SURROGACY LAWS IN QUEENSLAND: ONE STEP FORWARD AND TWO STEPS BACK?

INTRODUCTION

The topic of surrogacy has been the subject of contested debate in Queensland over the past three decades. Surrogacy raises a number of moral concerns, making it a difficult topic to address from a regulatory position. Queensland’s original regulatory response was extremely prohibitive, barring all forms of surrogacy arrangements irrespective of whether or not they would be entered into for altruistic reasons. Furthermore, those who took steps to enter, or did actually enter into such arrangements, were liable to criminal prosecution, with the offences having extra-territorial application. The former Labor Party government reformed the legal position in 2010 following an extensive review of the law and a public consultation undertaken by the Investigation into Altruistic Surrogacy Committee. The reformed legislation enables single persons and couples to lawfully enter into altruistic surrogacy arrangements in some circumstances, irrespective of their sexual orientation. However, debate on the topic has again re-ignited due to the fact that the Liberal National Party (LNP), under the leadership of Campbell Newman, is proposing to amend the law by reverting to a position where criminal sanctions would be imposed, this time based on the marital status or sexual orientation of the participants.

The proposed reforms, outlined below, seek to impose criminal offences that would apply to a surrogacy arrangement entered into by a single person, a same-sex couple, or a heterosexual de facto couple of less than two years. These changes are not isolated proposals for reform, but follow on from other recent changes to the law. This political agenda appears to be aimed at eroding the progress made by the former Labor Party government in seeking to protect the rights of certain minority populations in Queensland. Thus, the LNP has recently amended the Civil Partnerships Act 2011 (Qld), which was established to enable two adults to formally declare their relationship by holding a ceremony before a notary and a witness, irrespective of their sexual orientation. Instead, under the renamed Relationships Act 2011 (Qld), a same-sex couple is now only able to “register” their relationship with the Registry of Births, Deaths and Marriages.

SURROGACY REGULATION IN QUEENSLAND AND THE PROPOSED AMENDMENTS

Currently in Queensland, surrogacy is available to heterosexual couples, same-sex couples and single men and women, provided, in cases where a woman is involved, that she is an “eligible woman” within the meaning of the Act. Put simply, this means the woman must not be able to conceive naturally, or if she can conceive she must be unable, on medical grounds, to carry a pregnancy or give birth to a healthy child. The inclusion of a social need for surrogacy as well as a medical need due to the fact that surrogacy arrangements irrespective of whether or not they would be entering into for altruistic reasons is extremely prohibitive, barring all forms of surrogacy arrangements irrespective of whether or not they would be entered into for altruistic reasons. Furthermore, those who took steps to enter, or did actually enter into such arrangements, were liable to criminal prosecution, with the offences having extra-territorial application. The former Labor Party government reformed the legal position in 2010 following an extensive review of the law and a public consultation undertaken by the Investigation into Altruistic Surrogacy Committee. The reformed legislation enables single persons and couples to lawfully enter into altruistic surrogacy arrangements in some circumstances, irrespective of their sexual orientation. However, debate on the topic has again re-ignited due to the fact that the Liberal National Party (LNP), under the leadership of Campbell Newman, is proposing to amend the law by reverting to a position where criminal sanctions would be imposed, this time based on the marital status or sexual orientation of the participants.

On 21 June 2012, debate during the second reading of the Civil Partnerships and Other Legislation Amendment Bill became heated. In addition to watering down the legal recognition given to the relationships of same-sex couples under the Civil Partnerships Act 2011 (Qld), the LNP unveiled proposals to significantly change the surrogacy legislation in Queensland. The Attorney-
General, Jarrod Bleijie, indicated that the government would be introducing amendments to the surrogacy legislation similar to those introduced by Lawrence Springborg in 2009 in the Family (Surrogacy) Bill.\(^8\)

The Springborg proposals were the unsuccessful competitor to the Surrogacy Bill 2009 (which ultimately became law). The key difference of relevance under the Springborg proposals was that they contain specific eligibility criteria.\(^9\) Single people, same-sex couples, and de facto couples who have lived together for less than two years were all excluded from the definition of an “eligible couple”. The effect of such a limitation is that those falling outside of the eligibility requirements would be committing an offence by entering into a surrogacy arrangement in Queensland. However, to further limit access to surrogacy for the groups mentioned, offences under the proposals also carry extra-territorial application. This means that those residents of Queensland who do not qualify as an “eligible couple” cannot seek to enter into a surrogacy arrangement in a less discriminatory jurisdiction, as this would, in itself, constitute an offence under the Family (Surrogacy) Bill 2009. In essence, if the LNP proceeds to amend the surrogacy legislation in this way, altruistic surrogacy will again become a criminal offence, although only for those individuals or couples previously mentioned. This is problematic for a number of reasons.

**Problems with the Proposed Amendments**

The exclusion of specific groups of Queenslanders from the eligibility criteria under the reformed legislation, is discriminatory in nature. Interestingly however, s 6 of the Family (Surrogacy) Bill exempted its provisions from the scope of the Anti-Discrimination Act 1991 (Qld) with the result that discrimination on the basis of attributes such as marital status or sexuality, would be lawful.\(^10\) The justification put forward for this approach was based on the reasoning that the limitations were appropriate in safeguarding the best interests of children who may be born through such arrangements. It was claimed that the child’s best interests must be maintained above the rights of any person wishing to participate in an altruistic surrogacy process (including any right to be protected from discrimination).\(^11\) Underlying this justification is the unfounded view that the sexuality or marital status of a parent or parents can be a blight to the child’s welfare. Surprisingly, no evidence was provided to substantiate this view. In fact, this approach is contrary to that adopted in other jurisdictions where research has been considered to assess the impact of parenting in family circumstances where children are raised by single parents or same-sex couples. For example, the Victorian Law Reform Commission (VLRC), in its report into assisted reproductive technology and adoption, stated:

> the Commission does not believe it is justified to require people who are commissioning a surrogacy arrangement to be married or in a heterosexual de facto relationship. This reflects the commission’s conclusion that a person’s marital status or sexuality are not factors that are considered by child welfare authorities or experts to be predictors of harm to children.\(^12\)

This view was supported in Queensland when the Investigation into Altruistic Surrogacy Committee undertook its review of the law and issued its recommendations,\(^13\) upon which the 2010 surrogacy legislation was based.

The underlying reasoning that has been cited to support the amendments that may be adopted by the LNP lack justification. The amendments are not underpinned by evidence to support why those who fall outside of the eligibility criteria should be excluded from becoming parents by way of a surrogacy arrangement. The notion that surrogacy should only be available to heterosexual couples who have lived together for two or more years reinforces the view that those falling outside of the

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\(^8\) **Civil Partnerships and Other Legislation Amendment Bill**, Record of Proceedings (21 June 2012) p 994. The amendments introduced by Mr Springborg on 11 November 2009 can be found in the Family (Surrogacy) Bill, which was an unsuccessful competitor to the Surrogacy Bill 2009. It was an unusual situation where two Bills on the same topic were introduced into Parliament by opposing parties. The Surrogacy Bill 2009 was passed through Parliament.

\(^9\) Family (Surrogacy) Bill 2009, cl 9.

\(^10\) Family (Surrogacy) Bill 2009, Explanatory Notes, p 4.


\(^13\) Investigation into Altruistic Surrogacy Committee, Report, n 3, p 36.
“traditional family model” are deemed to be unsuitable parents. Furthermore, the discriminatory agenda of the LNP, which is being given effect by way of these reforms, is eroding of the rights of an already under-protected minority of the Queensland population. Punishing those individuals or couples who seek to have a child through surrogacy, by way of criminal sanction, is a retrograde step for Queensland.

**Other Australian Jurisdictions**

Surrogacy legislation across Australia is complex, as each State or Territory adopts its own regulatory approach. The one consistent factor between all jurisdictions is that commercial surrogacy arrangements are completely prohibited.\(^\text{14}\) However, the approaches in relation to altruistic surrogacy differ significantly. Despite this, in all other Australian jurisdictions, no similar approach to that proposed by the LNP in Queensland, exists. Those who seek to carry through a surrogacy arrangement in other Australian jurisdictions would not face the risk of being criminally prosecuted for their conduct simply because they fall outside any prescribed eligibility criteria (although there may be issues associated with obtaining legal recognition as a parent, which is outlined below). Furthermore, the three jurisdictions which limit access to surrogacy based on eligibility criteria,\(^\text{15}\) do not extend the limitation extra-territorially.

It is worth noting that in New South Wales, surrogacy is open to single persons, heterosexual couples, and same-sex couples. The New South Wales legislation is very similar to the current Queensland legislation. Similarly in Victoria, surrogacy is available to single men and women, heterosexual couples, and same-sex couples. However, the Victorian legislative regime has an added requirement if, as is generally the case, the surrogate mother requires assisted reproductive technology (ART) from a registered ART provider to achieve the pregnancy. In this event, the surrogacy arrangement must be approved by the Patient Review Panel.\(^\text{16}\) Without such approval, a registered ART provider is unable to provide reproductive services to a woman under a surrogacy arrangement.\(^\text{17}\) Despite this requirement, the marital status and/or sexuality of the parties to the surrogacy arrangement are not matters that the Patient Review Panel is required to take into account when considering an application for surrogacy.\(^\text{18}\)

The main aim of the parties to a surrogacy arrangement, apart from achieving a successful pregnancy and birth, is for the intended parents to become the child’s legal parents. Legislation in most Australian jurisdictions\(^\text{19}\) outlines a procedure that enables the transfer of legal parenthood from the surrogate or birth mother (and where relevant, her partner), to the intended parents. The effect of a parentage order is that it affords legal recognition to the relationship between the intended parent(s) and the child. Such an order also extinguishes the status of the birth parent(s) as the legal parent(s) of the child.\(^\text{20}\) Significantly, the statutory provisions in New South Wales, Victoria, and Queensland (until the legislation is amended as proposed), enable single people, same-sex couples, and

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\(^{14}\) *Surrogacy Act 2010 (Qld)*, s 56; *Surrogacy Act 2010 (NSW)*, s 8; *Parentage Act 2004 (ACT)*, s 41; *Assisted Reproductive Treatment Act 2008 (Vic)*, s 44; *Surrogacy Contracts Act 1993 (Tas)*, s 4(4); *Family Relationships Act 1975 (SA)*, s 10H; *Surrogacy Act 2008 (WA)*, s 8.

\(^{15}\) The Australian Capital Territory limits surrogacy to heterosexual and same-sex couples, South Australia limits surrogacy to heterosexual couples and Western Australia limits surrogacy to heterosexual couples, same-sex female couples and single women.

\(^{16}\) The Patient Review Panel is a new entity established under the reformed statutory framework that applies to assisted reproductive technologies in Victoria. The Patient Review Panel was established to consider and review decisions relating to the provision of ART services. The Patient Review Panel is responsible for approving access to some ART procedures, such as those involving surrogacy arrangements or techniques resulting in posthumous conception. The Panel is also responsible for reviewing individual cases where prospective participants have a presumption against treatment imposed upon them on the basis of their previous criminal convictions, where participants have been refused access by ART providers, or where participants do not meet the statutory eligibility criteria. See Smith MK, “Regulating Assisted Reproductive Technologies in Victoria: The Impact of Changing Policy Concerning the Accessibility of In Vitro Fertilisation for Preimplantation Tissue Typing” (2012) 19(4) JLM 820.

\(^{17}\) *Assisted Reproductive Treatment Act 2008 (Vic)*, s 39.

\(^{18}\) *Assisted Reproductive Treatment Act 2009 (Vic)*, s 40.

\(^{19}\) Except for Tasmania which prohibits all forms of surrogacy and the Northern Territory which has no surrogacy legislation.

\(^{20}\) *Surrogacy Act 2010 (Qld)*, ss 22 and 39; *Surrogacy Act 2010 (NSW)*, ss 12 and 39; *Status of Children Act 1974 (Vic)*, ss 22 and 26; *Parentage Act 2004 (ACT)*, s 26 and 29; *Family Relationships Act 1975 (SA)*, s 10HB; *Surrogacy Act 2008 (WA)*, ss 19 and 26. The Tasmanian legislation makes no provision for parentage orders.
heterosexual couples, to obtain parentage orders following the birth of the child by way of a surrogacy arrangement.\(^{21}\)

In the remaining jurisdictions, where eligibility for altruistic surrogacy is not directly addressed on the face of the legislative framework, there may be indirect barriers contained within the statutory scheme which prevent certain people or classes of people from being able to carry through a surrogacy arrangement. In these jurisdictions, access to surrogacy is obstructed as a result of the limitations placed upon who can obtain a parentage order. For example, in the Australian Capital Territory (ACT), heterosexual and same-sex couples can obtain parentage orders, but single persons cannot.\(^{22}\) In South Australia, same-sex couples and single persons cannot obtain parentage orders,\(^{23}\) and in Western Australia same-sex male couples and single men are precluded from obtaining such orders.\(^{24}\) However, despite the provisions concerning parentage orders, those seeking to enter surrogacy arrangements in these jurisdictions will not face criminal charges for travelling to other jurisdictions to pursue their dream of becoming a parent by way of an altruistic surrogacy arrangement.\(^{25}\)

Even where legislation prevents certain individuals or groups of people from obtaining a parentage order by virtue of their marital status or sexuality, it may still be possible to apply to the Family Court for a parenting order under the \textit{Family Law Act 1975 (Cth)}. Although a parenting order is not the same as legal parentage, it does give the intended parents responsibility for making decisions concerning the child.\(^{26}\) In deciding whether to award a parenting order, the Family Court will take into account matters relating to the welfare of the child.\(^{27}\) Interestingly, the marital status and sexuality of the applicant are not factors that the court has to consider under the \textit{Family Law Act 1975 (Cth)}. The inference that can be drawn from this is that the marital status and/or sexual orientation of the applicants are not matters that are considered to be of significance when determining what is in a child’s welfare.\(^{28}\) Irrespective of these factors, the position in Queensland would be significantly affected if the LNP’s proposals are enacted to make surrogacy a criminal offence for single people, same-sex couples, and heterosexual de facto couples of less than two years, as this may in turn impact on their ability to obtain a parenting order.\(^{29}\)

\textbf{CONCLUSION}

The proposed changes to the Queensland surrogacy legislation, which have been outlined by the LNP, are unwarranted and unnecessary. These amendments would result in a position where Queensland is the only Australian jurisdiction to impose criminal sanctions upon individuals or couples who seek to have a child by way of an altruistic surrogacy arrangement. The proposed changes are not intended to apply universally to all Queenslanders, but are instead intended to apply only to specific groups of people. These people could face criminal prosecution for their desire to carry through an arrangement that would enable them to have children, solely on the basis of their marital status or sexual orientation. This approach is not supported by evidence to demonstrate that children born into such

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\item This is achieved by making an application to the appropriate court in the relevant State or Territory. For example, in Queensland, this is the Children’s Court: \textit{Surrogacy Act 2010 (Qld), s 13.}
\item Parentage Act 2004 (ACT), s 24(c).
\item \textit{Family Relationships Act 1975 (SA), s 10HA(2)(a)(ii) and s 10HA(2)(a)(iii).}
\item Surrogacy Act 2008 (WA), s 19. This section is complicated. However same-sex couples do not satisfy the definition of eligible couple and a single male cannot be an “eligible person” within the meaning of the Act. A member of a lesbian couple may satisfy the definition of “eligible person”, as may a single woman, provided in both cases the women are medically infertile.
\item The Parentage Act 2004 (ACT) provides for extra-territorial extension of offences in s 45. However, it is not an offence for single persons to enter into a surrogacy arrangement in the ACT, although they are unable to obtain a parentage order.
\item Applications for parenting orders can be made by any person concerned with the care, welfare or development of the child. \textit{Family Law Act 1975 (Cth), s 65C.}
\item Family Law Act 1975, s 600C(3)(g) mentions additional considerations (as opposed to primary considerations) including the maturity, sex, lifestyle and background of the child and of either of the child’s parents. However there is no mention of the sexuality of the parents.
\item Despite the fact that this conduct may be criminally punishable in Queensland should the amendments be passed, it is possible that the Family Court may still elect to award parenting orders in such cases based on consideration for the child’s welfare. Thus, in Ellison and anor & Karmcanit v [2012] FamCA 602, Ryan J noted at [3] the difficulty that the court faces when balancing public policy with the welfare of the child: “[o]f course imprisonment of the applicants would see two much loved children inexplicably separated from the only people they have known as parents. The potential for long term psychological and emotional harm to the children were such an event to come to pass is obvious”.
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families would be at any greater risk of harm than those born into a “traditional” family setting. When reforming the surrogacy legislation in Queensland, the former Labor Party government had made significant progress in showing the diversity and progression of Queensland as a forward-thinking State. If the LNP proceeds to amend the legislation as proposed, this has the potential not only to reverse such progression, but to also reinforce the acceptability of discrimination against such members of society. Ultimately, whilst the Labor Party had taken Queensland’s surrogacy laws one step forward, the LNP is seeking to take the law, at least two steps back.

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