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Director, Civil Justice
Vulnerable Communities & Inclusion,Policy, Reform & Legislation Branch
Department of Communities & Justice

Email: policy@dcj.nsw.gov.au

Dear Director

REVIEW OF THE *SURROGACY ACT 2010* AND THE *STATUS OF CHILDREN ACT 1996*

I ***attach*** my submissions:

- To the Parliamentary Committee, concerning Mr Greenwich's Bill.
- To the ACT Government of July 2023.

Both should be read with this submission.

1. What do you think of the guiding principle and policy objectives of the *Surrogacy Act*? Do you think they are still valid?

I support protecting the interests of children born of surrogacy arrangements and to provide certainty for parties to surrogacy arrangements. I consider that the *guiding principle* is still valid.

I do not support the prohibition of commercial surrogacy arrangements. The theory about why there is that policy objective is because of a paper prepared in 2009[1]:

> *"There is widespread agreement that commercial surrogacy (where the surrogate mother is remunerated for financial gain or reward) should be banned and that, if altruistic surrogacy agreements or arrangements are to be recognised (for example by making legal provision for parenting orders), the agreement that the surrogate mother would transfer the care of the child to the intended parents should not be enforceable. This means that it will always be the right of the surrogate mother to parent the child if she finds herself unable to surrender the care of the child to the intended parents after birth."*

That paternalistic approach, taken seemingly without any community consultation or research whatsoever, has denied women the ability to be paid for taking the risk of death or injury to give

[1] Standing Committee of Attorneys-General, Australian Health Ministers' Conference, Community and Disability Services Ministers' Conference, Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy*, 2009.

the gift of life for others[2], and has directly led to a shortage of surrogates in Australia, with the consequence that the vast majority of Australian children born via surrogacy are born overseas[3].

It is notable that that proposal did not reference Australia's international obligations as to human rights.

Ironically, many of those babies born overseas will have been born via commercial or compensated surrogacy.

I have long argued that a properly regulated approach to compensate surrogates, where there is a cap imposed by regulation on the fee payable will:

- minimise the risk of exploitation of surrogates, and
- give people who are considering whether or not to give the gift of life to others, the autonomy to do so, rather than seemingly be punished for helping others and taking the risk of injury or death - where the others involved in the process - doctors, embryologists, nurses, counsellors and lawyers, among others, are also getting paid, without taking the central starring role filled with risk.

I will not repeat what I have said in my submission to the Parliamentary Committee regarding the current Bill before Parliament. The submission is attached.

2. Does the *Surrogacy Act* ensure that the best interests of the child are paramount in every case?

Quite simply, it does not.

My criticisms of the post-birth process were set out by me in my submission to the ACT Government's review of surrogacy last year.

The period of one month to six months post-birth, which is now the norm across Australia before an application for a parentage order can be made, is ultimately based on a constituency request of a member of the House of Commons. It has no rhyme nor reason, other than allowing plenty of time for the surrogate to change her mind not to transfer parentage.

In the words of the 2009 paper:

> *"This means that it will always be the right of the surrogate mother to parent the child if she finds herself unable to surrender the care of the child to the intended parents after birth. Existing parentage presumptions will govern this situation, ensuring that the surrogate mother and her partner (if any) are regarded as the legal parents of the child, even if they are not genetically related to the child. Although a surrogacy arrangement may not be enforceable by requiring a surrogate mother to surrender a child under the arrangement there may be circumstances where a court decides that it is in the best interests of the child to be parented by the intended parents rather than the surrogate mother and makes orders accordingly."*

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[2] See *The Feminist Legislation Project: Rewriting Laws for Gender-Based Justice*, Batagol et al. eds, Routledge, London, 2024, chapter 8 by Ronli Sofris, and chapter 8A by the author.

[3] See for example by the author: *LGBTIQ+ access to assisted reproductive treatment*, Family Court Review (2024) https://doi.org/10.1111/fcre.12806.

What that paper failed to acknowledge was the blindingly obvious:

- Parenting disputes, except as to ex-nuptial children in Western Australia, are dealt with exclusively under the *Family Law Act 1975* (Cth). Courts under that Act have the power to make parenting orders, but not to alter the parentage of a child.

- If a surrogate and their partner decline to relinquish the child, and a court determines that it is in the best interests of the child to live with the intended parents, then the child is caught in the vice of limping parentage- where the parentage of the child does not reflect the agreed intentions of the parties at commencement, and most importantly does not reflect the lived reality for the child.

In that scenario, if one of the intended parents is recognised as a parent (and assuming that a federal court is not in a position to make a parentage order- see *Tickner*, below), then the parentage of the baby remains uncertain for at least five years until a step-parent adoption occurs[4], or for 18 years as the child has been raised as their child[5].

That approach fails the child. It also fails to meet Australia's international obligations to the child, as set out in Table 1.

Table 1: how limping parentage conflicts with Australia's international obligations

Issue	**International Law**
Not acting in the best interests of the child, by failing to finalise parentage	UNCRC, Art. 3.1
Failing to properly protect the child	UNCRC, Art 3.2
Failing to respect the responsibilities, rights and duties of parents	UNCRC, Art. 5
Failure to protect the identity of the child	UNCRC, Art. 8.1
Arbitrary interference with the child's and parents' right to privacy and family	UNCRC, Art. 16.1, ICCPR, Art. 17, UDHR, Art. 12[6]
Discrimination against the child and parents	ICCPR, Art. 2, UDHR, Art. 2; ICESCR, Art. 2, CEDAW, Art. 2, CRPD Arts. 5 and 6.

It is notable that for the last 13 years, the Hague Conference on Private International Law has been seeking to have an international convention on international surrogacy arrangements. The concern has been raised by HCCH repeatedly about the effect on the child of there being limping parentage and seeking to overcome that issue.

[4] *Adoption Act 2000* (NSW), s.30(1)(a).
[5] *Adoption Act 2000* (NSW), s. 24(1)(b).
[6] And note a similar provision in the Inter-American Convention on Human Rights was held to include the right to ART: *Murillo v. Costa Rica* (2012) https://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf ; and a similar provision in the European Convention on Human Rights was held to include the right to access ART: *Dickson v United Kingdom* ECtHR Application No 44362/04 (2007); and a right to have the parentage of a child born via surrogacy recognised: *Mennesson v France* ECtHR (Application No 65192/11) (2014) and *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement and the intended mother* ECtHR (Request No P16-2018-001) (2019).

There have now been three reported cases where the surrogate has refused to hand over the child:

- In Queensland, following a fallout between the surrogate and the intended mother, who were third cousins:*Lamb & Shaw* [2017] FamCA 769; *Lamb & Shaw* [2018] FamCA 629

- In New South Wales, a commercial surrogacy arrangement between friends went awry. The surrogate, her husband and their lawyer appeared to seek to extort the intended parents: *Seto & Poon* [2021] FamCA 288

- In New South Wales, where a single surrogate lied in saying that she had lost the pregnancy: *Tickner & Rodda* [2021] FedCFamC1F 279.

The post-birth process to obtain a parentage order is extremely slow and not in the best interests of the child. By comparison, in Canada, the post-birth process where orders are obtained, is much quicker. For example, in Alberta, orders are obtained 2-3 business days after the child is born. In most other provinces, the period is 2-4 weeks. Currently, orders are not needed in British Columbia, Manitoba and Ontario, as a statutory process recognises the intended parents. I have set out the statutory process concerning British Columbia in my submission to the ACT government.

In *Lamb & Shaw,* if the intended parents had not acted quickly in filing an urgent application to the Family Court of Australia, the surrogate may well have been successful with her attempt to adopt the child out. The genetic parents of the child were the intended parents. The surrogate was a gestational surrogate. Her ability to be able to adopt the child out as the only parent was because of the law recognising her as the only parent. If the law had recognised the intended parents as the parents, such an egregious act would not have been possible.

If the intended parents were recognised, by operation of law as the parents upon the birth of the child, then the egregious acts of the surrogate in *Tickner & Rodda* would likely not have been contemplated by her, as it would have been in breach of the agreement.

Surrogacy arrangements in not being legally binding agreements ultimately do not provide certainty to the intended parents, surrogate and partner and therefore most importantly, fail the best interests of the child.

As an example of the difficulties with the *Surrogacy Act* as currently practiced, the long delays post-birth fail children. Although there is a period of 30 days to 6 months post-birth in which to file the application for a parentage order, my experience is that most of my clients will typically do that at about five months. There are two reasons that it takes them so long in which to do so:

1. They have a newborn, with a reduced capacity on their part to attend to legal matters.

2. The documents required to obtain a parentage order are significant – and growing. For example, the Supreme Court *now* requires the birth certificates of each of the intended parents to prove their identity and a certified copy of their marriage certificate. This was not once a requirement under the Act but is now an expectation by the court.

Unlike courts in Queensland, Victoria and South Australia, for example, the Supreme Court requires ordinarily that an application be dealt with on the papers, not by way of an in-person hearing.

Presumably the reason for doing so is because of expected efficiencies and reduction in costs to parties. The reality is that there are significant delays built into the system. In Queensland, for

example, when the application is ready to be filed, the listing date is typically one month later. Sometimes it might be two weeks, or it may be in excess of six weeks, but on average it is about one month. There have been, from my experience, similar timeframes in South Australia and Victoria.

In New South Wales, it is a black hole as to what happens when the application is lodged. In theory, the application is listed before a judge to determine in chambers and, in theory, it is dealt with in three weeks. In reality, that timeframe is rarely met. It is not uncommon for the timeframe to be nine or 12 weeks. Officials of the Supreme Court do not like staff from my office chasing what has happened with the matter. One would have thought that parentage of a child would be a high priority by the court, but it appears to be a very low priority – at least in terms of the application being heard and determined. Having a hearing date then imposes a deadline on judges to make a decision. It gives certainty to the parties and to the child as to parentage being determined. The pandemic delayed matters, resulting in one application waiting nine months to be determined.

An example of the difficulties that can happen with the current system were clients who took five months in which to file the application. The delays were as I have explained above. The application was filed in November last year. One would expect that therefore, before Christmas, the application would be determined. It was not.

In February, when the application was still undetermined, I learnt that my clients had separated. I then immediately notified the court. The matter was then listed for directions. The court, quite properly, said that each of my clients if they wished to proceed with the application needed to obtain separate independent legal advice and then, if they still wished to engage me, needed to obtain an updated report from the post-birth counsellor plus updated affidavits from them. All of that was obtained, whilst the parties were also dealing with their separation. That application was determined last week in favour of my clients, when the child was one year and one day old.

I have no doubt that the stress applied to my clients by the failure of the court to determine the application before Christmas was an added factor that assisted, like the straw on a camel's back, in them separating. The prospect of the closure of those court proceedings similarly assisted them in subsequently reconciling.

Delays in the court have real world effects on parties and children. For one year and one day the certainty of the parentage of that child was left hanging in the air.

The Registrar of Births, Deaths and Marriages is similarly slow in undertaking its duties- and failing children and their families in the process. Last year it took the Registrar five months to issue the first birth certificate for the child, without which the application for a parentage order could not be made, and the child could not be registered for Medicare. My clients desperately waited that period, while worrying that they might run out of time to file their application for a parentage order.

If the Registrar is acting quickly, the timeline from when the parentage order is made and when the post-order birth certificate issues takes 6 weeks. However, clients have had to wait up to 3 months for the post-order certificate.

By contrast, the approach in Queensland is much quicker. The sealed order in Queensland typically issues the same day as the order is pronounced, but sometimes this takes two business days. The intended parents then have to fill out a form with the Queensland Registrar- either online or in a paper form, with a copy of the order, to update the register. The Queensland Registrar takes between a couple of hours and 2 business days to update the register and issue the post-order certificate.

There appears no rhyme nor reason why the NSW Registrar is so slow.

These long delays from the post-birth process have significant adverse effects on children in two ways:

1. Medicare.

2. A child with health needs.

Medicare

From discussions I have had with Services Australia, a child will not be able to obtain a Medicare card with the family of the intended parents until either a parentage order is obtained or a parenting plan has been entered into by the parties under the *Family Law Act 1975* (Cth), or some other (vague) circumstance. We have had clients whose Medicare card for their child has been denied until the parentage order has been made. Given that there may be many months before a parentage order is made and given that a child as an infant is at its most vulnerable and is regularly attending upon doctors, this is a direct adverse impact on those children.

Having a quicker process, however it may be described, to have the parentage of the child recognised, will be of assistance in the child having Medicare benefits.

Children's Health Needs

Some children have special needs at birth. I am a father through surrogacy in Queensland and known egg donation in Queensland. Our surrogate was in hospital for a week before she gave birth. During that time, she was unable to spend time at home with her daughter. Our surrogate gave birth at just after 1 a.m. By 4 p.m. that day, our surrogate was initially cleared to leave the hospital in Brisbane. It was then realised that she was a surrogate. That hospital is the largest maternity hospital in Queensland and has had many children born there via surrogacy. Nevertheless, this was the first time that it was realised that the surrogate was going home first. My daughter needed to stay overnight for medical checks.

The matter then went through the hands of three midwives, then three hospital executives. There was then one of those scenes from TV that played out in the corridor between the hospital executive, our surrogate and me, in which we were told that the matter had ended up in the hands of the hospital lawyer and that as a surrogate – *as the only parent* – that it would not be *"advisable"* for her to leave the hospital. Our surrogate felt immediately violated and went to her room, closing off from the world. I immediately felt invisible and unworthy, not being recognised by the law as a parent. Each of us immediately understood, without it needing to be said, that if our surrogate had left that night, the hospital would have been mandated to notify the Department of Child Safety.

No one else should have to go through that problem.

However, that problem has repeated itself a few times when a child has medical needs. Someone has to have parental responsibility for the child. The current settings place parental responsibility in the hands of people who do not want it. Ironically, when there is a single surrogate, there has been a bypass of the *Surrogacy Act* and similar legislation interstate as a result of the implementation of *Masson v Parsons* [2019] HCA 21 as to who is a parent – as seen in *Seto & Poon* and *Tickner & Rodda*.

The first time that this issue arose for our clients, after the birth of my child, was a child born in Adelaide. The intended parents lived in North Queensland. The child had medical issues and

needed to remain in hospital. The child had to be medevaced from the hospital in Adelaide to a hospital in North Queensland.

There were four possible solutions to the problem:

1. Move the proceedings under the *Surrogacy Act 2010* (Qld) forward – as a colleague had done for her clients in another matter, for this very problem. That approach is expensive and stressful on the intended parents. It is difficult to do because of the post-birth processes required under the Act, both in Queensland and even more so, in New South Wales. There is no flexibility under section 16 of the Act, unlike the Queensland Act, to bring the application for a parentage order earlier than 30 days.

2. Obtain orders under the *Family Law Act* as to parental responsibility. This is an expensive option which is highly stressful and given listing issues in that court, at times, there is no guarantee that the matter would be dealt with quickly. Currently, urgent matters in that court can be dealt with quickly.

3. Apply to the Supreme Court for orders under its *parens patriae* jurisdiction. Again, this can be done, but it is expensive and stressful.

4. Enter into a parenting plan under section 63C of the *Family Law Act 1975* (Cth).

There must be two parents for the purposes of a parenting plan under section 63C of that Act. The effect of *Masson*, as interpreted in *Seto* and *Tickner* is that the intended genetic father is a parent for the purposes of the *Family Law Act*. Therefore, if there is a single surrogate, one can feel safe that there will be a minimum of two parents. The other parent or parents may be the surrogate by having given birth and/or the other intended parent, by intention or genetics (or both). The High Court in *Masson* left open the possibility that there may be more than two parents recognised under the *Family Law Act*[7].

Not surprisingly, in that case my clients entered into a parenting plan which was accepted by both hospitals and the Medivac service.

It is now my practice, following what has occurred with me and other cases involving clients with children with medical needs, and the advice from Medicare Australia, to have my clients enter into a parenting plan upon the birth of the child. If the intended parents were recognised as the parents at birth, such an extra step would not be necessary. It adds yet another cost burden that is required because of the settings under the Act.

In another case, a child was hospitalised for 6 months. In order to fix the problem, so that someone interested had parental responsibility, the hospital lawyer advised the intended genetic father that he be named on the birth certificate. That happened. The parentage order was not made until the child was exactly 6 months old. As one could imagine, naming the intended genetic father as a parent on the birth certificate led to complications at the time of the parentage order being sought, as seen in *S v B*; *O v D* [2014] NSWSC 1533, for example.

In my view, the *Surrogacy Act* has failed to protect children born overseas through surrogacy in that the parentage of the intended parents has not been recognised. There ought to be the ability under the *Surrogacy Act* to recognise that parentage. Despite whatever qualms there may be about the surrogacy process that occurred overseas, the child ought to be protected. The focus of the Act seems more to be about the rights of the surrogate as a parent, than the rights of the child to have

[7] At [26].

its identity and family protected, and not be the subject of discrimination. Currently, there are adults who have been born through surrogacy overseas and only one or none of their parents have been recognised by law here. They and those under 18 should be protected in having their parents properly recognised rather than having limping parentage continue.

3. Does the *Surrogacy Act* offer sufficient protections for birth mothers?

Clearly, the *Surrogacy Act*, when copied from the Queensland Act, failed in allowing for the surrogate by statute to have bodily autonomy as to the pregnancy and birth, like anyone else. I note that Tasmania copied this provision in 2012, then Victoria in 2017, South Australia in 2019 and most recently, the ACT in 2024. It is vital that there be such provision in the Act. Surrogates should have their bodily autonomy protected.

4. Does the *Surrogacy Act* adequately meet the needs of various family structures, including LGBTQIA+ families, families who conceive through fertilisation procedures and families created through surrogacy arrangements?

The *Surrogacy Act* only concerns surrogacy arrangements. The rest of those procedures are either under the *Assisted Reproductive Technology Act 2007* or the *Status of Children Act 1996*. Clearly, too often the clunky structures of the Act fail to adequately protect LGBTQIA+ families where the child is conceived through surrogacy, as I have explained elsewhere and in the attachments.

5. Do you have any comments about the definition of *surrogacy arrangements*?

I support the current definition of *surrogacy arrangement*, with this rider: it and the Act ought to be written in gender-neutral terms. I note that the ACT in its 2024 amendments is written in gender-neutral terms.

6. Do you have any comments about the extent to which surrogacy arrangements can be enforced?

It seems extraordinary that in another altruistic regime, that of Canada, it is possible to have enforceable surrogacy agreements. I say extraordinary when you suggest that *"enforcing a surrogacy arrangement against a surrogate may subject vulnerable birth mothers to exploitation and/or coercion, and the transfer of parentage to non-consenting intended parents would be inconsistent with the best interests of the child"*.

Having a binding contract means that there is certainty for all involved as to what arises by entering into the agreement. It is crystal clear to the parties at the beginning that the intended parents will be the parents and that the surrogate and partner will not.

One must take the approach by the then Special Rapporteur of the United Nations with circumspection. Her approach was significantly criticised by International Women's Health Coalition and Human Rights Watch[8], where they are critical of the relevant human rights that should inform any discussions around surrogacy, identify human rights implicated by surrogacy arrangements and, say who the relevant rights holders who should be part of discussions around surrogacy and set out key considerations and principles arrived from human rights law and research that should frame the formulation of guidance, law and/or policy and issues of surrogacy.

[8] https://www.hrw.org/news/2019/06/03/submission-special-rapporteur-sale-and-sexual-exploitation-children?fbclid=IwAR1ij8PIVZ_3qbU1GlScsQIryEKdbIrUta5kkE5QHGMyWAGqGIUERGpiloc.

They say in conclusion:

> *"There are risks of abuse in surrogacy. The solution to this problem is not to ban surrogacy, but for surrogacy to be practiced under a framework based in international human rights law, incorporating the rights of the child, surrogates and potential surrogates, and people seeking to become parents through use of surrogacy and other forms of assisted reproduction."*

In 2018, the then Special Rapporteur came to the conclusion in her paper that:

1. If there were a binding contract for surrogacy, that that amounted to the sale of a child under the *Optional Protocol* to the UN *Convention on the Rights of the Child*.

2. That if the surrogate were paid for more than reasonable expenses, that too amounted to the sale of the child.

3. The making of an order before the birth of the child also amounted to the sale of the child.

That approach was significantly criticised by the International Women's Coalition and Human Rights Watch which said:

> *"People acting as surrogates may do so for no remuneration (money paid for work or a service) or no consideration (money in exchange for benefits, goods, or services), and in other cases may receive compensation that constitutes fair recompense for lost wages and other opportunity costs, healthcare and nutrition expenses, and restitution for the significant burdens and risks associated with pregnancy. We submit that such arrangements do not and should not in and of themselves constitute sale of children under the optional protocol."*

They also identify various rights under international law, including the right to decide the number and spacing of children, the right to found a family and the rights of persons with disability. I will not repeat what they set out in the footnoted paper.

They had not, however, identified the *Yogyakarta Principles*. Principle 24 sets out the right to found a family and starts with:

> *"Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of their sexual orientation or gender identity of any of its members."*[9]

The then Special Rapporteur's analysis of binding contracts, payment of expenses and pre-birth orders was, with respect, absurd and out of touch with reality. Pre-conception orders are made in Greece, South Africa and Israel, all of which are altruistic regimes.

You properly draw attention to the events at Mediterranean Fertility Institute in August last year. I have had clients affected by those actions. My clients went to a clinic that had operated for 30 years, seemingly blemish free. The clinic was the subject of registration under Greek laws, and subject to a regulator, the Greek National Authority of Assisted Reproduction, a body with similar duties to those of the NSW Ministry of Health under the *Assisted Reproductive Technology Act 2007* (NSW). Greek law makes plain that surrogacy is altruistic[10].

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[9] http://yogyakartaprinciples.org/principle-24/.

[10] *Greek Civil Code*, Art. 1458; *Law 3089/2022*, Art. 8; *Law 3305/2005*, Arts. 13, 26.

It is alleged by Greek authorities that eight of the ten employees at that clinic committed acts of fraud and human trafficking of would be surrogates. Those charged are entitled to the presumption of innocence. If they are found guilty of those offences, they should be punished to the full extent of the law for committing those evil crimes.

Intended parents are recognised by operation of law as the parents in Buenos Aires, Argentina; Russia, Ukraine, Georgia, Kazakhstan, British Colombia, Manitoba, Ontario, Illinois and Pennsylvania. Pre-birth orders are made commonly in many States in the United States.

Binding contracts are entered into in, among other places, the United States and Canada.

If what the Special Rapporteur had said was true, then that would mean that judges in many parts of the United States and Canada were parties to the sale of children and that legislatures in Greece, Israel, South Africa and British Columbia, Manitoba and Ontario were also parties to the sale of children – which clearly they have not been.

As New Zealand researchers have pointed out, the prohibition of commercial surrogacy in New South Wales overseas is *"a failed experiment"*[11]. The number of children born overseas through surrogacy compared to the number of children born in Australia through surrogacy, and the failure to prosecute one person in the time that approximately 3,000 children have been born overseas, demonstrates that. You recognised the problems in 2018 as to the difficulty in prosecuting for overseas commercial surrogacy. You called for Commonwealth leadership. That has not been forthcoming. In the last 6 years, as with the previous 7, there has been no prosecution by NSW authorities for commercial surrogacy- although there have been many children born to NSW residents overseas, many of whom must have been born through commercial surrogacy.

It should not continue to be the case that for every child born in Australia via surrogacy that three are born overseas. It should be easier for intended parents to undertake surrogacy here.

The only way that there will be a substantive difference in the number of children born through surrogacy in Australia is to compensate those who would be surrogates here. No one, unless they have an emotional attachment to the intended parents (for example, friends or family) or to the notion of surrogacy (because the proposed surrogate is, for example, a midwife) would volunteer to be a surrogate unless they were properly compensated, given the risk of injury or death. It is blindingly obvious why there is such a shortage – but there is a lack of political will to fix the problem.

8. Do you have any comments about the prohibition on NSW residents entering into commercial surrogacy outside of NSW?

There ought to be an end to the failed experiment. Its deterrent effect is minimal at best. It brings the law into disrepute.

If a couple live in New York and one of them remains domiciled in New South Wales, notwithstanding that they may have been living there for five years, that party runs the risk of

[11] New Zealand Law Commission, Issues Paper 47, *Review of Surrogacy*, footnote 1.7 citing: Debra Wilson and Julia Carrington "Commercialising Reproduction: In Search of a Logical Distinction between Commercial, Compensated, and Paid Surrogacy Arrangements" (2015) 21 NZBLQ 178 at 186. See also South Australian Law Reform Institute Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA) (Report 12, 2018) at [12.3.1]; and House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements (Parliament of the Commonwealth of Australia, April 2016) at [1.70]–[1.71] and [1.112]–[1.113].

committing an offence under the *Surrogacy Act* if the surrogacy arrangement is deemed to be a commercial one.

9. Do the offences and penalties for commercial surrogacy in the *Surrogacy Act* meet the policy objectives?

No, as I explained to the Parliamentary Committee in my submission and as I have explained in my submission to the ACT Government last year.

10. What disadvantages may be experienced by children born through commercial surrogacy agreements due to parentage orders not being available in NSW?

As identified above, and by the International Women's Health Coalition and Human Rights Watch in their excellent submission[12].

11. Do you have any comments about advertising for altruistic surrogacy arrangements? Do you think individuals should be able to pay for advertising relating to altruistic surrogacy arrangements?

There should not be an offence concerning advertising for altruistic surrogacy arrangements. The problems with having an offence relating to advertising were recognised by the Gorton Review in Victoria and recently by the ACT Government in its amendments. The prohibition does not work. No person has ever been prosecuted in any State or Territory with an advertising offence relating to surrogacy. As the Gorton Review recognised, advertising is occurring every day.

12. Do you have any comments about the lack of a central register recording details of women willing to be surrogates and/or intended parents?

Ms Narelle Dickenson, psychologist and ANZICA member when she undertook her Churchill Fellowship into surrogacy overseas (2016), came to the startling conclusion that surrogacy agencies overall were beneficial and took the position that it would be of assistance in Australia that surrogacy agencies were allowed. She said[13]:

> *"My beliefs and attitudes regarding surrogacy have unquestionably been challenged during the time I have worked as a surrogacy counsellor. Many of my pre-existing views about what it takes to be a gestational surrogate, what it means to be an IP, and the best/most successful means to undertake a surrogacy arrangement, have been altered by the experience of observing a wide variety of completed arrangements. My attitudes about commercial CBS* [cross-border surrogacy] *have also been altered as a result of this Fellowship. The experience afforded me a far better understanding of the various models of commercial CBS, and the potential impact of introducing financial reward to a surrogacy agreement.*
>
> *The Fellowship clearly demonstrated that not all surrogates involved in commercial cross-border surrogacy are exploited but it also clearly demonstrated that some surrogates do experience exploitative and coercive treatment. In order to reduce the exploitation of women in commercial surrogacy arrangements, attention should be directed at assisting IPs to find surrogates who are protected from unscrupulous service providers, and help them to make well considered, informed choices about their participation in surrogacy.*

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[12] https://www.hrw.org/news/2019/06/03/submission-special-rapporteur-sale-and-sexual-exploitation-children?fbclid=IwAR1ij8PIVZ_3qbU1GlScsQIryEKdbIrUta5kkE5QHGMyWAGqGIUERGpiloc.
[13] Pp. 52-53.

Australia can establish nationally consistent policy and legislation which ensures sufficient domestically based women are prepared to act as surrogates and at the same time uphold its international responsibilities to protect vulnerable women overseas who may become involved in exploitative arrangements.

Implications for models of domestic surrogacy

Having investigated a range of models for surrogacy provision (both domestic and international), I have yet to see a "perfect" model in action. However, Australia is in a position to implement a surrogacy practice model that selects the most ideal aspects of care and protection for all involved. We have an opportunity to learn from other legislators, and introduce sufficient protection and support to IPs, surrogates, and most importantly, the children born through surrogacy.

Provision of surrogacy in Australia is currently governed by a jigsaw of clinical guidelines and state-by state legislation. It is critical that consistency of regulation be introduced across Australia to simplify interstate arrangements. The complexity of surrogacy in the USA with enormous variation between states clearly demonstrates the risks of absent consistent regulation. Reliance on professional organisation guidelines and ethical codes is insufficient to guarantee standards of practice, as enforcement capacity is limited. It is evident in international models that certain providers of surrogacy services (most specifically the surrogacy agencies) often fall outside the scope of these guidelines, and only clear limits, based in legislation, can provide enforceable protections for surrogacy service users. All providers of surrogacy services must have regulatory frameworks around their practice.

The altruistic aspect of a surrogacy arrangement is imperative. Even generously compensated commercial arrangements also require a desire to help another person in order for surrogacy to operate smoothly. However, evidence from Australia and overseas has consistently indicated that there is generally insufficient motivation for women to engage in uncompensated surrogacy unless the surrogate has a pre-existing relationship with her IP. It would be reasonable for Australia to consider introducing limited compensation for surrogates, as recognition for the time, effort and physical and social impact of undertaking a pregnancy for another person. This would predictably increase the availability of women prepared to undertake surrogacy, particularly for women with whom they have no pre-existing relationship.

Another primary reason for utilising CBS cited by IPs is the perceived cost of surrogacy in Australia. Costs are incurred for legal and counselling fees and surrogate expenses, but a significant cost results from the IVF treatment itself, as Medicare rebates currently specifically exclude ART in the context of third party reproduction. It would be appropriate for Medicare to treat all third party reproduction (including donor cycles and surrogacy) undertaken domestically with comparable rebate to any other fertility treatment. This would substantially reduce the cost for consumers of undertaking domestic surrogacy arrangements.

It can be incredibly difficult to identify qualified and experienced surrogacy providers who are genuinely capable of providing ethical quality services. Legal, medical and counselling practitioners working in the surrogacy industry should undertake specialised accreditation which acknowledges this specialised knowledge and experience, thereby assisting service users to identify and select appropriate service providers. All practitioners must comply with ongoing CPD requirements to maintain and update their skills and knowledge of surrogacy treatment and legislation.

Surrogacy agencies can provide a valuable function in selecting and matching suitable surrogates to potential IPs. They can provide a supportive function to both IPs and surrogates, and assist with management of advertising, screening and matching processes. Agencies could be designed to function within regulatory guidelines, as a means to avoid exploitative, unethical or substandard service delivery. Agencies could be required to involve representatives from all aspects of surrogacy (ie medical, counselling, nursing, legal and consumer), to provide oversight and compliance with legislative frameworks and ensure practice is managed in a manner which is ethical and non-exploitative.

The implementation of pre-birth orders for domestic surrogacy arrangements would simplify policies and practices regarding children born within Australia through surrogacy, and assist to clarify and streamline processes regarding birth registration and child support payments etc.

The establishment of trust accounts (similar in structure to escrow accounts, as used in the USA), could assist to ensure transparent financial management of surrogacy arrangements. This can be useful if third parties are involved in managing the arrangements (such as surrogacy agencies), but also for independently managed surrogacy arrangements. Trust accounts of this nature may help prevent issues occurring during the arrangement associated with poor communication around financial expectations, or mismanagement of funds."

I note that surrogacy agencies are part of the landscape in Canada, an altruistic regime, and enables surrogacy to occur there in a more open manner than occurs in Australia.

If there is not the political will for there to allow compensated surrogacy, at the very least there should be the ability to operate surrogacy agencies in Australia. Having firm controls over the amounts that surrogates are able to be paid will in itself have a major constraint on the operations of those agencies.

A central register recording details of women willing to be surrogates and/or intended parents will not work. Such a register was attempted in South Australia and failed. It is now not part of the *Surrogacy Act 2019* (SA) because it failed. It is one thing to go onto Facebook or Instagram to say that you might be prepared to be a surrogate. It is another thing entirely to list your details with the Government.

13. Do you have any comments about the process for obtaining parentage orders in NSW?

I have detailed these above.

14. Do you have any comments about the pre-conditions to obtaining parentage orders?

These are considerably longer than those in most other States and considerably longer than in like jurisdictions overseas, such as in Canadian jurisdictions.

The requirement for the intended parents to be at least 25 impinges on their reproductive autonomy, right to privacy, right to decide the number and spacing of children and the right to found a family, and right to benefit from scientific progress and in some cases, rights of persons with disabilities.

By way of example, section 30 requires that a medical or social need for the surrogacy arrangement must be demonstrated. The purpose of section 30, although unstated, is to reduce maternal mortality risk and injury to those who would be surrogates. It must be necessary for the relevant journey.

Recently, in a matter I had before the Supreme Court, the judge questioned whether there was any evidence of medical need. My clients were a heterosexual couple. The short report from the fertility doctor (as the fertility doctor did not see providing a detailed report in a timely manner as a priority, as compared to direct care of patients) merely listed in short form that the intended mother had undertaken IVF, including sperm donation and egg donation, and that ultimately, the surrogacy had occurred via egg donation with sperm from the intended father with the resultant embryo being implanted into the surrogate.

The intended mother's affidavit said that she had undertaken 16 cycles of IVF overall, plus sperm donation (before her relationship with her husband commenced) and then when her relationship with her husband commenced, they attempted to conceive naturally, then further attempts of IVF, ultimately followed by egg donation.

I would have thought that there was ample evidence that my client was not a Hollywood or Bollywood actress trying to keep her figure and put the life of someone else potentially at risk unnecessarily.

Nevertheless, the judge while making the order, was insistent that on the next occasion there ought to be expert evidence on that point.

15. Do you think the process for obtaining parentage orders adequately protects birth mothers and other parties to a surrogacy arrangement?

Answered above.

16. Do you think the parentage order process meets the policy objectives of the act, including providing legal certainty in promoting the best interests of the child?

Answered above.

17. Do you have any other comments about the provisions of the *surrogacy act*?

Answered above.

18. What do you think are the policy objectors of the *Status of Children Act*? Do you think they are still valid?

There is now little certainty as to who is a parent. In many ways, the *Status of Children Act* has been sidelined by the effect of the High Court's decision in *Masson v Parsons* [2019] HCA 21. That decision makes plain that if there is any conflict between the *Family Law Act 1975* (Cth) and this Act, the former prevails.

That decision also makes plain that who is a parent under that Act is a question of fact, which may turn on intention, and that Act may allow for more than two parents to be recognised[14]. While a lesbian couple undertaking a fertilisation procedure will be recognised as the parents under section 14 of the Act and section 60H(1) of the *Family Law Act* – and the donor will not be recognised as a parent, a possible outcome of *Masson* is that the donor's partner *may*, depending on intention, be recognised as a parent.

Of course, I support that there should not be legitimate and illegitimate children, but just children. An unfortunate effect for children born overseas through surrogacy is that we now have two classes of children in NSW, namely, those born within Australia whose parentage is recognised and those

[14] At [26].

born overseas through surrogacy whose parentage may be uncertain. Certainty about the status of their parentage should be given to those children born overseas through surrogacy.

19. Does the *Status of Children Act* ensure the equal status of children regardless of family structure?

In large part it does. It does not provide equal status of children for those born overseas through surrogacy, discussed above. It also fails to recognise those where more than two people agree to become parents.

Children are being conceived and born to parents who are members of the LGBTQIA+ community whereby agreement is reached by more than two parents who are identified at commencement. This is not a new phenomenon. Recently, we acted in a case involving a lesbian couple and a gay couple – all living in New South Wales, where the child would now be 16. The two couples agreed at commencement that there would be four parents. However, because of the limitation of only two parents being recognised, only the women were identified as the parents of the child. The men were excluded. There have been a series of cases where the man sought to be recognised as a parent at commencement but was then removed from the birth register[15], an unfortunate side effect of the recognition of lesbian couples as parents. There should be the ability, by agreement at commencement, to recognise more than two parents, as occurs for example in British Columbia and Ontario.

There also ought to be certainty where there is a known donor, particularly for single women as to whether or not the donor is to be a parent – the very problem seen in *Masson* and other cases.

It would be ideal if sperm donor agreements and similarly egg donor agreements and embryo donor agreements involving known donors were to be recognised by statute. The evident challenge in NSW is that to provide for their recognition under the Act may require, in all likelihood, cooperation by the Commonwealth Government and preferably that of the other States and Territories.

20. Does the *Status of Children Act* adequately establish parentage?

Clearly, as seen in *Masson*, it does not – at least in some cases. That case clearly identified that a man who provides his sperm can be a parent. As seen in the subsequent cases of *Seto & Poon* and *Tickner & Rodda*, the genetic intended parent is recognised as a parent – even for surrogacy arrangements, which if intention were to be the basis for establishing parentage for the other intended parent, then State and Territory regulation of surrogacy is largely irrelevant.

22. Do you have any comments about the parentage presumptions contained in the *Status of Children Act*?

Answered above.

23. Do you think there are any situations not covered by the current presumptions that should be included?

There should be the easy ability under the Act or under the *Births, Deaths and Marriages Registration Act 1995* for those who are recognised overseas as parents through surrogacy to be recognised in NSW as the parents, so that the parentage of the child is not in doubt. I note the

[15] *AA v Registrar of Births, Deaths and Marriages and BB* [2011] NSWDC 100; *Dent & Rees* [2012] FMCAfam 1303; *LU v Registrar of Births Deaths and Marriages (No 2)* [2013] NSWDC 123; *A & B v C* [2014] QSC 111; *McAuley & Salberg* [2020] FCCA 1538.

proposal by the Western Australian Ministerial Expert Panel[16] on that point, accepted in principle by the Western Australian government[17].

This could be done either by having to make an application to the Supreme Court (which imposes costs barriers on intended parents and therefore affects children but is transparent in its nature being a judicial proceeding), or by administrative means by automatic recognition, such as by regulation from recognition of certain types (such as court orders) or from certain places. Children in New South Wales have been conceived and born in surrogacy arrangements in overseas countries where their parentage is recognised in the overseas country such as:

- Pre-conception order – Greece, Israel, South Africa.
- Pre-birth order – for example, many parts of the United States.
- Post-birth order – most parts of Canada, some States in the United States.
- Second parent adoption order – some parts of the United States, for example, Hawaii, Iowa, Minnesota, Tennessee and Florida.
- Post-birth parentage order – some parts of the United States such as Iowa, Texas, Florida, United Kingdom.
- Parentage by operation of law – for examples, Buenos Aires, Russia, Georgia, Ukraine, Kazakhstan, Colombia, and in some states, Mexico.
- Adoption order, some states in the United States, New Zealand.

These children should have certainty about their parentage, in accordance with their fundamental human rights.

As the Department of Home Affairs data reveal, Australian children have been born in a dazzling variety of overseas countries- not just the usual surrogacy destinations.

24. Do you have any comments about the categories of persons who can apply to the Supreme Court for a declaration of parentage?

It appears wide and does not evidently need to be broadened.

25. Do you have any comments about the pathway to obtaining a parentage declaration?

Hopefully it is quicker, simpler and cheaper than obtaining a parentage order.

26. Do you have any comments about the categories of persons who can apply for a parental testing procedure?

No.

[16] https://www.health.wa.gov.au/~/media/Corp/Documents/Health-for/ART/MEP-on-ART-and-Surrogacy-Final-Report.pdf.
[17] https://www.health.wa.gov.au/~/media/Corp/Documents/Health-for/ART/Government-Response-to-MEP-Report-Recommendations.pdf.

27. Do you think the court has sufficient powers to order parentage testing?

Yes. In addition to its other powers, the Court has cross-vested jurisdiction under the *Family Law Act 1975* (Cth) and *parens patriae* jurisdiction.

28. Do you have any other comments about the provisions of the *Status of Children Act?*

No.

About Me

I am a gay man who is married to my husband and who has previously experienced infertility. We have a daughter aged 5 born through surrogacy and known egg donation in Queensland. I was admitted as a solicitor in 1987. Since 1988 I have advised in just under 2,000 surrogacy journeys, including for many clients from New South Wales. I have drafted many egg, sperm and embryo donor agreements since about 2013.

My clients have come from all over Australia and at last count, 37 other countries.

I have appeared in the Childrens Court of Queensland, Supreme Court of New South Wales, Youth Court of South Australia and County Court of Victoria on parentage order applications, the only lawyer to have done so. I expect within the next month or so to appear in the Supreme Court of the ACT on an application by clients from there who underwent traditional surrogacy with a surrogate in New South Wales.

I am a Fellow of the International Academy of Family Lawyers, including co-chair of its Sexuality and Gender Identity Committee, a member of its Parentage Committee and a member of its Forced Marriage Committee.

I am a Fellow of the Academy of Adoption and Assisted Reproduction Attorneys, including a member of its ART Resources Committee and International Committee.

Since 2012, I have been an international representative on the ART Committee of the American Bar Association, including being the advocate for and co-author of a Policy (2016) as to a proposed Hague International Surrogacy Convention.

I am one of the co-founders of the International Surrogacy Forum which has been held in Cambridge (2019) and to which the then Special Rapporteur attended, then in Copenhagen (2023) with the next to be held in Cape Town in March 2025.

I am a board member of the Fertility Society of Australia and New Zealand.

Between 2017 and 2022, I lectured in *Ethics and the Law in Reproductive Medicine* at The University of New South Wales, for which I received a post-graduate teaching award (2019).

In 2020, I received the inaugural Pride in Law Award.

In 2021 I was a member of the Northern Territory Government's joint surrogacy working group, which led to the enactment of the *Surrogacy Act 2022* (NT). I continued to assist that Government with issues regarding that Bill, until the day of its enactment.

In 2023, I received the Queensland Law Society President's Medal.

I am the author of *When Not If: surrogacy for Australians*. I expect that in late August 2024 my second book, *International Assisted Reproductive Technology: a practical guide for lawyers*, will be published by the American Bar Association. I am the sole author.

The opinions in this letter are mine and mine alone.

I ***attach*** my curriculum vitae.

If I can be of any assistance to the Department, please just ask.

Yours faithfully

Stephen Page
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