Back to the future: Prohibiting surrogacy for singles, same-sex and shorter-term heterosexual couples in Queensland

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This article considers the regulatory position concerning altruistic surrogacy in Queensland, focusing on the intended changes to the current legal framework announced by the Government in June 2012. The previous Government had made significant progress by reforming surrogacy laws in 2010. However, that progress is at risk of being reversed. The proposed changes to the law would make it a criminal offence to enter into an altruistic surrogacy arrangement for certain individuals or couples. If enacted, the offence would only apply in altruistic surrogacy cases where the intended parent or parents are either single, in a same-sex relationship, or are in a heterosexual relationship of less than two years. Moreover, if enacted the offence would apply extra-territorially. We argue that these changes represent a retrograde step for the law and urge the Government to reconsider. This is based on the fact that they are out of step with current social attitudes, are contrary to the spirit of anti-discrimination laws, and that they are unjustified in terms of child welfare concerns.

INTRODUCTION

The road to surrogacy law reform in Queensland has been paved with mixed intentions, and that trend is set to continue. The legislation originally enacted in Queensland, the Surrogate Parenthood Act 1988 (Qld), made altruistic surrogacy a criminal offence. Even an offer to act as an altruistic surrogate, made by one person to another, constituted a criminal offence, and a person convicted of such an offence could be imprisoned for three years.1 Queensland was the only Australian jurisdiction in which altruistic surrogacy constituted a criminal offence. This situation continued for more than two decades until the enactment of the Surrogacy Act 2010 (Qld) by the then Labor Party Government. Under this legislation, altruistic surrogacy is permitted, and a surrogacy arrangement can be entered into by a married couple, de facto couple (heterosexual or same-sex) or a single man or woman. The 2010 surrogacy legislation formed part of a socially progressive agenda of the Labor Government. In November 2011, the government also passed the Civil Partnerships Act 2011 (Qld) which allowed heterosexual and same-sex couples to formally register their relationship as a ‘civil partnership’ with the Registry of Births, Deaths and Marriages, and to formally celebrate that union.

The Liberal National Party (LNP) Government, led by Campbell Newman, was elected to office by a landslide in March 2012, and is in the process of overturning these reforms. The Civil Partnerships Act 2011 (Qld) has already been amended by renaming it the Relationships Act 2011 (Qld), and removing the ability of a same-sex couple to celebrate the registration of their union by a ceremony sanctioned by the Act. This reform addressed apparent concerns that such a ceremony ‘could be perceived as mimicking a marriage ceremony’.2 In the Record of Proceedings of Parliamentary Debates surrounding the amendments to the Civil Partnerships Act 2011 (Qld), Queensland’s Attorney-General, Jarrod Bleijie, indicated that the government would also be amending the surrogacy legislation to prevent heterosexual de facto couples in a relationship for less than two years, all same-sex couples, and single men and women from accessing surrogacy arrangements.3 This is despite a commitment given by Campbell Newman before the election that the current legislation would not be amended.

The authors are of the view that the surrogacy reforms proposed by the LNP Government are misguided, and should not proceed. This article commences by reviewing the history of surrogacy regulation in Queensland,

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1 Surrogate Parenthood Act 1988 (Qld), s 3(1).
2 Civil Partnerships and other Legislation Amendment Bill 2012 (Qld), Explanatory Notes, p 2.
3 Queensland, Legislative Assembly, Parliamentary Debates (21 June 2012) p 994 (Jarrod Bleijie).
including the reasoning behind the progressive reform that underpinned the 2010 legislation, and then considers the nature of the reform being proposed by the LNP Government. To facilitate comparisons with other legislative models, the surrogacy frameworks in other Australian States and Territories are reviewed. Finally, the authors provide three grounds to argue that the current surrogacy laws in Queensland should not be amended: the proposals for reform are out of step with the trends in eligibility criteria in assisted reproductive technology law and practice, inconsistent with the principle of non-discrimination and, most significantly, are not supported by available research about what is in the best interests of a child.

THE WINDING ROAD OF SURROGACY REFORM IN QUEENSLAND

The regulation of surrogacy arrangements, and the nature that such regulation should take, has been on the political agenda in Queensland for almost three decades. In 1983, the Queensland Cabinet appointed a Special Committee to consider a range of issues relating to assisted reproductive technology. Although the major component of the review related to the regulation of such technology, the committee also reviewed and commented on surrogacy arrangements. The Committee published its report, known as the Demack Report, in February 1984. The committee identified potential problems that could arise from a surrogacy arrangement, including severe psychological stress on a child, potential exploitation if surrogate mothers are paid for their services, the possibility of severe emotional stress for a surrogate mother who relinquishes her child, and problems that could arise if the parents refused to take custody of the child. In the view of the committee, the identified problems were ‘such that the most prudent course would seem to be to leave such agreements unenforceable, at least until experience demonstrates whether regulation of such agreement is required in the interest of society and of the parties involved.’

Notwithstanding the problems identified by the committee, it concluded:

[I]t would not be desirable, at least at present, to make surrogacy arrangements criminal offences, and that the lack of enforceability of surrogacy contracts will probably suffice to prevent the widespread encouragement of surrogate motherhood arrangements. However, the matter is one which will need review from time to time.

Notwithstanding the recommendation of the Demack Report that entry into a surrogacy arrangement should not constitute a criminal offence, the subsequently enacted Surrogate Parenthood Act 1988 (Qld) prohibited entry into all surrogacy arrangements, whether commercial or altruistic. The Act made it an offence to enter into a surrogacy arrangement, or even to offer to enter into such an arrangement. The potential scope of the legislation was extraordinarily wide. A woman who made an offer to act as a surrogate to an infertile woman would have committed an offence, punishable by up to three years imprisonment, even if neither woman contemplated any payment of money. This put the Queensland legislation out of step with legislation in other Australian jurisdictions where only commercial surrogacies were regarded as criminal offences. The draconian nature of the legislation was further exacerbated because it purported to be extra-territorial in effect. If the person who entered into an agreement (or offered to do so) was ordinarily a Queensland resident,

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4 The Committee was chaired by Justice Demack (Supreme Court of Queensland) and was comprised of Professor Kevin Ryan (QC, part-time member of the Queensland Law Reform Commission), Sister Regis Mary Dunne (Director, Provincial Bio Ethics Centre for the Queensland Catholic Dioceses), Reverend Dr John Morgan (Warden, St John’s College, University of Queensland), Dr Jean Collie (Director, Division of Research and Planning, Department of Health), Professor Eric Mackay (Professor of Obstetrics and Gynaecology, University of Queensland) and Dr Allan Halladay (Senior Lecturer in Social Work, University of Queensland).


7 Select Committee, Parliament of Queensland, n 5, p 116.

8 Select Committee, Parliament of Queensland, n 5, pp 117-118. In its formal recommendations, however, the committee recommended that it should be made illegal to advertise to recruit women to undergo surrogate pregnancy, or to provide facilities for persons who wish to make use of the services of such women (recommendation D1), p 146.

9 Surrogate Parenthood Act 1988 (Qld), s 3(1).

10 At the time, commercial surrogacy was an offence in Victoria and South Australia (in relation to agencies only) pursuant to the Infertility Medical Procedure Act 1984 (Vic) and the Family Relationship Act 1973 (SA). However, altruistic surrogacy was not an offence. At that time, legislation in relation to surrogacy had not been passed in the other States and Territories of Australia.
she (or he) would have committed an offence, even if the relevant conduct occurred outside Queensland, in a jurisdiction where the conduct was lawful. Despite altruistic surrogacy being criminalised in Queensland, there is evidence that such arrangements still occurred. Nevertheless, prosecutions were infrequent. It is not known whether this is because such conduct was difficult for police to uncover; or it was possible to investigate and identify such practices, but it was not a priority for the police to pursue; or such conduct was pursued by police, but prosecutorial discretion was exercised in a manner that did not result in many prosecutions.

A decade after the legislation was enacted, the then Minister for Justice and Attorney-General, Matt Foley, and Minister for Women’s Policy, Judy Spence, established a taskforce to investigate the impact of the Criminal Code on the women of Queensland. Although surrogacy was not regulated by the Criminal Code, the taskforce investigated such practices because surrogacy attracted criminal sanctions. The report of the taskforce was published in 2000. The taskforce recognised the complex nature of issues raised by the topic of surrogacy, and the concerns expressed by some about the potential for such arrangements to exploit women who acted as surrogate mothers. Consensus was not reached about how surrogacy should be regulated, but a recommendation was made that altruistic surrogacy should not be a criminal offence. The government did not act on this recommendation.

Almost a decade later, in 2008, altruistic surrogacy was back on the agenda of the Queensland Government. The Legislative Assembly established a Select Committee (the Lavarch Committee), chaired by the then Attorney-General, Linda Lavarch, to review the Queensland law on altruistic surrogacy. Part of the terms of reference was whether altruistic surrogacy should be decriminalised. The Lavarch Committee released its report in October 2008, and made 26 recommendations. As a threshold point, the committee recommended that altruistic surrogacy should not be a criminal offence. The committee’s recommendations in relation to who should be entitled to enter into surrogacy arrangements, and prescribed the circumstances in which the court would order a recommendation, reflected the committee’s concerns about the obstacles faced by same-sex couples when raising children, and the potentially adverse consequences of that situation for children.

Following this review, the government enacted the Surrogacy Act 2010 (Qld). This legislation facilitated parties entering into surrogacy arrangements, and prescribed the circumstances in which the court would order a

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11 Surrogate Parenthood Act 1988 (Qld), s 3(2).
13 Parliament of Queensland, Investigation into Altruistic Surrogacy Committee, n 12, p 9; Brown, Willmott and White, n 12 at 15-16.
15 Parliament of Queensland, n 14, p 300.
16 Parliament of Queensland, Investigation into Altruistic Surrogacy Committee, n 12, p 23, Recommendation 3: The committee recommended that the Queensland Government decriminalise altruistic surrogacy supported with an appropriate legislative and regulatory framework as described in later recommendations.
17 Parliament of Queensland, Investigation into Altruistic Surrogacy Committee, n 12, p 6.
18 Parliament of Queensland, Investigation into Altruistic Surrogacy Committee, n 12, p 6.
20 Parliament of Queensland, Investigation into Altruistic Surrogacy Committee, n 12, p 65. This criterion was incorporated into Recommendation 16.
parentage order in favour of an intending parent or parents. Importantly, heterosexual de facto couples (regardless of length of the relationship), same-sex couples as well as single men and women could enter into a surrogacy arrangement and later apply for a parentage order.22 For the sake of completeness, the regulation of assisted reproductive technology in Queensland should be mentioned. In most modern surrogacy arrangements, the surrogate mother will become pregnant through in vitro fertilisation (IVF). The involvement of medical professionals is therefore generally required. Queensland has not passed legislation guiding IVF practice, so such practices are largely unregulated except through professional guidelines.23

PROPOSALS FOR REFORM BY THE NEWMAN LNP GOVERNMENT
Prior to the last State election in Queensland, Campbell Newman made a commitment that, if elected, an LNP government would not amend the Surrogacy Act 2010 (Qld). It now seems unlikely that this commitment will be honoured. When introducing legislation to reform Queensland’s Civil Partnerships Act 2011 (Qld), the Attorney-General, Jarrod Bleijie, formally gave notice that the government would be reforming the surrogacy legislation by ‘repealing the provisions in the Surrogacy Act that deal with same-sex couples, de facts of less than two years and singles’.24

The amending legislation has not yet been introduced into Parliament. However, Bleijie indicated that the legislation will be similar to the Bill proposed by Lawrence Springborg in 2009, the Family (Surrogacy) Bill 2009 (Qld).25 Under the Springborg proposals, intending parents would have to qualify as an ‘eligible couple’ to enter into a surrogacy arrangement and to obtain a parentage order in their favour. ‘Eligible couple’ was defined to mean:

(a) a married couple; or
(b) a de facto couple comprising a male de facto partner and a female de facto partner who, when the eligible surrogacy arrangement was made, have lived together in a de facto relationship for at least 2 years.26

This meant that heterosexual de facto couples in a relationship for less than two years, same-sex couples regardless of the duration of their relationship, and single men and women could not enter into a surrogacy arrangement, or have a parentage order made in their favour.

As the proposed legislation discriminated against individuals in heterosexual de facto relationships of less than two years duration, same-sex couples, and single men and women by excluding them from the ambit of the definition of ‘eligible couple’, cl 6 of the Bill expressly provided that a person may make a decision authorised by the Family (Surrogacy) Bill 2009 ‘despite the Anti-Discrimination Act 1991’.27 Where proposed legislation does not comply with the ‘fundamental legislative principles’ contained in the Legislative Standards Act 1992 (Qld), such as compliance with anti-discrimination legislation, the reason for that divergence must be explained in the Explanatory Notes to the Bill.28 In relation to cl 6, the Explanatory Notes provided as follows:

Overriding the Anti-Discrimination Act 1991 ... clearly breaches fundamental legislative principles. However, the breach is justified because the imposition of discriminatory processes, particularly in relation to the paramount principles of the best interests of the child must be maintained above the rights of any person wishing participate (sic) in the altruistic surrogacy process, including any rights they may otherwise have under the Anti-Discrimination Act 1991 not to experience discrimination.29

22 Surrogacy Act 2010 (Qld), ss 9 and 21.
23 For more detail about the professional guidelines, see below n 64 and accompanying text.
24 Queensland, Legislative Assembly, Parliamentary Debates (21 June 2012) p 994 (Jarrod Bleijie).
25 Lawrence Springborg introduced this Bill into the Legislative Assembly on 11 September 2009. Later that month, on 26 November, the former Attorney-General, Cameron Dick, introduced the Surrogacy Bill 2009 (Qld). The latter Bill was subsequently passed.
26 Family (Surrogacy) Bill 2009 (Qld), cl 9(2).
27 Family (Surrogacy) Bill 2009 (Qld), cl 6.

The only implication that can be drawn from this explanation is that it was considered necessary to discriminate against this group by preventing them from becoming parents in order to safeguard the best interests of the child. That is, allowing such individuals to become parents would not be in the best interests of the child. Indeed, this position seems to be confirmed by Lawrence Springborg who, when introducing his Bill into Parliament in 2009, commented in the following way on the alternative surrogacy Bill proposed by the then Labor Government under which such groups were allowed access to surrogacy arrangements:\textsuperscript{30}

Mr Speaker, the Bligh Labor Government’s draft Bill insisted on opening the debate for altruistic surrogacy available to anyone and everyone and to prescribe to this approach would risk having the issue high jacked by social engineers who wish to use the opportunity to redefine the mainstream understanding of family.

One final point should be made about the Bill proposed by Lawrence Springborg: it purported to have extra-territorial effect. That is, the prohibitions introduced by the legislation, including entry into surrogacy arrangements by individuals who were not ‘eligible’ under the Bill, applied to acts done in Queensland as well as ‘acts done outside Queensland if the offender is ordinarily resident in Queensland at the time the act is done’.\textsuperscript{31} Therefore, a Queensland resident who is single, in a same-sex relationship, or a heterosexual de facto relationship of less than two years duration would commit an offence if he or she travelled interstate to enter into a surrogacy arrangement that was lawful in that particular jurisdiction.

**SURROGACY FRAMEWORK IN AUSTRALIA**

Surrogacy law cannot be reviewed meaningfully without reference to the assisted reproductive technology framework that operates in the jurisdiction under review. Today assisted reproductive technology is invariably a feature of surrogacy regardless of the marital status or sexuality of those involved. Some jurisdictions prohibit the surrogate’s egg being used in the surrogacy procedure.\textsuperscript{32} As a result, IVF is an integral component of the surrogacy equation, as either a donor egg or the egg of the intended mother must be fertilised before being implanted into the surrogate. In cases where the surrogate’s egg is used in the procedure, assistance through artificial insemination will generally occur. As a result, surrogacy legislation should be read in conjunction with legislation relating to assisted reproductive technology. While the focus of this article is on surrogacy law, it should be understood that assisted reproductive technology legislation may also have an impact on whether a surrogacy arrangement can be entered into by the intended parent or parents.

For the purpose of this article, it is important to review two aspects of the surrogacy laws. First, the provisions that relate to eligibility are obviously relevant. As we have seen in relation to the Family (Surrogacy) Bill 2009 that was introduced into the Queensland Parliament by Lawrence Springborg, the eligibility criteria can exclude certain individuals from the ambit of the legislation.

Secondly, the provisions that allow an intended parent or parents to apply for a parentage order are also critical. Unless a parentage order is made, the surrogate mother and her partner will be presumed to be the legal parents of the child.\textsuperscript{33} Legislation in most Australian jurisdictions prescribes a procedure to transfer parentage from the surrogate mother and her partner to the intended parent(s).\textsuperscript{34} The effect of a parentage order is that the child becomes a child of the intended parent(s), and the intended parent(s) become the parent(s) of the child. In addition, the child stops being the child of the birth parent(s) and the birth parent(s) stop being the parent(s) of the child. This is significant as important rights may accrue depending on who are the legal parents. These rights relate to citizenship, migration, medical treatment, intestacy and child support.\textsuperscript{35} In some jurisdictions, the ability to apply for a parentage order is restricted to married and heterosexual de facto couples. As such, even if

\textsuperscript{30} Queensland, Legislative Assembly, Parliamentary Debates (11 November 2009) p 3259 (Lawrence Springborg).

\textsuperscript{31} Family (Surrogacy) Bill 2009 (Qld), cl 54(b).

\textsuperscript{32} For example, the Parentage Act 2004 (ACT), s 24(b), provides that neither birth parent of the child (that is, the surrogate mother or her partner) can be a genetic parent of the child. In Victoria, the Assisted Reproductive Treatment Act 2008 (Vic), s 40(1)(ab), provides that the Patient Review Panel may approve a surrogacy arrangement if the Panel is satisfied that the surrogate’s oocyte will not be used.

\textsuperscript{33} Pursuant to the Status of Children Act 1978 (Qld), the woman who gives birth to a child is presumed to be the child’s mother and her partner or spouse, if she has one, is the child’s father. Equivalent legislation exists in other Australian States and Territories: Status of Children Act 1996 (NSW); Status of Children Act 1974 (Vic); Parentage Act 2004 (ACT); Status of Children Act 1974 (Tas); Artificial Conception Act 1983 (WA); Family Relationships Act 1975 (SA); Status of Children Act (NT).

\textsuperscript{34} This is not the case in Tasmania where the legislation does not facilitate the transfer of legal parentage, or the Northern Territory where surrogacy legislation has not been enacted.

\textsuperscript{35} Ellison and Kanchanit [2012] FamCA 602 at [100].
individuals in a same-sex couple or a single man or woman enter a surrogacy arrangement and the surrogate mother relinquishes the child, the parent(s) may not be able to achieve the status of legal parent.

**Queensland, New South Wales and Victoria**

Currently in Queensland, altruistic surrogacy may be available to married and de facto heterosexual couples, same-sex couples and single men and women. If there is a woman involved, there must be a medical reason for requiring a surrogacy arrangement such as inability to conceive or carry the fetus to term, or she is likely to have a child affected by a genetic condition or disorder. The legislation also refers to a social need for surrogacy which opens up access to males, whether they are single or in a same-sex relationship. As Queensland has not enacted legislation governing assisted reproductive technology practice, there are no legislative provisions regarding eligibility for assisted reproductive technology, and access to such services will depend on the practices of individual clinics.

As in Queensland, married couples, heterosexual de facto couples, same-sex couples and single persons can access surrogacy in New South Wales. The assisted reproductive technology legislation in New South Wales is silent on eligibility to access such services, so that legislation is not a barrier for single persons or same-sex couples.

In Victoria, entry into surrogacy arrangements is regulated by the assisted reproductive technology legislation. As in Queensland and New South Wales, surrogacy is available to married couples, heterosexual de facto couples, same-sex couples and single men and women. The Victorian legislative regime has an added layer of complexity if, as will generally be the case, the surrogate mother requires assisted reproductive technology from a registered assisted reproductive technology provider to achieve a pregnancy. In this event, the surrogacy arrangement must be approved by the Patient Review Panel before the surrogacy can proceed. The Patient Review Panel may approve a surrogacy arrangement if it is satisfied that a doctor has reached a conclusion about certain matters, but those matters do not include the marital status and sexuality of the parties to the surrogacy arrangement. Accordingly, these matters are not relevant to approving a surrogacy arrangement in Victoria.

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6 The legislation uses the term ‘eligible woman’ which is defined in Surrogacy Act 2010 (Qld), s 14(2), as follows: “a woman who (a) is unable to conceive; or (b) if able to conceive (i) is likely to be unable, on medical grounds, either to carry a pregnancy or to give birth; or (ii) is unlikely to survive a pregnancy or birth; or (B) is likely to have her health significantly affected by a pregnancy or birth; or (iii) is likely to conceive (A) a child affected by a genetic condition or disorder, the cause of which is attributable to the woman; or (B) a child who is unlikely to survive a pregnancy or birth; or (C) a child whose health is likely to be significantly affected by a pregnancy or birth.”

7 Surrogacy Act 2010 (NSW), s 30.

8 Assisted Reproductive Technology Act 2007 (NSW).

9 For a discussion of the issues surrounding access to assisted reproductive technologies more generally in New South Wales, see Smith M, ‘Reviewing Regulation of Assisted Reproductive Technology in New South Wales: The Assisted Reproductive Technology Act 2007 (NSW)’ (2008) 16 JLM 120.

40 For a discussion of the issues surrounding access to assisted reproductive technologies more generally in Victoria, see Smith M, ‘Regulating Assisted Reproductive Technologies in Victoria: The Impact of Changing Policy Concerning the Accessibility of In Vitro Fertilisation for Preimplantation Tissue-Typing’ (2012) 19 JLM 820.

41 Assisted Reproductive Treatment Act 2008 (Vic), s 3, defines ‘surrogacy arrangement’ as “an arrangement, agreement or understanding whether formal or informal, under which a woman agrees with another person to become or try to become pregnant, with the intention – (a) that a child born as a result of the pregnancy is to be treated as the child, not of her, but of another person or persons (whether by adoption agreement or otherwise); or (b) of transferring custody or guardianship in a child born as a result of the pregnancy to another person or persons; or (c) that the right to care for a child born as a result of the pregnancy be permanently surrendered to another person or persons.” The reference in the definition to ‘person or persons’ indicates that both single persons and couples can take part in a surrogacy arrangement in Victoria. This is also reflected in the Status of Children Act 1974 (Vic), s 17. The Assisted Reproductive Treatment Act 2008 (Vic), s 40, prescribes matters the Patient Review Panel should consider when approving surrogacy arrangements. One of these is that if the commissioning parent is a woman, the woman is likely to place her life or health, or that of the baby, at risk if she becomes pregnant, carries a pregnancy or gives birth. By implication, the legislation has contemplated the commissioning parent not being a woman and therefore being a man. In addition, there are no restrictions in either piece of legislation which limit the sexuality of couples or single persons entering into surrogacy arrangements.

42 Assisted Reproductive Treatment Act 2008 (Vic), s 39. This section provides that a registered assisted reproductive technology provider may carry out a treatment procedure on a woman under a surrogacy arrangement only if the surrogacy arrangement has been approved by the Patient Review Panel. However, the Status of Children Act 1974 (Vic), s 23, contemplates surrogacy arrangements that do not require assistance from a registered assisted reproductive technology provider. The section applies if the surrogate mother became pregnant as a result of artificial insemination whether or not this was a result of treatment by an assisted reproductive technology provider.

43 These matters include the doctor being satisfied that the commissioning parent is unlikely to become pregnant, carry a pregnancy or give birth; the surrogate mother’s oocyte will not be used in the surrogate procedure; the surrogate has previously carried a pregnancy and that the surrogate is at least 25 years of age: Assisted Reproductive Treatment Act 2009 (Vic), s 40.

Heterosexual and same-sex couples and single persons who currently engage in altruistic surrogacy arrangements in Queensland, New South Wales and Victoria can obtain parentage orders.44

**Australian Capital Territory**

Surrogacy arrangements in the Australian Capital Territory are referred to as ‘substitute parent agreements’. The legislation does not limit who may enter into a substitute parent agreement. Further, as the Australian Capital Territory has not enacted legislation governing assisted reproductive technology practice, there are no legislative provisions regarding eligibility for assisted reproductive technology, and access to such services will depend on the practices of individual clinics.

However, a parentage order can only be made if there is a substitute parent agreement under which two people (the substitute parents) have indicated their intention to apply for a parentage order in relation to the child.45 This precludes single men and women from applying for a parentage order in the Australian Capital Territory. Same-sex couples are able to both enter into a substitute parent agreement and seek a parentage order in the Australian Capital Territory.

**South Australia**

The South Australian legislation precludes same-sex couples and single persons from entering into surrogacy arrangements. Under the *Family Relationships Act 1975* (SA), a surrogacy contract is illegal and void,46 but not if it is a ‘recognised surrogacy agreement’ as defined by the Act.47 One requirement of a ‘recognised surrogacy agreement’ is that the surrogate mother must agree to surrender custody of and rights in the child to two other persons called the commissioning parents. Therefore single men and women are excluded from entering into a recognised surrogacy agreement.48 Another requirement is that the commissioning parents must be legally married or have cohabited continuously together as de facto husband and wife for a period of three years prior to the agreement.49 This requirement excludes same-sex couples. Only those parties to a ‘recognised surrogacy agreement’ are permitted to apply for a parentage order under the Act.50 Therefore, same-sex couples and single persons cannot apply for a parentage order pursuant to a surrogacy arrangement in South Australia.

**Western Australia**

The *Surrogacy Act 2008* (WA) regulates ‘surrogacy arrangements’ in that State. The legislation does not contain any prohibitions on who may enter into such arrangements. Therefore, heterosexual and same-sex couples as well as single men and women are not prohibited by the surrogacy legislation from entering into a surrogacy arrangement.51 However, restrictions apply if the intending parents want to obtain a parentage order. Before a parentage order can be obtained under the Act, the intending parent or parents must qualify as either an ‘eligible couple’ or ‘eligible person’.52 The drafting of the legislation is quite complex, but the effect is that a married or heterosexual de facto couple can apply for a parentage order if there is medical infertility or there is a risk of a child being born with a genetic abnormality. A lesbian couple could also apply for a parentage order if either of the women is infertile or there is a risk of a child being born with a genetic abnormality. A single woman may also satisfy the eligibility requirements if she is medically infertile or there is a risk of a child being born with a genetic abnormality. The drafting of the eligibility provisions in the surrogacy legislation means that a single male or a male same-sex couple will not be able to obtain a parentage order.

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44 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.
45 Parentage Act 2004 (ACT), s 24(c).
46 Family Relationships Act 1975 (SA), s 10G(1).
47 Family Relationships Act 1975 (SA), s 10G(4).
48 Family Relationships Act 1975 (SA), s 10HA(2).
49 Family Relationships Act 1975 (SA), s 10HA(2)(a).
50 Family Relationships Act 1975 (SA), s 10HA(2)(b)(iii).
51 Family Relationships Act 1975 (SA), s 10HB(2).
52 Surrogacy Act 2008 (WA), s 3, defines surrogacy arrangement as an arrangement for a woman (the birth mother) to seek to become pregnant and give birth to a child and for a person or persons other than the birth mother (the arranged parent or parents) to raise the child, but the term does not include an arrangement entered into after the birth mother becomes pregnant unless it is in variation of a surrogacy arrangement involving the same parties.
53 Surrogacy Act 2008 (WA), s 19.
Underpinning the surrogacy legislation in Western Australia is the Human Reproductive Technology Act 1991 (WA), which must be adhered to if assisted reproductive technology services are required for a surrogacy arrangement. While originally the Act required those seeking access to assisted reproductive technology services to be either married or in a heterosexual de facto relationship, access to services for single and lesbian women is now permitted as a result of the Acts Amendment (Lesbian and Gay Reform) Act 2002 (WA) in cases where such women are medically infertile (s 23(1)(a)).

Therefore surrogacy is available in Western Australia for heterosexual couples, female same-sex couples and single women (provided there is medical infertility or a risk of a child with a genetic abnormality), and these intending parent(s) may also apply for a parentage order.

Tasmania

The Surrogacy Contracts Act 1993 (Tas) prohibits surrogacy contracts in relation to child bearing. The legislation makes it an offence to provide technical or professional services in relation to achieving a pregnancy which is the subject of a surrogacy contract, and also to introduce potential parties to a surrogacy arrangement. However, it does not prohibit individuals from entering into an altruistic surrogacy arrangement. This means that there are no legislative prohibitions on altruistic surrogacies being entered into by same-sex couples or single persons. On 29th August 2012 the Tasmanian Legislative Council passed the Surrogacy Bill 2011. The Bill received royal assent on 26th October 2012 and, at the time of writing, awaits proclamation. Once proclaimed, the Surrogacy Act 2012 (Tas) will allow heterosexual couples, same sex couples, single men and single women, access to altruistic surrogacy in Tasmania. As Tasmania has not enacted legislation governing assisted reproductive technology practice, there are no legislative provisions regarding eligibility for this technology, and access to such services will depend on the practices of individual clinics. Although the current surrogacy legislation does not facilitate a transfer of legal parentage to intended parents, the new legislation will open this path to parenthood for intended parents.

Northern Territory

The Northern Territory has not enacted legislation that regulates surrogacy arrangements. This means there are no legislative limitations on who can enter into such arrangements, and access will depend on the availability of

54 Human Reproductive Technology Act 1991 (WA), s 23, states: ‘(1) An in vitro fertilisation procedure may be carried out where – (a) it would be likely to benefit – (i) persons who, as a couple, are unable to conceive a child due to medical reasons; or (ii) a woman who is unable to conceive a child due to medical reasons; or (ii) a couple or a woman whose child would otherwise be likely to be affected by a genetic abnormality or disease; or (iii) a woman who is unable to give birth to a child due to medical reasons and is a party to a surrogacy arrangement (as defined in the Surrogacy Act 2008 section 3) that is lawful.’

55 However, the position in Western Australia remains complicated because of the wording of s 23(1)(c) of the Human Reproductive Technology Act 1991 (WA), Section 23(1)(c) states that ‘any persons seeking to be regarded, in applying paragraph (a) of section 23, as members of a couple are – (i) married to each other; or (ii) in a de facto relationship with each other and are of the opposite sex to each other.’ On the basis of this provision, it seems to exclude same-sex de facto couples from accessing assisted reproductive technology services. Yet, this is at odds with the Explanatory Notes to the Acts Amendment (Lesbian and Gay Reform) Act Bill 2001 (WA), which, at cl 70 states: ‘This amendment makes provisions that will allow a woman who is unable to conceive a child for medical reasons, or whose child is likely to be affected by a genetic abnormality or disease, to have access to in vitro fertilisation procedures. There is no restriction on whether the woman is married, single or in a de facto relationship with a person of the same or opposite sex.’ Clause 70 goes on to state: ‘[p]rovision is also made for heterosexual couples to access in vitro fertilisation procedures where the woman is not infertile, but there are medical reasons preventing [a couple from] conceiving a child, or their child is likely to be affected by a genetic abnormality or disease.’ On the basis of this latter paragraph, the authors are of the opinion that s 23(1)(c) of the Human Reproductive Technology Act 1991 (WA) should be interpreted to mean that the marriage or heterosexual relationship requirement is only intended to apply to circumstances where a woman seeks treatment with her male partner on the basis that the inaccessibility to conceive stems from the male partner’s infertility (or other medical condition), with the woman suffering no impairment to her fertility (ordinarily, a woman in these circumstances would not be eligible for treatment under the Act). Thus, if interpreted in such a way, this provision would be irrelevant in the context of a lesbian couple seeking access to services. Furthermore, this interpretation is supported by the underlying intention of the Acts Amendment (Lesbian and Gay Reform) Act 2002 (WA). As outlined in the Explanatory Notes to the Acts Amendment (Lesbian and Gay Reform) Act Bill 2001, the amendments to the legislation were intended to enable single and lesbian women to gain access to assisted reproductive technology services. Additionally, this requirement also appears to be inconsistent with Commonwealth legislation preventing discrimination on the basis of marital status and would therefore need to be interpreted in a non-discriminatory way; see Tarrant S, ‘Western Australia’s Persistent Enforcement of an Invalid Law: Section 23(c) of the Human Reproductive Technology Act 1991 (WA)’ (2000) 8 JLM 92.

56 Surrogacy Contracts Act 1993 (Tas), Long Title.

57 Surrogacy Contracts Act 1993 (Tas), s 5.

58 Surrogacy Contracts Act 1993 (Tas), s 4.

59 Surrogacy Act 2012 (Tas) ss 5, 7.

60 Surrogacy Act 2012 (Tas) s 13.
and restrictions on assisted reproductive technology services generally. It also means that no parentage orders can be made.

**Family Court orders**

For the sake of completeness, it should be mentioned that there is another option for those who are unable to obtain a parentage order by virtue of their marital status or sexuality. These parents may still apply to the Family Court for a parenting order. A parenting order deals with who a child lives with, the time a child spends with certain persons, the parental responsibility for the child and any aspect of the care, welfare or development of the child. When assessing these orders, the court takes into account matters relating to the welfare of the child. The marital status and sexuality of the applicant are not factors which the court has to consider under the *Family Law Act 1975* (Cth). However, if the surrogacy agreement itself is deemed to be illegal under State or Territory legislation, this may have an impact on the court’s decision to make a parenting order. In addition, parenting orders do not confer legal parentage on the intended parents. They simply provide a person with the responsibility of caring for the child until he or she reaches 18 years.

**PROPOSED ALTERATIONS OF THE ELIGIBILITY CRITERIA ARE UNJUSTIFIABLE**

Informed by that backdrop of the national surrogacy framework, the authors now turn to examine why the proposed LNP reforms are not justifiable. They argue that the proposed changes are out of step with the current trend of reforms for assisted reproductive technology generally, that they are discriminatory, and that the purported rationale for the changes – the welfare of children – is not sustained by the evidence.

**Out of step with current trends for accessing assisted reproductive technology services**

Although there are some distinctive ethical considerations associated with the practice of surrogacy, the progression of assisted reproductive technology policy and practice provides a useful comparison, and has significant implications for the issue of eligibility for surrogacy. The discussion below demonstrates how the law and practice in other jurisdictions has responded to social attitudes concerning the question of who should be able to become a parent with the assistance of reproductive technologies.

As discussed above, in many cases where altruistic surrogacy is contemplated, access to assisted reproductive technology is often necessary so that such agreements can be carried into effect. In some jurisdictions, legislation regulating assisted reproductive technology has been enacted. In the other jurisdictions (including Queensland), no legislation has been passed to address the broader issues raised by IVF practices. As a result, in those jurisdictions, IVF is regulated by way of a national system of professional guidelines. Under this national framework, the Fertility Society of Australia (FSA) requires all assisted reproductive technology centres to gain accreditation from its Reproductive Technology Accreditation Committee (RTAC) and the accreditation process requires all centres to comply with ethical guidelines issued by the National Health and Medical Research Council (NHMRC). Of particular significance for this article is the fact that the national guidelines that regulate assisted reproductive technology practices do not address the question of eligibility. This...

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81 *Family Law Act 1975* (Cth), s 60CC. Section 60CC(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.

82 However, see *Ellison v Karmchanit* [2012] FamCA 602 per Ryan J where the court was asked to make a parentage order in the face of an illegal commercial surrogacy agreement. ‘Of 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’ (at [3]). His Honour further commented (at [88]): ‘I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts.’


84 The terms of the accreditation process administered by the RTAC require clinics to adhere to all relevant legislation and applicable guidelines and the RTAC Code of Practice: Fertility Society of Australia, Reproductive Technology Accreditation Committee, *Code of Practice for Assisted Reproductive Technology Units* (revised October 2010).

leaves the position concerning access to this technology in Queensland (and other non-statutory jurisdictions) unregulated.66

Legislation concerning assisted reproductive technology has been enacted in Victoria, New South Wales, South Australia and Western Australia. With the exception of the New South Wales legislative framework, eligibility was determined by the statutory schemes and the various legislative requirements stipulated that those seeking access to assisted reproductive technology services should be either married or in a stable heterosexual de facto relationship.67 However, such requirements in Victoria and South Australia were deemed to be inconsistent with Commonwealth legislation which prohibits discrimination on the basis of marital status. The marriage requirement under the former Victorian legislation (which has since been reformed) was challenged in the case of *McBain v Victoria* (2000) 99 FCR 116; [2000] FCA 1009, due to the fact that a doctor could not comply with both the Commonwealth legislation and the former Victorian legislation when approached by a single woman who was seeking access to assisted reproductive technology.68 The Federal Court of Australia held that the Victorian legislation was discriminatory and, because the marriage requirement was inconsistent with the Commonwealth legislation, it was invalid under s 109 of the Constitution.69 Similarly, in *Pearce v South Australian Health Commission* (1996) 66 SASR 486, the Supreme Court of South Australia declared that the marriage requirement contained in the former *Reproductive Technology (Clinical Practices) Act 1988 (SA)* 70 was inconsistent with the *Sex Discrimination Act 1984 (Cth)* and, therefore, invalid. In Western Australia, statutory amendments were enacted to remove the discriminatory nature of the marriage requirement under the legislation.71

The statutory frameworks addressing eligibility also contained additional requirements that obstructed access to assisted reproductive technology for single and lesbian women. The legislative provisions required prospective participants to show that they were either medically infertile or at risk of passing on a genetic condition when conceiving naturally. Such terms had been construed narrowly.72 In Victoria, the former regulatory body, the Infertility Treatment Authority (ITA), had advised licensed clinics that women (including those who are not married or in a de facto relationship) could only be treated after a medical assessment confirming clinical infertility. Similar approaches were also adopted in Western Australia73 and South Australia.74

Attitudes towards eligibility for assisted reproductive technology services have shifted significantly over the past decade. This is particularly well demonstrated by the review of the Victorian legislation undertaken by the

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66 It should be noted that in Queensland, discrimination claims have been commenced against assisted reproductive technology clinicians and centres in cases where access to assisted reproductive technology has been limited on the basis of marital status or sexual orientation. See below, n 84 and accompanying text.


68 Section 22(1)(a) of the *Sex Discrimination Act 1984 (Cth)* states that ‘it is unlawful for a person who ... provides goods or services ... to discriminate against another person on the ground of the other person’s sex, marital status, pregnancy or potential pregnancy’. The Federal Court of Australia adopted a liberal interpretation of the term ‘services’ under the Commonwealth Act, noting that the term is ‘eminently apt to statutory amendments were enacted to remove the discriminatory nature of the marriage requirement under the legislation.71

70 *Reproductive Technology (Clinical Practices) Act 1988 (SA)*, s 13(3). The legislation was updated by the *Reproductive Technology (Clinical Practice) (Miscellaneous) Amendment Act 2009 (SA)*.


72 For example, in Victoria, the former statutory body, the Infertility Treatment Authority (ITA), had sought advice on interpreting the statutory term ‘unlikely to become pregnant’. The advice provided to the ITA suggested that assisted reproductive technology participants should be medically infertile to be eligible for such services under the statute, with services only being accessible after a medical opinion confirming the inability to conceive naturally. See Victorian Law Reform Commission, *Assisted Reproduction & Adoption: Should the Current Eligibility Criteria in Victoria be Changed?* Consultation Paper (2003) pp 26-27.


74 South Australian Council on Reproductive Technology (SACRT), ‘Eligibility for Assisted Reproductive Technology’ Memorandum 1, reported in South Australian Council on Reproductive Technology, *Annual Report* (2004) p 21: ‘Infertility refers to the inability or significantly reduced capacity of a person to conceive or otherwise bear or father a child, evidenced by: (i) a reasonable period of unprotected intercourse with no resulting pregnancy; or (ii) a proven medical condition resulting in reduced fertility; or (iii) other evidence presented to the treating medical practitioner … Further as a guide: a man may be considered infertile if his female partner has been unable to conceive a child naturally; a woman may be considered infertile if, with a male partner, she has been unable to conceive a child naturally.’
Victorian Law Reform Commission (VLRC), which noted that the eligibility criteria under the former legislative scheme had been applied inconsistently to married, women, women in heterosexual de facto relationships, and women without legally recognised partners. The VLRC observed that a more strict interpretation of the relevant Victorian eligibility term ‘unlikely to become pregnant’ had been ‘applied to women without legally recognised male partners’ to prevent them from accessing reproductive services in Victoria. The VLRC noted that this interpretation meant that, in practice, a single woman or a woman in a same-sex relationship could only be eligible if she were medically infertile (which is generally limited to physiological reasons), while a woman with a male partner could also point to other reasons such as the infertility of her partner, a psychological inability to have sex or some other unexplained inability to conceive, to satisfy the eligibility criteria. It was for this reason that the Commission recommended a broader approach to the issue of eligibility, and that criteria not be limited to medical infertility. The VLRC had formed this view following an extensive public consultation process, noting that ‘the marital status requirement is not only inconsistent with the principle of non-discrimination, but it also bears no relationship to the health and wellbeing of children’. These issues of discrimination and the wellbeing of children born to same-sex couples and single persons are discussed further below.

Notably, the VLRC’s recommendations were adopted in the reformed legislative scheme, enabling the provision of assisted reproductive technology services to single women and same-sex couples, even if those individuals are not medically infertile. Although the requirement concerning the need to establish medical infertility may still apply in South Australia and Western Australia, where there is an eligibility criterion under the legislation for the provision of these services, in the remaining jurisdictions (including New South Wales, where the legislation does not impose eligibility criteria), the issue of who can access these services is determined by individual clinics. In this latter context, there are no barriers imposed by the State to prevent the provision of such services to single persons, same-sex couples, or de facto couples of less than two years.

The above discussion demonstrates that in the wider context of assisted reproductive technology, the notion that only the traditional nuclear family should be afforded permission to access such services has weakened significantly alongside the recognition of a more diverse range of family structures.

**Discriminatory nature of proposed amendments**

If the LNP Government’s intended amendments are modelled on the Springborg proposals, they will exclude single persons, same-sex couples and heterosexual de facto couples of less than two years from becoming parents through surrogacy. As noted above, the Explanatory Notes to the Bill sought to defend this discriminatory approach by pointing to concerns about the best interests of children born to such prospective parents. However, according to current research, referred to in the next section, there is not a reliable evidence base to conclude that being raised by such individuals or couples poses any harm to children who may be born into alternative family settings. For this reason, the justification discussed above for reforming the law in a manner that is inconsistent with the principles of Queensland’s anti-discrimination legislation is unconvincing. This section of the article considers the prospect that the discriminatory nature of the proposed amendments may be contrary to the Commonwealth anti-discrimination legislation.

In the general context of assisted reproductive technology, it was established above that legislative provisions regulating access to services, which impose restrictions on the grounds of marital status, have been found to be inconsistent with Commonwealth anti-discrimination legislation. In the surrogacy context, the Lavarch Committee also observed the potential for conflict between legislation at the State level and the Commonwealth

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76 Victorian Law Reform Commission, n 72, p 67.

77 Victorian Law Reform Commission, n 72, pp 52-53.

78 Victorian Law Reform Commission, n 72. The Commission’s Final Report suggested (p 68) that a ‘woman be eligible for treatment if she is unlikely to become pregnant and that her inability to become pregnant (or to carry a pregnancy or give birth to a child, or likelihood of transmitting a genetic abnormality or disease) be assessed on the basis of the circumstances in which she finds herself (whether single, married, in a same-sex relationship, psychologically averse to having sexual intercourse with a man, or otherwise)’.

79 Victorian Law Reform Commission, n 72, p 67.

80 The eligibility criteria permit access in cases where a doctor is satisfied, on reasonable grounds, that the woman is unlikely to become pregnant other than by a treatment procedure, or the woman is unlikely to be able to carry a pregnancy or give birth to a child without a treatment procedure, or the woman is at risk of transmitting a genetic abnormality or genetic disease as a result of a pregnancy conceived other than by a treatment procedure, including a genetic abnormality or genetic disease for which the woman’s partner is the carrier: *Assisted Reproductive Treatment Act 2008* (Vic), s 10(2).

81 See above n 29 and accompanying text.

anti-discrimination legislation. The committee obtained advice from the Human Rights and Equal Opportunities Commission, which stated that ‘[s]tate law and regulation must not restrict access to services or discriminate on the basis of marital status, sexuality, race or religion’. If the Queensland surrogacy legislation is amended to require a clinician or an assisted reproductive technology centre to refuse to provide assisted reproductive technology services for the purpose of carrying through a surrogacy arrangement (on the basis of the participants’ marital status or sexuality), there is room to argue that such requirement would be inconsistent with the Sex Discrimination Act 1984 (Cth). Although in this context assisted reproductive technology services are provided to the surrogate mother, the cost of such services will most likely be met by the intended parent(s). This means that all of the relevant parties would be privy to an agreement for the provision of IVF services. A clinician who is not able to provide such services on the basis of the marital status or sexuality of the participants would arguably be unable to comply with both State legislation and the Commonwealth anti-discrimination provisions.

If the surrogacy legislation is amended in the form proposed by the LNP Government, this would not be the first time that a Queensland government has endorsed discriminatory legislation that seeks to prevent certain classes of people, who require assistance by way of reproductive technologies in order to become parents, from accessing such services. In the case of JM v QFG, a lesbian woman, JM, and her partner of four years were denied access to treatment by a Queensland fertility clinic. The applicant claimed that the clinic had discriminated against her on the basis of her sexual orientation and was therefore in breach of the Anti-Discrimination Act 1991 (Qld). Ultimately, it was held that there had been no discrimination against the applicant, although the reasoning underpinning this decision is somewhat controversial and has been challenged in academic commentary. Following the JM case, the Queensland Government sought to ensure that the potential for future discrimination claims in this context were averted by amending the Anti-Discrimination Act 1991 (Qld). The amended legislation enables assisted reproductive technology centres to refuse to provide reproductive services on the grounds of a participant’s relationship status or sexuality. The LNP Government’s proposals are underpinned by discriminatory reasoning. Although the proposal to limit the eligibility requirements for entering into surrogacy arrangements is purportedly focused on protecting the welfare of children born as a result of such arrangements, the basis of the concern appears to be that a child exercising over any member of a civilised community against his will, is to prevent harm to others. The above discussion of statements in Hansard suggests that the LNP Government considers that the ‘harm’ here will be to

No evidence of harm to children

The need to demonstrate harm

Preventing access to surrogacy for heterosexual de facto couples in a relationship for less than two years, all same-sex couples, and single men and women needs to be justified. The proposed reforms involve discriminating against a cohort of people on the basis of their relationship status and so there is an onus resting on those who advocate for this position to clearly justify it. Traditionally, in a liberal society, this requires the demonstration of harm. Liberal theories on regulation view state intervention in the lives of its citizens as an interference with individual autonomy which can only be justified when it is necessary to prevent harm. The harm principle, famously espoused by JS Mill, states that ‘[t]he only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others’. The above discussion of statements in Hansard suggests that the LNP Government considers that the ‘harm’ here will be to

82 Parliament of Queensland, Investigation into Altruistic Surrogacy Committee, n 12, p 39.
83 Parliament of Queensland, Investigation into Altruistic Surrogacy Committee, n 12, p 39.
86 Anti-Discrimination Act 1991 (Qld), s 45A(1), which states: ‘Section 46 [which prohibits discrimination in the supply of goods or services] does not apply to the provision of assisted reproductive technology services if the discrimination is on the basis of relationship status or sexuality.’
87 See above n 30 and accompanying text.
the welfare of children born via surrogacy arrangements to these groups of people. But is this claim substantiated by evidence? One would expect clear evidence to justify excluding an identified cohort of people from having access to the means to have a family through surrogacy arrangements.

The VLRC report

The most significant Australian review of this issue in recent times was conducted by the VLRC in its Assisted Reproductive Technology and Adoption report discussed above. As part of its review, the VLRC commissioned and published a literature review in 2004, which considered a number of studies that assessed the outcomes for children born following the provision of assisted reproductive technology in diverse family formations. The studies referred to in the published literature review considered the development of children who were raised in a broad range of ‘non-traditional’ family structures such as singles and same-sex couples. The VLRC also engaged with a further body of empirical research in its final report.

Same-sex parents

Despite a number of methodological challenges faced by researchers in this field (particularly in relation to the small sample sizes in many of the studies), the VLRC noted that ‘there is sound evidence that children born into families with ... same-sex parents do at least as well as other children’. It should be observed that while the majority of the literature in this field has formed the view that the outcomes for children of same-sex parents are generally favourable, there have been studies which indicate that children in gay or lesbian families have experienced bullying and discrimination because of their parents’ sexuality. These studies, however, also noted that such children tend to be more ‘broad-minded, tolerant and empathetic than children born into conventional families’.

In an attempt to try and overcome the methodological challenges of the research in this field, the results of a number of studies have been aggregated, with the conclusion that the ‘meta-analyses confirm that there are no significant discrepancies between studies which report favourable outcomes for children brought up by same-sex couples’. Significantly, the VLRC noted:

The research indicates that children with lesbian and gay parents do not differ at all, or significantly, from children with heterosexual parents when assessed according to a range of standard criteria measuring parent-child relationships, socio-emotional development, psychiatric ratings and gender development.

Single parents

A number of studies have also been undertaken which suggest that ‘most children in single-parent families do just as well as the average child in a two-parent family’, although there is also some research which suggest that children ‘in single-parent families do less well on educational and psychological measures than children in two-parent families’. However, again, the VLRC observed that it may be misleading to rely on such studies as they often involve children who have been raised following divorce, compared to studies which examine the outcomes for children of single mothers who have conceived by way of donor insemination:

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90 See above n 29 and accompanying text.
91 Victorian Law Reform Commission, n 72.
93 Victorian Law Reform Commission, n 72, Ch 2.
94 Victorian Law Reform Commission, n 72, p 32.
95 Victorian Law Reform Commission, n 72, p 30.
96 Victorian Law Reform Commission, n 72, p 33.
97 Victorian Law Reform Commission, n 72, p 33.
98 Victorian Law Reform Commission, n 72, p 32.
99 Victorian Law Reform Commission, n 72, p 32. The Victorian Law Reform Commission did note, however, that the majority of studies conducted in this field had been undertaken in relation to children raised by lesbian parented families. The VLRC observed that although similar findings have been made in relation to children raised in male homosexual parented families, this area of study has not yet reached the same level of sophistication: Victorian Law Reform Commission, n 72, p 34.
101 Victorian Law Reform Commission, n 72, p 35.
When children being brought up by single parents show negative effects this can generally be attributed to factors associated with their parents' separation, such as parental hostility and the economic consequences of divorce, rather than fatherlessness itself. By contrast, the single mothers by choice who made submissions to [the VLRC’s review] appeared to be well prepared for single parenthood prior to conception, both emotionally and financially.102

No demonstrated harm

As noted above, the onus of demonstrating harm rests with those seeking to justify prohibiting certain conduct. The most comprehensive review of the literature undertaken in Australia to date by the VLRC reveals that this claim cannot be substantiated. The limited literature concerning children raised by single parents is inconclusive, and the evidence in relation to children raised by same-sex couples suggests that children raised by such families are at no greater risk of harm than children raised by heterosexual couples. And although it did not purport to examine the literature dealing with ‘non-traditional’ family structures in the same depth, the Lavarch Committee reached a similar conclusion, stating, ‘the committee believes concerns for the outcomes for children of same-sex parents are not supported by the available research’.103 These findings have also been supported by a range of studies since the VLRC review.104 While ongoing research is needed to better understand how children experience surrogacy arrangements in general and when raised by single and same-sex parents,105 it is clear that the required evidence base to justify a plainly discriminatory approach is lacking.

CAUTION, SAFEGUARDS AND EVIDENCE-BASED REGULATION, NOT DISCRIMINATION

In response to some of the concerns that have been raised in the surrogacy debate, it could be argued that it is a distinct category of reproduction that warrants particular consideration.106 It has certainly been recognised that the practice of surrogacy raises a number of distinct ethical issues that go beyond the scope of general reproductive treatments.107 When considering the regulatory issues surrounding surrogacy, the VLRC noted:

The commission’s assessment of surrogacy is that it is sufficiently different from other forms of ART to warrant a cautious regulatory approach, with an additional set of requirements for access to treatment services. Our view is that the eligibility criteria that apply to surrogacy should address the risks associated with surrogacy arrangements that do not arise in other forms of ART. In particular, surrogacy involves another party (the surrogate mother) who carries the child throughout pregnancy but will be asked to relinquish that child upon birth.108

Undoubtedly, these additional factors in the surrogacy context justify a distinct regulatory approach. However, as explained above, the potential for concern arising from this distinct use of assisted reproductive technology is not necessarily correlative to the marital status or sexual orientation of the intended parents. In addressing the fact that there should be a distinct category of eligibility criteria in the context of surrogacy arrangements, it has

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102 Victorian Law Reform Commission, n 72, p 35.
103 Parliament of Queensland, Investigation into Altruistic Surrogacy Committee, n 72, p 78.
105 Such research, however, needs to be undertaken in an academically rigorous way as demonstrated by the recent scandal involving a paper which argued that outcomes for children of same-sex parents (as controversially defined in this study) were worse than for heterosexual parents: Regnerus M, ‘How Different are the Adult Children of Parents Who have Same-sex Relationships? Findings from the New Family Structures Study’ (2012) 41 Social Science Research 752. This study has been the subject of widespread academic critique which led to an internal audit by the journal which published the paper. That audit has not yet been published, but media reports state it is highly critical of the paper and the reviewers, and that the paper’s lack of rigour meant that it should never have been accepted for publication: Bartlett T, ‘Controversial Gay-Parenting Study Is Severely Flawed, Journal’s Audit Finds’, Chronicle for Higher Education (27 July 2012), http://chronicle.com/blogs/percolator/controversial-gay-parenting-study-is-severely-flawed-journals-audit-finds/30255 viewed 7 August 2012.
106 The Investigation into Altruistic Surrogacy Committee noted that there are a number of concerns in the context of surrogacy arrangements which highlight the need for a cautious regulatory approach: Parliament of Queensland, Investigation into Altruistic Surrogacy Committee, n 72, p 22.
108 Victorian Law Reform Commission, n 72, p 172.
been noted that the ‘protection of children and surrogate mothers must be the primary concern of any law regulating surrogacy’. Other Australian jurisdictions, such as Victoria, have displayed a willingness to embrace diversity in terms of adapting to contemporary social attitudes, which in turn has led to a position where modern family structures are given recognition. Most significantly, it was noted that:

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.

The requirement that those seeking to enter a surrogacy arrangement in Queensland should conform to the ‘traditional’ family model is a precarious position which fails to recognise modern social attitudes and realities. In 2010, 34% of all children born in Australia were born outside of marriage. In the context of natural procreation, children are frequently born to women who would fall short of the eligibility criteria outlined by the proposed amendments in Queensland, where the woman is single, is in a same-sex relationship, or where she has been with her male partner for less than two years.

If the key concerns in the context of surrogacy arrangements are the welfare of any resulting child and the interests of the surrogate mother, then the restrictions imposed with regard to eligibility should align with those purposes. Proportionate safeguards designed to promote the best interests of children and the interests of surrogate mothers are eminently justifiable. But this is not what is being proposed under the LNP reforms. Instead, marital status and sexual orientation are adopted as measures of child welfare and then used as a basis to exclude access to surrogacy for some groups of people. Such an approach is not supported by evidence and is discriminatory. The current authors urge the LNP Government to reconsider its position and to do so informed by the large body of available empirical evidence, fundamental principles of law such as non-discrimination, and the realities of modern-day Australian society.

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109 Victorian Law Reform Commission, n 72, p 173.
112 It has been acknowledged that many women in same-sex relationships seek to become pregnant by way of artificial insemination: Victorian Law Reform Commission, n 72, p 55.