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South Australian Law Reform Institute

Surrogacy: A legislative framework

Fact Sheet 2 – Surrogacy and the Law in South Australia

Surrogacy Terminology

SALRI wants to hear from all interested South Australians as well as legal and other experts as part of this Reference. SALRI is committed towards active and inclusive consultation. The following list may help with the terminology used in this area and in the other Fact Sheets.

altruistic surrogacy is when a woman agrees to become pregnant, carry the pregnancy and give birth to a child for another person or persons *without* charging a fee or accepting payment or other forms of valuable consideration for this act. As set out in Fact Sheet 3, this form of surrogacy agreement can be legal in South Australia if certain strict conditions are also satisfied. Reasonable medical and/or other costs incurred by the surrogate mother may be permitted under this model as is discussed in Fact Sheet 6.

commercial surrogacy is when a woman enters into an agreement or contract with a person or persons to become pregnant, carry the pregnancy and give birth to a child for the other person or persons and charges a fee, or accepts payment or other forms of valuable consideration for this act. As set out in Fact Sheet 9, this form of surrogacy agreement is prohibited in South Australia and elsewhere in Australia and the United Kingdom but not in certain overseas jurisdictions such as California in the United States.

commissioning parents are the couple who engaged the services of the surrogate and who intend to be the legal parents of a child born under a surrogacy agreement. Under the *Family Relationships Act 1975* (SA) 'commissioning parents' are defined as 'two persons to whom custody of any child to whom the agreement relates is, or is to be, surrendered.'

Declaration of Parentage is an order obtained from the Federal Circuit Court or Family Court which determines or declares the legal parentage of a child, pursuant to the *Family Law Act 1975* (Cth).

gestational surrogacy is when the surrogate mother is *not* genetically related to the child she carries. This arises when the child is conceived using assisted reproductive treatments, which can include, for example, using the eggs and sperm of the commissioning parents, or from a donor.

Orders as to parents of a child born under a recognised surrogacy arrangement is an order obtained from the Youth Court of South Australia pursuant to s10HB of the *Family Relationships Act 1975* (SA) that transfers legal parentage of a child born as a result of a recognised surrogacy agreement from the surrogate mother to the commissioning parents. The Youth Court is a state court. If no application is made within six months of a child's birth the presumptions of parentage proscribed in the Commonwealth *Family Law Act 1975* apply indefinitely and the surrogate (and her partner) remain the legal parents of the child with all of the rights and responsibilities that come from this status.

Parental Responsibility Order is an order that can be obtained from the Family Court of Australia or Federal Circuit Court of Australia pursuant to s 61D of the Commonwealth *Family Law Act 1975* that confers parental responsibility for a child on a person. This type of order can confer all the duties, powers, responsibilities and authority which, by law, parents have in relation to children, but it does

not confer or declare legal parentage. The federal Courts do not have general power to confer parentage in relation to child born under a surrogacy agreement as this power is held by the States.

recognised surrogacy agreement means an altruistic surrogacy agreement that meets the conditions set out in s10HA of the *Family Relationships Act 1975* (SA) and includes a surrogacy agreement (however described) entered into in accordance with a prescribed corresponding law of the Commonwealth, or of another State or Territory; and a prescribed international surrogacy agreement. Further information about recognised surrogacy agreements is set out in Fact Sheet 8.

State Framework for Altruistic Surrogacy means a framework, to be established by the relevant Minister, namely the State Attorney-General, pursuant to s 10FA of the *Family Relationships Act 1975* (SA) which sets out the circumstances in which a person can be lawfully involved in helping other parties to make a surrogacy agreement, the conditions that must be satisfied before the Minister could approve of an international surrogacy agreement, and the circumstances in which a person can advertise for the services of a surrogate mother. Further information about this Framework is set out in Fact Sheet 3.

surrogacy contract is defined in the *Family Relationships Act 1975* (SA) as a contract under which a person agrees to become pregnant and to surrender custody of, or rights in relation to, a child born as a result of the pregnancy. Such a contract is prohibited, and distinguished from a recognised surrogacy agreement.

surrogate mother, in respect of a recognised surrogacy agreement, means the woman who will, or will seek to, become pregnant for the purposes of the agreement.

Surrogate Register means a register set up by the Minister that lists South Australian adult women who are willing to act as a surrogate mother under the *Family Relationships Act 1975* (SA). The Register is not open for public inspection. Further information about the Register is set out in Fact Sheet 3.

traditional surrogacy can be used to describe an arrangement where the surrogate mother is genetically related to the child she carries. For example, when the child is conceived by sexual intercourse, self-insemination, or by medically supervised artificial insemination.

valuable consideration means consideration consisting of money, or any other kind of property, that has a monetary value.

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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21 May 2018

SALRI acknowledges the assistance of the SA Attorney-General's Department in providing grant funding for this project.