><i>Mandatory preconditions to making parentage order</i></p> <ul style="list-style-type: none"> <li>• <i>Order is in child's best interests</i></li> <li>• <i>Commissioning (intended) parents live with child in Victoria at time of application</i></li> <li>• <i>ART procedure was pre-approved</i></li> <li>• <i>Surrogate (and partner, if relevant) consents</i></li> <li>• <i>If not ART provider, surrogate must be at least 25 years old and all parties must have received counselling and information about legal implications (s 22 Status of Children Act 1974 (Vic))</i></li> </ul>	<p>Section 39</p> <p>Section 44</p> <p>Section 43 Section 40</p> <p>Section 44</p> <p>Sections 20 to 23</p>
<p><b>Queensland</b></p>	<p><i>Surrogacy Act 2010</i></p>	

	<p><i>Types of surrogacy arrangements</i></p> <ul style="list-style-type: none"> <li>• <i>No arrangements specified</i></li> <li>• <i>Agreement must be executed pre-conception and relate to an altruistic arrangement</i></li> </ul> <p><i>Compensation available</i></p> <ul style="list-style-type: none"> <li>• <i>No payments permitted other than birth mother's "surrogacy costs"</i></li> </ul> <p><i>Preconditions for making surrogacy agreement</i></p> <ul style="list-style-type: none"> <li>• <i>Both "birth parents" (surrogate and her partner) and intending parents must obtain independent legal advice and counselling</i></li> <li>• <i>Surrogacy agreement must be in writing</i></li> </ul> <p><i>Mandatory preconditions to making parentage order</i></p> <ul style="list-style-type: none"> <li>• <i>Child's birth must be registered by surrogate and partner, if relevant</i></li> <li>• <i>Guidance report from counsellor must be obtained</i></li> <li>• <i>Order is in child's best interests and for their wellbeing</i></li> <li>• <i>Surrogacy agreement was consensual, relates to altruistic surrogacy and was entered into before the birth of the child</i></li> </ul> <p><i>Discretionary preconditions to making parentage order</i></p> <p><i>(Note: can be dispensed with only in exceptional circumstances and if dispensation will be for the wellbeing, and in the best interests, of the child)</i></p> <ul style="list-style-type: none"> <li>• <i>Child lived with intending parents for at least first 28 days</i></li> <li>• <i>Child aged between 28 days and 6 months</i></li> </ul>	<p>Section 57</p> <p>Sections 30 and 31</p> <p>Section 25</p> <p>Section 25</p> <p>Section 32</p> <p>Section 22</p>
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	<ul style="list-style-type: none"> <li>• Evidence of medical or social need for surrogacy</li> <li>• All parties legally advised and obtained counselling before entering into arrangement</li> <li>• Agreement is in writing and signed by parties</li> <li>• Guidance report supports making of order</li> <li>• Both parties consent to making order</li> </ul>	
<b>South Australia</b>	<p><i>Family Relationships Act 1975</i></p> <p><i>Types of surrogacy arrangements</i></p> <ul style="list-style-type: none"> <li>• Commercial surrogacy arrangements – illegal to enter into, or induce someone to enter into a contract/receive “valuable consideration” for surrogacy</li> <li>• Permitted arrangements – arrangement is permitted if the surrogate agrees to become/attempt to become pregnant and surrender custody and rights to child to two other persons (intending parents)</li> </ul> <p><i>Compensation available</i></p> <ul style="list-style-type: none"> <li>• No consideration able to be payable except for expenses relating to: <ul style="list-style-type: none"> <li>• Pregnancy (including attempts to become pregnant)</li> <li>• Birth or care of a child born as a result of the pregnancy</li> <li>• Counselling or medical services</li> <li>• Legal services</li> <li>• Matters prescribed in Regulations</li> </ul> </li> </ul> <p><i>Preconditions to making recognised surrogacy agreement</i></p> <ul style="list-style-type: none"> <li>• All parties (includes intended parents, surrogate and surrogate’s partner if any) to be over 18</li> <li>• Intended parents to be domiciled in Australia and must be married or in heterosexual de facto relationship for more than three years</li> </ul>	<p>Section 10H</p> <p>Section 10HA(2)(ix)</p> <p>Section 10HA</p> <p>Section 10HA</p>

	<ul style="list-style-type: none"> <li>• <i>Intended mother must be infertile or at risk of passing on serious genetic defect, disease or illness</i></li> <li>• <i>Surrogate must be approved by recognised counselling service– reproductive technology clinics are bound by Assisted Reproductive Treatment Act 1998 (SA) which requires recognised surrogacy agreement</i></li> <li>• <i>Surrogate and intended parents must have obtained counselling certificate</i></li> <li>• <i>At least one of the intended parents must provide “human genetic material” unless there is a medical reason not to use that material</i></li> <li>• <i>Agreement must be in writing, signed by all parties and be accompanied by a medical certificate</i></li> </ul> <p><i>Preconditions to making parentage order</i></p> <ul style="list-style-type: none"> <li>• <i>Child was born under Recognised Surrogacy Agreement</i></li> <li>• <i>Intended parents live in South Australia</i></li> <li>• <i>Fertility treatment occurred in South Australia</i></li> <li>• <i>Birth mother “fully and freely” consents (unless is deceased or has lost capacity)</i></li> </ul> <p><i>Other considerations for making of order</i></p> <ul style="list-style-type: none"> <li>• <i>If only one intended parent applies for order, other intended parent must consent</i></li> <li>• <i>No consideration paid</i></li> <li>• <i>Child lives with intended parents</i></li> <li>• <i>Intended parents are “fit and proper parents” to assume care of child</i></li> </ul>	<p>Section 10HA(3)</p> <p>Section 10HA(5)</p> <p>Section 10HA(6)</p> <p>Section 10HB</p> <p>Section 10HB</p>
<p><b>Tasmania</b></p>	<p><i>Surrogacy Act 2012</i></p> <p><i>Types of surrogacy arrangements</i></p>	

	<ul style="list-style-type: none"> <li>• <i>Surrogacy arrangement - an arrangement for the birth mother to conceive and give birth to a child which is to be treated as the child of the intended parents. Cannot be entered into after conception</i></li> <li>• <i>Commercial surrogacy arrangement - prohibited if it provides for a person to receive a payment, reward or other material benefit for giving up a child born as a result of the arrangement or making a parentage order</i></li> </ul> <p><i>Compensation available</i></p> <ul style="list-style-type: none"> <li>• <i>The intended parents must pay or reimburse the mother's surrogacy costs</i></li> </ul> <p><i>Preconditions to making surrogacy agreement</i></p> <ul style="list-style-type: none"> <li>• <i>there is a medical or social need for the surrogacy</i></li> <li>• <i>the arrangement is not a commercial surrogacy arrangement</i></li> <li>• <i>the intended parents are over 21</i></li> <li>• <i>the surrogate is over 25 and has given birth to a live child</i></li> <li>• <i>all parties have signed a written agreement after having received counselling</i></li> <li>• <i>all parties were resident in Tasmania</i></li> </ul> <p><i>Mandatory preconditions to making parentage order A court must be satisfied that:</i></p> <ul style="list-style-type: none"> <li>• <i>the order is in best interests of the child</i></li> <li>• <i>all parties have received counselling following the birth and prior to the application for parentage orders (in addition to counselling prior to signing the agreement)</i></li> <li>• <i>all relevant parties consent to making the parentage order</i></li> <li>• <i>court may make orders without consent of surrogate (and her partner) in case of death, lack of capacity or absence of</i></li> </ul>	<p>Section 5</p> <p>Section 8</p> <p>Section 10</p> <p>Section 12</p> <p>Section 16(2)(k)</p>
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	<p><i>communication and child is living with intended parents</i></p> <ul style="list-style-type: none"> <li>• <i>the arrangement is not a commercial surrogacy arrangement</i></li> <li>• <i>a written, signed agreement exists</i></li> <li>• <i>intended parents are aged at least 21 years and surrogate at least 25 years</i></li> <li>• <i>all parties resident in Tasmania at time of agreement and child is living with intended parent in Tasmania at time of hearing</i></li> <li>• <i>surrogate has given birth to a live child</i></li> <li>• <i>there is a medical or social need for the surrogacy</i></li> <li>• <i>the other intended parent is notified if only one applies</i></li> </ul> <p><i>Other requirements</i></p> <ul style="list-style-type: none"> <li>• <i>Orders must be made about each child in the case of multiple births</i></li> </ul>	<p>Section 16(2)(j)</p> <p>Section 16(4)</p> <p>Section 16(3)</p> <p>Section 16(2)(j)</p> <p>Section 16(2)(d)</p> <p>Section 16(2)(h)</p> <p>Section 17</p>
<p><b>Australian Capital Territory</b></p>	<p><i>Parentage Act 2004</i></p> <p><i>Types of surrogacy arrangements</i></p> <ul style="list-style-type: none"> <li>• <i>Substitute parent agreements - agreement for woman to become (or attempt to become) pregnant with a child taken to be the child of another party, or agreement with a woman who is pregnant with a child who will be taken to be the child of another party</i></li> <li>• <i>Commercial substitute parent agreements - an agreement under which a person agrees to make payment other than for expenses connected with the pregnancy/birth/care of a child born of a pregnancy.</i></li> </ul> <p><i>Compensation available</i></p> <ul style="list-style-type: none"> <li>• <i>It is an offence to:</i></li> <li>• <i>intentionally enter into a Commercial Substitute Parent Agreement</i></li> <li>• <i>facilitate the pregnancy of another person who intends to be a party to a commercial substitute parent agreement</i></li> </ul>	<p>Section 24</p> <p>Section 40</p> <p>Section 41</p>

	<ul style="list-style-type: none"> <li>• <i>Obligation to meet mother’s “surrogacy costs” – no requirement for expenses to be “reasonable”</i></li> <li>• <i>Payment of mother’s surrogacy costs under substitute parent agreement not otherwise legally binding</i></li> </ul> <p><i>Preconditions to making surrogacy agreement</i></p> <ul style="list-style-type: none"> <li>• <i>No specific preconditions, but parentage orders can only be made where there is a non-commercial substitute parentage agreement</i></li> </ul> <p><i>Mandatory preconditions to making parentage order</i></p> <ul style="list-style-type: none"> <li>• <i>Child born of procedure carried out in ACT</i></li> <li>• <i>Intended parents live in ACT</i></li> <li>• <i>Neither surrogate nor her partner is biological parent and (except in case of death or incapacity – s 6(2)) both understand and consent to making of the order</i></li> <li>• <i>At least one intended parent is genetic parent of child</i></li> <li>• <i>Substitute parent agreement indicating intention to apply for parentage order is in place</i></li> <li>• <i>Order is in best interests of the child</i></li> </ul>	<p>Section 44</p> <p>Section 710</p> <p>Section 24(c)</p> <p>Section 24</p> <p>Section 26(1)(b)</p>
<p><b>Western Australia</b></p>	<p><i>Types of surrogacy arrangements</i></p> <ul style="list-style-type: none"> <li>• <i>Agreement for woman to become (or attempt to become) pregnant with a child to be raised by the intended parents</i></li> <li>• <i>Agreement must be entered into before birth mother becomes pregnant to be valid</i></li> <li>• <i>Egg or sperm donor and their spouse are parties</i></li> </ul> <p><i>Compensation available</i></p> <ul style="list-style-type: none"> <li>• <i>Surrogacy cannot be for “reward” – i.e. commercial</i></li> </ul>	<p>Section 3</p> <p>Section 17</p>



	<p><i>Preconditions to making surrogacy agreement</i></p> <ul style="list-style-type: none"> <li>• <i>Written agreement signed by all parties</i></li> <li>• <i>All parties received counselling, legal advice and clinical assessment at least three months before agreement made</i></li> <li>• <i>Agreement made pre-conception</i></li> <li>• <i>Approved plan in place that is “reasonable”, promotes child’s welfare and balances rights and responsibilities of parties</i></li> </ul> <p><i>Preconditions to making parentage order</i></p> <ul style="list-style-type: none"> <li>• <i>Child’s best interests are paramount consideration</i></li> <li>• <i>Agreement must be approved by Western Australian Reproductive Council</i></li> <li>• <i>Parties have received legal advice and counselling</i></li> <li>• <i>Child is in day to day care of intended parent</i></li> </ul>	<p>Section 8</p> <p>Section 22</p> <p>Section 17</p> <p>Section 16</p> <p>Section 21</p>
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