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South Australian Law Reform Institute

Surrogacy: A legislative framework

Fact Sheet 1 – An Overview of SALRI and this Reference

What is the South Australian Law Reform Institute?

The South Australian Law Reform Institute (SALRI) is an independent, non-partisan law reform body which conducts inquiries—also known as references—into areas of law. The subject of a reference is determined by the SALRI Advisory Board and may also be at the request of the State Attorney-General. SALRI looks at how the law works in South Australia and other places and speaks to the community and interested parties. Based on the research and consultation that it carries out during an inquiry, SALRI then makes reasoned recommendations to the State Government so that the Government can make informed decisions about any changes to the law. SALRI's recommendations do not necessarily become law. It is entirely up to the Government and Parliament whether to accept any recommendation from SALRI.

When undertaking its work, SALRI has a number of objectives. These include identifying law reform options that would modernise the law, fixing any problems in the law, consolidating areas of overlapping law, removing unnecessary laws, or, where desirable, bringing South Australian law into line with other States and Territories.

SALRI was established in December 2010 under an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

Surrogacy Law Reference

SALRI was asked by the former South Australian Attorney-General, the Hon John Rau MP, to inquire into and report on certain aspects of the present law regulating surrogacy in South Australia, contained in Part 2B of the *Family Relationships Act 1975* (SA) and to suggest a suitable regulatory framework for surrogacy for South Australia. The present South Australian Attorney-General, the Hon Vickie Chapman MP, supports SALRI undertaking this reference.

Surrogacy is the practice of a woman (the **surrogate**) becoming pregnant with a child (that may or may not be genetically related to her), carrying the pregnancy and giving birth to the child for another family (the **commissioning parents**) who then become the legal parents of the child. Further information about the meaning of these and other key terms is set out in Fact Sheet 2.

The basic law relating to surrogacy in almost all of Australia is clear: 'commercial surrogacy' (where a fee is charged for carrying the pregnancy and having the child) is prohibited,¹ and 'altruistic surrogacy' arrangements (where no fee is charged but the surrogate mother's medical and/or other costs may be reimbursed) will only be legally recognised if a range of strict conditions are satisfied.

The precise legal schemes regarding surrogacy differ in each Australian jurisdiction, but all have a strong focus to prohibit commercial surrogacy, protect the best interests of children born under surrogacy arrangements and to protect the rights and wellbeing of the surrogate mother.

¹ The Northern Territory has no laws but commercial surrogacy is ethically prohibited there (as it is throughout Australia).

These features of the existing South Australian law (set out in further detail in Fact Sheet 3) are **not** the subject of this Reference.

Rather, this Reference looks at a number of recent and proposed changes to Part 2B of the *Family Relationships Act 1975* (SA) to determine whether they are likely to operate effectively or if and how they can be updated to meet the rapidly changing environment. This includes consideration of:

- the South Australian Surrogacy Framework, introduced by the *Family Relationships (Surrogacy) Amendment Act 2015*, to provide a way for certain international surrogacy agreements that meet prescribed conditions to be recognised as lawful surrogacy agreements in South Australia;
- the Surrogate Register, introduced by the *Family Relationships (Surrogacy) Amendment Act 2015* to provide a list of women who are prepared to act as surrogates in South Australia;
- proposed changes to what type of expenses or ‘**reasonable costs**’ can be recovered or form part of a recognised and lawful; surrogacy agreement under Part 2B of the *Family Relationships Act 1975* (Cth); and

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- The recent Report into Surrogacy of the Commonwealth Parliament² and other law reform and parliamentary reports and research.

This Reference also includes consideration of the way the courts approach the question of who is the legal parent of a child born as a result of a surrogacy agreement, following the Full Court of the Family Court of Australia’s decision in *Bernieres* [2017] FamCAFC 180.

The Reference further provides that when considering these issues, SALRI should be guided, as far as possible, by the general principle that surrogacy arrangements are private arrangements between individuals, with the State setting the parameters of what must and must not be agreed to, rather than taking a direct and ongoing role in the establishment and maintenance of individual arrangements.

To help understand the key issues involved in this Reference, SALRI has prepared a series of **Fact Sheets** with plain English information about key terms and definitions, the current South Australian law, the changes introduced in 2015 and the particular law reform issues being explored in this Reference.

SALRI is aware that surrogacy raises many complex ethical, social and legal issues. There are sincere and differing views. For these reasons, SALRI will consult widely with interested parties, legal and other experts, community members with direct experience with surrogacy agreements, as well as the community more broadly. The views we collect as part of this consultation, along with other legal and other research, will help us identify practical reform options to clarify and improve the law relating to surrogacy in South Australia.

Your help is needed

SALRI wants to hear from you about your experiences with the surrogacy provisions in Part 2B of the *Family Relationships Act 1975* (SA), or other related perspectives concerning the regulation of altruistic surrogacy in South Australia. What are your views about the present law? Your views are important. Our consultation period ends on **** June 2018**, so please get in quick with your feedback!

² House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (April 2016).

There are four main ways that you can be involved:

1. Fill out the quick and easy survey on the YourSAy site;
2. Participate in one of SALRI's community roundtables; or
3. Send us a written submission or letter via email to salri@adelaide.edu.au;
4. By arranging to speak to us or meet us in person.

SALRI is particularly interested in your personal experiences with the laws in this area, but does not need or want any information that could identify individuals, so please be general when giving examples. We look forward to hearing from you soon.

Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice we encourage you to speak to a lawyer and/or contact a community legal service or the South Australian Legal Services Commission's Legal Advice Helpline on 1300 366 424.
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