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THE SURROGACY LAWS IN AUSTRALIA: WHAT CAN BE USEFUL FOR UKRAINE

The main question of this article is the identification and comparative analysis of legislative provisions of states and territories of Australia that regulate the use of surrogacy. The particular importance lies in specifying those prohibitions and restrictions, who they are applied to, and how they relate to the human right to procreation. The comparison will be made with the laws of other countries and legislative norms will be determined that will be useful for borrowing into the legislative system of Ukraine.

Key words: surrogacy, assisted reproductive technologies (ART), legal regulation of ART methods, surrogate mother

For couples and single people who can have no children naturally or through in vitro fertilization (IVF), surrogacy is the feasible way to parenthood. But in Australia, as in many other countries of the world, the laws of each state set out prohibitions and restrictions on the use of this method. The relations in the field of assisted reproductive technology (ART) with the method of

surrogacy are complex and have different legal regulations in the territory of the Commonwealth of Australia. Each State and Territory has different laws about surrogacy.

The legislation of Australia on surrogacy is practically little studied by researchers from Ukraine but numerous authors pay attention to this topic in their research and publications. These authors are Howard W. Jones, Kent Anderson, Erin A. O' Hara, Janice G. Raymond, Ruth Landau, Fiona MacCalum, Malcolm Smith, Mary Keyes, Susan Markens, Daniela Danna, Carmel Shalev, Martha A. Field, Thomas M. Pinkerton, Richard F. Storrow, Susan Golombok, Vasanti Jadva, E. Jackson, Roger Kempers, Jean Cohen, Emma Lycett, Brenda Hale, Dean A. Murphy, and others.

Prior to the research of legal regulation of '*surrogacy*' and its peculiarities, such facets of the concept as the origin, meaning, and the attitude of society and church towards surrogacy require special attention.

Dictionaries and scientific literature provide various definitions of the term 'surrogacy' as well as explanations of its origin. The definitions reflect both medical and legal aspects of this concept*. The following definition from *Osborn's Concise Law Dictionary* gives the main characteristics and a comprehensive description of the concept of 'surrogacy':

'*Surrogacy* A process under which a woman,' the surrogate mother (q.v.), carries a child under an arrangement made before the birth of the child with a view to handing over that child after birth so that other persons assume parental responsibility for that child, usually an infertile couple who have made the arrangement with the surrogate mother'**.

In Glossary on ART Terminology of World Health Organization and the International Committee for Monitoring Assisted Reproductive Technologies (ICMART) surrogacy is defined as a method of assisted reproductive technology***.

The term "surrogacy" is used in the legislation of some Australian states, as well as other countries, including the UK, Canada, and some US states****.

Given the great social significance, the ambiguity, and complexity of control, each country has the right to choose its own model of legal regulation of relations, in particular those that are connected with the use of the method of surrogacy.

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* See for ex. *The Oxford English Dictionary* (2008), *The Macquarie Dictionary* (2001).

** See *The Osborn's Concise Law Dictionary* (Sweet & Maxwell, 2013), p 414.

*** Revised Glossary on ART Terminology (2009), the International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO), viewed 26 June 2016, <http://www.who.int/reproductivehealth/publications/infertility/art_terminology2/en/>.

**** See for example, Parentage Act 2004 (ACT), Surrogacy Act 2008 (WA), Surrogacy Act 2010 (NSW), Surrogacy Act 2010 (Qld), Surrogacy Act 2012 (Tas), the Surrogacy Arrangements Act 1985 (UK), the Uniform Parentage Act of 2000 (Texas, the USA) and others.

In spite of the fact that according to some researchers in general the country adheres to the British model, the legislation on surrogacy in some Australian states is unique*. Special laws that regulate the use of this method are passed and are in force in those territories. Regulatory acts are not passed at the federal level but at the level of the states and territories, as they comply with the principles of the composition of legislation and the division of legislative powers**.

Before focusing on the specifics of the legal regulation of surrogacy established by the legislation of the Australian states and territories, the reasons of the decision the legislator makes while choosing a model of legal regulation need special attention***. According to the author, some principles and reasons can be taken into account when developing a special law on surrogacy in Ukraine.

Since the late 1980s, the debate about the necessity of the legal regulation of assisted reproductive technologies, and in particular the method of surrogacy, began in Australia****. In the discussion, the main identified principles were important in the formation of the concept of legal regulation. Some of them are the following:

1) The *principle of personal autonomy* or self-determination, namely that people should be free to make their own life decisions for themselves so long as those decisions do not cause harm to others. With regard to surrogacy, this can be interpreted as meaning:

(a) that a couple should, as far as possible, be free to make their own procreative arrangements to form a family so long as this does not involve demonstrable harm to others (e.g. the surrogate mother and her family (if any), the child that is brought into being by the surrogacy arrangement, or the community); and

(b) that a woman should be free to make decisions about the use of her own body and to gestate a child for another woman so long as this does not demonstrably harm others (the child, her own family, or the community).

2) The *principle of justice*, namely that all those involved in surrogacy arrangements should be treated justly and fairly. With regards to surrogacy, this involves ensuring that the best interests of a surrogate mother are safeguarded

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* Weisberg, D, *The Birth of Surrogacy in Israel* (University Press of Florida, 2005), p 204.

** The National Bioethics Consultative Committee *Surrogacy Report 1* (1990), p. 2,

*** In Australia the implications of surrogate motherhood have been considered by a number of State government enquiries and State law reform commissions, as well as by many other bodies. One might mention, for example, the Victorian Waller Committee Report of 1984, the Queensland Demack Committee Report of 1984, the Tasmanian Chalmers Committee Report of 1985, the West Australian Michael Committee Report of 1986, the South Australian Cornwall Committee Report of 1987, the West Australian Legislative Select Committee Report of 1988, and most recently the NSW Law Reform Commission Report of 1989. See Appendix 3 of the1st Report on Surrogacy by The National Bioethics Committee (April 1990). See Ibid at 1.

**** Ibid at 1, 30–33.

(and also the interests of her family, if any) and also that the best interests of the child born as a result of a surrogacy arrangement are safeguarded. This also means that any potential for the exploitation of the surrogate mother, the child, or in fact any of the parties is minimised. Importantly, in the Australian legal system, a child born as a result of a surrogacy arrangement, outside the ordinary family situation, and which requires a transfer of legal parentage from the surrogate mother to the commissioning couple, will be treated by a court of law in the same way as any other custody or adoption proceeding. In other words, the courts will invoke the judicial principle that the best interests of the child are paramount and outweigh the interests of other parties to a surrogacy arrangement (the commissioning couple, the surrogate mother, etc).

3) The *principle of the common good*, namely that the good of the whole community must be considered when we are dealing with such central social realities as parenthood and the family. In other words, society has a stake in ensuring that, as far as possible, the parent-child relationships must be established in an orderly way. The information about the parentage has to be valid and accessible, and the institution of the family should not be subverted*.

While assessing surrogacy according to these principles, different variants were offered, including the complete prohibition. However, given the potential negative consequences of such a ban, the National Bioethics Consultative Committee in the special Report on Surrogacy № 1 recommended a compromise:

(a) Surrogacy should not be totally prohibited.

(b) Surrogacy should not be freely allowed.

(c) Surrogacy practice should be strictly controlled by uniform legislation.

(d) Uniform legislation should include the following:

(i) All surrogacy agreements can be rendered unenforceable.

(ii) Controlling mechanisms for agencies.

(iii) Advertising controls**.

Later the legislators of states and territories of Australia have chosen the combined variant that was expressed in the complex of prohibitions and restrictions.

In addition, at the stage of the formation of special legislation, there was chosen a key principle that should be applied in the legal evaluation of legal relations related to surrogacy in the context of human rights protection. It is the principle of "*ensuring the best interests of the child*"***. The argumentation which gave Professor Helen Gamble (formerly chairperson of the NSW Law Reform Commission) is of special attention. She explained:

"Currently all judicial and most administrative decisions about the guardianship and custody of children are made by reference to the welfare principle. There seems to be no reason why children born through surrogacy

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* The National Bioethics Consultative Committee (The Commonwealth of Australia) 1990, *Surrogacy Report 1*, April, p 14.

** Ibid at 36.

*** Trimmings, K and Beaumont P, (2013), p 430.

should be treated differently. To allow the parties to a surrogacy agreement to contract out of the application of the welfare principle is to treat these children differently from all others.

This view needs explanation. On most occasions, the parties to a surrogacy agreement will fulfill the terms of the agreement without disagreement. The terms and conditions written into the agreement, including those regulating transfer of guardianship and custody, will therefore govern their arrangement. The counseling and guidance offered before the parties enter into the agreement should seek to ensure such a successful outcome. However, it would be wrong to suggest that any guarantee will be given to the parties that the contract will govern their affairs in all circumstances. In the case of a dispute over the transfer of the child from the surrogate mother to the social parents, there can be no guarantee that the terms of the contract will determine the issues between the parties. There are two limited situations in which it may do so. First, in a situation in which the parties are prepared to concede that either family will be adequate to meet the needs of the child and secondly, in a case in which the court makes a finding on the evidence that both families would serve the interests of the child equally well. As neither situation is likely to occur very often, the welfare principle will be applied in most disputes and the decision of the court will be based on findings made about the suitability of the parties as parents for the child. In this process the court is guided by the welfare principle"*.

Also Professor Gamble concludes by saying,

"I would be opposed to any proposal which disturbed this process so as to give statutory precedence to the terms of a private contract between the parties. The terms of the contract should only be enforceable when they establish a guardianship or custody situation which is in the interests of the welfare of the child. Whether the contract does establish such a situation will be a matter for decision by the court"**.

Nowadays, along with the legal permission of surrogacy in Australia, the country allows such types of ART as IVF, Gamete Intrafallopian Transfer (GIFT), Zygote Intrafallopian Transfer (ZIFT), Intracytoplasmic Sperm Injection (ICSI), and Donor eggs***.

According to National Health and Medical Research Council (NHMRC) of Australia 'ART is the application of laboratory or clinical technology to gametes (human egg or sperm) and/or embryos for the purposes of reproduction. All reproductive medicine units offering ART services should comply with the NHMRC'****.

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* Ibid at 21.

** Ibid.

*** Lindsey Zaldivar, 'Types of Assisted Reproductive Technologies' (14.04.2012), *Sydney Morning Herald*.

**** Australian Government, National Health and Medical Research Council, < https://www.nhmrc.gov.au/health-ethics/ethical-issues/assisted-reproductive-technology-art> Accessed 26 June 2016.

The legal regulation of the use of the ART methods in Australia, including surrogacy, varies depending on the jurisdiction. Each state and territory has their laws*. There are strict regulations and requirements in all of the jurisdictions; the only exception is the Northern Territory because there are no laws regarding surrogacy**.

There are peculiarities of realization of the right to reproductive health for different categories of patients that are called Intended Parents including single persons, same-sex couples in different states and territories of Australia as well as restrictions of the right to procreation with the help of ART in the Australian territory and abroad. The following table gives the information about it***.

The peculiarities of realization of the right to reproductive health for different categories of patients in Australia

Status of registered relationships	**Anti-discrimination legislation**	**Adoption and foster parenting**	**Recognition of parents on birth certificate**	**Access to fertility (such as ART, IVF, surrogacy, AI, etc.)**
Commonwealth of Australia	Family of law The *Marriage Act 1961* bans same-sex marriages since 2004, under the *Marriage Amendment Act 2004*)	The *Marriage Act 1961* bans same-sex marriages since 2004, under the *Marriage Amendment Act 2004*)	Family of law *Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*)	+
New South Wales	+	+	+	+
Northern Territory	–	–	–	–
South Australia	domestic partnership agreement	Is banned for gay couples, under review	+	banned if not infertile, under review

* The laws of the states and territories that regulate issues of surrogacy: Parentage Act 2004 (ACT), Surrogacy Act 2010 (NSW), Surrogacy Act 2010 (Qld), Surrogacy Act 2012 (Tas), Surrogacy Act 2008 (WA), Assisted Reproductive Treatment.

** See comm. in Trimmings, K and Beaumont P, (2013), p. 27.

*** Loane Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences* (LexisNexis Butterworths, Australia, NSW, 3rd ed, 2008).

Queensland	+	Is prohibited for gay couples	+	+
Western Australia	+	+	equality in IVF access, but surrogacy is banned for gay couples)	+
Victoria	+	+	+	Is prohibited for gay couples
Tasmania	+	+	+	+

Having analyzed the provisions of state laws, it is possible to identify the most significant prohibitions and restrictions based on such features as:

– type and kind of surrogacy (commercial or altruistic, traditional, or gestational);

– way of making an agreement on surrogacy (informal or formal, in particular, in the written form);

– the marital status of the intended parents and the duration of marriage (registered marriage or long-term relations without registration);

– age of potential parents (minimum and maximum);

– gender of intended parents (traditional family or same-sex couples);

– state of health of intended parents (physical and mental);

– possibility and the size of compensation of expenses connecting with medical service during surrogate programs and childbirth;

– imposing of additional obligations on the parties of surrogate program (care, visits, etc.);

– the nature and terms to ensure confidentiality;

– territory (jurisdiction) of the program*.

This generalized classification facilitates the comparative analysis of the prohibitions and restrictions on surrogacy for Australian jurisdictions where they are established.

Prohibitions and restrictions based on the type and kind of surrogacy are main and most typical for the legislation of the Australian states. In all Australian jurisdictions, commercial surrogacy is prohibited. In the Northern Territory, surrogacy is not directly regulated. The degree of the prohibition is different, and ultimately all participants of such programs can be criminalized**. Any interposition, assistance of the organization of programs, advertising, and promotion of the service is forbidden in any way. It also should be noted without giving an extensive comment that in the three

* Sanders, A, *Global Surrogacy: Legal Regulation and Support* (VERDYS Publishing, 2016), p. 178.

** Parentage Act 2004 (ACT), s 41; Surrogacy Act 2010 (NSW), s 8; Surrogacy Act 2010 (Qld), s 56; Surrogacy Act 2012 (Tas), s 40; Surrogacy Act 2008 (WA), s 8.

jurisdictions (NSW, Queensland, and the ACT), there is a ban on commercial surrogacy for the residents abroad*.

In New South Wales under Surrogacy Act 2010 'commercial surrogacy arrangements are prohibited. A person must not enter into, or offer to enter into, a commercial surrogacy arrangement. Maximum penalty: 2,500 penalty units, in the case of a corporation, or 1,000 penalty units or imprisonment for 2 years (or both), in any other case.' Under article 38 of this Act 'the birth of the child must have been registered in accordance with the requirements of the Births, Deaths and Marriages Registration Act 1995 or a corresponding interstate law. If the child was born outside the Commonwealth and registration of the birth is not permitted under the Births, Deaths and Marriages Registration Act 1995 or a corresponding interstate law, the birth of the child must have been registered in accordance with the requirements (if any) of the law of the jurisdiction in which the child was born**.'

While there is a strict ban on commercial surrogacy, the legislation of the states and territories permits the altruistic type of surrogacy. In some jurisdictions, intended parents can even reimburse the expenses related to the medical part of the program and childbirth. The size of the payment must be of a "reasonable character***."

In most jurisdictions, the possibility of gestational type of surrogacy program (without a genetic connection of a surrogate mother with a child) is fixed. According to Australian law, a surrogate mother is regarded as a parent, even if she is not genetically related to the child. If the pregnancy was achieved with the help of a fertility procedure and if the partner or spouse of the surrogate mother consented to that procedure, that person will also be regarded as the parent of the child. In such cases, the biological parents are conclusively presumed not to be parents of the child. An intended parent may be regarded as a parent if registered as such in a birth register, or if that person has acknowledged parental status****.

The legislation of some states does not set restrictions based on the type of surrogacy making it possible to consider the programs of genetic surrogacy*****.

According to the way of entering into agreements between the participants of the program, the legislation allows both informal and formal options******. In

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* See Parentage Act 2004 (ACT), s 45 (1), Surrogacy Act 2010 (NSW), s 11 (2), Surrogacy Act 2010 (Qld), s 54 (b), and see also full comm. in Trimmings, K and Beaumont P, (2013), p. 27.

** Surrogacy Act 2010 (NSW), s 38 (2), and see also comm. in Trimmings, K and Beaumont P, (2013), p. 39.

*** See for ex. Family Relationships Act 1975 (SA), s 10G(1) and see comm. in Trimmings, K and Beaumont P, (2013), p. 36.

**** Ibid at 41.

***** For ex. Surrogacy Act 2010 (NSW). In literature, there are several cases of genetic surrogacy. See Trimmings, K and Beaumont P, (2013), p. 40.

****** Ibid at 31.

four jurisdictions, the surrogacy agreement must be in the written form*. In most jurisdictions, the agreement is done between the surrogate mother, her spouse or partner, and the intended parents, but in Western Australia, if there is a third party egg or sperm donor, that party must also sign the agreement**. Three jurisdictions explicitly require that the agreement was made before the pre-conception***.

The latter must not include provisions that are contrary to the law, in particular concerning a fee or the compensation agreed in advance. In such cases, the agreement is invalid and unenforceable****.

The legislation of the states provides clear requirement relating to the age of the participants of surrogacy programs. It applies to both intended parents and a surrogate mother. In most jurisdictions there are requirements concerning the minimum age (18 or 25 years). Three jurisdictions impose minimum age requirements for the intended parents and the surrogate mother, and another two also impose requirements for spouse or partner of the surrogate mother. The two remaining jurisdictions impose minimum age requirements only for some parties. In some jurisdictions, the minimum age is 18 years, in others it is 25 years*****. In New South Wales, the surrogate mother must have been at least 25 years and the intended parents must have been at least 18. In New South Wales, if an intended parent was under 25 years of age, the court 'must be satisfied that the intended parent is of sufficient maturity to understand the social and psychological implications of making a parentage order'******. In Tasmania, at the time the arrangement was made the surrogate mother must

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* Surrogacy Act 2010 (NSW), s 34(1); Surrogacy Act 2010 (Qld), s 22(2)(d); Family Relationships Act 1975 (SA), s 10HA(6); Surrogacy Act 2008 (WA), s 17(b). There is no express requirement of writing in the Parentage Act 2004 (ACT) s 23, or in Victoria: Assisted Reproductive Treatment Act 2008 (Vic), s 3 (definition of surrogacy arrangement). The Tasmanian legislation states that a surrogacy agreement may be made orally or in writing (Surrogacy Act 2012 (Tas), s 5(6)). One of the requirements in the Tasmanian legislation that must be satisfied before the court can make a parentage order is that the agreement is in writing (Surrogacy Act 2012 (Tas), s 16(2)(e)). That requirement can be dispensed with if the court considers that making the parentage order is in the child's best interests: Surrogacy Act 2012 (Tas), s 16(3)(a). Ibid.

** Surrogacy Act 2008 (WA), s 17(b). Ibid.

*** Surrogacy Act 2010 (NSW), s 24(1); Surrogacy Act 2010 (Qld), s 22(2)(e)(iv); Surrogacy Act 2012 (Tas), s 5(5)(a). It is an implicit requirement in the other jurisdictions: Parentage Act 2004 (ACT) s 23 (definition of substitute parent agreement); Family Relationships Act 1975 (SA) ss 10HA(2)(a)(i), 10HA(2)(b)(viii)(A); Assisted Reproductive Treatment Act 2008 (Vic), s 39; Surrogacy Act 2008 (WA), s 17(c). In Victoria, it is not even an implicit requirement in cases where the pregnancy was achieved without medical assistance. Ibid.

**** Ibid and also Sanders, A, (2016), p. 314.

***** For ex. Surrogacy Act 2010 (Qld), s 22 (2), (f). See Trimmings, K and Beaumont P, (2013), p. 30.

****** Surrogacy Act 2010 (NSW), ss 27 (1), 28 (1). Ibid.

have been at least 25 years and both intended parents must be at least 21*. In Western Australia, the surrogate mother and at least one of the intended parents must be at least 25 years old, apparently at the time of applying for parentage orders**. In Queensland, all parties must have been at least 25 years old when the surrogacy agreement was made. In South Australia the intended parents, the surrogate mother and her husband must all be at least 18 years old***. In the ACT, the intended parents must be at least 18, apparently at the time the application for parentage orders are made****. There is no minimum age prescribed for the surrogate mother or her partner or spouse. According to the Victorian legislation, the surrogate mother must have been at least 25 years at the time of entering the agreement. There is no age requirement for the intended parents*****.

The special laws of all jurisdictions have restrictions relating to the marital status of the intended parents. The laws of such jurisdictions as a South Australia impose an officially registered marriage. In this state the intended parents must be married, or 'in de facto relationships of at least 3 years' standing prior to the date of the surrogacy agreement or for periods aggregating a total of three years over a four-year period immediately preceding the agreement******.

In most jurisdictions, there is a clear requirement relating to the sex of Intended parents, i.e. the structure of a family, a man and a woman, or persons of the same sex. Recently, in some jurisdictions of Australia, there have been wide discussions on the possibility of registration marriages of the same-sex spouses and giving them equal rights. Supposedly, the reform of the legislation on marriage could lead to the removing of restrictions on surrogacy*******. In South Australia and Western Australia, the same-sex couples cannot be intended parents********. Nowadays in Australia there is no discrimination between de facto and married couples********.

The restrictions on participation of single women and men in the surrogacy program should also be mentioned. In all jurisdictions except South Australia,

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* Surrogacy Act 2010 (Tas), s 16 (2) (b), (c). Ibid.

** Surrogacy Act 2008 (WA), ss 17 (a), (i), 19 (1) (a). Ibid.

*** Surrogacy Act 2010 (Qld), s 22 (2), (f), (g). Ibid.

**** Parentage Act 2004 (ACT), s 26 (3) (b). Ibid.

***** Assisted Reproductive Treatment Act 2008 (Vic), s 40 (1) (b); Status of Children Act 1974 (Vic), s 23 (2) (a). Ibid.

****** For ex in South Australia: Family Relationships Act 1975, s 10 HA (2) (b) (iii). Ibid at 31.

******* Murphy D, *Gay Men Pursuing Parenthood Through Surrogacy: Reconfiguring Kinship* (UNSW Press, 2015), p. 36.

******** Family Relationships Act 1975 (SA), s 10HA (2) (b) (iii); Surrogacy Act 2008 (WA), s 19 (1) (b), (2).

******** Family Relationships Act 1975 (SA), s 10HA (2) (b) (iii) and see in Trimmings, K and Beaumont P, (2013), p. 31.

single people can be intended parents*. Consequently, a single client involves an additional participation of gamete donor**.

In most jurisdictions, the restrictions concerning the reimbursement of expenses related to medical care for a surrogate mother are fixed (medical services and medicines for of IVF, related to pregnancy and childbirth, and others). It is explained by the desire of the legislator to exclude the possibility of concealment of commercial surrogate arrangements. The size of expenses is not limited to a specific amount, but should be of a "reasonable character" and confirmed. Such restrictions are fixed***. The specific expenses that may be recovered by the surrogate mother vary between the seven jurisdictions****. In the Australian Capital Territory, the legislation specifically refers only to recovery of expenses relating to the pregnancy, the birth and care of the child*****. In six states, expenses related to medical and legal services are explicitly stated to be recoverable, and in five of those the legislation specifically permits recovery of costs connected with counselling******. Reimbursement of insurance premiums and the recovery of lost income are expressly allowed in four states*******, and travel costs associated with the surrogacy may be recovered in Tasmania and Victoria********.

In many jurisdictions, the health of intended parents is an important criterion. The sufficient health state provides the possibility to take care and educate a child born with the help of a surrogacy program. Limitations according to the health of intended parents are established in such jurisdictions as Western Australia********. In six jurisdictions, it must be shown that there was a need for the surrogacy********. Medical needs satisfy

* Family Relationships Act 1975 (SA), s 10HA(2) (a) (ii). Ibid.

** Ibid at 31.

*** Trimmings, K and Beaumont P, (2013), p. 33.

**** Ibid.

***** Parentage Act 2004 (ACT) s 40. Ibid.

****** The five states that expressly allow recovery of counseling expenses, in addition to medical and legal expenses are: Surrogacy Act 2010 (NSW), s 7 (2) (a), (d), (4); Surrogacy Act 2010 (Qld), s 11 (2) (a), (b), (d), (e); Surrogacy Act 2012 (Tas), s 9 (3) (d); Family Relationships Act 1975 (SA), s 10HA(2) (b) (ix); Surrogacy Act 2008 (WA), s 6 (1), (2), (3) (a), (c). In Victoria, counselling expenses are not expressly listed: Assisted Reproductive Treatment Act 2008 (Vic), s 44 (2), Assisted Reproductive Treatment Regulations 2008 (Vic), reg 10 (a), (b). See Trimmings, K and Beaumont P, (2013), p. 33.

******* Surrogacy Act 2010 (NSW), s 7 (2) (c), (e); Surrogacy Act 2010 (Qld), s 11 (2) (c), (f); Surrogacy Act 2012 (Tas), s 9 (3) (c), (f); Surrogacy Act 2008 (WA), s 6 (3) (b), (d). Ibid.

******** Surrogacy Act 2012 (Tas); Assisted Reproductive Treatment Act 2008 (Vic), s 44 (2); Assisted Reproductive Treatment Regulations 2008 (Vic), reg 10 (c). Ibid.

******** In Western Australia, all parties must have undergone both psychological and medical assessment: Surrogacy Act 2008 (WA), s 17 (c) (ii), (d). Ibid.

******** Surrogacy Act 2010 (NSW), s 30 (1); Surrogacy Act 2010 (Qld), s 22 (2) (d); Surrogacy Act 2012 (Tas), s 16 (2) (h); Surrogacy Act 2008 (WA), s 19 (1) (b); Assisted

this requirement in all of these jurisdictions*, and in three states the requirement of a social need may be satisfied if the intended parent or parents are males**.

Only in two states there is requirement that some of the parties have undergone assessment to confirm their suitability to be involved in the surrogacy arrangement***. In three states, the requirement to the surrogate mother is that she must usually have already given birth to a live child****. Two jurisdictions mandate that one of the intended parents is genetically related to the child, and one of those jurisdictions also requires that neither surrogate parent is genetically related to the child. In Victoria, the requirement is that the surrogate mother must not be genetically related to the child.

The legislation of certain jurisdictions has limitations relating to additional obligations concerning the care and help for a surrogate mother. They may be agreed during entering into an informal or a formal agreement, e.g. child care. Specific obligations are not described in the law*****.

In most Australian jurisdictions, the surrogacy legislation does not specifically refer to the surrogate mother's entitlement to maintain contact with the child. Ongoing contact between the child and the surrogate mother is referred to only in the legislation of Tasmania and Western Australia******. In Western Australia, the plan that the intended parents and surrogate parents

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Reproductive Treatment Act 2008 (Vic), s 40 (1) (a); Family Relationships Act 1975 (SA), s 10HA(2) (b) (v). Ibid.

* Medical needs are satisfied if the intended mother is unable to conceive (Surrogacy Act 2010 (NSW), s 30(3)(a); Surrogacy Act 2010 (Qld), s 14(2)(a); Family Relationships Act 1975 (SA), s 10HA(2)(b)(v); Surrogacy Act 2012 (Tas), s 7(2)(a); Surrogacy Act 2008 (WA), s 19(2)) or sustain a pregnancy, or if she would face serious health risks if she were to undertake a pregnancy (Surrogacy Act 2010 (NSW), s 30(3) (b), (c); Surrogacy Act 2010 (Qld), s 14(2)(b); Surrogacy Act 2012 (Tas), s 7(2)(b), (c)). The requirement is also satisfied in some jurisdictions if there is a risk that any child of the intended mother would suffer from a serious genetic abnormality, disease or illness: Surrogacy Act 2010 (NSW), s 30(3)(d); Surrogacy Act 2010 (Qld), s 14(2)(b) (iii); Family Relationships Act 1975 (SA), s 10HA(2)(b)(v); Surrogacy Act 2012 (Tas), s 7(2)(d); Surrogacy Act 2008 (WA), s 19(2). Ibid.

** Surrogacy Act 2010 (NSW), s 30(2)(a), (b)(ii); Surrogacy Act 2010 (Qld), s 14(1) (a), (b)(ii); Surrogacy Act 2012 (Tas), s 7(1)(a), (b)(ii).

*** In South Australia, the surrogate mother must have been assessed and approved by an accredited counselling service: Family Relationships Act 1975 (SA), s 10HA(2) (b) (vi). Ibid.

**** Surrogacy Act 2012 (Tas), s 16 (2) (d); Surrogacy Act 2008 (WA), s 17 (a) (ii); Assisted Reproductive Treatment Act 2008 (Vic), s 44 (1) (ac). Ibid.

***** Ibid at 32.

****** The child's contact with surrogate mother is referred to in the same cases, for ex. Re A & B [2000] NSWSC 640, (2000) 26 FAM LR 317 and see com. Trimmings, K and Beaumont P, (2013), p. 34.

are required to make concerning the child must set out arrangements about the child's contact with the surrogate parents*.

Confidentiality and privacy of legal surrogacy relations is very important. The need to save privacy and limit access to information of third persons is defined in special legislation of surrogacy in all jurisdictions. In particular, it applies to such privacy issue as providing the child with the information about his origin. In most jurisdictions, the legislation regulates access to information concerning the surrogacy, particularly information recorded in birth registers after a parentage order has been made**. Children are entitled to access court records relating to applications for parentage orders, although the courts' leave to do so is required. It involves long-term storage and the provision of the adult child with the information about the donor on his request***.

In terms of law and the protection of human rights in the field of surrogacy, the territorial jurisdiction is important. According to this feature, the state legislation of Australia greatly differs from other countries. Three jurisdictions (NSW, Queensland and the ACT) have the ban on commercial surrogacy programs abroad****. The surrogacy legislation incorporates nexus provisions in relation to the criminal offences. Established ban implies even criminalization of its violators. One purpose of these provisions is to prevent the exploitation of surrogate mothers in developing countries. In the other jurisdictions, the general rules of the criminal law would be applied to determine the scope of operation of the legislation.

According to the information from the media and specific court practice, the mentioned prohibitions and restrictions do not stop the Australians*****. Both couples and single people use the right to procreation and parenthood. They are trying to find a way to carry out such programs abroad including in Ukraine******. First of all, it deals with the commercial surrogacy. The altruistic variant is very difficult to realize due to a very small number of women who are ready to become a surrogate mother without a fee*******.

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* If entry into a surrogacy arrangement outside the jurisdiction there may be effects within the jurisdiction. It is possible to take the following cases into consideration: *Hubert v Juntasa* [2011] FamCA and *Johnson v Chompunut* [2011] FamCA.

** Surrogacy Act 2010 (NSW), ss 55-57; Surrogacy Act 2008 (WA), s 38.

*** Surrogacy Act 2010 (NSW), s 53; Surrogacy Act 2010 (Qld), s 52; Family Relationships Act 1975 (SA), s 10HE; Status of Children Act 1974 (Vic), s 34; Surrogacy Act 2008 (WA), s 37 (1). See Trimmings, K and Beaumont P, (2013), p. 34.

**** Parentage Act 2004 (ACT), s 45 (1); Surrogacy Act 2010 (NSW), s 11 (2); Surrogacy Act 2010 (Qld), s 54 (b).

***** See Sanders, A (2016), p. 182 and also Everingham, Sam G., Stafford-Bell Martyn A, and Hammarberg K, 'Australians' Use of Surrogacy' (2014), *Medical Journal of Australia vol 201 (5)*, p. 1–2.

****** The cost of commercial surrogacy programs abroad is quite high, at least 40,000 USD (in Ukraine). See Sanders, A (2016), p. 45.

******* See Everingham and others (2014), p. 3.

In Australia, surrogacy is not prohibited, but the country does not have 'surrogacy-friendly' jurisdictions. Special laws of most states and territories establish a number of prohibitions and restrictions on surrogacy. The prohibition on agreements about commercial surrogacy is the most serious of them. Moreover, several states established a prohibition on the signing of such agreements for their residents even abroad. Such an obstacle does not exist in the legislation of other countries of the world.

In spite of the wide range of argumentative positions on the legal restriction of the use of surrogacy, it is necessary to continue looking for a balance between interests of society and people who want to become parents of children genetically related to them. Some of the main reasons that explain the prohibition on the agreements about commercial surrogacy are concerns about possibility of exploitation of surrogate mothers and the violation of the rights of children born after the signing of such agreements. Such threats may take place; however, it is possible to avoid these problems easily by operating within the law as well as specific mechanisms and procedures of strict control by the state.

In our opinion, Ukraine should learn from the successful experience of creating legislative norms of individual states and territories of Australia. First of all, this concerns the organization of state control and ethical standards. The comprehensive control should be done at all levels, stages, and with respect to all subjects involved in the organization and conduction of these reproductive programs: intended parents, surrogate mothers, agencies, medical institutions, and lawyers.

Антонов С. В.

Законодавство про сурогатне материнство в Австралії: що може бути корисним для України

Викладено результати порівняльного аналізу законодавчих положень штатів і територій Австралії, які регулюють використання сурогатного материнства. Зосереджено увагу на визначенні головних принципів формування норм права щодо заборон та обмежень, до кого вони застосовуються та як стосуються права людини на продовження роду. Визначено законодавчі норми, які корисно запозичити у законодавчу систему України.

Правове регулювання використання методів ДРТ в Австралії, включаючи сурогатне материнство, змінюється залежно від юрисдикції її штатів і територій. Кожний штат і територія Австралії мають свої спеціальні закони, єдиний виняток – Північна територія, яка не має законодавства щодо сурогатного материнства.

У більшості випадків норми законодавства різних юрисдикцій Австралії дозволяють тільки альтруїстичне сурогатне материнство з можливістю фінансових і нефінансових компенсацій сурогатним матерям. Розмір таких фінансових компенсацій обмежується нормативно.

В Австралії існують особливості реалізації права на репродуктивне здоров'я для різних категорій пацієнтів, зокрема для самотніх осіб та одностатевих пар. У деяких юрисдикціях Австралії програми сурогатного материнства доступні навіть для одностатевих пар. В окремих штатах і територіях Австралії заборони та обмеження щодо реалізації права на продовження роду за допомогою допоміжних репродуктивних технологій, у тому числі методу сурогатного материнства, мають навіть екстратериторіальний характер (штати Новий Південний Уельс та Квінсленд). За порушення законодавства застосовуються різні види штрафів та обмежень діяльності.

На нашу думку, Україні варто запозичити успішний досвід запровадження законодавчих норм в окремих штатах і територіях Австралії. Передусім це стосується організації державного контролю та додержання етичних норм. Комплексний державний контроль повинен здійснюватися на всіх рівнях, етапах і стосовно всіх суб'єктів, які беруть участь у виконанні та проведенні таких репродуктивних програм: потенційних батьків, сурогатних матерів, закладів охорони здоров'я, агенцій та юристів.

Ключові слова: сурогатне материнство, допоміжні репродуктивні технології, правове регулювання застосування методів допоміжних репродуктивних технологій, сурогатна матір.

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