

NO KIDDING



Louise O'Reilly

When the Surrogacy Act 2010 was introduced to decriminalise altruistic surrogacy in Queensland, political and religious debate ensued over the parentage rights granted to same-sex couples. But a Brisbane family law specialist says the ambiguity of whether surrogacy agreements can be court-enforced hinder any impending parents' hopes of using the legislation anyway.

RICE Naughton Buckley solicitor Louise O'Reilly, says the development intends to provide a new opportunity for starting a family that was not previously available in Queensland, however the risks could be unattractive for both parties.

"However though legal, the opportunity to have a baby using a surrogate is not all smooth sailing," says O'Reilly.

"There are a series of legal hurdles that must be overcome, and certain risks that both the intended parents and the surrogate need to consider if they choose to have a child in this manner."

According to O'Reilly, the fact that the birth mother is the legal parent until a transfer of parentage is completed remains the biggest risk for couples looking to use surrogacy – particularly as this aspect of surrogacy arrangements appears non-court enforceable.

"Potentially problematically, surrogacy arrangements in so far as they provide for a transfer of parentage appear on the face of the Act to be not enforceable and therefore cannot be the subject of a court application," says O'Reilly.

"After the baby is born, the birth mother is registered as the mother of the baby and her partner, if any, is presumed to be the father. The making of a parentage order will transfer parentage from the birth parents to the intended parents.

"However, a birth mother may decide not to relinquish the child to the intended parents and similarly the intended parents may decide not to permanently care for the child prior to the making of a parentage order.

"The consequence for the child and all adults involved in either of these circumstances are clearly serious."

Furthermore, O'Reilly says ambiguity surrounds the process of determining if a prospective mother is eligible to legally enter an agreement with a surrogate mother.

The Act states that a woman is eligible if she is unable to conceive or is unable on medical grounds to carry a pregnancy or give birth.

It also includes scenarios where the child would be affected by a genetic condition or disorder or the child's health or life would be at risk by the pregnancy or birth.

"Not everybody is automatically an 'eligible person' under the Act," says O'Reilly.

"In order to establish that a woman is eligible an appropriately qualified medical practitioner must prepare a report explaining why the person is 'an eligible woman'.

"Whether a threshold test is applied to determine whether a woman is in fact eligible under the Act remains to be seen."

The Australian Families Association (AFA) has always opposed the introduction of legalised altruistic surrogacy, but Queensland president Michael Ord says the Act is a 'toothless tiger'.

He says just one example is the requirement that the intending parents and the surrogate mother be at least aged 25 and that all obtain counselling and independent legal advice.

"Under this Act there are no penalties if these rules are not followed by those entering into an altruistic surrogacy arrangement," says Ord.

"The surrogate mother could be a young girl of 18 or perhaps even 16, who decides to enter into an altruistic surrogacy agreement with all her expenses paid in order to qualify for the \$5000 Commonwealth Government baby bonus payable to the birth mother and does not obtain counselling or legal advice first.

"We (the AFA) maintain that the government should not recognise the surrogacy arrangement, but needs to defend the interests of the unfortunate child."

The AFA concedes the legalisation of altruistic surrogacy in Queensland is a reality but is lobbying for the Surrogacy Act 2010 to be repealed and replaced with an amended version of the previous law (Surrogate Parenthood Act 1988) to address the contentious legal issues.

The organisation would likely find no opposition from the legal fraternity that the numerous flaws in the Act need to be addressed before an unfortunate real-life case highlights the urgency.

"Although legal, given that under the Act the obligation to effect or consent to a transfer of parentage is not enforceable; and birth mothers can only be reimbursed for certain expenses and not remunerated, means surrogacy may only be an attractive option for a small number of 'would be' parents," says O'Reilly.

"These issues may deter many from taking advantage of the legislation and leave them to pursue other options such as entering into surrogacy arrangements abroad where commercial surrogacy is legal."

Australia a 'gold mine' for commercial surrogates

THE commercial surrogacy options O'Reilly refers to are not scarce and Australia remains a gold mine for overseas companies targeting western couples for commercial surrogacy arrangements.

A simple Google search identifies an array of websites promoting and/or arranging such agreements. One organisation calls itself 'The Surrogacy Centre of Australia' despite its US/Indian ownership.

Another website, surrogatefinder.com, features women from all over the world offering their wombs to prospective parents. While most cite a 'fulfilling experience' and 'desire to help' as their motivation, some are more upfront in their objectives.

One Latvian woman found by *Brisbane Legal* states: "It is true that many women are doing this for money and I am no different. With a two year old child I cannot work and the money would go a long way."

Reports that a homosexual couple in Cairns is paying two Indian women up to \$80,000 to give birth to their surrogate babies raises further questions about the number of Australians engaging in commercial surrogacy arrangements.