



REPORT NO.

**102**

**PARLIAMENT OF INDIA**  
**RAJYA SABHA**

**DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON  
HEALTH AND FAMILY WELFARE**

**ONE HUNDRED SECOND REPORT**

**On**

**THE SURROGACY (REGULATION) BILL, 2016**

*(Presented to the Rajya Sabha on 10<sup>th</sup> August, 2017)*

*(Laid on the Table of Lok Sabha on 10<sup>th</sup> August, 2017)*



**Rajya Sabha Secretariat, New Delhi**  
**August, 2017/Shravan, 1939 (SAKA)**

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\*to be appended at Printing Stage.

**COMPOSITION OF THE COMMITTEE**  
**(2016-17)**

1. Prof. Ram Gopal Yadav - **Chairman**

**RAJYA SABHA**

2. Shrimati Renuka Chowdhury  
3. Shri Rajkumar Dhoot  
4. Dr. R. Lakshmanan  
5. Dr. Vikas Mahatme  
6. Shri Jairam Ramesh  
7. Shri Ashok Siddharth  
8. Shri Gopal Narayan Singh  
9. Shri K. Somaprasad  
10. Dr. C. P. Thakur

**LOK SABHA**

11. Shri Thangso Baite  
§12. Shrimati Ranjanaben Bhatt  
%13. Shri Gyan Singh  
14. Shri Nandkumar Singh Chauhan  
\*15. Dr. Ratna De (Nag)  
^16. Shri Dasrath Tirkey  
17. Dr. (Smt.) Heena Vijay Gavit  
18. Dr. Sanjay Jaiswal  
19. Dr. K. Kamaraj  
20. Shri Arjunlal Meena  
21. Shri Anoop Mishra  
22. Shri J. Jayasingh Thiyagaraj Natterjee  
23. Shri Chirag Paswan  
24. Shri C. R. Patil  
25. Shri M.K. Raghavan  
26. Dr. Manoj Rajoria  
27. Dr. Shrikant Eknath Shinde  
28. Shri R.K. Singh (Arrah)  
29. Shri Bharat Singh  
30. Shri Kanwar Singh Tanwar  
31. Shrimati Rita Tarai  
32. Shri Manohar Untwal

**SECRETARIAT**

Shri P.P.K. Ramacharyulu	Additional Secretary
Shri J. Sundriyal	Joint Secretary
Shrimati Arpana Mendiratta	Director
Shri Rakesh Naithani	Director
Shri Dinesh Singh	Additional Director
Shrimati Harshita Shankar	Under Secretary
Shri Pratap Shenoy	Committee Officer
Shrimati Gunjan Parashar	Research Officer

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§ ceased to be member of the Committee w.e.f 20<sup>th</sup> October, 2016.

% nominated as a member of the Committee w.e.f. 02<sup>nd</sup> January, 2017.

\* ceased to be member of the Committee w.e.f 02<sup>nd</sup> January, 2017.

^ nominated as a member of the Committee w.e.f. 02<sup>nd</sup> January, 2017.

## PREFACE

I, the Chairman of the Department-related Parliamentary Standing Committee on Health and Family Welfare, having been authorized by the Committee to present the Report on its behalf, present this One Hundred Second Report of the Committee on the Surrogacy (Regulation) Bill, 2016\*.

2. In pursuance of Rule 270 of the Rules of Procedure and Conduct of Business in the Council of States relating to the Department-related Parliamentary Standing Committees, the Chairman, Rajya Sabha, referred\*\* the Surrogacy (Regulation) Bill, 2016 ( **Annexure I**) on the 12<sup>th</sup> January, 2017 as introduced in the Lok Sabha on the 21<sup>st</sup> November, 2016 for examination and report by 11 April, 2017. Subsequently, Hon'ble Chairman granted extension of time for presentation of Report on the Bill upto 11<sup>th</sup> July, 2017 and again till 11<sup>th</sup> September, 2017.

3. The Committee issued a Press Release inviting memoranda/views from individuals and other stakeholders. In response thereto, a number of Memoranda from individuals/organisations were received.

4. The Committee held ten sittings during the course of examination of the Bill, i.e., on 2<sup>nd</sup>, 3<sup>rd</sup>, 17<sup>th</sup> & 30<sup>th</sup> March, 27<sup>th</sup> & 28<sup>th</sup> April, 24<sup>th</sup> & 25<sup>th</sup> May, 4<sup>th</sup> July and 8<sup>th</sup> August, 2017. The list of witnesses heard by the Committee is at **Annexure-II**.

5. The Committee considered the draft Report and adopted the same on 8<sup>th</sup> August, 2017.

6. The Committee has relied on the following documents in finalizing the Report:

- (i) The Surrogacy (Regulation) Bill, 2016;
- (ii) Background Note on the Bill received from the Department of Health Research;
- (iii) Presentation, clarifications and Oral evidence of Secretary, Department of Health Research;
- (iv) Memoranda received on the Bill from various institutes/bodies/associations/organizations/experts and replies of the Ministry on the memoranda selected by the Committee for examination.
- (v) Oral evidence and written submissions by various stakeholders/experts from various stakeholders, on the Bill; and
- (vi) Replies received from the Department of Health Research to the questions/queries raised by Members during the meetings on the Bill.

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\* Published in Gazette of India Extraordinary Part II Section 2, dated 21<sup>st</sup> November, 2016.

\*\* Rajya Sabha Parliamentary Bulletin Part II, No.56225, dated 13<sup>th</sup> January, 2017.

7. On behalf of the Committee, I would like to acknowledge with thanks the contributions made by those who deposed before the Committee and also those who gave their valuable suggestions to the Committee through their written submissions.

8. For facility of reference and convenience, the observations and recommendations of the Committee have been printed in bold letters in the body of the Report.

**NEW DELHI;**  
**8<sup>th</sup> August, 2017**  
**Shravan 17, 1939 (Saka)**

**Prof. Ram Gopal Yadav**  
**Chairman,**  
**Department-related Parliamentary Standing**  
**Committee on Health and Family Welfare**  
**Rajya Sabha.**

## REPORT

### I. Brief Background

1.1 India is called the 'world capital of surrogacy'. Surrogacy generates 2 billion dollars annually in India. Despite India being a hub of surrogacy, there are no laws to regulate it. However, commercial surrogacy has been held legal in India as witnessed in the case of Baby Manaji Vs. Union of India with the Supreme Court judgment. Similarly, in the case of Jan Balaz vs. Anand Municipality, the Gujarat High Court reiterated the apex court judgment legalizing commercial surrogacy in India and further elucidated that commercial surrogacy was held legal in India as there was no law prohibiting womb lending or surrogacy agreements. Both these judgments directed for the enactment of law on surrogacy in India. Consequent to this, the ICMR drafted the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India in 2005 as the first ever national guidelines for laying down standards of conduct for surrogacy in India. Later, the draft ART Bill was formulated in 2008, reviewed and redrafted in 2010 & 2014 but was never passed as law.

1.2 The Law Commission *suo-motu* took up the subject of the need for legislation to regulate Assisted Reproductive Technology Clinics as well as rights and obligations of parties to a surrogacy. The Commission presented its 228<sup>th</sup> Report in 2009 which stated that the growth in the ART methods was recognition of the fact that the infertility as a medical condition is a huge impediment in the overall well-being of couples. Further, the Commission recognized the fact that India had become a favorable destination for foreign couples who look for a cost effective treatment of infertility leading to a flourishing medical tourism due to cheap surrogacy services in the country.

1.3 The Law Commission, however, recommended for legalizing altruistic surrogacy and to ban commercial surrogacy. It recommended measures for better protection of rights of surrogate mother, securing full informed consent

from surrogate mother, insurance cover, life insurance cover, right to abortion or medical termination of surrogate pregnancy, right to privacy and other health safeguards. The Commission also recommended for financial support for surrogate child, legitimacy, parentage right to registration of birth certificate of the surrogate child among others. It further recognized the fact that the legal issues related with surrogacy were very complex and needed to be addressed by a comprehensive legislation.

1.4 The Ministry of Home Affairs has attempted to control the misuse of surrogacy services by foreign nationals through their Guidelines introduced in July, 2012. These guidelines imposed certain restrictions by redefining the eligibility criteria exclusively for the foreign couples commissioning surrogacy in India which intended to prohibit foreigners, homosexuals, and singles from commissioning surrogacy in India and permit only such heterosexual married couples with a marriage subsisting for two years or more to commission surrogacy in India. Medical visa for commissioning of surrogacy in India was stopped through the Notification No. 2502/74/2011-F-1 dated 9<sup>th</sup> July, 2012. The Punjab HC upheld the Home Ministry guidelines as a binding law.

1.5 Restrictions on surrogacy were also provided in the Ministry of Commerce, Notification No. 25/2015-2020 dated 26<sup>th</sup> October, 2015 prohibiting the import of human embryo except for the purpose of research. Another Notification (No. 25022/74/2011-F-1) dated 3<sup>rd</sup> November, 2015 of the Ministry of Home Affairs prohibited foreign nationals, PIO and OCI card holders from commissioning surrogacy in India. The Department of Health Research notification (No. 250211/119/2015-HR) dated 4<sup>th</sup> November, 2015 validated the notification of the Home Ministry banning commercial surrogacy in India. State Governments were accordingly advised in this matter.

1.6 On a specific query about the number of IVF/ART Clinics in the country, the Department of Health Research apprised the Committee that 1035 clinics are registered with ICMR. However, the actual number of such clinics is likely to be more. 468 IVF/ART Clinics are not registered with ICMR. As per

unconfirmed reports, the number of surrogacy births in the country in the last three years is approximately 2000. The Department also submitted that only 11 complaints of surrogacy clinics have been reported so far. However, a number of court cases relating to surrogacy can be seen in the list attached in **Annexure III.**

1.7 The developments narrated in the preceding paras laid the justifiable grounds for bringing forth a legislation to regulate surrogacy with a view to safeguard the interests of both surrogate mother and child and to put a check on the ART clinics running in the country.

## **II. THE SURROGACY (REGULATION) BILL, 2016- AN INTRODUCTION**

2.1 The Surrogacy (Regulation) Bill, 2016 was introduced in Lok Sabha on 21<sup>st</sup> November, 2016 (hereinafter referred to as the Bill) and referred to the Department-related Parliamentary Standing Committee on Health and Family Welfare by the Chairman, Rajya Sabha in consultation with the Speaker, Lok Sabha on the 12<sup>th</sup> January, 2017 for examination and report.

2.2 The Statement of Objects and Reasons to the Bill reads as follows:-

“India has emerged as a surrogacy hub for couples from different countries for past few years. There have been reported incidents of unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and import of human embryos and gametes. Widespread condemnation of commercial surrogacy in India has been regularly reflected in different print and electronic media for last few years. The Law Commission of India has, in its 228th Report, also recommended for prohibition of commercial surrogacy by enacting a suitable legislation. Due to lack of legislation to regulate surrogacy, the practice of surrogacy has been misused by the surrogacy clinics, which leads to rampant commercial surrogacy and unethical practices in the said area of surrogacy. In the light of above, it had become necessary to enact a legislation to regulate surrogacy services in the country, to prohibit the potential exploitation of surrogate mothers and to protect the rights of children born through surrogacy.”

2.3 As per information provided by the Department of Health Research, the major objectives of the Bill are:-

(i) to regulate surrogacy services in the country;

- (ii) to provide altruistic ethical surrogacy to the needy infertile Indian couples;
- (iii) to prohibit commercial surrogacy including sale and purchase of human embryo and gametes;
- (iv) to prevent commercialization of surrogacy;
- (v) to prohibit potential exploitation of surrogate mothers and protect the rights of children born through surrogacy.

2.4 The Surrogacy (Regulation) Bill, 2016 proposes to regulate surrogacy in India by establishing National Surrogacy Board at Central Level, State Surrogacy Boards and Appropriate Authority in States and Union Territories. In a nutshell, the proposed legislation ensures effective regulation of surrogacy, prohibit commercial surrogacy and allow ethical surrogacy to the needy infertile Indian couples.

2.5 According to the Department of Health Research, surrogacy has been in practice in India for last few decades. However, there is no legislation to regulate it. This has resulted in malpractices ranging from commercialization of surrogacy, trade in human embryos, exploitation of surrogate mothers and abandonment of children born through surrogacy. The issue of surrogacy including the exploitation of surrogate mothers and need for regulation in surrogacy has been raised time and again in the Parliament since 2010. As on date, there are 11 such Parliament Assurances pending on the matter. The Law Commission of India has strongly recommended for prohibiting commercial surrogacy. Hon'ble Supreme Court has been intimated of the commitment of the Government to bring the legislation in this regard. As per the Affidavit filed in the Hon'ble Supreme Court of India, the Government intends to ban commercial surrogacy through a proper legislation.

2.6 As per the background note received from the Department of Health Research, the proposed Bill appears to have been conceived on the basis of following parameters laid to achieve the following objectives:-

- The bill proposes to allow altruistic ethical surrogacy to intending infertile Indian married couple between the age of 23-50 years and 26-55 years for female and male respectively.

- The couples should be legally married for at least five years and should be Indian citizens.
- The couples should not have any surviving child biologically or through adoption or through surrogacy earlier except when they have a child and who is mentally or physically challenged or suffer from life threatening disorder with no permanent cure.
- The couples shall not abandon the child, born out of a surrogacy procedure under any condition.
- The child born through surrogacy will have the same rights as are available for the biological child.
- The surrogate mother should be a close relative of the intending couple and should be between the age of 25-35 years. She will carry a child which is genetically related to the intending couple and can act as surrogate mother only once.
- An order concerning the parentage and custody of the child to be born through surrogacy, is to be passed by a court of the Magistrate of the first class.
- An insurance coverage of reasonable and adequate amount shall be ensured in favour of the surrogate mother.
- The Bill provides for setting up of a National Surrogacy Board and State Surrogacy Boards which shall exercise the powers and shall perform functions conferred on the Board under this Act. The National Surrogacy Board shall consist of the Minister in-charge of the Ministry of Health and Family Welfare, as the Chairperson, Secretary to the Government of India in- charge of the Department dealing with the surrogacy matter, as Vice-Chairperson and three women Members of Parliament, of whom two shall be elected by the House of the People and one by the Council of State as Members. The total number of members of National Surrogacy board will be 24.
- The National Surrogacy board and State Surrogacy board shall be the policy making bodies and Appropriate Authority will be the implementation body for the Act. The total number of members of State Surrogacy board will be 24.
- The Appropriate Authority shall comprise of an officer of or above the rank of the Joint Director of Health and Family Welfare Department, as

Chairperson and an eminent woman representing women's organization, an officer of Law Department of the State or the Union Territory concerned not below the rank of a Deputy Secretary, and an eminent registered medical practitioner, as members.

- No person, organization, surrogacy clinic, laboratory or clinical establishment of any kind shall undertake commercial surrogacy, abandon the child born out of surrogacy, exploit the surrogate mother, sell human embryo or import embryo for the purpose of surrogacy. Violation to the said provision shall be an offence punishable with imprisonment for a term which shall not be less than ten years and with fine which may extend to ten lakh rupees.
- The surrogacy clinics shall have to maintain all records for a period of 25 years.
- There will be Transitional provision under this Act providing a gestation period of ten months from the date of coming into force of this Act to protect the wellbeing of already existing surrogate mothers.

### **III. Examination of the Bill by the Committee**

3.1 Keeping in view the objectives envisaged in the proposed legislation and their impact on the people, the Committee decided to elicit the views of various stakeholders and the general public on the Bill through a Press Release inviting suggestions/views from all concerned people. A good response to the Press Release from various organizations, stakeholders, individuals, associations was received by the Committee. The Committee also held extensive interactions with representatives of Associations/Organizations/Councils/Institutes as well as renowned experts and professionals from the assisted reproductive industry and the benefactors. These included representatives from Ministry of Women and Child Development; Ministry of Home Affairs; Ministry of External Affairs; National Commission of Women; Federation of Obstetric and Gynaecological Societies of India (FOGSI) and Indian Society of Third Party Assisted Reproduction (INSTAR). The Committee also interacted with professionals namely Ms. Sonali Kusum, Member, International Surrogacy Forum, Ms. Pinki Virani, Journalist and Human Rights Activist and Dr. Kamini Rao, Member, National Advisory Committee for Drafting of Guidelines on

Assisted Reproductive Technology. The Committee also got benefit of the views of Smt. Jayshree Wad, Supreme Court Lawyer, Shri Anurag Chawla, Advocate, Surrogacy Laws India, Ms. Petal Chandok, Advocate, Trust Legal, Advocates and Consultants, Ms. Aprajita Amar, Student, Amity Law School, surrogate mothers, a commissioning parent and Dr. Mrinal Satish, Associate Professor of Law, National Law University, Delhi.

#### **IV. Views of stakeholders/experts**

Several important issues were deliberated extensively during interactions with the experts/ stakeholders which are mentioned briefly hereunder:-

##### **Ministry of Women and Child Development**

4.1 During their deposition before the Committee, Shri Chetan B. Sanghi, Joint Secretary, Ministry of Women and Child Development informed the Committee that though the Ministry of Health and Family Welfare consulted them on 'Assisted Reproductive Technology' Bill, 2014, no specific consultation took place on the 'Surrogacy (Regulation)' Bill, 2016 per se. Their views and comments on the ART Bill have, however, been incorporated in the Surrogacy Bill. He *inter-alia* suggested that option of surrogacy should be made available to every lawfully married infertile couple and also to every Indian woman whether married or single including not married; separated; widowed irrespective of their ability to bear the child. According to him, surrogacy should be allowed only after strict screening of intending parents as done in the case of adoption procedure and a provision of mandatory counseling of intending couple should be made wherein an option of adoption should also be explored. As regards the ban on foreigners, he was of the view that all countries that do not allow full citizenship rights to children born out of surrogacy should be barred from availing the benefit of the Act. In context of the eligibility criteria for the surrogates, it was pointed out that relatives and friends of intending couple should not serve as surrogates as it may lead to conflict of interest in the future. He advocated for a system wherein surrogates

are empanelled by the States and should have an option to withdraw their names if they choose to do so at any point of time after enrolment, before the commencement of the procedure. It was also suggested that a psychological counseling for such women must be provided before she gives consent for willingness to become a surrogate. A surrogate mother, if declared medically fit, should be provided the option of being surrogate twice in her lifetime with 3 years of interval period between two pregnancies. Reacting to a query on the nature of surrogacy, he clarified that a total ban on commercial surrogacy may lead to opening of unregulated market for this kind of service which in turn may adversely affect women offering services as surrogates. He suggested for a comprehensive legally binding agreement between the intending parent(s) and the surrogate mother providing for monetary compensation, its pre and post delivery disbursement and the follow up care for surrogates. Considering the health risk that surrogacy entails, a comprehensive health care should be made an integral part of the agreement providing coverage to surrogates for a period of 5 years starting from the date she undergoes the surrogacy procedure. In case of any health complications/ risks and death, provision of compensation to surrogate and her family should also be incorporated. Six months of breast feeding should be provided to the child or facilities of Breast Milk Banks may be utilized for the purpose.

#### **National Commission of Women (NCW)**

4.2 During her deposition, Smt. Lalitha Kumaramagalam, Chairperson, National Commission for Women supported the Bill as it prohibits commercial surrogacy in the backdrop of exploitation of surrogate mother belonging to the poor strata of society. She was of the view that providing education, skill development training, and jobs to such poor women would empower them more instead of allowing them to rent out their wombs for money. She also suggested that the Bill should encourage adoption at first instance. She further cited that surrogate mother should be considered as skilled employee and not just as a womb on rent and a fair wage should be paid compulsorily along with a wide insurance coverage. In addition, provision of psychological counseling,

post delivery care and related expenses preferably till three months after delivery should also be provided. She suggested that the object of the Bill needs to clearly mention that infertility is a medical condition and not a stigma.

### **Ministry of Home Affairs**

4.3 Shri Mukesh Mittal, Joint Secretary, Ministry of Home Affairs apprised the Committee that earlier foreigners coming to India to commission surrogacy were given tourist visa. Later in the year 2012, it was decided to give medical visa for the surrogacy purpose. After discussion with Ministry of Health and Family Welfare and Ministry of External Affairs, it was decided that no visa should be issued by Indian missions to foreign nationals intending to visit India for commissioning surrogacy. Also, no permission should be granted by the Foreigners Regional Registration Offices and FROs to Overseas Citizen of India cardholders to commission surrogacy in Indian and no exit permit to the child who is born of surrogacy would be issued.

### **Ministry of External Affairs**

4.4 Shri Upender Singh Rawat, Joint Secretary (CPV), Ministry of External Affairs informed the Committee that foreigners had come to India for surrogacy in the past and to deal with the problems associated with it, the visa rules were changed during the year 2012. The mission posts abroad were also instructed to follow the revised instructions. Shri Rawat also clarified that Overseas Citizenship of India cardholders are foreigners and therefore, they are kept out of the purview of the Bill.

### **Federation of Obstetric and Gynecological Societies of India (FOGSI)**

4.5 Dr. Rishma Pai, President, FOGSI informed the Committee that India is witnessing a high burden of infertility, with an estimated 22 to 33 million couples in the reproductive age suffering from infertility. It is well established that surrogacy cycles constitute approximately 1% of the total number of IVF Cycles. If 100000 cycles are the projected number of IVF cycles per year in India- the approximate number of surrogacy cycles in India is around 1000 per year. At a pregnancy rate of 40%, this would result in 400 pregnancies per year. At a take home baby rate of 32%, this would result in 320 babies being

born from surrogacy a year. According to her, the Bill is biased and unfair to the surrogacy procedure, its benefits, its seekers, its providers and the women who become surrogates. She suggested that the Bill should be made more equitable and effective by providing a single window system for registration and reporting of surrogacy procedures. She wanted a provision of compensation towards expenses for medically indicated surrogacy.

### **Indian Society of Third Party Assisted Reproduction (INSTAR)**

4.6 Dr. Rita Bakshi, Vice-President, INSTAR drew the Committee's attention on the concept of altruistic surrogacy and suggested that there should be some kind of minimum as well as maximum capping on compensation amount to be paid to a surrogate mother. She was of the view that focus should also be on rights of intending parents along with the rights of surrogates. She objected to some clauses of the Bill relating to the 'close relative' and the surrogate being genetically related to the intending couple. She was in favour of allowing gestational surrogacy only. She pointed out that foreigners, OCI and PIO cardholders should be allowed to avail surrogacy. To her, the five years duration before commissioning surrogacy was irrational. Provision of life insurance for surrogate mother and her medical insurance for one year post-delivery was underlined. She expressed that a national registry of surrogate mother is a must to curb their exploitation.

4.7 Smt. Jayshree Wad, Supreme Court Lawyer, suggested that a provision of surrogacy agreement should be added in the Bill to have a binding effect on intending couple to take the delivery of the child born out of surrogacy irrespective of any abnormalities. Such agreement would also act as proof of willingness of surrogate mother for the procedure. She also suggested that the word 'legal' should be added before 'parents' to have a binding effect on the intending couple. She further highlighted changes required in the definitions of 'surrogate mother' and 'surrogacy'. She mentioned that the Bill is silent with regard to live-in relationship, same sex marriages, single parents (divorcee/widow/unmarried). She suggested a provision for depositing the amount in the

Court which will take care of the required expenses of the surrogate regarding her health problem during pregnancy period.

4.8 Ms. Sonali Kusum, Member, International Surrogacy Forum was of the view that there should be a right based perspective in the Preamble of the Bill itself to ensure the protection of the best interest of the child born through surrogacy, reproductive health interest of the surrogate mothers and the intending mother. She advocated a scheme of compensation for surrogacy arrangement which should include reasonable expenses and the whole procedure should have a legal documentation in form of surrogacy agreement. The compensation should be fixed by the Government appointed committee instead of being a matter of bargain. She also suggested that a minimum and a maximum limit should be fixed in the compensated surrogacy. She pointed out that the Bill was silent on issues of birth certificate of the child born out of surrogacy, control of sex-selective surrogacy, trafficking, exploitation, inter country movement of the surrogate mother and child's right to be breastfed. In her opinion, the Bill fails to address the twibling cases wherein two surrogates are being hired by same couple, provision of local guardian appointed for child's social security, insurance for child and protection of privacy of the stakeholders of surrogacy arrangement. She suggested that instead of five years, a minimum period of one year should be specified to determine infertility. She was of the view that the issue of close relative, genetic connection of the surrogate mother, gamete donation, the quantum of punishment for violation of surrogacy laws etc. are provided appropriately in draft ART (Regulation) Bill, 2014 in comparison to the proposed Surrogacy Bill.

4.9 Ms. Pinki Virani, Journalist and Human Rights Activist informed that India is being constantly referred to as commercial surrogacy capital of the world which amounted to commodification of women and children. She suggested that the Surrogacy Board should be entrusted with the authority to approve and evaluate surrogacy contracts in detail from home visits of

intending couple to psychological evaluation of stakeholders within a legal framework. She further suggested that an insurance coverage for surrogate mother should be for six years duration for all purposes. She also expressed her views on issues such as exploitation of surrogate mothers, five year waiting period, donation of eggs, switching of embryos, pre-condition of close relative to be surrogate mother, etc.

4.10 Dr. Kamini Rao, Member, National Advisory Committee for Drafting of Guidelines on Assisted Reproductive Technology pointed out that none of the members of the drafting Committee (ART Bill) of the Government of India were invited for the drafting of the Surrogacy (Regulation) Bill. She was of the view that surrogacy cannot be done without ART procedures and therefore, the proposed Bill should not be passed in isolation. On the issue of a period of five years for declaring a couple as infertile, she submitted that the fundamental right to reproduce must be that of the couple. She was also not in favour of the clause of the Bill limiting surrogacy to close relatives. As regards the safeguards to protect the interest of surrogate mother in the Bill, she referred to the provisions under ART Bill and suggested that regulation is the answer to all commercialization of these procedures. She, however, also favoured commercial surrogacy but within a legal structure and regulatory purview. She opined that unlike organ donation, surrogacy is a kind of service for which consideration should be given. She also suggested for a National Registry to keep a record of surrogate women which can be linked to their Aadhar Cards to record details of number of times they have provided such services.

4.11 Shri Anurag Chawla, Advocate, Surrogacy Laws India submitted that the Bill was restricted to Indian married couples only whereas the ambit of the Bill should be extended to foreigners to enable them to avail services of medical tourism in India. He felt that since the appropriate authorities are formed to scrutinize every applicant, the application to commission surrogacy would be rejected if any angle of commercialization or exploitation is found. He further submitted that the Bill is silent on the definition of 'donor' who is also an essential party in the whole process.

4.12 Ms. Petal Chandok, Advocate, Trust Legal Advocates and Consultants, during her deposition highlighted certain aspects in the Bill relating to close relative, allowance of altruistic surrogacy arrangement and ban on commercial surrogacy that are violative of the rights of the surrogates, the rights of the couple and the rights of the child. She was of the view that although surrogate mothers and child are being exploited in the country, a complete ban on commercial surrogacy would lead to black market of this industry.

4.13 Ms. Aprajita Amar, Student, Amity Law School suggested that there should be provision of home study of intending couple in line with Central Adoption Resource Authority (CARA) guidelines, breastfeeding for the child and its awareness to ensure child rights. She also underlined the inclusion of provision for psychological counseling of surrogate mother's first child to ensure his/her mental health and supported compensated surrogacy instead of altruistic or commercial surrogacy.

4.14 The Committee also heard the views of surrogate mothers and a parent who had commissioned surrogacy. The women who became surrogates informed the Committee that the reason they went ahead for surrogacy was the need of money as they were from economically weaker sections of the society. From the money they earned out of surrogacy, they were able to send their children to better schools, provide them with good food and better standard of living. They also informed the Committee that there was an agency who contacted them and there was a surrogate home which took care of their delivery, nutritional and medical needs during the entire pregnancy period. They further informed the Committee that they willfully signed the contract with the consent of their families and were informed about the contract beforehand. They suggested that the surrogacy should be allowed only for needy couples and not for completion of an ideal family. For them, it was an honest means to earn and commercial surrogacy should not be banned rather they suggested that amount to be paid to them should be raised and a second chance to become surrogate should be given.

4.15 A commissioning parent submitted before the Committee that altruistic surrogacy does not exist in today's world. With reference to his personal experience, he shared the financial break-up of a successful surrogacy arrangement that amounted to Rs. 20 lakh. He was of the view that Government should not determine the method of procreation for an individual & number of children for an infertile couple. He also drew Committee's attention towards the fact that eggs of female celebrities were available at a price depending upon the socio-economic background of the lady in question.

4.16 Dr. Mrinal Satish, Associate Professor and Executive Director, Centre for Constitutional Law, Policy and Governance, National Law University, Delhi submitted that as of now there is no binding legal framework for the regulation of surrogacy in India and the ICMR Guidelines of 2005 governing surrogacy are not binding on any of the parties. There are no safeguards for the surrogate mothers and the contracts signed between the surrogate mother and the commissioning couples do not mention the risks associated with surrogacy. Prof. Satish suggested that compensated surrogacy should be permitted under stringent regulatory regime. He also suggested that the surrogates should be given guaranteed payment from the day they begin use of any medication and there should be limits on the number of embryos implanted. He underlined the need of a regulatory body for monitoring compliance with the provisions of this Act, banning of surrogate homes, etc.

## **V CLAUSE BY CLAUSE EXAMINATION OF THE BILL**

5.1 During the course of the examination of the Bill, the Committee took note of concerns, suggestions and amendments expressed by various experts/stakeholders on the Bill and duly communicated them to the Department of Health Research for its response. Committee's observations and recommendations contained in the Report reflect an extensive scrutiny of submissions and all the viewpoints put forth before it. Upon scrutiny of the replies received from the Ministry, the Committee is of the view that certain provisions of the Bill need to be recast to serve the intended purpose of the Bill

better. Various amendments to the Bill have been suggested by the Committee which are discussed in the succeeding paragraphs.

### **Clause 2(a)-Definition of ‘Abandoned Child’**

5.2 Clause 2 (a) reads as under:

*‘In this Act, unless the context otherwise requires,—*

*(a) “abandoned child” means a child—*

*(i) born out of surrogacy procedure;*

*(ii) deserted by his intending parents or guardians; and*

*(iii) who has been declared as abandoned by the appropriate authority after due enquiry;’*

### **Suggestions**

5.3 Some stakeholders have sought to modify the definition of ‘abandoned child’ in the proposed Bill. They suggested that the explanation for the term ‘abandoned child’ should be given in one sentence as the three points mentioned in Clause 2 (a) (i),(ii)&(iii) are not mutually exclusive and have to be read together.

### **Department’s Response**

5.4 The Ministry while justifying the clause has stated that the definition of the ‘abandoned child’ has been drafted in consultation with Ministry of law.

### **Recommendation of the Committee**

**5.5 The Committee is of the view that since the proposed Bill is an attempt to regulate the practice of surrogacy and protect the interest of the surrogate mother and child, it is essential to define the term ‘abandoned child’ appropriately. Protection of the interests and rights of the child born out of surrogacy is the essence of this proposed legislation. The definition of ‘abandoned child’ as given in the present form fails to explain the meaning clearly as the three sub clauses of clause 2 (a) in (i), (ii) & (iii) indicate three different conditions which are liable to misinterpretation. The Committee recommends that the three conditions have to be read together to make the definition of abandoned child proper and to ensure that there are no ambiguities in the proposed legislation. Therefore, this**

**clause should be reframed in the following manner after legislative vetting:-**

*'abandoned child means a child born out of surrogacy procedure, deserted by his intending parents or guardian and who has been declared as abandoned by the appropriate authority after due enquiry'.*

**Clause 2 (b) and Clause 2 (f)- Definition of 'Altruistic Surrogacy' and 'Commercial Surrogacy'**

5.6 Clause 2 (b) reads as under :

*"altruistic surrogacy" means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative;*

Clause 2 (f) reads as under :

*"commercial surrogacy" means commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother;*

**Suggestions**

5.7 Stakeholders have submitted that the Surrogacy (Regulation) Bill, 2016 allows altruistic surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative. The Bill also warrants that the surrogate mother should be a close relative who is genetically related to the intending couple. The Bill imposes a "blanket ban on the commercial surrogacy" and imposes stringent "penal sanctions" including imprisonment upto 10 years and fine upto Rs. 10 lakhs for violating the provisions of the Bill.

5.8 Stakeholders have also pointed out that the Surrogacy (Regulation) Bill, 2016 through its altruistic model promotes 'forced labour' as non-payment of any compensation is against Article 23 of the Constitution of India. Pure altruistic drive for any substantial and meaningful contribution of someone else's life is unreasonable to expect in today's economic and social environment. Endorsing altruistic surrogacy will enforce emotional and social pressure on close female relatives without any compensation for immense emotional and bodily labour of gestation involved in surrogacy as well as loss of livelihood. A woman should not be expected to act as a surrogate and go through all the trial and tribulations of physical and emotional tolls of this arrangement free of cost and only out of compassion. A surrogate is indeed the most important stakeholder in this whole process who puts her life to risk and thus should be compensated for doing so. It has also been argued that one cannot guarantee that the altruistic surrogate who is a 'close relative' is not coerced into becoming a surrogate by just removing the commercial component of the practice. Not every member of a family has the ability to resist a demand that she be a surrogate for another family member. As such within family, surrogacy might become even more exploitative than compensated surrogacy.

5.9 Stakeholders in support of commercial surrogacy were of the view that the Bill proceeds on the incorrect premise that commercial surrogacy is synonymous with purported unethical practices and seeks to ban commercial surrogacy instead of preparing a positive legislative regime to protect the rights of surrogate mothers and prohibit any exploitation of such surrogate mothers. The money paid to the surrogate is a mere compensation for the loss of wages over the period of nine months when they cannot engage in strenuous occupation. The surrogates use the money they get from surrogacy for education of their children, construction of their home, treatment of child or spouse, starting a small business or buying an auto rickshaw or farm or small shop which can make them independent and empower her whole family.

5.10 It has also been stated that permitting uncompensated surrogacy but prohibiting compensated surrogacy assumes the women's inherent role to give

birth but it denies women the capacity to earn wages for this work. By banning compensated surrogacy, there could be a black market in surrogacy services. The whole surrogacy service could go underground and would lead to increased exploitation with no mechanism for protection of any of the parties involved in the surrogacy arrangement. There is also the likelihood of surrogacy being driven underground involving illicit inter-country movement of women to be surrogate mothers into foreign nations or safe surrogacy heavens globally for monetary returns. This may subject the surrogate to worst sufferings. Hence, a prohibition of commercial sector is likely to hurt the very people it seeks to protect.

5.11 It has also been pointed out that with small family norms and increase in number of working women, very few 'close relatives' would be interested in helping out by being a surrogate. Also, the intending parents may not be comfortable sharing their infertility issue with their relatives as it is a private matter. In the present socio-cultural familial context where impotence and infertility is associated with social stigma and ridicule, such disclosure of medical incapacity of women to bear child before her in-laws and family members is breach of her privacy and confidentiality. This will rather put her at greater risk of domestic violence, abuse, name shaming, loss of respect, eviction of women from home and annulment of marriage.

5.12 Further, it has also been pointed out that some of the altruistic models across the world include certain expenses like food / nutrition, medical / legal / psychological counseling charges, reasonable out of pocket expenses, loss of earning, post delivery care including free health supplements and free diagnosis, child care support or crèche support for surrogate mother's own children, maternity clothing etc.

5.13 It has been argued that instead of putting a blanket ban on commercial surrogacy, a compensated surrogacy should be permitted and should be viewed as a form of labour that requires adequate labour protection by granting minimum conditions of work.

5.14 Some stakeholders have argued that the urge for a child cannot be subject to the moral judgment of politics and society. It needs a safe, regulated and legally binding environment and framework in which individual choices may be made. It is a private right of an individual to choose a means of attaining parenthood and family formation. A stringent legal framework is, therefore, required to control the illegal practices under the ambit of assisted reproduction technology.

5.15 The Chairperson, NCW and few other stakeholders have, however, supported the Surrogacy (Regulation) Bill, 2016 as it has put a blanket ban on commercial surrogacy which exploits surrogate mothers. According to NCW, most of the surrogates are poverty stricken hence they opt for surrogacy. It was suggested that focus should be on providing education, skill development / training so as to empower them.

#### **Department's Response**

5.16 The Department of Health Research has not furnished any comments on the issues raised on the 'altruistic surrogacy'. The Ministry informed that the Bill proposes to ban commercial surrogacy in the country after detailed deliberation with all Departments/Ministries and other stakeholders and as per existing legal provisions in most countries. They added that as per the Bill, the sale or purchase of gametes is also commercial surrogacy.

#### **Recommendation of the Committee**

**5.17 The Committee has come across different views of various stakeholders with regard to altruistic surrogacy. The Committee notes that as of now except for the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India 2005 of ICMR, there are no binding rules or legislation for the protection of surrogates. Since ICMR guidelines do not have the force of law, they provide little protection for surrogate mothers. The paramount objective of this Bill is to control the exploitation of poor surrogate mothers and safeguard their interests by banning commercial surrogacy because surrogate mothers mostly come from the lowest socio-economic strata who are doing surrogacy for money**

and are being exploited in the process. It has been argued before the Committee that poor women who become surrogates are not capable of exercising real autonomy since they are in such dire economic situations that they are coerced by their circumstances to engage in surrogacy. The Committee observes that there is no doubt that as of today there is a potential for exploitation and the surrogacy model that exists today can and does exploit surrogate women. But this potential for exploitation is linked to the lack of regulatory oversight and lack of legal protection to the surrogate and can be minimized through adequate legislative norm-setting and robust regulatory oversight.

5.18 The Committee learnt from the surrogate mothers who appeared before the Committee that they engaged themselves in surrogacy out of economic necessity and saw surrogacy as a means of economically uplifting their families. Surprisingly, their other economic options were equally, if not more, exploitative and nowhere close to being as remunerative as surrogacy. The Committee is, therefore, of the view that economic opportunities available to surrogates through surrogacy services should not be dismissed in a paternalistic manner. Permitting women to provide reproductive labour for free to another person but preventing them from being paid for their reproductive labour is grossly unfair and arbitrary. The Committee would like to observe that if many impoverished women are able to provide their children with education, construct home, start a small business, etc. by resorting to surrogacy, there is no reason to take this from them.

5.19 The Committee is of the view that altruistic surrogacy is another extreme and entails high expectations from a woman willing to become a surrogate without any compensation or reward but a decision based on noble intentions and kindness. Pregnancy is not a one minute job but a labour of nine months with far reaching implications regarding her health, her time and her family. In the altruistic arrangement, the commissioning couple gets a child; and doctors, lawyers and hospitals get paid. However,

**the surrogate mothers are expected to practice altruism without a single penny.**

**5.20 The Committee, therefore, finds merit in the argument that the proposed altruistic surrogacy is far removed from the ground realities. The Committee is, therefore, of the view that expecting a woman, that too, a close relative to be altruistic enough to become a surrogate and endure all hardships of the surrogacy procedure in the pregnancy period and post partum period is tantamount to a another form of exploitation.**

**5.21 The Bill limits the circle of choosing a surrogate mother from within close relatives. Given the patriarchal familial structure and power equations within families, not every member of a family has the ability to resist a demand that she be a surrogate for another family member. A close relative of the intending couple may be forced to become a surrogate which might become even more exploitative than commercial surrogacy. The Committee, therefore, firmly believes that altruistic surrogacy only by close relatives will always be because of compulsion and coercion and not because of altruism.**

**5.22 Based on the analysis of the facts in the preceding paras, the Committee is convinced that the altruistic surrogacy model as proposed in the Bill is based more on moralistic assumptions than on any scientific criteria and all kinds of value judgments have been injected into it in a paternalistic manner. Altruistic surrogacy across the world means compensated surrogacy and a range of monetary payments to surrogate mothers are permitted as reasonable compensation. Even the Law Commission Report No. 228 of 2009 recommends reimbursement of all reasonable expenses to the surrogate mother. The Committee, therefore, recommends that the word “altruistic” in clause 2 (b) of the Bill be replaced with the word “compensated” and appropriate modifications be incorporated in the said clause and other relevant clauses of the Bill with a view to harmonizing the Bill with the compensated surrogacy model.**

**5.23 The Committee takes note of the view of the Department of Health Research that surrogacy is a privilege and should be resorted to in exceptional circumstances only and that adoption should be the first preference for family formation. The Committee is also aware of Central Adoption Resource Agency (CARA) study of March, 2016 to the extent that only 1600 odd children were available for adoption while 7700 applications from prospective parents for adoption were received. Out of the 1600 children available for adoption, 770 were normal and the rest were those with special needs. Also, the waiting time for adoption in India is one to three years. The Committee is, therefore, unable to comprehend as to how the adoption route would be an answer to infertility which is growing in India. The Committee also observes that adoption is a benevolent choice available to the community at large and the Government cannot force adoption in lieu of surrogacy. Surrogacy and adoption have to be an equal choice and in the name of adoption, the Government cannot take away the reproductive rights of couples to have a biologically related child through surrogacy.**

**5.24 The proposed Bill has confined the expenses to “medical” and insurance coverage to surrogate mother during the process of surrogacy which has narrowed down the expenses incurred on the surrogate mother only. There is no scope for the other reasonable expenses. The Committee is of the view that medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother are not the only expenses incurred during the surrogacy pregnancy. For any woman who is going through surrogacy, there is a certain cost and certain loss of health involved. Not only will she be absent from her work, but will also be away from her husband and would not be able to look after her own children. The Committee, therefore, recommends that surrogate mother should be adequately and reasonably compensated. The quantum of compensation should be fixed keeping in mind the surrogacy procedures and other necessary expenses related to and arising out of surrogacy process. The**

compensation should be commensurate with the lost wages for the duration of pregnancy, medical screening and psychological counseling of surrogate; child care support or psychological counseling for surrogate mother's own child/ children, dietary supplements and medication, maternity clothing and post delivery care. The Committee also recommends that in case the surrogate mother dies in the course of surrogate pregnancy or while giving birth to the surrogate child, additional compensation should be given to the kin of the surrogate mother.

5.25 The Committee observes that the surrogacy industry in India is currently governed by the private contract model which relies on the bargaining power of the parties in setting the terms of the contract and its enforcement. Since there are enormous inequalities in the bargaining power of surrogates vis-à-vis medical clinics and commissioning parents due to surrogate's illiteracy, socio-economic marginalization and lack of access to legal representation, the chances of exploitation of surrogate mothers are immense. The Committee, therefore, recommends that the amount of compensation should be fixed by relevant authorities and the compensation so fixed should not be the subject matter of bargain between the commissioning couple and the surrogate mother. The Committee further recommends that the compensation to surrogates should be guaranteed from the moment they begin any use of medication in connection with surrogacy procedures and the money should be deposited directly in their bank accounts, by the commissioning parents.

5.26 The Committee would simultaneously like to observe that surrogacy cannot be a way out for women opting for surrogacy due to poverty and should not be allowed as a profession. In fact, the Bill rightly provides that no woman can become a surrogate more than once. It is, indeed, sad that the burden of the whole poverty stricken family falls on the woman who resorts to becoming a surrogate to earn quick money. As suggested by National Commission for Women, education and vocational training should be given to women so that they can be financially empowered.

**However, the Committee taking cognizance of the harsh realities of the poverty stricken families cannot simply suggest to take away the opportunity surrogacy provides to a family to better their lives.**

**Clause 2(g), Clause 2(p), and Clause 4 (iii) (c) - Definition of “couple”, Infertility, and eligibility certificate for intending couple.**

5.27 Clause 2 (g) of the Bill deals with the definition of couple and reads as under :

*“couple” means the legally married Indian man and woman above the age of 21 years and 18 years respectively;*

Clause 2 (p) of the Bill deals with the definition of “infertility” and reads as under:

*“Infertility” means the inability to conceive after five years of unprotected coitus or other proven medical condition preventing a couple from conception;*

Clause 4(iii) (c) of the Bill deals with eligibility certificate for intending couple and reads as under:

*(iii) no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or initiated, unless the Director or in-charge of the surrogacy clinic and the person qualified to do so are satisfied, for reasons to be recorded in writing, that the following conditions have been fulfilled, namely:—*

*(c) an eligibility certificate for intending couple is issued separately by the appropriate authority on fulfilment of the following conditions, namely:—*

*(I) the age of the intending couple is between 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification;*

*(II) the intending couple are married for at least five years and are Indian citizens;*

*(III) the intending couple have not had any surviving child biologically or through adoption or through surrogacy earlier:*

*Provided that nothing contained in this item shall affect the intending couple who have a child and who is mentally or physically challenged or suffers from life threatening disorder or fatal illness with no permanent cure and approved by the appropriate authority with due medical certificate from a District Medical Board;*

*(IV) such other conditions as may be specified by the regulations.*

## **Suggestions**

5.28 The Committee was given to understand by many witnesses/ stakeholders that the right to avail surrogacy services has been limited to Indian married

couples only which is not justified. Restricting it to only Indian married couples is discriminatory and violative of the right to life, personal liberty, reproductive autonomy and right to equality guaranteed to all persons under the Constitution of India.

5.29 It was also pointed out that the Hon'ble Supreme Court has recognized the status of live-in partners as a "relationship in the nature of marriage" and the proposed Bill in an unreasonable and discriminatory manner fails to recognize the rights of live-in partners to surrogacy. Therefore, a mechanism should be established which can incorporate everyone in the ambit of surrogacy regulatory framework.

5.30 Ministry of Women and Child Development has informed that they are in favour of allowing the option of surrogacy to foreigners, every lawfully married infertile heterosexual couples, every Indian woman whether married or single (which include not married/separated/widow etc.) irrespective of their ability to bear child or not. However, they favored putting restrictions on single men commissioning surrogacy to make it on par with Juvenile Justice (Care and Prevention of Children) Act, 2015 which prohibits adoption of girls by single men. Some other stakeholders were also in favor of extending the option of surrogacy to foreigners, NRIs, PIOs, OCI cardholders, stating that surrogacy should not be restricted to Indian nationals only.

5.31 Various other stakeholders were in support to allow the individuals who are single including unmarried, separated, widows, transgenders, single parents to exercise their right to parenthood. They argued that if single individuals are financially capable of taking care of their children and if they have family support, they should be fully entitled to have children through surrogacy. They felt that restricting the people to commission surrogacy on the basis of their marital status, would be violation of human rights.

5.32 Some concerns have been raised with respect to the condition of childlessness as one of the eligibility criteria to commission surrogacy as proposed in the Bill. It has been argued that there is no one child policy in our

country and therefore, this condition of childlessness may be removed from the Surrogacy Bill.

5.33 As regards the definition of 'infertility', the World Health Organization terms infertility as "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse". The earlier draft Assisted Reproductive Technologies (ART) Bill 2010 and 2014 also defined Infertility as "the inability to conceive after at least one year of unprotected coitus". Majority of the experts / stakeholders have contended that the proposed Bill imposing the extended time period of five year before commissioning surrogacy seems irrational and arbitrary in many aspects. They have cited judicial pronouncements in cases like B.K. Parthasarthi vs. Government of Andhra Pradesh and in Govind vs. State of MP to buttress their argument that the five year waiting clause was violative of the right of reproductive autonomy.

5.34 Though the definition of infertility is limited to failure to conceive only, there are other medical conditions for which surrogacy is availed. For example, TB destroys thousands of uteruses irreversibly. A large number of girls are born without a uterus or a very underdeveloped uterus. A large number of women have repeated miscarriages. There are many women who have their uterus removed because of cancer or because of many tumors. The Bill also ignores medical condition of a woman where she conceives but is not able to carry the child to the full term.

5.35 The Bill discriminates against medically infertile couples as this condition of five years is applicable for infertile couples only whereas it is not applicable to other couples who are healthy and free from medical complications and are free to attain parenthood any time before five years of their wedlock or without observing the waiting time period of five years. The Committee understands that in the present context of late marriage (late 30's), further delay of five years would adversely affect the quality of gametes of couples or render the couple's gametes less viable.

5.36 The National Commission of Women has supported the definition of infertility as proposed in the Bill justifying that in today's time, due to a gross imbalance of work life ratio, it is essential to give a couple enough time to try and conceive a child themselves before engaging in external aid. Few other stakeholders also agree with psychologists that after marriage, it takes one to two years to understand each other. After that, there is one year of unprotected sex and then, there has to be one year of continuous trying through fertility clinics.

### **Department's Response**

5.37 On being asked about the exclusion of homosexual couples, single parents, live-in couples from Surrogacy (Regulation) Bill, 2016, the Department clarified that inclusion of these sections of society would open the scope of misuse of such facilities and it would be difficult to ensure better future of the child born through surrogacy. Secondly, upbringing of a child is a big responsibility equally shared between a father and mother and is a lifelong commitment. A single parent might not be able to fulfil his/her responsibility completely. In Indian context, both parents, a mother and a father should be there to raise a child. Since, there is no legal liability for gay couples and live-in couples as they can get separated or get married whenever they decide to. But complication arises when such decision are taken in middle of surrogacy procedure.

5.38 The Department while justifying their stand on keeping a period of 5 year duration stated that the five year period is provided for the couple to avail all assisted reproductive techniques to have a child of their own. It has also been submitted that and the conditions of infertility will be specified in rules and regulations.

5.39 The Department while justifying its stand on limiting the option of surrogacy to married Indian couples stated that the single woman or man is not allowed to avail surrogacy as the Bill intends to provide a complete family to the child born out of surrogacy. Moreover, the single parent needs a donor for oocytes and sperm from a third party which may lead to legal complications and

custody issues at later stage. Also, the live in partners are not bound by law and safety of the child born through surrogacy will be questionable.

### **Recommendation of the Committee**

**5.40** The Committee notes that the Bill limits the option of surrogacy to legally married Indian couples. The Committee observes that limiting the option to avail surrogacy facilities to an Indian heterosexual married couple to have their own biological child has overlooked a large section of the society. Given our sentiments and sensibility, the social status of a woman in our society is judged by her reproductive life and there is a lot of pressure on her for child bearing. The Department of Health Research by imposing prohibition on widows and divorced women seems to have closed its eyes to the ground reality. Besides, the decision to keep live-in partners out of the purview of the Bill is indicative of the fact that the Bill is not in consonance with the present day modern social milieu that we live in and is "too narrow" in its understanding. Even the Supreme Court has given a legal sanctity to live-in relationships. Surrogacy is one of the least used options by childless Indians. If all these categories are to be banned then why have surrogacy at all. The Committee, therefore, recommends that the Department should broadbase the eligibility criteria in this regard and widen the ambit of persons who can avail surrogacy services by including live-in couples, divorced women/ widows. Appropriate alterations accordingly be made in clause 2(g) and 4 (iii) (c) of the Bill.

**5.41** The Committee would, however, observes that surrogacy is a privilege and cannot be extended to foreign nationals indiscriminately. Foreigners come to India for commissioning surrogacy because the procedure is much cheaper here. The Committee is, therefore, not in favour of extending the option of commissioning surrogacy to foreign nationals.

**5.42** The Committee notes that the proposed Bill has excluded NRIs, PIOs and OCI card holders from the purview of the Bill. Based on the scrutiny of the facts put forth before the Committee, it feels that there are adequate provisions in the Bill for the Appropriate Authority to scrutinize all the documents submitted by the intending couple before commissioning surrogacy and to reject the application in case of any violation of rules and regulations. The Committee finds no point in restricting NRIs, PIOs and OCI card holders from availing surrogacy services in India. The Committee is of the view that since the NRIs, PIOs and OCIs cardholders are of Indian origin only, there should not be any prejudice and discrimination towards them when it comes to allowing them for opting surrogacy in the country of their origin. The Government has been extending several concessions to PIOs/OCIs to boost the ties of the Indian diaspora with the country of their origin. The Committee is of the view that PIOs/OCIs should not be classified along with other foreign nationals for the purpose of availing surrogacy in India. The Committee, therefore, recommends that an appropriate mechanism should be made for a complete background check of the NRIs, PIOs and OCIs cardholders who intend to commission surrogacy and they be permitted after a thorough scrutiny of their documents submitted to the appropriate authority designated for granting permission for availing surrogacy services in India. The Committee further recommends that the intending couple should provide a specific ‘declaration’ or a ‘NOC’ that the child born out of surrogacy would be getting the same citizenship rights as possessed by the intending couple. The Committee recommends that while foreign nationals be kept out of the ambit of surrogacy bill, Persons of Indian Origin (PIOs), Overseas Citizens of India (OCIs) and NRIs should be permitted to avail surrogacy services in the country.

**5.43** The Committee also takes note of the submission of the Department of Health Research that “the five year period has been provided for the couple to avail all assisted reproductive techniques to have

a child of their own". Five year waiting period for surrogate parenthood appears to be based on the impression that surrogacy, which is third party reproduction, is being resorted to as a first choice of family formation which should be checked. However, from the information made available to the Committee, it notes that surrogacy is a rare practice among childless Indian couples who try various medical options before they choose surrogacy which costs them anywhere between Rs. 15 to 20 lakh. Since surrogacy is not well-regulated in the country, specific and reliable data on surrogacy is not available. However, as per Ernst and Young Study (Call For Action: expanding IVF treatment in India , July 2015) , in India, around 27.5 million couples in the reproductive age group are infertile and about one percent i.e. about 270,000 infertile couples seek infertility evaluation as per the Annexure IV. As per the information made available to the Committee, of the people seeking remedy for infertility, 20-25% undergo IVF treatment and of that small group, one percent may require surrogacy. Ten to Twelve percent of surrogacy is commissioned because of irreversible destruction of uterus due to TB, 8 percent because of absence of uterus, 12 percent because of multiple failed IVF cycles, 12 percent because of multiple miscarriages, 10 percent because of removal of uterus due to cancers, fibroids etc.

5.44 The Committee also notes that a lot of people are getting married in their 30's and 40's and the requirement of five year wait would adversely affect the quality of their gametes and thus impair their chances of attaining parenthood through surrogacy. Besides, this time bar of five years plausibly violates the right to reproductive autonomy, and an individual's right to exercise his choice.

5.45 Looking to all these facts there is no gainsaying that the definition of infertility as the inability to conceive after five years of unprotected coitus and the condition of subsistence of five years of wedlock as laid down in

clause 2(p) and clause 4 (iii)(c)(II) of the Bill respectively have not been stipulated with due diligence and with due regard to the ground reality in society, well-indicated medical reasons for infertility, current scenario of late marriages and the need for safeguarding reproductive autonomy.

5.46 It is also worth mentioning that the definition of 'infertility' in the Surrogacy (Regulation) Bill, 2016 is inconsistent with the definition given by WHO and also as in the ART ( Regulation ) Bill, 2014 which describe infertility as the inability to conceive after at least “one year of unprotected coitus”. The Committee is of the view that the fundamental right to reproduce to have a child is a part of a person’s personal domain and fixing a period of five years will only cause breach of his/her reproductive rights and delayed or deferred parenthood. In India, infertility is considered a social stigma and the infertile couples go through a lot of agony and trauma due to infertility. Since, conception has many interplay functions, a five year time bar would add to the misery of already distressed intending couples. The five year waiting period is therefore arbitrary, discriminatory and without any definable logic. The Committee, therefore, recommends that the definition of infertility should be made commensurate with the definition given by WHO. The words “five years” in clause 2(p) and 4 (iii) (c) II, be therefore, replaced with “one year” and consequential changes be made in other relevant clauses of the Bill. The Committee further recommends that in circumstances where the need for surrogacy is absolute due to medical reasons like absence of uterus, destruction of uterus because of cancers, fibroids etc., even the prescribed one year period should be waived off.

5.47 The Bill provides that for those intending couples who have their own child who is mentally or physically challenged or suffering from life threatening disorder or fatal illnesses with no permanent cure can commission surrogacy after the approval from the appropriate authority. The Committee also notes that the Bill provides prohibition to abandon

**child born through surrogacy for the reasons of any genetic defects, birth defects, any other medical conditions. However, as per provisions of the Bill, a couple who is commissioning surrogacy cannot go for surrogacy again to have a normal child even in the event of child born through surrogacy having genetic and birth defects or other life-threatening disorders. The Committee fails to understand rationale behind such contradictory provisions in the Bill. This appears discriminatory. The Committee is, accordingly, of the view that all intending couples should have the right to go for second chance at surrogacy in case of any abnormality in the previous child irrespective of the fact whether the abnormal child is born through surrogacy or by other means. The Committee, therefore, recommends that necessary amendment may, accordingly, be made in clause 4 (iii) (c). Consequential changes in other relevant clauses of the Bill may also be made.**

**5.48 The Committee also recommends that Clause 4(c) III should contain an unambiguous provision to an effect that the intending couple shall produce an affidavit declaring that they do not have any surviving child.**

### **Clause 2(n)-Definition of “Human Embryologist”**

5.49 Clause 2 (n) of the Bill deals with the definition of “human embryologist” which reads as:

*“human embryologist” means a person who possesses any post-graduate medical qualification in the field of human embryology recognized under the Indian Medical Council Act, 1956 or who possesses a post-graduate degree in human embryology from a recognized university with not less than two years of clinical experience;*

### **Suggestions**

5.50 During the examination of the Bill, the Committee's attention was drawn to the fact that there is no degree given by the MCI designating as Human Embryologist. Therefore, it was suggested that the name may be termed as

Clinical Embryologist. The Committee understands that a Clinical Embryologist means a person having either a medical graduate degree or a post graduate degree or a doctorate in an appropriate area of life science or degree in Bachelor of Veterinary Sciences (BVSc) and having an experience in mammalian embryology, reproductive endocrinology, genetics, molecular biology, biochemistry, microbiology, in-vitro culture techniques and familiar with ART. There is no university in India which offers a post-graduate medical qualification in the field of human embryology.

### **Department's Response**

5.51 In response to the concerns raised by the stakeholders on the definition of 'Human Embryologist', the Department of Health Research has stated that there are clinical embryologists working on human embryo.

### **Recommendation of the Committee**

**5.52 The Committee is surprised to observe the desultory approach of the Department while drafting the proposed Bill. Interestingly, there is no university offering medical courses across the country that confers the degree of human embryology. The Committee fails to understand how the Department would utilize the services of such specialty doctors in every corner of the country when these doctors do not exist. The Department does not have the data about number of clinical embryologists working in the country. The Committee feels that in the absence of a regulatory framework for assisted reproductive technology and surrogacy procedures, dearth of these specialty doctors would add to the plight of already suffering childless couples who would be prey to the physical, mental and financial exploitation in the name of these advanced reproductive medical science facilities. Therefore, the Committee would like the Department to get their facts correct and collect information regarding the same and rephrase the definition of Human Embryologist also entailing the qualification of specialty doctors performing surrogacy and related procedures to avoid any kind of negligent and violatory incidents. Clause 2 (n) and other relevant clauses of the Bill may accordingly be modified.**

## **Clause 2(q)-Definition of “insurance”**

5.53 Clause 2 (q) of the Bill deals with the definition of “insurance” and reads as under:

*“insurance” means an arrangement by which a company, individual or intending couple undertake to provide a guarantee of compensation for specified loss, damage, illness or death of surrogate mother during the process of surrogacy;*

### **Suggestions**

5.54 The Committee has received various views on the definition of "insurance" as proposed in the Bill. Stakeholders have submitted that the definition of insurance needs to be more comprehensive and inclusive of other aspects as well like expenses during the process of surrogacy and after the process is complete.

5.55 An important suggestion put forth before the Committee was that the insurance coverage should be for a period of six years. Explaining the rationale behind the six year period, it was submitted that one year should be for the evaluation of surrogate on medical, psychological, her domestic and other evaluations and withdrawal if she so desires; and also to evaluate the intending parents. One year maximum should be for specified IVF cycles on the surrogate. If successful, one year should be for carrying and delivery, one year for post-delivery recuperation, breastfeeding, two years for health monitoring for after-effects, if any, of the aggressive-IVF and chemical-hormones. It was argued that the provision of insurance cover was necessary beyond the period of surrogacy to account for effects of health that may arise out of surrogacy but manifest thereafter. Substantial evidence exists that point to the possibilities of such long term health consequences during as well as beyond the period of surrogacy.

5.56 It was also submitted that since the insurance for the purpose of surrogacy pregnancy and related conditions is a new class of insurance and as of now, there are no insurance products specific to surrogacy, IRDA, should be involved in developing appropriate insurance product for surrogacy. Insurance cover must also be provided for the surrogate child/ children till they attend the

age of majority, so that in situations like death, disability, sickness of commissioning parents, his interests could be protected. .

5.57 It has also been pointed out by witnesses/ stakeholders that it is necessary to have more clarity on who would be responsible and accountable for such insurance. In case of death during pregnancy or during the time of childbirth, a separate compensation must be paid to her family.

5.58 Another issue that was raised was clarity on Maternity benefits wherein it was submitted that in case of surrogacy, there are two women- one, the surrogate mother who carries the pregnancy and two, the commissioning mother who has to rear the new born child. Both women must be entitled for appropriate part of leave and other maternity benefits.

#### **Department's Response**

5.59 The Department while giving clarification stated that the insurance period will cover post partum delivery. The insurance coverage will be as per the IRDA dispersal system monitored by the Government of India. As regards the clarity on maternity benefits the Department was of the view that the proposed suggestion can be considered while framing the rules.

#### **Recommendation of the Committee**

**5.60 The Committee notes that the definition of insurance as given in the Clause 2(q) does not extend to the surrogate beyond the process of surrogacy. The Committee observes that surrogate pregnancy is not a disease. However, it is not risk-free and there are certain long-term health-risks arising out of surrogate pregnancy because surrogate's complete menstrual cycles have to be altered for an embryo to be transplanted inside her womb and large doses of hormonal treatment are given. Surrogacy has also resulted in deaths of surrogate mothers in many cases. The Committee, therefore, recommends a comprehensive insurance cover for the surrogate mother covering even the after effects of surrogacy. A period of six years of medical insurance cover along with life insurance of a certain sum of money for the surrogate mother needs to be determined to cover any health complications that may occur long after delivery. The Committee is of the view that insurance for surrogate mother should be in**

two steps. The first step would provide insurance cover for one year from the date the surrogacy procedure starts. The second step would provide insurance cover for six years from date of confirmation of pregnancy even if there is no take home baby. The Committee, therefore, recommends that the definition of insurance may be revised accordingly.

5.61 The Committee finds that the Bill does not provide for the social security insurance for the surrogate child in the event of death of commissioning parents during the process of surrogacy. The earlier ART Bill 2014 provided the social security insurance for all the three stakeholders, i.e. the surrogate mother, the surrogate child and the egg donor. The Committee would, therefore, like the Department of Health Research to provide for insurance for the surrogate child in case of unforeseen contingencies like accidental death of the commissioning parents or divorce during the process of surrogacy. Accordingly, the definition of insurance for the surrogate child may also be incorporated in the Bill.

5.62 The Committee would also like to recommend to the Department to consider incorporating the provision of Maternity Benefits to the surrogate mother as well as the intending mother as both of them are involved in child birth and child rearing respectively. They both should be entitled to maternity benefits to ensure the continuity of their service and to cover loss of wages.

#### **Clause 2(r)-Definition of 'intending couple'**

5.63 Clause 2 (r) of the Bill deals with the definition of intending couple" which reads as under:

*"intending couple" means a couple who have been medically certified to be an infertile couple and who intend to become parents through surrogacy;*

#### **Suggestions**

5.64 It has been suggested by a stakeholder that after the words, "who intend to become", the word "legal" should be added so that the provision may be read as follows:

*"who intend to become legal parents through surrogacy by legally adopting the baby/babies born through surrogacy process and thereafter obtaining parental order from the District Surrogacy Board"*

5.65 There was a suggestion that the words "the intending couple", be replaced with "the intending parents" who wish to commission surrogacy to have a child of their own.

### **Department's Response**

5.66 The Department of Health Research has not commented on these issues.

### **Recommendation of the Committee**

**5.67 The Committee is of the view that suggestion of the stakeholders can be considered on the justification that the word 'legal' before the parents in the definition of the 'intending couple' will have binding effect on the couple and it will reduce the scope of exploitation of surrogate mother or the child born out of surrogacy either directly or indirectly. The suggestion on inclusion of the word "legal" before the word "parents" in clause 2(r) of the Bill may, therefore, be examined in consultation with the Legislative Department to explore its inclusion, if necessary.**

### **Clause 2(zb)-Definition of "surrogacy"**

5.68 Clause 2 (zb) of the Bill deals with the definition of "surrogacy" and reads as under:

*"Surrogacy" means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth;"*

### **Suggestions**

5.69 The Committee was given to understand that in the earlier ART Bill 2010 and 2014 "surrogacy" is defined as "an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of gametes belong to the her or her husband, with the intention to carry it and hand over the child to the commissioning couple for whom she is acting as a surrogate". This definition of surrogacy provided under the ART Bill is

more comprehensive as it enumerates all the salient features of surrogacy. Hence, it was suggested that the Surrogacy Bill may provide for definition of surrogacy as provided in the ART Bill 2010 and 2014.

### **Department's Response**

5.70 The Department did not comment on these changes in definition of surrogacy.

### **Recommendation of the Committee**

**5.71 The Committee notes that the Clause 2(zb) is not clear and explicit in articulating the procedure of surrogacy holistically. The Clause does not refer to the manner of achieving surrogate pregnancy by a surrogate mother. It does not mention pregnancy through the assisted reproductive technology either which is essentially a medical procedure by way of “in-vitro fertilization or IVF”. Also, there is no mention of origin of gamete either from the intending couples or gamete donors. The definition of surrogacy provided under the Bill does not specify whether gestational or traditional surrogacy is permissible, though the Department of Health Research in its written submissions has submitted that only gestational surrogacy is allowed under the Bill. The Committee observes that the definition of surrogacy should be precise, explicit and descriptive with no scope of arbitrary interpretation. The definition of surrogacy in the draft ART Bill is inclusive of all the relevant ingredients as required to understand the surrogacy in its entirety. The Committee recommends that the definition of surrogacy as provided in the ART Bill, 2014 be included in clause 2(zb) of the Surrogacy Bill, with specific provision for Gestational Surrogacy.**

### **Clause 2(ze): Definition of “Surrogate mother” and Clause 4: Regulation of surrogacy and surrogacy procedures**

5.72 Clause 2 (ze) of the Bill deals with the definition of “surrogate mother” which reads as under:

*“surrogate mother” means a woman bearing a child who is genetically related to the intending couple, through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of section 4;*

Clause 4 (iii) (b) (I), (II), (III) & (IV) deals with the conditions to be fulfilled to be surrogate and reads as under:

*4. On and from the date of commencement of this Act,—*

*(iii) no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or initiated, unless the Director or in-charge of the surrogacy clinic and the person qualified to do so are satisfied, for reasons to be recorded in writing, that the following conditions have been fulfilled, namely:—*

*"(b) the surrogate mother is in possession of an eligibility certificate issued by the appropriate authority on fulfilment of the following conditions, namely:—*

*(I) no woman, other than an ever married woman having a child of her own and between the age of 25 to 35 years on the day of implantation, shall be a surrogate mother or help in surrogacy by donating her egg or oocyte or otherwise;*

*(II) no person, other than a close relative of the intending couple, shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act;*

*(III) no women shall act as a surrogate mother or help in surrogacy in any way, by providing gametes or by carrying the pregnancy, more than once in her lifetime: Provided that the number of attempts for surrogacy procedures on the surrogate mother shall be such as may be prescribed;*

*(IV) a certificate of medical and psychological fitness for surrogacy and surrogacy procedures from a registered medical practitioner;*

## **Suggestions**

5.73 The Committee has received several perspectives on the definition of 'surrogate mother' and pre-conditions to be a surrogate mother. Most of the stakeholders have expressed concern over the term 'genetically related' to the intending couple as well as the condition of being a 'close relative' of the intending couple as one of the eligibility criteria of a surrogate mother. They sought deletion of the term 'genetically related' from the Bill. If a surrogate mother is a close relative of the male member of the intending couple (e.g., his sister), and is allowed to donate her egg for the surrogacy, it may result in congenital anomalies for the surrogate child.

5.74 Majority of the stakeholders expressed objection to the provision relating to 'close relative' of the concerned couple as an eligibility to be a surrogate mother. According to them, this may result into unavailability of women to act as surrogate mother. There are many socio- legal problematic issues with the "surrogate mother being the "close relative" and genetically related to Intending couples which are as follows-

- In case of close family relative acting as surrogate mother, this may give scope for familial disputes concerning inheritance and property issues. There is also likelihood of custody disputes over the child.
- The surrogate and couples being close relatives sharing the same ancestry, familial or kinship ties, there is greater likelihood of surrogate mother developing emotional attachment to the surrogate child thereby causing emotional wrangles surrounding the custody and parentage of child.
- Altruistic surrogacy through a close relative has the potential of creating harsh psychological and emotional implications on child as well as on the parents and surrogate relative as the child shall grow up within the same family.
- Being a close relative is also no guarantee for non-commercial surrogacy. By limiting surrogate mothers to 'close relatives', an attempt may be made to force women to become surrogate mother for their relatives.
- Asking or coercing a close relative to be a surrogate mother will make the relations more complex, shaking apart the very foundation of Indian family.

### **Department's Response**

5.75 The Department while justifying this Clause stated that the Surrogacy Regulation Bill allows only Gestational surrogacy as the child has to be related to the intending couple. However, the definition of the surrogate mother has been drafted in consultation with Ministry of Law. The provision for the surrogate mother to be a close relative of the intending parents has been kept with a view to avoid commercialization of surrogacy. The clause has been incorporated after detailed deliberation with stakeholders and Ministry of Law. On the definition of 'close relative', the Department clarified that the same will be elaborated after deliberations with the National Surrogacy Board.

### **Recommendation of the Committee**

**5.76 The Committee notes that despite Department's clarification, the way Clause 2 (ze) is worded, it would make it appear that the surrogate**

mother should be genetically related to the intending couple. The Committee observes that such ambiguity in the clause would lead to arbitrariness in interpretation of the law. The Committee, therefore, recommends that necessary drafting modifications be carried out in the said clause to stipulate that the surrogate child and not the surrogate mother will be genetically related to the intending couple. It also needs to be clarified in the clause that only Gestational surrogacy will be permissible. Other consequential changes in relevant clauses of the Bill may also be made.

5.77 The Committee is also dismayed to observe that on the one hand the Department asserts that only Gestational surrogacy is permitted under the Bill, whereas clause 4(iii)(b)(III) advocates the concept of Traditional Surrogacy. Thus, there is an apparent contradiction between the Department assertions and provisions of clause 4(iii)(b)(III). The Committee, therefore, recommends that the infirmity in clause 4(iii)(b)(III) be rectified and the clause be amended suitably so as to spell out in unambiguous terms that the surrogate mother will not donate her eggs for the surrogacy.

5.78 The Committee notes that as per clause 4 (iii) (b) (II), only a close relative of couples is permitted to act as a surrogate mother. According to the Department this provision has been proposed with a view to avoid commercialization and stop exploitation of surrogates. The Committee is, however, of the view that the proposition of a close relative becoming a surrogate mother overlooks the various social, legal, emotional and ethical dynamics of this issue and is fraught with numerous disruptive issues for several reasons.

5.79 Curbing exploitation of surrogates has been touted as the main objective of the proposed legislation. The Bill seeks to operate from the understanding that just by changing the nature of surrogacy from commercial to altruistic and confining the practice of surrogacy in the private domain of family would end the exploitation of surrogates. Such a

proposition, however, ignores the ground reality that in Indian marital homes the decision making power rarely rests with women and not so privileged or financially weak relatives who can be coerced into becoming surrogate mothers and the chances of coercion and exploitation are even more in case of close relatives due to family pressures.

**5.80** This clause also disregards the social and cultural ethos of our country. The restriction that the surrogate mother must be a close relative of the intending couples may also result in the surrogate mother and the child developing an emotional bond given that the commissioning couple and the surrogate are accessible and related and the child is always in proximity. Such an attachment will not only have the detrimental psychological and emotional impact on the child who could feel divided between the two mothers, it may also lead to parentage and custody issues apart from inheritance and property disputes within the family.

**5.81** Infertility is a real stigma in our society but undergoing surrogacy and IVF is a taboo even today in our country. For these reasons, surrogate pregnancy is a private affair and majority of the patients seeking parenthood through surrogacy want to keep their treatment private and confidential. This precondition of only close relatives to become surrogate mothers would tend to compromise their privacy by way of forcing them to declare their infertility within family. This is violative of the basic rights of privacy and reproductive autonomy of the medically infertile persons who whilst maintaining the privacy of their medical problems have the right to surrogacy from women who volunteer to be surrogate mothers.

**5.82** In today's social order of nuclear families, it would be unrealistic to expect that all infertile persons will have a close relative between 25 and 35 years of age, having one child, satisfying all conditions as prescribed in the Bill and would voluntarily consent to be a surrogate mother altruistically for the infertile couples. This condition of close relative being surrogate mother will therefore cause acute dearth and unavailability of women to

**act as a surrogate mother and shut all options for the medically infertile for whom surrogacy is the only option to have their biological child.**

**5.83 Keeping in view the facts as stated above, the Committee is convinced that limiting the practice of surrogacy to close relatives is not only non pragmatic and unworkable but also has no connect with the object to stop exploitation of surrogates envisaged in the proposed legislation. The Committee, therefore, recommends that this clause of “close relative” should be removed to widen the scope of getting surrogate mothers from outside the close confines of the family of intending couple. In fact, both related and unrelated women should be permitted to become a surrogate. Appropriate modifications may be carried out in the provisions of clause 4(iii)(b)(II) and other relevant clauses of the Bill to address the concerns as pointed in the preceding paras.**

### **Suggestions**

5.84 Stakeholders have raised concerns over other requirements stipulated in clause 4 (iii)(b), (I), (III) & (IV). The issues raised are as follows:-

i) The age limit of the surrogate mother is prescribed between 25-35 years of age. However, it has been suggested that it should be raised to 39 years as in today's life, there is increase in number of working women who reach the age of 35 years in planning their own family.

ii) The terms “ever married women” are not defined in the Bill, and it is not clear if the terms ‘ever married’ women would include surrogate mother who may be a widower or a divorcee. The Bill also fails to mention “Indian nationality” of women to be surrogate mother.

iii) The Bill does not clarify about egg donation by women for money.

(iv) There should be provision wherein surrogate mother or egg donor may be sourced from the surrogacy clinic provided under Bill which includes ART Bank within itself. Such surrogacy clinic may conduct necessary medical screening and record keeping on the same as provided under the earlier ART Bill, 2010 and 2014.

(v) The Bill proposes that no woman shall act as a surrogate mother or help in surrogacy in any way, by providing gametes or by carrying the pregnancy, more than once in her lifetime. It has been suggested that since the procedure does not guarantee success in first attempt, the number of attempts for surrogacy procedures on the surrogate mother shall be three cycles of assisted/artificial reproduction techniques with a fourth, if necessary, as the last and final “closure” cycle. The ART Bill also allows maximum three cycles of medications for surrogate mother.

(vi) Other experts suggested that a woman should be allowed to be a surrogate mother only two times with a gap of at least 3 years between the two, whereas the ART allowed minimum 2 years of interval between two deliveries. According to Ministry of Women and Child Development, if surrogate is declared medically fit, then she should be provided with the option of being surrogate twice in her lifetime with a mandatory period of interval as prescribed between two pregnancies. It was also pointed out that in ART (Regulation) Bill, 2014, the Clause 60 (5) provided that a surrogate mother should have at least one child of her own with minimum age of three years. There is, however, no such condition for the age requirement of the surrogate mother's own child in the proposed Bill that fails to define the time interval between two pregnancies of surrogate mother.

#### **Department's Response**

5.85 In response to various concerns and suggestions, the Department has stated that the procedures of surrogacy and the adjuvant hormonal therapy has some side effects which is why the number of times a woman can be a surrogate is kept only once in her life time. The number of attempts will be as per rules and regulations. The clause (iii) b(I) of Section 4 has been incorporated after detailed deliberations with stakeholders and the Ministry of Law. The Department is, however, silent on the other issues raised with respect to the conditions mentioned in clause 4 of the Bill.

#### **Recommendation of the Committee**

**5.86 Provisio to clause 4(iii)(b)(III) mandates that the number of attempts for surrogacy procedure shall be prescribed. The Committee also takes note of the suggestion that there should not be more than four cycles of surrogacy procedures on the surrogate mother. The Committee is aware that there are risks with IVF and fertility medications and the more the cycles, greater the risks. The Committee, therefore, expresses agreement with the suggestion that 'the number of attempts for surrogacy procedures on the surrogate mother should be three cycles of assisted/ artificial reproduction techniques with a 4<sup>th</sup>, if necessary, as the last cycle'. The Committee would, however, like to emphasize in this regard that this is a procedural aspect of surrogacy which may require periodic revision depending on the various scientific advances and progress. The Committee would like this aspect to remain in the domain of delegated legislation to**

ensure that frequent amendments are not warranted in the governing statute.

**5.87** Any pregnancy carries with it multiple risks and surrogate pregnancy also involves the same, even more risks due to potential reaction to fertility drugs. Taking this risk for someone else is a huge commitment. Taking all factors into account, the Committee is not in favour of providing the surrogate the option of being the surrogate more than once in her lifetime. The Committee is, however, inclined to accept the suggestion on raising the upper age limit of the surrogate mother from 35 years to 39 years.

**5.88** The Committee understands that if the pregnancy of a woman, who has acted as a surrogate mother, does not mature due to abortion, she will be allowed to volunteer to be a surrogate mother again. However, there are no explicit provisions in the Bill to this effect. It is a cardinal principle of law that there should be no ambiguity in the law and therefore, suitable changes be made in the definition of the surrogate mother encompassing the above stated position to avoid any ambiguity on this aspect.

**5.89** The Committee notes that there is no mention of egg or sperm donor in the Bill. This suggests that both gametes should come from the couple. However, this cannot be possible in all cases of infertility. Clause 4(ii)(a) lays down that surrogacy can be availed “when either or both members of the couple is suffering from proven infertility”. Needless to say that in case of one of the commissioning couple being infertile, the gamete will be required to be donated by somebody. Gamete donation also assumes significance in view of the fact that the option of surrogate parenthood should also be open to widows and divorced women. Since the lack of provision for gamete donation will greatly narrow down the category of people who can avail surrogacy, the Committee recommends that appropriate modifications be made and provision for gamete donation be incorporated in the Bill.

**Clause 2 (zc) : Definition of Surrogacy Clinic**

5.90 Clause 2 (zc) of the Bill reads as under:

*(zc) "surrogacy clinic" means surrogacy clinic or centre or laboratory, conducting assisted reproductive technology services, invitro fertilisation services, genetic counselling centre, genetic laboratory, Assisted Reproductive Technology Banks conducting surrogacy procedure or any clinical establishment, by whatsoever name called conducting surrogacy procedures in any form;*

### **Suggestions**

5.91 The Committee has been given to understand that this Clause is not applicable to IVF clinics not conducting surrogacy.

### **Department's Response**

5.92 The Department has stated that the Bill clearly restricts to surrogacy and surrogacy procedures.

### **Recommendation of the Committee**

**5.93 The Committee would like to point out that there are no separate surrogacy clinics as such. Generally ART clinics offer surrogacy services as well. It would be difficult to monitor ART clinics as it would not be easy to distinguish between a surrogate pregnancy and other pregnancy through IVF. The other IVF clinics which are not involved in surrogacy are out of the purview of the Bill. The need of the hour, hence, is to regulate all ART clinics. The Committee learns that the Department would be bringing forth the draft ART Bill after the Surrogacy (Regulation) Bill, 2016 for regulation of ART Clinics. In this context, the Committee opines that bringing ART Bill before the Surrogacy (Regulation) Bill, 2016 would have been an ideal attempt for regulation of such clinics.**

### **Clause 3(vi): Abortion during the period of surrogacy.**

5.94 Clause 3 (vi) provides as under:

*On and from the date of commencement of this Act,—*

*(vi) no surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, human embryologist, intending couple or any other person shall conduct or cause abortion during the period of surrogacy without the written consent of the surrogate mother and on authorisation of the same by the appropriate authority concerned:*

*Provided that the authorisation of the appropriate authority shall be subject to, and in compliance with, the provisions of the Medical Termination of Pregnancy Act, 1971;*

### **Suggestions**

5.95 The stakeholders have informed that the Medical Termination of Pregnancy Act and Indian Penal code sufficiently imposes restrictions to safeguard the interests of pregnant woman and child. Therefore, an additional requirement of approval from the appropriate authority was unreasonable. Further, the Bill has not provided the time period by which such authorisation for abortion has to be given. It has also ignored the stake of the intending couple in the event of an abortion. It was also pointed out that this is different from the provisions of the Medical Termination of Pregnancy Act, 1971 which allows abortion in such circumstances with the consent of the "pregnant woman". The complication in the case of surrogacy is that the surrogate mother (who is carrying the child) is different from the intending couple which has to bring up the child. Another concern expressed was that the "right to seek abortion or medical termination of pregnancy" is a statutory right of every Indian woman as per the Medical Termination of Pregnancy Act. It was therefore unreasonable to put a condition of authorization for same from appropriate authority before performing abortion. Also, in crucial life threatening cases requiring abortion to save the life of surrogate mother, obtaining authorisation from appropriate authority in such cases may not be pragmatic or workable; rather this may go against the interest of surrogate mother. Therefore, it was suggested that the condition seeking authorisation from the appropriate authority before conduct of abortion on surrogate mother should be removed. The written consent of surrogate mother herself subject to compliance with relevant provision of the Medical Termination of Pregnancy Act, 1971 is adequate safeguard of reproductive right of surrogate mother.

### **Department's Response**

5.96 The Department has been silent on this issue.

### **Recommendation of the Committee**

**5.97 In view of the concerns raised by the stakeholders, the Committee would like the Department to review the requirement of approval of the**

appropriate authority for abortion. The time factor is crucial in such cases of medical emergencies where there would be no time left to ask for permission from an authority for performing abortion to save the life of the surrogate. Since Medical Termination of Pregnancy Act imposes restrictions to safeguard the interests of pregnant woman and child, the rationale behind seeking permission from appropriate authority is not clear. The role of appropriate authority can be envisaged where abnormalities of any kind have been detected in the unborn surrogate child. In such cases, it may be statutorily mandated upon the appropriate authority to state categorically the reasons for permitting abortion within a specified time-frame taking into account the consent of the intending couple and the physical well-being of the surrogate mother. The Committee, therefore, recommends that suitable modifications be made in Clause 3(vi) on the above lines. Consequential changes in other relevant Clauses of the Bill may also be incorporated.

### **Clause 3 (vii) : Prohibition of storage of human embryo or gametes**

5.98 Clause 3 (vii) reads as under:

*On and from the date of commencement of this Act,—*

*(vii) no surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, human embryologist, intending couple or any other person shall store a human embryo or gamete for the purpose of surrogacy:*

*Provided that nothing contained in this clause shall affect such storage for other legal purposes like sperm banks, IVF and medical research for such period and in such manner as may be prescribed.*

### **Suggestions**

**5.99** The stakeholders have informed that the prohibition of storage of embryos and gametes for the purpose of surrogacy is contrary to the ICMR guidelines which allow the storage of embryos for a period of five years. It was submitted that in order to initiate surrogacy arrangement, the eggs are extracted from the intending mother, which are then implanted in the surrogate mother's uterus. This requires multiple implantation attempts on the surrogate mother as the success rate of one implantation in one single attempt is below 30% under best of circumstances. Therefore, extra eggs are extracted in order to secure

availability of eggs for repeat attempts for implantation in surrogate mother's uterus. The infertile intending mother needs to undergo extensive hormonal treatment for the extraction of eggs to be successful. This sometime requires repeated stimulation of woman's periodic cycle to extract eggs putting her to risk of other diseases. Further, in case of oocyte donor or sperm donor, it will not be possible to use the donated gametes in creation of embryos in-vitro immediately for surrogacy. Scientifically also, the donated sperm needs to be quarantined for certain period before use. It has been argued that human embryo is treated as life in itself and prohibiting its storage will force clinics to discard the remaining embryos without the consent of the parent is apparently unethical. In case the baby dies at early stages or is born still, parents would not have stored embryos to try again. The procedure would also become very expensive for the intending infertile couple. Hence, it was suggested that provision for storage and use as per the need should be made under provisions of law and the procedure should be on the basis of medical certificate by ART Clinic doctor. One of the stakeholders also pointed out that in fertility clinics, embryos are being switched to accommodate intending parents which is unethical.

#### **Department's Response**

5.100 The Department of Health Research, in reply to these suggestions informed that the storage of embryos will be as per rules and regulations.

#### **Recommendation of the Committee**

**5.101 The Committee notes that Section 53 of the draft ART Bill, 2014 mandates highest possible standards in the storage and handling of human gametes and embryos for the duration of not more than five years on a prescribed fee after which such embryo shall be allowed to perish or donated to an research organization registered for research purposes. The Committee understands that generally three or more embryos are created during the process of surrogacy and in-vitro fertilization. Out of them either two or three embryos are transferred in the womb of the surrogate mother during one cycle and remaining embryos are cryo-preserved so that if the first cycle fails, then the remaining embryos can be used in**

subsequent cycles. The success rate of implantation of embryos in one singular attempt is around 30% under the best of circumstances. Gamete (either oocytes or sperm or both) also need to be cryo-preserved before creating the embryos as the timing of the creation of the embryos in-vitro has to be in line with the menstrual cycle of the surrogate mother. The Committee notes that repeated extraction of eggs and fertility medicines that stimulate egg production may lead to the risk of Ovarian Hyperstimulation for the intending mother or the donor. There may be several situations like the surrogate mother aborting on the way, the baby being born still or dying early or turning out to be congenitally abnormal, which may warrant storage of embryos.

**5.102** Keeping in the facts as stated above the Committee fails to comprehend the rationale behind such limitations on the storage of human gametes and embryos. The Committee feels that the infertile couple and the surrogate mother should not undergo same trauma repeatedly. This can be avoided with the storage facilities. The Committee, therefore, recommends that the storage of embryos should be permitted and Clause 3(vii) be amended appropriately permitting storage of embryos on the lines of ART Bill 2014.

#### **Clause 4 - Regulation of surrogacy and surrogacy procedures**

5.103 Clause 4 (ii) deals with regulation of surrogacy and surrogacy procedures and reads as under:

*On and from the date of commencement of this Act,—*

*ii) no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or availed of, except for the following purposes, namely:—*

- (a) when either or both members of the couple is suffering from proven infertility;*
- (b) when it is only for altruistic surrogacy purposes;*
- (c) when it is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures;*
- (d) when it is not for producing children for sale, prostitution or any other form of exploitation; and*
- (e) any other condition or disease as may be specified by regulations made by the Board;*

#### **Suggestions**

5.104 The Committee was informed by the stakeholders that under clause 4 (ii) (a), it is impossible to certify infertility as infertility is not an absolute condition. The Bill does not cover the cases where surrogacy can be commissioned for reasons other than infertility as there may be couples who may not be infertile but due to medical complications / other diseases, doctors may have advised them not to conceive or get pregnant.

5.105 The Committee has received a suggestion to include a provision in the Bill for mandatory screening of the intending couple on the lines of CARA guidelines. This would enable effective screening or assessment of the couple by qualified social worker, preparation of a home study report after such assessment before vesting custody of child. The screening would ensure better custody, care arrangement and effective parental responsibility of intending couples towards the child.

#### **Department's response**

5.106 The Department has submitted that infertility conditions will be elaborated in rules and regulations. The Department has not responded to the suggestion regarding home study.

#### **Recommendation of the Committee**

**5.107 The Committee supports the compensated surrogacy and expects the Department to carry out necessary amendments to clause 4 (ii) (b) and (c) in consonance with the concept of compensated surrogacy. The Committee endorses the suggestion seeking a provision in the Bill mandating on the rights of the surrogate child and the interest of the child so that the child is not ill-treated, abused, sold or trafficked or exploited in any way. The Committee, therefore, recommends that the Surrogacy Bill must incorporate enabling provisions on screening of intending couple seeking medical assessment of their fitness to be parent, social economic background, criminal records in past, age, family information and related checks before they are permitted to commission surrogacy. There should be a provision to ensure that the intending parents have not been involved in any child trafficking or child abuse.**

**5.108 The Committee notes that Clause 4(ii)(e) has left certain conditions for surrogacy to be specified through regulations by the National Surrogacy Board and observes that this Clause is couched too much in ambiguities and generalities. The Committee is of the considered view that the substantive purposes for which surrogacy will be allowed should be enshrined in the statute itself and not left to be covered under regulations. If required, an exhaustive list of purposes for surrogacy may be provided by way of regulations. The Committee, therefore, recommends that Clause 4(ii)(e) may be amended suitably and the substantive purposes for surrogacy be clearly delineated therein.**

#### **Clause 4 (iii) (a): Conditions of surrogacy and surrogacy procedures**

5.109 Clause 4 (iii) (a) deals with the conditions of surrogacy and surrogacy procedures and reads as under:

*On and from the date of commencement of this Act,—*

*(iii) no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or initiated, unless the director or in-charge of the surrogacy clinic and the person qualified to do so are satisfied, for reasons to be recorded in writing, that the following conditions have been fulfilled, namely:—*

*(a) the intending couple is in possession of a certificate of essentiality issued by the appropriate authority, after satisfying for itself, for the reasons to be recorded in writing, about the fulfillment of the following conditions, namely:—*

*(I) a certificate of proven infertility in favour of either or both members of the intending couple from a District Medical Board.*

*Explanation.—For the purposes of this item, the expression “District Medical Board” means a medical board under the Chairpersonship of Chief Medical Officer or Chief Civil Surgeon or Joint Director of Health Services of the district and comprising of at least two other specialists, namely, the chief gynaecologist or obstetrician and chief paediatrician of the district;*

*(II) an order concerning the parentage and custody of the child to be born through surrogacy, have been passed by a court of the Magistrate of the first class or above, on an application made by the intending couple and surrogate mother;*

*(III) an insurance coverage of such amount as may be prescribed in favour of the surrogate mother from an insurance company or an agent recognised by the Insurance Regulatory and Development Authority established under the Insurance Regulatory and Development Authority Act, 1999;*

#### **Suggestions**

5.110 Various stakeholders in their written comments furnished to the Committee, have stated that the Surrogacy Bill does not define 'certificate of essentiality'. The maximum time duration, the criteria or the grounds on which this certificate may be granted or denied, grievance redressal or recourse in case of rejection or refusal of such certificate is not provided. The purpose behind seeking such certificate from appropriate authority by couples is not clear and therefore, it was suggested that the certificate of essentiality may be removed.

5.111 It has also been submitted that the minimum and maximum time duration to be required by the Magistrate court in issuing an order on parentage and custody of the child born through surrogacy is not specified. Even the grounds for grant or denial of such order are not prescribed and the recourse in case of refusal of such order is also not provided in the Bill. Further, it does not mention about any appellate forum against the order of Magistrate same. These gaps give rise to legal issues in establishing parentage of child born of surrogacy. It has been suggested that the court order on parentage and custody may be in the nature of “pre birth court order” which may be applied by the intending couple after successful conception in surrogate mother before birth of child. Having a pre birth court order would mean that the couple may take immediate custody of child and there is registration of birth of child immediately after birth to avoid any legal complications or delay of parentage determination post birth of child ensuring stability and predictability of surrogacy arrangement.

### **Department's Response**

5.112 The Ministry while justifying the provision stated that the appropriate authority will be the monitoring and implementing authority in the State and Union Territory. A parental order will be issued through the Magistrate of the first class or above before commissioning surrogacy.

### **Recommendation of the Committee**

**5.113 The Committee notes that certificate of essentiality is required to be obtained by the intending couple from the Appropriate authority after**

giving the reasons to commission surrogacy. This certificate of essentiality would include three conditions that need to be fulfilled viz. certificate of proven infertility, order on parentage and custody of child from court. This further requires an insurance coverage in favour of surrogate mother from an insurance company or an agent recognized by Insurance Regulatory and Development Authority (IRDA). The Committee observes that childless couples in India try various medical treatment options including assisted reproductive methods before they go for surrogacy as the last resort. Infertility is considered a taboo in our society and infertile couples go through a lot of mental agony and psychological trauma due to infertility. The couples who are already reeling under such emotional trauma of infertility and huge costs of the surrogacy treatment would be additionally burdened with the requirement of certificate of infertility from appropriate authority causing further distress and hardships. Besides, certificate of infertility has a negative impact psychologically and is considered derogatory for women in India. A certificate of infertility may also act as an evidence for filing divorce in case one partner is certified to be infertile. Hence, the Committee is of the view that once the couple has had all the procedures under assisted reproductive technology without any success, certificate of infertility from appropriate authority is unwarranted. The Committee, therefore, recommends that requirement of having certificate for infertility from an appropriate authority should be done away with and instead medical reports and prescription of the couple certifying repeated failures in conception or inability to carry the baby to full term should be allowed as a proof for their decision to commission surrogacy. Necessary modifications may accordingly be made in Clause 4(iii) (a)(I).

5.114 The Committee notes that neither any time limit has been prescribed for issuing an essentiality certificate by the District Medical Board nor there is any appeal or review procedure, in case the application for surrogacy is rejected. This confers huge discretionary powers to the

**District Medical Board for issuance of essentiality certificate. It would, therefore, be in the fitness of things if suitable safeguards are built in the Bill and it is mandated that the essentiality certificate will be issued within a specified time frame. Also, there is an imperative need for an appellate authority to be provided for in case of refusal of such an order. The Committee, therefore, recommends that suitable enabling amendments may accordingly be made in clause 4 and other relevant clauses of the Bill.**

**Clause 6: Written informed consent of surrogate mother**

5.115 Clause 6 provides that:-

*No person shall seek or conduct surrogacy procedures unless he has—*

*(i) explained all known side effects and after effects of such procedures to the surrogate mother concerned;*

*(ii) obtained in the prescribed form, the written informed consent of the surrogate mother to undergo such procedures in the language she understands.*

**Suggestions**

5.116 The stakeholders have pointed out that the term 'written informed consent' is not defined in the Surrogacy Bill. The Bill only provides for written informed consent of the surrogate mother but exempts her husband and the intending couples from such consent. Secondly, there is no provision for securing consent under the Surrogacy Bill. There is no competent statutory authority responsible for obtaining such consent from surrogate mother and the intending couple. There is no mention of counselling to proceed first in order to provide information and subsequently obtaining consent following the counselling. The Indian Council of Medical Research, Ethical Guidelines for Biomedical Research on Human Subjects 2006 and Statement of specific principles of ART, under the principles of Informed Consent provide for prior counselling with explanation of various risk factors associated with ART procedures to be in simple language of understanding. There should be an obligation on the assisted reproductive technology clinics and banks for obtaining written consent from all the parties seeking assisted reproductive

technology in all possible stages of such treatment or procedures as provided under the earlier ART Bill 2010 and 2014.

5.117 It was also suggested to the Committee that a surrogate mother should have a representative who can attest to the surrogate having informed consent without coercion or family pressure. Such representative should not be a relative of the intended parents but a relative of the surrogate mother.

5.118 The Ministry of Women and Child Development has suggested that a system should be developed wherein women willing to provide services are empanelled by the State.

#### **Department's Response**

5.119 The Department has been silent on this issue.

#### **Recommendation of the Committee**

**5.120 The Committee observes that there is huge disparity in the bargaining power of surrogates vis-à-vis commissioning parents due to surrogates' impoverishment, illiteracy and the resultant lack of access to legal representation. Surrogate mothers are not informed of the effects of fertility medications and treatment protocols and as a result thereof, they are left completely unprotected and vulnerable in the matter. Therefore, mere explaining of all side effects of surrogacy procedure does not hold good in this context. The Committee, therefore, recommends an elaborate mechanism for obtaining full informed consent by a competent authority after comprehensive medical, social and psychological counselling and the risks associated with ART procedures, fertility medications and surrogate pregnancy. The competent authority should consist of independent functionaries including civil society members and NGOs working on women's health and rights. The Committee also feels that consent from the husband of surrogate mother is also important. The Committee accordingly recommends that suitable amendments be made in the Bill, incorporating the provisions for mandatory appointment of a competent authority to obtain full informed consent of surrogate mothers.**

**5.121 The Committee is also of the view that a mandatory consent from intending couple would be legally binding on all the stakeholders of the**

**surrogacy arrangement. The Committee endorses the suggestion of the Ministry of Women and Child Development that a surrogate mother should have an option to withdraw from the surrogacy arrangement if she chooses to do so before the start of the procedure. Empanelment of women wanting to be a surrogate by the State is a good suggestion of the Ministry as the surrogates can be identified, traced and counselled before giving their consent. The Committee, therefore, recommends to the Department to incorporate the changes in the proposed Bill on the above lines.**

**Clause 8 : Number of oocytes or embryos to be implanted.**

5.122 Clause 8 reads as under :

*The number of oocytes or embryos to be implanted in the surrogate mother for the purpose of surrogacy, shall be such as may be prescribed*

### **Suggestions**

5.123 The Committee has received various suggestions regarding the number of embryos to be implanted in the uterus of surrogate mother. It has been pointed out that it is only the embryo that are transferred and not the oocytes as provided in the present Bill. More than one embryo are implanted into uterus of surrogate which increases success rate in IVF / surrogacy avoiding thereby the repetition of IVF cycle further due to failure. Another viewpoint was that no more than two embryos should be transferred to the surrogate mother. The risks with embryo transfer (ET) should be explained in detail beforehand. The process of foetal reduction should not be permitted. The Committee understands that that most countries have restricted this to two or maximum three.

### **Department's Response**

5.124 In response to the suggestions related to number of embryos transfer in surrogate mother's uterus, the Department stated that the number of embryo to be implanted will be as per rules and regulations and suggestions would be considered while framing the rules.

### **Recommendation of the Committee**

**5.125 The Committee notes that the proposed Bill does not specify the number of embryo transfer with respect to the number of attempts or number of cycles or number of embryos that are implanted in the surrogate's body. The Committee is of the view that considering the complexities of the procedures and scope of exploitation of a woman's body, there should be a prescribed limit to number of embryo implants. However, the Committee is not in favour of including the number of embryos to be implanted in the main statute. Since the Department has assured to consider the suggestion while framing rules, the Committee recommends that the requisite safeguard limiting the number of embryos to be implanted, be provided in the Rules.**

#### **Clause 14: Constitution of National Surrogacy Board**

5.126 Clause 14 reads as under :

*14. (1) The Central Government shall, by notification, constitute a Board to be known as the National Surrogacy Board to exercise the powers and perform the functions conferred on the Board under this Act.*

*(2) The Board shall consist of—*

*(a) the Minister in-charge of the Ministry of Health and Family Welfare, the Chairperson, ex officio;*

*(b) the Secretary to the Government of India in-charge of the Department dealing with the surrogacy matter, Vice-Chairperson, ex officio;*

*(b) three women Members of Parliament, of whom two shall be elected by the House of the People and one by the Council of States, Members, ex officio;*

*(c) three Members of the Ministries of the Central Government in-charge of women and Child Development, Legislative Department in the Ministry of Law and Justice and the Ministry of Home Affairs not below the rank of Joint Secretary, Members, ex officio;*

*(e) the Director-General of Health Services of the Central Government, Member, ex officio;*

*(f) ten expert Members to be appointed by the Central Government in such manner as may be prescribed and two each from amongst—*

*(i) eminent medical geneticists or human embryologists;*

*(ii) eminent gynaecologists and obstetricians or experts of stri-roga or prasuti-tantra;*

*(iii) eminent social scientists;*

*(iv) representatives of women welfare organisations; and*

*(v) representatives from civil society working on women's health and child issues, possessing of such qualifications and experience as may be prescribed;*

*(g) four Chairpersons of the State Boards to be nominated by the Central Government by rotation to represent the States and the Union territories, two in the alphabetical order and two in the reverse alphabetical order, Member, ex officio;*

*(h) an officer, not below the rank of a Joint Secretary to the Central Government, in-charge of Surrogacy Division in the Ministry of Health and Family Welfare, who shall be the Member-Secretary, ex officio.*

## **Suggestions**

5.127 The stakeholders have suggested that the members who have the knowledge and experience in the field of law or human rights, bioethics and assisted reproduction should be in the National Surrogacy Board. It has also been pointed out that surrogacy is part of super specialized field and there should be adequate representation from related professional associations.

5.128 There was another suggestion that an independent Registrar having a law degree be appointed in the Board to explain the implications of the surrogacy agreement to the parties after obtaining their consent. He should register the surrogacy agreement in the Register to be kept separately by the State Boards.

## **Department's Response**

5.129 The Department has clarified that the Bill already incorporates the members from specialized fields in the National Surrogacy Board and the Appropriate Authority will be the monitoring and implementing body in the State and Union Territory.

## **Recommendation of the Committee**

**5.130 The Committee notes that there are twenty four members in the Board representing various government bodies and specialized fields. They may be from the fields of medical geneticists, human embryologist, gynaecology, obstetrician, stri-rog, prasuti-tantra, social science, women welfare organization, and representatives from the civil society working on women's health and child issues possessing requisite prescribed qualifications and experience. The Committee also notes that the National Board of Assisted Reproductive Technology in the draft ART Bill, 2014 is represented by experts from the field of assisted reproduction, andrology,**

**mammalian reproduction, biomedical sciences, embryology, bioethics, gynaecology, social science, law or human rights, public health and civil society representatives apart from the officials from government bodies. Since the National Surrogacy Board is a critical instrument for advising the Government on policy matters relating to surrogacy and supervising various bodies constituted under the Act, it is important that there should be appropriate mix of different categories of professionals in the Board who could help the Board play its designated role effectively. The Committee, therefore, recommends that the composition of the National Surrogacy Board may be modelled on that of the National Board of Assisted Reproductive Technology in the ART Bill, 2014. The Committee also sees logic in having a Registrar at the national level Board having in-depth legal knowledge of the concerned subject. The Committee, accordingly, recommends to the Department to include a Registrar in the Board who would facilitate the surrogacy procedure informing the legal implications of the surrogacy agreement to the concerned parties.**

#### **Clause 22: Functions of Board.**

5.131 Clause 22 deals with functions of Board and reads as under :

*22. The Board shall discharge the following functions, namely:—*

- (a) to advise the Central Government on policy matters relating to surrogacy;*
- (b) to review and monitor the implementation of the Act, rules and regulations made thereunder and recommend to the Central Government, changes therein;*
- (c) to lay down code of conduct to be observed by persons working at surrogacy clinics; to set the minimum standards of physical infrastructure, laboratory and diagnostic equipment and expert manpower to be employed by the surrogacy clinics;*
- (d) to oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure their effective performance;*
- (e) to supervise the functioning of State Surrogacy Boards; and*
- (f) such other functions as may be prescribed.*

#### **Suggestions**

5.132 It has been suggested that the regulatory authority should also maintain a Registry for surrogates, ART banks and fertility clinics.

#### **Department's Response**

5.133 The Department is silent on the matter.

### **Recommendation of the Committee**

**5.134 Keeping in mind the complexities and ambit of the surrogacy procedures and to effectively regulate and monitor the entire spectrum of this field, the Committee appreciates the need to keep a record of all the cases of surrogacy from the beginning of the process till its end. Having a centralized database at the National level would be a step in right direction so as to monitor the surrogates, surrogacy clinics and the commissioning parents. All State Surrogacy Boards should be required to submit to the National Surrogacy Board, data on the surrogacy services and arrangements. Therefore, the Committee is in unison with the suggestion of keeping a registry at the national level having details of the registration and conduct of every surrogacy clinic, surrogacy arrangements, including its stakeholders, taking place across the country. Such a registry will also help in tracking the surrogate mothers who will act as surrogate only once in their lifetime. The Committee, therefore, recommends the Department that a National Registry should be maintained on similar lines as in the ART Bill, 2014 which contains details of all the ART clinics and ART banks, nature and type of services provided, outcome of the services etc.**

### **Clause 23: Constitution of State Surrogacy Board**

5.135 Clause 23 deals with Constitution of State Surrogacy Board and reads as under:

*23. Each State and Union territory having Legislature shall constitute a Board to be known as the State Surrogacy Board or the Union territory Surrogacy Board, as the case may be, which shall discharge the following functions, namely:—*

*(i) to review the activities of the appropriate authorities functioning in the State or Union territory and recommend appropriate action against them;*

*(ii) to monitor the implementation of the provisions of the Act, rules and regulations made there under and make suitable recommendations relating thereto, to the Board;*

*(iii) to send such consolidated reports as may be prescribed in respect of the various activities undertaken in the State under the Act to the Board and the Central Government; and*

*(iv) such other functions as may be prescribed.*

### **Suggestions**

5.136 It has been pointed out by stakeholders that the State Board is given under Chapter-V titled National Surrogacy Board whereas the State Board should have been under a separate chapter. The State Surrogacy Board should have members who have the knowledge and experience in the field of law or human rights, bioethics and assisted reproduction. It has also been suggested that every State Surrogacy Board or Union Territory Board shall constitute District Surrogacy Boards for smooth implementation of the provisions of the Act at the grassroots level. This District Surrogacy Board should consist of an officer not below the rank of a Joint Secretary to the Central Government or the State Government, in-charge of the Surrogacy Division in the Ministry of Health & Family Welfare. There should also be a Registrar of the Board in each District Surrogacy Board to explain the implications of the surrogacy agreement to the parties, obtaining their consent and register the surrogacy agreement in the Register.

5.137 Stakeholders have informed that there is no mention of the reporting mechanism of the Appropriate Authority. They suggested that the Appropriate Authority should be made responsible to report its activity to the National and State Surrogacy Board regularly. Furthermore, Board's accountability to report should also be specified in the Bill.

### **Department's Response**

5.138 The Department is silent on these issues.

### **Recommendation of the Committee**

**5.139 The Committee recommends that the State/ Union Territory Surrogacy Board may be structured on the lines of the Committee's recommendation made in respect of the National Surrogacy Board.**

### **Clause 32 : Appointment of appropriate authority.**

5.140 Clause 32 reads as under :

**32. (1 )** *The Central Government shall, within a period of ninety days from the date of commencement of this Act, by notification, appoint one or more appropriate authorities for each of the Union territories for the purposes of this Act.*

*(2) The State Government shall, within a period of ninety days from the date of commencement of this Act, by notification, appoint one or more appropriate authorities for the whole or part of the State for the purposes of this Act.*

*(3) The appropriate authority, under sub-section (1) or sub-section (2), shall,—*

*(a) when appointed for the whole of the State or the Union territory, consist of—*

*(i) an officer of or above the rank of the Joint Director of Health and Family Welfare Department—Chairperson;*

*(ii) an eminent woman representing women's organisation—Member;*

*(iii) an officer of Law Department of the State or the Union territory concerned not below the rank of a Deputy Secretary—Member; and*

*(iv) an eminent registered medical practitioner—Member:*

*Provided that any vacancy occurring therein shall be filled within one month of the occurrence of such vacancy;*

*(b) when appointed for any part of the State or the Union territory, be officers of such other rank as the State Government or the Central Government, as the case may be, may deem fit.*

## **Suggestions**

5.141 The stakeholders have suggested that the Appropriate Authority should consist of members who have the knowledge and experience in the field of bioethics and assisted reproduction.

5.142 They mentioned that the Bill provides for only one civil society member in Appropriate Authority. According to them more civil society members should be included in the Appropriate Authority, the National Board and also in State Boards in order to bring transparency in implementation. Moreover, the medical practitioner should be from Government Sector, so that s/he has less or no business interest out of the surrogacy arrangements.

## **Department's response**

5.143 According to the Department the provision as suggested has already been incorporated in the Bill.

## **Recommendation of the Committee**

**5.144 The Committee agrees with the suggestion of having a wide representation of members from surrogacy related fields. The Committee**

**recommends to the Department to include experts having knowledge and experience of bioethics and assisted reproduction and also have more than one civil society member as the whole arrangement of surrogacy has social, psychological, physical and emotional implications for all involved in the procedures. The Committee also recommends that a single window system should be set up for registration and reporting of surrogacy clinics so that it is easier for the clinics to follow the law.**

**Clause 35 : Prohibition of commercial surrogacy, exploitation of surrogate mothers and children born through surrogacy.**

5.145 Clause 35 provides as under :

*35. (1) No person, organization, surrogacy clinic, laboratory or clinical establishment of any kind shall—*

*(a) undertake commercial surrogacy, provide commercial surrogacy or its related component procedures or services in any form or run a racket or an organized group to empanel or select surrogate mothers or use individual brokers or intermediaries to arrange for surrogate mothers and for surrogacy procedures, at such clinics, laboratories or at any other place;*

*(b) issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding commercial surrogacy by any means whatsoever, scientific or otherwise;*

*(c) abandon or disown or exploit or cause to be abandoned, exploited or disowned in any form the child or children born through surrogacy;*

*(d) exploit or cause to be exploited the surrogate mother or the child born through surrogacy in any manner whatsoever;*

*(e) sell human embryo or gametes for the purpose of surrogacy and run an agency, a racket or an organisation for selling, purchasing or trading in human embryos or gametes for the purpose of surrogacy;*

*(f) import or shall help in getting imported in whatsoever manner, the human embryo or human gametes for surrogacy or for surrogacy procedures.*

## **Suggestions**

5.146 The Committee has received various suggestions for and against commercial surrogacy practices, which have been dealt with under clause 2(f) in earlier part of this Report. On some other issues like exploitation of the

surrogate mother, the surrogate child, sex-selective surrogacy, sale of gametes, etc., the following suggestions/ submissions were received by the Committee:

- (a) The Surrogacy Bill prohibits and penalizes “exploitation of surrogate mother” but the term “exploitation of surrogate mother” is not defined in the Surrogacy Bill. There is no prohibition, no offense of “human trafficking, abduction or inter country movement of surrogate mother for “bodily exploitation for gestation, extracting oocytes (eggs)/ gametes” without their consent under force or coercion or threat or under deception, for commercial purposes or vested interest. Therefore, it is suggested that the Surrogacy Bill may include all such possible means of exploitation and be declared a punishable offense under Surrogacy Bill.
- (b) As regards exploitation of surrogate child, it has been pointed out that there is no prohibition, no offense of “human trafficking, abduction or inter country movement of child born of surrogacy in the proposed Bill. Though the Surrogacy Bill prohibits “exploitation of surrogate child,” but the term “exploitation of surrogate child” is not described or defined in the Bill. Considering the illicit practices of child trafficking under the garb of surrogacy at national and at international level, it has been suggested that the term “exploitation of surrogate child under surrogacy” should provide for abduction, trafficking or sale, auction and inter country movement of child conducted in the guise of surrogacy.
- (c) It has also been pointed out that the Surrogacy Bill is silent on incorporating relevant provisions on the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. There is no prohibition, no offense of “sex selective surrogacy” or surrogacy to have child of a pre-determined sex” or no prohibition on conduct of sex selective techniques (pre natal,

post natal) in guise of surrogacy to have child of desired sex , no prohibition on “use of pre genetic diagnosis (PGD) for detection of sex-linked genetic disorders” by screening for carriers of X-linked, Y linked genetic diseases thereby causing sex selective surrogacy. It has been suggested that a strict prohibition on such practices and penalization on the “sex selective surrogacy” needs to be in place.

(d) Another issue that has been raised is that there is no offense, no punishment, no penalization on the practice of *Twiblings* i.e “using of two surrogate mothers” for successive embryo transfers at the same time or simultaneously by the same intending couples. This *Twibling* is associated with multiple embryo transfers or multiple pregnancies among surrogate mothers which is highly dangerous to the health of surrogate mothers and is a grave misuse of surrogacy. Therefore, it has been suggested that there should be strict prohibition and penalization on couples who use more than one surrogate at any given time.

(e) Stakeholders have pointed out that prohibition on sale of gametes i.e., human sperm and egg will also prohibit the availability of human sperm and egg to infertile couples for in-vitro fertilization and surrogacy.

#### **Department's Response**

5.147 The Department has not addressed the concerns raised in the above suggestions.

#### **Recommendation of the Committee**

**5.148 The Committee in the earlier part of this Report has recommended that compensated surrogacy be permitted. The Committee recommends that the spirit of the Committee’s recommendation in this regard be captured and Clause 35 be modified accordingly. As regards the exploitation of surrogate mothers and children born through surrogacy, the Committee notes that the Bill lacks clarity about certain specific offences like human trafficking, abduction or inter-country movement of**

surrogate mother or child for surrogacy purposes. Therefore, the Committee recommends that the Bill should have explicit provisions prohibiting inter-country movement of surrogate mother or child.

5.149 The Committee has noticed that although Clause 7 provides for prohibition to abandon the child born through surrogacy on the reasons of the sex of the child; it nowhere prohibits sex selective surrogacy. It again does not prohibit conduct of sex selective techniques (pre-natal, post natal) in the name of surrogacy to have a child of desired sex and on use of pre-genetic diagnosis for detection of sex-linked genetic disorder. In view of the above, the Committee feels that the whole purpose of the Bill would get defeated if there is no provision on sex selective techniques / surrogacy which may lead to exploitation of surrogate mother and child. Therefore, the Committee recommends that the provisions of the Bill may be harmonized with relevant provisions of Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 and suitable drafting changes be made in the Bill.

5.150 The Committee treats the practice of twiblings as a grave offence which directly leads to exploitation of the surrogate mother. Considering the high chances of such misconduct and its associated risks for the well being of the surrogate mother, the Committee recommends that the Bill should have specific provisions for prohibition of such a practice and penalization of couples and clinics on utilizing two surrogates for same intending couple at same time.

5.151 The Committee notes that selling and buying human gametes or embryos for surrogacy is prohibited as per the provisions of the Bill and involvement of a third party i.e. donors who would donate egg/sperm are nowhere mentioned in the Bill. The Committee has already dealt with this issue in the earlier part of this Report and therefore, recommends even at the cost of sounding repetitive that the Bill should include adequate provision of donors for gametes for the use of intending couple during surrogacy procedure.

**Clauses 35(2), 36, 37, 38 : Prohibition of commercial surrogacy, exploitation of surrogate mothers and children born through surrogacy; Punishment for contravention of provisions of Act; Punishment for initiation of commercial surrogacy; Penalty for contravention of provisions of Act or rules for which no specific punishment is provided**

5.152 Clauses 35(2), 36, 37, 38 read as under :

*Clause 35(2): Notwithstanding anything contained in the Indian Penal Code, contraventions of the provisions of clauses (a) to (f) of sub-section (1) (of clause 35) by any person shall be an offence punishable with imprisonment for a term which shall not be less than ten years and with fine which may extend to ten lakh rupees.*

**36.** *(1) Any registered medical practitioner, gynaecologists, paediatrician, human embryologists or any person who owns a surrogacy clinic or employed with such a clinic or centre or laboratory and renders his professional or technical services to or at such clinic or centre or laboratory, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act (other than the provisions referred to in section 35), rules and regulations made thereunder shall be punishable with imprisonment for a term which shall not be less than five years and with fine which may extend to ten lakh rupees.*

*(2) In case of subsequent or continuation of the offence referred to in sub-section (1), the name of the registered medical practitioner shall be reported by the appropriate authority to the State Medical Council concerned for taking necessary action including suspension of registration for a period of five years.*

**37.** *Any intending couple or any person who seeks the aid of any surrogacy clinic, laboratory or of a registered medical practitioner, gynaecologist, paediatrician, human embryologist or any other person for commercial surrogacy or for conducting surrogacy procedures for commercial purposes shall be punishable with imprisonment for a term which shall not be less than five years and with fine which may extend to five lakh rupees for the first offence and for any subsequent offence with imprisonment which may extend to ten years and with fine which may extend to ten lakh rupees.*

**38.** *Whoever contravenes any of the provisions of this Act, rules or regulations made thereunder for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment for a term which shall not be less than three years and with fine which may extend to five lakh rupees and in the case of continuing contravention with an additional fine which may extend to ten thousand rupees for every day during which such contravention continues after conviction for the first such contravention.*

### **Suggestions**

5.153 The Surrogacy Bill enumerates a series of grounds for culpability for couples including commissioning commercial surrogacy. These provisions of Surrogacy Bill by imposing penal sanctions on intending parents cause

criminalization for exercising reproductive rights, family making choices, privacy rights.

5.154 The nature & quantum of criminal sanctions on Intending Couples under Surrogacy Bill has been referred as unjustified and unreasonable. The quantum of punishment extends to ten years that is close to a life time imprisonment and the offences are non bailable. Considering the medical condition and background of the couples, it may be noted the couples, are not hardened criminals who need reform, repentance, correction. They neither cause law and order problem nor are they a threat to larger community if left in society. Hence, such stringent, excessive punishment for the same may not be justified. It is important to note that there is no element of criminality in a surrogacy arrangement, nor do the couples or individuals bear any malice or criminal intent. Therefore, making such innocent, bonafide couples or individuals suffer such severe imprisonment alongwith fine would serve no purpose of justice or reform, repentance or deterrence but only impose culpability penal sanctions on the innocent.

5.155 It has also been pointed out by stakeholders that the criminal provisions in the current Bill do not adhere to basic principles of criminal law and basic constitutional guarantees. For instance, Sections 35(2), 36, 37 and 38 provide for minimum punishments without stipulating the maximum punishment. This clearly violates Article 20 (1) of the Constitution.

5.156 It has been pointed out that imposing criminal sanctions would affect surrogate child's interest. Criminal actions on intending couples or individuals may gravely prejudice interest of child born through such surrogacy. The rights of child including right to parentage, custody, citizenship would be affected. Any such punishment would separate the child from its own biological parents, the child would be abandoned, denied of custody care arrangement of child and would make the child vulnerable to being declared parentless, stateless, state orphaned.

#### **Department's response**

5.157 The Department is silent on this issue.

#### **Recommendation of the Committee**

**5.158** The Committee notes that Clause 36(1) deals with punishment for surrogacy professionals or any other person who owns a surrogacy clinic or employed with such a clinic or centre etc and renders his professional or technical services. This clause stipulates imprisonment for minimum five years and fine upto ten lakh rupees. The Committee would like to emphasize that transgressions which are purely procedural or technical in nature should be viewed in a broader perspective and should not invite stringent provisions. On the other hand, the fraudulent practices and activities should be dealt with severely and in a deterrent fashion. The Committee would therefore, recommend that the gravity of punishment in clause 36(1) be modified suitably.

**5.159** The Committee agrees with the contention of the stakeholders that surrogacy and its related procedures are not criminal activities. It is a procedure which is an advancement in the medical science in the field of assisted reproductive technology to have a biological child for infertile couple or for those who are unable to have their own child due to medical reasons. It is also true that the concerned parties are neither criminals nor are they threat to the society. Moreover, penal sanctions on the commissioning parents would have a definite impact on the surrogate child. The child would be separated from his/her own biological parents, and would be denied of custody care arrangement defeating the very purpose of the Bill.

**5.160** In view of the above, the Committee is of the view that punishment should be commensurate with the level or degree of infraction committed. Minor infractions of law should be considered in mild manner and not carry any criminal liability. Also, if default is unintentional, the same should be taken into consideration without rigidly giving a harsh punishment. The Committee, accordingly, recommends that clause 37 may be modified suitably, keeping in view the best interest of the surrogate child.

**5.161 The Committee also notes that the criminal provisions as contained in clauses 35, 36, 37 and 38 provide for a minimum punishment and no maximum punishment, which is unheard of in any criminal legislation. This is indicative of the fact that the Department has not exercised the required due diligence at the time of drafting the Bill. The Committee, therefore, recommends that the necessary modifications relating to the maximum punishment be incorporated in the Bill.**

## **VI. MISCELLANEOUS POINTS**

6.1 The Committee has received many submissions containing issues and concerns that have been raised by the stakeholders with respect to the proposed Surrogacy (Regulation) Bill, 2016 that have not been considered in the said Bill or have not been given due importance. On examining these issues, the Committee found them relevant for surrogacy and related procedures and worth incorporating in the Bill. These are as follows:

### **I. SURROGACY AGREEMENT**

#### **Suggestions**

6.2 The Committee has received various suggestions regarding incorporating a provision of surrogacy agreement in the proposed Bill in the languages understood by all the stakeholders of the surrogacy arrangement. It has been suggested that surrogacy agreement should be a duly signed, notarised and registered written agreement made prior to the initiation of surrogacy procedure between the intending couple and the woman chosen to be the surrogate to have a binding effect on the intending couple to take the delivery of baby/babies born out of surrogacy, irrespective of any condition/abnormalities in the baby. This would also give protection to surrogate in case abnormal baby/babies is/are born.

6.3 It has been suggested that instead of two separate agreements first between commissioning parents and surrogate mother and second between IVF clinic and the surrogate mother, a tripartite agreement between the commissioning parents, the surrogate mother and the IVF Clinic should be

provided for, because the rights and liabilities of all three parties are intertwined and interdependent on the performance of the parties.

6.4 Ministry of Women & Child Development is of the opinion that every surrogacy should be backed by a comprehensive legally binding agreement between the intending parent(s) and surrogate mother.

### **Department's Response**

6.5 The Department in response to the suggestion of having a provision of surrogacy agreement has stated that the parental order will be equal to a surrogacy agreement passed by the court of the Magistrate of the first class or above.

### **Recommendation of the Committee**

**6.6 The Committee is of the view that mere parentage order issued by the first class magistrate will not suffice. If the intent of the Bill is to protect the surrogate mothers and children, it must provide a legal framework for a comprehensive surrogacy agreement containing all safeguards. The agreement should mandatorily provide insurance, monetary compensation to surrogates, the manner of its disbursement and pre / post delivery care of the surrogates. It should also contain a provision for nourishment of the surrogates not just during the pregnancy but also in the post partum period; comprehensive healthcare for a period of five years starting from the date any medication for surrogacy procedure is begun; legal, medical and psychological counselling etc. Since the surrogates are predominantly uneducated, the contract should be made available in the language they fully understand and should be explained properly to them. The surrogacy agreement should be registered also. The jurisdiction for registration should lie before the Registrar where surrogate mother resides or where the intending parents resides or where the agreement is executed. Since a surrogacy agreement is a legal document, it will act as bedrock of the surrogacy arrangement and shall have a legal binding on all the parties**

**involved in the surrogacy and help in solidifying the rights and duties of both the participants to the arrangement. Therefore, the Committee recommends that an agreement of surrogacy among all the stakeholders of the facility i.e the intending parents, surrogate mother and the surrogacy clinic should be made a mandatory document for the surrogacy arrangement for them. Necessary amendments/ alternate clauses may accordingly be incorporated in the Bill.**

## **II. CHILD RIGHTS**

### **Suggestions**

6.7 It has been submitted that in the development of surrogacy in India the child in the womb is at the centre of whole surrogacy arrangement, and is as such entitled for legal protection against any acts of commission and omission by the other parties to the contract. Therefore, an Act for protection of unborn child is required to be enacted simultaneously. After all the entire purpose is to complete the family of the infertile couple and bring them joy and happiness. The proposed Bill does not incorporate sufficient safeguards for the protection of the rights of children born through surrogacy. In UK, Congenital Disabilities /Civil Liabilities Act 1976 provides for the protection of the rights of the unborn child.

6.8 The fact that the Surrogacy Bill fails to provide for insurance for the child born through surrogacy proves that it overlooks such situations where commissioning or intending parents may incur death, disability, sickness during the process of surrogacy leaving the child parentless at birth. It was suggested that the Bill requires commissioning couples to secure appropriate insurance for child or children the surrogate delivers, at the time of signing the agreement through an appropriate Insurance Policy like Jeevan Balya for maintenance of the child up till the age of twenty-one years.

6.9 It has also been suggested that a definition of 'Surrogate child" should be added in the Bill which means: 'a human life which is conceived in womb of surrogate mother by process of surrogacy. A surrogate child, on conception till birth and there after shall be deemed to be a surrogate child of intended couple.

### **Department's Response**

6.10 The Department has stated that rights of child born through surrogacy have already been incorporated in the Bill.

### **Recommendation of the Committee**

**6.11 The Committee strongly believes that the interest of the surrogate child needs to be secured in all situations including unforeseen contingencies. The Committee, therefore, recommends that the Bill should have a comprehensive provision entailing adequate insurance coverage for the unborn child. The Committee is of the view that mere insurance for the surrogate child would not suffice and recommends that the Bill should contain provisions for Bank guarantees / fixed deposits for taking care of the expenses of the surrogate child in any emergent situation. Such a cover would ensure financial support for the surrogate child in case of any eventuality. It would also ensure cover for a child born with any abnormality/ disability. It would also be the responsibility of the State Government to take care of all abandoned children born out of surrogacy.**

**6.12 The Committee recommends that surrogate child is defined separately in the Bill so as to distinguish the surrogate child from a child born to a couple who have undergone ART procedures themselves.**

### **III. Provision for breast milk for surrogate child**

#### **Suggestions**

6.13 Various stakeholders have suggested that the Bill should make provision for breastfeeding after the delivery of child or provide that the surrogacy agreement should have mandatory provision for the same. In this regard, the Ministry of Women and Child Development submitted that care should be taken to monitor that child/children born out of this arrangement are provided with six

months of breastfeeding and for the purpose, facilities of Breast Milk Banks etc. may be utilized.

### **Department's Response**

6.14 The Department has submitted that it would consider to incorporate the suggestions during framing of rules and regulations.

### **Recommendation**

**6.15 The Committee observes that the provision of breastfeeding or making available breast milk for child born out of surrogacy finds no place in the proposed Bill. It is the right of the child to have mother's milk for adequate nutrition for his/her well being. As regards the way mother's milk is provided to the child, the Committee is of the view that the provision of breast milk should be allowed by way of Human Milk Bank services only and not by direct breastfeeding by surrogate mother as six months of breast feeding will establish an emotional attachment of surrogate child with the surrogate mother. It would be very difficult for the surrogate mother to give up the child leading to complications. Therefore, the Committee suggests that the surrogate child should get mother's milk for initial six months and recommends the Department to include a provision in the Bill for providing breast milk to the surrogate child through Human Milk Bank services only.**

## **IV BIRTH CERTIFICATE**

### **Suggestions**

6.16 It has also been given to note that The Birth Registration Act provides for recognition of birthing mother as "natural mother" or "natural parent". Accordingly, the name of birthing mother is registered in the birth certificate as mother for all legal purposes.

6.17 It has been pointed out by stakeholders that the Bill has no provision on "birth certificate of child born of surrogacy. It is suggested that the Surrogacy Bill may provide for issue of birth certificate to child born of surrogacy with

indicating the names of intending couple who commissioned surrogacy. Therefore, it has been suggested that the existing Birth Registration Act may be amended by making a provision in case of child born of surrogacy through assisted reproductive technology by allowing the name of women commissioning surrogacy to be placed in the birth certificate not the birthing or surrogate mother as an exception.

### **Department's Response**

6.18 The Department has stated that a parental order passed by the court of the Magistrate of the first class or above will be equal to a birth certificate.

### **Recommendation**

**6.19 The Committee notes that there is no such provision regarding birth certificate in the Surrogacy Bill while such provision is there in the draft ART Bill, 2014. The Committee notes that the Bill provides for an intending couple to get a parentage order from Court to establish their parentage over the surrogate child. The Committee recommends that the Bill should also have the provision of birth certificate which is a legal document for the child born out of surrogacy with the names of the commissioning parents on it and for the requirement of date of birth of the surrogate child. Since in surrogacy arrangement, the birth mother is not genetically related to the child, logically her name should not be written on the birth certificate. Therefore, the Committee agrees with the suggestion of making an amendment in the Birth Registration Act for the cases of surrogacy arrangements in order to avoid legal complexities related to parentage of the child born out of surrogacy. Therefore, the Committee recommends to the Department to incorporate the provision of birth certificate of the surrogate child in the Surrogacy Bill and to take up the matter with relevant authorities to make necessary amendments in the existing rules of registration of birth.**

## **V. DEFINITION OF GAMETE DONORS**

### **Suggestions**

6.20 It has been pointed out by some stakeholders that the Surrogacy Bill has not defined the gamete donors and the process of seeking gamete donors (egg and sperm donors).

#### **Department's Response**

6.21 The Department is silent on this issue.

#### **Recommendation**

**6.22 The Committee notes that the Bill allows only Gestational surrogacy wherein the surrogate mother would only assist in carrying pregnancy and hand over the surrogate child to the intending couple. However, there is no definition of gamete donors in the Bill and no mention of process of seeking human gamete donors for the purpose of surrogacy. Since, gamete donation is part of surrogacy procedure and may entail huge scope of exploitation associated with the related procedures, the Committee feels that it is important to specify the role of gamete donors in the Surrogacy Bill. Also, as recommended earlier, the national registry would have a data base of such donors too. Therefore, the Committee recommends to the Department to include the definition of gamete donors in the Bill appropriately. The Committee also recommends that egg donation should not be allowed as a profession and a woman should be permitted to donate her eggs only once in her lifetime.**

## **VI. DISPUTE RESOLUTION SYSTEM**

### **Suggestions**

6.23 Some stakeholders have raised concern over the absence of provision for dispute resolution in the proposed Bill. It has been suggested that a mandatory counselor at the Surrogacy Clinic should act as a mediator for any disputes that arises in the surrogacy arrangement.

#### **Department's Response**

6.24 The Department is silent on this issue.

## **Recommendation of the Committee**

**6.25** The Committee notes that the Bill does not provide for any dispute resolution mechanism between the surrogate mother, intending parents and the clinic. In case of any conflict of interest or disagreement between the surrogate mother and the intending couple, the surrogate mother has no one to advocate her case. To handle such issues that can be dealt at the clinic level, there is a need to have an independent agency for resolution of disputes or redressal of any grievances of any of the parties involved in surrogacy process. The authority so created should have quasi-judicial powers to get its orders implemented. The Committee, accordingly, recommends to the Department to have an agency/body for the said purpose and incorporate enabling provisions to this effect in the Bill.

## **VII. PROVISION FOR DNA TESTING**

### **Suggestions**

**6.26** Some of the stakeholders raised concern over the lack of provision in the Bill to have a scientific proof of parentage of intending couple about the child born through surrogacy.

### **Recommendation**

**6.27** The Committee notes that there is no provision in the proposed Bill to have a scientific proof to establish parentage of the intending couple over their child born through surrogacy. In order to avoid any kind of custody disputes between the surrogate mother and the intending couple or to confirm the genetic connection between the child and intending couple, there should be a scientific mechanism to establish the fact that the child born through surrogacy is the biological child of the intending couple which can be done through DNA Testing. The Committee also feels that DNA testing can help in determining parenthood of intending couple so that surrogacy clinic do not indulge in any kind of unethical practices. The Committee, therefore, recommends to the Department to incorporate the provision allowing DNA testing in the Bill in circumstances where there is

**need to have genetic determination of parenthood in any surrogacy arrangement so that surrogacy clinics do not indulge in any kind of fraud.**

### **VIII. ASSISTED REPRODUCTION TECHNOLOGY (ART) REGULATION BILL**

6.28 The Committee has observed that the Assisted Reproductive Technologies (ART) Bill, drafted in 2008, was subjected to frequent review and redrafting once in the year 2010, then in the year 2014. The Bill aimed at proper regulation and supervision of Assisted Reproduction Technology (ART) clinics and banks in the country and for prevention of misuse of this technology including surrogacy and for safe and ethical practice of ART services. At present, the ART( Regulation) Bill is under consideration in the Department of Health Research, Ministry of Health & Family Welfare, Government of India.

6.29 The Committee has been given to understand by the stakeholders that the ART Bill has been pending before the Government for long and the Surrogacy ( Regulation ) Bill, 2016 has been brought bypassing the ART Regulation Bill. On being asked about the reasons for suddenly introducing the Surrogacy (Regulation) Bill, the Department has stated that they would soon bring the ART Regulation Bill after the Surrogacy Bill.

6.30 One of the stakeholders submitted before the Committee that the very essence of the Surrogacy (Regulation) Bill, 2016 was explained in the ART Bill and hence there cannot be a Surrogacy Bill without ART Bill. She was of the view that Surrogacy Bill cannot be passed in isolation as the procedure of surrogacy cannot take place without Assisted Reproductive Technology. Surrogacy Bill was already included in ART Bill and by not passing the ART Bill along with the Surrogacy Bill, many problems could come to surface. She also pointed out while drafting the Surrogacy (Regulation) Bill, no one from the Drafting Committee of Government of India were consulted.

6.31 It has also been pointed by stakeholders that the Surrogacy Bill does not touch various points related to ART like surrogacy agreement, gamete donor, ART banks and clinics, records, foetal reduction, provision of National Registry of ART Banks and clinics, duties of ART clinics etc. Further, many provisions of the ART Bill have been drafted with more clarity and precision

when compared with the Surrogacy Bill like definitions of surrogacy, surrogate mother & infertility, organization structure, powers and functions of the regulatory bodies etc.

**6.32 The Committee observes that the Assisted Reproductive Technologies (ART) Bill, 2008 had been drafted in 2008 and revised in 2010 and 2014. Since then, it has been lying with the Government. Moreover, the draft ART Bill also included provisions on regulation of surrogacy facilities. The Committee takes note of the inordinate delay in bringing forth the draft ART Bill especially in view of the fact that there has been mushrooming of ART clinics across the country offering various services from IVF to surrogacy etc. The Committee fails to comprehend the reasons behind bringing a fresh Bill specifically on surrogacy, when a detailed, comprehensive and all-encompassing Bill on ART services had already been drafted by the Department. The Committee, therefore, would like to be apprised of the reasons behind such prompt decision to bring a separate legislation for surrogacy without the ART Bill.**

**6.33 The Committee strongly believes that with the rapid advancement of science and technology in all spheres of life, there is an urgent need to regulate the use of modern techniques especially w.r.t. assisted reproduction and use of ART for surrogacy. Hence, the Committee feels that along with surrogacy regulation, there is urgent need to regulate the ART clinics across the country. It is a fact that surrogacy procedures cannot be conducted without assisted reproduction techniques and therefore, mere enactment of the Surrogacy Bill would not serve the purpose of the controlling commercialization of the surrogacy facilities across the country in the absence of regulation of assisted reproductive clinics and banks where surrogacy is being conducted as ART Clinics and Surrogacy Clinics are not separate. The Committee, therefore, strongly recommends that the ART Bill should be brought forth before the Surrogacy (Regulation), Bill, 2016.**

