

## Surrogacy

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### Introduction

A surrogacy arrangement is one in which a woman (sometimes called a surrogate or gestational carrier) carries and gives birth to a child with the express, pre-conception intention that the child be parented by another. It is a pathway to parenthood for people who are themselves unable to become pregnant, such as gay/single men or women who cannot sustain a pregnancy. Before the advancements of IVF, 'traditional surrogacy' was the only form of surrogacy, meaning that a surrogate would become pregnant using her own eggs. Medical and technological developments such as IVF opened the door to 'gestational surrogacy', where a surrogate is implanted with an embryo formed using the egg of another woman (who may or may not be the intended parent). Gestational surrogacy is now the dominant form of surrogacy.<sup>1</sup> Some countries, such as Australia, the United Kingdom, Denmark and Belgium, only permit 'altruistic' surrogacy, meaning surrogacy where the surrogate is not paid or is only paid reasonable expenses.<sup>2</sup> Other countries, such as Russia, Ukraine and some parts of the United States, permit payment to the surrogate beyond reasonable expenses.<sup>3</sup> This is sometimes referred to as 'commercial' or 'compensated' surrogacy.<sup>4</sup> There is also a third group of countries, such as France, Germany and Italy, that prohibits all forms of surrogacy.<sup>5</sup> Thus the question of whether surrogacy should be legally permissible and accessible, and if so in what form, is controversial and politicised.

This chapter considers surrogacy in the Australian context. It begins by setting out the law in Australia before discussing current political and policy debates. It then turns

1 Paula Abrams, 'The Bad Mother: Stigma, Abortion and Surrogacy' (2015) 43 *Journal of Law, Medicine and Ethics* 179, 182.

2 Helier Cheung, 'Surrogate babies: Where can you have them, and is it legal?', *BBC News* (online), 6 August 2014, <<http://www.bbc.com/news/world-28679020>>. It should be noted that the definition of 'reasonable expenses' may vary between jurisdictions. For example, in the United Kingdom courts have authorised payments above reasonable expenses provided that they are considered proportionate payments, whereas in Victoria (Australia) s 44 of the *Assisted Reproductive Treatment Act 2008* only permits reimbursement of 'prescribed costs actually incurred by the surrogate mother as a direct consequence of entering into the surrogacy arrangement'.

3 Cheung, above n 2.

4 It is beyond the scope of this chapter to consider whether there is, or should be, a distinction drawn between 'commercial surrogacy' and 'compensated surrogacy'.

5 Cheung, above n 2.

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