

# NSW Law Reform Commission

## REPORT 60 (1988) - ARTIFICIAL CONCEPTION: SURROGATE MOTHERHOOD

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## Terms of Reference and Participants

### New South Wales Law Reform Commission

To the Honourable J R A Dowd LLB, MP,

Attorney General for New South Wales

### ARTIFICIAL CONCEPTION: SURROGATE MOTHERHOOD

Dear Attorney General,

We make this Report pursuant to the reference from the late Honourable D P Landa LLB, MP Attorney General for New South Wales, to this Commission dated 5 October 1983.

Helen Gamble

(Chairman)

Eva Learner

(Commissioner)

Keith Mason QC

(Commissioner)

Susan Fleming

(Commissioner)

### Terms of Reference

1. To inquire into and report on the need to make laws on:

- (i) Human artificial insemination (AI).
- (ii) In vitro fertilization of human ova. With human sperm (IVF) and transfer of the resulting embryo to the human uterus (ET).
- (iii) Any other procedure whereby human ova may be fertilized otherwise than by sexual intercourse.
- (iv) Any other procedure whereby the process of human reproduction may be commenced, continued or completed otherwise than in the body of a human female.
- (v) The preservation of human ova, human sperm and human embryo outside the human body.
- (vi) "Surrogate mothering" arrangements (arrangements under which a woman agrees to bear a child for another person or persons).
- (vii) Any other related matter.

2. To include in its report recommendations on the extent and nature of any recommended laws.

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3. In making its inquiry and report the Commission may take into account the extent that it decides is necessary or desirable:

- (i) Social, ethical and legal issues related to the subjects described above.
- (ii) Any form of artificial conception of a human child that it considers relevant.
- (iii) The public interest and the interests of children, parents, infertile couples, and any other relevant person.
- (iv) The nature of and issues raised by arrangements and agreements relating to any of the subjects described above, and to any child that may be born as a result.
- (v) The legal rights and liabilities of medical and other personnel involved in such practices and other related practices.
- (vi) Present laws including laws concerning children, including custody, adoption, inheritance and anti-discrimination, ownership of and dominion over human tissues, and the treatment of human infertility.
- (vii) Proposals and activities in relation to the subjects described above under consideration by the Standing Committee of Attorneys General, and by any Committee or other Organisation established in Australia by a State or Territory or by the Commonwealth.

D P Landa

Attorney General and

Minister of Justice

5 October 1983

### **Participants**

#### **Commissioner-in-charge of Reference**

Ms Helen Gamble

#### **Members of Artificial Conception Division**

Dr Susan Fleming

Ms Helen Gamble

Eva Learner

Mr Keith Mason QC

(Mr Russell Scott was Commissioner in charge of the reference from 5 October 1983 until 17 June 1988. He did not participate in the writing of this report.)

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## Artificial Conception Reference Publications

The following have been published in the course of the Artificial Conception Reference.

### Discussion Papers

New South Wales Law Reform Commission, *Human Artificial Insemination: Discussion Paper 1* (DP 11, 1984).

New South Wales Law Reform Commission, *In Vitro Fertilization: Discussion Paper 2* (DP 15, 1987).

New South Wales Law Reform Commission, *Surrogate Motherhood: Discussion Paper 3* (DP 18, 1988).

### Booklets

New South Wales Law Reform Commission, *Human Artificial Insemination Public Hearings* (Sydney, 16 April 1985).

New South Wales Law Reform Commission, *In Vitro Fertilization Public Hearing* (Sydney, 15 April 1988).

New South Wales Law Reform Commission, *Surrogate Motherhood: Public Hearing* (Sydney 14 October 1988).

### Reports

New South Wales Law Reform Commission, *Human Artificial Insemination* (LRC 49, 1986).

New South Wales Law Reform Commission, *In Vitro Fertilization* (LRC 58, 1988).

### Research Report

New South Wales Law Reform Commission, *Surrogate Motherhood: Australian Public Opinion* (RR2, 1987).

## Table of Abbreviations

|                            |  |
|----------------------------|--|
| AI                         | Human artificial insemination  |
| .                          |  |
| AI Discussion Paper        | New South Wales Law Reform Commission, <i>Human Artificial Insemination: Discussion Paper 1</i> (DP 11, 1984)  |
| .                          |  |
| AI Report                  | New South Wales Law Reform Commission, Report <i>Human Artificial, Insemination Report</i> (LRC 49, 1986)  |
| .                          |  |
| Family Law Council Report  | Family Law Council, <i>Creating Children: A uniform approach to the law and practice of reproductive technology in Australia</i> (July 1985)   |
| .                          |  |
| ET                         | Embryo Transfer  |
| .                          |  |
| IVF                        | Human in vitro fertilization   |
| .                          |  |
| IVF Discussion Paper       | New South Wales Law Reform Commission, <i>In Vitro Fertilization: Discussion Paper 2</i> (DP 15, 1987).  |
| .                          |  |
| Ontario Report             | Ontario Law Reform Commission. <i>Report on Human Artificial Reproduction and Related Matters</i> Volumes I and II (1985).   |
| .                          |  |
| South Australian Report    | Select Committee of the Legislative Council on Artificial Insemination by Donor, In-Vitro Fertilization and Embryo Transfer Procedures and related matters in South Australia, <i>Report</i> (April 1987). |
| .                          |  |
| Surrogacy Discussion Paper | New South Wales Law Reform Commission, <i>Surrogate Motherhood: Discussion Paper 3</i> (DP 1988).  |

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United Kingdom Committee

Committee of Inquiry into Human Fertilization and Embryology, chaired by Dame Mary Warnock DBE

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United Kingdom Report

*Report of the Committee of Inquiry into Human Fertilization and Embryology* (July 1984)

.

Victorian Committee

Committee to Consider the Social, Ethical and Legal Issues Arising From In Vitro Fertilization, chaired by Professor Louis Waller

.

Victorian Report (1982)

The Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, *Interim Report* (September 1982)

.

Victorian Report (1983)

The Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, *Report on Donor Gametes in IVF* (August 1983)

.

Victorian Report (1984)

The Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, *Report On The Disposition of Embryos Produced by in Vitro Fertilization* (August 1984)

.

## Summary of Recommendations

### Definitions

**Surrogacy Arrangement** : An arrangement whereby a woman agrees to become pregnant and to bear a child for another person or persons, to whom she will transfer custody at or shortly after birth.

**Child**: In this report our references to a child or children are to those children who are recognized by the law as having been born or who are stillborn.

### RECOMMENDATION 1: Welfare of Child

The welfare of the child should be the paramount consideration and should prevail over the interests of the adults involved in a surrogate motherhood arrangement. (paragraphs 4.1-4.4)

### RECOMMENDATION 2: Surrogate motherhood should be discouraged

The practice of surrogate motherhood should be discouraged by all practicable legal and social means. (paragraphs 4.5-4.7)

### RECOMMENDATION 3: Prohibition of Commercial Surrogacy

All forms of commercial surrogacy should be prohibited. It should be an offence to pay, receive, offer or solicit any reward for participation in or facilitation of a surrogacy arrangement or any part of a surrogacy arrangement. (paragraphs 4.8-4.12)

### RECOMMENDATION 4: Advertising in relation to Surrogacy

Anyone who publishes or causes to be published a statement or advertisement offering or soliciting participation in a surrogacy arrangement should be guilty of a criminal offence. It should also be an offence to publish, advertise or cause to be advertised a statement that a person is willing to negotiate, arrange or obtain the benefit of a surrogacy arrangement on behalf of another. (paragraph 4.13-4.14)

### RECOMMENDATION 5: Prohibited Activities

The following practices associated with surrogate motherhood should be prohibited, and criminal penalties should be imposed on anyone convicted of engaging in them except the immediate parties to the arrangement:

(A) Any person, except one of the immediate parties to the arrangement, who knowingly arranges or undertakes to arrange an introduction between those who may be interested in participating in a surrogacy arrangement, or who in any other way knowingly assists in such an arrangement, or any part of such an arrangement, should be guilty of an offence. (paragraphs 4.18-4.26)

(B) Any person who drafts or assists in the drafting of a surrogacy agreement should be guilty of an offence. (paragraphs 4.27-4.28)

### RECOMMENDATION 6: IVF Surrogacy

No special provision need be made for IVF surrogacy. It should be an offence for a medical practitioner to knowingly assist a surrogacy arrangement by providing IVF services to the parties. This would constitute an offence under Recommendation S(A) above which recommends a prohibition on knowingly assisting or making an offer of assistance. (paragraphs 4.30-4.32)

### RECOMMENDATION 7: Public Education



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Along with the prohibitions outlined above, further steps should be taken to dissuade infertile couples from resorting to surrogacy arrangements. (paragraph 4.33)

### **RECOMMENDATION 8: Surrogacy Agreements to be Void and Unenforceable**

Surrogacy agreements should be void and unenforceable at law. (paragraphs 4.34-4.44)

### **RECOMMENDATION 9: Presumptions of Parenthood**

There should be a conclusive presumption that the surrogate mother is the mother of the child. No other changes should be made to the presumptions of parenthood currently applied under the common law and by statute. (paragraphs 4.45-4.49)

### **RECOMMENDATION 10: Adoption**

An adoption order should only be available to the commissioning parents if orders for guardianship and custody under the Family Law Act 1975 (Cth) would not make adequate provision for the welfare of the child. (paragraphs 4.50-4.54)

### **RECOMMENDATION 11: Registration of Birth**

An accurate record of the circumstances of the child's conception and birth should be kept on the register of births. This should be available to the child on attaining the age of 18. (paragraph 4.55-4.57)

### **RECOMMENDATION 12: Department of Family and Community Services**

The Department of Family and Community Services should have no specially assigned role in relation to children born through surrogacy. (paragraph 4.58-4.60)

# 1. Background to Report

## I. INTRODUCTION

### A. The Reference

1.1 On 5 October 1983, the then Attorney-General, the late Honourable D P Landa LLB, MP referred to this Commission a number of matters that the Commission has collectively entitled *Artificial Conception*. The terms of reference are set out in the preliminary pages to this report. The reference arose out of previous work done by the New South Wales Advisory Committee on Human Artificial Insemination.<sup>1</sup> The Commission decided to divide its subject matter into three parts:

human artificial insemination;

in vitro fertilization; and

surrogate motherhood.

### 1. Human Artificial Insemination

1.2 The project, human artificial insemination was completed, when the report *Human Artificial Insemination*<sup>2</sup> was presented to the then Attorney General, the Honourable T W Sheahan BA, LLB, MP in June 1986. This was preceded by a substantial discussion paper published in December 1984.<sup>3</sup> The report, accompanied by draft legislation, was published by the Commission with the consent of the Attorney General in July 1986, and was tabled by him in Parliament on 28 May 1987. The legislation suggested by the report has yet to be enacted.

### 2. In Vitro Fertilization

1.3 In July 1987 the Commission published a lengthy discussion paper on the issues surrounding in vitro fertilization.<sup>4</sup> It provided background information on every aspect of the procedure, outlining the legislative responses both within Australia and overseas, and reviewed the moral and social issues raised by this new procedure. The report *In Vitro Fertilization*<sup>5</sup> was presented to the Attorney General in July 1988, and was tabled in Parliament on 2 August 1988.

### 3. Surrogate Motherhood

1.4 Surrogate motherhood is the third and final project of the Artificial Conception reference. Work has been in progress on the matter since 1986. In May 1987 the Commission published a research report that canvassed Australian public opinion on surrogacy.<sup>6</sup> This was followed in September 1988 by a discussion paper, *Surrogate Motherhood*.<sup>7</sup> The discussion paper outlined the background to surrogacy arrangements, their current legal status and the legislative responses made in jurisdictions outside New South Wales. It concluded by setting out four different "models for reform", and called for comments and submissions from the public.

### B. Principles of Reference

1.5 The principles on which the Commission has considered the reference were first outlined in the report on Human Artificial Insemination. These principles continue to guide our work. They are:

It is desirable, where possible, to alleviate the consequences of infertility through practices such as AI and IVF.

The paramount consideration in the practice of AI and IVF shall be the welfare of the child.

The formation of stable families is socially desirable and necessary.

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Personal freedom and individual autonomy should, so far as possible, be respected.<sup>8</sup>

In the surrogate motherhood project the Commission has placed particular emphasis on the second of these principles.

### C. Membership of the Commission

1.6 The members of the New South Wales Law Reform Commission who have produced this report are:

Ms Helen Gamble, Chairman of the Commission and Commissioner-in-charge of the Artificial Conception reference.

Dr Susan Fleming, Obstetrician and Gynaecologist.

Eva Learner, Social Worker.

Mr Keith Mason QC, Solicitor General for New South Wales.

Mr Russell Scott was Commissioner-in-charge of the reference until he resigned from the Commission on 17 June 1988 in order to take up a consultancy in the private legal profession. He did not participate in the writing of this report.

## II. PUBLIC CONSULTATION

1.7 Copies of the Surrogate Motherhood discussion paper were distributed in August-September 1988. The paper called for comment on the issues and incidence of surrogacy in New South Wales. A public Hearing was conducted by the Commission at the Assembly Hall, University of Sydney Law School on 14 October 1988. Fifteen oral submissions were received, and a full transcript of the proceedings was made.<sup>9</sup> In addition to the submissions made at the hearing, the Commission also received more than 30 oral and written submissions in response to the discussion paper. A list of submissions can be found in Appendix A.

1.8 As the Commission undertook to report to the Attorney General by December 1988, the period for public consultation has been considerably shorter than was allowed for previous projects. Nevertheless the Commission has carefully considered the views expressed both at the hearing and in the other written and oral submissions and is grateful for the efforts of and interest shown by those individuals and groups who made submissions.

## III. THE PRACTICE OF SURROGACY

1.9 In the discussion paper on Surrogate Motherhood, the Commission called for information from members of the public as to the practice and incidence of surrogate motherhood, to enable us to establish a fuller picture of the way in which surrogacy is being used in this State. While we received several submissions in response to this request,<sup>10</sup> it must be stressed that we have been unable to obtain a complete picture of the practice in New South Wales.

1.10 Few detailed studies have been conducted to give an adequate background to surrogacy, the terms and conditions of the agreements, and a description of the reasons why people become involved. No such study has been undertaken in Australia.<sup>11</sup> Such evidence as there is remains anecdotal and is generally confined to those few cases generating national attention. Most recent examples of this are the Kirkman-IVF surrogacy in Victoria<sup>12</sup> and the IVF surrogacy triplets in Western Australia.<sup>13</sup> However, we believe we have enough evidence, from media reports and submissions made to us, to indicate that surrogacy has been practised regularly in this State in recent years. We believe that it will continue to be practised to some extent whatever measures are introduced into the law.

1.11 Much of the evidence about surrogacy which is readily available comes from the coverage of dramatic trials, like the *Baby M* case, or from widely publicised individual accounts. These accounts tend to give a distorted impression of the practice and make it difficult to assess the incidence and effects of surrogacy. The task of assessing the information is further complicated by the fact that for the most part, more publicity will be given to

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agreements which fail. The matter will have entered the public arena because the parties have turned to the courts for assistance in enforcing (or striking down) their agreement.

1.12 While the Commission's request for information about surrogacy arrangements elicited some negative responses, it has also made available information from a number of women who have been involved in surrogacy arrangements which they considered were very successful.<sup>14</sup> These arrangements were basically altruistic,<sup>15</sup> is with varying levels of professional medical involvement and advice. What became clear from talking to these women was that the agreements shared many common features: all were essentially informal, altruistic arrangements with a substantial degree of openness about the procedure, with no attempt to maintain secrecy among family and friends. It also became clear that surrogacy is not a new process, nor is it necessarily associated with the new reproductive technologies. One caller gave evidence of surrogacy arrangements in one family that went back several generations.<sup>16</sup> This is unusual but it is unlikely to be unique.

### IV. DEFINITIONS

#### A. Surrogate Motherhood

1.13 In our terms of reference surrogate motherhood is defined as an arrangement under which a woman agrees to bear a child for another person or persons.<sup>17</sup> The Commission has modified that definition and now defines surrogate motherhood as being an **arrangement whereby a woman agrees to become pregnant and to bear a child for another person or persons, to whom she will transfer custody at or shortly after birth**. As we noted in the discussion paper, there is an ambiguity in referring to the birth mother as a surrogate, especially when she is genetically related to the child she carries.<sup>18</sup> We have continued to use the term because we believe it has an established meaning in common parlance. In doing so we are conscious of claims that we may be biasing the debate by denying the birth mother her proper title.<sup>19</sup> That is not our intention.

1.14 There are three important aspects of the concept surrogate motherhood as we have defined it:

an essential feature of the practice is that the woman who is to carry the child initiates a pregnancy on behalf of those who commission the child. We therefore exclude the situation in which the woman is already pregnant at the time the agreement is made. This situation is dealt with satisfactorily under existing law. The woman who agrees to part with a child she is already carrying is in a different position from the woman who contracts to become pregnant, because she does not bring new life into existence for the purposes of the agreement.

Another distinguishing feature of surrogate motherhood, as we have defined it, is that it involves an agreement to part with custody of the child at or shortly after the birth. In submissions made to the Commission it was pointed out that those cases of surrogacy said to have occurred in ancient times did not really involve surrogacy as we know it today. The essential difference was that in those cases the surrogate mother remained in the family with the child and took part in the child's nurture.<sup>20</sup> We do not regard an arrangement as surrogacy unless a permanent transfer of custody is intended in which the birth mother is to relinquish the child to someone else.

It is possible that the surrogate mother may enter into an arrangement with the genetic father of the child whereby he is to have sole custody of the child at birth. The Commission does not believe this situation should be covered by the definition of surrogacy, because under such an arrangement custody would be assigned to someone of who is entitled to it under s60B of the Family Law Act 1975 (Cth). When custody is to be assigned to the genetic father and his partner, however, there is a classic surrogacy situation created which should be included within our definition. The reason a distinction should be made between the two cases is that the introduction of a third party typically indicates a more remote relationship between father and birth mother and no intention for them to share in the child's upbringing. When only two parties are involved it is more likely that their arrangement can be regulated adequately under the Family Law Act. For instance the transfer of custody could be effected under a child agreement registered pursuant to s66ZC of that Act. This would bring the case to the notice of the Family Court. A three party agreement is less obviously accommodated within existing law.

#### B. Child

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1.15 In this report our references to a child or children are to those children who are recognized by the law as having been born or who are stillborn. In the course of our public consultation, some submissions raised the question of how "child" was to be defined in relation to surrogacy. It is not our intention to make recommendations about the care or disposal of the unborn foetus.<sup>21</sup> Therefore we have adopted those definitions of child and stillborn child which are commonly used at common law and in the statute of this State to mean a baby fully and completely born with an independent existence from its mother.<sup>22</sup>

### FOOTNOTES

1. See particularly NSW Advisory Committee on Human Artificial Insemination, *Australian Attitudes to Human Artificial Insemination* prepared by G Rawson (NSW Govt Printer 1984).
2. New South Wales Law Reform Commission *Human Artificial Insemination* (LRC 49, 1986).
3. New South Wales Law Reform Commission *Human Artificial Insemination: Discussion Paper 1* (DP 11, 1984).
4. New South Wales Law Reform Commission *In Vitro Fertilization: Discussion Paper 2* (DP 15, 1987).
5. New South Wales Law Reform Commission *In Vitro Fertilization* (LRC 58, 1988).
6. New South Wales Law Reform Commission *Surrogate Motherhood: Australian Public Opinion* (RR 2, 1987).
7. New South Wales Law Reform Commission *Surrogate Motherhood: Discussion Paper 3* (DP 18, 1988).
8. See *Human Artificial Insemination* (LRC 49, 1986) at para 3.4.
9. *Transcript of Proceedings*, New South Wales Law Reform Commission Public Hearing on Surrogate Motherhood (14 October 1988).
10. See Appendix A; particularly "Commissioning Parent" (No 1) (SB 4, 1988); "Surrogate Mother" (No 1) (SB 6, 1988); "Commissioning Parent" (No 2) (SB 10, 1988); "Surrogate Mother" (No 25) (SB 27, 1988).
11. Some studies have been carried out in the United States. See United State Office of Technical Assessment, *Infertility: Medical and Social Choices* (1988).
12. "Woman to bear her sister's baby" *Sydney Morning Herald* 8 April 1988 at 1; "Surrogate Mum: this is the ultimate in sisterhood" *Weekend Australian* 9-10 April 1988 at 3; "My Sister's Child" *Sunday Telegraph* 16 October 1988 at 177-179; Maggie and Linda Kirkman, *My Sister's Child* (Penguin Books, Ringwood, 1988).
13. "Triplets born to surrogate sister" *Daily Telegraph* 20 October 1988 at 7; "Surrogate Mother to be 'special aunt'" *Australian* 20 October 1988 at 1; "A Perfect Family" *New Idea* 3 December 1988 at 3-7.
14. See "Surrogate Mother" (No. 1) (SB 6, 1988); "Commissioning Parent" (No 2) (SB 10, 1988); "Surrogate Mother (No 2) (SB 27, 1988) and "Mary" (PH 9, 1988).
15. In one there was no payment, in another, it was a minimal amount.
16. Mr A.C. Houlby (SB 9, 1988).
17. *Surrogate Motherhood* (DP 18, 1988) at 2.1.
18. *Ibid.*
19. In their submission B Guthrie and M Kingshott expressed the view that "such misuse of language is dangerous" because "by calling something exactly what it is not, [the Commission] attempts to make it acceptable" (SB 28). A submission from the Association of Relinquishing Mothers (SB 14) was also uncomfortable with the term, as was the submission of the NSW Infertility Social Workers Group (SB i5).

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20. Social Issues Committee of the Anglican Church Diocese of Sydney (SB 18, 1988).

21. Oral submission from John Wade at Public Hearing in which he requested that the Commission define child so as to indicate whether a foetus or in vitro or stored embryo was included within its recommendations.

22. In *Hutty* [1953] VLR 338, 339, Barry J of the Supreme Court of Victoria said:

. . . Murder can only be committed on a person who is in being, and legally a person is not in being until he or she is fully born in a living state. A baby is fully and completely born when it is completely delivered from the body of its mother and it has a separate and independent existence in the sense that it does not derive its power of living from its mother. It is not material the child may still be attached to its mother by the umbilical cord; that does not prevent it from having a separate existence. But it is required, before the child can be the victim of manslaughter or of infanticide, that the child should have an existence separate from and independent of its mother, and that occurs when the child is fully extruded from the mother's body and is living by virtue of the functioning of its own organs.

The definition in Crimes Act 1900, s20 is:

**Child murder - when child deemed born alive.** On the trial of a person for the murder of a child, such child shall be held to have been born alive if it has breathed, and has been wholly born into the world, whether it has had an independent circulation or not.

In the Registration of Births, Deaths and Marriages Act 1973, s4(1)-

“still-born child” means a child who -

(a) is of at least twenty weeks gestation, or at least 400 grams weight, at delivery; and

(b) has not breathed after delivery.

## 2. Current State of the Law

### I. THE LAW IN NEW SOUTH WALES

2.1 As the law stands in New South Wales, the arrangement of a surrogate motherhood contract is neither prohibited nor encouraged. Although there is no legislation specifically designed to regulate surrogacy, any arrangement made in the State would have to take account of provisions in the existing law which have application. The impact of existing laws on those attempting to obtain a child by surrogacy was analysed at some length in the discussion paper.<sup>1</sup> Therefore, this report only provides a brief summary of those provisions likely to have the greatest impact on surrogacy arrangements.

#### A. Guardianship and Custody of the Child

2.2 Since the commencement of Part VII of the Family Law Act 1975 (Cth) in April 1988, most matters relating to the guardianship and custody of children are heard in the Family Court of Australia. That Part of the Act implemented the transfer of jurisdiction in all cases concerning ex-nuptial and step-children contained in the Commonwealth Powers (Family Law-Children) Act 1986.<sup>2</sup> Previously they were heard in State courts. The State courts retain jurisdiction over adoption proceedings and matters arising under the State welfare legislation.<sup>3</sup> The Family Law Act 1975 allows applications to the Family Court to be made by the parents, the child, or "any other person who has an interest in the welfare of the child".<sup>4</sup> In a surrogacy arrangement, those interested include:

the commissioning parents;

the sperm and ova donors (usually, but not necessarily the commissioning couple);

the surrogate mother; and

the surrogate mother's spouse.

The Court will decide issues of guardianship and custody on the basis of the best interests of the child.<sup>5</sup>

2.3 So long as there is no dispute between the parties, there is no need for a surrogacy arrangement to come to judicial notice. Those seeking some security for their arrangements may register a child agreement under s66ZC of the Family Law Act 1975. Upon registration the agreement takes effect as an order of the Family Court, and will be enforced by the Family Court to the extent that it is consistent with the best interests of the child.<sup>6</sup>

#### B. Adoption of the Child

2.4 Evidence in the press and submissions made to the Commission,<sup>7</sup> suggest that the commissioning couple in a surrogacy arrangement may often wish to adopt the child. An adoption order transfers all parental rights and duties to the adopting parents and extinguishes those of the natural parents.<sup>8</sup> Unless dispensed with by a court, adoption requires the consent of the parents or guardians and evidence to satisfy the court of the suitability of those applying to adopt. As it is one of the areas of State power reserved from the transfer to the Commonwealth, adoption applications will continue to be heard in the Supreme Court. The unmarried father of a child may object to an adoption application, but this is unlikely to occur in a surrogacy case since he will probably be either the commissioning father or an unknown donor of sperm who is ignorant of the birth.

2.5 Before making an adoption order, the Court requires a background report from either the Department of Family and Community Services or an approved private adoption agency.<sup>9</sup> The Court may proceed without such a report in cases in which the applicants to adopt are related to the child.

#### C. Other Welfare Provisions

2.6 Even if a surrogacy arrangement is concluded between the parties without dispute, the child may still become the subject of judicial proceedings brought by the Department of Family and Community Services. The Department may consider itself to have a public responsibility to test the enforceability or propriety of the surrogacy arrangement in court. It could do this by bringing proceedings in the Family Court, the Children's Court under the child welfare legislation or in the wardship jurisdiction of the Supreme Court.<sup>10</sup>

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2.7 In the English case of *Re C (A Minor) (Wardship: Surrogacy)*,<sup>11</sup> there was no dispute between the commissioning couple and the surrogate mother. The surrogate had given the child to the commissioning parents voluntarily and took no part in the proceedings. The local authority invoked the wardship jurisdiction of the English High Court. Upon being satisfied of the commissioning couple's suitability as the child's custodians, Latey J gave care and control to them until a further order could be made. In the meantime wardship was continued.

### **D. Presumptions of Parentage**

2.8 The existing legal presumptions of parentage may also affect parties to a surrogacy arrangement. Where the child is conceived by use of artificial insemination parentage may be determined under the provisions of the Artificial Conception Act 1984. The Act has three main implications for a surrogacy arrangement:

1. Where a married woman acting as a surrogate conceives by artificial insemination, with the consent of her husband, the law conclusively presumes the husband to be the father of the child.
2. Where, in such circumstances, the husband refuses to consent to the AI procedure, the child may be fatherless as the semen donor may be conclusively presumed not to be the father.
3. Where a surrogate is unmarried and conceives by artificial insemination, the child may be presumed to be hers alone, with a conclusive presumption against the paternity of any semen donor.<sup>12</sup>

2.9 As a result of these presumptions the biological father may have no right to have his name entered on the register of births as the father.<sup>13</sup> The law requires, in situation 1 above, that the surrogate's husband be registered as the father. In situations 2 and 3 it may be that no one will be registered as the father unless the donor acknowledges or obtains a declaration of his paternity from the Supreme Court.<sup>14</sup>

2.10 In most States in Australia, the law presumes the birth mother to be the legal mother and therefore requires her name to be entered on the register of births. The Family Law Act adopts these State laws for purposes of proceedings in the Family Court.<sup>15</sup> The position in New South Wales is unclear because no legislation has been enacted to assign maternity following artificial conception. It is therefore uncertain who would be treated as the legal mother of a child born in a surrogacy arrangement in this State.<sup>16</sup>

### **E. Offences**

2.11 In organising and pursuing a surrogacy arrangement, the parties also run the risk of committing a number of statutory offences. Four were noted in the discussion paper, under the adoption legislation, the Children (Care and Protection) Act 1987 and the Registration of Births, Deaths and Marriages Act 1973.<sup>17</sup>

2.12 The main offence under the Adoption of Children Act 1965 is contained in s50. This makes it an offence to receive any payment or other reward "in relation to the transfer of possession or control of a child with a view to the adoption of the child".<sup>18</sup> Some cases of paid surrogacy would involve the commission of this offence.

2.13 The Adoption of Children Act 1965 also contains offences relating to public advertisements which express willingness to adopt or place a child for adoption, or to offer to make arrangements for an adoption.<sup>19</sup> These provisions may extend to intermediaries who place advertisements. Currently, the most likely sources of information for the surrogate mother and commissioning parties are medical practitioners or family planning clinics. As neither of these is likely to advertise it is unlikely these offences will be committed. The offences can also be easily avoided by ensuring that an advertisement does not make reference to any intention to have the child adopted.

2.14 Those who avoid liability under the adoption legislation may come within the ambit of Part III of the Children (Care and Protection) Act 1987. This prohibits the placement of a child with anyone who is not a relative for a period in excess of 28 days in any 12 month period.<sup>20</sup> Anyone receiving a child who is not related to them is required to have a licence to foster issued by the Department of Family and Community Services.<sup>21</sup> The offence would not be committed if one of the commissioning couple is, in law, the parent of the child.

2.15 The Registration of Births, Death and Marriages Act 1973 makes it an offence to supply false or misleading information in an application to register a birth.<sup>22</sup> Unless both of the commissioning couple are, in law, the parents of the child, they could not lawfully register the child as their own.

## **II. LEGISLATIVE RESPONSES IN AUSTRALIA**



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2.16 The enquiries that have been undertaken into surrogate motherhood were described in detail in the discussion paper.<sup>23</sup> Here we refer only to legislative initiatives that have directly addressed the question of surrogacy. In Australia there have been three such enactments, in Victoria, South Australia and Queensland.

### **A. Victoria**

2.17 Following the Victorian Committee's reports<sup>24</sup> on all aspects of Artificial Conception, the Victorian Parliament passed the Infertility (Medical Procedures) Act 1984. Section 30 of the Act deals directly with surrogate motherhood. Under that provision, which came into operation on 10 August 1986,<sup>25</sup> any payment made pursuant to a surrogate motherhood agreement is prohibited.<sup>26</sup> The making or receiving of such a payment is an offence whether the party in question is an intermediary, the surrogate mother or a commissioning parent.<sup>27</sup> Agreeing to enter such an arrangement is also an offence.<sup>28</sup> Persons committing offences under s30, are liable for a fine or two years imprisonment.<sup>29</sup> Advertising is prohibited and the Act specifically provides that all surrogacy "contracts" are void.<sup>30</sup> The Act does not, however, prohibit altruistic surrogacy or an intermediary operating- for no payment.<sup>31</sup>

### **B. South Australia**

2.18 Part IIB of the Family Relationships Act 1975 was introduced by the Family Relationships Act (Amendment) Act 1988 to deal with commercial surrogacy. This Part makes surrogacy contracts and procurement contracts (defined to cover the introduction of parties by an intermediary) illegal and void.<sup>32</sup> However, the Act only attaches criminal penalties to the actions of intermediaries and to the use of advertising.<sup>33</sup> It is not an offence to enter a surrogacy agreement, but all agreements are void and illegal. Some payments made under them are, however, recoverable as debts.<sup>34</sup> As in the Victorian Act, the offences under this Act are limited to commercial activities.

### **C. Queensland**

2.19 The most recent of the legislative responses in Australia is embodied in the Surrogate Parenthood Act 1988, which commenced operation on 6 October 1988.<sup>35</sup> The Act prohibits all forms of surrogacy, formal and informal, paid and altruistic. All surrogacy contracts are void and entering into an agreement (or offering to do so), as well as giving or receiving payment are prohibited.<sup>36</sup> Any advertising in relation to surrogacy is also prohibited.<sup>37</sup>

2.20 Unlike other legislation in Australia, this Act attaches criminal penalties to all parties to agreements.<sup>38</sup> This includes intermediaries, surrogates and commissioning parents. They are all liable to fines or a maximum of three years imprisonment or both.<sup>39</sup> In addition, in an attempt to control those who would go interstate to arrange a surrogacy, the Act purports to apply to any person ordinarily resident in Queensland, wherever the prohibited acts occur.<sup>40</sup>

### **D. IVF Surrogacy in Australia**

2.21 The use of IVF to assist a surrogate pregnancy has been prohibited in Victoria and South Australia. Victoria was the first State in Australia in which a child was born by use of IVF surrogacy. In May 1988, Linda Kirkman gave birth to a child conceived by the use of ova taken from her sister Maggie and fertilized by donor sperm.<sup>41</sup> In July 1988, ss 11,12, and 13 of the Infertility (Medical Procedures) Act 1984 (Vic) were proclaimed to commence. These provisions seek to prevent a repetition of IVF surrogacy in Victoria, by prohibiting the use of IVF technology on women who have not been diagnosed as infertile.<sup>42</sup>

2.22 In South Australia the Reproductive Technology Act 1987, which commenced in April 1988, contains a similar prohibition on the offer of IVF treatment to couples who are otherwise fertile, unless there is a risk of the transmission of a genetic defect in natural conception.<sup>43</sup>

2.23 A second Australian IVF surrogacy was carried out in Western Australia, when a Victorian woman travelled to Perth in October 1988 to give birth to triplets for her sister and brother-in-law.<sup>44</sup> The triplets were the genetic children of the commissioning couple. The medical practitioner who attended the surrogate mother is reported to have undertaken the IVF treatment against the recommendation of two ethics committees in the State.<sup>45</sup>

## **III. MAJOR OVERSEAS INITIATIVES**

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2.24 Initiatives being taken overseas were described in detail in our discussion paper.<sup>46</sup> Some are repeated here to give an indication of the current legislative climate.

### A. United Kingdom

2.25 Following the majority report of the Warnock Committee, legislation was passed by the United Kingdom Parliament.<sup>47</sup> The Surrogacy Arrangements Act 1985 prohibits advertising and other aspects of commercial surrogacy.<sup>48</sup> The Act is aimed primarily at intermediaries and they are the only persons on whom the Act imposes criminal penalties.<sup>49</sup> Neither the surrogate nor the commissioning parents can be charged under the Act, and payments made directly to the surrogate are excluded from the definition of "commercial basis".<sup>50</sup>

2.26 The United Kingdom legislation is drafted to apply to "arrangements whether or not they are lawful and whether or not they are enforceable,"<sup>51</sup> but the question of whether the agreement is enforceable at common law is left open.<sup>52</sup>

### B. Canada

2.27 The Ontario Law Reform Commission's study of surrogate motherhood is the only major inquiry of its sort to recommend legislation to permit and enforce surrogacy contracts.<sup>53</sup> The model recommended by the Commission allows for the enforcement of surrogacy arrangements if the contract has received prior court approval.<sup>54</sup> The process would require the Court to be satisfied that:

the surrogate and the commissioning couples are suitable to participate in the the arrangement;

surrogacy is the only medical option available to the commissioning couple to allow them to have a child; and

the physical and mental health of the surrogate is satisfactory.<sup>55</sup>

2.28 The Ontario Report also recommended that the names of the commissioning parents should be entered on the birth certificate as the child's parents.<sup>56</sup> The report clearly runs counter to more recent trends in the area, and has yet to be acted on.

### C. United States

2.29 The situation in the United States is difficult to summarise as there are different activities occurring at State and Federal levels.<sup>57</sup> In a recent visit to the Commission, Dr Alto Charo, of the Office of Technical Assessment, explained the far-reaching influence on U.S. attitudes of the *Baby M* case, exemplified by an increase in the number of anti-surrogacy bills which have been brought before both State and Federal legislatures recently.<sup>58</sup>

## FOOTNOTES

1. *Surrogate Motherhood: Discussion Paper 3* (DP 18 1988) at 3.5-3.53.

2. Commonwealth Powers (Family Law - Children) Act 1986, s3(1).

3. *Id* s3(2); Family Law Act 1975 (Cth), s60E.

4. Family Law Act 1975 (Cth), s63C(1).

5. See discussion in *Surrogate Motherhood: Discussion Paper 3* (DP 18, 1988) at 3.12.

6. Family Law Act 1975, s66ZD(3) and (4).

7. See Chapter 1 note 13; Submissions from NSW Infertility Social Workers Group (SB 15, 1988); J R Lauer (SB 23, 1988); S J Steigrad and L R Leoder (SB 24, 1988); "Surrogate Mother" (No 2) (SB 27, 1987).

8. Adoption of Children Act 1965, s35.

9. *Id* s21, 21(1A)-(1C).

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10. See *Surrogate Motherhood: Discussion Paper 3* (DP 18, 1988) at 3.18-3.22.
11. [1985] FLR 846.
12. Artificial Conception Act 1984, ss5, 6; but see also Children (Equality of Status) Act 1976, s18A, discussed in *Surrogate Motherhood: Discussion Paper 3* (DP 18, 1988) at 3.34-3.37.
13. Registration of Births and Deaths and Marriages Act 1973 s12(1), s42A(1) and (2).
14. Children (Equality of Status) Act 1976, ss11, 13 but see s18A(3); Registration of Births and Deaths and Marriages Act 1973, s42A(2)(f).
15. s60B(2).
16. For discussion of this issue, see *In Vitro Fertilization: Discussion Paper 2* (DP 15, 1987) at 3.2-3.7 and -the report *In Vitro Fertilization* (LRC 58, 1988) at 2.7-2.10.
17. At 3.28, 3.30 and 3.32.
18. Adoption of Children Act 1965, s50(1).
19. *Id* s52(1).
20. Children (Care and Protection) Act 1987, s42, 44; as amended by Children (Care and Protection) Amendment Act 1988, Schedule 1(7).
21. *Id* s42(1).
22. Registration of Births, Deaths and Marriages Act 1973, s57(1).
23. *Surrogate Motherhood: Discussion Paper 3* (DP 18, 1988) at 4.4 - 4.20.
24. Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization *Interim Report* (1982); *Report on Donor Gametes in IVF* (August 1983); *Report on the Disposition Produced by in Vitro Fertilization* (August 1984) at 51.
25. *Victorian Government Gazette* 6 August 1986.
26. Infertility (Medical Procedures) Act 1984, s30(2)(b) and (c).
27. *Id* s30(2)(c).
28. *Id* s30(2)(b).
29. *Id* s30(2).
30. *Id* s30(3).
31. While the definition of surrogate motherhood in s30(1) extends to altruistic arrangements, the offences listed in subsection 2 do not.
32. Family Relationships Act 1975, s10g(1) and (2).
33. *Id* s10h.
34. *Id* s10f(3).
35. The Act commenced on the date of assent.
36. Surrogate Parenthood Act 1988 (Qld), ss3, 4.
37. *Id* s3(1)(a).

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38. *Id* s3(1) generally.

39. *Ibid*.

40. *Id* s3(2).

41. Maggie and Linda Kirkman, *My Sister's Child* (Penguin, 1988).

42. The Infertility (Medical Procedures) Act requires that the woman who is to receive the treatment and her husband should have been undergoing examination or treatment for not less than 12 months which has satisfied the medical practitioner that the woman is unlikely to become pregnant as a result of a procedure other than IVF.

43. Reproductive Technology Act 1987 (SA), s12(3)(b).

44. "Triplets born to surrogate sister" *Daily Telegraph* 20 October 1988 at 7; "Surrogate Mother to be 'special aunt'" *Australian* 20 October 1988 at 1; "A Perfect Family" *New Idea*, 3 December 1988 at 3-7.

45. The doctor in question was aware of the committees' opinions, but decided to follow the recommendations of the ethics committee established within his own private IVF clinic; "IVF babies 'created against advice'" *Australian* 21 October 1988 at 1.

46. *Surrogate Motherhood: Discussion Paper 3* (DP 18, 1988) at 4.21-4.47.

47. Between the report and the legislation, the Government issued two further consultative documents: Department of Health and Social Security (UK) *Legislation on Human Infertility Services and Embryo Research* (Cm 46, HMSO, London, 1986); Department of Health and Social Security (UK) *Human Fertilization and Embryology: A Framework For. Legislation* (Cm 259, HMSO, London, 1987).

48. Surrogacy Arrangements Act 1985 (UK), ss2(1), 3(1).

49. *Id* s2(2).

50. *Id* s2(3).

51. *Id* s1(9).

52. See *Surrogate Motherhood: Discussion Paper 3* (DP 18, 1988) at 4.26; see also Susan Sloman "Surrogacy Arrangements Act 1985" (1985) 135 *New Law Journal* 978 at 980.

53. *Ontario Report* (Vol II) at 218-271.

54. *Id* at 234.

55. *Id* at 236ff lists in detail the features of the scheme.

56. *Id* at 260.

57. *Surrogate Motherhood: Discussion Paper 3* (DP 18, 1988) at 4.38-4.43.

58. Meeting of the Commission with Dr Alto Charo, 6 June 1988; details of these bills are given in Office of Technology Assessment of the Congress of the USA, *Infertility: Medical and Social Choices* (1988).

### 3. The Debate

#### I. PUBLIC RESPONSE TO OPTIONS FOR REFORM

3.1 The submissions received by the Commission have been diverse. They range from those which totally oppose the practice to others which are solidly in favour of it. There are also submissions which express a preference for total prohibition but are reconciled to accepting something less satisfactory because they regard total prohibition as impossible to attain. Others speak in favour of allowing the practice to continue but complain that poor outcomes can be expected while the law remains ambiguous.<sup>1</sup> The reasons given for and against the practice are also disparate. They range from blanket and sometimes unexplained rejection, to wholehearted and equally unexplained acceptance of the practice.

#### A. Arguments in Favour of Surrogacy

3.2 Those who argued in favour of surrogate motherhood generally did so from the stance of the infertile commissioning couple. They pointed out that in many cases the use of a surrogate mother was the final resort of an infertile couple.<sup>2</sup> The practice was seen as particularly appropriate for those, couples who had failed to achieve a pregnancy by any other means and for whom the alternatives offered by the artificial reproductive techniques were not available. There was support in the survey of public opinion, conducted on behalf of the Commission in May 1987, for use of surrogacy in these circumstances.<sup>3</sup> A total of 51% of those interviewed were not opposed to the use of surrogacy to assist married couples who for medical reasons could not have children, but almost 80% rejected use of the practice for non-medical reasons.<sup>4</sup>

3.3 One person who responded to our request for information told the Commission of a family in which two children had been born by use of a surrogate, the first in 1870 and the second in 1900. The granddaughter of the younger child is now seeking to have a child by use of IVF surrogacy.<sup>5</sup> This family is very much in favour of surrogacy and would extend both legal recognition and enforcement to the practice. We also heard of an arrangement carried out between close friends in which contact has been maintained between the two families throughout the five years since the child was born. Both the surrogate mother and the woman who received and is caring for the child reported that the arrangement was successful. However, neither was willing to recommend surrogacy as a general solution to the problem of infertility.<sup>6</sup>

3.4 The Commission also received submissions from two women who had acted as surrogate mothers with positive results and who lent their support to the practice as a means of providing children for infertile couples.<sup>7</sup> One of these women told of an arrangement which was conducted with complete openness and pride in her family and in which she was continuing to enjoy access to the children born of the arrangement.<sup>8</sup>

3.5 Some argued that to restrict the use of surrogacy in any way is to impose constraints on the freedom of the individuals involved and to impinge upon their privacy. In particular it is argued that women should be free to use their bodies in whatever way they choose and that the decision to carry a child for another is something they should be free to do.<sup>9</sup> Others argue that the child born of a surrogacy arrangement could be offered better prospects in life than if born into a normal household, because of the commitment to the child demonstrated by the commissioning couple when they seek out a surrogate mother.<sup>10</sup>

3.6 One person wrote to the Commission to express the view that "law reformers should attempt to minimise the discrepancy between what the law prescribes and what people feel entitled to do".<sup>11</sup> He thought people were prepared to accept a greater variety of life styles than the Commission had canvassed in the discussion paper and suggested that we recommend a course of minimum intervention consistent with the prevention of social harm. Where there was no evidence that substantial harm would be caused by the exercise of personal choice, freedom of choice should be permitted. Where there was no conflict between the parties, and no "evident significant danger" to the child "there is no case for interfering with whatever parenting arrangements have been voluntarily agreed to", including, tile registration of "any number of persons as 'parents'". His conclusion was that "a law which fails to recognise all viable, 'family' arrangements cannot be said to be consistent with the best interests of the child principle".<sup>12</sup>

## **B. Arguments against Surrogacy**

3.7 The most consistent argument against the use of surrogacy concerned the potential the practice has to exploit the women and children involved in it.<sup>13</sup> Those opposed to surrogacy on this ground did not distinguish between commercial and altruistic surrogacy. They saw as much potential for exploitation in unpaid as in paid surrogacy.<sup>14</sup> The examples of exploitation given included cultural and ethnic discrimination,<sup>15</sup> undue influence exercised by the commissioning father over his wife to gain her consent to the use of a surrogate, and the possible emotional pressure exerted by the family of an infertile couple on other members of the family to act as a surrogate or donor.<sup>16</sup>

3.8 Degradation and trauma suffered by the surrogate mother in carrying the child and transferring custody were mentioned by some.<sup>17</sup> Others placed emphasis on the likely damage to the child's self-esteem through being conceived from a transitory, extra-marital liaison.<sup>18</sup> Several of the submissions suggested that the creation of a child under these circumstances was tantamount to the acceptance of slavery.<sup>19</sup> Others concentrated on the tendency the practice had to demean the status of marriage and the natural family.<sup>20</sup>

3.9 Another argument which was constantly raised by those opposed to the practice concentrated on the perceived distortion of the welfare of the child principle involved in the legal recognition of surrogacy. The contention was that it could never be in the best interests of a child to be separated from its mother at birth. The interests being satisfied in a surrogacy arrangement were those of the commissioning couple and not the child. The child's best interests could only be served by ensuring its birth into a stable family of which the birth mother was a part. Anything less, it was argued, underestimated the value to the child of its bonding to the birth mother.<sup>21</sup>

3.10 Another argument which was put to the Commission very forcefully drew on the experiences in the past of those mothers who had relinquished their children for adoption. Although it was acknowledged that many individual adoptions had been highly successful, the gravamen of these arguments was that the experiences of significant numbers of relinquishing mothers in adoption were so negative as to demand that more study be done on the effects of relinquishing a child on the mother, child and all other family members involved, before approval is given to the use of surrogacy as a recognised means of providing children for infertile people.<sup>22</sup>

3.11 Perhaps the strongest argument put to the Commission in opposition to surrogacy was that which sought to make a distinction between adoption and surrogacy. Many of the submissions pointed out that surrogacy entailed the deliberate creation of a child for the purposes of the commissioning couple, while in adoption the new parents simply took an existing child their care.<sup>23</sup> It was argued that there was a difference in kind between the two procedures which was often obscured by the commissioning couple's desire to have a child. In one submission the point was made that both adoption and surrogacy involve a break in the link between child-bearing and child nurturing but, it was said, in surrogacy "this detachment ... is not undertaken for the good of the child, as is the case with adoption, but for the good of those who want a child".<sup>24</sup>

3.12 In another submission the contrast was made between the adopting couple who altruistically raise someone else's child as their own and surrogacy which "creates babies who would not have otherwise been born solely to meet the desires/needs of adults".<sup>25</sup> The comment was made: "There seems to be a slippage in the argument from desire for a child to need for a child to moral right to have a child to legal right to have a child to legal right to be provided with a child by whatever means are necessary."<sup>26</sup> Some saw the effects of this process as the "dehumanising" of the reproductive process, saying that "the notion of using a woman to reproduce a child for someone else reflects a fundamental lack of humanity ... (t)he reproductive process becomes part of a transaction in which the mother is the production unit or, in some cases, just the incubator, the child is the product and the couple, the consumers or customers".<sup>27</sup>

## **II. THE COMMISSION'S VIEW**

3.13 The Commission has found itself in sympathy with many of those who would like to stop the practice of surrogate motherhood. We have been persuaded by the arguments against the practice more than by those advanced in its favour.

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3.14 As we said in the discussion paper, surrogacy involves identifiable risks to the child, the surrogate mother and to the commissioning parents.<sup>28</sup> It also holds risks for the families of all parties to the arrangement. The Commission is also concerned that early official acceptance of the practice may precipitate community attitudes to its use.

3.15 The objections the Commission has to surrogacy can be stated here quite briefly. We develop them in Chapter 4. We believe that the practice does not provide an acceptable answer to the problem of infertility. While we recognise the distress and disappointment felt by those unable to have a child by other means, we do not regard their needs as properly met by surrogacy. There are several features of surrogacy which make it unsatisfactory to fulfil this function:

it involves the deliberate creation of new life for the purpose of alleviating infertility;

the body of a woman is put to the service of the commissioning parties;

the practice entails the planned separation of child and birth mother, at a very early age and permanently;

it ignores the interests of other members of the families of the participants;

both the woman who is to act as the surrogate and the woman who commissions the child are placed at significant risk by the process because of the possibility of pressure being exerted on them to comply. Even in altruistic surrogacy arrangements there can be no guarantee that both women have exercised true freedom of choice.

3.16 All these reasons persuade the Commission that surrogacy is not a practice which should receive the active approval or encouragement of government. If we thought it could be achieved without injustice we would recommend that the practice be totally prohibited by statute. However, we do not believe that a total legislative prohibition would be either just in its results or enforceable in practice. After careful consideration the Commission has concluded that many of the significant issues involved in the practice of surrogacy are not amenable to control by the law. Whether surrogacy is to find widespread acceptance in the community in the future is not something that can be controlled by the law. There are many who urge that the only effective way to prevent growth of the practice is to enact a total statutory prohibition. To these people we respond, as we did in the discussion paper, that the law is a very blunt and inappropriate instrument by which to mould social values. In particular the criminal law should be used sparingly for the purpose of changing or controlling social habits.

3.17 In the discussion paper we dealt at some length with the debate on the role of law in the enforcement of morals.<sup>29</sup> The debate, which is perennial amongst lawyers and legal philosophers, is most often described as the Hart-Devlin debate. More recently, it has been restated in a simpler way by the American legal philosopher, H L Packer.<sup>30</sup> Packer reintroduces J.S. Mills' claim that "the 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"<sup>31</sup> but adds: "The question is not one of whether or not there will be harm done, it is one of the remoteness and probability of the harm".<sup>32</sup> He goes on to point out that some things are more harmful than others and that a balance must be made also between gravity and remoteness of harm, for in Packer's view one "cannot meaningfully deal with the question of 'harm to others' without weighing benefits against detriments".<sup>33</sup>

3.18 The Commission finds itself in general agreement with the approach adopted by Packer. We have started our analysis from the position that unless there is a serious risk of substantial harm to others, the law should treat decisions about surrogacy as matters of personal judgment. However, we recognise that surrogacy can cause serious harm to others beyond the immediate parties to an arrangement. The other people obviously exposed to risk by the practice are the child and the families of all the parties involved. The -immediate parties to the arrangement may also be placed at risk by tile conduct of others. If the arrangement is viewed as being for the benefit of the commissioning parents, the interests of the surrogate mother may warrant protection. The spouse of the commissioning father may also need protection from her husband and relatives and all may deserve support from the community if they seek to withdraw from the arrangement once it is set in motion.

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3.19 In the recommendations made in Chapter 4, we have tried to achieve a balance between use of the criminal law to give the parties and the community the protection we think is required while maintaining as much freedom of choice as is possible for the individuals involved.

### FOOTNOTES

1. "Commissioning Parent" (No 1) (SB 4, 1988).
2. "Commissioning Parent" (No 2) (SB 10, 1988); Brian Dawson (SB 11, 1988).
3. *Surrogate Motherhood: Australian Public Opinion* (RR 2, 1987) at 8.2.
4. *Id* at 2.1-2.7, 8.2.
5. A C Houlsby (SB 9, 1988)
6. "Surrogate Mother" (No.2) (SB 2 2 ,1988); "Mary" (PH 9, 1988).
7. "Surrogate Mother" (No.1); (SB 6, 1988); "Surrogate Mother" (No.2, 1988) (SB 27, 1988).
8. *Ibid*.
9. Mrs Eugene (SB 1, 1988); Mrs J Hutchison (SB 8, 1988); Brian Dawson ( SB 11, 1988 NSW infertility Social Workers Group (SB 15, 1988); "Surrogate Mother" (No. 2) (SB 27, 1988).
10. V Potempa (SB 22, 1988).
11. Paul Kaufmann (SB 26, 1988).
12. *Ibid*.
13. Dr D Bartels (SB 2, 1988); Catholic Women's League (SB 7, 1988); Ms J McHutchison (SB 8, 1988); NSW Infertility Social Workers Group (SB 15, 1988).
14. Dr Ditta Bartels (SB2, 1988); Catholic Women's League (SB7, 1988).
15. Dr Ditta Bartels (SBZ, 1988); Right to Life Association (NSW) (SB 13, 1988).
16. Catholic Women's League (SB 7, 1988).
17. Dr Ditta Bartels (SB 2, 1988); Dr A Jago (SB 5, 1988); Right to Life Association (NSW) (SB 13, 1988).
18. Dr A Jago (SB 5, 1988); Right to Life Association (NSW) (SB 13, 1988).
19. Ms Patricia MacMaster (SB 3, 1988); Catholic Women's League (SB 7, 1988); Ms Judy McHutchison (SB 89, 1988); Right to Life Association (NSW) (SB 13, 1988).
20. Dr A Jago (SB 5, 1988); Right to Life Association (NSW) (SB 13, 1988).
21. NSW Infertility Social Workers Group (SB 15); Salvation Army (SB 16, 1988); Presbyterian Women's Association of Australia in NSW (SB 21, 1988); Julianne R. Lauer (SB 23, 1988).
22. Association of Relinquishing Mothers (SB 14, 1988); Rebecca M Albury (SB 19, 1988); NSW Infertility Social Workers Group (SB 15, 1988) The Salvation Army (SB 16, 1988); Catholic Archdiocese of Sydney (SB 201 1988); Presbyterian Women's Association of Australia in NSW (SB 21, 1988); Margaret van Keppel (SB 2S, 1988).
23. Catholic Women's League, Australia (SB 7, 1988); Rebecca M Albury (SB 19, 1988).



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24. Catholic Archdiocese of Sydney (SB 20, 1988).

25. Rebecca M Albury (SB 19, 1988).

26. *Ibid.*

27. B Guthrie and M Kingshott (SB 31, 1988).

28. *Surrogate Motherhood: Discussion Paper 3* (DP 18, 1988) at 6.21.

29. *Id* 6.12 - 6.18.

30. H L Packer, *The of the Criminal Sanction* (OUP California, 1968) 266-267.

31. Quoted in Packer, *id* 266.

32. *Ibid.*

33. *Id* 267.

## 4. Recommendations

### RECOMMENDATION 1: Welfare of Child

**The welfare of the child should be the paramount consideration and should prevail over the interests of the adults involved in a surrogate motherhood arrangement.**

4.1 As stated in the discussion paper,<sup>1</sup> the major concern the Commission has in this part of the reference on artificial conception is to ensure that the welfare of any children born through the use of surrogate motherhood is protected. Our first recommendation is that, as in all matters concerning the guardianship and custody of children, the welfare of the child should be the paramount consideration. Along with many others in the community, the Commission believes that surrogate motherhood is not a desirable means of providing children for the infertile, and we are keen to ensure that it does not become an accepted alternative for those who have failed to have a child by artificial insemination or IVF, even if regarded as a last resort.

4.2 Throughout work on the artificial conception reference, the Commission has been guided by four principles. They are:

It is desirable, where possible, to alleviate the consequences of infertility through practices such as AI and IVF.

The paramount consideration in the practice of AI and IVF still be the welfare of the child.

The formation of stable families is socially desirable and necessary.

Personal freedom and individual autonomy should, so far as possible, be respected.

4.3 In this part of the reference, the Commission has taken the view that the interests of the child should prevail over those of the infertile couple. On some occasions, in the recommendations which follow, we have felt justified in curtailing the freedom of the adults involved in order to contain the growth of the practice. On other occasions, we have relied on the welfare principle to justify a more lenient treatment of the immediate parties to a surrogacy agreement than we would otherwise have recommended.

4.4 Application of the welfare principle does not mean that the interests of others are always ignored or overridden. Rather, it means that their interests can be recognised only when they coincide with the interests of the child. Therefore, no agreement between adults can determine matters of guardianship, custody or access and no rights thought to belong to the birth mother or genetic father can be decisive.

### RECOMMENDATION 2: Surrogate Motherhood should be Discouraged

**The Commission recommends that the practice of surrogate motherhood should be discouraged by all practicable legal and social means.**

4.5 The Commission believes that the practice of surrogacy is undesirable:

it involves the deliberate creation of new life for the purpose of alleviating infertility;

the body of a woman is put to the service of the commissioning parties;

the practice entails the planned separation of child and birth mother, at a very early age and permanently;

it tends to ignore the interests of other members of the families of the participants;

both the woman who is to act as the surrogate and the woman who commissions the child are placed at significant risk by the process because of the possibility of moral pressure being exerted on them to comply. Even in altruistic surrogacy arrangements there can be no guarantee that both women have exercised true freedom of choice;

the legal recognition and enforcement of a surrogacy agreement is inconsistent with the philosophy that in all cases concerning guardianship or custody, the welfare of the child should be the paramount consideration.

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4.6 In its consideration of the matter, the strongest claim the Commission has found in support of the practice is that it provides children for the infertile. While the Commission has sympathy with this view, we regard the disadvantages of the practice to be so great as to outweigh even the needs of the infertile. We cannot accept that it is in the child's interests to be conceived and born for this purpose. The process denigrates the position of women in society and the process of childbirth. It lends credence to the view that children may be used as means to an end and employs the services of professional medical practitioners and health care workers to assist. A clear majority of the submissions received by the Commission were opposed to surrogacy and the promotion of it as a legitimate alternative for couples wishing to have a child. These submissions are analysed in detail in Chapter 3 and show a remarkable unanimity.

4.7 The practice of surrogate motherhood holds dangers, both for the individuals involved and for the future development of childbearing and childcare arrangements in our society. In our recommendations we have tried to prevent the worst abuses without intruding too far on individual autonomy. Our recommendations are a compromise between complete prohibition of the practice of surrogacy and no regulation at all. We believe they meet current community demands.

### RECOMMENDATION 3: Prohibition of Commercial Surrogacy

**The Commission recommends that all forms of commercial surrogacy should be prohibited. It should be an offence to pay, receive, offer or solicit any reward for participation in or facilitation of a surrogacy arrangement or any part of a surrogacy arrangement.**

4.8 This recommendation is intended to prevent the development of commercial surrogacy in this State. Similar prohibitions on the activities of commercial intermediaries are in force in Victoria,<sup>2</sup> Queensland<sup>3</sup> and South Australia.<sup>4</sup> The prohibition is intended to extend to all those who offer or receive payment or some financial advantage from surrogacy, whether as a broker, a commissioning parent, or as a woman wishing to act as a surrogate mother. Therefore, whether acting as a commercial broker or not, anyone who invites or accepts payment for assisting the parties to the arrangement should be included in the prohibition. This would include members of the medical and legal professions, psychologists, counsellors and those involved in family planning, who accept payment for assisting in a surrogacy arrangement. Further recommendations on the liability of these professional people are made in Recommendation 5 below.

4.9 Under this recommendation it would be an offence to make a direct payment for services related to surrogacy or for the transfer of custody. To ensure the effectiveness of the prohibition we also recommend that the offence should extend to attempts to avoid liability by making indirect payments (for example, payment of the surrogate mother's expenses) or conferring other benefits not otherwise due at law (accommodation, clothing or travel). The recommendation is not intended to affect payments made by court order or agreement under either the Family Law Act 1975 (Cth) or the Maintenance Act 1964.

4.10 In coming to its conclusions the Commission has been influenced by evidence of certain practices reported from the United States of America. In that country there has been a rapid development of very sophisticated brokerage services. Of particular concern to the Commission is the evidence that these brokers not only advertise for services but also seek to control the lives of their clients in unacceptable ways. These agencies also seek to influence public opinion by promoting apparently successful surrogacy arrangements whilst suppressing those that fail. The Commission has also been told of instances of brokers targeting young women in vulnerable economic circumstances (students and social services recipients) and persuading them to become surrogate mothers for their wealthy clients. Certain members of the medical and legal professions are deeply involved in the enterprise in the United States, along with psychologists and those operating the brokerage firms. Many of these professionals are reported to have developed mechanisms for making payments or conferring benefits on the surrogate mother which avoid statutory prohibitions on commercial surrogacy. Care must therefore be taken to prevent the development of such schemes in New South Wales.

4.11 The Commission has received no evidence to suggest any widespread use of paid intermediaries or surrogate mothers in New South Wales. However, since there is obvious potential for profit in the practice, there is reason to believe that a brokerage industry would develop if not prevented by legislation. Apart from the negative experiences reported from the United States, the Commission has identified five aspects of the practice of commercial surrogacy which make it unacceptable:

It permits profit to be made from the creation and transfer of custody of a child;

It entails the use of a woman's body, and of human gametes, for commercial purposes;

It creates a "Profit motive" that encourages persons, mainly potential surrogates, to enter into surrogacy arrangements; The receipt of money may inhibit those immediately involved in the arrangement in reconsidering their decisions. Whether or not it is well-founded, a payment of money to the surrogate mother

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may lead her to believe that she cannot withdraw from the arrangement. This belief may be reinforced by the commissioning couple threatening proceedings for recovery of money paid if she does not complete the agreement. The Commission has also been told of American experiences in which threats are made to report the surrogate mother for non-disclosure of the receipt of money to taxation or social security authorities. These matters may overbear the surrogate mother in her decision whether to part with the child.

It is tantamount to a trade in women and children which has never been countenanced in Australian society. The traditions reflected in our adoption and child welfare laws have always been opposed to the commercial exploitation of childrearing and we have always been careful to repose responsibility for the care of children in public or charitable institutions and not in private, commercial organisations.<sup>5</sup>

4.12 We therefore recommend that legislation should be enacted to prohibit commercial surrogacy in the terms appearing in this recommendation. Special attention should be given to the definition of the terms payment and reward to ensure that the prohibition is not avoided by use of devices which purport to cover expenses or confer other benefits.

### RECOMMENDATION 4: Advertising in relation to Surrogacy

**Anyone who publishes or causes to be published a statement or advertisement offering or soliciting participation in a surrogacy arrangement should be guilty of a criminal offence. It should also be an offence to publish, advertise or cause to be advertised a statement that a person is willing to negotiate, arrange or obtain the benefit of a surrogacy arrangement on behalf of another.**

4.13 These offences should have a very wide operation. They should attach to paid promoters of surrogacy arrangements, surrogate mothers who advertise their services and to the commissioning couple. Newspapers which accept such advertisements should also be guilty of offences.

4.14 Whether made to the surrogate mother by an entrepreneur or the commissioning couple public offers of this nature are unacceptable because they encourage the development of a trade in surrogates and their children. Therefore, the parties should not be permitted to advertise on their own behalf, even if no financial reward is offered. For the reasons set out in Recommendation 5, we find it unacceptable to impose sanctions on those who participate in the practice privately and therefore have not recommended that surrogacy be outlawed altogether. Such advertising of requests and offers of services no longer constitutes a private activity. It is public, and tends to the same mischief as other commercial forms of the practice. It should therefore be prohibited.

### RECOMMENDATION 5: Prohibited Activities

**The Commission recommends that the following practices associated with surrogate motherhood should be prohibited, and that criminal penalties should be imposed on anyone convicted of engaging in them, except the immediate parties to the arrangement.**

4.15 The Commission has had difficulty settling the two parts of this recommendation which follow (at paragraphs 4.18 and 4.27) because it is anxious not to extend the criminal law beyond reasonable limits. We believe the criminal law is properly used to prevent the growth of a commercial industry in surrogacy. We are less sure about its use to deter those who seek no profit. We have sought a compromise so as not to be too harsh on the immediate parties to the arrangement and the child. Therefore, in the recommendations that follow, we propose that criminal penalties should be imposed on anyone who assists the immediate parties with their arrangements for a surrogacy agreement but that the parties themselves should remain free from criminal sanctions. One member of the Commission has dissented from the recommendations to impose criminal sanctions in these circumstances. The terms of the dissent are set out in paragraphs 4.22 - 4.26 below.

4.16 There are several reasons for distinguishing between the immediate parties and others outside who assist in the arrangements. We believe there is general public sympathy and tolerance for the predicament of the immediate parties. The commissioning couple suffer the distress and disappointment of infertility and the surrogate mother (and her partner who should be included amongst those immediately involved) respond to that. Although the Commission believes that they will be acting unwisely if they enter into a surrogacy arrangement, we are not prepared to allow the criminal law to intrude into their affairs in order to secure the total prohibition on surrogacy we would like. Other disincentives are offered later in the report: see Recommendations 8, 9 and 10 below.

4.17 The Commission also believes that the enforcement of the criminal law against the immediate parties may self-defeating. The spectacle of the arrest, trial, and imprisonment of a surrogate mother, her partner and the commissioning couple would be unedifying. While those immediately involved are likely to be deterred by the imposition of criminal sanctions, no such reliable prediction can be made for the immediate parties. Other considerations may make them act unreasonably or even recklessly. Should proceedings be necessary against

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the immediate parties, they will occur at a time when the interests of the child should be the central concern of the parties and the community. The need for the parents to defend criminal proceedings in relation to the birth can hardly be in the best interests of the child. Prosecution of the parties may also interfere with decisions the parties and courts have to make on the guardianship and custody of the child. With these considerations in mind, we make the following recommendations:

### **(A) Unpaid Intermediaries**

**Any person, except one of the immediate parties to the arrangement, who knowingly arranges or undertakes to arrange an introduction between those who may be interested in participating in a surrogacy arrangement, or who in any other way knowingly assists in carrying out such an arrangement, or any part of such an arrangement, should be guilty of an offence.**

4.18 Criminal penalties should be imposed on anyone acting as an intermediary between the parties in the making of a surrogacy arrangement. The Commission also seeks to prevent third parties acting to arrange introductions between the parties. These prohibitions should extend to anyone outside the immediate parties to the arrangement, including medical practitioners and counsellors. Members of the immediate parties' families and their friends should also be prevented from providing active assistance. However, they should not be penalised for offering advice and no professional should be prevented from counselling a patient or client.

4.19 During consultation, the Commission became aware of many individuals and organisations prepared to assist in surrogacy without receiving payment. Those falling into this category included members of the medical profession, psychologists and those staffing family planning clinics as well as relatives and friends of the immediate parties to the arrangement. It is the Commission's view that all these people should be subject to criminal penalties if they give active assistance to the parties in giving effect to their arrangements. Such assistance would include the act of a hospital employee who knowingly entered false records of maternity, or otherwise actively participated in handing over a child to a woman who was not the birth mother, knowing the act was in part giving effect to a surrogacy arrangement.

4.20 The Commission is, however, anxious to ensure that its recommendations do not result in the withdrawal of counselling and medical services from the surrogate mother and child. Professional groups offering infertility counselling and advice should be able to continue their work unimpeded by the threat of criminal sanctions. Our recommendation is also designed to ensure that, once the pregnancy is established, all medical and health support services are available to the mother and child and that those providing them should not risk prosecution for this offence. We hope that those involved would not abuse any position of counselling in order to facilitate a surrogacy arrangement. The clear statement of legislative policy intended by our recommendations, coupled with the risks of professional disciplinary action or, in extreme cases, imposition of criminal liability should be sufficient deterrent for those who would abuse their position.

4.21 The purpose and policy behind the law controlling these activities should be explained to the medical practitioners and other professionals likely to be approached for assistance (as well as to the patients) in the publicity campaign described in Recommendation 7. This instruction, and the risk of criminal prosecution, should ensure that medical practitioners and health care workers take no major role in surrogacy, but the matter should be kept under review.

### **Minority View**

4.22 The Chairman of the Commission dissented from this recommendation. While agreeing in principle that the activities of third parties should be discouraged, Ms Gamble is not prepared to join in the recommendation to impose criminal penalties on unpaid activities. She believes that the prohibitions on commercial surrogacy contained in Recommendation 3 and on advertising in Recommendation 4 represent the limit to which the imposition of criminal penalties should extend. The provision of counselling, advice and medical assistance by professional people, relatives and friends should remain beyond the reach of the criminal law. The reasons for this dissent are set out below in paragraph 4.23 - 4.26. It does not extend to the matters relating to IVF surrogacy contained in Recommendation 6 below.

4.23 Private relationships amongst family and friends should not be the subject of criminal investigation. In private, people should be free to make mistakes and errors of judgment without penalty. The appropriate answer to the social ill caused by such private activities is widespread and well planned education programs which inform of the emotional, physical and legal hazards of surrogacy. Even if surrogacy is found to be acceptable to a few through use of personal contacts, this is something the community should be prepared to accept, for it is better that a few engage in a practice the majority regards as unacceptable than that all be subjected to the public scrutiny of criminal investigation.

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4.24 Members of the medical and health care professions will be subjected to a lot of pressure from some of their patients to assist in both the planning and the performance of surrogacy arrangements. So long as they do not advertise or hold themselves out as brokers or procurers of surrogacy, they should not be subject to criminal penalties. Where professional people act conscientiously and according to their understanding of good practice, the criminal law should not intervene. Instead, effort should be put into instructing them in the dangers of surrogacy.

4.25 Perhaps the most important reason for opposing the recommendation is that it involves an appropriate extension of the criminal law. The major reason for resorting to criminal sanctions is to deter would be offenders. The labelling of an activity as criminal is one of the simplest ways the community has of expressing its disapproval. If this were all the Commission's recommendation amounted to, there, could be little objection to it, but the consequence of labelling something as criminal is public enforcement. If such ordinary enforcement is not intended, then the Commission should not recommend creation of the new offence.

4.26 One of the concerns frequently expressed to the Commission has been that if medical practitioners are permitted to assist in these arrangements, surrogacy may come to be regarded as a natural progression for the infertile from failed artificial insemination and IVF. To date, the evidence is to the contrary. Indeed, the Commission has received evidence which suggests that some members of the medical professional would welcome the creation of these offences in order to avoid the dilemma they face when a request is made for assistance or advice on surrogacy. Doctors do not need the backing of the criminal law to refuse treatments they do not wish to perform and their personal quandary of whether to offer treatments of which they do not approve does not provide a good reason for imposing such penalties.

### **(B) Drafting or assisting in the drafting of a Surrogacy Agreement**

**It should be a criminal offence to draft or assist in the drafting of a surrogacy agreement.**

4.27 Another professional person who may be called on to give advice is the family lawyer. Lawyers who only give advice on the validity of a proposed agreement or on the status of the child should not be regarded as committing an offence. However, if the advice or assistance goes further, and amounts to facilitating or encouraging the parties in their intention to enter the agreement, this should constitute an offence.

4.28 During the consultation period, several lawyers contacted the Commission, asking for information on behalf of clients wishing to arrange surrogacy arrangements. We believe that the use of lawyers to facilitate or draw up surrogacy agreements may become widespread. They should be prohibited from acting as intermediaries, or assisting in the organisation of such an arrangement in any way that encourages the growth of surrogacy.

4.29 We believe that unless prohibited, these activities could legitimise and promote surrogacy arrangements. In addition, the drawing up and signing of such an agreement may give the parties to it a sense of security or obligation that is not supported by the law. The Commission considers that the false impressions produced would be compounded if the agreement is drawn up by a legally qualified adviser or practising lawyer.

## RECOMMENDATION 6: IVF Surrogacy

**No special provision need be made for IVF surrogacy. It should be an offence for a medical practitioner to knowingly assist a surrogacy arrangement by providing IVF services to the parties. This would constitute an offence under Recommendation 5(A) above which recommends a prohibition on knowingly assisting or making an offer of assistance.**

4.30 When a couple is able to supply the gametes required for conception, IVF surrogacy offers the closest substitute for natural conception since it produces the genetic child of the commissioning couple. The process is open to serious objection, however, because the body of the surrogate mother is simply used as an incubator by the commissioning couple. The woman is subjected to an invasive procedure for which she has no need and the natural child carrying process is thought to be distorted by the fact that the surrogate mother is counselled against bonding to a child she is to lose at birth. For these reasons, and many more discussed in Chapter 3, the procedure is rejected by many as a reasonable alternative for the infertile couple.

4.31 In the three States in which it has been addressed IVF surrogacy has not been approved. This is in spite of the fact that it is a procedure which is most keenly sought after by many who are infertile. So far as we are aware no hospital or clinic in New South Wales has, permitted the use of IVF surrogacy to date but there is evidence that medical practitioners will face increasing pressure to perform the operation. The view most often expressed by these practitioners is that, given both legislative approval and the approval of their ethics committees, they

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would be prepared to offer IVF surrogacy where the medical condition of the commissioning couple indicated that this was the only way they could have a child.

4.32 Treated in isolation as a remedy for the commissioning couple, IVF surrogacy does not appear objectionable. However, the Commission is unable to view the procedure in this way, because we are conscious of the interests of the other people involved. Above all, we find it impossible to reconcile the medical practitioner's duty to the commissioning couple with the duty to the surrogate mother who also becomes a patient. We cannot accept that it is in the interests of the surrogate mother to subject herself to the IVF process and carry the child for the commissioning couple. The Commission therefore recommends that no special exception be made to the prohibition in Recommendation 5A to permit IVF surrogacy to be performed.

### RECOMMENDATION 7: Public Education

**Along with the prohibitions outlined above, the Commission recommends that further steps should be taken to dissuade infertile couples from resorting to surrogacy arrangements.**

4.33 We would envisage steps along the following lines:

#### *Publicity*

A program should be developed to offer the public as much information on surrogate motherhood as possible in order to heighten awareness of the dangerous implications of general acceptance of the practice. The public should also be informed of the provisions in force to reduce the incidence of surrogacy. We propose the release of a number of brochures through the Department of Health. We would also envisage the Biomedical Council recommended in the report *In-Vitro Fertilization* having a substantial role in this educative process.

#### *Counselling*

Counsellors involved in infertility counselling and family planning should be made aware of the dangers involved in surrogacy. This should ensure that counselling against surrogacy is widely available, especially in the early stages when those likely to be involved are assessing their alternatives and may be more open to persuasion against the practice.

#### *Enforcement*

The major disincentive to those proposing surrogacy will be the unenforceability of any term in the contract which requires transfer of the child. This proposal is dealt with in Recommendation 8 below, but clearly the greatest discouragement to those seeking a child in this manner will be the refusal to ensure that custody will actually pass to them. Another disincentive would be the fear of criminal penalties attached to certain activities.

#### *Public Attitudes*

The attitude of the public to surrogacy is obviously very important in the model the Commission is proposing. The main contribution of this report, and the recommendations contained in it, may be to assist in creating a social climate in which the surrogacy option becomes unpalatable to potential surrogates and parents. The Commission recognises, however, that ultimately the law cannot enforce community morality on this question. It can only place obstacles and create a negative climate to discourage the process.

### RECOMMENDATION 8: Surrogacy Agreements to be Void and Unenforceable

**The Commission recommends that surrogacy agreements should be void and unenforceable at law.**

4.34 Although the Commission does not wish to see criminal penalties imposed on the immediate parties where they privately give effect to a surrogacy arrangement, we do not believe that any agreements they reach should be enforced through the courts. Legislation should be enacted to ensure that any agreement for surrogate motherhood is both void and unenforceable. If such a provision is enacted no part of any surrogacy agreement would be recognised by the law.

4.35 Any term in an agreement which seeks to bind the surrogate mother to hand the child over to the commissioning parents is already void and unenforceable at common law because it is contrary to public policy. The judicial attitude to other parts of the contract is not so clear. The decided case law in England and the United States of America leaves some doubt whether those provisions of a contract for surrogate motherhood which do

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not cover transfer of custody of the child will be enforced by the courts. There are two grounds on which these aspects of the contract may be regarded as unenforceable. First, the whole contract may be regarded as contrary to public policy and therefore unenforceable. The court may take the view that the whole contract is affected even though its most sensitive aspect, the transfer of custody, is removed from contention. Secondly, even if the view is taken that these ancillary provisions of the contract are enforceable, a court may decline to enforce them because to do so in a particular case would be regarded as unconscionable. There is no reason to believe that the courts of New South Wales would take a different view from the courts in England and the United States.<sup>6</sup> When the question comes before the courts of this State therefore it may be that even the ancillary parts of the surrogacy contract will be held to be unenforceable.

4.36 The Commission's view is that it should be made plain that all parts of the agreement are void and unenforceable. In this we are supported by the legislation and the recommendations of all the major inquiries which have touched on the matter. Section 30(3) of the Infertility (Medical Procedures) Act 1984 (Vic) makes surrogacy agreements void and s10g of the Family Relationships Act 1975 (SA), as amended in 1988, makes them illegal and void. In Queensland, the Surrogate Parenthood Act 1988 which came into operation in September 1988, makes all surrogacy agreements void and unenforceable.

4.37 In England, the Warnock Committee recommendation that all surrogacy agreements should be illegal and unenforceable was not implemented in the Surrogacy Arrangements Act 1985. Section 1(9) of that Act appears to leave the status of these agreements to be determined by the courts since it applies to arrangements whether or not they are lawful and whether or not they are enforceable by or against the person making them".<sup>7</sup>

Since the enactment of that Act the British Department of Health and Social Security has released a White Paper which suggests that surrogacy arrangements should be made legally unenforceable.<sup>8</sup>

4.38 A number of submissions received by the Commission recommended that the agreements be made both void and unenforceable at law, the aim being to render them a complete nullity at law.<sup>9</sup> The strongest submission on this point came from the Social Issues Committee of the Anglican Church Diocese of Sydney. In their submission the Committee put forward a "model of deliberate non-recognition of surrogacy". A crucial part of this model was that the surrogacy arrangement should be regarded as a legal nullity so that "surrogacy arrangements will be at the risk of the parties to them - they may still occur and would not be illegal *per se*, but the parties to one would derive no enforceable rights or obligations from them". The object of this policy of deliberate non-recognition is to generate uncertainty so as to discourage people from entering into the arrangements. This uncertainty would be reinforced by the enactment of a statement in the form of Recommendation 1 which should bring home to all concerned that custody will not automatically pass to the commissioning couple in the event of a dispute.

4.39 The NSW Infertility Social Workers group supported this policy from another perspective. They thought that the most important aspect of the agreement, the transfer of the child should only occur if the surrogate mother were "truly comfortable with her decision to surrender the child". If she were comfortable, the transfer would occur whether or not there was an enforceable agreement.

4.40 The Commission agrees with these submissions and has been particularly impressed with the model for deliberate non-recognition proposed by the Social Issues Committee. This model is consistent with our desire to discourage but not penalise the immediate parties to the agreement unless they advertise or pay or receive money for their involvement. We believe they should be counselled against entering into a surrogacy agreement and denied any assistance from the law in making or enforcing their arrangements. Legislation declaring these agreements void and unenforceable should achieve these purposes. If made void and unenforceable no action could be taken on the surrogacy agreement by either party and any money paid under its terms would not be recoverable.

4.41 We believe that the parts of the agreement which provide for transfer of the child would be unenforceable independently of any nullity effected by statute as we are confident that this aspect of the agreement is contrary to public policy and therefore currently unenforceable. Decisions on guardianship and custody will be made in the Family Court in accordance with the welfare principle. Under s63F(1) of the Family Law Act 1975 (Cth) "each of the parents" is a guardian and both have joint custody of the child. Since Part VII of the Family Law Act (Cth) commenced in April 1988, s63F applies to all children, whether born within marriage or not.<sup>10</sup>

4.42 The provisions of the Family Law Act, the Artificial Conception Act 1984 and the Children (Equality of Status) Act 1976, which settle questions of maternity and paternity by legal presumption, do not exclude the jurisdiction of the Family Court in guardianship and custody. The four parties involved, the surrogate mother and her partner and the commissioning couple, may all participate in these proceedings and there is no reason why evidence of the circumstances of conception cannot be given in court.



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4.43 Our recommendations do not leave the mother and child without support. The support provisions of both the Family Law Act 1975 (Cth) and the Maintenance Act 1964 apply to them. Section 66B of the Family Law Act places the onus of supporting a child on both parents, and gives priority to this responsibility over the support of themselves and other dependents. So long as the father is identified, and his paternity is not excluded by statutory presumption, he will share responsibility for support of the child with the surrogate mother.

4.44 The father will also be liable to contribute to any medical expenses the surrogate mother may incur during the pregnancy. This obligation is imposed under s17 of the Maintenance Act. That Act also makes provision for the father to contribute to the funeral expenses if either the child or mother dies during childbirth.<sup>11</sup>

### RECOMMENDATION 9: Presumptions of Parenthood

**A conclusive presumption that the surrogate mother is the mother of the child should be enacted. No other changes should be made to the presumptions of parenthood currently applied under the common law and by statute.<sup>12</sup>**

4.45 In making this recommendation the Commission is conscious that anomalies exist in the application of the statutory presumptions of paternity which may leave a child without a legal father and with impaired rights to maintenance and inheritance. As these presumptions do not prevent a court from giving recognition to the father of the child in a guardianship or custody order, the Commission recommends no change in them.

4.46 Some of the most passionate submissions received by the Commission concerned the rights of the surrogate mother to be recognised as the legal mother of the child she carries. The conclusion we reached, in the discussion paper,<sup>13</sup> was that Under existing law the surrogate mother would be recognised as the legal mother of the child. In our view this is the effect of the presumptions of maternity contained in the Family Law Act 1975 (Cth), the Children (Equality of Status) Act 1976, the Artificial Conception Act 1984 and those applying at common law. The presumptions have the same effect whether the surrogate mother is single, married or living in a de facto relationship at the time of the birth.

4.47 The Commission recommends that there be a clear statutory statement of the surrogate mother's maternity in the form of a conclusive presumption that she is the legal mother, whether or not she is biologically related to the child. Two reasons underlie our recommendation. Firstly, we believe that it is only in this way that the surrogate mother can be protected from the worst excesses feared in the procedure. Some have suggested that the use of donated ova be prohibited in IVF to avoid any difference occurring between genetic and legal maternity.<sup>14</sup> We have attempted to achieve the same result by recommending restriction of the use of IVF to infertile women in Recommendation 6.

4.48 The second reason we recommend a conclusive presumption of maternity in favour of the surrogate mother is that by doing so we may be able to discourage some who would otherwise be willing to enter into a surrogacy arrangement. The legal recognition of the surrogate mother as the mother of the child will do as much to confirm her status in any dispute over custody or guardianship as it will to cast uncertainty on the role of the commissioning mother. Although the assignment of legal parenthood is less significant than it has been in the past, it still has symbolic significance. A necessary corollary of the assignment of parenthood is of course the attachment of legal duties to it as well. As the presumptions of paternity often leave the father in an ambiguous position in relation to a child conceived by artificial means, it will be the mother who will be most readily identified as the person bearing the financial and other day to day responsibilities for the child's upbringing. The Commission acknowledges that there are circumstances when the mother may find it difficult to enforce the financial responsibilities against the father of the child. Under our proposals she would be forced to bear the primary burden of supporting the child, for she would not be permitted to enforce any contractual agreement against the father and the commissioning mother would be deemed not to have any relationship with the child, even if she provided the ovum used in the conception. It would also be to the surrogate mother's estate to which the child will turn for support after the deaths of both parents, unless the father has made provision for the child in his will or circumstances permit an application under the Family Provision Act 1982.

4.49 This recommendation would not deny the genetic parents all rights. As explained above (paragraphs 4.41 - 4.42), we believe that the commissioning couple would have standing in a custody or guardianship case, whatever the operation of the presumptions of paternity and maternity.

### RECOMMENDATION 10: Adoption

**An adoption order should only be available to the commissioning parents if orders for guardianship and custody under the Family Law Act 1975 (Cth) would not make adequate provision for the welfare of the child.**

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4.50 The wording of this recommendation is taken from ss11 and 12 of the Adoption Act 1984 (Vic). A shift of opinion has been occurring in adoption law in recent years. Previously, the major objective of adoption was to provide a guarantee of legal parental rights to the adopting parents. The child was given certainty of legal parentage as well and adoption was the statutory assignment of parentage to secure the interests of children who could not live with their natural parents. Most commonly it was used to place newly-born children with people who were not related to them. The order established a legal relationship between the adopting parents and severed relations with the natural parents. Because the emphasis was on the ascription of legal rights, adoption was also made available to those who were related to the child. Section 19(4) of the Adoption of Children Act 1965 allows the court to make an adoption order in favour of a couple notwithstanding that one or both of them are the natural parents of the child. Section 21(1A)(c) allows the court to dispense with a report from the Department of Family and Community Services or a private adoption agency when the adoption is sought by a relative.

4.51 In recent years adoption has been used just as much to create new family groups after the divorce of the natural parents as it has to secure homes for those without parents. Used in this way the practice has disadvantages.<sup>15</sup> The drawbacks identified in use of adoption for step-parents are that the order may be used to deny a natural parent access to a child or to deny information about that parent to the child. As an adoption order normally entails the issue of a new birth certificate to alter the facts recorded at birth, and the maintenance of confidentiality by all who could report the truth officially, there are real dangers of abuse.

4.52 The response in some jurisdictions has been to withhold adoption orders from step-parents and relatives. Sections 11(2) and 12 of the Adoption Act 1984 (Vic) prevent a court making an adoption order in favour of a relative of the child unless there are exceptional circumstances and a finding has been made that a guardianship or custody order under the Family Law Act 1975 would not make adequate provision for the welfare and interests of the child. Similar legislation is in operation in England.<sup>16</sup> In these jurisdictions it was thought undesirable when step-parents are involved that a legal presumption of parentage should take the place of the common law assignment of custody and guardianship.<sup>17</sup> But even in these jurisdictions, adoption has not been displaced as the preferred option for the care of very young children who are to grow up apart from their natural parents.

4.53 The Commission believes that these developments should be reflected in the law which is to regulate relationships between participants in a surrogacy arrangement. We do not believe that the surrogate mother and her family should be conclusively excluded from any relationship with the child by statutory presumption or all adoption order.

4.54 Two issues of policy need to be addressed in deciding whether adoption should be available to secure the relationship between the child and the commissioning parents. The first is whether adoption should be regarded as having the same status as it did in the past. Developments in both custody law and the law of adoption raise some doubt whether it is still appropriate to make a conclusive and permanent assignment of legal guardianship to adopting parents. On one view, the welfare principle itself is inconsistent with adoption since it concentrates not on the legal rights and duties of the parents but on achieving the best solution for the child in the circumstances of the case. This often requires a flexibility which is not available in adoption and may be better provided by the custody/guardianship jurisdiction of the Family Court. Recent progress towards more open adoption practices lends support to this new view of the parent/child relationship in which the right to custody is regarded as something that has to be earned. Even if adoption is found to be worthy of continued support in principle, the second question to be raised in surrogacy is whether the order should be available to the commissioning couple. Adoption is still the most positive way in which the child/parent relationship can be recognised between those who are not related. If surrogacy is to be discouraged, serious thought must be given to restricting its availability in surrogacy arrangements. Before withholding use of the order for this purpose, however, a very clear decision must be made about the effect that withholding the order will have on the welfare of the child. It may be that the price of withholding security from the commissioning parent's is too high. We recommend that before making an adoption order, a court should have to be satisfied that guardianship and custody orders would not adequately serve the interests of the child. This would ensure that the courts weigh up all the matters we have raised before making the order for adoption.

### RECOMMENDATION 11: Registration of Birth

**An accurate record of the circumstances of the child's conception and birth should be kept on the register of births. This should be available to the child on attaining the age of 18.**

4.55 The Commission recommends that information recorded on the register of births should accurately represent the legal Circumstances of the child's birth. This means that those people recognised as the legal parents of the child would be recorded as the parents, although they may be different from the child's guardians. It is the guardians who should have the right to give the child a name.

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4.56 This recommendation could result in the child bearing a name which is different from the legal parents. If our proposals under Recommendation 9 are accepted, it will be the surrogate mother who will have the right to register the birth and assign the child a name. It may be that at this stage the presumptions in the Artificial Conception Act 1984 will prevent the commissioning couple (in particular the father whose gametes are most likely to have been used) from gaining recognition as parents. Later, possibly after successful litigation in the Family Court, or perhaps by consensus between the parties, the commissioning parents may receive guardianship rights. In this case they will have the right to rename the child and alter the register.

4.57 Such changes in the right to exercise guardianship over the child are no different in surrogacy from the changes which may occur after parents have separated or divorced. Any conflicts which develop can be resolved satisfactorily in the Family Court by application of the welfare principle.

### RECOMMENDATION 12: Department of Family and Community Services

**The Department of Family and Community Services should have no specially assigned role in relation to children born through surrogacy.**

4.58 No legislation should be enacted to require notification of the Department or its approval before custody can be transferred. The Department should maintain its normal functions of providing assistance to a court hearing a custody dispute and of intervening when a child is not believed to be receiving adequate care.

4.59 The Commission does not regard the intervention of the Department of Family and Community Services as necessary in all surrogacy cases. There is therefore no need to assign the Department special functions in the area. Post-natal checks made by staff attached to baby health clinics will alert the Department to early signs of inadequate care or abuse. The Department should also be notified, and a foster care licence sought, if a child is placed for more than 28 days with people who are not relatives.<sup>18</sup> This will only be necessary if neither of the commissioning parents is related to the child. Where guardianship or custody are contested in legal proceedings, it is likely that the court will call for background reports on all parties and the child from officers of the Department. If not satisfied with the parties' arrangements for the child, the Department will be able to express an opinion in court.

4.60 As there is every chance that cases requiring assistance from the Department will come to its attention under existing procedures, there is no need to assign it special powers.

### FOOTNOTES

1. *Surrogate Motherhood: Discussion Paper 3* (DP 18, 1988) 1.12-1.14, 7.11-7.17.
2. Infertility (Medical Procedures) Act 1984 (Vic) s30(2).
3. Surrogate Parenthood Act 1988.
4. Family Relationships Act Amendment Act 1988, ss10F, 10h.
5. Even when adoptions could be arranged by private individuals, before the Adoption of Children Act 1965, the arrangement had to be approved by a court.
6. *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846; *In the Matter of Baby M* 537 A.2d 1227 (1988).
7. Surrogacy Arrangement Act 1985 (UK), s3(1).
8. Department of Health and Social Security (UK) *Legislation on Human Infertility Services and Embryo Research* (Cm 46, HMSO, London, 1986).
9. Social Issues Committee, Anglican Church Diocese of Sydney (SB 18, 1988); Catholic Archdiocese of Sydney (SB 20, 1988); Mr John Wade (PH 1, 1988) Ms Marion Brown (PH 8, 1988).
10. The Commonwealth Powers (family Law - Children) Act 1986 (NSW) commenced operation in October 1987 but the transfer of powers was not taken up under the Family Law Act until the Family Law Amendment Act 1987 commenced in April 1988.
11. Maintenance Act 196,1 sections 19 and 20.

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12. This Recommendation confirms Recommendation 37 of the report *In Vitro Fertilization* (LRC S8, 1988) at 100.

13. *Surrogate Motherhood* (DP 18, 1988) 3.7 - 3.11.

14. Rebecca M Albury (SB 19, 1988); Presbyterian Women's Association of Australia in NSW (SB 21, 1988 B Guthrie and M Kingshott (SB 28).

15. Adoption Legislation Review Committee (Victoria) report 1983, Chapter 4; Susan F Koffman, Step - parent Adoption, a comparative analysis of laws and policies in England and the United States (1984) 7 *Boston College International and Comparative Law Journal* 469, 474-475.

16. The English equivalent is Children Act 1975, s37(1). And see comments in *Cinderella Revisited* Family Law Council, June 1988, 3.1-3.13.

17. In particular, it has been thought undesirable that older children from divorcing families should be adopted by the new spouse of one of their parents . Re S. (Infants) [1977] Fam 173; Re S (A Minor) (*Adoption or Custodianship*) [1987] Fam 98. See also S Cretney, *Principles of Family Law* (Sweet & Maxwell 1984) 431, note 97.

18. Children (Care and Protection) Act 1987 s42, discussed in DP 18 at paragraph 3.28.

## Appendix A - Schedule of Organisations and Persons Who Made Submissions

### I. SUBMISSIONS MADE IN RESPONSE TO THE DISCUSSION PAPER

|       |  |
|-------|--|
| SB1   | Mrs Eugene   |
| SB2   | Dr Ditta Bartels   |
| SB3   | Ms Patricia MacMaster  |
| SB4   | "Commissioning Parent" (No.1)  |
| SB5   | Dr A Jago  |
| SB6   | "Surrogate Mother" (No.1)  |
| SB7   | Catholic Women's League  |
| SB8   | Ms Judy McHutchinson   |
| SB9   | Mr A.C. Houlsby  |
| SBIO  | "Commissioning Parent" (No.2)  |
| SB11  | Mr Brian Dawson  |
| SB12  | Writer's Workshop (NSW Humanist Society)                             |
| SB13  | Right to Life Association (NSW)                                      |
| SB14  | Association of Relinquishing Mothers                                 |
| SB15  | NSW Infertility Social Workers Group                                 |
| SB16  | The Salvation Army   |
| SB17  | Dr E Teiffel, Dr Dorrington and Dr M Craddock (Joint Submission)     |
| SB18  | Social Issues Committee, Anglican Church Diocese of Sydney           |
| SB19  | Rebecca M. Albury  |
| SB 20 | Catholic Archdiocese of Sydney                                       |
| SB21  | Presbyterian Women's Association of Australia (NSW)                  |
| SB22  | Ms V. Potempa  |
| SB23  | Ms Julienne R. Lauer   |
| SB24  | Dept of Fertility and Reproductive Endocrinology, Royal Hospital for |

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|      |   |
|------|---|
|      | Women (NSW)                                   |
| SB25 | Ms Margaret van Keppel                        |
| SB26 | Mr Paul Kaufman                               |
| SB27 | "Surrogate Mother" (No.2)                     |
| SB28 | Association of Relinquishing Mothers (Vic)    |
| SB29 | Ms Lucy Sullivan (Parents Centre Australia)   |
| SB30 | Women's Legal Resources Centre                |
| SB31 | B Guthrie and M. Kingshott (joint submission) |
| SB32 | Miss J Coombs                                 |
| SB33 | Women's Action Alliance                       |
| SB34 | NSW Council for Civil Liberties               |
| SB35 | M. Carter                                     |
| SB36 | Victorian Standing Committee on Adoption      |
| SB37 | Council of Churches in NSW                    |

## **II. ORAL SUBMISSIONS MADE TO THE COMMISSION AT THE PUBLIC HEARING ON SURROGATE MOTHERHOOD**

|     |   |
|-----|---|
| PH1 | Mr John Wade  |
| PH2 | Miss Janet Coombs (Right to Life Assoc, NSW)  |
| PH3 | Mr John Grice   |
| PH4 | Mrs Marion Smith (Presbyterian Women's Association of Australia - NSW)                            |
| PH5 | Fr. Brian Lucas (Catholic Archdiocese of Sydney)  |
| PH6 | Dr Richard Porter (Clinical Director of the Human Reproduction Unit, Royal North Shore Hospital)  |
| PH7 | Dr E.S. Teiffel, Dr M. Craddock and Dr D. Dorrington (joint submission on behalf of The Brethren) |
| PH8 | Ms Marion Brown (Women's Legal Resources Centre)  |
| PH9 | "Mary" ("Commissioning Parent" No.3)  |

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- PH10 Dr Graham Cooper (Social Issues Committee of the Anglican Church, Diocese of Sydney)
- PH11 Ms Heather Dietrich
- PH12 Ms Rebecca Albury
- PH13 Mrs Vicki Potempa
- PH14 Mrs Martin (Salvation Army)
- PH15 Mrs D Mittis

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