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SURROGACY LAWS IN AUSTRALIA AND NEW ZEALAND

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BY STEPHEN PAGE[1]

OVERVIEW

In broad terms, the laws in Australia and New Zealand concerning surrogacy are broadly similar. They criminalise commercial surrogacy and regulate altruistic surrogacy. At that point, the laws diverge. Of the nine jurisdictions: New Zealand plus six Australian States and two Australian Territories, the laws are different in each place.

I have kept this paper to a broad overview, to try and keep the length down.

New Zealand has a different method of regulating surrogacy to Australian jurisdictions. There are also proposals in New Zealand to change the law there. Accordingly, I'll start with an overview as to where Australians and New Zealanders undertake surrogacy.

It has been estimated by the New Zealand Law Commission that there are 50 surrogacy births to New Zealanders every year. This figure is pretty broad. On that estimate, about half of all New Zealand surrogacy births are overseas and half are domestic. Traditional surrogacy is not captured in NZ's ANZARD data.

Australia has better data, but there are significant gaps in the data. We know how many children are born through gestational surrogacy through IVF clinics in Australia. What we don't know is how many children are born via traditional surrogacy anywhere in Australia. We know how many Australian children are born overseas through surrogacy.

We know Australian domestic data from one prime source and four secondary sources. The prime source is from ANZARD, specifically its annual reports, showing the number of children born through Australia and New Zealand IVF clinics through gestational surrogacy. I was critical of ANZARD for not giving a breakdown for New Zealand, but then recently found separate ANZARD figures for New Zealand. With a simple case of maths, it is therefore possible to calculate the number of children born via gestational surrogacy in Australia and New Zealand.

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Table 1: The number of children born through gestational surrogacy in Australia and New Zealand: ANZARD

Year	Australian and New Zealand births	Australian births	New Zealand births
2009	19	14	5
2010	16	11	5
2011	23	19	4
2012	19	17	2
2013	35	28	7
2014	36	29	5
2015	52	44	8
2016	45	38	7
2017	62	51	11
2018	86	74	18
2019	73	61*	12*
2020	91	76*	15*

*Estimates calculated on a per capita basis by me.

The secondary sources of information come from:

- Childrens Court of Queensland annual reports as to the number of parentage orders made in Queensland. This gives an indication of the number of orders made, but not the number of children. It is a broad estimate of the number of children, but I have had a couple of cases (and no doubt there are others)where twins have been born.

- Victoria has two sources of data – VARTA records the number of surrogacy births each year in its annual reports; the County Court of Victoria in its annual reports records the number of substitute parentage orders made.

- The Reproductive Technology Council of Western Australia in its annual reports records the number of surrogacy births recorded in Western Australia. A number isn't recorded every year. The number has to reach five for the purposes of privacy purposes before it is recorded. The result is that it is possible to definitively say that in most years in Western Australia, one child is born there through surrogacy.

The source of data for overseas surrogacy for Australians is from the Department of Home Affairs which records the number of applications for Australian citizenship by descent for children born who are born overseas. This data is fascinating.

Table 2: Comparison of domestic and international surrogacy, Australia 2009-2021

Year	Domestic Surrogacy Births	International Surrogacy Births
2009	14	10
2010	11	<10
2011	19	30
2012	172	266
2013	28	244
2014	29	263
2015	44	246
2016	38	204
2017	51	164
2018	74	170
2019	61*	232
2020	76*	275
2021	NK	223

ANZARD records its data based on calendar years. The Department of Home Affairs does so based on financial years.

As can be seen, in recent years in broad terms, for every child born in Australia via surrogacy, four are born overseas.

New Zealand researchers have described that the approach taken, first in Queensland, then the ACT and then New South Wales to ban international commercial surrogacy as a *"failed experiment"*. One couldn't argue with that. Not one person has been prosecuted under those laws. Instead, the move to criminalise people undertaking surrogacy overseas had the opposite effect. The best description would be that it was an own goal. The then minister in the New South Wales Government in 2010 moved in the House on the third reading of the *Surrogacy Bill* to amend it to ban overseas commercial surrogacy. Despite there having been a previous Parliamentary Inquiry and plenty of time for consultation, this move was done without consultation. Members of Parliament told me that they felt compelled to go along with the

Government's proposed change because they wanted surrogacy laws to be in place and the alternative to vote against it would mean that there was no surrogacy laws.

After these changes came into effect, there was a firestorm of publicity. Those who were in the midst of their overseas surrogacy journeys were outraged.

There was the inevitable reaction which included that of surrogacy advocates setting up seminars, particularly Surrogacy Australia, but even VARTA in Victoria about how to do surrogacy overseas.

The very thing that MPs wanted their residents not to do, which was to go to developing countries and in particular India, for surrogacy was the opposite of what was achieved. What in fact happened was that there was a huge increase in surrogacy between 2009 and 2012 and that increase primarily focused in India.

Table 3: Australian surrogacy births in India

Year	Number of births
2009	<10
2010	<10
2011	<10
2012	227
2013	191
2014	108
2015	74
2016	54
2017	14
2018	<5
2019	<5
2020	<5
2021	0

More Australian children are born via surrogacy in the US than at home: table 4.

Table 4: Australian children born via surrogacy in the US and at home

Year	Australian surrogacy births: US	Australian surrogacy births: Australia
2016	49	38
2017	66	51
2018	67	71
2019	95	61
2020	120	76
2021	76	N/K

The decline in the number of Australian births through India wasn't because of anything that occurred in Australia, except indirectly as a result of the *Baby Gammy* and related scandals. The decline of Australians going to India was because of steps that the Indian Government took- at first administrative, then regulatory and then by the Parliament by a passage of new laws. The demand for Indian surrogacy services stopped. Australian laws were not the cause of the reduction.

Although Thailand passed laws in 2014 to restrict surrogacy to foreigners, nevertheless Australian children have continued to be born there.

Table 5: Australian children born via surrogacy in Thailand

Year	Number of Australian surrogacy births
2015	97
2016	199
2017	12
2018	9
2019	10
2020	11
2021	8

The top 6 countries where Australians go for surrogacy is set out in table 6.

Table 6: Top 6 surrogacy countries for Australians (2021)

Rankings	Country	Number of Australian surrogacy births
1	US	76
2	Ukraine	38
3	Canada	28
4	Georgia	27
5	Mexico	9
6	Thailand	8
Total births top 6 countries:		**186**
Total births all countries:		**223**

THE STANDOUT EXAMPLE

The standout example about how Australian surrogacy laws work or don't work is that of Western Australia. This is demonstrated in the data. Western Australia has 10% of the Australian population. Its population is richer and younger than those of South Australia or Tasmania, for example. For the sake of the exercise, I have calculated that the number of children born overseas to WA residents is on a per capita basis, i.e. 10% of those births. That figure contrasts with one child a year born to WA residents through surrogacy in WA.

Table 7: Comparison of Western Australia domestic and international surrogacy births 2017-2021

Year	Domestic Births	International Births
2010	1	1
2011	1	3
2012	1	26
2013	1	24
2014	1	26
2015	1	24
2016	1	20

Year	Domestic Births	International Births
2017	1	16
2018	1	17
2019	1	23
2020	1	27
2021		22

Australian principal surrogacy laws

Australia's principal surrogacy laws are shown in table 8:

Table 8: Australia's principal surrogacy laws

Jurisdiction	Law
ACT	*Parentage Act 2004*
NSW	*Surrogacy Act 2010*
NT	*Surrogacy Act 2022*
Qld	*Surrogacy Act 2010*
SA	*Surrogacy Act 2019*
Tasmania	*Surrogacy Act 2012*
Victoria	*Assisted Reproductive Treatment Act 2008* *Status of Children Act 1974*
Western Australia	*Surrogacy Act 2008*

A summary of when Australian surrogacy laws might apply overseas is shown in table 9. This occurs either because of extra-territorial effect, or because of a related long arm law (which extends criminal offences in the law of that jurisdiction when elements of the offence are committed in that jurisdiction, or the effect of the offence occurs in that jurisdiction).

Table 9: Extra-territorial or long arm laws criminalising overseas commercial surrogacy

Jurisdiction	Extra-territorial?	Long arm?	Neither extra-territorial nor long arm?
ACT	Yes	Yes	N/A
NSW	Yes	Yes	N/A
NT	Yes	Yes	N/A
Qld	Yes	Yes	N/A
SA	No	Yes	N/A
Tas	No	No	Yes
Vic	No	No	Yes
WA	No	Yes	N/A

Those who assist their clients or patients to engage in commercial surrogacy offences or other related offences will typically be treated as principal offenders under local law.

I will now go around Australia clockwise, starting with Queensland.

QUEENSLAND

Surrogacy in Queensland is governed by the *Surrogacy Act 2010* (Qld). There have been no significant amendments (if any) to the Act since its enactment.

Surrogacy in Queensland involves, as it does with the other Australian States and Territories, a post-birth transfer of parentage by virtue of a court order, which is applied for typically 1-6 months post-birth. In Queensland, there is a requirement for a post-birth assessment of care arrangements for the child, called a surrogacy guidance report.

The application is made in the Childrens Court of Queensland, which is by a judge who holds a dual commission as a District Court judge. Therefore, there are a limited number of places in Queensland where parentage orders can be made.

Because of the decentralised nature of Queensland, and because of the nature of the Childrens Court, many more Childrens Court judges in Queensland make parentage orders than equivalent judges do in for example, South Australia or Victoria.

A Feature of going to Court

These days, typically, an appearance is required in court. The intended parents, surrogate and her partner all attend court. If there is legal representation at that stage, evidently so do the lawyers. The baby comes to court. Judges love seeing the babies.

There is a paper filing of material. I merely mention that because in other family law matters in the Federal Circuit and Family Court of Australia it is now electronic filing so we don't print off enormous wads of material. From recollection, there are 29 matters that are required to be met to comply with the Queensland *Surrogacy Act* and when all that material is put together, it is about 5 or 6cm in thickness.

Despite that bulk, when the matter proceeds, the hearing time typically only takes about five minutes. Judges usually read the material ahead of the court appearance. Satisfied that all the criteria under the Act have been met and that it is in the best interests of the child to make the order, the process occurs smoothly.

In Brisbane, the listing time varies. We might be told that there is a listing time of 10 a.m. but discover we're not on until considerably later. There will be other matters listed at the same time – bail applications for young people, mentions as to upcoming sentences, sentences and the like. Some judges want to deal with the babies first and so we get in and out of court quickly. Some judges are more concerned that there are children or young people in custody and want to deal with them first – in which case we have to wait.

The court is a strictly closed court which has the result that if we have another matter on, typically the other lawyers will be sitting at the back at the court (the Childrens Court generally being a closed court) and they get turfed out for our matter. On one occasion, the judge didn't close the court in that way and therefore criminal lawyers were able to see the magic that occurs with a parentage order hearing.

Usually, the judge gives wonderful warm words of congratulations at the time of making the order.

Due to representations that I and a couple of colleagues have made to the Queensland Law Society, which then made representations to the court, the usual practice is now that photographs are taken in the court of the baby and parents and others.

Only once have I seen a judge want to have her photograph taken. It turns out that she was a relative of one of the parties. Just so that we are clear, her Honour sought ethical guidance within the court as to whether she could hear the matter and then raised it as a procedural matter at the commencement of the hearing. All the parties were aware of the issue and no one took objection. It was a delightful appearance.

Once the order is made, as is the case with parentage orders made anywhere in Australia, then in accordance with section 60HB of the *Family Law Act*, the parents under the order are

recognised as the parents anywhere in Australia. If the parents are Australian citizens or permanent residents, then the child acquires their citizenship (if it is not already a citizen from the surrogate) by virtue of section 8 of the *Australian Citizenship Act 2007* (Cth).

Queensland (NSW, NT, SA and Tasmania) has flexibility compared to the ACT, Victoria and Western Australia in that Queensland allows the IVF to occur anywhere in the world.

The intended parents do not need to reside in Queensland (or for that matter in NSW or the NT) until the time of the making of the order. I have had a number of matters where the IVF has occurred overseas (because of the lack of an egg donor). I have had a number of matters where I have had clients who have lived overseas or interstate who have moved to Queensland (or NSW) in time for the making of the order (typically about the time of the birth of the child).

Traditional surrogacy in Queensland is available.

There is no discrimination under the law concerning intended parents.

Section 45A of the *Anti-Discrimination Act 1991* (Qld) allows providers of artificial reproductive technologies to discriminate on the basis of sexuality or relationship status. That section, in my view, falls foul of section 22 of the *Sex Discrimination Act 1984* (Cth), which prohibits that discrimination. As a general principle, if the Commonwealth law is valid as is the State law, then under the *Commonwealth Constitution*, the Commonwealth law prevails. In two previous cases, in Victoria and South Australia, those earlier provisions of section 22 were tested. In both cases, the State provisions (which restricted the availability of ART) gave way.

The Queensland Human Rights Commission has called for the abolition of this section. It has said that the section no longer has any utility. Aside from it being inequitable, IVF clinics don't rely on it – and regularly advertise their services to members of the LGBTQIA+ community.

The Queensland Government has accepted that recommendation in principle. We wait to see any changes to the law.

Queensland criminalises those who enter into or offer to enter into commercial surrogacy arrangements overseas, or make payments overseas.

Those laws apply to anyone who is ordinarily resident in Queensland. The intention is for those laws to apply around the world.

It is an offence to advertise for a surrogate, although there are qualifications to that, so that in some cases it is possible to advertise for a surrogate.

It is an offence to provide a service concerning a commercial surrogacy arrangement, but this is limited to medical assistance to the surrogate before she is pregnant.

These extra-territorial laws, as the figures demonstrate, don't work.

There aren't any proposed changes to the law on the horizon.

In 2022 Queensland Parliament had a donor inquiry at the behest of the then Attorney-General Shannon Fentiman.

The donor inquiry recommended that Queensland have a central registry along the lines of New South Wales and Victoria and that there be retrospective transparency for donors. The Government responded to that inquiry's recommendations with support. We await to see the outcome. Given that there is likely to be a central registry, there will probably be changes to the *Surrogacy Act* to compel intended parents to provide information to the central registry, as occurs in New South Wales.

Shannon Fentiman has played swaps with the Health Minister Yvette D'Ath. Ms D'Ath has returned to be the Attorney-General. Ms Fentiman has now become the Health Minister. I don't know what effect this change will have on the bringing forward of any bill.

Queensland is flexible about the expenses it allows for the surrogate. It and New South Wales have been used by me as the model for what other States should have for their various expenses. Flexibility does not mean commerciality but makes it a lot easier for the surrogacy arrangement to occur. Similar approaches are taken now in the NT, SA, Tasmania and Victoria. WA takes a more restrictive approach. The ACT also takes a flexible approach to expenses.

I am glad that when there have been reviews of surrogacy laws in other States, and in particular in South Australia, Victoria and Northern Territory, this basic premise of flexibility has been adopted.

There was a decision by the Family Court in a difficult surrogacy arrangement that had gone wrong that the effect of the *Status of Children Act 1978* (Qld) when it concerned a single surrogate was that the intended genetic father under the surrogacy arrangement, who had no rights or liabilities towards the child was nevertheless the parent, albeit one with no responsibilities or liabilities. That decision on its face would seemingly allow a step-parent adoption in favour of the intended mother.

The effect of that decision was to throw into doubt as to who was a parent at the time of the child's birth and in particular, whether the intended genetic father should be included.

Following a decision in 2019 which confirmed the approach taken in my own surrogacy matter and others, the Childrens Court has made plain that the approach of the Family Court was wrong. If the rationale of the Family Court had been correct, then it didn't make sense when it came to lesbian couples. The sperm donor to a lesbian couple has the same phraseology i.e. no rights or liabilities. The Queensland Parliament had said that there was to be no more than two parents on a birth certificate. If the rationale of the Family Court decision were correct,

then the sperm donor would be a third parent. The Queensland Parliament had made plain, however, there was to be no more than two parents.

After the parentage order is made by the Childrens Court, the order is typically available the same day or at worst, within two business days. A form is then provided by the parents, either online or paper form to the Queensland Registrar of Births, Deaths and Marriages to change parentage on the birth register to them. Queensland's Registrar of Births, Deaths and Marriages is extraordinarily efficient and processes these applications typically within two business days. In my own matter, that application was processed within about three hours. This is the quickest of any of the registrars anywhere in the country.

NEW SOUTH WALES

Surrogacy in New South Wales is governed under the *Surrogacy Act 2010* (NSW) although there are some requirements under the *Assisted Reproductive Technology Act 2007* (NSW) as to the pre-signing counsellor's report and as to the central registry.

The system of surrogacy in Queensland and New South Wales is remarkably similar. That's because the then New South Wales Attorney-General, John Hatzistergos decided that he wanted to copy the Queensland *Surrogacy Act*. The downside for interstate surrogacy arrangements is that his *"copying"* was along the lines of well, it'll be copied but some changes will be made too.

The New South Wales Act does not discriminate. It has an offence of to enter into or to offer to enter into a commercial surrogacy arrangement, and an advertising offence. These offences can be committed overseas. This applies to those who are ordinarily resident in New South Wales, but also those who are domiciled there.

I have acted for clients who have lived in places such as London, New York, Hong Kong and Tokyo where one or both of the parties, although they were undertaking surrogacy somewhere else (for example, in the United States), remained domiciled in New South Wales and therefore potentially the subject of these laws.

Unlike Queensland, there is no offence for making payment under a commercial surrogacy arrangement. There is an advertising offence, but it isn't committed if the advertising is for an altruistic surrogacy arrangement *and* no money is paid for the advertisement.

New South Wales has the same approach to Queensland which is to require a pre-signing counselling report and a post-birth assessment. New South Wales also has a requirement for relinquishing counselling of the surrogate and the surrogate's partner.

New South Wales has similar flexibility to Queensland in that it enables IVF to occur anywhere in the world and those and there is no requirement to reside in New South Wales until the orders are made.

I have acted in cases where IVF has been done overseas and where my clients have lived overseas and then moved to New South Wales by the time of the child's birth.

New South Wales has a central registry. There is therefore a requirement as part of the various steps for surrogacy to ensure that the central registry is notified before a parentage order is made.

Parentage orders are made by the Supreme Court. The Supreme Court typically sits in both Sydney and Newcastle. The usual way in which an order is made is not by a court appearance, but on the papers. However, intended parents can request that the matter be heard in court. I have had one such appearance in Sydney, which was an absolute delight.

The time for making the orders in chambers typically takes three weeks from when the paperwork is filed. In the past, however, there have been delays in judges' chambers in having orders made. A delay of up to nine weeks has not been uncommon. In the midst of Covid, I had one matter where it took nine months to process.

Once the order is made, it is transmitted by the court to the Registrar of Births, Deaths and Marriages. Typically, it takes six weeks from when the order is made until when the new birth certificate issues.

New South Wales law does not allow discrimination on the basis of sexuality or relationship status in undertaking surrogacy.

Traditional surrogacy is allowed in New South Wales. Of the large clinics, I have undertaken one traditional surrogacy journey through IVF Australia, but their general philosophy is not to do traditional surrogacy. Monash IVF and City Fertility both undertake traditional surrogacy in New South Wales on a case-by-case basis. I'm unaware as to whether Genea does traditional surrogacy.

AUSTRALIAN CAPITAL TERRITORY

The *Parentage Act 2004* is the first of the modern *Surrogacy Acts* Australia-wide – and it shows. The *Parentage Act* is based on UK legislation, but took up then Queensland law to ban overseas commercial surrogacy for those ordinarily resident in the ACT. There is some flexibility in the ACT when it comes to surrogacy, but there are also some rigidities:

1. There is no basis of discrimination as to sexuality.

2. However, both the substitute parents (the ACT name for intended parents) must be a couple.

3. The surrogate cannot be single. She must have a partner.

4. The transfer must occur in the ACT.

5. Traditional surrogacy is not allowed.

6. There is no requirement under the legislation for there to be independent legal advice. The practice of what is now IVF Australia has been that there is a requirement for independent legal advice and counselling before surrogacy commences.

The court that deals with proceedings in the ACT is the Supreme Court. The appearances there occur in person. It is, as is common with the other courts, a closed court.

There is no requirement in the ACT for the agreement to be written. Put bluntly, an oral agreement is a potential recipe for disaster.

The ACT has commenced the process of new laws for setting up a central register and likely having an *ART Act*. We shall see what impact those likely changes will have.

VICTORIA

Surrogacy in Victoria is governed by the *Assisted Reproductive Treatment Act 2008* (Vic) and the *Status of Children Act 1974* (Vic).

Traditional surrogacy is doable in Victoria – but not through a clinic.

The implantation must occur in Victoria.

The import or export of donor gametes or embryos from donor gametes must be approved by VARTA.

There is no specific offence concerning commercial surrogacy. Instead, it is an offence to pay a surogate mother other than prescribed expenses. Following the *Gorton Review*, the *Assisted Reproductive Treatment Regulations 2019* (Vic) have greatly liberalised the expenses for the surrogate that may be met – largely in line with those in Queensland and New South Wales.

Victorians can lawfully engage in commercial surrogacy overseas – there is no law that makes it a criminal act. In fact, just a month after the *Surrogacy Act 2010* (NSW) commenced in 2011, VARTA brought out a fertility specialist from India to speak about cross-border reproductive health care with surrogacy.

There was a suggestion, following Sonia Allan's recommendations in the WA *ART/Surrogacy Review (2018)* for extra-territorial surrogacy laws in WA, for there to be extraterritorial surrogacy laws in Victoria. When I became aware of that suggestion, I immediately wrote to the *Gorton Review* raising my concerns. The *Gorton Review* declined to deal with that issue, noting that a further inquiry would need to be undertaken and that whether or not there were extra-territorial surrogacy laws was outside its terms of reference.

The surrogacy arrangement, like that in the ACT, need not be in writing.

The surrogacy arrangement, after it is entered into, must be approved by the Patient Review Panel, which is a statutory body like VARTA. Prior to the pandemic, the PRP typically required hearings to be in person. An effect of the pandemic has been that those hearings have been conducted remotely.

The PRP previously preferred, via its guidance note, that intended parents have counselling both through a clinic counsellor and an independent counsellor. The former seems no longer required. In addition to the prescribed matters, the guidance note issued in March asks the counsellors to say if the counselling was remote- and any qualifications that arise as a result, and:

(a) general information about the history of the relationships between all of the parties, including when and how they met, how long any couples who are parties to the arrangement have been in a relationship and lived together, and the genders and ages of any existing children of any party to the arrangement;

(b) any previous surrogacy arrangements entered into by the intended parents or surrogate mother;

(c) the surrogate mother's motivation for offering to act as a surrogate, including whether she would consider acting as a surrogate for anyone else or just the intended parents;

(d) specific details of any support network/s available to the surrogate that can provide emotional, psychological and practical support during and after a pregnancy, including friends, family and professional support services, if applicable;

(e) the attitudes of all parties to a multiple birth;

(f) the intentions of the parties should a child be born with a serious medical condition or disability;

(g) if there is 1 intended parent, their intentions for the care of the child if they were to die;

(h) if there are 2 intended parents, their intentions for the care of the child if both of them were to die;

(i) how the surrogacy arrangement will be discussed with the existing children of all parties (if any);

(j) any agreement about lifestyle factors for the surrogate mother during the pregnancy, such as consumption of alcohol, smoking, diet or exercise;

(k) where the birth is to take place and what plans have been made regarding how and when the relinquishment of the baby will occur;

(l) the attitudes of the parties to any relevant religious or cultural practices (e.g. circumcision); and

(m) any agreement that the parties have made in relation to medical decisions, such as vaccinations, for the child in the period of time up until a Substitute Parentage Order is made.

The PRP has its own legal officer. Each of the lawyers in effect have to provide the legal advice that they have provided to their clients to the PRP. At times, this requirement can be extremely onerous.

In Victoria, like the ACT, the surrogacy arrangement can be oral. *I strongly recommend that surrogacy arrangements be written and signed by all the parties*.

After the birth, an order transferring parentage is made by the Supreme or County courts. Typically, this occurs in the County Court. The County Court has a check list of matters that must be complied with at the time of filing. This check list is very helpful for practitioners. Once filed, a date is set quickly. Appearances typically are friendly, with the child coming to court, photos taken in court, including with the judge and a teddy bear provided by the local lion's club.

Post-birth, the court provides the order direct to the Registrar of Births, Deaths and Marriages, which then alters the birth register to reflect the intended parents as the parents.

Victoria does not require a post-birth assessment. However, I have been in a case where the judge required a post-birth assessment because of the breakdown of the relationship between the parties. It is significant that in that case the surrogacy arrangement was oral. It would have been greatly helpful, in my view, if the surrogacy arrangement in that matter had been written and signed by the parties – so that there was no doubt as to the intentions of the parties.

There is no discrimination in Victoria as to whether singles or couples can undertake surrogacy or as to the gender or sexuality of the intended parents.

The form of order in Victoria, in favour of the intended parents (whose name was a change that I championed during the *Gorton Review* and I'm glad that it has been adopted), is called a substitute parentage order. I look forward to the day that it is merely called a parentage order.

A unique provision in Victoria is what is called a registration order. When a child is born in Victoria, but where a parentage order has been made interstate, the birth register in Victoria cannot be altered unless a registration order is obtained from the Supreme or County Courts of Victoria. It is, in essence, an anti-avoidance provision, to ensure that intended parents haven't sought to evade Victorian law.

It is likely that the provision is invalid on a constitutional basis. Each of the States is required to give effect to a court order made interstate under s.118 of the *Commonwealth Constitution*.

Section 185 of the *Evidence Act 1995* (Cth) is to the same effect. Under s.60HB of the *Family Law Act 1975* (Cth) and regulation 12CAA of the *Family Law Regulations 1984* (Cth), when a State or Territory parentage order is made, the parents under that order are recognised as parents under the *Family Law Act*. Under section 109 of the *Commonwealth Constitution*, where provision of a State Act is contrary to a provision of a Commonwealth Act, the State Act gives way.

Why have I mentioned all of this? Because if a parentage order is made in Queensland, for example, concerning a child born in Victoria, the requirements of the *Constitution*, the Commonwealth *Evidence Act* and the *Family Law Act* mean that the parents, for all purposes under Australian law are the parents named in the parentage order.

But Victorian law says differently. It is almost certain that this provision is constitutionally invalid – but there it remains, potentially costing intended parents more money if they have obtained an interstate parentage order – and then have to obtain a second order in the Victorian court so that they could be recognised under Victorian law as the parents.

TASMANIA

Surrogacy in Tasmania is governed by the *Surrogacy Act 2012* (Tas).

The surrogacy arrangement must be in writing. Like other States, there is a requirement for pre-birth counselling and independent legal advice. The counsellor, unlike other States, does not need to be an ANZICA member, but merely a counsellor who has been approved by the Government. What those qualifications are is unclear.

There is no discrimination in Tasmania as to gender or sexuality. IVF can occur anywhere in the world. However, Tasmania requires, unless it is specifically exempted by the magistrate at the conclusion of the process, that all parties on entering into the surrogacy arrangement must reside in Tasmania. This poses an unnecessary burden on Tasmanian intended parents. Tasmania is not only the smallest State in population but also the oldest. If a sister of the intended mother, for example, lives in Melbourne, then that sister cannot be a surrogate. There is no legitimate reason why the surrogate and her partner need to live in Tasmania.

Post-birth, an order is made transferring parentage from the surrogate and her partner to the intended parents by the Magistrates Court. There is no requirement for a post-birth assessment.

It is an offence in Tasmania to engage in commercial surrogacy or brokerage, but these offences are not exterritorial. It is perfectly lawful for Tasmanians to engage in commercial surrogacy overseas.

SOUTH AUSTRALIA

Surrogacy in South Australia is governed by the *Surrogacy Act 2019* (SA). Surrogacy law reform in South Australia has been an interesting feature – commencing with additions to the

Family Relationships Act 1975 (SA) and then, under the ever-watchful eye of John Dawkins MLC, continued changes in 2014/15, 2016/17 and then finally, after the SALRI review, the enactment of the *Surrogacy Act 2019*.

Surrogacy arrangements, called lawful surrogacy agreements, are prescribed as to their form by the *Surrogacy Act*. They have a number of requirements including that they are written and signed. A certificate by each of the lawyers that the parties have had independent legal advice must be provided. A certificate of the pre-signing counsellor must also be supplied. Criminal history checks are required.

There is no discrimination in South Australia about who can be a parent.

The *Surrogacy Act* allows ART to occur anywhere. I was delighted that the South Australian Government accepted my submission that ART can occur anywhere in the world. The previous provisions in the *Family Relationships Act* restricted ART to that in South Australia only.

Traditional surrogacy can occur in South Australia.

The numbers of children being born in South Australia via surrogacy are unclear. Certainly, up until 2016 (when reporting of data ceased), in a typical year one child a year was born via surrogacy, but in one year there were three and another year there was zero.

Post-birth an order is made transferring parentage from the surrogate and her partner to the intended parents (again, I am delighted that I was heard, and that the name of the intended parents is intended parents, not commissioning parents and it was changed with the enactment of the *Surrogacy Act*) by the Youth Court, which typically sits in Adelaide. In 2014/15 in a case in which I was involved, the court also sat in a regional city as the surrogate and her husband came from there.

The expenses allowed in South Australia are now in line with those in Queensland and New South Wales.

Commercial surrogacy and brokerage are offences. When the *Surrogacy Act* was enacted, it would seem unlikely that it was intended that the surrogacy offences apply extraterritorially. There is no extraterritorial law concerning surrogacy in South Australia. However, a provision of the *Criminal Law Consolidation Act 1935* (SA) would apply – which can make it an offence in South Australia if elements of the offence are committed there, although other elements of the offence are committed overseas.

The South Australian Law Reform Institute noted my concerns about that provision but said that it was the intention of Parliament in the previous provisions of the *Family Relationships Act not* to criminalise surrogacy overseas. It's unclear what the approach taken by Parliament is for the purposes of the *Surrogacy Act 2019*.

South Australia, like Tasmania, Victoria and the Northern Territory has copied the provision in the Queensland *Surrogacy Act* to say that the surrogate has bodily autonomy over the pregnancy and birth. This is a good thing. I made submissions in Victoria, South Australia and the Northern Territory that that provision be adopted.

I am also delighted that a submission that I made that was accepted in the *Surrogacy Act* was that the human rights of all concerned, including the surrogate, her partner, the intended parents and the child be taken into account when decisions are made.

Both intended parents must be an Australian citizen or permanent resident, and one must be domiciled in South Australia when the lawful surrogacy agreement is entered into.

The surrogacy that is undertaken in South Australia by an IVF clinic must be for a lawful surrogacy agreement under the conditions of registration under section 9 of this *Assisted Reproductive Treatment Act 1998* (SA).

WESTERN AUSTRALIA

The *Surrogacy Act* and the *Human Reproductive Treatment Act 1991* (WA) govern surrogacy in WA.

Altruistic surrogacy in Western Australia is available like the other States. It is an offence to enter into a surrogacy arrangement that is for reward or to provide a service when it is for a surrogacy arrangement that is for reward. There is no extraterritorial law concerning surrogacy in Western Australia. However, a provision of the *Criminal Code* is what is a called a longarm law which means that if elements of the relevant offence for surrogacy overseas are committed in Western Australia, then the offence can be committed in Western Australia. What this also means is that no Western Australian lawyer can ever give advice to intended parents in Western Australia who are contemplating undertaking surrogacy overseas – because to do so is almost certainly going to be a commission of an offence by that lawyer.

The expenses that are allowed in Western Australia are very tightly drawn – unlike every other jurisdiction. I am aware from a WA colleague that sometimes travel expenses may be allowed. In my view, it is doubtful if travel expenses are allowed – or if they are allowed – it is only for limited purposes.

Because of the great restrictions of undertaking surrogacy in Western Australia, intended parents go overseas. One such destination is Canada, which is an altruistic regime. If Western Australian intended parents engage in surrogacy in Canada (or for that matter, anywhere else) and they do not take extreme care, then they will be committing offences under the *Surrogacy Act 2008* (WA). Three types of expenses are always seen in Canadian surrogacy agreements:

1. Travel expenses.

2. Accommodation.

3. Snow shovelling.

Even if travel and accommodation are allowed under the *Surrogacy Act*, snow shovelling is not. By entering into that agreement, Western Australian residents potentially put themselves in peril.

WA is an illustration of difficulties with Australian surrogacy laws- that there is no common definition of expenses. If intended parents live in NSW, for example, but the surrogate lives in WA, great care must be taken with the surrogacy arrangement. What is clearly lawful for payment of the surrogate's expenses in NSW, may be a criminal offence for the surrogate and her partner in WA.

Surrogacy arrangements in Western Australia need to be in writing. Traditional surrogacy can occur. They must be through a clinic, in effect, in Western Australia.

Traditional surrogacy is allowed in WA.

Those who can undertake surrogacy in Western Australia are heterosexual couples, female couples and single females. Male couples and single males cannot. I do not know where transgender, non-binary or intersex individuals fit within this framework.

The first comment about this discrimination is that it is likely to be in breach of section 22 of the *Sex Discrimination Act 1984* (Cth). It is clearly in breach of Australia's international obligations through the United Nations. The Western Australian Government sought, following the *Allan Review*, to legislate to remove this discrimination – a move that was defeated when the Government did not have the numbers in the Upper House.

Like Victoria, the surrogacy arrangement must be approved by the State regulator, the Reproductive Technology Council of Western Australia. There must be both psychological screening and counselling (two separate steps) of all parties. Those parties are the arranged parents (WA jargon for the intended parents), the surrogate and her partner, and the donor and their partner. Any gamete donor must be a party to the arrangement. Therefore, the ability to access surrogacy in Western Australia is greatly limited by the lack of being able to use gamete donors through clinics. A known donor is required.

All of these parties need independent legal advice – which of course is paid for by the intended parents.

My understanding is that the requirements of the process are so exacting that, in addition to the legal fees, the fees charged to have the application ready for the RTC are commonly set (including the counselling) at $10,000 by clinics.

The application, on being lodged with the RTC, is subject to a three month cooling off period. I am aware from anecdotal reports that in the past the time between lodging and the time of approval can be six months.

Once the RTC has given permission, then the parents can proceed.

Western Australia, like Victoria, requires the import or export of donor gametes or embryos from donor gametes to be approved by the State Regulator, in this case, the RTC.

Western Australia, like New South Wales, has a lower limit on the availability of gamete donors i.e. a five family limit worldwide i.e. four families other than that of the gamete donor.

I cannot say how many gay couples or single men are undertaking surrogacy in Western Australia. Since 1988, I have advised in close to 1,900 surrogacy arrangements for clients throughout Australia and at last count, 30 plus countries overseas. I've not kept precise statistics. In broad terms, about half my clientele are straight couples and about half are gay couples. There is also a smattering of single men and single women. I've acted for two or three lesbian couples and I've had a very small number of clients who identify as transgender or non-binary.

I do not know whether my figures are representative of the market, but given the number, I'm going to say that it is probably a fairly representative sample. Western Australia by cutting half the market is therefore distorting the availability of intended parents to undertake surrogacy.

I am hopeful that the current review which has I understand was put on the desk of the Health Minister in October last year, will lead to lasting change in Western Australia. The current situation in Western Australia is much akin to that seen in the old BBC comedy, Yes Minister in which the bureaucrat, Sir Humphry Appleby, speaks proudly of a particular hospital which has several hundred staff who are very busy at their work and very efficient in planning, writing reports, etc. Indeed, the hospital is up for the Florence Nightingale Award for cleanliness.

The only problem about that hospital is that it has no patients.

The same can be said about the WA surrogacy system, illustrated by table 7.

A post-birth parentage order is made by the Family Court of Western Australia. Uniquely, Western Australia requires that a plan be entered into as to the involvement of the surrogate with the child post-birth – the plan having to be approved by the court.

NORTHERN TERRITORY

With the enactment of the *Surrogacy Act 2022* (NT), finally we have wall to wall regulation of altruistic surrogacy in criminalisation of commercial surrogacy in Australia. The law took effect on 20 December 2022. NT parentage orders have been recognised under the Family Law Act since January.

Commercial surrogacy and brokerage (including altruistic brokerage) are criminal offences under the Act. There is no extraterritorial element in Northern Territory. However, a provision

of the *Criminal Code* can criminalise Territorians undertaking commercial surrogacy overseas if elements of the offence are committed in Northern Territory.

IVF can occur anywhere. NT jurisdiction only arises at the time of the making of the order. Traditional surrogacy can occur in the Northern Territory.

There is a grandfather provision for surrogacy arrangements that have been entered into before commencement for them to be recognised – this being available until 20 December 2024, or such longer period allowed by the court.

The surrogacy arrangement must be in writing. The birth mother has bodily autonomy with pregnancy and childbirth. The format of the surrogacy arrangement, which requires certificates by the lawyers and the counsellor is along the lines of South Australia. This was deliberate on the part of the Government, given that the only clinic that currently operates in the Northern Territory, Repromed, does so also being based in Adelaide – and with an agreement between the Northern Territory Government and Repromed that the practitioners comply as far as possible with South Australian law for the purposes of registration.

A post-birth order is made in the Local Court. Like NSW, there is a requirement for both a post-birth assessment, and relinquishment counselling of the surrogate and her partner.

There is no discrimination on who can access surrogacy.

Having been a member of the NT Government's surrogacy joint working group, I am particularly proud of the enactment of the *Surrogacy Act 2022* (NT). Not only does it, at long last, allow Territorians to undertake surrogacy at home, it makes a great difference in the lives of intended parents elsewhere who want to have a surrogate from the Territory. In the past, the clear advice to intended parents as to a proposed surrogate in the Territory was *"don't"*. However, there have been a small number of surrogates from the Territory. One of those, who had previously championed laws in the Territory after her own experience, had intended parents in Victoria. Whilst she was pregnant, she drove all the way from Darwin to Victoria. I am glad that in the future, no Territorian surrogate should ever have to put themselves at risk in that way ever again.

NEW ZEALAND

Surrogacy in New Zealand is governed under the *Human Assisted Reproductive Technology Act 2004*. In the words of the Act:

> *"A surrogacy arrangement is not of itself illegal, but is not enforceable by or against any person. It is an offence to engage in commercial surrogacy as is brokerage."*

The allowable expenses in New Zealand are even more narrow than those in Western Australia:

- To the provider concerned for any reasonable and necessary expenses incurred for any of the following purposes:

- Collecting, storing, transporting, or using a human embryo or human gamete
- Counselling one or more parties in relation to the surrogacy agreement
- Insemination or invitro fertilisation
- Ovulation or pregnancy tests or

- To a legal adviser for independent legal advice to the woman who is, or who might become, pregnant under the surrogacy arrangement.

Therefore, ordinary and everyday costs, including reasonable costs, that are ordinarily seen in surrogacy arrangements, are excluded, potentially making the surrogacy arrangement a commercial one, for example:

- Cab fares to and from the hospital (or for that matter other transport and accommodation).
- Other counselling costs.
- Payment for the provision of a Will for the surrogate (so that she isn't deemed to be the parent of the child).
- Payment of life insurance or income protection insurance for the surrogate (so that she and her family are protected).
- Massages, acupuncture or other alternative or allied therapies.
- Time off from work because she can't work.
- Health insurance.

This is just a short list of what could be a much longer list. Payment of any of these can result in the surrogacy arrangement being a commercial one.

Like most Australian jurisdictions, New Zealand has a longarm law, by which an offence can be committed in New Zealand if for an overseas surrogacy journey if the elements of the offence are met in New Zealand. My understanding is that the common approach in New Zealand is not to apply this longarm law.

According to the *2020 ACART Guidelines*:

(a) All parties must have individual and joint counselling;

(b) There must be independent legal advice;

(c) There must independent medical advice;

(d) There should be in principle approval from Oranga Tamariki to the intended parents adopting any child resulting from the surrogacy arrangement

Before giving in principle approval, Oranga Tamariki will undertake documentary checks (police background checks, medical record checks, character references and child protection checks) and a social worker from Oranga Tamariki's adoption team will meet with the intended parents in their home

ECART also can only approve an application relating to surrogacy if satisfying the following requirements are met:

> *"(a) All relevant parties have consented to the procedure and the parties have not been subjected to any undue influence. This involves consideration of the nature of the parties' relationship, including how the intended parents and surrogate met, how long they have known each other, how the offer of surrogacy came about and their intentions for the future, as well as their appreciation of the risks of the procedure;*
>
> *(b) Affected parties have discussed, understood and declared intentions between themselves about the day to day care, guardianship and adoption of any resulting child and any ongoing contact. These matters must be addressed in the counselling reports and are also addressed in the legal reports.*
>
> *(c) The procedure is the best or the only opportunity for intended parents to have a child, and they are not using the procedure for social or financial convenience or gain. Intended parents must demonstrate a medical need to resort to surrogacy, and for all applications, ECART will consider whether there will be a genetic link between one or both parents and the child. While a genetic link is no longer a mandatory requirement, ECART considers that this remains a consideration when determining whether the procedure is the "best or only" opportunity for the intended parents to have a child "on the basis of current literature that suggests that a genetic link to parents is the best interests of any potential child'.*
>
> *(d) Potential genetic, social, cultural of inter-generational aspects of the proposed arrangements, as well as the relationships between the parties, safeguard the wellbeing of all parties and especially in any resulting children.*
>
> *(e) The risks associated with the surrogacy for the parties in any resulting child must be justified. This includes risk to the health and wellbeing of:*
>
> *i. The surrogate, including risks associated with pregnancy, childbirth and 'relinquishment of a resulting child' to the intended parents, as well as the risk that the intended parents may change their mind and the risks to the surrogate's reproductive capacity in the future.*

ii. *The intended parents (and embryo donor, if applicable) including the risks that the surrogate changes her mind about relinquishing a resulting child; and*

iii. *The surrogate born child, including risks that arise when a child becomes a subject of a dispute if the relationship between the surrogate and intended parents breaks down.*

(f) The residency status and plans of the surrogate and intended parent(s) safeguard the health and wellbeing of the child, particularly in relation to being born in Aotearoa in New Zealand."

As of 2021, there were only three fertility clinics that operate in New Zealand: Fertility Associates, Fertility Plus and Repromed. Whilst ECART saw a record number of new surrogacy applications in 2020 (at 37, compared to just 14 in 2005) ECART only meets six times a year and only considers around 10 applications for all assisted reproductive procedures at each meeting. This means that sometimes people have to wait several months for their application to be considered. In 2020, Fertility Associates submitted 27 surrogacy applications at ECART, but by March 2021, it had a list of 29 surrogacy applications to go to ECART for the 2021 year. Only 2% of surrogacy applications are described as traditional surrogacy arrangements for ECART approval.

Whilst industry members spoke highly of the ECART process, the criticisms of it are that it is:

- Slow and complex.
- Expensive.
- Seen as overly invasive.
- There is not right to appeal or review.
- Some traditional surrogacy arrangements may lack safeguards as they don't have any requirement proposed to seek counselling, legal advice or medical advice.

The Law Commission recommended that ECART continue to pre-approve surrogacy arrangements.

The Law Commission suggested a number of options for approval:

1. Pre-birth order by which the intended parents are recognised as the parents at birth although this may be that the order may be on an interim basis.
2. An administrative model recognising the intended parents as the parents.
3. Post-birth traditional model.

The Law Commission has suggested that ECART approval is obtained and the surrogate has confirmed consent post-birth, then by an administrative process rather than having to go to court, the intended parents can be recognised in law as the legal parents. This is consistent with an approach taken in several Canadian provinces.

The process of becoming parents in New Zealand is unlike any Australian jurisdiction – it is a process of adoption. Therefore, before entry into the surrogacy arrangement, there need to be thorough checks undertaken by New Zealand authorities as to the suitability of the intended parents to be the parents.

Approval of ECART (Ethics Committee on Assisted Reproductive Technology) is required before the surrogacy arrangement can proceed. Gestational surrogacy arrangements will usually require ECART approval. Traditional surrogacy arrangements, only involving the use of an established procedure (artificial insemination) do not require ECART approval. Traditional surrogacy arrangements can occur at home. If a fertility clinic is involved in a traditional surrogacy arrangement, it can request an ethical review by ECART, but it is not required to do so. ECART can only provide non-binding ethical advice.

ACART (Advisory Committee on Assisted Reproductive Technology) has issued the *Assisted Reproductive Technology Order 2005*. Most of the procedures required for surrogacy such as IVF do not require ECART approval. However, there will be circumstances in which some of them require ECART approval. For example, if:

(a) The donor is a family member of the patient, or

(b) The donated eggs or donated sperm are used in conjunction with any other donated gametes.

It is illegal in New Zealand to advertise for commercial surrogacy.

In 2021 the Law Commission published *Te Kōpū Whāngai: He Arotake: Review of Surrogacy*.

The Law Commission estimated:

> *"A very broad estimate, based on the information discussed below, is that up to 50 children may be born as a result of a surrogacy arrangement each year. This figure includes both gestational and traditional surrogacy in Aotearoa New Zealand and international surrogacy where the intended parents lives in Aotearoa New Zealand the surrogate lives in another country."*

The Law Commission noted that ECART had considered 37 surrogacy applications in 2020 compared to 14 in 2005, however, the increase on 2019 (where 29 applications were considered) may be partly due to Covid-19 pandemic deterring intended parents from pursuing international surrogacy. On average, ECART has considered 23 surrogacy applications each year since 2010.

It is noted, however, that traditional surrogacy arrangements do not need to be approved by ECART, so the number of surrogacy applications considered by ECART are not representative of the total number of surrogacy arrangements entered in New Zealand. Second, not all surrogacy arrangements that are approved by ECART may result in the birth of a child. In 2017 just 11 children were born as a result of clinic-assisted surrogacy.

Another source of information were the number of adoption applications. As part of the adoption process, an Oranga Tamariki social worker must prepare a report for the court. Oranga Tamariki's records show that, in the year ended 30 June 2021, 22 births were written for adoption applications involving domestic surrogacy.

Prior to July 202, Oranga Tamariki did not distinguish the different categories a social worker reports submitted on adoption applications. However, for the year ended 30 June 2019, 37 reports were written for adoption applications involving domestic surrogacy. Of these, 28 related to gestational surrogacy and nine related to traditional surrogacy. A review conducted in 2018 identified that the number of adoption reports written each year in relation to domestic surrogacy range between six and nine between 2013 and 2018.

However, in 2005 the Law Commission observed that not all surrogacy arrangements were formalised by adoption, a common scenario being that the surrogate mother enters her own name and the intended father's name on the birth certificate without any other steps being taken to transfer establishing the intended parents' legal status. They simply take custody of the child and care for it on a day-to-day basis.

It was unclear as of 2021 whether the practice continues.

In the year ended 30 June 2021, 19 Oranga Tamariki reports were written for adoption applications involving international surrogacy. Oranga Tamariki is aware of 82 international surrogacy arrangements between 2016 to 2020. Most international surrogacy arrangements are over those five years (68 out of 82) involve the use of donated gametes and half (41) involve the use of an anonymous donor. It is noted that some intended parents may not disclose that a child born overseas was born as a result of a surrogacy arrangement or realise that they need to adopt the child to be recognised as the child's legal parents under New Zealand law. Of course, single men and male couples are likely to face greater scrutiny, as it will be apparent that neither is the birth mother.

The Law Commission identified the increasing use of surrogacy due to several factors:

- Changing social attitudes to diverse families, particularly male couple and single parent families. In 2005 when the Commission reviewed legal parenthood laws, the potential for surrogacy to enable male couples to build a family wasn't even raised as an issue in submissions or consultation. The first time that a male couple could legally adopt their surrogate born children was by the Family Court in 2015. Since then, there has been a significant increase in male couples using surrogacy.

- Declining rates of adoption:

> *"Surrogacy is sometimes the only way for people to have a child, even if they would have preferred to adopt a child in need of adoption instead."*

- Growing rates of infertility, particularly women waiting until later in life to have children.
- Advances in ART so that intended parents experiencing infertility have a greater chance of creating an embryo and having a child through gestational surrogacy.
- Increasing focus on fertility preservation, including egg freezing.

It was identified that the increasing use of international surrogacy by New Zealanders was also likely due to the following additional factors:

- Challenges in finding a surrogate in Aotearoa New Zealand:

> *"Agencies cannot operate in Aotearoa New Zealand to provide a service matching intended parents with surrogates. Some intended parents may not know anyone who they could ask to act as a surrogate, especially if they have only recently settled in the country. Others may not want to ask their friends or family. Restrictions on advertising and payments to surrogates are likely to be contributing to these challenges, and as we know it above, while people are increasingly seeking out a surrogate through social media, some may feel uncomfortable publicising their private lives in such a way."*

- Increasing availability of donated gametes overseas.
- Availability of commercial surrogacy:

> *"Some intended parents prefer a commercial model of surrogacy where they could recognise the value of the surrogate's role through the payment of a fee or other compensation and rely on the services of a intermediary to manage the arrangement. Intended parents may also feel more comfortable having a child through surrogacy in jurisdictions where commercial surrogacy is socially accepted, such as California."*

- High success rates and greater reproductive choices overseas:

> *"Some intended parents may prefer to go to fertility clinics overseas that report higher success rates than New Zealand-based clinics or that offer practices that are not available in Aotearoa New Zealand. IVF practices such as multiple embryo transfers and gender selection are not available in Aotearoa New Zealand but are available in some other countries. Another emerging practice overseas is the use of two or more surrogates at the same time. While this is not technically prohibited in Aotearoa New Zealand, such an arrangement is unlikely to satisfy the requirements of ECART approval."*

- Increasing cultural diversity in Aotearoa New Zealand:

> *"Cultural diversity driven by increasing migration means that, increasingly, New Zealanders may have links to two or more countries. In the context of surrogacy, intended parents may choose to have a child in a country to which they have a connection. Different cultural prospectors may also mean that some intended parents may prefer a commercial model of surrogacy available elsewhere over the non-commercial altruistic model that is available in Aotearoa New Zealand."*

The Law Commission carried out a surrogacy survey. 84% of respondents either approved (54%) or not objecting (30%). Only 5% objected to surrogacy, while 9% of respondents needed to know more and 2% had no opinion or preferred not to say. In response to another question, 88% of respondents said that they supported surrogacy being legal in Aotearoa New Zealand, while only 3% did not and 9% were unsure or preferred not to say.

68% of respondents said that the Government should reconsider surrogacy laws with most preferring a review in the next five years. Only 8% said no and 25% were unsure or preferred not to say.

The Law Commission set out six Guiding Principles for Surrogacy Law Reform:

1. The best interests of the surrogate born child should be paramount.
2. Surrogacy laws should respect the autonomy of consenting adults in their private lives.
3. Effective regulatory safeguards must be in place.
4. Parties should have early clarity and certainty about their rights and obligations.
5. Intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore.
6. Surrogacy laws should enable Maori to act in accordance with Tikanga and promote responsible Kawanatanga that facilitates Tano Rangataratanga.

The child's rights stated were:

- Rights to identity, including as to its origins.
- Rights to nationality.
- Rights to family life.
- Rights to health.
- Rights to freedom from discrimination.
- Rights to protection from abuse, exploitation and sale.

As to personal autonomy, the Commission said that this:

> *"Is a fundamental human rights value, granted in the respect for the inherent dignity of the human person. It is expressed in a number of different ways, including through recognition of a person's bodily integrity and reproductive freedom, rights to found a family and rights to respect for privacy and family. The European Court of Human Rights has interpreted the right to respect for privacy in family as including 'the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose'. These rights should be enjoyed without discrimination on grounds such as sex, gender, marital status or sexual orientation.*
>
> *This principle does not suggest that adults have an unqualified right to have a child by surrogacy, as that would undermine the recognition of children as individual rights holders. Rather, adults' freedom to have a child by surrogacy should be respected provided the rights of others, particular rights of the child and the surrogate, are adequately protected."*

The Commission noted that all the adults are potentially at risk of exploitation, including in non-commercial surrogacy arrangements:

> *"In any surrogacy arrangement, there is the potential for exploitation on both sides, including by the surrogate. For example, a surrogate might cut contact with the intended parents during the pregnancy or make increasingly unreasonable demands on them. Intended parents may feel powerless to do anything but accede to their demands. In one Australian review, an intended parent explained that 'when someone is carrying your baby, you will do anything for them' and there is 'so much potential for parents ... to be taken advantage of'.".*

In supporting intended parents undertaking surrogacy at home, the Law Commission said:

> *"This principle reflects the need to recognise the reality of international surrogacy. As some commentators observe:*
>
> > *Legislators cannot bury their heads in the sand; surrogacy is not going to go away. It is now an established artificial reproductive technique, and in a global marketplace, there is always going to be somewhere, somehow, that it is available. The only question is how we deal with the consequences."*

The five steps to support New Zealanders entering into surrogacy arrangements in Aotearoa New Zealand were identified as:

> *"(a) Surrogacy arrangements are undertaken within a regulatory framework with appropriate safeguards that uphold New Zealand human rights obligations and health standards.*

(b) *Surrogate born children can access information about their genetic and gestational origins, consistent with their rights to identity.*

(c) *The intended parents (and the surrogate born child) are closer geographically to the surrogate, which may help to provide positive and ongoing relationships.*

(d) *The intended parents and surrogate can remain close to their own family and support networks during the pregnancy and after birth.*

(e) *The intended parents do not incur overseas travel and other costs associated with spending time away from Aotearoa New Zealand. They also avoid unforeseen events that may disrupt international travel, like the Covid-19 pandemic."*

The commission also thought that surrogacy law should enable a Maori to act in accordance with customary practices and promote the right of the Crown to govern that facilitates the right of Maori to exercise authority according to Tikanga under the Treaty of Waitangi.

Maori involvement with surrogacy is small:

> *"While Maori may be generally positive about surrogacy, the most recent available data suggests Maori participation in surrogacy arrangements is low, Maori women are more likely to act as surrogates than as intended parents. A study of 104 applications reviewed by ECART from September 2005 up until the end of 2010 found that only 9% of applications involved a Maori surrogate, and only 2% of applications involved a Maori intended mother. Of all 104 women willing to be surrogates, 7% had partners who were Maori. Of all intended mothers, 2% had partners who were Maori."*

One observer considered that the causes for low participation may include:

(a) The high fertility rates of Maori historically reducing the need for surrogacy;

(b) The customary practice of Whangai [customary adoption] being the preferred option;

(c) The difficulty involved with finding a surrogate; and

(d) Cost of IVF required for gestational surrogacy arrangements inhibiting Maori from participating as intended parents.

IMPROVING ARRANGEMENTS FOR SURROGACY BILL

Tamati Coffey has moved the *Improving Arrangements for Surrogacy Bill 2022*. The effect of the Bill is that intending parents are automatically the legal guardians of the child when they

take custody. They will also be liable for child support if they refuse to take custody of the child. The parties can, if they wish, obtain a surrogacy order of the court instead.

The Bill was first introduced in September 2021 and first read in May 2022. It was then referred to the Health Committee.

The policy statement at the beginning of the Bill says:

> *"This Bill amends five Acts and two sets of regulations to simplify surrogacy arrangements, ensure completeness of information recorded on birth certificates, and provide a mechanism for the enforcement of surrogacy arrangements.*
>
> *New Zealand law does not currently afford any automatic rights to the intending parents of a child born via surrogacy. At the time of birth, the child's legal parents are the surrogate mother and partner, and a formal adoption process is required to complete the arrangement. This Bill affirms the intending parents' automatic legal status at the point that custody of the child is transferred. It also enforces the legal obligations of intending parents if they refuse to take custody by making them liable for child support, even if they do not have custody of the child. The United Nations Convention on the Rights of the Child, ratified by New Zealand in 1993, committed New Zealand to implementing the rights set out in the convention. These included a child's right from birth to know their parents and to be cared for by them (article 7.1) and the right to seek and receive information of all kinds (article 13(1)). This Bill requires the registrar to also register information about the identity of the surrogate and any person who donated an embryo cells for the pregnancy. In this way, the Bill recognises the rights of children to know their genetic origins."*

The Bill ended up with the Health Committee on 18 May 2022. On 27 May 2022 the Law Commission published its final report.

The committee noted that the Bill and the Commission have different approaches to some policy matters and that the Commission addresses a wider range of policy areas. Some of these matters are outside the scope of the Bill. The Health Committee said that it was scheduled to report to Parliament by 18 November 2022. On 26 October 2022 the Business Committee determined that the date that the Health Committee must report back to the Bill on the Bill be extended to 3 March 2023. The Committee is determining whether to consider whether to incorporate the Commission's recommendations for legislative change into the Bill.

The current timetable for the Health Committee's report is 3 August 2023.

We shall wait and see what happens next.

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