HOUSE OF REPRESENTATIVES
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COMMITTEES
Social Policy and Legal Affairs Committee
Report
SPEECH
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BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES
Mr PERRETT (Moreton) (10:33): Nobody would deny the heartache felt by somebody who has been dealt the terrible misfortune of being unable to become a parent when they want to. The urge to be a parent can be overwhelming, compelling, all consuming, as I am sure the member next to me, the member for Kingston, would attest to. Sadly, one in six women miss out on having a child, and many of them want to have a child. Nowadays, advances in medical technology have given people options not available even a decade ago. Even so, there are still Australians who cannot attain parenthood through assisted reproductive technology without the assistance of another woman willing to carry the child during gestation and give birth. This is commonly called surrogacy. I took part in the Standing Committee on Social Policy and Legal Affairs inquiry into the regulatory and legislative aspects of international and domestic surrogacy.

There are many happy stories of people experiencing surrogacy. They have achieved their dream of parenting through engaging a surrogate. The vast majority of people who undertake the surrogacy journey become wonderful parents with healthy children. They have happy, healthy babies and they are devoted to those children. Sadly, it has been reported that some commercial surrogacy arrangements have not protected the rights of those involved, including the child, and in others the commissioning parents have not entered into these arrangements with pure motives.

Australian laws struggle to keep pace with advancements being made in assisted reproductive technology. More than 800 children born through surrogacy arrangements have been brought to Australia through citizenship by descent applications in the past five years—meaning that the child has the genetic material of an Australian. This wave is cresting and maybe could get even bigger yet. There are two types of surrogacy arrangements recognised in Australian laws: altruistic surrogacy, where the surrogate is only remunerated for reasonable expenses, and commercial surrogacy, where the surrogate is paid a fee for her services. Commercial surrogacy is illegal in all states and territories. In the Australian Capital Territory, New South Wales and Queensland, it is also illegal to enter into commercial surrogacy arrangements outside of those jurisdictions. In those states and territories, residents would commit a criminal offence if they entered into a commercial arrangement with a surrogacy from overseas.

Notwithstanding these existing laws, more and more people are entering into overseas surrogacy arrangements. For children born by altruistic surrogacy in Australia, fitting within the state and territory legislative schemes, the Family Law Act 1975 deems those children to be the children of the commissioning parents. Where commissioning parents have entered into commercial surrogacy arrangements overseas, notwithstanding the illegality, there are no laws available for them to be legally recognised as the parents of the surrogate child. The only avenue currently open to them is to apply to the Family Court for a parenting order. However, a parenting order does not recognise that the child is legally a child of those commissioning parents applying for the order. The parenting order would merely convey parental responsibility for the child onto the commissioning parents.

The Family Court is in a bind when presented with applications by such commissioning parents for parenting orders. In such cases, the commissioning parents may have committed an illegal act. The child has been brought to Australia from his or her country of birth. The commissioning parents will be looking after the child but not recognised as a child's parents. The birth mother is overseas and not completely, if at all, involved in the application in front of the Australian Family Court. Such situations are problematic: Family Court judges have been complaining about the state of the laws and the difficulties they face when determining such applications.

Before commissioning parents can apply to the Family Court, they must bring the child to Australia. To do so, they can apply to the Australian embassy in the country of birth for citizenship by descent for the child if at least one person, who was a parent at the time of the birth, is an Australian citizen. This does not confer any parental status on the commissioning parents. There are numerous cases where birth documents have been falsified or do not exist at all.
While the current state of the laws and the obstacles that need to be overcome in order to obtain a child are a problem for the commissioning parents, there are other lives affected by these arrangements that also need further consideration. Surrogate mothers are usually the hidden face of such arrangements. While she has the most important role for the child, the commissioning parents very often do not wish to create a relationship with her nor do they often consider her position or plight in the arrangement they have entered into.

The first question is whether the surrogate freely consented to the arrangement. It is a seemingly simple question that must consider the age and understanding of the surrogate and her overall capacity to enter into the arrangement. An economic imbalance may result in a poor surrogate mother being practically coerced. Moreover, the surrogate mother is also at risk of fraud being visited on them by the procuring middleman. A surrogate mother may be left literally holding the baby during a contractual arrangement.

However, poor surrogates would hardly be bargaining as equals. She would most typically not be literate or have any education. It is reported that surrogates have not been told what procedures are being done to them or how many embryos are being implanted. It is common practice to perform caesarean sections on surrogates so that the commissioning parents can obtain flights at the correct time to be there for the birth. There appears to be little concern about the lasting health effects on surrogate mothers once the baby has been handed over. Once the baby has been born, the surrogate mother's job is done. There appears to be no concern for the emotional upheaval of handing the baby to the commissioning parents. Sadly, in most cases the surrogate mother will never see the child again.

In Australia we would never allow our citizens to be treated in the way surrogates are treated in some overseas countries. Our laws protect the most vulnerable from such abuse and contractual imbalances. While the commissioning parents have made a decision to enter into the surrogacy arrangement and the surrogate mother may have had limited choice, the child borne has had no choice in the arrangement at all.

Three commonly used types of surrogacy are in use: total gestational, where the embryo is created from the egg and sperm of the commissioning parents; gestational where one of either the egg or sperm is donated but the other is from the commissioning parents; or gestational with the use of a donor embryo. In each of these types of surrogacy the surrogate mother has no biological connection with the child unless her egg has been donated. Where the child is born overseas, that child is subject to the laws of that country until removed to Australia. In some countries the birth mother is recognised as being the parent of the child regardless of his or her biological make-up. Where a donor embryo is used, the child is not entitled to Australian citizenship by descent. The birth certificate issued in the foreign country may not always be accurate and does not necessarily help in any application for Australian citizenship. Consequently, the child may be left stateless. Once in Australia, if the child is able to obtain citizenship by descent, the child will consequently have no official parents recognised by Australian law. At best, the child may have parents who have parental responsibility until the child is 18 years old.

The other less spoken of but no less important aspect of children born of surrogacy is the potential for long-term psychological issues. Such children may never know the identity of their biological mother or father or of the person who gave birth to them. This lack of identifying information may impact not only on the child's self-perception but also on their relationship with commissioning parents and others. It could be argued that the Convention on the Rights of the Child supports the right of all children, including children born through surrogacy, to know their biological identity. Along with knowing their own personal identity, the biological history of a child can be important in identifying any health concerns that may be woven into their biological history, into their DNA.

There has been increasing awareness and debate about surrogacy within the general population due to the Baby Gammy case and other reported cases, and there has been an increasingly vocal call from judges to do something about this issue and to do it soon. Chief Judge Pascoe of the Federal Circuit Court has been particularly vocal about this issue. He made a submission to the inquiry and appeared to give evidence. The chief judge has consistently stated that Australia should adopt a uniform approach to all jurisdictions and move towards a model of domestic commercial surrogacy regulation open only to Australian citizens. He also suggests a short list of countries be approved for international commercial surrogacy. These countries would meet a minimum standard of protections and human rights conventions and will share details of the applicants with Australia. If a commissioning parent enters into a surrogacy arrangement with a surrogate not in a short-listed country, then that would be unlawful and the government should enforce the law to prevent the child ever entering Australia. Whilst this would be harsh, the message would quickly filter out to commissioning parents.
This is a very difficult area that sparks very emotive responses from stakeholders. Hearing the evidence was particularly troubling because of the heartache involved from the children and the parents and all involved. The recommendations from the Standing Committee on Social Policy and Legal Affairs may not go as far as some would like, but they are a start. The recommendation that the Attorney-General request the Australian Law Reform Commission to conduct a 12-month inquiry into the surrogacy laws of the Australian states and territories with a view to developing a model national law on altruistic surrogacy would be a huge step for those wishing to enter into altruistic surrogacy arrangements in Australia. I know this is an emotive issue but I do not think that our laws have caught up with our technology. I would urge the government of the 45th Parliament—whoever that might be—to consider this more closely.

Debate adjourned.