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7 July 2025

The Hon. Justice Mark Moshinsky
Australian Law Reform Commission

surrogacy@alrc.com.au

Dear Commissioner

Submission for the ALRC surrogacy review

This is my submission to the surrogacy review. It is made on the basis that my identity is able to be disclosed and the contents of this submission published.

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My opinion

The contents of this submission are my opinion, arising from:

1. Having become a dad, with my husband, of my beautiful daughter through known egg donation and surrogacy in Queensland.

2. Having experienced infertility.

3. Having advised, since 1988, in over 2,000 surrogacy journeys for clients throughout Australia, and in 39 other countries.

4. Working as a solicitor since 1987, a specialist family lawyer since 1988, and an accredited family law specialist since 1996, including being an Independent Children's Lawyer for 15 years.

5. Appearing in many pioneering court cases in Australia about surrogacy.

6. Having been an expert witness about Assisted Reproductive Technology (ART)/surrogacy both in Australia and the United Kingdom (including as to surrogacy law in Cambodia).

7. Advising many of Australia's IVF clinics about regulatory matters.

8. Serving in various assisted reproductive technology (ART) committees, nationally and internationally, including being co-founder of the International Surrogacy Forum.

9. Making, since 2011, many submissions to various reviews or inquiries about surrogacy/ART.

10. Presenting at numerous local, national and international conferences and seminars about ART.

11. Writing about ART in numerous articles.

12. Teaching *Ethics and the Law in Reproductive Medicine* for 5 years at The University of New South Wales, as well as having been guest lecturer in various universities about ART.

13. Being principal advocate for and co-author of a policy of the American Bar Association about a proposed Hague surrogacy convention.

14. Co-authoring one chapter and writing another chapter in books relating to surrogacy.

15. Authoring two books: *When Not If: Surrogacy for Australians* (2022), self-published, and *International Assisted Reproductive Technology* (2024), American Bar Association.

Disclosure

I am:

1. Member, Australian Law Reform Commission, Surrogacy Review, Advisory Committee

2. Legal Practice Director of Page Provan Pty Ltd, an incorporated legal practice in Brisbane that specialises in family and fertility law.

3. Secretary of the Fertility Society of Australia and New Zealand

4. Fellow, International Academy of Family Lawyers, including co-chair Gender Identity and Sexuality Committee, member, Parentage and Forced Marriage Committees

5. Fellow, Academy of Adoption and Assisted Reproduction Attorneys, member, International and ART Committees

6. International Representative, American Bar Association, Family Law Section, Assisted Reproductive Technology Committee, including member, International Sub-Committee

7. Member, Australian Lawyers for Human Rights, LGBTQIA+ Committee

8. Member, International Advisory Committee, Growing Families

9. Member, Queensland Law Society

10. Member, Law Council of Australia, Family Law Section

11. Member, Family Law Practitioners Association of Queensland

International context

Once written, the ALRC report will not only be read by the intended audience- the Government and people of Australia, but internationally.

I am seek that the report by the ALRC address two international matters in its report:

1. Any divergence of views it may have (if any) with the *Verona Principles*, published by International Social Services. In my view, while there are many worthy aspects of the *Verona Principles*, they are flawed as to their view of who is a parent through surrogacy, and as to the recognition of parenthood.

2. Any report that may be written by the United Nations Special Rapporteur on Violence against Women and Girls, Ms Reem Alsalem to the United Nations Human Rights Committee concerning surrogacy regulation or abolition.

The Special Rapporteur is considering whether there should be a United Nations instrument banning or regulating surrogacy. At the time of writing, Ms Alsalem is formulating her report to the Human Rights Council. I expect that her report will be written shortly.

I have made submissions to the Special Rapporteur, both oral and written, on behalf of the Fertility Society of Australia and New Zealand, and Rainbow Families Australia.

Summary of views

Proposals 1 and 2

1. That there be a uniform *Surrogacy Act*, to be enacted by a lead State or Territory, to be adopted by all States and Territories.

2. That a review be undertaken of relevant Commonwealth legislation, and amendments enacted, to accord with that *Surrogacy Act*.

Comment: If there is to be national reform, there have to be consistent laws. Despite the hope of the 2016 House of Representatives surrogacy inquiry for national non-discriminatory surrogacy laws, a decade later (when the ALRC report is presented) that will not have been achieved. What has been achieved has been 8 disparate systems, each with unique features, in a country with the population of a city the size of Shanghai or Mexico City, but less than that of Tokyo.

Proposal 3

3. That there be a preamble to the *Surrogacy Act* referring to international human rights instruments, and human rights principles taken up by the Act, in a similar manner to the South African *Children's Act*.

That Act makes plain[1] what human rights are relied upon in its enactment, giving a clear message to the people, judges and the international community as to Parliament's intentions.

Proposal 4

4. Amend the *Family Law Act 1975* (Cth), s.69R, to replace *"prescribed"* with *"an"*.

Until 13 December, 2024, s.69R was a dead letter, so far as it concerned the recognition of parentage arising from foreign birth certificates. From that date, the parentage of children born in most overseas surrogacy destinations is automatically recognised in Australia. **See page 131**. It is proposed to change the provision to enable the automatic, presumptive, recognition of parentage arising from birth certificates anywhere overseas. Being a rebuttable presumption, Government is not bound by the birth certificate in determining parentage when there is a concern that the child has been trafficked.

Proposal 5

5. That the human rights of all concerned with the surrogacy journey need to be protected and respected, that being the rights of the intended parents, the surrogate, surrogate's partner, and above all, that of the child. These include:

   a) Upholding the child's rights, including the right to be cared for by its parents, to have its best interests upheld, and that its identity is protected (including registration of birth and nationality).

   b) Where possible, enable the child to know its genetic origins and that it was born via surrogacy.

I discuss these human rights issues primarily at **pages 36 to 71, and 115 to 118**.

Proposal 6

International surrogacy

6. By way of a transitional provision, ensure that children born before the commencement date of any enabling legislation, who have been left stranded and Stateless overseas due to Australian officials not being satisfied as to the identity of the surrogate for the purposes of the *Australian Citizenship Act 2007* (Cth), s.17(3), or of the *Migration Act 1958* (Cth), be able to obtain Australian citizenship or an Australian visa, when they had a parent at birth who was an Australian citizen, or they have a parent who is an Australian visa holder.

[1] See page 116.

Children born via surrogacy to Chinese-Australian intended parents through surrogacy in China have been rendered Stateless because the parents cannot identify the surrogate. These children need to be protected. I discuss this at **page 135**.

Proposals 7 and 8

7. That the form of the electronic travel authority application in visa waiver countries be changed to enable a child to be brought quickly back to Australia, if the child has been born overseas through surrogacy.

8. That intended parents be able to access an approval in principle process for Australian citizenship and passports from the Departments of Home Affairs and Foreign Affairs and Trade following the conception of the child and before its birth, by submission of relevant paperwork to the Departments no later than 16 weeks gestation, with the expectation that approval in principle for both citizenship and passports be provided by 20 weeks gestation.

The practice of Australian intended parents in surrogacy destinations that are visa waiver countries (primarily the United States and Canada) is for their children to come home via the ETA, rather than applying for Australian citizenship overseas. In so doing, they are potentially committing criminal offences, as the applicant is required to state that the intention is not to reside in Australia. Coming to Australia in this manner has been the common practice for the last 15 years or so and has not prejudiced the obtaining of Australian citizenship by descent of those children. Regularising this process by adjusting the ETA form is simple, quick and cheap, is consistent with current practice, and removes the risk of criminalisation that currently exists.

Following the Nuchal test at 12 weeks, the intended parents should know fairly quickly if they have a viable pregnancy. If they were to apply by 16 weeks by a streamlined pre-approval process through one portal managed by both the Departments of Home Affairs and Foreign Affairs and Trade, and there is turn around by those Departments within one month, they can have certainty that their child's application has been approved in principle, and not have that stress hanging over them.

Children can be born viable from 20 weeks.

The Department of Home Affairs commonly processes applications for Australian citizenship by descent concerning surrogacy within one month.

DFAT issues emergency passports to children born overseas through surrogacy commonly within 2 weeks. Passports for children born overseas through surrogacy commonly take in excess of 2 months to issue. Last year, DFAT undertook a review of these processes. Although I made submissions as to that review, I do not know the outcome. Nor have I seen any change in practice.

Children's passports issued in each of Canada and the United States on application by Australian parents through surrogacy are typically issued within 2 working days.

The UK Government has put in place side by side consideration of citizenship and passport applications for children born via surrogacy in the United States. Having side by side consideration would speed up the process here too.

Proposal 9

9. That in the same manner as the Department of Home Affairs publishes live data on its website of processing times for visa and citizenship, the Department of Foreign Affairs and Trade publish live data on its website of processing times for the issue of children's passports, including for children born overseas through surrogacy.

This is a simple, cheap and effective accountability measure to be implemented by DFAT to assist potential applicants, in the same way as the Department of Home Affairs helpfully publishes live data on its website about visa and citizenship application processing times.

Proposals 10 and 11

10. That the *Australian Passports Act 2005* (Cth), s11(1) be amended, by adding new paragraph (c):

    " c. an order of a court in a convention country (within the meaning of the Family Law (Child Abduction Convention) Regulations 1986) permits any of the following:

    (i) the issue of a travel document to the child;

    (ii) the child to travel internationally;

    (iii) contact between the child and another person outside the country where the order was made."

11. Repeal *Australian Passports Determination 2015* (Cth), s.10(3)(h).

This is merely moving a provision from an obscure regulation to the statute. The issue concerns DFAT's attitude that the surrogate is a parent as she gave birth, notwithstanding overseas law. See **page 132.**

Proposals 12 and 13

12. That the *Australian Passports Act 2005* (Cth), s.11 be amended, by adding:

    "(6) When a child has been born overseas by a surrogacy arrangement, a surrogate will not have parental responsibility for a child unless:

    (i) a court order in that overseas country names the surrogate as a parent; or

    (ii) the order provides that the surrogate has parental responsibility for a child;or

    (iii) the surrogate is presumed to be a parent of the child within the meaning of the Family Law Act 1975, s.69R; or

    (iv) the surrogate is otherwise a person who has parental responsibility under subsection (5)."

13. That the Minister for Foreign Affairs publish a directive, displayed on the DFAT website, and provided to officers of the Department of Foreign Affairs and Trade who have delegated power

to issue passports under the *Australian Passports Act 2005* (Cth), that a surrogate will not be considered a parent of the child merely by having given birth to the child.

This is the same issue as that for proposals 10 and 11, so that intended parents do not have to revert to the overseas surrogate every 4 ½ or 5 years seeking her consent to the issue of the child's passport. The proposed amendment allows for the surrogate to be recognised by a Court as holding parental responsibility under the *Family Law Act 1975* (Cth) or the *Family Court Act 1997* (WA).

Proposals 14 and 15

14. That the Commonwealth continue to work with the Hague Conference on Private International Law (HCCH) to seek that there is a robust framework of private international law enabling the recognition of parentage of children born through international surrogacy arrangements, and the upholding of various human rights concerned.

15. That Australia seek through any United Nations process concerning international surrogacy arrangements that the recognition of parentage of children born through international surrogacy arrangements is the priority when considering the upholding of various human rights, and seek that the United Nations work constructively with HCCH concerning those children, and the work of HCCH in seeking to legislate concerning private international law regarding children.

HCCH has sought to legislate in this difficult area since 2011. Australia, primarily through the Hon. John Pascoe CVO AC, has played a key role in that process.

If there is to be any move by the United Nations to legislate, then it should be done in co-operation with HCCH, not in competition (as realised by the former United Nations Special Rapporteur in 2019) because:

a) HCCH is across the issues in this area. HCCH has had assistance from its international observers, UNICEF, International Social Services, and the International Academy of Family Lawyers.

b) The United States is the leading surrogacy destination internationally *and* the United States must be engaged constructively for there to be a workable international solution. I accepted the role, in 2011, of being the principal advocate and co-author of the policy by the American Bar Association about a proposed Hague international surrogacy convention (which policy was adopted by the ABA's House of delegates on behalf of its 400,000+ members in 2016) cognisant of these two critical issues.

c) The United States has been constructively engaged through HCCH processes on this legislative project since 2011.

d) HCCH came to the conclusion, when looking at competing issues, that the highest priority must be given to the recognition of parentage of children born through surrogacy. The American Bar Association policy paper did not address human rights. It was considered that it was unhelpful to have done so, given the tension between the focus in the United States on the right to procreate, given its history with eugenics, in particular (so that the intended parents are recognised as the parents); and that much of Europe is opposed to any form of surrogacy, and is firmly of the view that the surrogate is, and always would be, the mother (and then looking at UNCRC issues in that light).

Proposal 16

16. Requirements for domestic surrogacy arrangements:

a) There be no discrimination (based on the attributes referred to in the *Sex Discrimination Act 1984* (Cth), s.22) about who can be an intended parent through surrogacy.

b) Informed consent prior to entry into the surrogacy arrangement, which would require:

i) Pre-entry implications counselling of all parties by one counsellor, who is an ANZICA counsellor or ANZICA eligible counsellor. A report of that counselling is provided to the IVF clinic and to both parties.

ii) Surrogate and partner to be aged 25 or older, and from 18 or older if the ANZICA counsellor or ANZICA eligible counsellor is of the view in a written report that they are sufficiently mature.

iii) Intended parent/s to be 18 or older.

iv) Independent legal advice for the surrogate/ partner and the intended parent/s respectively by an Australian legal practitioner.

v) A complete medical evaluation of the surrogate by a medical practitioner.

vi) A complete medical evaluation of each intended parent by a medical practitioner.

vii) Medical or social need for the intended parents.

viii) At the election of the surrogate, but at the cost of the intended parents, attendance by the surrogate on an independent obstetrician of the surrogate's choice.

c) Any Australian IVF clinic shall not undertake an artificial conception procedure[2] pursuant to a surrogacy agreement unless it has a surrogacy committee.

d) The surrogacy committee of the Australian IVF clinic must authorise treatment prior to a medical practitioner or the clinic undertakes an artificial conception procedure under the surrogacy arrangement. The committee, in deciding to authorise, must have regard to the provisions of the Act, and the requirements of *RTAC Code of Practice*[3]/ FSANZ surrogacy guidance.

e) The composition of the surrogacy committee shall include:

- The medical director
- The scientific director or another embryologist of the clinic
- The counselling director
- Fertility nurse
- Another fertility specialist

f) That the outcome of the surrogacy arrangement be reported by the IVF clinic for inclusion in the central registry.[4]

g) That there be a written surrogacy agreement entered into by the surrogate/partner and the intended parent/s, which signature has been verified, such as being witnessed by a Justice of the Peace, Commissioner for Declarations, legal practitioner or notary public.

h) That there be independent legal representation of the surrogate/partner throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement.

i) That there be independent legal representation of the intended parent/s throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement.

j) The intended parents pay for the independent legal representation of the surrogate/partner and independent obstetrician.

k) The agreement must be entered into before any artificial conception procedure[5] occurs.

l) A compliant gestational surrogacy agreement is enforceable.

m) If a child was conceived by assisted reproduction under a gestational surrogacy agreement that is non-compliant, the court shall determine the rights and duties of the parties to the agreement consistent with the intent of the parties at the time of entering into the agreement. Each party to the agreement and any individual who at the time of the execution of the agreement was a spouse of a party to the agreement has standing to maintain a proceeding to determine an issue related to the enforcement of the agreement.

n) Except as expressly provided in a gestational surrogacy agreement or n. or o., if the agreement is breached by the woman acting as a gestational surrogate or one or more intended parents, the nonbreaching party is entitled to the remedies available at law or in equity.

o) Specific performance is not a remedy available for breach by a woman acting as a gestational surrogate of a provision in the agreement that the gestational surrogate be impregnated.

p) Except as otherwise provided in x, if an intended parent is determined to be a parent of the child, specific performance is a remedy available for:

   i) Breach of the agreement by a woman acting as a gestational surrogate which prevents the intended parent from exercising parental responsibility immediately on birth of the child; or

   ii) Breach by the intended parent which prevents the intended parent's acceptance, immediately on birth of the child conceived by assisted reproduction under the agreement, of parental responsibility.

q) Depending on the view of the ALRC as to what type of surrogacy be permitted:

[2] As defined in the *Family Law Act 1975* (cth).
[3] Or requirements of any successor to RTAC, as may be apparent from the Health Ministers' 3 month rapid review of IVF regulation.
[4] Along the lines of the provisions of ss41A to 41M of the *Assisted Reproductive Technology Act 2007* (NSW).
[5] Using the language of the definition of that term in *Family Law Act 1975* (Cth), s.4, which includes an at home insemination as well as IVF.

i) If only altruistic surrogacy be permitted, subject to there being a compliant gestational surrogacy agreement, and registrable information is supplied by the parties to the central registry about the surrogacy arrangement[6], the intended parent/s be recognised by operation of laws as the parents of the child immediately upon birth.

ii) If compensated or commercial surrogacy be permitted[7], then when there is a compliant gestational surrogacy agreement:

A. An application to court to establish the parent and child relationship between the intended parent or parents and child may be filed before the child's birth. A copy of the gestational surrogacy agreement shall be filed in the proceedings, as well as compliance with provision of registrable information to the central registry. Each party shall be required to file an affidavit setting out how the gestational surrogacy agreement is compliant.

B. The court, if satisfied that agreement is compliant, make an order establishing the parent and child relationship, and that the surrogate and the surrogate's spouse or partner is not a parent of and does not have parental responsibility for the child.

C. The order may be made before or after the child's birth, but if made before the birth, be stayed until the birth. The order shall issue forthwith and without further hearing or evidence, unless the court or a party to the gestational surrogacy agreement has a good faith, reasonable belief that the agreement is non-compliant.

D. Upon application by a party to the gestational surrogacy agreement, the matter shall be scheduled for hearing before an order is issued. This does not prevent a court from declaring that the intended parent is, or intended parents are, the parent or parents of the child where the gestational surrogacy agreement is non-compliant; however, the court shall require sufficient proof entitling the parties to the relief sought.

E. That if pre-birth orders are to be made under the *Family Law Act 1975*(Cth), that:

1. The Act and the *Federal Circuit and Family Court of Australia Act 2021* (Cth) be amended to allow pre-birth orders to be made, including by Registrars.

2. The *Federal Circuit and Family Court of Australia Rules 2021* (Cth) mandate that the process of determination of pre-birth orders that are consented to be determined within 2 weeks of lodgment.

3. The Federal Circuit and Family Court of Australia issue guidance to practitioners of an expectation to lodge the applications no later than at 16 weeks gestation.

iii) A traditional surrogacy agreement is enforceable, but only if:

[6] Along the lines of similar to the *Surrogacy Act 2010* (NSW), s.37.

[7] It is intended that if the ALRC is of the view that compensated or commercial surrogacy arrangements be permitted, then this rule should apply to *all* gestational surrogacy agreements, so that there is a simple, one size fits all procedure, rather than having to differentiate between compensated/commercial surrogacy or altruistic surrogacy arrangements.

A. Before the child was conceived[8], the court validates the agreement after finding that:

i. It is compliant; and

ii. It was made free from any threat, duress or coercion9, and all parties understand its terms; and

iii. It has not been terminated.

iv) A traditional surrogacy agreement may be terminated by:

A. An intended parent at any time before a gamete or embryo transfer (whether the first or a subsequent transfer), by giving written notice of termination to all other parties; or

B. A woman acting as a traditional surrogate at any time before 48 hours after the birth of the child. To withdraw consent, the woman must withdraw her consent signed, in writing and witnessed by a Justice of the Peace, Commissioner for Declarations, legal practitioner or notary public, and provided to the other parties. Except in a case of fraud, neither the surrogate nor her spouse or partner or former spouse or partner, if any, is liable to the intended parent or parents for a penalty or liquidated damages for terminating a traditional surrogacy agreement.

v) The intended parent/s would be parents of any child born, regardless of the number of children born or gender or mental or physical condition of each child; and the surrogate/partner would not be.

vi) The agreement must include information disclosing:

A. how each intended parent will cover the surrogacy-related expenses of the surrogate and the medical expenses of the child.

B. If the surrogate and her partner have executed wills, by which the child is not to inherit from them.

C. The name of any testamentary guardian (in favour of the child) appointed under the will of each intended parent.

vii) If it is intended under the agreement that there be private health insurance to assist in the costs of birth, or life or income protection insurance for the surrogate, then those policies must be stated in the agreement.

viii) The agreement would apply only to surrogacy journeys through assisted reproduction (whether through gestational or traditional surrogacy), and not natural conception.

[8] I have adopted s.22(2)(e)(iv) of the *Surrogacy Act 2010* (Qld), as interpreted in *LWV v LMH* [2012] QChC 22. The Inter-American Court of Human Rights in *Artavia Murillo v Costa Rica* also took the view that conception was the act of commencement of pregnancy, not fertilisation at [186], [187].

[9] I have adopted here the language of the *Family Law Act 1975* (Cth), s63C(1A) as to parenting plans.

ix) The agreement must state that the law allows the surrogate to have bodily autonomy for both the pregnancy and childbirth, including the right to terminate the pregnancy.

x) The agreement must state the circumstances in which a party has the right to terminate the agreement.

xi) An agreement may provide for:

A. Payment of consideration and reasonable expenses;

B. Reimbursement of specific expenses if the agreement is terminated.

xii) The role of the surrogate under the agreement is not by way of employee or independent contractor of the intended parent or parents.

xiii) A right created under the agreement is not assignable and there is no third party beneficiary of the agreement other than the child.

xiv) A breakdown of the marriage or de facto relationship of the surrogate and partner after the agreement is signed by all parties does not affect the validity of the agreement.

xv) A breakdown of the marriage or de facto relationship of the intended parents after the agreement is signed by all parties does not affect the validity of the agreement.

xvi) A party to a gestational surrogacy agreement may terminate the agreement, at any time before an embryo transfer, by giving notice of termination in a record to all other parties. If an embryo transfer does not result in a pregnancy, a party may terminate the agreement at any time before a subsequent embryo transfer.

xvii) Unless a gestational surrogacy agreement provides otherwise, on termination of the agreement under (xviii), the parties are released from the agreement, except that each intended parent remains responsible for expenses that are reimbursable under the agreement and incurred by the gestational surrogate until the date of termination.

xviii) Except in a case involving fraud, neither the gestational surrogate nor the partner or former partner, if any, is liable to the intended parent/s for a penalty or liquidated damages, for terminating a gestational surrogacy agreement.

xix) Where the parties have agreed to the conception of a child through natural conception, the process of establishment of parentage be through adoption, and that subject to the best interests of the child, the intention of the parties as to parentage when entering into the surrogacy arrangement be determinative as to parentage.

r) Ensuring that the surrogate has bodily autonomy for her pregnancy and childbirth.

s) Ensuring that maternal mortality risk and injury to surrogates is minimised, by requiring intended parents to have a social or medical need for surrogacy, and where one of the intended parents is a woman, a medical need.

t) That the reproductive freedom of intended parents through surrogacy is recognised, including that they are treated equally as any other person who wants to become a parent.

This would include, so far as a medical need to undertake surrogacy, that this is treated broadly, so that the requirement is not unduly onerous10.

u) That the Fertility Society of Australia and New Zealand be encouraged:

i) As part of its annual scientific meeting or other training, to ensure training is provided for fertility specialists and other officers of IVF clinics as to eligibility requirements for surrogacy, and related matters.

ii) That, subject to the 3 month Health Ministers' rapid review of IVF, to undertake the issuing of surrogacy guidelines for IVF units.

iii) And through it, Australian IVF clinics, to provide more information to consumers about the availability and legality of surrogacy in Australia.

v) That, subject to the 3 month Health Minister's rapid review of IVF, RTAC be encouraged to include considerations for eligibility for surrogacy, including medical need, be part of the *RTAC Code of Practice*.

w) As part of their reproductive freedom, intended parents be able to have treatment from the doctor and clinic of their choice, and not be required to undertake ART in their State.

x) Ensuring that no one is exploited, and therefore that there be surrogacy agencies, and that they be subject to clear standards, and firm and consistent regulation.

There needs to be nationwide consistency, either by one uniform law to be enacted in each State and Territory, or a referral of powers to the Commonwealth, for Commonwealth laws to be enacted. It is unlikely that Western Australia would refer powers, even if all other States did so.

I thought after I and others had persuaded the House of Representatives to have national, non-discriminatory surrogacy laws, that these would be enacted. We are still waiting, a decade later.

In 2015 at Parliament House, I complained to the House of Representatives committee reviewing surrogacy that there should be an end to discrimination, and for an end to interstate inconsistencies. I outlined several aspects of that discrimination. Despite that committee calling *in 2016* for national, non-discriminatory surrogacy laws (and noting the changes as to sexuality, gender identity and intersex to s.22 of the *Sex Discrimination Act 1984* (Cth) in 2013):

a) While discrimination against same sex couples ended in South Australia in 2017, singles could not access surrogacy until 2019, with the enactment of the *Surrogacy Act 2019* (SA). The reason for delay was political. In 2017, a Legislative Council member from a minor party was agreeable to gay couples undertaking surrogacy, but not single men or women.

b) It took the Northern Territory until late 2022 with the enactment of the *Surrogacy Act 2022* (NT) to remove discrimination with ART there.

c) It took Queensland until 2024, with the enactment of the *Assisted Reproductive Technology Act 2024* (Qld) to remove discrimination allowed with ART there.

d) It took the ACT until 2024 with amendments to the *Parentage Act 2004* (ACT) to remove discrimination that required the intended parents to be a couple, and for the surrogate to be part of a couple.

[10] An example that is not unduly onerous is the *Surrogacy Act 2019* (SA), s.10(4)(f).

e) Tasmania, our smallest State, still requires all parties to reside in Tasmania[11], thereby limiting availability to surrogacy, with no change proposed[12].

f) Western Australia still discriminates[13] against single men, male couples and anyone else who cannot be characterised as being in a heterosexual relationship, single female or lesbian couple.

g) Intended parents through surrogacy are still subject to discrimination as to Medicare benefits.

I have set out practical ways of enabling domestic surrogacy to occur.

I discuss below why I have suggested taking a particular path. There has been a suggestion by others that there be a central screening approach, in part based on those undertaken by the Patient Review Panel in Victoria and the Reproductive Technology Council of Victoria. Aside from ideological reasons as to why I have rejected that approach, such an approach is impractical.

Each of the PRP and the RTC have been the subject of significant, seemingly consistent criticism. They are a poor model to copy. **See pages 85 to 87 and 99 to 101**.

In any event, it is possible for intended parents in any State or the ACT, other than Victoria or Western Australia, to undertake their ART overseas as part of their domestic surrogacy journey. I have acted for clients who have obtained parentage orders in each of NSW and Queensland where the ART occurred overseas, primarily in the United States. There are a number of reasons that intended parents undertake ART in domestic surrogacy journeys abroad than at home, including:

- Embryos were created there when they were considering IVF, and before they realised that they needed to undertake surrogacy.

- Egg donors are available there, or are available there to what they consider the appropriate standard. For example, while eggs are imported from Ukraine (except in Victoria), a number of clients have refused to consider Ukrainian egg donation, given the ongoing effects of the war.

- A perception, likely strengthened by the two Monash IVF embryo errors, that IVF overseas is of a higher quality than here.

- They want to be treated by that fertility specialist, who happens to be overseas.

The result is that there will always be intended parents who wish to proceed with domestic surrogacy while engaging a foreign IVF clinic, but would object (as would their doctors and clinics) to being told by an Australian IVF panel as to whether they were eligible or not.

Rather than have two rules, I have suggested a requirement for Australian IVF clinics that wish to do surrogacy work to set up a surrogacy committee (if they do not already have one), and the composition of that committee. Every IVF unit is required, as a condition of its RTAC accreditation, to have a medical director, scientific director and counselling director. I have suggested two fertility specialists (i.e. the medical director and one other) to sit on the committee. That way there is a natural tension between the two for consensus to be reached both about medical eligibility for any female intended parents, but also medical suitability of any surrogate. If either of those fertility specialists were the treating specialists, then in accordance with current practice, they would have to declare their conflict, and recuse themselves. For small clinics, they will have to make arrangements for colleagues from another clinic to sit on their committee, if needed.

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[11] *Surrogacy Act 2012* (Tas), s.16(2)(g).
[12] https://www.abc.net.au/news/2025-06-08/surrogacy-tasmania-calls-for-law-reform/105387582 .
[13] *Human Reproductive Technology Act 1991* (WA), S.17; *Surrogacy Act 2008* (WA), s.17.

Then to aid consistency between clinics, encourage the Fertility Society of Australia and New Zealand to proceed with its surrogacy guidelines, and to provide training in this aspect at its annual scientific meeting, or other CPD. The annual scientific meeting is attended by hundreds of FSANZ members: fertility specialists, fertility nurses, embryologists and fertility counsellors. In addition, the individual sections can provide training:

- ANZICA, Australian and New Zealand Infertility Counsellors Association
- DART, Doctors in Assisted Reproductive Technology
- FNA, Fertility Nurses Association of Australasia
- IVF Medical Directors
- SIRT, Scientists in Reproductive Technology

What accreditation requirements, surrogacy guidelines and training through FSANZ, or requirement to attend to certain added steps regarding surrogacy as part of the RTAC *Code of Practice* will depend on the outcome from the current 3 month rapid review of regulation of the IVF industry by Health Ministers. Once that landscape is clearer, it will be easier to specify what measures are put in place to encourage consistency between IVF units and in their professional development.

Proposal 17

17. Recognise the substantial financial costs with surrogacy, and seek to reduce those costs, in order to increase access to surrogacy for those from lower socio-economic backgrounds, and to ensure that families resources are more devoted to the raising of children than on the journey to become parents:

    a) Repeal *Health Insurance (General Medical Services Table) Regulations 2021* (Cth), clause 5.2.6.

    b) That the Commissioner of Taxation publish a ruling that, for the purposes of interpreting *Superannuation Insurance (Supervision) Regulation 1994* (Cth), reg.6.19A(1)(a) that the medical treatment for the person includes the medical treatment for a person who has entered into an Australian surrogacy agreement.

    c) Enable more surrogacy journeys occur domestically, rather than abroad.

    d) Ensure a streamlined process of entry into surrogacy agreements, so that there is not a requirement for State approval.

Each of these is designed to drive down cost, one of the key barriers to undertaking surrogacy in Australia. I discuss Medicare at **pages 32, 35, 123-124**. I discuss superannuation drawdown at **page 80**. I discuss the limitations of the PRP and RTC at **pages 85 to 87 and 99 to 101**.

Proposal 18

18. Ensure:

a) Except where it is alleged that the child is the genetic child of the surrogate, where the child is born through a gestational surrogacy agreement, the gestational surrogate and any partner or former partner is not a parent of the child.

b) If a child is alleged to be a genetic child of the woman who agreed to be a gestational surrogate, the court shall order parentage testing of the child. If the child is a genetic child of the woman who agreed to be a gestational surrogate, then the woman who agreed to be a gestational surrogate and the biological father are the parents of the child.

c) Subject to b, if, due to a clinical or laboratory error, a child conceived by assisted reproduction under a gestational surrogacy agreement is not genetically related to an intended parent or a donor who donated to the intended parent or parents, each intended parent, and not the woman acting as a gestational surrogate and the surrogate's spouse or former spouse, if any, is a parent of the child, subject to any other claim of parentage.

d) Except for a non-compliant agreement, an intended parent is not a parent of a child conceived by assisted reproduction under a gestational surrogacy agreement if the intended parent dies before the transfer of a gamete or embryo unless:

i) The agreement provides otherwise; and

ii) The transfer of a gamete or embryo occurs not later than 36 months after the death of the intended parent or birth of the child occurs not later than 45 months after the death of the intended parent.

I have largely used the language of *Revised Code of Washington* for these provisions, adjusted to accord with the language we use. The parapgraphs are intended to overcome ancillary issues that occasionally arise.

Proposal 19

19. Where the parentage shown on the birth certificate (whether domestic or international surrogacy) does not reflect the reality of parentage, then the intended parents (or the child, even after 18) be able to apply to a court for a parentage order to correct that parentage.

This is intended to resolve parentage for those children where parentage has not been resolved through overseas surrogacy, and are subject to what HCCH called "limping parentage". Each of the ACT and NSW have made attempts to do so, though each has its faults, as I discuss at **page 86**. The proposal by the Western Australian Ministerial Expert Panel seemed more flexible.

Adoption orders can be made in some States, for example, NSW and Victoria, after the child has turned 18. Some children born through overseas surrogacy have already turned 18. The parents, or the child in those cases should be able to so apply to regularise the child's parentage, given the lifelong consequences for the child of parental recognition.

Proposal 20

20. Enable greater access to surrogacy in Australia by:

    a) Compensating surrogates;

    b) Legalising and regulating surrogacy agencies;

    c) Allowing advertising, other than by IVF clinics seeking would be surrogates.

I discuss these topics at length in my submission.

Proposal 21

21. Provide more information by Australian Governments, including through social media, with clear messages that:

    a) Surrogacy is a legitimate form of family formation.

    b) Surrogacy is the only available form of family formation for some people, such as cancer survivors, and gay couples.

    c) Surrogacy is lawful in Australia.

    d) There is a clear pathway to becoming parents through surrogacy in Australia. Having flowcharts is helpful.

    e) Australia does not discriminate in who can become parents through surrogacy.

    f) Children born through surrogacy have equal rights as other children.

    g) Australian IVF clinics undertake surrogacy work.

    h) Medicare benefits are available for ART with surrogacy.

    i) Surrogates ought to be cherished for their extraordinary contributions in enabling others to become parents.

    j) Key ways in which surrogacy journeys can be celebrated and managed, to enable the journeys to be as respectful and trouble free as possible.

    k) Overseas maternal mortality rates, as published by the WHO, in known surrogacy destinations, as compared to Australia

Positive messaging by Government about surrogacy is vital- and missing. See **pages 143 to 144**. There is almost complete ignorance by Australian intended parents of overseas maternal mortality rates, as compared to Australia. Those rates are published by the WHO. See **page 89**.

Proposals 22 to 26

22. Decriminalise surrogacy, but criminalise predatory surrogacy practices.

23. Amend the various *Adoption Acts* of each State and Territory to make plain that the offence of paying for an adoption is not intended to apply to a child born through surrogacy.

24. Ensure continued vigilance against people trafficking, such as by the Department of Home Affairs when considering applications for Australian citizenship, and the Department of Foreign Affairs and Trade, when considering applications for a child's passport.

25. That any central donor registry retain information about children born through surrogacy.

26. Until the establishment of a national donor registry, each State and Territory donor registry be authorised to exchange information with counterparts interstate.

Predatory surrogacy practices should be criminalised, to avoid exploitation. See **page 139**.

The proposed amendment of the *Adoption Acts* is at **page 142**.

Only NSW is required to keep information about children born through surrogacy, although there are donor registries in the ACT, NSW, South Australia, Victoria and Western Australia, and in Queensland from 1 March 2026. Only the NSW registry is authorised to share information with the others.

Submissions by me in Queensland in 2022 and 2024 that the Queensland registrar be authorised to share information were ignored, and as a result, are not part of the *Assisted Reproductive Technology Act 2024* (Qld).

Proposals 27 to 31

27. The University of New South Wales, as part of its reporting under ANZARD, recording the number of traditional surrogacy births (as well as gestational surrogacy births) and recording the number of each of gestational and traditional surrogacy births in Australia.

28. The Registrars of Births, Deaths and Marriages in each State and Territory recording the number of surrogacy births registered by them.

29. Courts recording in their annual reports as to the number of parentage orders made.

30. The Department of Home Affairs compile the number and country of children born through surrogacy overseas the subject of applications for Australian substantive visas.

31. Armed with this data, and that already compiled by the Department of Home Affairs as to the number and country of birth of children born overseas who have applied for Australian citizenship by descent, the Australian Institute of Health and Welfare publish an annual report as to the number of children born in Australia and overseas through surrogacy, in similar format to its annual adoptions report.

What cannot be measured cannot be seen. It is striking as to the wealth of data available through the Australian Institute of Health and Welfare as to Australian adoptions, as compared to the relative dearth of data as concerns surrogacy. There needs to be proper measurement of the amount of surrogacy births in Australia and for those children applying to enter Australia on substantive visas.

ANZARD publishes the number of gestational surrogacy births through Australian IVF clinics, but not traditional surrogacy births. ANZARD does not give a breakdown between Australia and New Zealand clinics- but separately publishes New Zealand data, thereby enabling the ability to find the Australian data.

I raised these issues in 2022 with the director, Professor Georgina Chambers, but they have not been addressed.

The County Court of Victoria and the Childrens Court of Queensland record the number of parentage orders made. South Australia did so until 2016, but then stopped. No other courts publish this data in their annual reports- although it is available to them. The RTC and VARTA both recorded the number of children born in those States through surrogacy.

While the Department of Home Affairs collates data about the number of children born overseas through surrogacy who applied for Australian citizenship by descent, it seems not to have done so for children born overseas through surrogacy who have applied for a substantive visa. If it did so, a more complete picture of the number of children being born overseas through surrogacy would be available.

Each of the Registrars of Births, Deaths and Marriages correct the birth records arising from parentage orders- but do not publish the data, either directly or through the Australian Bureau of Statistics.

DISCUSSION

> *"If you watch animals objectively for any length of time, you're driven to the conclusion that their main aim in life is to pass on their genes to the next generation. Most do so directly, by breeding. In the few examples that don't do so by design, they do it indirectly, by helping a relative with whom they share a great number of their genes. And in as much as the legacy that human beings pass on to the next generation is not only genetic but to a unique degree cultural, we do the same. So animals and ourselves, to continue the line, will endure all kinds of hardship, overcome all kinds of difficulties, and eventually the next generation appears."*
>
> **Sir David Attenborough, *The Trial of Life* (1990)**

> *"[Surrogacy] represents a reality brought about by advances of science that impact the traditional conception that until now has been established around family relationships, mainly kinship and affiliation with children, and rights of maternity and paternity, as it can give rise to various situations and conflicts between the parties involved, which makes it regulation imperative…*
>
> *In summary, when establishing the parentage of minors and resolving conflicts in this regard, there are several purposes to be fulfilled in order to satisfy the best interests of the child that could come into conflict: allowing the minor to know his biological origin, maintain the minor's relationships with the biological family, protect the stability of relationships with family members, protect established filiation identities and guarantee the fulfillment of obligations arising from affiliation that are necessary for proper development, among others….*
>
> *"With recognition [of children], a woman or a man assumes the obligations derived from parenthood. By allowing the assumption of obligations derived from parenthood, the fulfillment of the obligations and benefits that the minor requires for his/her development are promoted. To protect the minor, recognition is usually irrevocable, even when there is no biological link with the minor. While it is true that in several cases it has been recognised that the recognition may be revoked by error, deception or incapacity, it is true that demonstrating the nonexistence of a biological link with the minor is insufficient to prove the existence of an error in the celebration of recognition. This is so because, through the recognition of children, rights and obligations are*

> *assumed from parenthood* ***regardless of whether there is a biological link between the author of the recognition and the recognised***." (emphasis in original)[14]
>
> Supreme Court of Mexico, *Amparo in revision 553/2018*

These quotes represent the essence of the issue that is the subject of the review:

1. Attenborough's quote illustrates the point that those whose main aim in life is to become parents, will use whatever technique is available to them in order to become parents, until they achieve their goal. One of those techniques that has become particularly available since the rise of IVF and egg donation over 40 years ago is that of surrogacy. Thus we see intended parents, who cannot become parents at home through surrogacy, travel to the ends of the earth to achieve their goal. The genie having been released from the bottle cannot be placed back.

2. It is therefore necessary to regulate surrogacy. Australian data has proven that prohibition of surrogacy has failed (discussed below). As recognised in the terms of reference, the upholding of human rights for those concerned, and especially that of any child conceived and born through surrogacy, must be a significant if not paramount factor in the regulation of surrogacy.

3. There are various factors to consider when determining who is a parent.

4. The critical requirement for determining parenthood should be based on the intention of those who wish to be parents.

In my view, there are three fundamental considerations as to how to regulate surrogacy. These fundamental considerations are at times conflicting, with the result that they need to be weighed up, and balanced, preferably by statutory certainty:

1. Women[15] are not putting their bodies at undue risk so that others can become parents.

2. Children born through surrogacy have their parentage recognised, preferably from birth.

3. Intended parents have their reproductive freedom to become parents through surrogacy.

Surrogacy is a legitimate form of family formation.

For intended parents, it is the option of last resort, when all other methods have failed, or for some, the only option of resort. Over many years, surrogacy has been stigmatised by some, as have those, including me, who have become parents through surrogacy.

Those who want to do surrogacy are those who wish to become parents and need to do surrogacy. Surrogacy is the most complex way of human reproduction, of which the most complex form is international surrogacy. Surrogacy is the option of reproduction of last resort, or for some, such as gay couples like my husband and me, or single men, the only option.

[14] [24], [44], [54].

[15] When I refer to surrogates in this submission, I refer to *women*. Anyone who wishes to be a surrogate must be a biological woman, in order to have a functioning uterus. There has been no documented surrogacy journey worldwide by a surrogate who identifies other than being female. It is possible that a transman could be a surrogate, as transmen have become parents- by stopping or reversing hormonal therapy before and during the pregnancy- and reverting afterwards. There is no documented case of a transman anywhere being a surrogate. Similarly, those who do not identify as female, but are biologically female, could also be surrogates, but they have never done so.

Surrogacy in the context of infertility

One in six of us have infertility[16], the third most common disease in Australia after heart disease and cancer. The total fertility rate in Australia is the lowest ever, dropping from 1.86 in 1993 to 1.5 in 2023, an historic low[17]. By contrast, the fertility replacement rate is 2.1 children per woman.

Alternative 1 to surrogacy: Adoptions

Many of my clients, before they embark on a surrogacy voyage, have considered adoption as the means of family formation. In reality, the availability of adoptions for most is a mirage. Clients of mine have been traumatised, waiting years for a child to be available through adoption, or saying information sessions about adoptions were *"thoroughly negative"* and *"profoundly depressing"* with *"no children available"*. While State adoptions agencies hold information sessions about adoption, no State authorities except the former VARTA[18] hold information sessions about surrogacy.

Those traumatising experiences are borne out by the data. Every year, the Australian Institute of Health and Welfare reports that adoptions are at historic lows. By contrast, at the time of the forced adoptions, in 1972, 9,798 children were adopted, when Australia had a population of 13 million, less than half that now.

In 2024 60 children were adopted by adoptive parents who did not know the children before the adoption, either through domestic or international adoption, as seen in **Table 1**. There were 207 adoptions in Australia[19]. There were 26 local adoptions (the balance of 147 domestic adoptions were by a carer (88 or 51%), or step-parents (54, or 31%).

It is possible that a small number of the step-parent adoptions involved surrogacy, in order to enable the other intended parent who was not recognised on the birth certificate as a parent, to be so recognised. There has been a reported case of this type in Western Australia[20], and an attempt to do so in Queensland[21]. I have acted in such a case as to a non-compliant domestic surrogacy arrangement in NSW, in which a step-parent adoption was made, and I act in such a case that involved an overseas surrogacy journey, in a matter that is pending in Victoria.

There were 34 children adopted from overseas, 20 from countries that are parties to the 1993 *Hague Intercountry Adoption Convention*, and 14 from countries with a bilateral agreement with Australia. There were a further 3 known child intercountry adoptions.

Table 1: Adoptions of children in 2023-2024, not being known adoptions

Type of adoption	Number
Domestic	26
Overseas	34
Total	**60**

Table 2 compares the number of children born through international and gestational surrogacy, and the number of adoptions, not being known adoptions, between 2009 and 2024. The source of international surrogacy births is from the Department of Home Affairs[22]. That of domestic gestational surrogacy births

[16] www.fertilitysociety.com.au .
[17] https://www.abs.gov.au/media-centre/media-releases/birth-rate-continues-decline#:~:text=There%20were%20286%2C998%20births%20registered,Bureau%20of%20Statistics%20(ABS).
[18] Victorian Assisted Reproductive Treatment Authority, which ceased to exist on 31 December 2024.
[19] https://www.aihw.gov.au/reports/adoptions/adoptions-australia/contents/adoptions .
[20] *Blake and Anor* [2013] FCWA 1.
[21] *Lloyd & Compton* [2025] FedCFamC1F28.
[22] See at p. 72 below.

is from the Australian and New Zealand Assisted Reproductive Database[23]. That of adoptions is from the Australian Institute of Health and Welfare from its annual adoption reports. There is no national data on adoptions for the year ended 30 June 2023, as Victoria did not provide its data.

Table 2: A comparison of the number of domestic and international surrogacy births and adoptions (not being known adoptions) in Australia: 2009 to 2024

Year	Domestic gestational surrogacy births	International surrogacy births	Domestic adoptions, not known adoptions	International adoptions, not known adoptions
2009	14	10	68	269
2010	11	<10	61	222
2011	19	30	45	215
2012	17	266	55	149
2013	28	263	54	129
2014	29	263	46	114
2015	44	246	56	83
2016	38	207	45	82
2017	51	164	42	69
2018	73	170	32	65
2019	55	232	42	57
2020	76	275	48	37
2021	79	223	39	42
2022	114	213	31	16
2023		236		
2024		376	26	31

The waiting time and eligibility to access adoption reflects that, for most, adoption is a much more difficult option than is surrogacy. The waiting time for an intercountry adoption, once approval is granted, varies from 3 years to 5 ½ years[24]. That length does not include the often lengthy delay endured by intending adoptive parents waiting for approval. Clients have complained to me that they have had to wait several years before their eligibility to adopt was to be assessed.

By contrast, a typical surrogacy journey lasts 18 months to 2 years for most, although occasionally (as I experienced in my journey), the journey lasts over 4 years. If there is not an available surrogate locally, intended parents head overseas.

There has been concern expressed about surrogacy by the mothers who were the subject of forced adoptions, that surrogacy involves the removal of children from their mothers. What they and the children endured was shameful. But it is important not to conflate surrogacy and adoption. Surrogates do not identify as the mothers, even when the surrogacy is traditional.

[23] Ibid.
[24] https://www.aihw.gov.au/reports/adoptions/adoptions-australia/contents/adoptions .

The American Bar Association wrote that there was a clear distinction between adoption and surrogacy:

> *"Surrogacy is a form of procreation through the use of assisted reproduction typically involving "a contract between intended parents and a gestational carrier intended to result in a live birth." The legal position of intended parents creating their own child through a surrogacy arrangement should be viewed as distinct from the legal position of adoptive parents seeking to raise someone else's existing child as their own…*
>
> *[S]urrogacy and adoption are separate and distinct ways for people to achieve parenthood. Surrogacy is a medical solution to infertility, whether the infertility is physiological or social (based on relationship status), and is, therefore, a method of reproduction. Adoption is the transfer of legal responsibility over an existing child from one party (or the state) to another. Most, if not all societies permit adoption in some form, while many jurisdictions ban gestational surrogacy in one way or another. Regulating these two processes in similar fashion is inappropriate."*[25]

While adoption and surrogacy are two different methods of family formation, and should not be conflated, they are entwined on occasion. Sometimes, when a child is born through surrogacy, the legal process to establish parentage is by adoption, either by both parents or via step-parent or second parent adoption. Therefore, our laws criminalising paid adoptions, or recognising parentage through adoption, can impact on surrogacy journeys. See **page 129**.

Alternative 2 to surrogacy: Uterine transplants

Another alternative to surrogacy is that of uterine transplant. To my understanding, there have been two in Australia, with the first child being born via the procedure in 2023. The procedure is relatively new and somewhat experimental. Surgery is complex. Surgery to remove the uterus from the donor takes 10 hours or more. There are significant risks for the donor. Surgery for the recipient takes 5 hours or more- and the transplant is only temporary. Like any other transplant, the recipient is subject to immune-suppressive therapy. Typically, according to doctors, there has to be removal of the uterus from the recipient's body- hysterectomy- within 5 years. Children must be born by Caesarian section.

While uterine transplant is available, it is rare and considerably riskier than surrogacy.

Regulation not prohibition of surrogacy

Overseas courts have held:

- Access to assisted reproductive technology (ART) is a human right.
- Access to surrogacy is a human right.

The impact of the recognition of these human rights is that surrogacy *cannot* be prohibited, other than in breach of those human rights. This is aside from the practical point[26], that unless the intention is to regulate the bedroom, it is impossible to prohibit surrogacy, as children can continue to be conceived via surrogacy at home.

Australia has already discovered that seeking to regulate consenting adults in their bedroom is fraught, being in breach of our international obligations[27].

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[25] American Bar Association, *Approved Position Paper 112B*, 8 February 2016. I was the lead advocate of the paper, and co-author. The paper, and subsequent resolution 112B which approved the paper, concerned a proposed Hague surrogacy convention.

[26] As stated by Golombok et al, recognised by the New Zealand Law Commission, Issues Paper 47, *Surrogacy* at [1.13].

[27] *Toonen v Australia*, Communication No 488/92, U.N. Doc CCPR/C/50/D/488/1992 (1994), the effect of which was then enacted by the *Human Rights (Sexual Conduct) Act 1994* (Cth).

The issue, therefore, is *how* surrogacy is regulated, while respecting human rights of all those involved in the journey[28].

Some children[29] born through overseas surrogacy are now over 18. Their parental relationship may not have been properly established under the law, which has potential lifelong consequences for them.

Some children born to Australian intended parents through overseas surrogacy, especially in China, have been rendered stateless.

For both these groups of children, there needs to be a means under Australian law for *their* parentage to be recognised, and for the latter group, to enable them to obtain Australian citizenship.

Surrogacy basics

There are three magic ingredients to enable the conception of a child:

- Viable sperm
- Viable egg
- Healthy uterus

Surrogacy arises when a person or couple[30] want to become parents, and between them they are missing that last element between them, that of a healthy uterus. It is at this point that another person comes along, a biological woman who has a healthy uterus, who offers to carry the child for that person or them, that there is a surrogacy arrangement.

That surrogacy arrangement is either:

- **traditional surrogacy**, where the surrogate's eggs are used for the conception of the child, or
- **gestational surrogacy**, where the surrogate eggs are not used for the conception of the child.

Traditional surrogacy has been with humanity since time immemorial, referred to in Genesis[31] and ancient Indian texts[32].

Some of the surrogacy journeys I have advised about have been traditional surrogacy journeys. Some of these have been through IVF clinics. Some have involved at home insemination.

There have been traditional surrogacy journeys where the child was conceived naturally[33].

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[28] Which concept I was delighted was taken up from my submission, in the *Surrogacy Act 2019* (SA), s7(1)(a): *"the human rights of all parties to a lawful surrogacy agreement, including any child born as a result of the agreement, must be respected".*

[29] I have used "children" to describe those born through surrogacy.

[30] I acknowledge that there are a small number of throuples, some of whom have ART journeys. Any legislation will need to consider, consistent with human rights, and not discriminating as to access, how to enable throuples to become parents. The effect of current law is that only two people are parents, although the High Court has left the door open to more than two: *Masson v Parsons* [2019] HCA 21 at [26]. If only two are recognised as parents, then the child's reality as to family does not accord with the strictures of the law. The third, while not recognised, subject to what was said in *Masson*, is still liable financially for the child: *W v G* [1996] NSWSC 43. I have been told by colleagues in British Columbia and Ontarion that provisions that allow for multiple parents by consent are rarely utilised. This is not surprising, as these relationships are rare, though becoming more common.

[31] That of Abraham, his infertile wife Sarai and their maid Hagar: Genesis 16.

[32] For example, the birth of Balarama.

[33] For example, *Lowe & Barry* [2011] FamCA 625; *CDA v TRA* [2024] 12. Adoption should be the method of regularising that parentage, but in a more flexible manner than exists currently.

As a result, any streamlined regulation of surrogacy, which does not require orders to be made by a court in order for the intended parents to establish parentage, will need to consider what criteria might be used to determine which types of surrogacy have the streamlined process, and which do not.

A feature that I have noticed, especially since 2017, is the number of gay couples who have a home and careers, get married and then have a family (through surrogacy). Often, for those couples, the fundamental desire to get married is entwined with the equally fundamental desire to become parents together. Often I am told:

"We got married because we wanted to have children."

There is no requirement, of course, under Australian law for couples to marry to then have children, but the desire to marry, and have a permanent, loving relationship, is a positive sign towards the upbringing of a child.

1. PERSONAL EXPERIENCE OF SURROGACY

Question 1

If you or someone close to you has had personal experience of surrogacy, please describe:

- What parts of your experience were positive?
- What parts of your experience were negative?
- What could be improved and how?

In your response, please let us know:

a) how you were involved in the process (for example, if you were a surrogate, intended parent, or child born through surrogacy);

b) if the process took place in Australia or overseas;

c) if the process took place overseas, the country in which the surrogacy arrangement took place and what was attractive about that country; and

d) if you think you faced barriers because of certain personal characteristics (for example, if you were in a same-sex relationship or from a culturally or linguistically diverse background)

I am a father, with my husband, through surrogacy and known egg donation. Our journey all happened in Brisbane. Our journey was an exceptional one in two respects:

1. Our journey happened locally. Most children are born via surrogacy overseas.

2. Ours was a much longer journey than most, due to medical complications, which were outside the control of my husband, our surrogate or me.

I have also suffered infertility. Since 1988, I have advised in over 2,000 surrogacy journeys for clients in every part of Australia and in 39 other countries. I have served on numerous related committees, made many submissions about surrogacy, and written and spoken about surrogacy and ART around the world, including writing two books. My CV is attached. For five years I lectured about Ethics and the Law in Reproductive Medicine at the University of New South Wales. I am the co-founder of the International Surrogacy Forum. Among the committee positions I now hold are: international representative on the

ART Committee of the American Bar Association, and as Secretary of the Fertility Society of Australia and New Zealand. These submissions are my personal submissions, not on behalf of any organisation.

Although I have not kept precise statistics on the proportions of those clients:

- Just under 50% of those, or about 2,000 people, were heterosexual couples.
- Just under 50% of those, or about 2,000 people, were gay male couples.
- Ten of those were 5 lesbian couples.
- Less than a handful were those who identified as transgender or non-binary.
- The balance were single men or single women. About five years ago, it could be safely said that every single man who came to see me about surrogacy would identify as gay. Now that is not the case. Most of the single men who come to see me about surrogacy identify as straight[34]. Over time it seems that there has been a realisation by some straight men, either those who have always been single, or those whose relationship has broken down, that although the dream of being in a relationship is beyond them, that of parenthood is now achievable, even though they don't have an egg or a uterus.
- If I am retained early, I ask my gay clients if they are HIV+. A total of 7 men have identified as being HIV+. Two of those 7 were a couple.

For some heterosexual couples, an outsider looking in would consider one of them to fall within the LGBTQIA+ spectrum, but they would not consider themselves that way. This is where the women are born with Mayer-Rokitansky-Küster-Hauser (MRKH) syndrome, the effect of which is they are born without a uterus. These women have known since that they had this condition since they could not have periods as teenagers. They have known- since then- that they cannot carry a child or reproduce without surrogacy. In the past, before there was liberalisation of our surrogacy laws, this condition sentenced these women to eternal childlessness.

These women would be characterised by some as having intersex status[35], but none of those with MRKH I have seen in the last 15 years have ever identified as anything other than heterosexual.

A common feature of surrogacy, through my clients at least, has been that about 75% have needed an egg donor. Of those groups of intended parents:

- self-evidently, all the gay couples and single men needed an egg donor
- all the single women needed an egg donor
- four out of the five lesbian couples needed an egg donor
- over half the heterosexual couples needed an egg donor.

The regulation of egg, sperm and embryo donation is not part of the remit of the review. Fifteen years ago, the lack of egg donors in Australia meant that it was a push factor for surrogacy, and indeed I made submissions to various surrogacy inquiries to that effect. Those who could not find an egg donor, and needed a surrogate, either gave up or made their way overseas to undertake surrogacy.

[34] i.e. they identify as heterosexual.
[35] See *Sex Discrimination Act 1984* (Cth), s.5C.

Times have changed. With the exception of Western Australia[36], there is no longer a significant barrier concerning egg donation in Australia. The change has come about from Australian IVF clinics importing eggs from overseas, compliant with Australian requirements, including as to non-commercial donation. The result has been much greater availability of egg donation with surrogacy, and therefore the ability to create embryos through Australian IVF clinics rather than overseas. Western Australia has particular barriers, which I cover at **pages 78 to 79** below.

The view, expressed most pointedly by some European academics at the International Surrogacy Forum in Copenhagen in 2023, that there ought to be a genetic link between the intended parents and the child, and without that there is not valid parentage, or deficient parentage, does not match reality- or recognised human rights.

That view, of the desirability of a genetic link, was also set out in the *Verona Principles*:

> *"It is generally in the best interests of children born through surrogacy to have at least one genetically-related intending parent."*

In an ideal world, two intended parents always want the resultant child to have the genetic connection with both of the parents.

In an ideal world, a single intended parent always wants the resultant child to have a genetic connection with them.

No intended parents want a child who is genetically unconnected to them- unless there is no other choice.

All the single women I have acted for who have undertaken surrogacy have needed a sperm donor, an egg donor and a surrogate. It is not for want of desire that they want to become a mum, but they are missing the essential three elements to conceive a child. Some of these women are cancer survivors, having had, for example, leukaemia, uterine, cervical or breast cancer. Being cancer survivors has meant that without surrogacy and egg donation that they cannot become mothers.

Four of the five lesbian couples I have assisted also needed a sperm donor, an egg donor and a surrogate. The perception that if they are supplied sperm that one or other, or both, could easily conceive, did not match reality.

International research about outcomes for children through surrogacy, particularly that of the Cambridge Family Research Centre, as pioneered by Dr Susan Golombok[37], has demonstrated that the outcomes for children born in non-traditional families (including surrogacy) are about the same.

While having a genetic connection is a factor, the critical element is that the child is attached to its parents in a secure way, that is the surest guide to ensure a positive outcome for the child. That is true for any child, whether born through surrogacy or not- as any visit to the Federal Circuit and Family Court of Australia to view parenting proceedings, or in any of the country's Magistrates Courts in protection order proceedings, or in many criminal proceedings, will attest.

My life has been far more complicated than I ever thought it would be. I note that the Australian Law Reform Commission has a copy of my book, *When Not If: Surrogacy for Australians* (2022). I set out in there my professional journey to do with surrogacy and my personal fertility journey.

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[36] Under the *Human Reproductive Technology Directions 2021* (WA), cl. 8.1 there must be a maximum of 5 families worldwide who are recipients of gamete donors. Under the Surrogacy Act 2008 (WA),s.17(b)(iii), a known donor is required for the surrogacy journey. WA is the only jurisdiction worldwide to require this as part of the surrogacy journey.

[37] The full listing is at https://www.psychol.cam.ac.uk/staff/professor-susan-golombok .

I named the book *When Not If*, because those three words reflect the reality about surrogacy. For anyone who needs to undertake a surrogacy journey, it is a certainty that they will become parents through surrogacy unless:

1. They die.

2. They do not have enough money.

3. They need a donor, but they are not prepared to have a donor.

4. They have some difficulty with their journey, and decide to give up.

Rather than repeating what is in those chapters of my book, given that this submission will be available to the public, I will set out the key points.

I knew at about the age of 4 that a key part of my life was to be a parent. A shining light in my life from that point on was to be a parent. By my early 20's I had qualified as a lawyer (and in 1988 handled my first surrogacy case), had a job, and a girlfriend. My life's trajectory was clear:

- Marriage
- Parenthood
- Career
- Home ownership

My dream was of the sometimes derided white picket fence: to be content, and enjoy an idyllic life.

My fiancée had endometriosis. She used to have terrible, crippling pain. It was pitiful. We went to see a gynaecologist. His advice:

> *"Get pregnant now."*

Our jaws were agape. I blurted out:

> *"But we're in our early 20's. We're broke. We want to have a house and then have children- like everyone else."*

The doctor responded:

> *"What am I, a financial planner? I'm a doctor."*

It felt like the proverbial smack across the chops.

We then tried to conceive naturally. The doctor told us that if that didn't work, then to do IVF, which had a success rate of 24%. With false optimism, I translated that 24% to 100%. I saw IVF as the cure all if we failed to conceive.

After months of trying to conceive, keeping a book, and following that, we had not succeeded. My wife said that I should get tested. I pointed the finger at her, and said that I did not have a problem, that she had endometriosis. I refused, with particular hubris, to get tested. I thought, like many men, that my sperm was a reflection of my virility and masculinity.

Three months later, after our efforts still had not worked, I got tested. My sperm were slow swimmers. I was devastated. The best way to describe it is like looking in the black pit of doom. At that time, I was a family lawyer in Brisbane. Many of my clients were remarkably fertile. I would wonder to myself:

> *"How come they can have children and I can't?"*

My experience was soul destroying. I am asthmatic. Several times a year I have an asthma attack, when I cannot breathe. I am not particularly religious. However, at those moments I wonder why God has punished me when I move my lungs, but cannot breathe – when everyone else can breathe.

The same woeful thoughts washed over me during this period. My eyes would somehow raise up to the ceiling, and then to the cornice, where I would wonder why God had punished me for not being able to have children, when everyone else had children. It was the deep, dark, pit of doom.

A Family Court judge described it to me this way:

> *"When a wife wants to have children, it is the best time in the marriage for the husband. However, when it doesn't work, then it is like arsenic to the marriage."*

Although my wife and I had classical infertility[38], ultimately we got lucky and conceived a child naturally. We did not need IVF. Ultimately, we had two children.

My wife and I later divorced.

I remarried. My second wife and I later divorced. We did not have children.

I then formed my relationship with my now husband. Very early on, we agreed that we would get married and have a child through surrogacy. Marriage to gay couples was not available then in Australia. We married in 2015 in the United States, when we had travelled there for me to speak at seminars about surrogacy.

Our surrogacy journey was in Brisbane. Our egg donor, our surrogate, our various clinics and doctors and the maternity hospital, as well as ourselves, were all in Brisbane. There are great advantages in having a local surrogacy journey. Being local reduces many stressors and costs associated with overseas surrogacy journeys.

We were able to have a local surrogacy journey, because we were fortunate to have a family member offer to be our surrogate, and a friend offer to be an egg donor. The offer to us was made on Christmas Day. My husband and I cried tears of joy. Many clients have told me of similar experiences.

Our surrogacy journey was punishingly hard, but ultimately successful. Most surrogacy journeys take 18 to 24 months to complete. Occasionally, a surrogacy journey will take over 4 years to complete, typically because of medical issues. Ours was such a journey. It took over 4 ½ years to complete. We had:

1. **Financial issues**. Following legal advice received by our treating clinic about the effect of clause 5.2.6 of the then *Health Insurance (General Medical Services Table) Regulations*, the clinic decided that it was going to change policy, and was no longer going to claim Medicare rebates for patients creating embryos before undertaking surrogacy. Given that the Medicare rebate for IVF is about $5,000 per cycle, the change in policy meant that undertaking surrogacy through that clinic became unaffordable. We moved to a clinic that did claim the rebate. We were experiencing, as I told the Senate Reproductive Healthcare inquiry last year, the lottery that comes with choosing fertility specialists and IVF clinics when undertaking surrogacy.

[38] A heterosexual couple being unable to conceive after 12 months despite having engaged in regular, unprotected sexual intercourse.

2. **Medical issues** with each of our surrogate and our egg donor.

3. The first embryo transfer resulted, a few weeks later, in a miscarriage. This was gutting. We persisted[39].

4. The second embryo transfer resulted, a few weeks later in an ectopic pregnancy. Emergency surgery occurred the same day to remove both our surrogate's tubes.

5. Some months later, when she was ready to try again, our surrogate became pregnant.

6. We attended Queensland's busiest maternity hospital. It was a place that had pioneered surrogacy, with the first written surrogacy policy of any hospital in Australia, and employing a surrogacy coordinator.

7. Nevertheless, we felt different at antenatal class, when we were the only non-heterosexual couple. My husband, our surrogate and me were the only trio. The antenatal class was aimed at heterosexual couples only.

8. Our daughter was born. Before she did so, she almost died in childbirth.

9. Following the birth, as a room was available, my husband and I were able to care for our daughter in our room. Our surrogate was in the adjoining room. In our exhaustion, this was wonderful.

10. However, at that point, there was a hitch, as I set out in the box below.

11. Unlike most intended parents, who do not make an application for parentage for 4 to 5 months, our application for a parentage order was made within a couple of months, and heard about a month later.

12. After we had paid about a $1,000 filing fee to the government for the privilege of making an application to have us recognised as parents, I appeared on our behalf. This was a particularly difficult exercise, as the appearance was after a Queensland case that upended the common understanding of who is a parent under Queensland law, and shortly after the High Court decision in *Masson v Parsons* (2019) …CLR …, which again provided confusion about who was a parent before the parentage order was made. If the wrong person was on the birth certificate, there was a risk that the parentage order was either not made, or the matter adjourned, until the birth certificate was rectified. I submitted that our surrogate was the only parent before the order was made. The Court agreed- and the order was made.

13. We then had photos in the courtroom, a much better prospect than had earlier been the case, when clients had photos taken on a concrete wall on the outside of the Court building. That change came about after I and two colleagues had written to seek that change.

14. Within a couple of days, we registered the change of parentage with the Registrar of Births, Deaths and Marriages[40]. The same day, having paid twice for a birth certificate for our daughter (the one

[39] Experience has taught me that those who give up when there has been a miscarriage in surrogacy are only ever heterosexual couples. For gay couples, there is no other way to reproduce, so it is necessary to try again. Gay couples by that stage have not endured trauma in their journey to parenthood. Typically, by the time heterosexual couples have undertaken surrogacy, it is option D. They have endured much trauma. Option A was natural conception. When that did not work, they tried option B- IVF. When that did not work, they tried option C- egg donation. When that did not work, they tried option D – surrogacy. The significance of the differences between persistence and giving up is not unique to sexuality, but because of expectations about how to become parents- and then the at times unrelenting difficulty of achieving that, including cycle after cycle of IVF, each beginning in hope, and ending in despair.

[40] Procedures as to how the change in the birth register is effected are different. In Queensland, for example, it is incumbent upon the intended parents to notify the Registrar of Births, Deaths and Marriages. Typically the change to the birth register

after birth and the second after the parentage order was made), we had the birth certificate showing us as the parents. The Queensland Registry is particularly efficient, processing these applications usually within a couple of days. NSW, by comparison, typically takes 6 weeks or more to do the same.

Relief at last.

I cannot begin to put into words the joy of having had a child born through surrogacy. Every day is a miracle. My daughter, who has now started school, is thriving. She *"is a long awaited and precious gift, much loved by (her) family and a miracle of modern medicine"* to use the words of a judge in another case[41].

"It is 'advisable'"

Our daughter was born just after 1am. Labour had started, for the third time, at 9am the day before.

By 5.30am, the three of us moved to our room. My husband had the bed. I am tall. I slept on the couch attached to the wall, with a fair proportion of my legs dangling over the edge.

We were woken 20 minutes later with the first of the visits by nurses. The hospital was excellent with ordering food- by phone from a menu- for two parents. As I was considered number three, I had to register before I could order. This took an hour or so to organise.

As the day progressed, it became clear that our surrogate wanted to go home, to be with her child. Our surrogate had spent a week in hospital already, due to pregnancy complications.

By 4pm, she was cleared to go. Our surrogate mentioned she was a "surrogate". Suddenly there was a complication. Our daughter needed to stay overnight for checks. Despite having undertaken many surrogacy births, the hospital had never come across a child having to stay after the surrogate was to be discharged.

The matter went through one, two and then three midwives; then one, two and then three hospital executives.

Then there was a scene as we have all seen on TV, of the discussion in the corridor. Why it could not be a room, I do not know. The hospital executive telling our surrogate and me that the hospital lawyer had been called, and that his response was that as our surrogate was the only parent, it was "advisable" that she stay. I felt immediately invisible and ignored. Who was I? Although *"but for* [our] *acted-on intention* [of my husband and me] *the child would not exist"*[42] , in the eyes of the hospital lawyer, neither my husband nor I had any legal standing. The only parent was our surrogate, the person who offered to be our surrogate out of love- and who had never wanted to parent another child, let alone one who was not genetically hers. As she had told us: *"I've got mine. I don't want yours too."*

Our surrogate and I immediately understood what was said. It was, in essence, that if our surrogate left, there was not a parent able and willing to protect the child from harm[43], necessitating the involvement of Child Safety.

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will be updated within 2 business days. In my case, it took about 3 hours. By contrast, the delay between when the Supreme Court of NSW makes a parentage order and when the NSW Registrar of Births, Deaths and Marriages updates the register (the Court being mandated to send the orders to the Registrar) is, on a good day, 6 weeks, though it can be longer.

[41] *LWV v LMH* [2012] QChC 26 at [1].

[42] *Johnson v Calvert* 5 Cal. 4th 87 at 93.

[43] *Child Protection Act 1999* (Qld), s.10.

Our surrogate ran to her room, crying. She said she felt *"violated"*. She refused to speak with me or my husband, or anyone else.

Our surrogate and our daughter were discharged the following day. That searing experience and that of some clients has caused me to ensure that my clients have parenting plans[44] in place to bridge the gap between when the child was born and when a parentage order is made. If we had had that in place, our surrogate and I could have avoided that trauma.

After our daughter was born, a story was published in December 2019 about us in *The Australian*, **attached**. The co-ordinator of the Australian Christian Lobby, on her Facebook page, under tags of no bullying, said: *"With one magic wave of a gavel, this child has forever been denied her mother."*

At which point it might be noted that our daughter has never had a mother. Our surrogate has never sought to be and never identified as her mother, nor has our egg donor. Both sought and did help both of us so that *we* could be the parents, not them.

And then the awful words from others followed, including that we were poor parents, that we could not reproduce naturally, and so on. The advice of a judge was: *"Don't let the haters win"*; that of a colleague, the more pithy: *"Fuck 'em."*

The pain of the comments made by those keyboard warriors was real. And lasting.

What could have been improved about our journey?

These things:

1. No discrimination in the way our child was conceived when it came to Medicare. *Health Insurance (General Medical Services Table) Regulations 2021*, clause 5.2.6 actively discriminates against surrogacy. It is a dinosaur provision, which has been around in one form or another since the Commonwealth started funding Medicare back in 1991. Back then, surrogacy was frowned upon. Queensland criminalised all forms of surrogacy, here and there, whether altruistic, commercial, traditional or gestational, and was the first place in the world to criminalise surrogacy overseas[45].

2. That discrimination led to us changing clinics. It also led to us paying $10,000 for three embryo transfers not covered in any way, shape or form by Medicare- unlike those whose method of conception is not surrogacy, who have unrestricted MBS funding for their IVF cycles (up to applicable funding limits, as applied throughout the MBS system). The Medicare Benefits Schedule Review taskforce in 2021 recommended that this discrimination be abolished[46]. It was not.

3. Having auto recognition of parentage of intended parents upon birth, so that there is no longer limping parentage.

4. Public statements that surrogacy is a legitimate form of family formation, and that for LGBTQIA+ people to have children is normal.

Question 2: What reform principles should guide this Inquiry?

As seen in the summary, above.

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[44] A parenting plan is an alternative to parenting orders, and is provided for under the *Family Law Act 1975* (Cth), s.63C, and *Family Court Act 1997* (WA), s.76.

[45] *Surrogate Parenthood Act 1988* (Qld). My first surrogacy case occurred shortly after the enactment of the Act.

[46] https://www.health.gov.au/sites/default/files/documents/2020/12/taskforce-final-report-gynaecology-mbs-items-taskforce-report-on-gynaecology-mbs-items.pdf at p.48.

Question 3: What do you think are the key human rights issues raised by domestic and/or international surrogacy arrangements? How should these be addressed?

I have listed **children's** human rights implicated by surrogacy arrangements in **Table 3**.

Table 3: Children's human rights implicated by surrogacy arrangements

Human rights of children	Reference
The best interests of the child as a primary consideration	UNCRC 3.1 General Comment No 14 (2013) Verona Principle 6
Right to equality and non-discrimination	UDHR, arts. 1, 2, 24.1, 25.2 ICCPR, arts. 24, 26 ICESCR, art. 2 CRPD, art. 5.1 Verona Principle 2, 3
Right to identity, access origins and family environment	UNCRC arts. 7, 8, 9, 10, 18, 20 ICCPR, art. 24 Verona Principle 10, 11, 12
Right to nationality	UDHR, art. 15 ICCPR, art. 24 ICESCR, art. 5 UNCRC, art. 7 UN 1961 Convention on the Reduction of Statelessness, arts. 3, 8 Verona Principle 13
Right not to be sold	UNCRC, art. 35 Optional Protocol Verona Principle 14
Right not to be trafficked	UNCRC, arts. 11, 35 Palermo Protocol Verona Principle 14
Right to privacy	UNCRC, art.16 UDHR, art. 12 ICCPR, art. 17 CRPD, art. 22
Right to take advantage of scientific progress	UDHR, art. 27.1 ICESCR, art. 15(b)
Right to information	UNCRC, art. 17 UDHR, art. 19

Human rights of children	**Reference**
	ICCPR, art. 19
Right to have the family protected	UDHR, art. 16.3 CRPD, art. 23
Rights of persons with disabilities	CRPD, arts 5, 6, 7, 12, 17, 22, 23
Right to health	UDHR, art. 25 ICESCR, art. 12 Verona Principle 4

I have listed **the surrogate's** human rights implicated by surrogacy arrangements in **Table 4**.

Table 4: The surrogate's human rights implicated by surrogacy arrangements

Human rights of surrogates	**Reference**
Right to equality and non-discrimination	UDHR, arts. 1, 2, 25.2 ICCPR, art. 26 ICESCR, art. 2 CRPD, art. 5.1
Right not to be trafficked	Palermo Protocol Yogyakarta Principle 11 Verona Principle 7
Right to privacy	UDHR, art. 12 Verona Principle 7
Right to benefit from scientific progress	UDHR, art. 27.1 ICESCR, art. 15(b)
Right to information	UDHR, art. 19 ICCPR, art. 19 Verona Principle 7
Right to have the family protected	UDHR, art. 16.3 ICCPR, art.23 CRPD, art. 23
Rights of persons with disabilities	CRPD, arts 5, 6, 7, 12, 17, 23
Right to health	UDHR, art. 25 ICESCR, art. 12 CEDAW. art. 12 Verona Principle 7

Human rights of surrogates	**Reference**
Right of bodily autonomy	Common law ICCPR arts 7,17 CEDAW, art. 12, GR 24 Verona principle 7
Right to decide number and spacing of children	CEDAW, art. 16
Legal professional privilege	Common law, statute

I have listed **the intended parent's** human rights implicated by surrogacy arrangements in **Table 5**.

Table 5: The intended parent's human rights implicated by surrogacy arrangements

Human rights of intended parents	**Reference**
Right to equality and non-discrimination	UDHR, arts. 1, 2, 25.2 ICCPR, art. 26 ICESCR, art. 2 Yogyakarta Principles 1, 2
Right not to be trafficked	Palermo Protocol
Right to privacy, including the right to found a family and to access ART	UDHR, art. 12, 16 ICCPR, art. 16, 23, GC 19 Yogyakarta Principle 24
Right to benefit from scientific progress	UDHR, art. 27.1 ICESCR, art. 15(b) Verona Principle 8
Right to information	UDHR. art. 19 ICCPR. art. 19
Right to have the family protected	UDHR, art. 16.3 ICCPR, art. 23 CRPD, art.23
Rights of persons with disabilities	CRPD, arts 5, 6, 7, 12, 17, 23
Right to health	UDHR, art. 25 ICESCR, art. 12 CEDAW, art. 12 Yogyakarta Principle 17
Reproductive autonomy	Common law CESCR, GC 22 CEDAW, art. 12, GR 24
Legal professional privilege	Common law, statute

I now discuss some of those human rights:

3.1 The right to access ART/reproduce

3.1A United States

The United States Supreme Court has held that there is a right to procreate (in the context of eugenics): *Skinner v Oklahoma* 315 US 535 (1942):

> *"We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."*

3.1B Common law

In the United States, England and Australia, under the common law there has been recognised a right or freedom to reproduce. Nicholson CJ in *Re Jane* [1988] FamCA 57said:

> *"In the case of Re Grady N.J. 426A 2(d) 467, Pashman J. in giving the principal judgment of the Supreme Court of New Jersey said:*
>
> *"Sterilisation may be said to destroy an important part of a person's social and biological identity — the ability to reproduce. It affects not only the health and welfare of the individual, but the well being of all society. Any legal discussion of sterilisation, must begin with an acknowledgement that the right to procreate is fundamental to the very existence and survival of the race. Skinner v. Oklahoma [1942] USSC 129; 316 U.S. 535 at p. 541. This right is a basic liberty of which the individual is forever deprived through unwanted sterilisation."*
>
> *His Honour went on to say that in the U.S.A., at least, there is also a constitutional right to be sterilised as part of a right to control one's own body, citing cases such as Griswold v. Connecticut381 U.S. 79, Eisenstadt v. Baird [1972] USSC 61; 405 U.S. 438 and other more recent cases. His Honour pointed out that although the U.S. Supreme Court had not as yet specifically recognised such a right, it has been recognised by a number of state appellate courts in the U.S.A. His Honour continued:*
>
> *"Having recognised that both a right to be sterilised and a right to procreate exist, we face the problem as in Quinlan 355A 2(d) 647, that L is not competent to exercise either of her constitutional rights. What is at stake is not simply a right to obtain contraception or to attempt procreation, implied in both these complementary liberties, is a right to make a meaningful choice between them."*
>
> *I find the analysis of Pashman J. to be a useful one for present purposes.* ***It involves a clear recognition of the right to procreate or reproduce as being a basic human right recognised by the common law****. In view of the fact that such a right appears to have been recognised by superior appellate courts in the United Kingdom, Canada and the United States, I am confident that such a right would also be recognised as forming part of the common law of Australia.*
>
> *I also consider, however, that* ***in Australian law*** *as in U.S. law****, there is no reason to suggest that there is not a right to refuse to procreate****, i.e. a right to contraception whether by chemical means or sterilisation. Such a right appears to have been recognised in England…*
>
> *I consider that the rights in question may be better characterised as liberties to reproduce or not reproduce as the case may be."*(emphasis added)

The matter was further raised in ***The Marriage of F*** [1989] FamCA 41. The husband sought to restrain the wife from having an abortion. The husband said that the basis of the injunction, to protect the unborn child, was not based on judicial authority, but, following Re Jane "upon the common law right of every human being to procreate or reproduce".

Lindenmayer J stated:

> *"He conceded that that right, or perhaps more accurately that liberty, must be exercised with the concurrence and consent of some member of the opposite sex. He also conceded that if every human being has a legal right to procreate, then he or she also has a right to refuse to procreate and that these competing rights are of equal strength."*[47]

Further:

> *"Mr Theobald, for the wife, contended that if the husband has a legal right to procreate, the wife has an equal right to refuse to procreate and that the husband's right does not extend to giving him the right to insist that the wife carry his child through to birth in order to preserve his right. He further submitted that there has never been such a right recognized by the common law."*[48]

Lindenmayer J stated:

> *"I am nevertheless unable to conclude that the husband's so-called right to procreate extends to giving him a right to force the wife to carry through her pregnancy to the birth of the child, contrary to her wish not to do so."*[49]

3.1C European Court of Human Rights

In ***Dickson v United Kingdom*** [2007] ECtHR, Application No. 44362/04, the Court held that Mr Dickson, a prisoner, had a right to assisted reproductive technology and that the choice to become a genetic parent was a *"particularly important facet of an individual's existence or identity"*.[50]

This right was founded in Article 8 of the *European Convention of Human Rights* which provides:

> *"Right to respect for private and family life*
>
> 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

3.1D Inter-American Court of Human Rights

In ***Artavia Murillo v Costa Rica*** [2012] the court held that there was a right to access assisted reproductive technology, under article 11 of the *Inter-American Convention on Human Rights*.

Article 11 provides:

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[47] [24].
[48] [26].
[49] [27].
[50] At [78]. Cf. *Smith v Chief Executive, Queensland Corrective Services* [2024] QSC 288, the appeal form which has been heard but not determined. Human rights issues were not raised in that case.

"Article 11. Right to Privacy

1. *Everyone has the right to have his honor respected and his dignity recognized.*

2. *No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.*

3. *Everyone has the right to the protection of the law against such interference or attacks."*

Both the *Inter-American Convention*, art. 11 and the European Convention, art. 8 are in similar terms to the *Universal Declaration of Human Rights*, art. 12 and *International Covenant on Civil & Political Rights*, art. 17 (and UNCRC, art. 16).

Art. 12 of the UDHR provides:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Article 17 of the ICCPR provides:

"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

Art. 23.1 and 23.2 of the ICCPR provide:

"1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized."

Article 16 of the UNCRC provides:

"1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks."

The Court in *Artavia Murillo* said (citations removed):

"144. The Court considers that this case addresses a ***particular combination of different aspects of private life that are related to the right to found a family, the right to physical and mental integrity and, specifically, the reproductive rights of the individual.***

145. First, the Court emphasizes that, unlike the European Convention on Human Rights, which only protects the right to family life under Article 8 of this instrument, the American Convention contains two articles that protect family life in a complementary manner. In this regard, the Court reiterates that Article 11(2) of the American Convention is closely related to the right recognized in Article 17 of this instrument. Article 17 of the American Convention recognizes the central role of the family and family life in a person's existence and in society in general. The Court has already indicated that the family's right to protection entails, among other obligations, facilitating, in the broadest possible terms, the development and strength of the family unit. This is such a basic right of the American Convention that it cannot be

waived even in extreme circumstances. Article 17(2) of the American Convention protects the right to found a family, which is also comprehensively protected in different international human rights instruments. ***For its part, the United Nations Human Rights Committee has indicated that the possibility of procreating is part of the right to found a family.***

146. *Second,* ***the right to private life is related to: (i) reproductive autonomy, and (ii) access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right.*** *The right to reproductive autonomy is also recognized in Article 16(e) of the Convention for the Elimination of All Forms of Discrimination against Women, according to which women enjoy the right "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means that enable them to exercise these rights." This right is violated when the means by which a woman can exercise the right to control her fertility are restricted. Thus, the protection of private life includes respect for the decisions both to become a mother or a father, and a couple's decision to become genetic parents.*

147. *Third, the Court emphasizes that, in the context of the right to personal integrity, it has analyzed some of the situations that cause particular distress and anxiety to the individual, as well as some serious impacts of the lack of medical care or problems of accessibility to certain health procedures. In the European sphere, case law has defined the relationship between the right to private life and the protection of physical and mental integrity. The European Court of Human Rights has indicated that, although the European Convention on Human Rights does not guarantee the right to a specific level of medical care as such, the right to private life includes a person's physical and mental integrity, and that the State also has the positive obligation to ensure this right to its citizens. Consequently, the rights to private life and to personal integrity are also directly and immediately linked to health care.* ***The lack of legal safeguards that take reproductive health into consideration can result in a serious impairment of the right to reproductive autonomy and freedom.***

Therefore, there is a connection between personal autonomy, reproductive freedom, and physical and mental integrity.

148. *The Court has indicated that States are responsible for regulating and overseeing the provision of health services to ensure effective protection of the rights to life and personal integrity. Health is a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity. In relation to the right to personal integrity it is important to highlight that, according to the Committee on Economic, Social and Cultural Rights, "reproductive health means that women and men have the freedom to decide if and when to reproduce, and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as the right of access to appropriate health care services." The Programme of Action of the International Conference on Population and Development, held in Cairo in 1994, and the Declaration and Platform for Action of the Fourth World Conference on Women, held in Beijing in 1995, also contain definitions of reproductive health and of women's health. According to the International Conference on Population and Development (1994), "[r]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant UN consensus documents.* ***These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health****." Moreover, adopting a broad and integrated concept of sexual and reproductive health, it stated that:*

"Reproductive health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity – in all matters relating to the reproductive system

and to its functions and processes. Consequently, reproductive health implies that people are able to have a satisfying and safe sex life, that they are able to reproduce and that they have the freedom to decide if, when and how often to do so. Implicit in this is right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility, which are not against the law, and the right of access to health-care services that will enable women to go safely through pregnancy and childbirth."

149. *Furthermore, according to the Conference's Programme of Action, "in vitro fertilization techniques should be provided in accordance with ethical guidelines and appropriate medical standards." In the Declaration of the Fourth World Conference on Women (1995), the States agreed to "guarantee equal access to and equal treatment of men and women in […] health care and promote sexual and reproductive health." The Platform for Action, approved jointly with the Declaration, defined reproductive health care as the "constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems." According to the Pan-American Health Organization (PAHO), sexual and reproductive health "implies that people are able to have a satisfying and safe sex life, that they are able to reproduce and that they have the freedom to decide if, when and how often to do so." The right to reproductive health entails the rights of men and women to be informed and to have free choice of and access to methods to regulate fertility, that are safe, effective, easily accessible and acceptable.*

150. *Finally,* ***the right to private life and reproductive freedom is related to the right to have access to the medical technology necessary to exercise that right****. The right to enjoy the benefits of scientific progress has been internationally recognized and, in the inter- American context, it is contemplated in Article XIII of the American Declaration and in Article 14(1)(b) of the Protocol of San Salvador. It is worth mentioning that the General Assembly of the United Nations, in its declaration on this right, described its connection to the satisfaction of the material and spiritual needs of all sectors of the population. Therefore, and in keeping with Article 29(b) of the American Convention, the scope of the rights to private life, reproductive autonomy and to found a family, derived from Articles 11(2) and 17(2) of the Convention, extends to the right of everyone to benefit from scientific progress and its applications.* ***The right to have access to scientific progress in order to exercise reproductive autonomy and the possibility to found a family gives rise to the right to have access to the best health care services in assisted reproduction techniques, and, consequently, the prohibition of disproportionate and unnecessary restrictions, de jure or de facto, to exercise the reproductive decisions that correspond to each individual.****"* (emphasis added)

The Court in the subsequent decision of ***Gomez Murillo v Costa Rica*** (2019), noted that Costa Rica had initiated a discussion about surrogacy, which it welcomed as part of its reparations *in order to enable reproduction through ART*[51]. The Court made plain, in so doing, that it considered that the right to access ART included, for those for whom surrogacy is necessary, the right to access surrogacy.

3.1E Supreme Court of Mexico

The Supreme Court followed *Artavia Murillo* in ***Amparo in Revision 553/2018*** (2018). It held:

"The concept of family whose protection is ordered by the Constitution is not identified or limited to a single type of family, but in the context of a democratic State of Law in which plurality is part of its essence, it must be understood that ***the constitutional norm it refers to is the family as a social reality****, which is why is protects all its forms and manifestations as an existing reality.*

[51] At [31], [32], order 2(d).

Among the ways in which a family can take place is that formed by same-sex couples, regarding which it has been recognized their right to marry…

Regarding the right of every person to decide freely, responsibly and informed about the number and spacing of their children[52], must be considered to fall within the scope of freedom and private life of people, regarding which there should be no arbitrary interference by the State, in which it remains understood the right to decide to procreate a child*. The Inter-American Court of Human Rights has interpreted Art. 11 of the American Convention on Human Rights, referring to privacy and family, in the sense that it constitutes the right of every person to organize his or her life in accordance with the law individual and social according to their own choices and convictions; and that the decision to be or not to be a mother or father is part of the right to private life and includes the decision to be a mother or father in the genetic or biological sense, that is, their reproductive rights.*

In this regard, the Inter-American Court points out that ***the right to private life is related to reproductive autonomy and access to reproductive health services, which involves the right to access the medical technology necessary to exercise that right****. Therefore, the protection of privacy includes respect for the decisions of both becoming a parent, including the couple's decision to become genetic parents. This links to the article 14.1.b of the San Salvador Protocol, which recognizes the right of every person to enjoy the benefits of scientific and technological progress[53], in the understanding that the aforementioned Court has indicated that reproductive health involves the rights of men and women to be informed and have free choice and access to methods to regulate fertility, which are safe, effective, easily accessible and acceptable.*

This the Inter-American Court has recognized the right to access assisted reproduction techniques to achieve birth of a child, referring to couples with infertility problems.

In the case of same-sex couples, a situation arises similarly, not because of infertility of one of the members of the couple, but because in their sexual union there is no possibility of conception of a new being, understood as the fusion or fertilization of the egg (female element) by the sperm (male element).

In this sense and consider that the right to become a father or mother is understood to be given to every person, without distinction as to sexual preference…the rights of homosexual couples must be recognised to access scientific advances in assisted reproduction, and become parents through these techniques*."* (emphasis added)

The case involved a gay couple from Yucatan who sought that they both be recognised as the parents. The Supreme Court, in referring to homosexual couples, was clearly referring, in the case of gay couples, to being able to access surrogacy.

Amparo in revision 129/2019 **(2021)**

The Mexican Supreme Court held that a law of the state of Tabasco that outlawed surrogacy agencies was invalid, as was a law that prohibited foreigners from undertaking surrogacy- as the right to access ART extended to foreigners.

The Court held that the prohibition on surrogacy agencies was unconstitutional because:

"Although it would be legitimate to regulate this type of service and even prohibit of sanction certain specific actions or practices that objectively put minors at risk from assisted reproduction techniques, to pregnant women or the contracting parties themselves, which is not permitted in

[52] Which language echoes that of CEDAW, art. 16(1)(e).
[53] Which echoes CESCR, art. 15.

> *terms of article 5 of the constitution, is to absolutely and completely prevent without reasonable justification, that people engage in the profession, industry, commerce or work that suits them, provided that it is lawful."*[54]

The Court held that the *"arbitrary"* law *"openly and absolutely discriminates against foreign people, without any reasonable or justifiable justification for this"*[55], and was therefore invalid.

The Tabasco law required two steps to enable recognition of the surrogacy contract:

1. Notarial formalisation. The notary had to satisfy themselves that the contract was compliant with the statute, and if not, then the notary could be sanctioned; and then, only if step 1 had been complied with:

2. Court order. It was unclear to the Supreme Court whether or not the order had to be obtained before or after the birth of the child.

Because the parties could not proceed to court other than first obtaining notarial formalization, the law was invalid, by violating access to jurisdiction.

3.1F UN Human Rights Committee

The UN Human Rights Committee in General Comment No 19 (1990) said of ICCPR, art. 23:

> *"1. Article 23 of the International Covenant on Civil and Political Rights recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Protection of the family and its members is also guaranteed, directly or indirectly, by other provisions of the Covenant. Thus, article 17 establishes a prohibition on arbitrary or unlawful interference with the family. In addition, article 24 of the Covenant specifically addresses the protection of the rights of the child, as such or as a member of a family. In their reports, States parties often fail to give enough information on how the State and society are discharging their obligation to provide protection to the family and the persons composing it.*
>
> *2.* ***The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection*** *referred to in article 23… In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice…*
>
> *5.* ***The right to found a family implies, in principle, the possibility to procreate and live together****."*

Australia has recognised that the right of consenting adults to marry, irrespective of sexuality, with the passage of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), following the passage of the postal plebiscite. Given that Australia is recognising that gay couples can marry, therefore the effect of GC No 19 in Australia is the ability of gay couples to access surrogacy, it being the only method by which we can procreate.

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[54] P.12.
[55] P.16.

3.1G Yogyakarta Principles

That conclusion as to the impact of GC No 19, is strengthened by Yogyakarta Principle 22, The Right to Found a Family, which states:

> *"**The Right to Found a Family***
>
> *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 the sexual orientation or gender identity of any of its members.*
>
> *States shall:*
>
> *a)* ***Take all necessary legislative**, administrative and other **measures to ensure the right to found a family, including through access to** adoption or **assisted procreation** (including donor insemination), **without discrimination on the basis of sexual orientation** or gender identity;*
>
> *b) Ensure that laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration;*
>
> *c) Take all necessary legislative, administrative and other measures to ensure that in all actions or decisions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration, and that the sexual orientation or gender identity of the child or of any family member or other person may not be considered incompatible with such best interests;*
>
> *d) In all actions or decisions concerning children, ensure that a child who is capable of forming personal views can exercise the right to express those views freely, and that such views are given due weight in accordance with the age and maturity of the child;*
>
> *e) Take all necessary legislative, administrative and other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners;*
>
> *f) Take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners;*
>
> *g) Ensure that marriages and other legally-recognised partnerships may be entered into only with the free and full consent of the intending spouses or partners."*

3.2 The child's rights to having its birth registered, privacy, identity, nationality and to have a legal relationship with the intended parents

The various rights of the child have been considered internationally, and in Australia.

3.2A European Court of Human Rights

In similar manner to the upholding the right to access ART, the European Court of Human Rights has upheld the child's right to privacy, so that the child's identity with that of the intended parents has been

upheld. In doing so, that court has not been consistent, seemingly being more convinced when the method by which parentage has been established has been by way of court order (and not by operation of law) and that there is a genetic relationship between the intended parent and the child. The leading decisions are that of *Mennesson v France* and *Advisory Opinion P16-2018-001* (which also concerned the Mennesson family).

The child's right to know and be cared for by their parents, i.e., the child's right to privacy, has been considered on many occasions by the European Court of Human Rights such as in *Mennesson v France* ECtHR Application No. 65192/11 (2014) where the court held[56]:

> *"75. The Court notes the Government's submission that, in the area in question, the Contracting States enjoyed a substantial margin of appreciation in deciding what was "necessary in a democratic society". It also notes that the applicants conceded this but considered that the extent of that margin was relative in the present case.*
>
> *76. The Court shares the applicants' analysis.*
>
> *77. It reiterates that the scope of the States' margin of appreciation will vary according to the circumstances, the subject matter and the context; in this respect one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, for example, Wagner and J.M.W.L., and Negrepontis-Giannisis, both cited above, §§ 128 and 69 respectively). Accordingly, on the one hand, where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wide. On the other hand, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (see, in particular, S.H. and Others v. Austria, cited above, § 94).*
>
> *78. The Court observes in the present case that there is no consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children thus conceived abroad. A comparative-law survey conducted by the Court shows that surrogacy is expressly prohibited in fourteen of the thirty-five member States of the Council of Europe – other than France – studied. In ten of these it is either prohibited under general provisions or not tolerated, or the question of its lawfulness is uncertain. However, it is expressly authorised in seven member States and appears to be tolerated in four others. In thirteen of these thirty-five States it is possible to obtain legal recognition of the parent-child relationship between the intended parents and the children conceived through a surrogacy agreement legally performed abroad. This also appears to be possible in eleven other States (including one in which the possibility may only be available in respect of the father-child relationship where the intended father is the biological father), but excluded in the eleven remaining States (except perhaps the possibility in one of them of obtaining recognition of the father-child relationship where the intended father is the biological father) ...*
>
> *79. This lack of consensus reflects the fact that recourse to a surrogacy arrangement raises sensitive ethical questions. It also confirms that the States must in principle be afforded a wide margin of appreciation, regarding the decision not only whether or not to authorise this method of assisted reproduction but also whether or not to recognise a legal parent-child relationship between children legally conceived as the result of a surrogacy arrangement abroad and the intended parents.*

[56] At [75]-[94].

80. However, regard should also be had to the fact that an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned. The margin of appreciation afforded to the respondent State in the present case therefore needs to be reduced.

81. Moreover, the solutions reached by the legislature – even within the limits of this margin – are not beyond the scrutiny of the Court. It falls to the Court to examine carefully the arguments taken into consideration and leading to the solution reached and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by that solution (see, mutatis mutandis, S.H. and Others v. Austria, cited above, § 97). In doing so, it must have regard to the essential principle according to which, whenever the situation of a child is in issue, the best interests of that child are paramount (see, among many other authorities, Wagner and J.M.W.L., cited above, §§ 133-34, and E.B. v. France [GC], no. 43546/02, §§ 76 and 95, 22 January 2008).

82. In the present case the Court of Cassation held that French international public policy precluded registration in the register of births, marriages and deaths of the particulars of a birth certificate drawn up in execution of a foreign decision containing provisions which conflicted with essential principles of French law. It then observed that under French law surrogacy agreements were null and void on grounds of public policy, and that it was contrary to the "essential principle of French law" of the inalienability of civil status to give effect to such agreements as regards the legal parent-child relationship. It held that, in so far as it gave effect to a surrogacy agreement, the judgment delivered in the applicants' case by the Supreme Court of California was contrary to the French concept of international public policy and that, as the US birth certificates of the third and fourth applicants had been drawn up in application of that judgment, the details of those certificates could not be entered in the French register of births, marriages and deaths (see paragraph 27 above).

83. The applicants' inability to have the parent-child relationship between the first two applicants and the third and fourth applicants recognised under French law is therefore, according to the Court of Cassation, a consequence of the French legislature's decision on ethical grounds to prohibit surrogacy. The Government pointed out in that connection that the domestic courts had duly drawn the consequences of that decision by refusing to authorise entry in the register of births, marriages and deaths of the details of foreign civil-status documents of children born as the result of a surrogacy agreement performed outside France. To do otherwise would, in their submission, have been tantamount to tacitly accepting that domestic law had been circumvented and would have jeopardised the consistent application of the provisions outlawing surrogacy.

84. The Court observes that that approach manifests itself in an objection on grounds of international public policy, which is specific to private international law. It does not seek to call this into question as such. It must, however, verify whether in applying that mechanism to the present case the domestic courts duly took account of the need to strike a fair balance between the interest of the community in ensuring that its members conform to the choice made democratically within that community and the interest of the applicants – the children's best interests being paramount – in fully enjoying their rights to respect for their private and family life.

85. It notes in that connection that the Court of Cassation held that the inability to record the particulars of the birth certificates of the third and fourth applicants in the French register of births, marriages and deaths did not infringe their right to respect for their private and family life or their best interests as children in so far as it did not deprive them of the legal parent-child relationship recognised under Californian law and did not prevent them from living in France with the first and second applicants (see paragraph 27 above).

86. The Court considers that a distinction has to be drawn in the instant case between the applicants' right to respect for their family life on the one hand and the right of the third and fourth applicants to respect for their private life on the other hand.

87. With regard to the first point, the Court considers that the lack of recognition under French law of the legal parent-child relationship between the first and second applicants and the third and fourth applicants necessarily affects their family life. It notes in this regard that, as pointed out by the applicants, the Paris Court of Appeal acknowledged in this case that the situation thus created would cause "practical difficulties" (see paragraph 24 above). It also observes that, in its report of 2009 on the review of bioethical laws, the Conseil d'État observed that "in practice, families' lives [were] more complicated without registration, because of the formalities that had to be completed on various occasions in life" (see paragraph 68 above).

88. Accordingly, as they do not have French civil-status documents or a French family record book the applicants are obliged to produce – non-registered – US civil documents accompanied by an officially sworn translation each time access to a right or a service requires proof of the legal parent-child relationship, and are sometimes met with suspicion, or at the very least incomprehension, on the part of the person dealing with the request. They refer to difficulties encountered when registering the third and fourth applicants with social security, enrolling them at the school canteen or an outdoor centre and applying to the Family Allowances Office for financial assistance.

89. Moreover, a consequence – at least currently – of the fact that under French law the two children do not have a legal parent-child relationship with the first or second applicant is that they have not been granted French nationality. This complicates travel as a family and raises concerns – be they unfounded, as the Government maintain – regarding the third and fourth applicants' right to remain in France once they attain their majority and accordingly the stability of the family unit. The Government submit that, having regard in particular to the circular of the Minister of Justice of 25 January 2013 ..., the third and fourth applicants could obtain a certificate of French nationality on the basis of Article 18 of the Civil Code, which provides that "a child of whom at least one parent is French has French nationality", by producing their US birth certificates.

90. The Court notes, however, that it is still unclear whether this possibility does actually exist. Firstly, it notes that according to the very terms of the provision referred to, French nationality is granted on the basis of the nationality of one or the other parent. It observes that it is specifically the legal determination of the parents that is at the heart of the application lodged with the Court. Accordingly, the applicants' observations and the Government's replies suggest that the rules of private international law render recourse to Article 18 of the Civil Code in order to establish the French nationality of the third and fourth applicants particularly complex, not to mention uncertain, in the present case. Secondly, the Court notes that the Government rely on Article 47 of the Civil Code. Under that provision, civil-status certificates drawn up abroad and worded in accordance with the customary procedures of the country concerned are deemed valid "save where other certificates or documents held, external data, or particulars in the certificate itself establish ... that the document in question is illegal, forged, or that the facts stated therein do not match the reality". The question therefore arises whether that exception applies in a situation such as the present case, where it has been observed that the children concerned were born as the result of a surrogacy agreement performed abroad, which the Court of Cassation has deemed a circumvention of the law. Although they were invited by the President to answer that question and specify whether there was a risk that a certificate of nationality thus drawn up would subsequently be contested and annulled or withdrawn, the Government have not provided any indications. Moreover, the request lodged for that purpose on 16 April 2013

with the registry of the Charenton-le-Pont District Court by the first applicant was still pending eleven months later. The senior registrar indicated on 31 October 2013 and on 13 March 2014 that it was "still being processed in [his] department pending a reply to the request for authentication sent to the consulate of Los Angeles, California" (see paragraph 28 above).

91. To that must be added the entirely understandable concerns regarding the protection of family life between the first and second and the third and fourth applicants in the event of the first applicant's death or the couple's separation.

92. However, whatever the degree of the potential risks for the applicants' family life, the Court considers that it must determine the issue having regard to the practical obstacles which the family has had to overcome on account of the lack of recognition in French law of the legal parent-child relationship between the first two applicants and the third and fourth applicants (see, mutatis mutandis, X, Y and Z [v. the United Kingdom, 22 April 1997], § 48[, Reports of Judgments and Decisions 1997-II]). It notes that the applicants do not claim that it has been impossible to overcome the difficulties they referred to and have not shown that the inability to obtain recognition of the legal parent-child relationship under French law has prevented them from enjoying in France their right to respect for their family life. In that connection it observes that all four of them were able to settle in France shortly after the birth of the third and fourth applicants, are in a position to live there together in conditions broadly comparable to those of other families and that there is nothing to suggest that they are at risk of being separated by the authorities on account of their situation under French law (see, mutatis mutandis, Shavdarov, cited above, §§ 49-50 and 56).

93. The Court also observes that in dismissing the grounds of appeal submitted by the applicants under the Convention, the Court of Cassation observed that annulling registration of the details of the third and fourth applicants' birth certificates in the French register of births, marriages and deaths did not prevent them from living with the first and second applicants in France (see paragraph 27 above). Referring to the importance it had attached in Wagner and J.M.W.L. (cited above, § 135) to carrying out an actual examination of the situation, the Court concludes that in the present case the French courts did duly carry out such an examination, since they considered in the above-mentioned terms, implicitly but necessarily, that the practical difficulties that the applicants might encounter in their family life on account of not obtaining recognition under French law of the legal parent-child relationship established between them abroad would not exceed the limits required by compliance with Article 8 of the Convention.

94. Accordingly, in the light of the practical consequences for their family life of the lack of recognition under French law of the legal parent-child relationship between the first and second applicants and the third and fourth applicants and having regard to the margin of appreciation afforded to the respondent State, the Court considers that the situation brought about by the Court of Cassation's conclusion in the present case strikes a fair balance between the interests of the applicants and those of the State in so far as their right to respect for family life is concerned."

However, the approach by the Court has been mixed:

1. In *KK v Denmark*, ECtHR Application no 25212/21 (2022), the intended mother was not allowed to adopt, nor was her parentage recognised following egg donation and surrogacy in Ukraine (where parentage is established by operation of law).

2. In *Paradiso and Campanelli v Italy*, ECtHR Application no 25358/12 (2015), the child was removed from the intended parents for the purposes of adoption, as the intended mother had lied in the eyes of Italian authorities when she said that she was the mother. Surrogacy was undertaken in Russia

(where parentage is established by operation of law). It transpired that the intended father was not the genetic father. While the Court opined that there was a right to de facto family life, the removal by authorities of the child so quickly after it had arrived in Italy from Russia, combined with no genetic link to the intended parents meant that the de facto family life had not arisen.

3. In *Valdís Fjölnisdóttir v. Iceland*, ECtHR Application no 71552/17 (2021), a lesbian couple underwent sperm donation, egg donation and surrogacy in the United States. A judgment issued there declaring them to be the parents. As there were no actual, practical hindrances for their private life, the complaint that there was a breach by Iceland of Art. 8 of the ECHR was rejected.

4. In *AM v Norway*, ECtHR Application no 30254/18 (2022), a former couple, man and woman, underwent surrogacy and egg donation in the United States. A judgment issued in the United States declaring them to be the parents. The Court rejected that the intended mother was a parent.

5. In *DB v Switzerland*, ECtHR Applications no 58817/15 and 58252/15 (2023), a gay couple living in a civil partnership underwent egg donation and surrogacy in the United States. A judgment issued in the United States declaring the couple to be the child's parents. The Court recognised the parentage of the non-biological father, as the refusal to do so was in breach of the child's right to privacy under Art. 8 of the ECHR.

6. In *Advisory Opinion No P16- 2018- 00,* which also concerned the Mennesson family, the Court set out the test as to Article 8:

> *"In a situation where, as in the scenario outlined in the questions put by the Court of Cassation, a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father has been recognised in domestic law:*
>
> *1. the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother";*
>
> *2. the child's right to respect for private life within the meaning of Article 8 of the Convention does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests."*

The Court stated at [52]-[54]:

> *"(T)he Court considers that Article 8 of the Convention does not impose a general obligation on States to recognise ab initio a parent-child relationship between the child and the intended mother. What the child's best interests – which must be assessed primarily in concreto rather than in abstracto – require is for recognition of that relationship, legally established abroad, to be possible at the latest when it has become a practical reality. It is in principle not for the Court but first and foremost for the national authorities to assess whether and when, in the concrete circumstances of the case, the said relationship has become a practical reality.*
>
> *53. The child's best interests, thus construed, cannot be taken to mean that recognition of the legal parent-child relationship between the child and the intended mother, required in order to secure the child's right to respect for private life within the meaning of Article 8 of the Convention, entails an obligation for States to register the details of the foreign birth certificate in so far as it designates the intended mother as the legal*

mother. Depending on the circumstances of each case, other means may also serve those best interests in a suitable manner, including adoption, which, with regard to the recognition of that relationship, produces similar effects to registration of the foreign birth details.

54. What is important is that at the latest when, according to the assessment of the circumstances of each case, the relationship between the child and the intended mother has become a practical reality (see paragraph 52 above), an effective mechanism should exist enabling that relationship to be recognised. Adoption may satisfy this requirement provided that the conditions which govern it are appropriate and the procedure enables a decision to be taken rapidly, so that the child is not kept for a lengthy period in a position of legal uncertainty as regards the relationship. It is self-evident that these conditions must include an assessment by the courts of the child's best interests in the light of the circumstances of the case."

If there were any doubt about the possible impact on the child of non-recognition of parentage, the Court said:

"The lack of recognition of a legal relationship between a child born through a surrogacy arrangement carried out abroad and the intended mother thus has a negative impact on several aspects of that child's right to respect for its private life. In general terms, as observed by the Court in Mennesson and Labassee, cited above, ***the non-recognition in domestic law of the relationship between the child and the intended mother is disadvantageous to the child, as it places him or her in a position of legal uncertainty regarding his or her identity within society*** *(§§ 96 and 75 respectively). In particular,* ***there is a risk that such children will be denied the access to their intended mother's nationality which the legal parent-child relationship guarantees; it may be more difficult for them to remain in their intended mother's country of residence*** *(although this risk does not arise in the case before the Court of Cassation, as the intended father, who is also the biological father, has French nationality);* ***their right to inherit under the intended mother's estate may be impaired; their continued relationship with her is placed at risk if the intended parents separate or the intended father dies; and they have no protection should their intended mother refuse to take care of them or cease doing so****.*

41. The Court is mindful of the fact that, in the context of surrogacy arrangements, the child's best interests do not merely involve respect for these aspects of his or her right to private life. They include other fundamental components that do not necessarily weigh in favour of recognition of a legal parent-child relationship with the intended mother, such as protection against the risks of abuse which surrogacy arrangements entail (see Paradiso and Campanelli, cited above, § 202) and the possibility of knowing one's origins (see, for instance, Mikulić v. Croatia, no. 53176/99, §§ 54-55, ECHR 2002-I)."(emphasis added)

The Court considered Articles 2, 3, 7, 8, 9 and 18 of the UNCRC, articles 1 and 2 of the Optional Protocol, taken into account the activities of the Hague Conference on Private International Law and considered the 2018 report of the then United Nations Special Rapporteur. The effect of the Special Rappporteur's report, when taken in the context of the Mennesson case, was that a surrogacy arrangement of the type engaged in by the Mennesson's amounted to the sale of the child[57]. It is clear that the Court prioritised the need for the child's parentage to be speedily recognised over other factors, given the impact on the child.

[57] Because, according to the Special Rapporteur, any of these three things amount to the sale of a child in breach of the Optional Protocol: 1. A pre-birth order. 2. A binding contract. 3. Payment to the surrogate of an amount greater than her

3.2B Mexico

The Supreme Court in ***Amparo in Revision 553/2018*** (2018) discussed the child's right to an identity, including under UNCRC, at length. It said[58]:

> *"When establishing the parentage of minors and resolving conflicts int his regard, there are several purposes to be fulfilled in order to satisfy the best interests of the child that could come into conflict: allowing the minor to know his biological origin, maintain the minor's relationship with the biological family, protect the stability of relationships with family members, protect established filiation identities and guarantee the fulfillment of obligations arising form affiliation that are necessary for proper development, among others…*
>
> *(T)hrough the recognition of children, rights and obligations are assumed derived from paternity* ***regardless of whether there is a biological link between the author of the recognition and the recognized****… What would have to be proven is the determining reason of the will that is not attributable to the author of the recognition"* (emphasis in original)

A gay married couple who had undertaken gestational surrogacy and egg donation in Yucatan sought that they both be recognised as the parents of the child. The birth certificate had issued naming the genetic father and the surrogate (as the birth mother) as the parents. There was a written agreement between the three of them by which the surrogate agreed that the parents of the child were the intended parents:

> *"It was clear from the beginning that it was a procedure in which* [the would be surrogate] *would act as a surrogate mother, given the impossibility of the complainants both being biological parents, and was always aware that the legal paternity of the child would be one of these."*[59]

It was clear that the surrogate did not intend to be a parent[60].

The Court concluded that taking into account the best interests of the child and protecting the right to identity, specifically, to be registered immediately after birth and already have a name, and considering that the child is under the care and within the family of the complainant's partner, that filiation must be considered to be established with respect to them.[61]

The intention to parent, or as described in the judgment, procreative will, was a fundamental factor:

> *"[T]he procreative will is a fundamental factor expressed by the homosexual couple and the consent expressed by the pregnant mother in terms of not claiming rights and accepting that they are the biological father and his partner who act as the child's parents and consequently assume all obligations arising from the affiliation. Will that was expressed by an adult woman, over the age of majority, with legal capacity…"*[62]

If there were any doubt about the priorities should be about how the varying human rights should be applied, the Court made that plain:

> ***"[E]stablishing the filiation of the minor with respect to the complainants is that which requires the best interests of the child in this case. The child requires for its proper development, to have all the rights and benefits derived from filiation, such as food rights, inheritance, as well as to***

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reasonable expenses. The Mennesson's underwent surrogacy in California. As such they would have had: 1. A pre-birth order. 2. A binding contract. 3. Payment to the surrogate of an amount greater than her reasonable expenses. I discuss the Special Rapporteur's views in my discussion of the Verona Principles at page 114 below.

[58] At [39] and [54].

[59] At [92].

[60] For example, at [98].

[61] At [101].

[62] At [102].

> ***receive care, education and affection. The most is advisable that it be cared for by the people who want to take care of him and have done so since his birth***[63].
>
> *In this regard, it is important to reiterate that the surrogate mother has so far stated that she had no interest in taking care of the minor and fulfill all obligations arising from legal motherhood."*[64](emphasis added)

The Court held that the child had a right to know his biological origin, i.e., through surrogacy at the moment he decides, as part of his right to identity[65].

The Court recognised:

- The child's right to an identity and have its birth registered;
- The right of the intended parents to their private life and procreate through ART;
- The right of the surrogate to her private life and free development of personality[66].

Indirect Amparo Trial 1206/2021 **(2021)**

The approach in *Amparo in Revision 553/2018* was applied by the Federal Court of Mexico in Jalisco in this case, with particular emphasis on the rights of the child to an identity.

A single man and a gestational altruistic surrogate entered into a written agreement for her to be his surrogate, and for him to be the only parent. At the time of hearing, the child had not been born. The Court found that the man was a parent and that the surrogate was not, primarily based on the rights of the child to its identity, which was described as *"a fundamental human right"*[67]. In doing so, it relied on UNCRC, art. 8, and UDHR, art. 6. It said:

1. *"The child's right to an identity, which constitutes an element inherent to the human being, both in relations with the State and with society, which is built through multiple psychological and social factors"*

2. *"The person's self-image is determined largely by the knowledge of their origins and affiliation, as well as the identification the person has in society between a name and a nationality"*

3. *"Therefore, the right to an identity necessarily includes correlated others, such as the right to know a proper name, to know the filial history itself, to the recognition of the legal personality and nationality, among others."*[68]

4. *"The right to an identity, where a child is procreated through ART, moves away from the idea of identity as synonymous with nothing more than a biological or genetic link and is inspired by the content of the right to identity in a broad and multifaceted sense, even aspects that are linked to the identity in a dynamic sense."*[69]

5. *"That a child ought not be discriminated against in their method of conception, consistent with the principle of equality and non-discrimination."*[70]

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[63] Echoing what the High Court said about intent in *Masson*, as concerned Mr Masson at [54].
[64] At [103].
[65] At [105].
[66] At [106].
[67] At p.31.
[68] At p.26.
[69] At p.29.
[70] Ibid.

6. *"The right to identity consists of legal and social recognition of a person as a subject of rights and responsibilities and, in turn, of their belonging to a State, a territory, a society and a family, a necessary condition to preserve individual identity and collective of people…[I]dentity is not just one of the elements that make up the attribute of the human being as such, but represents the individuality of each person and the potential for development as a person and as part of a social group, to take advantage of all the natural and acquired attitudes and aptitudes, as well as the enjoyment and exercise of the freedoms and rights that the legal system recognizes and grants."*[71]

7. *"The birth record constitutes a portal of rights, which certifies the existence of the child and his or her relationship with their parents, which is also essential for the realization of their human rights, which although by itself does not guarantee their education, health, protection and participation, their absence leaves it invisible and therefore excluded, out of reach of those who have the responsibility to ensure their needs and rights.*

In other words, the lack of compliance with the right to identity places the child in a situation of extreme vulnerability and generates the impossibility of receiving protection from the State to access its protection and benefits.

Hence guaranteeing the right of children to identity, allowing them to apply for a passport in the future, to enter into marriage, open a bank account, obtain credit, vote or be voted in, find employment and inherit property.

Therefore, the lack of compliance with the right to identity involves the denial of the child's rights and can produce a chain of violations of their human rights."[72]

8. *"[T]he registration of the birth of an individual is the civil registry is part of his right to identity."*[73]

Regional Plenary in Civil Matters of the Central-South Region sentence at Jalisco 69/2023 (February 2024)

Three Magistrates had to determine which approach was correct:

a) Whether to recognise the parentage of a child, not yet born, based on the surrogacy contract; or

b) To wait until the child was born, and determine parentage at that point.

The Court, in applying *Amparo in Revision 553/2018,* chose the former, concluding it was:

> *"appropriate to grant provisional suspension against the determination of the Civil Registry that denies the future registration of an unborn person, without the data of the pregnant person, when it occurs on the occasion of his birth resulting from a surrogate maternity contract concluded by complaining persons, provided that the complaining persons exhibit the surrogate maternity contract and those documents that give an account of the pregnancy period."*[74]

3.2C Colombia

Surrogacy in Colombia is not regulated. The Constitutional Court has called repeatedly for it to be regulated, out of concerns, including potential trafficking. Parentage through surrogacy by case law has been determined based on procreative will, in the same way as that of the Supreme Court of California in *Johnson v Calvert.*

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[71] P.30.
[72] P.33.
[73] P.34.
[74] At [11].

Judgment *T-968/09*

The Court noted that the duty to uphold the best interests of the child prevailed over any other social, political, legal or economic consideration, and their rights prevail over the rights of others. The best interests of the child had first been recognised under the Geneva declaration of 1924, then in UDHR, then the Declaration on the Rights of the Child of 1959, ICCPR and UNCRC.

The Court noted UNCRC, arts. 3.1 and 3.2 and held:

> *"The best interests of the minor is not an abstract entity, devoid of links to concrete reality, on which they can formulate general rules of mechanical application. On the contrary: the content of this interest, which is of a real and relational nature, can only be established giving due consideration to individual, unique and unrepeatable of each minor, who as a worthy subject, must be cared for by the family, society and the State with all the care that requires your personal situation".*

The particular matters to be applied to determine the best interests of each child, depending on his or her own particular circumstances were:

1. ensure the integral development of the child.

2. guarantee the conditions for the full exercise of the fundamental rights of the minor.

3. protect the child form prohibited risks such as alcoholism, drug addiction, prostitution, violence physical or moral, economic or labour exploitation, and in general, disrespect for human dignity in all its forms.

4. in balancing the rights of the child and that of the parents, that of the child prevail.

5. provide a family environment suitable for the development of the child

6. there must be powerful reasons justifying State intervention in paternal/maternal relations, including that the family is a necessary condition for the satisfaction of most fundamental rights of minors.

The Court called for regulation of surrogacy:

(i) that women have a medical need for surrogacy;

(ii) that surrogacy be gestational, not traditional;

(iii) that there was an altruistic purpose, not lucrative end as its motive ;

(iv) that pregnant women meet a number of requirements such as majority, psychophysical health, having had children, etc.;

(v) that the pregnant woman has an obligation to undergo the relevant examinations before, during and after pregnancy, as well as psychological assessments;

(vi) the identity of the parties is preserved;

(vii) that the pregnant woman, once having given informed consent, and the reproductive material has been implemented or gametes, cannot retract the delivery of the child;

(viii) that the biological parents cannot reject the child under any circumstances;

(ix) that the child is not left unprotected by the death of the biological parents before birth; and

(x) that pregnant woman could only terminate pregnancy by medical prescription, among others.

Judgment *T-275/22*

A single father through surrogacy sought paternity leave. The Court noted that there was no mother[75]. Based on the intentions of the parties, he was the only parent[76]. He decided to assume *the* care of his daughter *alone*, it being his intention to volunteer to be a father and take care of his daughter *in solitude.*[77]

The Court noted that there had, between 1998 and 2021, been 16 bills before the Colombian Congress to regulate surrogacy[78]. None had been enacted. None made reference to maternity or paternity leave arising from surrogacy.

The Court held that maternity and paternity leave are a guarantee of the exercise of the child's fundamental rights [79] and constitute fundamental and subjective rights of the mother and father.[80]

Based on the principles of equality and the best interests of children, the benefits of maternity leave were extended to the father. [81]

Further, the surrogate was entitled to one week leave before birth and six weeks leave post-birth, not being maternity leave, but "the time required under normal conditions for women to recover from the process of gestation and childbirth", being medical incapacity, as she was not the child's mother.[82]

Judgment *T-127/24*

A single intended father, from the United States, underwent surrogacy in Colombia. In accordance with the usual practice in Colombia, following the birth of the child he was recognised by a Colombian court as the only parent.

The man subsequently applied with a Colombian consulate in the United States, for the child to have a Colombian passport. The application was rejected.

The father sought that the passport issue, in part relying on equality and non-discrimination under UDHR, art. 1, and the right of the child to have a name and acquire a nationality: UNCRC, art. 7.1. His application was unsuccessful.

After a long discussion of various human rights principles, the Constitutional Court stated that:

> *"Two main conclusions can be drawn from the above. First, boys and girls born through surrogate gestation processes have the same rights as all children, and second, have the right to equality and therefore cannot be discriminated against on the basis of all children as to the method of their birth. In addition, these children must be guaranteed equal treatment in the face of its family, in front of society and in the face of the State."*[83]

The Court raised concerns about:

a) the vulnerability of the human rights of children.

b) The prohibition on the sale of children

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[75] At [86], [87].
[76] At [87].
[77] At [92].
[78] And a further two in 2023: *T-124/24* at [129].
[79] At [63].
[80] At [64].
[81] At [102].
[82] At [109], [115].
[83] At [121].

c) The sexual exploitation of women

d) People trafficking

The Court dismissed the application, noting that the child was not entitled to Colombian citizenship because the surrogate was not its mother, and that there was no violation of the child's rights, such as risk of statelessness, because the child's name was reflected in the civil registry and had United States citizenship.

Judgment *T-232/24*

A single Ukrainian man became a parent through surrogacy in Colombia. The child was initially granted a Colombian passport, as the surrogate was shown as the mother upon birth. However, in accordance with Colombian practice, a Colombian court found that she was not a parent of the child.

He then sought to update the passport. The father and girl then travelled to Spain. At about the time of arrival in Spain, the Colombian passport had been cancelled. As they had entered Schengen, they travelled to Hungary. The father then left the girl in the care of relatives, when he proposed to move to Australia for work, as he was unable to remain in Hungary. He made *"multiple efforts for his daughter to acquire a nationality without success."*[84]

Issuance of the Colombian passport was refused, because the Colombian surrogate was not a parent of the child (*jus sanguinis*) and nor was the father domiciled in Colombia at the time of birth (*jus soli*).

His daughter was unable to obtain a Ukrainian passport (as Ukrainian authorities recognised the surrogate as the mother, even though she was not recognised as the mother in Colombia). The father had to prove that the mother had died, declared incapable or deprived of her parental rights, in order to be able to obtain a Ukrainian passport for the child:

> *"Indeed, [the father] reported that in Ukraine, for the recognition of the nationality of children of Ukrainians born abroad, registration of the mother and father in the civil birth register. On the other hand, for children recognized as nationals of another country (in this case, Colombia) do not It requires the registration of both parents. So, if the girl had her Colombian nationality, the requirement to have both parents on their registration would not be required and thus accessed to Ukrainian nationality without problem."*[85]

The father was unable to bring his daughter to Australia with him, because she did not have a passport. Australian authorities required that the girl have another nationality.[86] She was, in effect, rendered stateless. He subsequently returned to Ukraine from Australia, to be with his daughter[87].

The court noted that the right to nationality was a human right, under UDHR, art. 15, UNCRC, art.7, ICCPR, art. 24 and ICESCR, art. 5, being a *"fundamental law as an attribute of personality."*[88]

The Court found that authorities had violated the girl's right to nationality, identity and equality as well as her fundamental right to protection versus statelessness[89]:

> *"In sum, Leticia must not bear the consequences that she was born without regulation nor the bureaucratic burdens required to enjoy her rights. Therefore, the Court shall protect her right to have a nationality, a defined personal identity, equality before the law and non-discrimination. Mr*

[84] At [199].
[85] At [9].
[86] At [200].
[87] It is unclear how she entered Ukraine from Hungary.
[88] At [85].
[89] At [228].

Boris will be entrusted with the special care, attention and love his daughter deserves, in front of whom he will have his duty to ensure full growth, free from violence and with the guarantee that She can exercise her rights as a Colombian citizen throughout her life." [90]

3.2D Argentina

***IN v A, CL re challenge to parentage* (2024)**

The Supreme Court held that the surrogate was a parent. The biological father and the surrogate, being the birth mother, were the two parents to be named on the birth certificate in Argentina. The Civil and Commercial Code required that the woman who gave birth was the mother, and that there was a limit of two parents.

A gay couple entered into a surrogacy contract with a surrogate, on the basis that they would be the parents, and she would not. The surrogate did not wish to be registered as the mother. Based on public policy rules, the surrogate remained as a parent. Because there as not a persecutory purpose of the law, it did not violate the plaintiffs' right to equality.

The plaintiffs relied on UNCRC, arts. 3, 7 and 8.1, among other provisions, including the right to personal autonomy, right to privacy, to found a family, to equality and non-discrimination and to identity. They submitted that they should be recognised as parents as they had exercised procreative will *"and is a consequence of due respect for the right of every person to form a family according to their individual choices and regardless of their sexual orientation, as it constitutes the only option that a homosexual couple composed of two men- biological- has to have a child that is genetically their own (although only form one of them)."*[91]

They also submitted that they had a right to access ART, as per *Artavia Murillo v Costa Rica*, and that failure to recognise their parentage did not give priority to the best interests of the child nor granting the child protection of its identity or family relationships.

The Court held that it was not relevant that there was a surrogacy agreement nor that the pregnant woman expressed her will not have a legal relationship with the child, as the statute as to filiation was based on reasons of public order to attribute the link in a certain and determined way.[92] The surrogate was a parent under "the clear text of the law" [93]. The law was clear that there were two parents, i.e., the surrogate and the biological father, and that *"to admit a different interpretation, based on personal autonomy, would have the consequence of destroying the public order that governs this matter".* [94]

The *Civil and Commercial Code* did not prevent the right to found a family nor impose a single concept of family, but rather limits itself to regulating the determination of the filial bond where ART is used.[95]

The Court considered that there was no breach of UNCRC, art. 3 when it had not been established that the regulation of family relations was unreasonable in the way it addressed the best interests of the child as a primary consideration in addition to other interest that contribute to public order in matters of filiation.[96]

Nor was there a harm to the identity of the child, as the child's identity was established by the legal system of filiation, which records a biological reality- gestation.[97]

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[90] At [230].
[91] At [3].
[92] At [15].
[93] At [16].
[94] At [18].
[95] At [20].
[96] At [22].
[97] At [23].

3.2E United Kingdom

***A v. P* [2011] EWHC 1738 (Fam); [2012] 3 WLR 369**

Both Articles 8 of the UNCRC and the European Convention on Human Rights were considered in a surrogacy case. Theis J was considering s. 54 of the UK Act, which is equivalent to Australian provisions as to parentage orders, such as the *Surrogacy Act 2010* (Qld), s.22, which concerns the ability to make a parentage order transferring parentage from the birth parents to the intended parents.

She stated at [28]:

> *"The concept of identity includes the legal recognition of relationships between children and parents. In ZH (Tanzania) v Secretary of State for the Home Department UKSC 2011 4 Baroness Hale considered that the courts in this jurisdiction and decision makers had to have regard to the key principles of the UNCRC, both in respect of Article 8 of the ECHR and in its application to decisions by authorities in this jurisdiction (paras 22 – 25). If the consequences of a purposive construction of s 54(4) is that the child's identity with his biological father is preserved and the child's identity is linked to both Mr and Mrs A the court may consider itself bound to arrive at such a conclusion on the combined reading of Article 8 ECHR and Article 8 of the UNCRC."*

In that case, Mr A was the biological father. Mr and Mrs A were the intended parents of a child born through surrogacy.

***Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam)**

Munby P followed the "powerful analysis"[98] in *A v P*, stating:

> *"Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family. As Ms Isaacs correctly puts it, this case is fundamentally about Xs identity and his relationship with the commissioning parents. Fundamental as these matters must be to commissioning parents they are, if anything, even more fundamental to the child. A parental order has, to adopt Theis J's powerful expression, a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in Re J (Adoption: Non-Patrial) [1998] INLR 424, 429, referred to as "the psychological relationship of parent and child with all its far-reaching manifestations and consequences." Moreover, these consequences are lifelong and, for all practical purposes, irreversible: see G v G (Parental Order: Revocation) [2012] EWHC 1979 (Fam), [2013] 1 FLR 286, to which I have already referred. And the court considering an application for a parental order is required to treat the child's welfare throughout his life as paramount: see in In re L (A Child) (Parental Order: Foreign Surrogacy) [2010] EWHC 3146 (Fam), [2011] Fam 106, [2011] 1 FLR 1143. X was born in December 2011, so his expectation of life must extend well beyond the next 75 years. Parliament has therefore required the judge considering an application for a parental order to look into a distant future."*

[98] At [53].

3.2F Australia

***KRB and BFH v. RKH and BJH* [2020] QChC 7**

The approach in *A v P* and *Re X* was followed[99]. Coker DCJ stated:

> *"[9] Australia is a signatory to the International Convention on the Rights of a Child. Article 8 of the convention is relevant here. It relates to states entering into particular agreements with regard to the rights of children. Article 8 in particular provides:*
>
> *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law, without unlawful interference.*
>
> *[10] And secondly:*
>
> *Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.*
>
> *[11] These considerations are reflected in the Surrogacy Act 2010 Queensland, sections 5 and 6. Section 5 relates to the objects of the Act and is in these terms:*
>
> ***5 Main objects of Act***
>
> *The main objects of this Act are -*
>
> *(a) To regulate particular matters in relation to surrogacy arrangements, including by prohibiting commercial surrogacy arrangements and providing, in particular circumstances, for the court-sanctioned transfer of parentage of a child born as a result of a surrogacy arrangement; and*
>
> *(b) In the context of a surrogacy arrangement that may result in the court-sanctioned transfer of parentage of a child born as a result:*
>
> *(i) to establish procedures to ensure parties to the arrangement understand its nature and implications, and*
>
> *(ii) to safeguard the child's wellbeing and best interests.*
>
> *[12] Section 6 then goes on to detail what are called the 'Guiding Principles', and I note in particular that they are as follows:*
>
> ***6 Guiding principles***
>
> *(1) This Act is to be administered according to the principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and for the rest of his or her life, are paramount.*
>
> *(2) Subject to subsection (1), this Act is to be administered according to the following principles:*
>
> *(a) A child born as a result of a surrogacy arrangement should be cared for in a way that*
>
> *(i) ensures a safe, stable and nurturing family and home life; and*

[99] Although the case does not cite *A v P* or *Re X*, those cases were cited by me in my submissions to the Court. I appeared for the applicants.

(ii) promotes openness and honesty about the child's birth parentage; and

(iii) promotes the development of the child's emotional, mental, physical and social wellbeing.

(b) The same status, protection and support should be available to a child born as a result of a surrogacy arrangement regardless of –

(i) how the child was conceived under the arrangement; or

(ii) whether there is a genetic relationship between the child and any of the parties to the arrangement; or

(iii) the relationship status of the persons who become the child's parents as the result of a transfer of parentage.

(c) The long-term health and wellbeing of parties to a surrogacy arrangement and their family should be promoted, and

(d) The autonomy of consenting adults in their private lives should be respected.

[13] The parties to this application have been mindful of these guiding principles and have done all that they can to comply with the law, and they now seek that the law's protection for Baby P be provided through the parentage order."

3.3 Who is a parent for the *UNCRC*?

The UNCRC does not define who is a parent. Parent is defined by local law. This is consistent with the approach of the UN Human Rights Committee in *GC No 19*, above.

The High Court held in *Teoh's case* [1995] HCA 20 that when a convention has been ratified but is not part of Australian domestic law, nevertheless there is a legitimate expectation by a person affected that a decision maker will, in the absence of legislation or regulation to the contrary, comply with convention. Further, the convention will, to a degree, aid in the development of the common law, especially one that declares universal fundamental rights, although the courts should act with circumspection, so that there is not a backdoor means of importing an unincorporated convention into Australian law[100].

In that case, the Court considered the UNCRC. The Court accepted that the family in question was that of Mr Teoh, his wife, and her children. Mr Teoh's wife had one child of her first marriage, and three children from her de facto relationship with Mr Teoh's late brother.

It appears that the UNCRC is now part of our domestic law, as the objects of Part VII of the *Family Law Act 1975* (Cth) include to give effect to the UNCRC: s.60B.

3.3A Who is a parent under Australian law

Under Australian law there is an obvious anomaly that:

- Under state and territory laws, such as the *Surrogacy Act 2010* (Qld) and the *Status of Children Act 1978* (Qld), the surrogate and her partner (if any) are the parents.

- The effect of *Masson v Parsons* [2019] HCA 21 that a parent is a question of fact has led to three reported decisions that an intended genetic father through surrogacy is a parent under the *Family Law Act 1975* (Cth)- because he supplied his sperm on the express or implied understanding to be a

[100] At [28]-[34] per Mason CJ and Deane J.

parent, took steps to be registered as a parent, and then parented the child[101]. Further, in one case the non-genetic father through IVF was held to be a parent- based on intention[102]. In another recent case[103], where the Court questioned the application of *Masson* to surrogacy, the Court was not assisted by the practitioner, who had not brought to the Court's attention the other decided cases on point.

- The approach in *Masson* is the same test previously applied under the *Australian Citizenship Act 2007* (Cth) as to who is a parent for the purposes of that Act. The Full Federal Court in *H v Minister for Immigration and Citizenship* [2010] [104] made plain that a genetic connection is not required to establish parenthood.

A requirement under the various *Surrogacy Acts* is that the surrogate (and in most cases her partner) must consent to the making of the order. A parentage order cannot be made, even if that consent is withheld by caprice or with malice. The basis of these provisions is that the surrogate (and partner) is the parent, and therefore must consent to the transfer of parentage of "her" child.

In the face of obstruction by the surrogate or partner, a parenting order under the *Family Law Act* can address who has parental responsibility for the child, and where the child lives, but it cannot determine who is a parent. However, the effect of *Masson* is that the Federal Circuit and Family Court of Australia has now determined, three times, that the intended biological father through surrogacy is the parent, based both on biology and intention[105]. In one of those cases, *Seto & Poon* [2021], the traditional surrogate sought to extort the intended parents. In another, *Tickner & Rodda* [2021], a gestational surrogate fraudulently claimed to have lost the pregnancy, as she had decided to keep the baby for herself.

In two decisions in the one Queensland case decided pre-*Masson*, *Lamb & Shaw*[106], the Family Court determined that the genetic intended father was a parent under the *Status of Children Act 1978* (Qld), s.23, albeit with no rights or responsibilities. In that case, the surrogate had not relinquished the child, and had sought to adopt the child out (without the consent of the intended parents). The intended parents were the genetic parents.

However, that decision was criticised as being wrongly decided on that point, in *RBK v MMJ* [2019] QChC 42[107]:

> *"[15] Tree J's interpretation of the Status of Children Act and the Surrogacy Act in my view cannot be correct if it means that a sperm donor who wishes to be an intended parent is instead a birth parent because of the different terms used in s 21 of the Act. This is because the reference to the man who produced the semen having no rights or liabilities in respect of a child to be born as a result of pregnancy is also used in s 19C(2) in a situation where there has been artificial insemination and the female bearing the child has a female de facto partner or a female registered partner.*
>
> *[16] If it is correct that a child who is born as a result of donor semen by a man intending to become the full-time parent of the child with his male partner becomes for the purposes of the Act a birth parent; then, on that basis, there will be different meanings assigned to the same phrase in ss 19C and 21 of the Act. This is because of the interplay between those sections and s 10A of the Births, Deaths and Marriages Registration Act which allows for only two people to be registered as parents*

[101] *Seto & Poon* [2021] FamCA 288; *Tickner & Rodda* [2021] FecCFamC1F 279; *Gallo & Ruiz* [2024] FedCFamC1F 893.
[102] *Mizushima & Crocetti (No 3)* [2024] FedCFamC1F 542.
[103] *Lloyd & Compton* 2025] FedCFamC1F 28.
[104] [2010] FCAFC 119.
[105] *Seto & Poon* [2021] FamCA 288; *Tickner & Rodda* [2021] FedCFamC1F 279; *Gallo & Ruiz* [2024] FedCFamC1F 893.
[106] *Lamb & Shaw* [2017] FamCA 769; *Lamb & Shaw* [2018] FamCA 629.
[107] By way of disclosure, I appeared for the applicants.

in the birth certificate. In the case of s 19C of the Act that would be the mother of the child and her female partner.

[17] The better view then is that it cannot be that a semen donor in a case such as this is a birth parent within the meaning of the Surrogacy Act . The interpretation that fits both the Status of Children Act and the Births, Deaths and Marriages Registration Act is that a birth parent by definition is a person other than an intended parent. This means that once a person has entered into a surrogacy agreement as an intended parent they are excluded by the definition in s 8(3) of the Surrogacy Act from being a birth parent. This does not take away from the fact that they are a biological parent but accords with the provision that they have no rights or liabilities as a result of the donation of the sperm."

In an unreported case decided one month after *Masson* was decided[108], in which I acted for the non-biological father, the Family Court determined that both male intended parents through surrogacy were the parents, when they had the benefit of a court order in California that declared them to be the parents.

That approach is consistent with the pre-*Masson* decision of *Carlton & Bissett* [2013] FamCA 143, in which the biological intended father of twins born in South Africa, and the subject of a pre-birth order there, was found to their parent in Australia. The basis of *Carlton & Bissett* was to accept the overseas order for a biological father who ordinarily resided overseas and was recognised as the parent there, i.e., a comity approach.

3.3B Impact if a parentage order is not made

It is now clear that a genetic intended father through surrogacy is a parent under the *Family Law Act*. A refusal by a State or Territory court to make a parentage order (for example, arising out of a failure to consent by the surrogate and/or her partner) would then be met by:

1. An application under the *Family Law Act* for parenting orders.

2. Seeking a finding or declaration that the biological intended parent is a parent under that Act.

3. If there is another intended parent, seeking a finding or declaration that that intended parent is a parent under that Act, failing which if needed[109], seeking an order for leave to adopt.

4. When eligible, which can be up to 5 years[110], then make the application for the step-parent adoption, where the consent of the surrogate or her partner may be dispensed with[111].

5. The step-parent adoption application may be determined by the Court that declined the parentage order[112].

Taken to its logical conclusion, the approach in *Masson* is that the key element to determine parentage is that of intention. That is what occurred in both cases decided in *H:* McMullen and NWH.

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[108] *W & T* [2021] FamCA, Stevenson J.
[109] Queensland alone requires leave to adopt under the *Family Law Act 1975* (Cth). S.60G, to be granted before a step-parent adoption application is made: *Adoption Act 2009* (Qld), s.92(1)(d). Elsewhere, if the *prescribed adopting parent* already has parental responsibility, for example, under a parenting plan under the *Family Law Act*, s.63C, then leave to adopt is not required. Clients of mine have satisfied the Supreme Court of NSW and the County Court of Victoria that leave to adopt is not required in those circumstances, when the child was conceived through surrogacy (and where a parentage order was not possible).
[110] For example, *Adoption Act 2000* (NSW), s.30(1)(a).
[111] For example, *Adoption Act 2009* (Qld), s.39(4)(f) or s.39(1)(e).
[112] For example, the Supreme Court of the ACT.

3.3C *H v Minister for Immigration and Citizenship [2010]*

In **McMullen**, Mr McMullen had sex with a Fijian woman. She became pregnant. She claimed he was the father. A blood test undertaken after the birth showed that he and the girl's blood type were the same but the mother's was different. Mr McMullen acknowledged paternity. For the next 20 years he acted as father of the child. When the daughter underwent two DNA tests that showed that Mr McMullen was not the biological father, the mother admitted that the father was another man, believed to be an Australian citizen, but who had died.

The Court held that Mr McMullen was the father. The Court stated:

> *"47. The contest about the ordinary meaning of "parent" is not at all straightforward. In her preface to the scholarly publication Parenthood in Modern Society: Legal and Social Issues for the Twenty-first Century (Martinus Nijhoff Publishers, 1993), edited by John Eekelaar and Petar Sarcevic, Marie-Therese Meulders described the legal basis and social significance of parenthood as "one of the major and most complex issues throughout the history of mankind". As Professor Meulders noted, looked at superficially, the basis of parenthood might appear to be "blood ties resulting from procreation". Considered more carefully, however, as Meulders and other scholars acknowledge, it is clear that, over the ages and in different places, the status of being a parent has been socially defined in a great variety of ways that do not always reflect the biological facts. Certain socially recognized facts have come to define the social status of a "parent" in relation to another person. Modern ethnology and anthropology recognize as much. Historians have shown that family structures and notions of parent and child, marriage and descent have differed widely over time and within a range of demographic, economic and cultural frameworks distinctive for each society: see, for example, Lawrence Stone, The Family, Sex and Marriage in England 1500-1800 (Penguin, abridged version, 1979, reprinted 1990), pp 22-29, 48, 80-86, 109; Rosemary O'Day, The Family and Family Relationships, 1500-1900 (Macmillan 1994) pp 29, 127, 134; Martine Segalen, Historical Anthropology of the Family (translated by JC Whitehouse and Sarah Matthews; Cambridge University Press, 1986), pp 32-36, 173; Michael Anderson, Approaches to the History of the Western Family 1500-1914 (Macmillan, 1980), pp 14, 41-2, 60; and Philippe Aries, Centuries of Childhood (Jonathan Cape London, 1962). In essence, the status of being a parent may imply physical procreation, the social assumption of a specific relationship to another (as the child of the parent) or both. Comparatively recent developments in the biological sciences, especially in genetics, and the introduction of DNA testing, has highlighted the differences between understanding "parent" as a biologically defined status and as a socially-defined one.*
>
> *48. Today, perhaps, one assumes that when a person speaks of a "parent", the speaker is referring to a biological parent. If, however, it is plain from the context or from one's knowledge of the speaker that the reference is not to a genetic relation but to someone who, for the speaker, performs the role that society typically expects a parent to fulfil, then one accepts the reference to "parent" as apposite. Thus, in ordinary usage, the word "parent" may be used without modifier to signify a genetic or non-genetic connection with another: compare Black's Law Dictionary (8th ed, 2004). Whilst often a person's parents will in fact be biological parents, ordinary usage does not limit the meaning of parent in this way. Rather, the word "parent" is used today to signify a social relationship to another person. Whether or not this has always been the case, this usage reflects a widespread contemporary awareness of families that include non-biological parent-child relationships."*

Further:

> *"128.The word "parent" is an everyday word in the English language, expressive both of status and relationship to another. Today, as the Citizenship Act itself recognizes, not all parents become parents in the same way: see, e.g., s 8 of the Citizenship Act; H v J [2006] FamCA 1398; (2006) 205 FLR 464 at 466, citing Re Patrick [2002] FamCA 193; (2002) 168 FLR 6 at [323], [325] (Guest*

J). This is not to say that parents do not share common characteristics; everyday use of the word indicates that they do.

129. ***Being a parent within the ordinary meaning of the word may depend on various factors, including social, legal and biological****. Once, in the case of an illegitimate child, biological connection was not enough; today, biological connection in specific instances may not be enough: Citizenship Act, s 8 referring to ss 60H and 60HB of the Family Law Act, in turn picking up prescribed Sate and Territory laws such as the Status of Children Act 1974 (Vic). Perhaps in the typical case, almost all the relevant considerations, whether biological, legal, or social, will point to the same persons as being the "parents" of a person.* ***Typically, parentage is not just a matter of biology but of intense commitment to another, expressed by acknowledging that other person as one's own and treating him or her as one's own.***

130. The ordinary meaning of the word "parent" is, however, clearly a question of fact, as is the question whether a particular person qualifies as a parent within that ordinary meaning." (emphasis added)

NWH has similar aspects to surrogacy. Mr H travelled to China, fell in love with a Chinese woman, and married her. At the time he proposed, she was already pregnant to another. Nevertheless, when the child was born after the marriage, he acknowledged paternity. Like intended parents through surrogacy, Mr H voluntarily took on the lifelong obligations of parenthood.

By acknowledging paternity, Mr H was voluntarily submitting to the lifelong obligation to provide for the child, as intended parents do when they enter into surrogacy agreements abroad that say that they are forever liable for the child, as its parents, because they intend to be the parents, and the surrogate and her partner are not- because they intend not to be parents.

In the circumstances of surrogacy, consistent with the approach in *Masson* and *H*, where a gestational surrogate entered into a surrogacy arrangement intending not to be a parent, it appears that she is not a parent, although there is no case authority to that effect. In both *Seto & Poon*, which was traditional surrogacy, and *Tickner & Rodda*, which was gestational surrogacy, the Court made no findings as to whether or not the surrogate was a parent, but seemed to imply that she was a parent.

An intention approach is consistent with overseas authorities in the Americas, which considered the issue of parentage.

3.3D California

The first was that of the Supreme Court of California in *Johnson v Calvert* (1993)[113]. Mark and Crispina Calvert entered into a surrogacy contract with Anna Johnson. An embryo of Mark and Crispina's material was implanted into Anna, who later gave birth. Anna claimed that she was the mother.

The conundrum for the Court was that under California's parentage presumptions both the woman who was the biological mother and the woman who gave birth were the mother. How was the Court to determine which of these women was the mother?

The simple answer is that who intended to parent the child, i.e., who intended to reproduce, is the natural parent. The Court concluded therefore that both Mark and Crispina were the natural parents, and that Anna was not:

"Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as manifested in the surrogacy agreement. Mark and Crispina are a couple who desired to have a child of their own genes but are

[113] 5 Cal. 4th 87.

physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. ***But for their acted-on intention, the child would not exist****. Anna agreed to facilitate the procreation of Mark's and Crispina's child. The parties' aim was to bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child's mother. Although the gestative function Anna performed was necessary to bring about the child's birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's natural mother.*

We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child-that is, she who intended to bring about the birth of a child that she intended to raise as her own-is the natural mother under California law."[114] (emphasis added)

Anna also argued that the surrogacy contract fell foul of the adoption statute. This argument was also rejected by the Court, which saw the distinction between adoption and surrogacy:

"Anna urges that surrogacy contracts violate several social policies. Relying on her contention that she is the child's legal, natural mother, she cites the public policy embodied in Penal Code section 273, prohibiting the payment for consent to adoption of a child. fn. 11 She argues further that the policies underlying the adoption laws of this state are violated by the surrogacy contract because it in effect constitutes a prebirth waiver of her parental rights.

We disagree. Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. The parties voluntarily agreed to participate in in vitro fertilization and related medical procedures before the child was conceived; at the time when Anna entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring. As discussed above, Anna was not the genetic mother of the child. The payments to Anna under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up "parental" rights to the child. Payments were due both during the pregnancy and after the child's birth. We are, accordingly, unpersuaded that the contract used in this case violates the public policies embodied in Penal Code section 273 and the adoption statutes. For the same reasons, we conclude these contracts do not implicate the policies underlying the statutes governing termination of parental rights. (See Welf. & Inst. Code, § 202.)"[115]

Anna then argued that she was the subject of involuntary servitude. This, too, was rejected:

"Anna then argued that she was engaged in involuntary servitude, as she did not have bodily at has been suggested that gestational surrogacy may run afoul of prohibitions on involuntary servitude. (See U.S. Const., Amend. XIII; Cal. Const., art. I, § 6; Pen. Code, § 181.) Involuntary servitude has been recognized in cases of criminal punishment for refusal to work. (Pollock v. Williams (1944) 322 U.S. 4, 18 [88 L. Ed. 1095, 1104, 64 S. Ct. 792, 799]; see, generally, 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 411-414, pp. 591-596.) We see no potential for that evil in the contract at issue here, and extrinsic evidence of coercion or duress is utterly lacking. We note that although at one point the contract purports to give Mark and Crispina the sole right to determine whether to abort the pregnancy, at another point it acknowledges: "All parties understand that a pregnant woman has the absolute right to abort or not abort any fetus she is carrying. Any promise to the contrary is unenforceable." We therefore need not determine the

[114] At p.93.
[115] At pp. 95-96.

validity of a surrogacy contract purporting to deprive the gestator of her freedom to terminate the pregnancy."[116]

Anna also claimed that she was exploited or dehumanised. This argument was dismissed:

"Finally, Anna and some commentators have expressed concern that surrogacy contracts tend to exploit or dehumanize women, especially women of lower economic status. Anna's objections center around the psychological harm she asserts may result from the gestator's relinquishing the child to whom she has given birth. Some have also cautioned that the practice of surrogacy may encourage society to view children as commodities, subject to trade at their parents' will.

We are all too aware that the proper forum for resolution of this issue is the Legislature, where empirical data, largely lacking from this record, can be studied and rules of general applicability developed. However, in light of our responsibility to decide this case, we have considered as best we can its possible consequences.

We are unpersuaded that gestational surrogacy arrangements are so likely to cause the untoward results Anna cites as to demand their invalidation on public policy grounds. Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment. We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it. ***The limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.***

The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genes. *Certainly in the present case it cannot seriously be argued that Anna, a licensed vocational nurse who had done well in school and who had previously borne a child, lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract."* (emphasis added)

I pause at this point and note that the policy settings in Australia do not give women the choice of being paid to be surrogates. To do so is to commit an offence. The effect of that policy choice has been exactly that predicted by the Court- foreclosing a personal and economic choice on the part of the surrogate, and, as demonstrated by the data, to deny most intended parents the ability to undertake surrogacy in Australia.

Then ***In Re Marriage of Buzzanca*** (1998), the California Court of Appeal considered the issue of parentage when there was no genetic link by the intended parents to the child. The Court concluded, based on intention, that they were the parents:

"Jaycee was born because Luanne and John Buzzanca agreed to have an embryo genetically unrelated to either of them implanted in a woman - a surrogate - who would carry and give birth to the child for them. After the fertilization, implantation and pregnancy, Luanne and John split up, and the question of who are Jaycee's lawful parents came before the trial court.

Luanne claimed that she and her erstwhile husband were the lawful parents, but John disclaimed any responsibility, financial or otherwise. The woman who gave birth also appeared in the case to make it clear that she made no claim to the child.

[116] At pp. 96-97.

> *The trial court then reached an extraordinary conclusion: Jaycee had no lawful parents. First, the woman who gave birth to Jaycee was not the mother; the court had – astonishingly - already accepted a stipulation that neither she nor her husband were the "biological" parents. Second, Luanne was not the mother. According to the trial court, she could not be the mother because she had neither contributed the egg nor given birth. And John could not be the father, because, not having contributed the sperm, he had no biological relationship with the child.*
>
> *We disagree. Let us get right to the point: Jaycee never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate.*
>
> *The trial judge erred because he assumed that legal motherhood, under the relevant California statutes, could only be established in one of two ways, either by giving birth or by contributing an egg. He failed to consider the substantial and well-settled body of law holding that there are times when fatherhood can be established by conduct apart from giving birth or being genetically related to a child. The typical example is when an infertile husband consents to allowing his wife to be artificially inseminated. As our Supreme Court noted in such a situation over 30 years ago, the husband is the "lawful father" because he consented to the procreation of the child. (See People v. Sorensen (1968) 68 Cal. 2d 280, 284-286 [66 Cal. Rptr. 7, 437 P.2d 495, 25 A.L.R.3d 1093].)*
>
> *The same rule which makes a husband the lawful father of a child born because of his consent to artificial insemination should be applied hereCby the same parity of reasoning that guided our Supreme Court in the first surrogacy case, Johnson v. Calvert (1993) 5 Cal. 4th 84 [19 Cal. Rptr. 2d 494, 851 P.2d 776]- to both husband and wife.* ***Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents.*** *The only difference is that in this case -unlike artificial insemination -there is no reason to distinguish between husband and wife. We therefore must reverse the trial court's judgment and direct that a new judgment be entered, declaring that both Luanne and John are the lawful parents of Jaycee."*[117] (emphasis added)

Further:

> *"No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), and -as now appears in the not-too-distant future, cloning and even gene splicing - courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who - other than the taxpayers - is obligated to provide maintenance and support for the child. These cases will not go away."*[118]

That approach pioneered in Johnson v Calvert, based on intention, is the approach subsequently adopted in Mexico and Colombia.

***Mizushima & Crocetti (No 3)* [2024]**

In *Mizushima & Crocetti (No 3)* [2024] FedCFamC1F a man and woman in a de facto relationship had been trying to become parents for 15 years. Their attempts had spanned various countries. On the last occasion, after they had separated, the woman had implanted into her an embryo not comprising of any of their genetic material. A child was born. The Court held, applying *Masson*, that the man was a parent, based on his intention.

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[117] At pp. 1412-1414.
[118] At pp. 1428-1429.

It is arguable, based on *Mizushima*, that based on intention (as per *Masson*) that both intended parents under a gestational surrogacy arrangement are the parents under the Family Law Act. Such an approach is consistent with *H*, *Johnson v Calvert*, *Buzzanca*, and the Mexican and Colombian cases. If that is the state of the law, then current State and Territory requirements for the transfer of parentage arising from surrogacy are largely redundant. The position with traditional surrogacy is more complex.

3.4 How to apply these human rights

In my view, the words of International Women's Health Coalition and Human Rights Watch[119] are apt:

> *"Children born of surrogacy are obviously crucial rights holders whose human rights must be considered in any discussion of surrogacy, and whose best interests are a primary consideration in all matters affecting them. Nevertheless, they are not the sole rights holders implicated in surrogacy arrangements. Additionally, it may not be in children's best interests to exclude consideration of the human rights of surrogates and intending parents and doing so is unlikely to lay the groundwork for effective policy. Along these lines, the development of guidance and policy on surrogacy should not move forward without full participation by representatives of the following groups, without discrimination including on the basis of race, ethnicity, age, disability, sexual orientation or identity, etc., and expert groups who represent the interests of these groups:*
>
> *a) Children born of surrogacy;*
>
> *b) Individuals who have acted or wish to act as surrogates, including through both commercial and non-commercial surrogacy;*
>
> *c) Individuals struggling with infertility;*
>
> *d) Individuals who have utilized (or seek to utilize) assisted reproduction, including surrogacy, to become parents; and*
>
> *e) Individuals who have participated or may wish to participate in assisted reproduction, including surrogacy, through contribution of genetic material including eggs and sperm.*
>
> ***Key considerations and principles derived from human rights law and research that should frame the formulation of guidance, law and/or policy on issues of surrogacy***
>
> *As mentioned above, we fully agree with the importance of the primacy of protecting the rights of children born of surrogacy arrangements, and with the relevance of the core standards the Special Rapporteur has set forth in that regard. The following principles pertain more to other rights holders whose rights are implicated by surrogacy arrangements, as we are concerned that these rights have not yet been fully considered in this discussion:*
>
> *a) Everyone participating in a surrogacy arrangement in any capacity should have a full opportunity for informed consent, expert advice, accessible communication, and, as appropriate, supported decision making and legal counsel and representation.*
>
> *b) Every person has the right to make their own decisions about their reproductive life, including surrogates and potential surrogates, people who seek to become parents through surrogacy and other forms of assisted reproduction, and donors of genetic material.*

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

c) People who are pregnant should not be deprived of the right to make decisions about abortion and other healthcare decisions by reason of a surrogacy agreement, and legal or policy frameworks for surrogacy should not facilitate such deprivation.

d) To the extent that new legal frameworks are developed for surrogacy, they should not rely on criminal sanctions. Criminalizing conduct related to consensual sexuality and reproduction (for example: sex work, sex outside of marriage, adolescent sexual behavior, same-sex intimacy, adolescent pregnancy and pregnancy outside of marriage, abortion, etc.) is generally harmful and leads to violations of human rights. In addition, it is unlikely that criminalizing surrogacy would end the practice. Rather, it is more likely that criminalization would drive surrogacy underground where unsafe conditions, discrimination and exploitation for all rights holders involved can flourish.

e) Fetal personhood has no basis in human rights law.

f) The right to found a family, to make decisions on the number and spacing of children and to benefit from scientific progress including through surrogacy and other forms of assisted reproduction, should not be denied on the basis of discriminatory criteria such as sexual orientation, gender identity, disability, marital or partnership status, etc.

g) The best interests of the child is a dynamic concept that should be applied appropriately in this specific context, including an examination of the likely consequences for children of surrogacy, [if] it is prohibited and pushed underground.

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."

Question 4: What information about the circumstances of their birth do you think children born through surrogacy should have access to? How should this be provided or facilitated?

Children born through surrogacy are entitled to know how they were conceived. How each of us was conceived is unique to us- and we are entitled to know the truth and how of that.

There is the ability throughout Australia for donor conceived children to know from 18+ that they were donor conceived, although that age in Queensland will be 16+ from 1 March 2026[120], and is now 16+ or earlier if a counsellor is satisfied about maturity, for those in the ACT[121], or with the consent of a parent or a person with parental responsibility.

In my view, the ACT model as to age would be appropriate for surrogacy disclosure.

I support the descendants of the person born through surrogacy also being able to find out, as seen in the Queensland Act, for example[122].

Birth certificates should enable the person to find out, via a reference to further information, or by the issue of two birth certificates, one with the usual information, and one with more detailed.

I oppose the one birth certificate which sets out that the child was born via surrogacy and donation. Birth certificates are used for a myriad of tasks, such as enrolment at daycare and school, and in some cases for

[120] *Assisted Reproductive Technology Act 2024* (Qld), s.48.
[121] *Assisted Reproductive Technology Act 2024* (ACT), s.51.
[122] *Assisted Reproductive Technology Act 2024* (Qld), s.48.

job applications. A child could be discriminated against because the person receiving the birth certificate, for example, a childcare worker, is opposed to surrogacy. Experience teaches that in small country towns, for example, *Privacy Act* protections and confidentiality requirements at times are no match for small town gossip. The child should be protected from that.

Question 5: What do you think are the main barriers that prevent people from entering surrogacy arrangements in Australia? How could these be overcome?

There are many barriers to domestic surrogacy.

5.1 Lack of surrogates

The data is stark. Since 2009, for every child born in Australia through gestational surrogacy, four have been born overseas. The data demonstrates the point: that the demand to become parents via surrogacy is much greater than the number of available surrogates.

Most intended parents that I talk to say that they would rather undertake surrogacy at home, rather than overseas, but then complain that they have been unable to locate a surrogate. They have tried family and friends (but for recent migrants, they have few of either), and some have gone to Facebook groups or even the Surrogacy Australia Support Service. With rare exception, the news is gloomy. It is when they cannot undertake surrogacy at home within any meaningful timeframe that they look to do surrogacy overseas.

5.1A How many children are born via Surrogacy?

Uniquely, Australia through the Department of Home Affairs, keeps statistics on the number of children who apply for Australian citizenship born by descent born overseas via surrogacy. I obtain these statistics by freedom of information. This data does not capture two groups of children born overseas through surrogacy:

- Children of visa holders. As these children will not be applying for Australian citizenship, they will not be recorded in data concerning citizenship applications- but they are known to the Department.

- Where intended parents falsely say that their children were born by the mother. From experience, these cases are rare- because Departmental officials are rigorous and vigilant in seeking to protect the identity of the child, and therefore to minimise trafficking of the child.

Only three States collate data as to the number of surrogacy births – Queensland through the annual report of the Childrens Court of Queensland as to the number of parentage orders made; Victoria through the then Victorian Assisted Reproductive Treatment Authority, as to the number of children born via surrogacy and the County Court as to the number of substitute parentage orders made; and Western Australia through the annual reports of the Reproductive Technology Council of the number of children born. The other States and Territories do not collate data. No Births, Deaths and Marriages Registry collates the data, even though it is available to them. A recent ABC report said[123] that 6 children were born in Tasmania via surrogacy in the last five years.

The only reasonably accurate figure of Australian surrogacy births is that published by the Australian New Zealand Assisted Reproductive Database, published in its annual reports by the University of New South Wales, as to the number of gestational surrogacy births from Australian IVF clinics[124].

[123] https://www.abc.net.au/news/2025-06-08/surrogacy-tasmania-calls-for-law-reform/105387582 .
[124] I am the Secretary of the Fertility Society of Australia and New Zealand, which is one of the key partners of ANZARD. ANZARD does not set out the Australian figure in the reports, but a combined Australian and New Zealand figure. However, it separately publishes the New Zealand figure. I play no part in the collation of that data.

Between 2009 and 2024[125] , over 3,155 children were born via surrogacy to Australians overseas[126]. On a per capita basis, over 1,500 of those were born to residents of the ACT, NSW and Queensland, jurisdictions that criminalise overseas commercial surrogacy. Not one person has been prosecuted for those offences[127].

Between 2009 and 2022[128], 773 children were born through gestational surrogacy in Australia. The number does not capture the number of children born through traditional surrogacy, even through IVF clinics. Traditional surrogacy was not permitted in the ACT until 2024, and is not permitted through Victorian clinics[129], though traditional surrogacy can occur in Victoria through at home insemination[130]. It is likely that traditional surrogacy births are relatively few, but there is no clear data.

In 2010 the then NSW Minister for Communities stood up in Parliament on the third reading of the *Surrogacy Bill 2010* (NSW) and moved an amendment to criminalise NSW residents from undertaking commercial surrogacy overseas. The amendment was made without any consultation or notice. There was a community and media firestorm in reaction. Many who did not know that surrogacy was an option, suddenly realised that it was.

Rather than cause a falling off of demand for surrogacy overseas, the measure resulted in a huge increase in demand overseas. This showed for the year ended 30 June 2012 when 266 children were born overseas through surrogacy. As seen in **Table 6**, that number has remained fairly stable since then, although recently almost doubling.

TABLE 6 – Australian Overseas and Local Surrogacy Births 2009- 2024

Financial Year	**Overseas surrogacy births[131]**	**Calendar Year**	**Local surrogacy births[132]**
2009	10	2009	19
2010	<10	2010	16
2011	30	2011	23
2012	266	2012	19
2013	244	2013	35
2014	263	2014	36
2015	246	2015	52
2016	207	2016	45
2017	164	2017	62
2018	170	2018	86
2019	232	2019	73
2020	275	2020	91

[125] Financial years.
[126] Source: Department of Home Affairs obtained under freedom of information.
[127] There were reportedly five prosecutions in Queensland between 1988 and 2008, and one in Victoria in 2008. There have been none since.
[128] Calendar years.
[129] *Assisted Reproductive Treatment Act 2008* (Vic), s.40(1)(ab).
[130] *Status of Children Act 1974* (Vic), s.20(1)(a).
[131] Source: Department of Home Affairs, complied on a financial year basis.
[132] Source: ANZARD, complied on a calendar year basis.

Financial Year	Overseas surrogacy births[131]	Calendar Year	Local surrogacy births[132]
2021	223	2021	100
2022	213	2022	131
2023	236		
2024	376		

In those early years, India was the prime surrogacy destination, peaking in 2012 with 227 births, but then trailing off, so that by 2017 there were only 14 births and by 2021, no births.

The change in India has not been because of any change in Australian laws, but because of continued tightening of administrative rules and laws in India, occurring in 2012, 2014, 2016 and then with the enactment of the *Surrogacy Regulation Act 2021*.

In 2022, there were less than five Australian surrogacy births in India. In 2023 there were five, but none in 2024. Following the enactment of the Act in 2021, one might have thought that no Australians can now undertake surrogacy in India. It would appear that Overseas Citizens of India are able to access surrogacy there, resulting in the small numbers.

One might have thought, following the *Baby Gammy* scandal and the Thai baby farm in 2014, resulting in a crackdown of Thai surrogacy laws, in effect, only permitting Thai citizens to undertake surrogacy there, that Australians undertaking surrogacy in Thailand was a thing of the past. The numbers demonstrate otherwise, as seen in **Table 7**.

TABLE 7 – Australian Surrogacy Births in Thailand 2009 to 2024[133]

Year	Number of Births
2009	0
2010	<10
2011	<10
2012	<10
2013	23
2014	91
2015	97
2016	19
2017	12
2018	9
2019	10
2020	11
2021	8
2022	6

[133] Source: Department of Home Affairs.

Year	Number of Births
2023	6
2024	11

Anecdotal reports are that Thai surrogacy agencies market to Australians of Chinese origin via WeChat, and that advantage is taken of porous borders between Thailand, Laos and Cambodia to facilitate the journey. Recently, there have been reports that Thailand is seeking to legalise commercial surrogacy, as prohibition has not worked, with surrogacy happening underground[134].

Until Covid, the world's two largest surrogacy destinations were the United States and Ukraine. Then, in February 2022 Russia invaded Ukraine. The world's surrogacy destinations are continuing to react to those two significant events. Whilst surrogacy has long since been available again in Ukraine, most Australian intended parents do not want to go there. For the last few years, the United States has been the leading destination, although that is likely to change in light of the high cost of undertaking surrogacy there.

5.1B Where are Children born overseas?

The top ten surrogacy destinations for Australians in 2024 are shown in **Table 8**.

TABLE 8 – TOP 10 Surrogacy Destinations for Australians, 2024[135]

Ranking	Country	Ranking last year/movement[136]	Number of children born via surrogacy year ended 30 June 2024	Number of children born via surrogacy year ended 30 June 2023
1.	United States	1. Steady	121	68
2.	Georgia	3. +1	76	33
3.	Canada	4. +1	37	22
4.	Colombia	5. +1	32	12
5.	Ukraine	2. – 3	21	43
6.	Mexico	6. Steady	18	14
7.	Greece	7. Steady	15	7
8.	Thailand	8. Steady	11	6
9.	Argentina	NA	7	0
10.	Iran	NA	5	<5

According to the Department of Home Affairs, Australian children were, for the first time born via surrogacy in 2024 in Israel, Peru and Samoa, which reflects that in our country of migrants, many intended parents do not go to known surrogacy destinations, but to their home country[137].

[134] https://www.nationthailand.com/health-wellness/40050097 .
[135] Source: Department of Home Affairs.
[136] Ranked by the author.
[137] The other countries children were born in the year ended 30 June 2024 were Argentina, Brazil, China, Cyprus, Ghana, Kazakhstan, Kenya, Nigeria, Pakistan, South Africa and Sri Lanka.

Countries that are not considered now or in the past to be surrogacy destinations have nevertheless been where children have been born through surrogacy- and who have then applied for Australian citizenship by descent, as seen in **Table 9**.

Table 9: Surrogacy births of Australian children in non-surrogacy destination countries, 2009-2024, with comments about surrogacy prohibition and parental recognition

Country	Number of births	Is surrogacy banned?	Are intended parents recognised as parents?
Afghanistan	<5	NK	No
Bangladesh	<5	NK	Unclear
Belarus	<5	NK	NK
Brazil	4 x <5*	No	Yes
China	23+ (4x<5) + (1 x <10)	Yes: criminal offence for doctors to participate	Yes- as the surrogate is not identified to authorities, given underground nature of surrogacy
Czech Republic	2x<5	No	Sometimes
Egypt	<5	Yes	No
Ethiopia	<5	NK	NK
Ghana	4X<5	No	Yes, by adoption or birth registration
Guatemala	<5	No	Intended father and birth mother
Hong Kong	2 x<5	Yes	Biological father
Iran	5 + (5x<5)	No	Yes, by contract
Iraq	<5	NK	NK
Israel	<5	No	Yes
Italy	<5	Yes	No
Kazakhstan	3x<5	No	Yes
Kenya	5 + (5x<5)	No	Yes, via adoption
South Korea	2 x<5	No	Yes, via adoption, but very rarely practised
Lebanon	<5	NK	NK
Malaysia	(1x<10) = (4x<5)	Yes for Muslims only	Biological father and birth mother
Namibia	<5	No	No
New Zealand	(1x<10)+ (3x<5)	No	Yes via adoption
Nigeria	5 x <5	No	Yes, typically by adoption
Pakistan	4x<5	Yes	No
Panama	<5	NK	NK

Country	Number of births	Is surrogacy banned?	Are intended parents recognised as parents?
Papua New Guinea	2x<5	No	No
Poland	2x<5	NK	NK
Peru	<5	No	Biological father and birth mother
Russian Federation	12+(1x<10)+(3x<5)	Yes- since 2022 for foreigners	Yes
Samoa	<5	No	Biological father and birth mother
South Africa	(2x<10)+ <5	No	Yes
Sri Lanka	3X<5	No	Yes
Switzerland	<5	Yes	No, subject to ECHR
Turkiye	<5	Yes	Unclear
United Arab Emirates	<5	No, since late 2023	Yes
United Kingdom	<10 + 5 +(9x<5)	No	Yes
Vietnam	5+(2x<5)	No	Yes

*The Department keeps the minimum number at <5, though it used to collate it as <10, for privacy reasons. This indicates that Brazil there have been four years where the number of children born each year was <5.

The numbers demonstrate that many Australian intended parents go overseas for surrogacy, rather than at home. This reflects what most intended parents say- there are no available surrogates. After all, unless a woman were connected to the intended parents by family or friendship, or to the idea of surrogacy, why should she risk her life for no compensation when everyone else- the doctors, lawyers, nurses, embryologists, counsellors and the judge are all paid?

They also illustrate the points that:

- Banning surrogacy is ineffective.
- Australians go far and wide in order to become parents.
- People we would ordinarily see as being parents, having become parents through surrogacy, may not have been recognised as parents in the other country

5.2 Discriminatory access

It is now nine years since the House of Representatives surrogacy inquiry called for urgent reform, including that there be national, non-discriminatory surrogacy laws. A decade ago, I spoke at the initial, informal inquiry held by that Committee, in which I urged that there be consistent laws across the country, and that discrimination end.

Discrimination has slowly fallen away, as I outlined on **page 16**. Two examples of the removal of discrimination illustrate that it takes political will to ensure change:

1. In the Northern Territory, the *Anti-Discrimination Act 1992* (NT), s.4(8) allowed providers of assisted reproduction to discriminate. I was a member of the Northern Territory Government's Joint Surrogacy Working Group, which was given the task of preparing the ground for the passage of what became the *Surrogacy Act 2022* (NT). During one meeting, I raised my concern that s.4(8) be repealed. I was told that there was being a review of the *Anti-Discrimination Act*- and the change could happen then. I made the obvious point that given that the *Surrogacy Act* would not discriminate in access to surrogacy, how could it do so if the clinicians concerned were allowed to discriminate? Why not make that change now? The Government agreed. S. 4(8) was repealed by the *Surrogacy Act 2022* (NT).

2. In Queensland, the *Anti-Discrimination Act 1991* (Qld), s.45A purported to allow providers of assisted reproduction services to discriminate, based on sexuality or relationship status. I had long advocated for repeal of this section. In 2022, the Queensland Human Rights Commission recommended the repeal of this provision, as part of a recommended overhaul[138] of the *Anti-Discrimination Act*. In 2024, in the lead up to the enactment of the *Assisted Reproductive Technology Act 2024* (Qld), I advocated for the repeal of s.45A in that Act, without waiting for the promised overhaul. The Government agreed. S.45A was repealed by the enactment of the *ART Act*. Much of the anticipated overhaul of the *Anti-Discrimination Act* did not take place.

There remain three States that discriminate as to surrogacy:

- **Western Australia**, which excludes access to surrogacy to anyone other than single women, lesbian couples, and heterosexual couples[139]. Single men, gay couples and anyone else who identifies as LGBTQIA+ but does not fall within the allowed criteria does not have access to surrogacy there.

  The WA Government has promised repeatedly to remove this discrimination, but has not done so. This discrimination has since 1 August 2017 appeared to be in breach of the *Sex Discrimination Act 1992* (Cth), s.22, a matter I pointed out to the then Health Minister (and now Premier) Roger Cook, in 2017.

  Many single men or gay couples from Western Australia have continued to access surrogacy, but not at home. Instead, they have undertaken surrogacy overseas or occasionally interstate. By going overseas, they are risking committing a criminal offence[140].

  The effect of requiring Reproductive Technology Council approval is that the medical procedure for surrogacy must occur in Western Australia. Western Australia residents do not have the reproductive freedom to choose a doctor interstate or overseas- unless they undertake their surrogacy journey interstate or overseas.

- **Tasmania**, which requires that all the parties reside in Tasmania[141]. An interstate surrogate does not suffice. As set out on **page 17**, the Tasmanian Government is happy with this state of affairs. An effect of this restriction is that Tasmanian residents have undertaken surrogacy overseas.

- **Victoria,** which requires that the medical procedure for surrogacy occurs in Victoria[142]. An effect of this restriction is that Victorian residents have undertaken surrogacy either interstate or overseas, as seen in the example of **Jon and Patrick**. Their example shows the wastefulness and discrimination of current settings. Their reproductive freedom was significantly impinged by Victorian law. They incurred significantly higher costs and disruption by the need to move interstate than if they had been allowed to undertake their surrogacy journey at home.

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[138] https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0012/40224/QHRC-Building-Belonging.WCAG.pdf .
[139] *Human Reproductive Technology Act 1991* (WA), s.7(1)(b)(ii); *Surrogacy Act 2008* (WA), ss.18, 19(2).
[140] *Surrogacy Act 2008* (WA), ss.6, 8; *Criminal Code 1913* (WA), s.12.
[141] *Surrogacy Act 2012* (Tas), s.16(2)(g).
[142] *Status of Children Act 1974* (Vic), s.20(1)(a).

Jon and Patrick

Jon and Patrick were a couple living in Victoria. Jon's sister Eugenia volunteered to be their surrogate. Eugenia and her husband lived in Queensland. Jon and Patrick were told by a friend who was a fertility specialist that there were no quality embryos available in Victoria. In order to reduce the stress to their beloved Eugenia, there were told, they should pursue egg donation and IVF in the United States.

They could not pursue their surrogacy journey in Victoria, because "the child would not be conceived as a result of a procedure carried out in Victoria".

Instead, they entered into a surrogacy arrangement under the Surrogacy Act 2010 (Qld). Egg donation and IVF occurred in the United States. Eugena flew there to become pregnant. At about the time of the child's birth, Jon and Patrick moved to Queensland.

A parentage order was obtained. After the order was obtained, they returned to Victoria to live.

5.3 Lack of choice as to the treating doctor and IVF clinic

As set out in 5.2, both Western Australia and Victoria continues to require intended parents to access surrogacy in their States. Previous restrictions in South Australia and the ACT to the same effect were removed in 2019 and 2024[143].

It is common for intended parents to want to have an IVF clinician who is close to where their egg donor or surrogate lives. If that be interstate, so be it. It is seen by the intended parents as being respectful and the least disruptive impact on those women.

However, that option is not available for intended parents residing in either Western Australia and Victoria. I question whether these provisions are in breach of s.92 of the Constitution.

Pity the poor people living in northern Victoria. They cannot obtain a parentage order under Victorian law when they access IVF at their local clinic, in Albury. They have to convince the Supreme Court of NSW instead that there are exceptional circumstances[144] in order for a parentage order to be made.

5.4 Cost

The cost of surrogacy varies greatly. It should not be assumed that the only people who undertake surrogacy are wealthy. Experience taches me that most intended parents are not wealthy. Most would be described as middle class. Their source of funding the surrogacy journey has been from:

- Savings
- Drawing down their mortgage/obtaining a loan
- Loan from family members

The cheapest way of undertaking surrogacy is by traditional surrogacy with an at home insemination. However, those who undertake that method do not always obtain legal advice and counselling.

[143] I advocated for this reproductive freedom in both SA and the ACT before their respective Acts were enacted. In the case of SA, the draft bill still required the restriction on intended parents accessing ART in South Australia. I was delighted when my submissions to remove this restriction were accepted in the final version.
[144] For example: *C v B* [2013] NSWSC 254; *GP v BP* [2018] NSWSC 1887.

5.4A Superannuation drawdown

Until 2020, intended parents were able to draw down their superannuation for altruistic surrogacy. For example, in *KRB & BFH v RKH & BJH* [2020] QChC 7, my clients, the intended parents, had no other means to fund their surrogacy journey other than by draw down of their superannuation.

The ATO manages the withdrawal of funds from superannuation for compassionate grounds. Since 2020, the ATO has declined to permit the withdrawal of funds from superannuation for surrogacy, based on its reading of the regulation. Reg. 6.19A(1)(a) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) provides:

> *"(1) A person may apply to the Regulator for a determination that an amount of the person's preserved benefits, or restricted non - preserved benefits, in a specified superannuation entity may be released on the ground that it is required:*
>
> *(a) to pay for **medical treatment** or medical transport **for the person** or a dependant".* (emphasis added)

The ATO's position is that because medical treatment is required for a third party, the surrogate, it is not medical treatment for the person seeking to withdraw their benefits. As I said on p.27, this discrimination, which arises from a person not having a healthy uterus, and having to rely on someone else to carry their child, must end. However, it may be appropriate, given the significant cost of superannuation, and the long term impact of withdrawal of funds will be on the financial security of the person, that there is an upper limit, indexed with the CPI, as to the amount that may be withdrawn for surrogacy, such as say $50,000.

5.4B IVF

I regularly check in with my clients who have undertaken surrogacy journeys to find out how much they cost. The biggest single item for domestic surrogacy journeys is the cost of IVF. It is not uncommon for intended parents to have undertaken three IVF cycles as part of their surrogacy journey, but many have endured many rounds of IVF before embarking on surrogacy.

Fifteen years ago, American fertility specialists I spoke to were critical of Australian IVF specialists, because of the extraordinary number of IVF cycles endured by Australian heterosexual couples before they underwent surrogacy. It was commonly 10 or 15. In the view of the American doctors, surrogacy often needs to be explored as an option if there has been no success after 3 to 5 IVF cycles.

Sadly, I have had clients who have undertaken an extraordinary number of IVF cycles: 29 in one case and 38 in another. I cannot begin to imagine the toll that process takes on their bodies, relationships and wallets. The more information that is available that surrogacy is a legitimate form of family formation, increases the chances that those couples will endure a more positive journey. Their IVF journey, subsidised by the taxpayer at $5,000 a cycle, will be cheaper for the taxpayer too, even with the removal of the surrogacy exemption.

While there is limited funding of IVF by the NSW and Victorian governments, I am not aware of any intended parents who have used those schemes in order to become parents through surrogacy. They have to engage private IVF clinics. It would appear that eligibility to access those schemes, either in practice or perception, is that they are not available for surrogacy.

5.4C Domestic surrogacy

The cost of undertaking domestic surrogacy is in the range of $50,000 to $100,000. Half to two thirds of that cost is the cost of IVF, which in turn depends on how many IVF cycles they needed to undertake and whether they received any Medicare benefits, in doing so.

The costs are likely slightly higher in each of Western Australia and Victoria, due to the requirements to have regulatory approval first.

5.4D International surrogacy

International surrogacy costs vary dramatically. As seen in the recent case of *Lloyd & Compton*[145], the cost in North Cyprus was ~$140,000, which does not include travel costs, among others. Ballpark figures of cost are:

- Mexico, Colombia: ~$120,000
- Canada: $140,000
- United States: $300,000+.

There has been a dramatic increase in cost with surrogacy in the United States since the pandemic, caused by three factors:

- The decline in the exchange rate.
- The increase in the amount that surrogates are being paid, which has occurred because of increasing demand post-pandemic, and the invasion of Ukraine.
- Some modest inflation in the United States.

While the United States has been the favoured destination for surrogacy:

1. The cost of undertaking surrogacy there is out of the reach of most.
2. Therefore, when Australian intended parents venture overseas, they will increasingly go to cheaper destinations. Given recent difficulties with the availability of surrogacy in Canada, increasingly this will be to Latin American countries such as Mexico and Colombia.
3. Given the wild fluctuations in the exchange rate this year, it is hard to predict what the overall cost might be.

5.5 Process of establishing parentage

It seems that there are two standards of who can be parents in Australia. For those who are not parents via surrogacy, the "good enough parent" standard, as applied every day in the Federal Circuit and Family Court of Australia, is the applicable standard.

Parents via surrogacy are seemingly held to a higher standard. We are required to be subjected to pre-signing counselling and approval, before our journey can begin. If we are using an egg donor, then we endure two sessions of counselling- that for egg donation, and a separate one for surrogacy, and not always by the same counsellor. Only if the clinic is of the view that the proposed surrogacy arrangement is in the best interests of the child does it agree to provide treatment.

Those in Victoria or Western Australia have to establish an even higher standard- not only firstly obtaining clinical approval, but then also obtaining approval from the statutory regulator.

[145] [2025] FedCFamC1F 28.

But that's not all. Once the child is born, we are not automatically recognised as the parents, as all the parties intended. Instead, we then have to convince a judge that it is in the best interests of the child that a parentage order is made. Depending on the jurisdiction, this may require a physical attendance at court.

The process, as I describe above, is very slow, and leaves limping parentage for the child for many months, for which a parenting plan (or improperly naming the intended father on the birth certificate[146]) is a band-aid solution.

And then, after we have paid a filing fee of up to $1,000[147], we then have to wait- and pay for- a second birth certificate, where we are finally recognised as our child's parents. The delay to obtain that certificate varies, from a few days in Queensland to 6 weeks or more in NSW.

In NSW and the NT, the surrogate is potentially required to see three counsellors- pre-signing, relinquishment, and independent assessment, which can potentially be a case of systems abuse.

There must be a simpler, less costly, consistent and less intrusive way in which to become parents. That is why I have suggested auto recognition of intended parents – as the UK and NZ Law Commissions have recommended, and as occurs in several Canadian and US jurisdictions. However, that model would be most effective for altruistic surrogacy.

If the Commission were of the view that there should be compensated or commercial surrogacy, then the model of parental establishment should be by way of pre-birth orders (with a variation as set out above for traditional surrogacy), so that there is judicial oversight. I suggest pre-birth orders for all gestational surrogacy, to keep the process as quick, simple and cheap as possible.

Judicial oversight can be effective. California colleagues have told me, from time to time, that their judges give firm guidance to local attorneys as to what compensation to surrogates is acceptable, and what is not. Although a post-birth regime[148], I am advised by an Alberta colleague that judges there were insistent that surrogacy agreements be simpler and shorter, commenting, *"If I cannot understand the agreement, how can they?"* Thus, the agreements by that colleague are typically 24 pages, half the length of those by some colleagues in Ontario.

If there is to remain a post-birth process, in cases where this occurs by consent, there should be a clear emphasis in the court processes, rules and published material:

a) That the Court will seek to handle the matter in the friendliest, most welcoming manner;

b) Family members and friends chosen by the intended parents and surrogate/partner are welcome to attend;

c) Photographs of the parties and child and assorted others, such as the lawyers, can be taken in the courtroom afterwards.

d) Surrogacy matters have priority on the day, so that the babies do not have to wait hours before the matter is heard[149].

[146] *S v B; O v D* [2014] NSWSC 1533, for example.
[147] Approximate cost in NSW and Qld. ACT by contrast is free.
[148] Where the orders are typically made 2-3 business days post-birth.
[149] Most Childrens Court judges in Brisbane priorities children in custody to parentage order applications. Generally, the latter are dealt with quickly on the day, but on one occasion the matter was not heard until 4 hours after the listing time. The baby was at court.

5.6 Lack of portability in Australia

Australia is, according to Kirby J, *"a society which attaches high importance to freedom of movement and the right of adults to decide where they will live"*[150], but not when it comes to surrogacy.

Each of the State and Territory rules requires compliance with its requirements, without regard to the possibility that the intended parents may have commenced their journey interstate or may move interstate. The intended parents are, once they commence the formal part of their domestic surrogacy journey, stuck in their jurisdiction until the end, unless they have chosen to take advantage of more advantageous laws interstate (and move there during the journey in anticipation of compliance)- such as gay couples living in Western Australia who move interstate in order to become parents through surrogacy.

Having a national approach, in response to complaints by me and other to the House of Representatives, was recommended back in 2016, but has not been achieved. An example is that of **Barney and Betty**. Quite simply, there needs to be one set of laws, not 8 different versions as present.

Barney and Betty

Barney and Betty lived in NSW. Betty has had leukaemia as a child, rendering her infertile. As a teen, Betty had also enduring the breakdown of her parents' marriage. She had also taken on management of the family company at an early age.

When Betty was 22, her mother, who also lived in NSW, offered to be her surrogate. The three parties underwent counselling, and obtained independent legal advice. All, including the clinic, after consideration by its surrogacy committee, gave approval to the surrogacy arrangement proceeding.

Betty's mum, Wilma, became pregnant. Betty's dad, Fred was dying. As a result, Wilma, Barney and Betty moved to Queensland, where Fred lived, to help care for him. Fred died.

Wilma gave birth in Queensland.

Barney and Betty apply in Queensland for a parentage order. The agreement was non-compliant under NSW law- because Fred and Wilma had never divorced. Fred was deemed the father of the child. It had not mattered that they had been long separated. The same applied under Queensland law.

When she entered into the surrogacy arrangement, Betty was 22, younger than the requirement in NSW. It was necessary to show the Queensland court that there had been compliance with NSW provisions, and as far as relevant with Queensland provisions, and where there had not been, that a dispensation was appropriate under the *Surrogacy Act 2010* (Qld), s.23. Fred had to have consented to the surrogacy arrangement. It is clear by an email and bank records that were tendered that Fred had paid for the costs of the surrogacy journey and that he consented to Barney and Betty become parents.

The matter was more complicated- and hence more expensive- by the need to show that there had been compliance with both NSW law, and as far as relevant, Queensland law. It does not matter that the NSW Act was modelled on the Queensland Act. They are different in a number of subtle respects- which became obvious when the matter was heard.

It was also obvious that the lawyers who had advised the parties at commencement were not across presumptions of parentage, or the matter would not have proceeded without Fred being a party to the agreement and have received counselling and legal advice.

The Court made the parentage order.

[150] *AMS v AIF* [1999] HCA 26; 199CLR 160 at [145].

5.7 Inconsistent regulation of surrogacy

As highlighted in the example of Barney and Betty, there are different rules in each State and Territory.

Intended parents and surrogates (and their lawyers) have to run the gauntlet as to different rules as to what expenses are allowed and what are not allowed. Although the Act eventually got there last year, so that its rules are similar to all of the others bar Western Australia, as my **attached** submission to the ACT Legislative Assembly inquiry last year makes plain, they almost came up with a model that would have had a bizarre outcome.

Here are three examples of inconsistencies:

1. **What expenses are allowed and what are, and therefore criminalised.** Almost a decade on from the House of Representatives inquiry, there is no standard definition of allowable costs. While my colleague Rachel Oakeley is much more comfortable with what expenses are allowed in Western Australia, on the face of the Surrogacy Act 2008 (WA), travel and accommodation is not allowed, although they are allowed under interstate laws. Nor is maternity clothing. Nor childcare. WA residents who undergo surrogacy in Canada, an altruistic destination, inevitably are presented with surrogacy agreement that provide for a whole host of expenses, such as travel and accommodation, maternity clothing and childcare. Those residents may be risking committing a criminal offence in Western Australia, given the narrowness of the expenses that are allowed. When there is not a standard definition of allowable costs, the costs of the parties inevitably increase, as lawyers satisfy themselves that no offences will be committed in either jurisdiction.

2. **Who does the counselling.** There is no standard definition of who does the counselling. Tasmania, South Australia and Western Australia have their own state accreditation requirements. That limits interstate practitioners undertaking that work, unless they have those requirements. The ACT does not require any qualifications for counsellors[151]. By contrast, NSW has quite restrictive rules[152]. Recently I had to persuade the NSW Supreme Court that an independent assessment report by a Queensland counsellor, who met the Queensland requirements for providing a surrogacy guidance report, and who was clearly an expert in the *Makita v Sprowles* sense, but did not meet the requirements of the *Surrogacy Act 2010* (NSW), could be relied on. While I convinced the Court, significant cost and time was spent on having to do so- that would have been avoided with consistent, national rules.

3. **How the counselling is done.** The ACT now requires separate pre-signing counselling of the intended parents; and the surrogate and partner[153]. Elsewhere the counselling is joint, as it should be, to ensure unanimity of vision, and reduce the possibility of disputes.

   South Australia required three separate counsellors prior to entry into the surrogacy arrangement. None of them were required to talk with each other (just as there is no requirement under ACT law for the two counsellors to talk with each. It is no surprise, then, that along came a case in South Australia where there was a difference of views between the intended mother and the surrogate. I acted for the surrogate and her husband. My client was treated poorly by the intended mother, but in circumstances it was likely that would not have occurred if they had all attended the one counsellor before hand, and had that unanimity of vision.

   As a result of that case, South Australian law was amended to ensure that only one counsellor saw all the parties before hand- not three.

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[151] *Parentage Act 2004* (ACT), s.28A.
[152] Surrogacy Act 2010 (NSW), s.17, 35; *Surrogacy Regulations 2016* (NSW), regs 6 and 7.
[153] Parentage Act 2004 (ACT), s.28C.

And yet a decade later, we are repeating the errors of the past. I and others, including ANZICA and colleague Sarah Jefford have sought to have the ACT law amended- but to no avail.

The Patient Review Panel in Victoria for some years required, without statutory basis, the parties to attend two separate counsellors before they entered into the surrogacy arrangement – but has now reduced that to one, consistent with the Act.

5.8 Lack of data

As I have highlighted above at **page 25**, while there is a plethora of information about Australian adoptions, there is no consistent national data about the number of children born in Australia through surrogacy.

Victorian Arrogance

Notwithstanding the full faith and credit clause of the *Constitution*[154], taken up by the *Evidence Act 1995* (Cth)[155], and *Family Law Act, s.* 60HB recognising parentage of children the subject of State and Territory parentage orders[156], if a child is born in Victoria and the subject of an interstate parentage order, the Victorian *Status of Children Act 1974* requires that a registration order is made in Victoria before the intended parents are recognised as the parents on the Victorian birth certificate.

Aside from what appears to be the law's unconstitutionality, the requirements are largely duplicative (and therefore increase costs and delay), covering best interests, consent and the surrogate's age. The registration order requirements do not allow for conception to have occurred overseas, even though that may have been part of the interstate surrogacy journey[157].

South Australian Forgetfulness

It is unlawful in South Australia to enter into an interstate surrogacy arrangement. This is presumably due to an oversight. Under the *Surrogacy Act 2019* (SA), s.9, except as may be provided for in the Act, a surrogacy agreement is void and of no effect. What is a lawful surrogacy agreement is provided for in s.4 as meaning either a lawful surrogacy agreement under the Act or *"a surrogacy agreement … entered into in accordance with a prescribed corresponding law of the Commonwealth or another State or Territory."*

South Australia has not prescribed such a corresponding law.

ACT Change for Overseas Commercial Surrogacy

The *Parentage Act 2004* (ACT) was amended in 2024 to allow the Supreme Court to make a parentage order for an overseas commercial surrogacy arrangement.

The Court can only make that order if *"there is a pressing disadvantage facing the child that would be alleviated by making"* the order[158]. Eligible intended parents would be most reluctant to apply,

[154] S.118.
[155] S.185.
[156] Through reg. 12CAA.
[157] Allowable in most States and both Territories.
[158] *Parentage Act 2004* (ACT), s28H(2)(b).

because of the risk of prosecution. The making of the order does not affect the person's criminal responsibility[159]. There is no time limit for prosecution[160] of the offence[161].

NSW Change for Overseas Commercial Surrogacy

Parentage orders for overseas commercial surrogacy will be able to be made from 1 July 2025 for children who were born by commercial surrogacy both before and after 30 June 2025[162]. However, a parentage order can only be made concerning the latter if the Court finds that there are exceptional circumstances.

Why both the ACT and NSW changes have occurred is that children born in some overseas surrogacy destinations are lumbered with limping parentage. The reality of parentage does not reflect the form. Either only one parent, not two, is shown on the birth certificate[163], or the biological father and the surrogate are shown[164]. The other parent is invisible.

A difficulty with the requirements in the ACT and NSW is that there must be a *surrogacy arrangement* in the first place. If the surrogacy arrangement is written as only being between a single intended parent (as used to be the case in India for gay couples, for example), then the court may not be satisfied that there is *a "surrogacy arrangement",* and cannot make an order.

The alternative is to obtain leave to adopt under the *Family Law Act*, s.60G, and then bring a separate step-parent adoption application, which may have to wait until the child is 5 years old[165]. This option is expensive, slow, and in one case the Court declined to give leave to adopt in part out of concern that there had been commercial surrogacy[166].

Question 6: Should there be eligibility requirements for surrogacy? If so, what should those requirements be?

I have listed eligibility requirements below.

6.1 Sexuality and relationship status

All States and Territories restrict surrogacy to singles or couples.

Western Australia now alone restricts surrogacy to single women, lesbian couples and heterosexual couples[167]. The restrictions are in apparent breach of the *Sex Discrimination Act 1984*(Cth), s.22. Despite promises of change, they remain in place. The results are predictable: single men and gay couples from Western Australia go overseas or interstate to be parents through surrogacy.

The restrictions are in clear breach of Australia's international obligations, and remain a continuing embarrassment, but more importantly frustrate the reproductive freedoms of those discriminated against.

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[159] s31(2).
[160] Legislation Act 2001 (ACT), s.192(1)(a).
[161] *Parentage Act 2004* (ACT), s.41.
[162] *Equality Legislation Amendment (LGBTIQA+) Act 2024* (NSW), schedule 8.
[163] For example, when gay couples underwent surrogacy in India, only one of the men was shown on the birth certificate, for example, *Blake & Anor* [2013] FCWA 1.
[164] For example, Thailand, Malaysia, sometimes in Mexico, and since mid-2024 in Argentina.
[165] For example, *Adoption Act 2009* (Qld), s.92(1)(h).
[166] *Lloyd & Compton* [2025] FedCFamC1F.
[167] Surrogacy Act 2008(WA), s.17.

6.2 Medical or social need

All States and Territories, except the ACT, require that there be a medical or social need for surrogacy.

It is necessary to have reproductive freedom, but this ought, in my view, necessarily be constrained by minimising risks to the woman who is carrying a child for someone else. Australia and New Zealand have the lowest maternity mortality risk in the world[168]. In my view, it is an appropriate balance of reproductive freedom, and establishing a medical or social need, to minimise maternal mortality risk. No woman should die or be injured so that another woman can maintain her good looks.

The Kerala clinic

Some years ago, when India allowed commercial surrogacy, a promoter of surrogacy in Kerala came to Australia. She said that surrogacy in Kerala was very well run. Many Hollywood and Bollywood starts had accessed surrogacy there, in order to further their careers.

A medical need was not required.

I asked how often surrogates had C sections. I was told: *"80% of the time"* and the surrogates were *"very happy"*.

The obvious retort is that the convenience of the stars was put ahead of the bodily autonomy of poorer, less powerful women, who were likely coerced into having so many C sections, out of all proportion to responsible use.

I suggest that the formula in the South Australian Act be used, as it seems reasonably flexible. I have acted at times for intended parents who in my view were clearly eligible to undertake surrogacy, but the relevant clinic was concerned that to approve surrogacy may be in breach of the rules.

I do not support a national committee that gives pre-approval because:

1. Clinics engage in their own pre-approval process. This approval is in addition to clinical approval.

2. A second pre-approval process necessarily slows down the process of becoming parents.

3. It is an unnecessary imposition upon reproductive freedom.

4. The two places where there has been such a process mandated have criticised their effectiveness, the Patient Review Panel being criticised in the interim Gorton report, and the Reproductive Technology Council being criticised in the Allen review.

5. Intended parents who undertake their ART outside Australia, but with domestic surrogacy journeys, as has happened, and can happen currently in every jurisdiction other than Victoria or Western Australia, are not subject to this approach.

In my view, the reason that a national pre-approval body is called for by some is to have a consistent approach adopted as to eligibility. In my view, a better approach, to encourage consistency of decision making across clinics, is:

a) To have one definition of medical need, and to have a broader definition, such as that in South Australia.

[168] *Trends in maternal mortality 2000 to 2020*, United Nations, 2023, p. xiv. https://iris.who.int/bitstream/handle/10665/366225/9789240068759-eng.pdf?sequence=1 .

b) To require each IVF unit that wishes to undertake surrogacy work to have a surrogacy committee, in order to give approval within the clinic.

c) That the committee have a mix of members, including two fertility specialists, as I suggest on **page 17**. Experience has taught me that there will then be a clear discussion about the merits and risks of each case, enriched by the different aspects as viewed by each person who is a member.

d) For the Fertility Society of Australia and New Zealand to prepare surrogacy guidelines, which it has already agreed to do, much like the ASRM surrogacy guidelines. Over the last 15 years, there has now been enough clinical experience of surrogacy nationwide to assist in drafting robust guidelines.

e) For the Fertility Society of Australia and New Zealand to provide regular continuing professional development as to surrogacy at its annual scientific meetings, and through its constituent arms.

I have no difficulty with RTAC (or whatever might replace RTAC) providing clear requirements and guidance as to the decisions by clinics to proceed with surrogacy treatment via the *Code of Practice* or similar, therefore requiring the approval process to be subject to audit and overview.

I am aware of concerns that have been raised that some intended parents have sought to bully fertility counsellors to approve their surrogacy journey, and that on rare occasions that intended parents have shopped around, not happy with their fertility counsellors, until they have found one to their liking.

The practical ways of dealing with these issues are:

1. As part of the intake procedures with any surrogacy counselling, requiring each of the parties to advise if they have had surrogacy counselling with any other counsellor;

2. As part of the counsellor's privacy policy, for the intended parents, on engagement of that counsellor, to be able to obtain information from those previous counsellors;

3. To make it an offence to provide false information to counsellors, as it can be with provision of information to IVF clinics (such as the *Assisted Reproductive technology Act 2007* (NSW), s.61(1)(b) (and as happens with IVF clinics currently, to set out that offence in the intake forms of the counsellors);

4. The counsellors to make plain, except for traditional surrogacy arrangements involving at home insemination, that their role is not that of gatekeeper. That role, instead is that of the surrogacy committee of the relevant IVF clinic;

5. To make this an issue of continuing professional development by ANZICA, and being addressed in the *ANZICA Surrogacy Guidelines*.

For five years I served on the national donor and surrogacy committee for an IVF clinic. The committee was composed of:

- 3 fertility specialists
- fertility nurse
- embryologist
- fertility counsellor
- lawyer (me)

In accordance with usual ethical requirements, the member had to disclose conflicts of interest, and recuse themselves on consideration of the approval.

I was impressed that the *primary concern by doctors* was to reduce risk to the third party, i.e., the proposed surrogate, and only proceed with the surrogacy journey if it were medically necessary when one of the intended parents was a woman. This test was in addition to statutory criteria to the same effect. Doctors were typically more conservative than the statute required, out of concern to minimise maternal mortality risk and injury.

According to WHO[169], the lifetime maternal mortality risk in Australia is 1 in 24,000. There were 7 maternal deaths in 2023, of 304,000 live births. By contrast, the lifetime risk of death from pregnancy and childbirth for a 15 year old girl in Nigeria is 1 in 19.

Part of my concern about intended parents undertaking their surrogacy overseas is that in almost all countries surrogacy is undertaken, the maternal mortality risk is higher than that of Australia's. If intended parents are to be properly informed about the possible risks in undertaking surrogacy overseas, then the Government should publish information about overseas maternal mortality risks compared to that in Australia, so that intended parents can make an informed choice.

I commonly advise my clients undergoing surrogacy as to the relevant maternal mortality risk overseas. At the least, if they choose to go to that jurisdiction, they can do with their eyes wide open and make all efforts to reduce risk for the surrogate, such as providing a dedicated obstetrician, and a local, high quality maternity hospital.

I note that there is a pre-approval process in New Zealand for gestational surrogacy, but not traditional surrogacy. It is ironic that the surrogacy journey that has potentially the most risk there has the least oversight.

Australia and New Zealand's fertility industries are quite different. There are 8 IVF clinics in New Zealand, 6 of which are Fertility Associates, which has a near monopoly.

In Australia there are about 100 IVF clinics, in locations all over the country from Perth to Darwin, Hobart to Cairns. In Queensland, which has a similar population as New Zealand, there are 24 clinics.

However, the industry is dominated by 5 clinics, which have a total of 80% market share of all IVF in Australia, in order of size from largest to smallest, as seen in **Table 10**. It has been common for each IVF unit (for example, Monash IVF Auchenflower) to have its own committee. Several of the clinics have statewide committees for surrogacy approval, such as:

- IVF Australia, for ACT and NSW
- Monash IVF NSW
- Monash IVF Queensland
- Queensland Fertility Group

The three month rapid review of Australia's IVF clinics, currently underway, is likely to support national accreditation of IVF clinics, rather than the disparate current 8 different systems. This is an approach that

[169] Ibid.

the Fertility Society has called for, as set out in the National Fertility Plan, authored by former Health Minister Prof. the Hon. Greg Hunt and Dr Rachel Swift[170].

A likely outcome of moving to national accreditation (and hopefully uniform surrogacy laws) is that clinical decisions, rather than being on a jurisdiction by jurisdiction basis, to ensure compliance with State and Territory laws, will be made within each of those clinics on a national basis. Therefore, any decisions by surrogacy committees of these clinics would be made on a consistent basis within that clinic nationwide.

For small clinics that have only one fertility specialist, one would expect that they can engage other fertility specialists to sit on their committee- in a similar way that psychologists supervise other psychologists.

Table 10: Australia's largest IVF clinics

Rank in size	Clinic	Does it undertake surrogacy?	Where does it operate?	IVF national market share
1.	Virtus Health (IVF Australia, Melbourne IVF, Queensland Fertility Group, Tas IVF)	Yes	ACT NSW Qld Tasmania Victoria Overseas	35%
2.	Monash IVF (Repromed, Fertility Solutions Sunshine Coast)	Yes, at most clinics	NSW NT Qld SA Victoria Western Australia Overseas	22%
3.	Genea	Yes	ACT NSW Qld SA Victoria Western Australia Overseas	12%
4.	City Fertility	Yes	NSW Qld Victoria Western Australia Overseas connections	10%

170 https://www.fertilitysociety.com.au/public/267/system/newsAttachments/Recomendations%20and%20Framework%20for%20Australia's%2010%20Yr%20Fertility%20Roadmap%20vFF%20Nov.pdf

Rank in size	Clinic	Does it undertake surrogacy?	Where does it operate?	IVF national market share
5.	Adora Fertility*	No	NSW Qld Victoria WA	2-3%

*Low cost clinic. Same ownership but different management to Genea.

6.3 Age of the parties

Most States require the parties to be 25 or above.

However, there is an allowance to access surrogacy when the intended parents (or surrogate) are under 25, if they have the right maturity. In Queensland, clinics recently have refused to lower the age under 25, though there is a dispensation ability by the Court under the Act in such a case (which has been granted in the past). In light of the highly critical Queensland Office of the Health Ombudsman report into Queensland's IVF clinics last year[171], clinics are reluctant to take action unless it has been specifically authorized. This has meant that those who are quite mature, even though they are aged under 25, have been unable to undertake surrogacy until they turn 25. Some intended parents have reacted to this by waiting, others by giving up or undertaking surrogacy overseas.

If the fertility counsellor undertaking the pre-entry counselling is of the view that the party has sufficient maturity, then the party should be able to proceed, if they are aged over 18.

I am of the view:

1. Intended parents need to be 18. A woman who has survived leukaemia or has MRKH knows, before she is 18, that surrogacy is the only way for her to reproduce. If she is old enough to vote, and understands the implications of surrogacy, why should she be required to wait until she is 25 to access surrogacy?

2. Surrogates should be 25, subject to maturity being able to proceed before that date. Women who become surrogates need to know that they may be injured in the process of having a child for someone else, and may never be able to have a child again. They are the ones taking the risk. The age of the surrogate is closely tied to whether she has had all her own children.

Age eligibility for surrogacy is set out in **Table 11**.

Table 11: Age eligibility for surrogacy

Jurisdiction	Min age of surrogate	Min age of surrogate's partner	Min age of IP's	Law
ACT	25, unless counsellor satisfied of sufficient maturity	25, unless counsellor satisfied of sufficient maturity	18	Parentage Act, ss. 28B

[171] https://www.oho.qld.gov.au/assets/reports/OHO-ART-Investigation-Final-Report.pdf

Jurisdiction	Min age of surrogate	Min age of surrogate's partner	Min age of IP's	Law
NSW	25	N/A	25, unless Court is satisfied of sufficient maturity	Surrogacy Act 2010, ss.27, 28, 29
NT	25, unless court satisfied exceptional circumstances	N/A	25, unless court satisfied sufficiently mature	Surrogacy Act 2022, ss.17, 18
Qld	25, unless dispensed in exceptional circumstances	25, unless dispensed in exceptional circumstances	25, unless dispenses in exceptional circumstances	Surrogacy Act 2010, s.22(2)(f) and (g)(i), s.23(2)
SA	25	N/A	25	Surrogacy Act 2019, s.10(3)(a), 10(4)(a)
Tas	25	N/A	21	Surrogacy Act 2012, s.26(2)(b) and (c)
Vic	25	N/A	18	Assisted Reproductive Treatment Act 2008 (Vic), s.40(1)(b)
WA	25	N/A	18	Surrogacy Act 2008, s.17(a)(i)

Hundreds of my clients have undertaken surrogacy in either the United States since 2008, and in Canada since 2011. My clients have undertaken surrogacy in 36 US states and 8 Canadian provinces, as well as in many other countries. I have dealt with many US attorneys and surrogacy agencies, and several Canadian lawyers and agencies over that time.

Every surrogacy agency has its own eligibility criteria. Common criteria by US agencies are:

- Intended parents are aged 18 or more.
- All parties will have a clear criminal history check.
- Surrogates will:
    - Be aged 25 or more (both so that they have the requisite maturity, but also not to interfere with their own family formation).
    - Have given birth to healthy children, and do not want any more.
    - Be gestational surrogates, not traditional.
    - Pass a psychosocial assessment. (Some agencies have psychosocial assessments of the intended parents and of the surrogate and her partner, as occurs in Australia- what we call pre-entry counselling- but many do not undertake psychosocial examination of the intended parents.)
    - Have an uncomplicated obstetric history- both as to pregnancy and childbirth.

- Be medically cleared by an obstetrician.
- Have as their prime motivation, seek to help others by giving them the gift of life through surrogacy.
- Not be in receipt of social security (so that they are stable, and their motivation when being compensated is not primarily about being paid).
- If they have a partner or spouse, that the partner or spouse is supportive, so that they also have the psychosocial assessment, and are a party to the surrogacy agreement/court orders.

6.4 Citizenship and residence

Current requirements are that the intended parents must reside in that State either for the duration, or at the time of making the application. The former does not allow for the reality that intended parents through surrogacy, like many other people, move homes and jobs, and in so doing may move interstate. **Table 12** shows this restriction.

The residence requirement has meant that Australian citizens living overseas undertaking a family surrogacy journey have had to give up their careers, residence and lifestyle overseas in order to become eligible. If the overseas resident (or if a couple one of them) is an Australian citizen, that should be a sufficient tie to Australia to undertake surrogacy here[172].

Table 12: Citizenship and residence restrictions

Jurisdiction	IP's need Australian citizenship	IP's need to reside there on entering or at hearing	Law
ACT	No	At hearing	*Parentage Act 2004*, s.28F(1)(b)
NSW	No	At hearing	*Surrogacy Act 2010*, s.32
NT	Yes or permanent resident	At hearing	*Surrogacy Act 2022*, ss.18, 33
Qld	No	At hearing	*Surrogacy Act 2010*, s.22(2)(g)(ii)
SA	Surrogate must be citizen or permanent resident, intended parents must be citizens or permanent residents, and one must be domiciled when entering into agreement	On entering	*Surrogacy Act 2019*, s10(3)(c), s.10(4)(c)
Tas	No	On entering	*Surrogacy Act 2012*, s.26(2)(g)
Vic	No	On entering	*Assisted Reproductive Treatment Act 2008*, s.40; *Status of Children Act 1974*, s.20(1)(a)

[172] See, for example, *Surrogacy Application by a Couple from the United States of America* [2017] NSWSC 1806.

Jurisdiction	IP's need Australian citizenship	IP's need to reside there on entering or at hearing	Law
WA	No	On entering	*Human Reproductive Technology Act 1991*, s.17, *Surrogacy Act 2008*, s.17

For any domestic surrogacy journey, care needs to be taken that one of the intended parents or that the surrogate or partner is an Australian citizen, so that the child has Australian citizenship[173]. If the surrogate is an Australian citizen or permanent resident, then the child acquires Australian citizenship upon birth[174].

Ron and Rita

Ron and Rita were intended parents through surrogacy. They were both Australian citizens. Their good friend Tina offered to be their surrogate. Tina had a partner, Jeremy. All lived in Brisbane.

Jeremy was a New Zealand citizen, but not an Australian permanent resident. Tina was a citizen of Zimbabwe, but was able to stay in Australia on a visa, as Jeremy's partner.

Upon the child being born in Brisbane, the child did not hold Australian citizenship. That was acquired only upon the parentage order being made by the Childrens Court of Queensland. At that point, Ron and Rita became the parents. The child then attained Australian citizenship due to the combined effects of the parentage order being made under the *Surrogacy Act 2010* (Qld), s.22, it being recognised under the *Family Law Act 1975* (Cth), s.60HB, and *Family Law Regulations 1984* (Cth), reg. 12CAA, and the *Australian Citizenship Act 2007* (Cth), s.8 (and for that matter, the full faith and credit clause of the *Constitution*, s.118, and the related provision of the *Evidence Act 1995* (Cth), s.185).

There was full disclosure to the Court of these matters[175].

The case was decided pre-*Masson*. The effect of *H v Minister for Immigration and Citizenship*, and the post-*Masson* decisions of *Seto & Poon*, *Tickner & Rodda* and *Gallo & Ruiz* is that the child attained Australian citizenship upon birth, as Ron, being the genetic intended father is a parent within the meaning of the *Australian Citizenship Act 2007* (Cth), and the child was born in Australia: s.12(1)(a).

6.5 Counselling/assessment

Each State and Territory requires pre-entry counselling. This is essential to the giving of informed consent. The form of that counselling and who provides that counselling varies, as I discussed on **page 95**.

In my view, if an auto recognition model is adopted, then post-birth counselling or assessment is not required.

Table 13 compares the counselling requirements.

[173] Australian Citizenship Act 2005 (Cth), s.8.
[174] Australian Citizenship Act 2005 (Cth), s.12.
[175] On which point, in my view, given the number of self-represented litigants with parentage applications that there should be a specific provision by statute (not regulation) requiring full and frank disclosure to the Court on the making of an application- as seen in NSW (by regulation) in the *Uniform Civil Procedure Rules 2005* (NSW), rule 56A.3.

Table 13: counselling requirements

Jurisdiction	Pre-entry counselling	Post-birth assessment	Relinquishment counselling	Law
ACT	Yes- though separate	No	No	*Parentage Act 2004*, ss28A(1), 28C(1)
NSW	Yes	Yes	Yes	*Surrogacy Act 2010*, ss17,35
NT	Yes	Yes	Yes	*Surrogacy Act 2022*, ss22, 23, 24
Qld	Yes	Yes	No	*Surrogacy Act 2010*, s.22(2)(e) and (i)
SA	Yes	No	No	*Surrogacy Act 2019*, s.14
Tas	Yes	No	No	*Surrogacy Act 2012*, s.26(2)(f)
Vic	Yes	No	No	*Assisted Reproductive Treatment Act 2008*, s.43
WA	Counselling + separate assessment by a counsellor	No	No	*Surrogacy Act 2008*, s.17(c)(i) and (ii)

Those who are ANZICA members or eligible for membership should be the counsellors providing this counselling. There is no requirement that the counsellors be independent of the clinic. If an auto recognition model is adopted, then these counsellors ought to be independent of the clinic. ANZICA has mandated thorough *Surrogacy Counselling Guidelines*[176]. These used to be easily available online, but now are not[177]. They should again be easily available on line.

Australian IVF clinics are required under the RTAC *Code of Practice* that counselling has been provided by a counsellor eligible for membership of ANZICA: 3.8(b).

6.6 Legal advice

Independent legal advice is required in every State and Territory. This is fundamental to any of the parties being required to provide informed consent.

The surrogate's partner is not required to consent to the surrogacy arrangement nor order in all jurisdictions. If the partner is a parent of the child, or presumed to be so, then it is fundamental, except in exceptional circumstances, that the partner be a party to the surrogacy arrangement and, if orders are to be made by consent, consent to the orders. **Table 14** compares when the partner is or is not required to be a party.

[176] I assisted in the drafting.
[177] But can be viewed here: https://www.parliament.act.gov.au/__data/assets/pdf_file/0011/2345753/Submission-006-ANZICA.pdf .

Table 14: When is the surrogate's partner required to be a party to the arrangement and consent to the order?

Jurisdiction	Partner required to be a party to the arrangement?	Partner consent to the orders?	Law
ACT	Yes	Yes	*Parentage Act 2004*, ss27, 28H(1)(b)
NSW	Yes	Yes	*Surrogacy Act 2010*, ss 31, 34
NT	Yes	Yes	*Surrogacy Act 2022*, ss16,
Qld	Yes	Yes	*Surrogacy Act 2010*, s.22(2)(e)(iii) and (v)
SA	No	Yes	*Surrogacy Act 2019*, s.18(5)(d)
Tas	No	Yes	*Surrogacy Act 2012*, ss. 4, 26(2)(e), 26(2)(j)(iii)
Vic	Yes	No	*Assisted Reproductive Treatment Act 2008*, s. 40(1)(c) and (d), 43; *Status of Children Act 1974*, s.22(1)(e)
WA	Yes	Yes	*Surrogacy Act 2008*, s.17(b)(ii), 21(1)(d)

6.7 Written agreement

Victoria alone allows for the surrogacy arrangement[178] to be oral. So that there is certainty for the parties, and in the best interests of the child by the minimisation of disputes, surrogacy arrangements need to be written.

Unanimity of vision is much easier to visualise when it is reduced to writing. If surrogacy arrangements are to be binding, then the agreements need to be reduced to writing.

In 2014, I had the unfortunate experience of having to appear four times in the County Court for the intended parents, before the substitute parentage order was made. I had come into the matter after the child was born. The parties had an oral surrogacy arrangement. They had obtained legal advice, counselling and PRP approval. The trigger that caused the breakdown of the relationship occurred post-birth, when the surrogate was put up in a good hotel by the hospital (as the hospital did for low risk births). The surrogate, or her partner, took the contents of the minibar. The intended parents objected to paying. The intended mother said to the surrogate:

> *"That's not part of our agreement."*

The surrogate responded:

> *"An oral agreement is worth the paper it's written on."*

The relationship between the parties deteriorated rapidly from that point on, until finally, after the surrogate had engaged in self-harm and psychiatric care, a substitute parentage order was made. Her solicitor told the court that her client had capacity.

[178] *Assisted Reproductive Treatment Act 2008* (vic), s3.

By contrast, clients of mine were confronted with their old friend, the surrogate deciding to keep the twins after they were born. The plan was to have one child. One embryo was implanted. It split. What had been several happy and smooth pregnancies (and child birth) became a very rough journey.

My clients showed their friend- who was in the hospital bed- the surrogacy arrangement, which showed her signature and her agreement that the children were to be with them. There was no doubt about what she had agreed. A court order was subsequently made by agreement. There was subsequently a reconciliation of their friendship.

Being reduced to writing and signed reduces risks and disputes. Although not a surrogacy case, *Masson* was litigated to the High Court, and beyond, when there was an express or implied understanding that Mr Masson was to be a parent[179]. It is clear that the agreement was oral. If it had been written, the terms would have been clear. The length (and costs) of litigation might have been much less as a result.

6.8 Criminal history check

South Australia requires mutual criminal histories to be provided[180], when Victoria at the same time repealed its requirements requiring the same and that of the presumption against treatment. The latter was on the basis of representations from clinics of taking a holistic approach, such that their checks and balances identified these risks, and the imposition on reproductive freedom and bodily autonomy, a matter outside the Gorton review but commented on by it in its interim report[181].

If there are to be surrogacy agencies, then one would expect that they would be subject to regulation, and have a code of practice, such as the Society of Ethical Egg Donation and Surrogacy does in the United States, where criminal history checks by members of SEEDS are mandatory:

> *"d. An Agency shall obtain a comprehensive background check (including civil, criminal, and DMV Records) on Surrogate, Surrogate's Spouse, Fiancé, and/or live-in partner, and any other adults living in Surrogate's household.*
>
> *Guideline: It is recommended that the background check should also include bankruptcy."*[182]

6.9 Regulatory approval

Regulatory approval for surrogacy is required in two States: Victoria and Western Australia.

While having regulatory approval is a fine idea in practice, both the regulators have been the subject of scathing criticism.

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[179] *Masson v Parsons* [2019] HCA 21 at [54].
[180] *Surrogacy Act 2019* (SA),s10.
[181] PP 121-2.
[182]
https://cdn.wildapricot.com/263053/resources/Documents/Standards/2025%20SEEDS%20Standards%20with%20Guidelines%20and%20intro.pdf?version=1747940670000&Policy=eyJTdGF0ZW1lbnQiOiBbeyJSZXNvdXJjZSI6Imh0dHBzOi8vY2RuLndpbGRhcHJpY290LmNvbS8yNjMwNTMvcmVzb3VyY2VzL0RvY3VtZW50cy9TdGFuZGFyZHMvMjAyNSUyMFNFRURTJTIwU3RhbmRhcmRzJTIwd2l0aCUyMEd1aWRlbGluZXMlMjBhbmQlMjBpbnRyby5wZGY~dmVyc2lvbj0xNzQ3OTQwNjcwMDAwIiwiQ29uZGl0aW9uIjp7IkRhdGVMZXNzVGhhbiI6eyJBV1M6RXBvY2hUaW1lIjoxNzUwNzEwMDM5fSwiSXBBZGRyZXNzIjp7IkFXUzpTb3VyY2VJcCI6IjAuMC4wLjAvMCJ9fX1dfQ__&Signature=NzMRKxYR60RUFmEoS4D6UM3XxNg37K5JoImLSmKmybPxMHrKGbhNqLrpICZogF8KmYo~zoJ4nTO9RhFImpp~g-sL5HD3580rDFcpRwR9IIcfnnl4SNy5Cni0oxdUB7oslemFTcd7k~34EAD~fMluxHeH3S6UKchSz1GZMPDwbDIdg6R8tuMqzT3EQfr9kGol7iTpnTvKWrsB6WqjiIzhiQnnXe46da612vXAuebg64OcZAUKw6ggjicu0rmE773D8PKjLbbDnSnp31g9RuxYeJtr1~2iCkTIZtYhlXcUu9bXVMBlgQvZPIhDT7LPMNx4RNwWykZDaM4W8KQUizRibg__&Key-Pair-Id=K27MGQSHTHAGGF

Rather than the autonomy of consenting adults in their private lives being respected[183], and the human rights of all parties to the surrogacy arrangement being respected[184]:

a) Justification must be given to an arm of the State that the surrogacy arrangement is one that ought to proceed. This is a patronising approach, not required of those who conceive naturally, through IVF or by gamete donation.

b) Intended parents must meet the schedule of the regulator, not their own. This is in addition to have meet the schedule of their IVF clinic for that clinic to approve treatment (subject to regulatory approval). In Western Australia, there is a mandated 3 month cooling off period[185], which I have been told by applicants can blow out to 6 months. The impression, I was told, was, *" All the reasons we can't be parents, than being supported about why we can be. It made us feel dirty."*

c) Clients of mine have told of being cross-examined at a PRP hearing about the nature of the relationship they had with their friends, the surrogate and her partner. The bank records and that of the surrogate were examined microscopically for the previous 7 years. While approval was given, the surrogate needed to attend upon a psychologist for therapy, and take anti-anxiety medication. My clients, who had been the intended parents[186], were also scarred by the process, which they called *"rude"*, *"patronising"*, *"intrusive"*, and looking for every reason why surrogacy should not be proceeded with, rather than seeing the positives of the process. My clients chose to undertake surrogacy in the United States instead, where they were made to feel welcome, not shunned, and celebrated, not demeaned. Similar comments have been made to me in the past also about the Reproductive Technology Council approvals of surrogacy in Western Australia.

d) Surrogacy appears to be well regulated in the rest of Australia- where prior regulatory approval is not required.

e) In the rest of the country, following a directive in approximately 2021 by then President of the Fertility Society of Australia and New Zealand[187], IVF clinics are not supplied with a copy of the surrogacy arrangement. Instead, the respective lawyers provide clearance letters. Liability for defects in the drafting should fall on the shoulders of the respective lawyers. But not so in Victoria and Western Australia, where the surrogacy arrangement must be supplied to the PRP and RTC respectively (although not so for an oral arrangement in Victoria), prior to approval.

f) A fundamental human right is the protection of legal professional privilege, so that those seeking legal advice can receive it with utmost candour. Legal professional privilege has been one of the golden threads of our common law. And yet, when it comes to regulatory approval in Victoria, there is a requirement in effect for a laying of all the cards on the table as to what legal advice was given, in order to obtain regulatory approval.

The High Court said of legal professional privilege:

> *"The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all*

[183] *Surrogacy Act 2010* (Qld), s.6(2)(d).
[184] *Surrogacy Act 2019* (SA), s. 7(1)(a). I am the author of this clause.
[185] *Surrogacy Act 2008* (WA), s.17(c).
[186] I did not act for them on their application to the PRP, but subsequently.
[187] After I made representations on the issue.

relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision."[188]

And yet, the Patient Review Panel has done so. In its Surrogacy Guidance note[189], the Patient Review Panel says:

"4.4 Legal advice

In order to approve an application, it is a requirement that the Panel must be satisfied that the parties to the arrangement are aware of and understand the legal consequences of the arrangement and that they are prepared for the consequences if the arrangement does not proceed in accordance with their intentions. To assist it to be satisfied of this, the Panel asks that the intended parent/s and the surrogate mother and her partner (if any) provide the Panel with a written memorandum or report of the legal advice that has been provided to them.

To avoid the potential of a conflict of interest, applicants should ensure that the intended parent/s and the surrogate mother and her partner (if any) have received legal advice from different lawyers and that those lawyers are not parties to the arrangement.

At a minimum, the legal advice should cover the following matters:

(a) the legal status of the child at the time of birth;

(b) the consequences if the intended parents refuse or are unable to accept the child once it is born;

(c) the consequences if the surrogate refuses to relinquish the child once it is born or refuses to consent to the making of the Substitute Parentage Order;

(d) the requirements needed to obtain, and the process for the intended parents to apply for, a Substitute Parentage Order, including the relevant time-frames for making the application;

(e) arrangements for the care of the child prior to the making of a Substitute Parentage Order; and

(f) arrangements for giving consent to medical treatment for the child prior to the making of a Substitute Parentage Order; and

(g) the requirement that the arrangement be altruistic and the prescribed costs that may be reimbursed.

Where one or more of the applicants live ***interstate or in another country****, the legal advice should also address:*

(a) where it is intended that the child be born;

(b) the implications of the child being born in a jurisdiction other than Victoria (interstate or overseas), including the legal status of the child, its parentage, and matters such as registering the birth and liaison with the Victorian Registrar of Births, Deaths and Marriages.

Legal practitioners are encouraged to address any substantial differences between the relevant jurisdiction's legislation as it may affect the process of obtaining a Substitute Parentage Order (if

[188] *Grant v Downs* (1976) 135 CLR 674 at p.685 per Stephen, Mason and Murphy JJ.
[189] https://www.vic.gov.au/patient-review-panel#applications-and-outcomes .

applicable) and make reference to any enquiries the practitioner has made with the relevant jurisdiction's equivalent of the Registrar of Births, Deaths and Marriages regarding their processes for managing the registration of Victorian Substitute Parentage Orders.

*Where **donor gametes/embryos** are intended to be used in the proposed arrangement, the legal advice should also address:*

(a) the right of the donor to withdraw consent to the treatment procedure and at what point this can occur, dependant on when the embryo/s are or have been formed, and any associated implications;

(b) the rights of donor-conceived children to identifying and non-identifying information about their donor/s;

(c) the information that is held on the Central Register and the Voluntary Register, including who can access what types of information about the arrangement, including information about the donor and other parties to the arrangement, and the process for accessing that information.

The legal advice should be recent and should reflect the law at the time the advice is provided. This should include any recent changes to the law. If, upon review by Panel staff or the Panel Chairperson, it appears that any legal advice provided to any of the parties to the arrangement is out of date, inaccurate or incomplete then the Panel may request that further legal advice be sought by the affected parties and a summary of that advice provided to the Panel, before the application is listed for hearing."

In other words:

a) Legal professional privilege is waived.

b) A person, who does not owe a professional duty to the party concerned, determines whether or not that advice is adequate.

Although the role of the Patient Review Panel was outside the terms of reference of the Gorton review, there was much criticism of it by stakeholders, as seen in the Interim Report. In addition to significant reported delays:

"Others, including individuals who have had matters heard by the Panel, report that the experience itself can be confronting and difficult. One clinic relayed feedback from patients that 'the meetings are intimidating, daunting, unpredictable and that they feel the system is punitive'.

A number of individuals told the Review they found the conduct of Panel hearings to be overly formal and legalistic. Some said they were asked questions they found intrusive, insensitive or rude. This was particularly the perception of some from the LGBTQI+ community.

Surrogacy Australia states that it has received feedback that people feel judged by the Panel on their ability to parent, and that the process is 'demoralising and dehumanising'. Donors and surrogates report feeling that their altruism and motivations are questioned by the Panel member. Others felt they were asked questions that were sexist or homophobic.

They do nothing to assist or inform patients. Many members of the panel are rude and judgemental, particularly in regards to LGTBI families.

Survey response – surrogate

Some stakeholders, including clinics, recipients of treatment and their representatives, have made claims that the Patient Review Panel is not consistent in the information it seeks from clinics or from parties to surrogacy arrangements.

They change the 'rules' for different people, allowing some flexibility while being difficult and unyielding with others about the same issues.

Survey response – recipient of assisted reproductive treatment

Others stated that there is a lack of transparency surrounding Panel processes and decision making, or that the Panel may seek information or set requirements that go beyond what is required to make determinations under the Act. For example:

• A number of clinic representatives commented there is a lack of clarity as to what constitutes acceptable evidence to demonstrate a deceased partner's consent for the posthumous use of gametes. One clinic proposed that the Patient review guidance note on this matter requires review.

• People involved in surrogacy arrangements stated that the guidance note regarding the approval of surrogacy arrangements required review to accurately reflect the role of the Panel in these cases.

• A clinic reported that, in relation to surrogacy matters, the Panel is 'requesting multiple legal opinions and comparing the contents, rather than ensuring the patient has sought legal advice and understands the advice provided'.

• A surrogate understood that the PRP requires all parties, including donors, to attend hearings in person, even where parties reside interstate and travel has significant impact on health, employment and child care.

I think the Patient Review Panel should be more transparent, approachable, and less dogmatic in its approach and processes.

Survey response – surrogate*"*[190]

Table 15 shows the number of surrogacy applications made to the Patient Review Panel between 2010 and 2023. It is unclear how many have been refused, or have not proceeded. There is some burden on Government resources in enabling consideration of these applications, which burden would be replicated nationally, if regulatory approval for surrogacy arrangements is required. There is no openly available data as to the cost to the Victorian taxpayer of the Patient Review Panel.

Table 15: Surrogacy applications to the Patient Review Panel: 2010-2023[191]

Year	Number
2010	5
2011	13
2012	12
2013	13
2014	18
2015	27
2016	30

[190] Pp.124-5.
[191] Source: https://www.vic.gov.au/patient-review-panel#previous-decisions .

Year	Number
2017	30
2018	32
2019	23
2020	41
2021	44
2022	39
2023	41
Total	**368**

It has been estimated by Western Australian IVF clinics that there is a cost of $10,000 in order to obtain RTC approval. This cost is met by the intended parents.

The Allen Review recommended the abolition of the Reproductive Technology Council. Professor Allen summed it up when she wrote:

> *"The experience of those being regulated did not reflect the stated intentions of the regulator."*[192]

Further:

> *"There appeared to be fear concerning legal risk regarding the HRT Act and those functions of the RTU that were not governed by legislation (e.g. the voluntary donor register). Views were expressed internally about 'not wanting to be sued' and/or 'not wanting to be blamed when things go wrong'. This appeared to lead to more restrictive interpretation and practice. It also contributed to costly and time-consuming processes, which did not appear to serve consumers or those born as a result of ART. Clinicians and consumers reported finding themselves unable to proceed due to the regulatory bureaucracy's interpretation or application of the regulatory rules, or alternatively because of the RTC/RTU's inertia.*
>
> *The RTC was also observed to be challenged in resolving matters of interpretation of the legislation and/or directions. Internally, there were examples of the RTC/RTU/legal officers having to seek legal advice about the HRT Act and HRT Directions through the State Solicitor's Office to assist with how the legislation and/or directions should be interpreted. This might have led to changes in how the HRT Act was enforced but did not necessarily lead to clear guidance being provided to clinics or the public."*[193]

One practitioner said:

> *"I don't understand what they do other than say no, the computer says no, and that is about as good as it gets."*[194]

Further:

[192] https://www.health.wa.gov.au/~/media/Files/Corporate/Reports-and-publications/HRT/Review-of-HRT-and-Surrogacy-Act-Part-1.pdf at p.58.
[193] Pp. 54-55.
[194] P.55.

> *"The RTC/RTU was described by numerous consumers and practitioners in terms of being 'obstructive', 'unhelpful', 'punitive', 'bureaucratic' and /or 'outdated'... and 'adversarial', suspicious', often negative and very stressful"*[195]

Further:

> *"The bureaucracy developed in WA is a completely unfriendly hindrance to normal clinical practices which already function at the highest level achievable on any international scale."*[196]

Australia has had two statutory regulators which have been required to approve surrogacy arrangements. Neither has covered themselves in glory. The model is flawed and should not be replicated nationally.

6.10 Given birth previously

Most States and Territories do not require the surrogate to have given birth previously. While the norm is that surrogates will have given birth previously, I have had two cases where there was not the case- and both matters proceeded smoothly. In both cases, the would be surrogate never wanted to have her own children:

- The 32 year old sister of the intended mother. The sister did not want to have children, but did want to give the gift of life for her sister.
- A 38 year old lesbian, who had no interest in becoming a mother, but did want to give the gift of life to a gay couple.

The best, although imperfect guide, of how a pregnancy and birth might turn out is previous pregnancies and births, a woman who has never been pregnant before can at least before entering into the surrogacy arrangement have the benefit of:

- Obstetric advice
- Counselling
- Independent legal advice.

The policy in Western Australia requiring that unless there are exceptional circumstances the woman has given birth to a live child[197] is a good measure of protection towards the woman. What I do not know is if any woman in Western Australia has ever been approved under that provision. Therefore, there is a risk that if it is a legislated requirement, of exceptional circumstances, the outcome may be too restrictive.

Fertility specialists and IVF clinics, in focusing on harm minimisation, are reluctant to enable surrogacy if the woman has not successfully carried before (due to the risks to her, and the issue of lack of informed consent), unless the most stringent screening has occurred first, and it is clear that the woman is of sufficient maturity and clearly indicates that she does not want to have children herself.

Canadian research

Research by Velez et al published in 2024 about surrogacy in Canada[198] is most worrying. Among singleton births of more than 20 weeks gestation, a higher risk of severe maternal morbidity and adverse pregnancy outcomes was seen among gestational carriers compared with women who

[195] Pp.56, 57 and 58.
[196] P.57.
[197] *Surrogacy Act 2008* (WA), s.17.
[198] Velez, Ivanova, Shellenberge, Pudwell and Ray, *Severe Maternal and Neonatal Morbidity Among Gestational Carriers, A Cohort Study*, Annals of Internal Medicine; 177: 1482-1488; doi:10.7326/M24-0417.

conceived with and without assistance. Although gestational carriage was associated with preterm birth, there was less clear evidence of severe neonatal morbidity.

The recommendation was that, *"a judicious selection of [gestational] carriers- something recommended within clinical practice guidelines. Further studies are needed to determine the physiologic effect of carrying a nonautologous embryo on the health of a gestational carrier. Efforts are needed to identify risk factors for pregnancy complications in gestational carriers, alongside the development of specific pregnancy care plans in this population."*

Analysis

The data revealed in the study is enlightening and most worrying. The view that surrogates only come from poor backgrounds is not true of those studied: 22% came from the poorest quintile, quintile 1, of income, 25% from quintile 2, 20% from quintile 3, 22% from quintile 4 and 12% from quintile 5.

36% of gestational carriers studied were obese, double the rate of women who unassisted conception or IVF. 3.5% had tobacco or drug dependence. Surprisingly, 9% had previously not been pregnant.

Comparison with Australia

Surrogates in Australia come from my experience from a broad socio-economic spectrum. They have included: chief financial officer, managing partner in a large law firm, psychiatrist and GP.

In my view, Australian fertility specialists are much less risk averse than their colleagues in Canada.

Clinicians in Australia look for risk factors. They look for anything out of the norm, and find published research on point that can assist. Clinicians in Australia do not want obese women being pregnant. As an example, following discussions with our clinic, my husband and I paid for our surrogate to attend on a health coach, so that she could become fit and lose weight, in order to reduce her BMI, in accordance with clinical guidelines. It worked.

Australian surrogates are required not to drink, smoke or take drugs. Of course, even with the best screening, they have bodily autonomy. Clients of mine rejected a would be surrogate who insisted that during the pregnancy, she be able to:

- Drink up to 6 cups of coffee, plus tea
- Continue to eat soft cheeses and salami
- Undertake a full renovation of her home (that she and her husband would do), followed by a full internal repaint
- Drink alcohol moderately.

Clinicians are very concerned when a would be surrogate has not carried a child to term before.

The comparison of maternal mortality ratios bears out my observations of the differences of practices within IVF clinics as seen in the research, and what I have observed here. On a country to country comparison, according to the WHO, in 2020 the maternal mortality ratio in Canada was 11, with 41 deaths and 371,000 births; in Australia the maternal mortality ratio was 3 with 9 deaths and 296,000 births.

Parties should have the ability to choose whether or not to proceed, given the known risks, such as through friends or family members. If there are to be surrogacy agencies, then one would expect that they would, as occurs in the United States, require the surrogate to have previously given birth, as set out in the SEEDS Ethical Standards:

"e. To be eligible as a Surrogate, the Surrogate, must, at a minimum:

i. Meet ASRM's guidelines (with deference to IVF Center's requirements and expertise);

ii. Have delivered at least one child;

Guideline: It is recommended that a Surrogate also be raising, or have raised, the child that she previously delivered.

iii Be financially stable (i.e., living above the federal poverty level)".[199]

Table 16 shows where the surrogate is required to have previously given birth.

Table 16: Where the surrogate is required to have previously given birth

Jurisdiction	Yes/No	Law: where required
ACT	No	
NSW	No	
NT	No	
Qld	No	
SA	No	
Tas	No	
Vic	Yes, for gestational surrogacy arrangements through IVF clinics, but not for at home traditional surrogacy arrangements	*Assisted Reproductive Treatment Act 2008*, s.40(1)(ac); *Status of Children Act 1974*, s.21
WA	Yes, unless there are exceptional circumstances	*Surrogacy Act 2010*, s.17(a)(ii)

See also **Clinical Approval**, below.

6.11 Clinical Approval

Any surrogacy arrangements through IVF clinics need clinical approval to proceed, whether they are gestational or traditional. Approval processes vary, but typically require:

- Obstetric, fertility and other relevant medical history of any female intended parent
- Medical history of any male intended parent
- Obstetric, fertility and other relevant medical history of any surrogate

199 https://cdn.wildapricot.com/263053/resources/Documents/Standards/2025%20SEEDS%20Standards%20with%20Guidelines%20and%20intro.pdf?version=1747940670000&Policy=eyJTdGF0ZW1lbnQiOiBbeyJSZXNvdXJjZSI6Imh0dHBzOi8vY2RuLndpbGRhcHJpY290LmNvbS8yNjMwNTMvcmVzb3VyY2VzL0RvY3VtZW50cy9TdGFuZGFyZHMvMjAyNSUyMFNFRURTJTIwU3RhbmRhcmRzJTIwd2l0aCUyMEd1aWRlbGluZXMlMjBhbmQlMjBpbnRyby5wZGY~dmVyc2lvbj0xNzQ3OTQwNjcwMDAwIiwiQ29uZGl0aW9uIjp7IkRhdGVMZXNzVGhhbiI6eyJBV1M6RXBvY2hUaW1lIjoxNzUxMjc5NzA5fSwiSXBBZGRyZXNzIjp7IkFXUzpTb3VyY2VJcCI6IjAuMC4wLjAvMCJ9fX1dfQ__&Signature=OV10iO2lriB70a4kxfruOD4V9FTOYmpm34VFfj0cfttpzG1p4qTArdTyxuAl4whxITJpy5RTa2cZea-fiDk3gka7NnjZiW3ZjbH72R67ZqO2Z9coTSYKUurcpSvp7hhYQQ8~Q7J4kA79XhrCB83RzyZsSkdA1rSwyT93NGxHvWeCrafjCF~8383uHRIyqDxDB1LdGsxMTBggc8zSYIH6ijfkhiCtY7RwowzXupts5j3PDjVWwZFRVrk9nZ~uKdMwTILhXhRuEvGtub-s9GwE2WPuhsQYHVq2NTXGIszPpr3sa4jDMOq132JKPU3LNr65YTUil-IOlr-q5S4mThCKhQ__&Key-Pair-Id=K27MGQSHTHAGGF .

- Medical history of the surrogate's partner
- Pre-entry counselling report
- 3+ months quarantine of gametes and embryos[200]
- Legal clearance

On the rare occasions that an intended parent is HIV+, most Australian IVF clinics have the technical capacity to handle the case. Of the 2,000+ surrogacy journeys I have advised, approximately half of those are for gay couples, plus a small number of single men, some of whom identify as gay. I typically ask my clients, if I am engaged at the beginning of the journey, whether they are HIV+. Of those ~2,000 gay men, a total of seven, two of whom were in the same relationship, have identified as HIV+.

Every Australian IVF clinic is expected to comply with the RTAC *Code of Practice*. The *Code of Practice* in turn incorporates the NHMRC *Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research* (2024).

The *Code of Practice* touches on surrogacy:

> *"3.8 Donor and surrogacy requirements (Critical Criterion 8)*
>
> *The ART Unit must ensure gametes, embryos and tissues are safe for donation and use in surrogacy arrangements and that appropriate counselling has been provided. It must provide evidence that:*
>
> *a) the Unit has obtained a declaration from the Patient/s before the initiation of the treatment cycle saying that the recipient patient/couple will provide information about the treatment cycle outcome*
>
> *b) counselling has been undertaken by a counsellor who is eligible for membership of ANZICA. For donor and surrogacy arrangements, counselling is mandatory for all donors, recipients and surrogates and their partners*
>
> *c) policies and procedures are in place, which have been developed in conjunction with the senior counsellor, to ensure compliance with ANZICA Guidelines for Professional Standards of Practice – Infertility Counselling*
>
> *d) for known donation, an additional joint session involving all parties must be undertaken before the signing of consents*
>
> *e) in Australia, in the absence of state, legislation comply with the recommendation of the NHMRC Ethical Guidelines for family limits. In New Zealand Units must comply with the health and disability Services Standard and guidelines and advice issued by ACART*
>
> *f) In New Zealand commercial surrogacy is banned under the HART Act, however, a New Zealand ART Unit may refer a patient internationally for commercial surrogacy…*
>
> *3.9.1 Transport of Cryostored material to an overseas Unit*
>
> *The ART Unit must have a documented policy that deals with a request for cryostored gametes or embryos to be transported to a Unit in an international destination. This policy must ensure:…*
>
> *c) That the intended purpose is not commercial surrogacy…*

[200] To avoid transmission of STI's, including HIV. Fifteen years ago, the quarantine period was typically 6 months. The drop in the length is due to technological improvement with testing for HIV.

4.3 Multiple pregnancies (Critical Criterion 12)

The ART Unit must minimise the incidence of multiple pregnancies. It must provide evidence of implementation and review of policies and procedures that:…

e) Ensure single embryo transfer is mandatory for a gestational carrier in surrogacy arrangements."

The *Ethical Guidelines* provide[201]:

"Surrogacy

Introduction

There is legislation governing surrogacy in all Australian states and territories. All persons involved in surrogacy must ensure that they are familiar with the relevant legislation and operate within the law. For ART activities requested under a surrogacy arrangement, the guidelines provided below should be followed, unless there is a legal impediment to doing so.

Surrogacy arrangements are between the commissioning parent(s) and the surrogate and should be entered into with each party having appropriate legal representation. it is not the role of clinics to provide legal advice to potential surrogates and/or commissioning parents, however, clinics do have an ethical obligation to ensure that a legal arrangement is in place, before proceeding with the required ART treatment.

Commercial surrogacy

Commercial surrogacy, where the surrogate receives financial compensation above and beyond expenses associated with the surrogacy procedure and pregnancy, is ethically unacceptable because it raises concerns about the commodification and exploitation of the surrogate, the commissioning parent(s) and any person born as a result of the surrogacy arrangement.

8.8 Do not practise, promote or recommend commercial surrogacy

8.8.1 Clinics and clinicians must not practise, promote or recommend commercial surrogacy, nor enter into contractual arrangements with commercial surrogacy providers (see paragraphs 4.2.7 – 4.2.10).

8.8.2 It is ethically unacceptable to provide, or offer to provide, direct or indirect inducements for surrogacy services.

Altruistic surrogacy

The term 'altruistic surrogacy' refers to an arrangement where the surrogate receives no financial compensation or inducement, beyond the reimbursement of verifiable out-of-pocket expenses directly associated with the surrogacy procedure, pregnancy or birth.

8.9 Confirm that the surrogacy arrangement is ethically acceptable

8.9.1 Clinics must not facilitate ART treatment under a surrogacy arrangement if there are concerns about whether the arrangement is ethical and/or legal. This includes the arrangement for reimbursement of verifiable out-of-pocket expenses.

[201] Pp 45-47.

Arrangements for any reimbursement of verifiable out-of-pocket expenses should be between the commissioning parent(s) and the surrogate and each party should be encouraged to seek legal advice before reimbursements are given or received to ensure compliance with relevant state or territory legislation.

It is reasonable for the commissioning parent(s) to reimburse a surrogate's verifiable out-of-pocket expenses directly associated with the procedure or pregnancy, which may include:

• medical and counselling costs, before, during, and after the pregnancy or birth

• travel and accommodation costs within Australia

• loss of earnings[202]

• insurance

• child care costs when needed to allow for attendance at appointments

and procedures related to the surrogacy arrangement

• legal advice.

Note: There may be state or territory legislation that regulates what out-of-pocket expenses can and cannot be reimbursed under a surrogacy arrangement.

8.9.2 In an effort to reduce the potential for harm for the surrogate, clinics must:

• ensure that the potential surrogate is medically and psychologically suitable to undertake the requested ART activity

• perform only a single embryo transfer. information giving, counselling and consent

8.10 Ensure the provision of relevant information and counselling

8.10.1 Clinics must ensure that sufficient information about the ART treatment is provided to meet the requirements outlined in paragraphs 4.1 and 4.2.1 – 4.2.2.

8.10.2 Individuals and couples involved in an altruistic surrogacy arrangement must undergo counselling before, during and after ART treatment because of the complex nature of the issues involved. In addition to the requirements outlined in paragraph 4.3, counselling must include a detailed discussion of the following:

• the potential long-term psychosocial implications for each individual and each family involved, including the person who may be born and any other child within the family unit(s) who may be affected by that birth

• the reason(s) why the potential surrogate wants to become involved in a surrogacy program

• the surrogate's right to make informed decisions about their own medical care, including before and during the pregnancy and birth

• the possibility that the surrogate may need medical and/or psychological assistance following the birth and that the pregnancy may affect the surrogate's own health

[202] Surrogates who access paid leave during the pregnancy and birth cannot be reimbursed for loss of earnings. Loss of earnings can be demonstrated by the surrogate providing payslips verifying that unpaid leave was taken.

• the potential significance of the gestational connection and the right of persons born to know the details of their birth, and the benefits of early disclosure

• the possibility that persons born may learn about their birth from other sources (for example from other family members) and may independently access information about their birth

• the possibility that persons born may attempt to make contact with the surrogate in the future.

8.10.3 Where a potential surrogate has a spouse or partner, the clinic should encourage the potential surrogate to include their spouse or partner in the discussions about the potential surrogacy arrangement, acknowledging the benefits of open disclosure and the potential impact of the decision on the spouse or partner, the couple's relationship and/or the family unit.

8.10.4 Clinics must not proceed with ART treatment to facilitate an altruistic surrogacy arrangement without first being satisfied that a legal arrangement is in place.

8.11 Obtain consent from all relevant parties

8.11.1 Clinics must obtain valid consent, in accordance with the requirements outlined in paragraph 4.5, from the relevant party(ies) for each specific treatment or procedure required. Clinics are not responsible for obtaining consent for the surrogacy arrangement itself as this is a legal arrangement between the commissioning parent(s) and the intended surrogate.

8.11.2 Clinics must respect the autonomy of surrogates to make informed decisions about their own medical care.

8.11.3 All relevant parties should be allowed adequate time for consideration of information and the complex issues involved before consent is provided.

Exchange of information between all relevant parties

There should be voluntary exchange of information between persons born via a surrogate, the surrogate and the commissioning parent(s), with the valid consent of all parties. The guidelines in this section specify the minimum level of information that should be accessible to all relevant parties.

8.12 Provide persons born with information about the surrogate

8.12.1 Persons born via a surrogacy arrangement are entitled to know the details of their birth and to have the opportunity to determine the significance of their gestational connection with the surrogate, in accordance with the principles outlined in paragraphs 5.6, 5.9 and 5.10."

There is however no consistent set of guidelines for Australian IVF clinics about surrogacy. At the International Surrogacy Forum in Cape Town in March 2025, an American colleague told of her surrogacy journeys, and her relief that the American Society for Reproductive Medicine had surrogacy guidelines in place.

As a result of that statement, and the realisation that there was a framework elsewhere for these guidelines, the Fertility Society of Australia and New Zealand is now working towards having surrogacy guidelines for IVF clinics. Those guidelines would more likely sit outside the *Code of Practice*. The ASRM surrogacy guidelines[203] are comprehensive.

[203] https://www.asrm.org/practice-guidance/practice-committee-documents/recommendations-for-practices-using-gestational-carriers-a-committee-opinion-2022/ .

Of course, what the Fertility Society does in this space depends on what comes from the Health Ministers' 3 month rapid review of the regulation of IVF clinics.

6.12 No traditional surrogacy through an IVF clinic

Most IVF clinics, where traditional surrogacy is lawful, practise traditional surrogacy on a case by case basis. However, one major clinic, IVF Australia, based in NSW and the ACT, does not. Its sister clinic, Queensland Fertility Group, has practised traditional surrogacy on a case by case basis since 2010. The reason not to treat is the perceived risk that the surrogate will not relinquish the child. One Brisbane senior fertility specialist told me that he used to decline traditional surrogacy arrangements, because of that perceived risk, but now relies on thorough pre-entry counselling reports to assist him to assess risk. He undertakes work in traditional surrogacy arrangements on a case by case basis.

Given that there are not binding contracts with surrogacy arrangements, there are risks with both traditional and gestational surrogacy arrangements, as seen in two recent cases:

- In *Seto & Poon*, where a traditional surrogate did not relinquish the children, in an attempt at extortion.

- In *Tickner & Rodda*, where a gestational surrogate committed an act of fraud, having told the counsellor that she had lost the pregnancy, all the while intending to keep the child for herself.

Victoria alone restricts traditional surrogacy, which cannot occur through an IVF clinic[204]. However, traditional surrogacy can occur at home[205], where there are fewer protections. Traditional surrogacy should be available in Victoria through clinics, as well as at home.

The clinic changed its view

I saw the prospective gestational surrogate and her husband. Her sister was unable to have children. IVF was to be undertaken, using embryos created from the sister's egg and her husband's sperm.

What if that doesn't work, I asked? In that case, I was told, there will need to be an egg donor. *"Why can't you be a traditional surrogate? It would be much better for the child to be related through you, and therefore both sides of the family, than from a stranger,"* I said.

My client responded, *"That would make sense, but the clinic will not do traditional surrogacy."*

The sister's embryos did not work. My client offered to be a traditional surrogate. The clinic agreed. A child was born as a result. The surrogacy journey was a happy one.

Question 7: Are there any eligibility requirements which should be introduced, changed, or removed?

This is answered at 6.

[204] *Assisted Reproductive Treatment Act 2008* (Vic), s.40(1)(ab).
[205] *Status of Children Act 1974* (Vic), s.21.

Question 8: Are there any requirements for a valid surrogacy agreement you think should be introduced, removed, or changed?

The critical requirement is that surrogacy agreements should be binding, subject to the surrogate maintaining bodily autonomy.

The drafting of a surrogacy arrangement will depend primarily on the skill and style of the lawyer drafting it. The surrogacy arrangements I draft cover the whole process, including:

a) Why the parties are entering into the arrangement

b) Who is going to be the treating doctor

c) Where the child is to be born

d) Whether the surrogate is a private or public patient

e) If the former, what arrangements are in place for health insurance

f) What arrangements are in place for the surrogate's life and income protection insurance, her will, and if she is married, but separated, her divorce

g) How the surrogate will ensure that she maintains her and the unborn baby's health

h) When, subject to bodily autonomy, there should be a termination

i) What happens if there is a stillbirth

j) The name of the child

k) The process of parentage after the child is born

l) Confidentiality

m) What expenses of the surrogate are to be met, and what the agreed limits to them are to be.

I am specific about the last, which is always subject to what expenses are allowed by law, and subject to further agreement between the parties. There has been occasion when disgruntled surrogates have tried to extort the intended parents with demands for more money. By defining what is to paid, and how much is to be paid, sets expectations. The budget is laid out for both parties in black and white. It is rare that in my cases the surrogate has been left short (which has been a common complaint of Australian surrogates), or seeks more than that agreed in writing. I adopted this practice, in accordance with the norms of surrogacy agreements in the United States and Canada (an altruistic regime), in order to provide certainty of terms and to reduce disputes between the parties. I have seen other lawyers draft surrogacy arrangements that merely say on this point that the intended parents will *"pay all reasonable costs of the surrogate"*. While well meaning, such drafting by being vague leaves the parties open to disputes later on. By giving definition to the type and amount of expenses, expectations are clear as to what is covered-and for how much.

To minimise disputes, it is helpful when both lawyers are retained for the duration of the surrogacy arrangement, and not just as a one off at the drafting stage, and then later on for completion. That way, if issues arise during the process, these can be quickly dealt with and resolved. I try to educate intended parent clients in my first consultation of the benefits to them, to their surrogate and to their child of this-which includes that the lawyer for the surrogate is properly funded.

Question 9: Should surrogacy agreements be enforceable?

You might want to consider:

a) if all parts of the agreement should be enforceable;

b) who should be able to enforce the agreement; and

c) how agreements could be enforced.

Surrogacy arrangements need to be enforceable, so that:

a) In the best interests of the child, its parentage is certain, even if the child is disabled or is not of the gender sought by the intended parents.

b) There is not an opportunity for surrogates or their partners to seek to extort the intended parents, of which *Seto & Poon* is an extreme example, or to minimise fraud, of which *Tickner & Rodda* is an example.

c) The surrogate has certainty that she will be paid her expenses, and if she is able to be paid a fee, her fee also.

However, aspects that should not be enforceable are:

a) Any restriction on the surrogate's health and bodily autonomy, including the pregnancy, birth and termination of pregnancy.

b) Any requirement compelling the surrogate to attempt to become pregnant.

An example where this has been legislated recently (2019) is in Revised Code of Washington State (RCW), sections 26.26A.785, 26.26A.715(1)(g), and 26.26A.765(2):

> *"RCW 26.26A.785*
>
> ***Genetic surrogacy agreement—Breach.***
>
> *(1) Subject to RCW 26.26A.715(1)(g) and 26.26A.765(2), if a genetic surrogacy agreement is breached by a woman acting as a genetic surrogate or one or more intended parents, the nonbreaching party is entitled to the remedies available at law or in equity.*
>
> *(2) Specific performance is not a remedy available for breach by a woman acting as a genetic surrogate of a requirement of a validated or nonvalidated genetic surrogacy agreement that the surrogate be impregnated.*
>
> *(3) Except as otherwise provided in subsection (2) of this section, specific performance is a remedy available for:*
>
> *(a) Breach of a validated genetic surrogacy agreement by a woman acting as a genetic surrogate of a requirement which prevents an intended parent from exercising the full rights of parentage forty-eight hours after the birth of the child; or*
>
> *(b) Breach by an intended parent which prevents the intended parent's acceptance of duties of parentage forty-eight hours after the birth of the child.*

RCW 26.26A.715

(1) A surrogacy agreement must comply with the following requirements:

(a) A woman acting as a surrogate agrees to attempt to become pregnant by means of assisted reproduction.

(b) Except as otherwise provided in RCW 26.26A.750, 26.26A.765, and 26.26A.770, the woman acting as a surrogate and the spouse or former spouse of the woman acting as a surrogate, if any, have no claim to parentage of a child conceived by assisted reproduction under the agreement.

(c) The spouse of the woman acting as a surrogate, if any, must acknowledge and agree to comply with the obligations imposed on the woman acting as a surrogate by the agreement.

(d) Except as otherwise provided in RCW 26.26A.750, 26.26A.765, and 26.26A.770, the intended parent or, if there are two intended parents, each one jointly and severally, immediately on birth will be the exclusive parent or parents of the child, regardless of number of children born or gender or mental or physical condition of each child.

(e) Except as otherwise provided in RCW 26.26A.750, 26.26A.765, and 26.26A.770, the intended parent or, if there are two intended parents, each parent jointly and severally, immediately on birth will assume responsibility for the financial support of the child, regardless of number of children born or gender or mental or physical condition of each child.

(f) The agreement must include information disclosing how each intended parent will cover the surrogacy-related expenses of the surrogate and the medical expenses of the child. If health care coverage is used to cover the medical expenses, the disclosure must include a summary of the health care policy provisions related to coverage for surrogate pregnancy, including any possible liability of the woman acting as a surrogate, third-party liability liens, other insurance coverage, and any notice requirement that could affect coverage or liability of the woman acting as a surrogate. Unless the agreement expressly provides otherwise, the review and disclosure do not constitute legal advice. If the extent of coverage is uncertain, a statement of that fact is sufficient to comply with this subsection (1)(f).

(g) The agreement must permit the woman acting as a surrogate to make all health and welfare decisions regarding herself and her pregnancy and, notwithstanding any other provisions in this chapter, provisions in the agreement to the contrary are void and unenforceable. This chapter does not diminish the right of the woman acting as a surrogate to terminate her pregnancy.

(h) The agreement must include information about each party's right under RCW 26.26A.700 through 26.26A.785 to terminate the surrogacy agreement.

(2) A surrogacy agreement may provide for:

(a) Payment of consideration and reasonable expenses; and

(b) Reimbursement of specific expenses if the agreement is terminated under RCW 26.26A.700 through 26.26A.785.

(3) A right created under a surrogacy agreement is not assignable and there is no third-party beneficiary of the agreement other than the child.

RCW 26.26A.765

(1) A party to a genetic surrogacy agreement may terminate the agreement as follows:

(a) An intended parent who is a party to the agreement may terminate the agreement at any time before a gamete or embryo transfer by giving notice of termination in a record to all other parties. If a gamete or embryo transfer does not result in a pregnancy, a party may terminate the agreement at any time before a subsequent gamete or embryo transfer. The notice of termination must be attested by a notarial officer or witnessed.

(b) A woman acting as a genetic surrogate who is a party to the agreement may withdraw consent to the agreement any time before forty-eight hours after the birth of a child conceived by assisted reproduction under the agreement. To withdraw consent, the woman acting as a genetic surrogate must execute a notice of termination in a record stating the surrogate's intent to terminate the agreement. The notice of termination must be attested by a notarial officer or witnessed and be delivered to each intended parent any time before forty-eight hours after the birth of the child.

(2) On termination of the genetic surrogacy agreement under subsection (1) of this section, the parties are released from all obligations under the agreement except that each intended parent remains responsible for all expenses incurred by the woman acting as a surrogate through the date of termination which are reimbursable under the agreement. Unless the agreement provides otherwise, the woman acting as a surrogate is not entitled to any nonexpense related compensation paid for serving as a surrogate.

(3) Except in a case involving fraud, neither a woman acting as a genetic surrogate nor the surrogate's spouse or former spouse, if any, is liable to the intended parent or parents for a penalty or liquidated damages, for terminating a genetic surrogacy agreement under this section."

That *Code* illustrates different treatment for a traditional surrogacy agreement. For example, s.26.26A.760 provides:

"(1) Except as otherwise provided in RCW 26.26A.775, to be enforceable, a genetic surrogacy agreement must be validated by the superior court. A proceeding to validate the agreement must be commenced before assisted reproduction related to the surrogacy agreement.

(2) The court shall issue an order validating a genetic surrogacy agreement if the court finds that:

(a) RCW 26.26A.705, 26.26A.710, and 26.26A.715 are satisfied; and

(b) All parties entered into the agreement voluntarily and understand its terms.

(3) An individual who terminates under RCW 26.26A.765 a genetic surrogacy agreement shall file notice of the termination with the court. On receipt of the notice, the court shall vacate any order issued under subsection (2) of this section. An individual who does not notify the court of the termination of the agreement is subject to sanctions."

Although I have submitted that there should be auto recognition of parentage through altruistic gestational surrogacy (or a pre-birth order if compensated or commercial gestational surrogacy), I have no difficulty with traditional surrogacy having a different test, that of pre-approval, given its unique challenges.

The then UN Special Rapporteur on the Sale and Sexual Exploitation of Children in 2018[206]contended that three things would amount to the sale of a child, in breach of the *Optional Protocol*:

a) An enforceable agreement;

b) An order before the birth of the child determining that the intended parents were the parents;

c) A payment to the surrogate of any amount greater than her reasonable expenses.

If those assertions were correct, then judges in these countries were parties to the widespread sale of children, which is clearly an absurd proposition, as seen in **Table 17**. I have used the then Special Rapporteur's stipulations of what amounts to the sale of children- and then set out the law or surrogacy practices in several countries that would meet one or more of those criteria.

Table 17: Examples of surrogacy, which would amount to sale of children, according to the 2018 thematic report

Jurisdiction	Reason this would be "the sale of children"
Canada	Binding contracts, even though surrogacy is altruistic.
Colombia	Parentage by operation of law.
Georgia	Parentage by operation of law.
Greece	Pre-conception orders. Surrogacy is altruistic.
Israel	Pre-conception orders.
Kazakhstan	Parentage by operation of law.
Mexico	Parentage by operation of law.
Russia	Parentage by operation of law.
South Africa	Pre-conception orders, after which the contract is binding. Surrogacy is altruistic.
Ukraine	Parentage by operation of law.
United States	Most states: binding contracts, even if only reasonable costs allowed, such as Virginia. Most states: pre-birth orders. In many states: parentage by operation of law, such as California (then formalised with a pre-birth order) Most states: payment in excess of reasonable expenses.

I note that the European Court of Human Rights in the *Advisory Opinion* upheld the Mennesson children's relationship with their mother. The Court took into account the Special Rapporteur's report. The Court did not find that the children had been sold. They were the subject of a surrogacy agreement and pre-birth in California. See page 53 of my submission.

The approach taken by the Special Rapporteur was then taken up in the *Verona Principles*. They state at 10.3 to 10.10:

[206] Thematic Report A/HRC/37/60.

"10.3States that do not permit but nevertheless encounter surrogacy should ensure that there is a legal framework governing parentage and parental responsibility applicable to children born through surrogacy. This framework shall ensure that the child has legal parent(s) at birth.

Determination of legal parentage at birth, by operation of law

10.4 Where the surrogate mother is a legal parent by operation of law at birth, a court or other competent authority should determine the post-birth wishes of the surrogate mother after an appropriate reflection period. If the surrogate mother wishes to:

a. relinquish and/or transfer legal parentage and parental responsibility, an expeditious post-birth legal and safe mechanism should be available.

b. retain legal parentage and/or parental responsibility, then a court or other competent authority should expeditiously conduct a post-birth best interests of the child determination.

10.5 Where the surrogate mother is not a legal parent by operation of law at birth, an expeditious procedure that comes into effect after an appropriate reflection period, should be provided by which the surrogate mother post birth:

a. has access to a suitably qualified neutral third party as part of informed consent procedure;

b. freely confirms or revokes her consent that the intending parent(s) have exclusive legal parentage;

c. provides her consent without any financial consequences as to either payments or reimbursements related to the surrogacy arrangement

10.6 States may provide intending parent(s) with exclusive legal parentage and parental responsibility by operation of law at birth only if the following two conditions are met:

a. the surrogate mother confirms consent post-birth (see para 10.5 above)

b. a post-birth best interests of the child determination is not required under these Principles

Transfer of legal parentage

10.7 A court or other competent authority of the State of birth shall, at a minimum, expeditiously conduct a post-birth best interests of the child determination in proceedings concerning legal parentage and/or parental responsibility or where child protection measures are being considered in domestic and international surrogacy arrangements where:

a. there have not been adequate pre-surrogacy arrangements; or

b. there is a conflict between the surrogate mother and intending parents(s) or between the intending parents after birth in regard to legal parentage or parental responsibility; or

c. there are unforeseen developments, particularly where neither the surrogate mother nor intending parents are able or willing to care for the child, or information has subsequently come to light that may affect the child's well-being, such as indications of sale, exploitation and trafficking or other illicit activity.

10.8 In international surrogacy arrangements where there is at least one State that does not permit the specific arrangement, a best interests of the child determination should be conducted additionally by a court or any other competent authority of the State where the intending parent(s) intend to reside with the child.

10.9 If the surrogate mother either revokes consent or fails to confirm consent, then a court or other competent authority should conduct a best interests of the child determination with particular attention to a psycho-social assessment of both parties.

10.10 States shall prohibit, as constituting the sale of children, any termination or transfer of legal parentage and/or parental responsibility, or promise to terminate or transfer legal parentage and/or parental responsibility, in exchange for remuneration or any other consideration."

Similarly, the *Verona Principles* state at 14.7:

"Accordingly, States that permit commercial surrogacy shall ensure, at a minimum, that all payments are separate from the determination or transfer of legal parentage and parental responsibility. Measures should include that:

a. the surrogate mother at birth retains the right to decide whether or not to consent to transfer of legal parentage and parental responsibility;

b. any remuneration or any other consideration provided to the surrogate mother (or anyone on her behalf) be made in advance of any post birth transfer of legal parentage and parental responsibility to the intending parent(s) or post-birth confirmation of the surrogate mother's consent, and be non-refundable (absent fraud);

c. all payments and reimbursements are reported and properly regulated by law; and

d. intermediaries are properly regulated by law.

14.8 Surrogacy purporting to be altruistic and non-commercial may nonetheless result or unduly risk the sale of children when:

a. there is a provision of unregulated, excessive or lump sum "reimbursements" or consideration in any other form; or

b. there are reimbursement categories like "pain and suffering", which can be similar to payment in commercial surrogacy; or

c. reimbursement occurs which cannot be separated completely from the establishment or transfer of legal parentage and/or parental responsibility. (See para. 7).

14.9 Sale of children occurs where legal parentage is assigned or transferred based primarily on contractual provisions (see Principle on legal parentage). Written agreements describing the intentions of the parties as to legal parentage and/or parental responsibility do not violate the prohibition of sale of children, as long as they are understood to be non-binding.

14.10 Sale of the child may occur if "remuneration or any other consideration" is promised or paid to obtain exclusive legal parentage and parental responsibility for intending parent(s)."

It is with a heavy heart that I criticise these passages, especially 10.4,10.5, 14.7 and 14.8. They assume throughout that the real mother is the surrogate- when she clearly has said that she does not want to be. No explanation is given as to why, after a certain outcome which she would have agreed to, she can choose, like Caesar, to raise her thumb or lower it. If the latter, she can stymie any attempt by the intended parents to be the only parents and holders of parental responsibility. While the principles then call, in 10.9

for in effect a family report to be obtained, followed by a contested hearing, there is no provision that the intended parents will be the only parents and holders of parental responsibility. From that time on, if she so chooses, the surrogate can dangle over the family of the intended parents and child, much like the Sword of Damocles.

South Africa

A binding agreement is the sale of a child, as is a pre-birth order, according to the *Verona Principles*. And yet, an agreement in South Africa, confirmed by the court pre-conception, is under the *Children's Act 2006*, from that moment binding[207]. South Africa is an altruistic jurisdiction. The *Verona Principles* would have it that the Court and the State are parties to the sale of children.

The absurdity of that proposition is seen in the preamble to the *Children's Act*. Parliament was seeking to uphold human rights, especially those of children:

> *"WHEREAS the Constitution establishes a society based on democratic values, social justice and fundamental human rights and seeks to improve the quality of life of all citizens and to free the potential of each person;*
>
> *AND WHEREAS every child has the rights set out in section 28 of the Constitution;*
>
> *AND WHEREAS the State must respect, protect, promote and fulfill those rights;*
>
> *AND WHEREAS protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable norpossible to protect children's rights in isolation from their families and communities;*
>
> *AND WHEREAS the United Nations has in the Universal Declaration of Human Rights proclaimed that children are entitled to special care and assistance;*
>
> *AND WHEREAS the need to extend particular care to the child has been stated in the Geneva Declaration on the Rights of the Child, in the United Nations Declaration on the Rights of the Child, in the Convention on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child and recognised in the Universal Declaration of Human Rights and in the statutes and relevant instruments of specialized agencies and international organisations concerned with the welfare of children;*
>
> *AND WHEREAS it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding".*[208]

When there is auto recognition (by operation of law or court order) of the intended parents as the parents upon the birth of the child, a malicious, capricious or fraudulent surrogate is empowered to poke her nose in, and to cause trouble, as seen with the extorting surrogate in *Seto & Poon*, or the fraudulent one in *Tickner & Rodda*. What is needed is legal certainty, in part for the parents, but primarily for the child. Why should the child's safe and secure world be upended? How that can possibly be in the child's best interests?

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[207] *Children's Act 2006*, s.295.

[208] https://www.gov.za/sites/default/files/gcis_document/201409/a38-053.pdf .

The invariable practice in surrogacy agreements throughout the world that I have seen has been that when the surrogate is paid compensation, it is NOT for the transfer of parentage (as the sale of children is invariably a crime), but for some other purpose, such as her expenses, reasonable compensation for her time, efforts, pain and suffering, and obligations to pay child support.

The *Verona Principles* are seemingly in this regard in discord with international jurisprudence, such as that in California, Mexico and Colombia about parentage. The Courts in Mexico and Colombia were at pains to take into account human rights concerns.

Question 10 What process requirements should be in place for surrogacy arrangements?

You might want to consider:

a) if counselling should also be available after the child's birth;

b) what should happen if legal advice and counselling are not provided before entering a surrogacy agreement; and

c) if parentage applications should require proof of legal advice and/or counselling.

Answered above.

It is reasonable for the intended parents to provide for counselling for the surrogate post-birth at her election for a period, which the *Surrogacy Act 2019* (SA),s. 15(1)(a)(iii), for example, contemplates at up to 6 months.

If there is non-compliance with formal requirements, then the court should have the ability to dispense, as seen with the *Surrogacy Act 2010* (Qld), s.23, for example.

Any application before the Court should require provision of the counselling report, so that the Court has the full picture of the arrangement. Provision of attendance for legal advice can be met by a certificate as happens, for example, under the *Surrogacy Act 201*9 (SA), s. 10(5).

Question 11 What are the gaps in professional services for surrogacy in Australia? You might want to consider:

a) if surrogacy agencies should operate in Australia; and

b) the availability, accessibility, and subject matter to be covered in legal advice and counselling sessions.

Surrogacy agencies are already operating in Australia. Surrogacy Australia Support Service is an altruistic, community agency based in South Australia. In addition, there are various agents operating on behalf of overseas surrogacy agencies, which agents are located in NSW, Queensland and Victoria, for example. In addition, one Mexican agency, for example, pays its former parents through surrogacy a spotter's fee of US$1500, to refer new clients.

Surrogacy agencies can play a vital role. The US model of an agency is to do two things:

a) *To match* the intended parents with the surrogate; and

b) *To manage* the surrogacy arrangement, so that it flows smoothly.

Two key roles that agencies play are:

a) On the rare occasions that there are difficulties between the surrogate and the intended parents, to manage that process, to enable the differences are respectfully resolved, much as real estate agents often do with the sale of property.

b) To manage the payment of monies to the surrogate, so that she is paid on time and in full. These monies are typically held in escrow accounts (not available in Australia) or attorney's trust accounts.

A well run agency ensures that there is proper screening and matching. Many of the agencies belong to SEEDS, which has issued standards of ethical conduct[209].

Despite being an altruistic surrogacy regime like Australia, agencies in Canada have thrived. In doing so, they have enabled more surrogacy journeys to occur there than would otherwise have occurred, thereby enabling Canadians and foreigners to become parents.

On balance, there are advantages in having agencies, including that surrogates are properly paid and on time.

The *form of ownership* of agencies, in my view, is much less important than the *form of regulation*. If someone wants to operate an agency, they should be allowed to do so, and come out of the shadows. Firm but flexible regulation is to ensure that there is trust by Australian society that there is not exploitation of vulnerable women, children or intended parents.

The form of regulation could be:

a) They are registered with RTAC, or whatever entity takes over from RTAC.

b) They meet their registration and audit costs so that there is neutral cost for the government.

c) They have their own *Code of Practice*. The kernel of this might be the SEEDS standards of ethical conduct, with necessary variation to take account of Australian requirements.

d) They be subjected to regular audits, to ensure compliance.

e) Failure to comply should be the subject of being shut down, with a big stick provision such as the *Assisted Reproductive Technology Act 2007* (NSW), s.57.

f) That there be whistleblower protection, so that whistleblowers can make complaint that the agency is acting unethically or illegally, particularly to prevent trafficking in women and children.

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209 https://cdn.wildapricot.com/263053/resources/Documents/Standards/2025%20SEEDS%20Standards%20with%20Guidelines%20and%20intro.pdf?version=1747940670000&Policy=eyJTdGF0ZW1lbnQiOiBbeyJSZXNvdXJjZSI6Imh0dHBzOi8vY2RuLndpbGRhcHJpY290LmNvbS8yNjMwNTMvcmVzb3VyY2VzL0RvY3VtZW50cy9TdGFuZGFyZHMvMjAyNSUyMFNFRURTJTIwU3RhbmRhcmRzJTIwd2l0aCUyMEd1aWRlbGluZXMlMjBhbmQlMjBpbnRyby5wZGY~dmVyc2lvbj0xNzQ3OTQwNjcwMDAwIiwiQ29uZGl0aW9uIjp7IkRhdGVMZXNzVGhhbiI6eyJBV1M6RXBvY2hUaW1lIjoxNzUwNzM3MzI4fSwiSXBBZGRyZXNzIjp7IkFXUzpTb3VyY2VJcCI6IjAuMC4wLjAvMCJ9fX1dfQ__&Signature=K9g~~xCHxYbXUdcaWbAO4I7P-or8mWtawRtWochcjtE3ofctehrbS7C4FTtTeq4MUQ7~oF4vt7QB3~1kogpG7HlUEW43Y5DUEM9AI6ZAtCqOg7W5n5C4CfyKKgfwlTmzEYh745uw613zkPYnW9Iryy6V-y6AbQ1USWE6m7ksZEpZlDymzOaI37TtLJOFpNsuM2wSccwbYAdQVbWbC2-29DOoEPgdHPJI5EjFmTrMhynalVuPx4HQCm~tvkl9syTdL7HCp1VDDEPGIjzAJn4PparaOdKeIGfyjl8Kz3i3dzP5h7iWuo4H8O4r0y-OPVdfUZNsLwe22ZpvwAn1y9MPZA__&Key-Pair-Id=K27MGQSHTHAGGF .

11.1 Counsellors

Following the pandemic, subject to the state accreditation requirements in South Australia, Tasmania and Western Australia, it has been much easier to find a surrogacy counsellor than before. Pre-pandemic, ANZICA insisted that counselling be in person. This meant difficulties accessing counsellors, and for those interstate, in regional or rural areas, or overseas, great difficulties and costs organising counselling.

The pandemic forced change. Counsellors had to adapt to use of Zoom and Teams- and ANZICA allowed them, and continues to do so. The result? If there is not a local counsellor available, engage someone interstate. Expensive and disruptive travel for the purposes of surrogacy counselling is no longer needed.

11.2 Solicitors

The workload of solicitors is broken down into two main parts:

- Entry into the surrogacy arrangement
- Representation for the making of the parentage order.

Where possible, it is much better that a solicitor act throughout the matter as a watching brief, to avoid any flare ups. The cases I have seen where solicitors retainers ended upon the execution of the surrogacy arrangement, also seem to be those where there has been a blow up later on. If a solicitor is merely going through the motions, and does not take a holistic approach with the journey, is that any surprise?

The Patient Review Panel used to require, as part of its guidance note with surrogacy, the requirement that the solicitor see the client in person. No explanation was ever given as to why that was an advantage. Thankfully, that is no longer required. I have long seen most of my clients via electronic means- via phone, then Skype, and most recently by Zoom. Even clients who live down the road typically prefer an electronic meeting that as being less disruptive, than an in person meeting.

Question 12: How should professional services operate in Australia? You might want to consider what their role should be:

a) if they should be for-profit or not-for-profit, or how they should be funded;

b) if different types of services should operate together or separately, for example, whether counselling services should be independent or integrated within agencies or fertility clinics; and

c) how they could best meet the diverse needs and experiences of people involved in a surrogacy arrangement.

The role of surrogacy agencies should be similar in type to those in the United States that operate as a one stop shop or a central referral hub of intended parents and surrogates to the various professionals involved in their surrogacy journey. Clients have often told me of their joy of having one body organising their journey for them, rather than them having to do it themselves, as occurs in Australia.

Counselling services already operate as part of fertility clinics and separately. There is no obvious reason to change that mix.

Agencies in countries like the United States operate very well. In the United States, for example, there are about 300 agencies, of which 90+ are based in California. Some of them are very well known, such as Circle Surrogacy, Growing Generations, and Northwest Surrogacy.

Agencies are based in or operate in most states in the United States, from as far afield as Alaska, Hawaii, Minnesota, Oregon, Idaho, Georgia and New Jersey, for example, with all the diversity that implies.

Surrogacy agencies in the United States are owned by a wide variety of people, from different backgrounds: lawyers, doctors, investors, nurses, former surrogates, former intended parents. Most if not all are LGBTQIA+ friendly, and many are openly LGBTQIA+ owned.

My clients have invariably been made by their agency to feel welcome, no matter my clients' ethnicity, colour, sexuality or relationship status.

There are many ethnicities among owners, who appeal as part of their unique selling proposition to particular types of clients- some of whom are from their ethnicity. Surrogacy agencies operating in the United States are primarily owned by Americans, but there are agencies owned by people from other countries, such as China, Spain and Australia, for example.

Question 13: How should surrogacy advertising be regulated? You might want to consider:

a) if advertising should be allowed;

b) who should be allowed to advertise;

c) what advertising content should be allowed; and

d) where advertising should be allowed, for example via newspapers, social media, or by establishing a surrogacy register.

As the Gorton review recognised, despite bans on advertising with surrogacy, advertising continues. Criminalisation of advertising does not work.

Open your browser on your phone, type in surrogacy, and see many ads, primarily for overseas agencies. There are currently inconsistent rules between the states as to advertising, which should be reconciled to allow advertising.

Advertising would be subject to the usual requirements of not being misleading or deceptive.

If there is the ability to advertise, I would not expect a deluge of advertising for surrogacy for three reasons:

1. Advertising for egg donation is allowed in NSW, but there has not been a deluge of advertising for that.

2. There is already a deluge of advertising for overseas surrogacy agencies.

3. Advertising is expensive.

I expect that few intended parents or surrogates will openly advertise, due to privacy concerns. If surrogacy agencies advertise, then this will crowd the advertising market, and increase advertising costs, such as through Facebook, likely decreasing any may have considered advertising.

IVF clinics should be prevented from advertising, because of the possibility of exploitation of women, in the same way that Parliament has been concerned about IVF clinics could take advantage of young women

to be egg donors[210]. If an IVF clinic wishes to set up a surrogacy agency, then it could do so. That agency would be subjected to its rigours of regulation, just like any other surrogacy agency.

A **surrogacy register** does not work. South Australia tried that a decade ago, as another experiment by the father of South Australian surrogacy, the Hon. John Dawkins. The idea was to encourage women to come forward to be on the register, to then alleviate shortages of surrogates (and encourage local, not overseas journeys). No one took up the option. Feedback at the time was that would be surrogates did not want to connect with intended parents through the Government. As a result, the register was not part of the *Surrogacy Act 2019* (SA).

Question 14: What entitlements, if any, should be available to surrogates and intended parents? You might want to consider:

a) Medicare rebates for fertility treatments;

b) access by surrogates to paid or unpaid parental leave, including through enterprise agreement terms; and

c) if it is desirable to make surrogacy arrangements generally more affordable, and how this could be achieved.

14.1 The First Medicare Lottery

Undertaking IVF is expensive. Recent estimates give the cost at about $17,000 per IVF cycle, of which about $5,000 is payable by Medicare. In order to attain Medicare benefits, it is necessary to show that there is a *clinically relevant service* under the *Health Insurance Act 1973* (Cth)[211]. That clinically relevant service for assisted reproductive services is infertility. There is no definition of infertility in the Act.

Infertility was defined internationally as repeated attempts over the period of 12 months by a heterosexual couple unsuccessfully to conceive by unprotected sexual intercourse. That definition excluded LGBTQIA+ couples and single people. If they were seen as being medically fertile, they were deemed *"socially infertile",* and did not have the benefit of Medicare.

The medical profession, through various bodies[212], has now formed the view that infertility, in effect, is anyone who needs to undertake assisted reproductive treatment. Only in the last few months has this view been accepted by the Department of Health.

It has been a lottery for intended parents through surrogacy, especially LGBTQIA+ couples and singles, to see if their treating doctor will claim Medicare rebates for them.

[210] The concern as to the welfare of young women at the hands of unscrupulous IVF clinics being the source of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth), s.21 and matching State and Act provisions.
[211] S.3.
[212] Fertility Society of Australia and New Zealand (December 2023), Royal Australian and New Zealand College of Gynaecologists and Obstetricians (August 2024), Australian and New Zealand Society for Reproductive Endocrinology and Infertility (August 2024).

14.2 The Second Medicare Lottery

When Medicare started funding assisted reproductive services, surrogacy was excluded, as surrogacy was illegal in several States[213], and generally frowned upon. Surrogacy has long been regulated, not prohibited, but the exclusion remains[214].

There are differences between IVF clinics as to how the exclusion applies. Some clinics take the view that if it appears that there will be surrogacy (for example, a gay couple seek to produce embryos), then no rebate will be claimed. Other clinics are happy to claim the rebate for embryo creation prior to the surrogacy arrangement being entered into. It is a lottery.

A recommendation by the Medicare taskforce in 2020 to remove this exclusion has not been taken up. On my calculations, the cost to the taxpayer of removing this exclusion would be less than $1 million a year, chickenfeed in the Medicare budget.

The exclusion is an historical anomaly. In my surrogacy journey, we had three embryo transfers, at $3,000 each, not covered by Medicare.

14.3 The Third Medicare Lottery

The Medicare pain for intended parents continues after the birth. The requirements for the application for a parentage order to be made one to six months post-birth, means that children often do not receive Medicare benefits for months after they are born. During those months between when the child is born and the order is made, the child's parentage does not reflect reality. The people who may have parental responsibility do not want it. Those who need to exercise it, the intended parents, may not have it.

The band-aid of parenting plans under the *Family Law Act 1975* (Cth) now have to be used to patch who exercises parental responsibility, at a time when a child is especially vulnerable, and may have significant medical challenges. A better solution would be to recognise the intended parents as the parents upon the birth of the child.

14.4 Leave

Current leave entitlements are as per EBA's or awards. Both the surrogate and one of the intended parents can claim the Commonwealth's paid parental leave scheme.

Leave for surrogacy varies greatly in awards and EBA's. It should be a standard condition. Queensland public servants are entitled to surrogacy leave, which is the same as other parenting leave.

In 2010, a gay nurse employed by Queensland Health had undertaken surrogacy overseas. At the time, all surrogacy by Queensland residents was illegal. He sought parental leave. Queensland Health refused to provide. He was supported by his union. Following intervention by the then Anti-Discrimination Commission, the nurse obtained his leave.

There are protections under the *Sex Discrimination Act 1984* (Cth), s.14 and *Disability Discrimination Act 1992* (Cth), s.15. A female teacher employed by a Catholic Archdiocese in NSW who has undertaken surrogacy in Canada, for example, has greater protection than does a teacher employed by the State.

NSW public servants have to prove that they have engaged in altruistic surrogacy and do so by obtaining a parentage order from the NSW Supreme Court. If they have engaged in surrogacy in Canada, they cannot obtain an order from the Court.

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[213] For example, in Queensland: *Surrogate Parenthood Act 1988* (Qld).

[214] *Health Insurance (General Medical Services Table) Regulations 2021* (Cth), cl. 5.2.4.

Premier's memorandum M2018-02 provides, relevantly:

"Eligibility for surrogacy leave is to be limited to the provision of documentary evidence of the altruistic surrogacy agreement and a statutory declaration advising of the intention to make application for a parentage order as required under the Surrogacy Act 2010. *A copy of the parentage order must be provided as soon as it is obtained. This will ensure consistency with NSW legislation in how altruistic surrogacy arrangements are recognised."*[215]

The memorandum assumes that the only form of parentage establishment is in NSW. The requirement to produce a copy of the agreement, while concerned with not committing an offence as to commercial surrogacy, is arbitrary and an invasion of privacy.

Cameron Long, a teacher, employed by the Department of Education, sought to challenge this memorandum[216] on the basis of discrimination. He had twins born through surrogacy in Mexico. As he did not obtain a parentage order from the Supreme Court, he could not obtain leave.

I note that the effect, since 13 December 2024, of s.69R of the *Family Law Act 1975* (Cth) for those undertaking surrogacy in countries like Mexico, is that they are the parents. It is doubtful for those intended parents, as a result, that a parentage order could be obtained. See **page 118**. How can parentage be transferred under State law by the making of a parentage order when one is already a parent under the *Family Law Act*?

14.5 Other Reductions in Costs

Two obvious ways of reducing costs are:

1. If altruistic surrogacy is to be the model adopted by the Commission, except in those few cases where a parentage order is necessary or desirable, or in cases of traditional surrogacy, to have automatic recognition of the intended parents by operation of law. I have suggested a scheme of doing so above, based on the Revised Code of Washington state. Another is contained more briefly in British Columbia's *Family Law Act*:

   "29 *(1) In this section, "surrogate" means a birth mother who is a party to an agreement described in subsection (2).*

   (2) This section applies if,

   (a) before a child is conceived through assisted reproduction, a written agreement is made between a potential surrogate and an intended parent or the intended parents, and

   (b) the agreement provides that the potential surrogate will be the birth mother of a child conceived through assisted reproduction and that, on the child's birth,

   (i) the surrogate will not be a parent of the child,

   (ii) the surrogate will surrender the child to the intended parent or intended parents, and

   (iii) the intended parent or intended parents will be the child's parent or parents.

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[215] https://arp.nsw.gov.au/support-employees-engaged-altruistic-surrogacy-and-permanent-out-home-care-parenting-arrangements .

[216] *Long v Secretary, Department of Education* [2022] NSWCATAD 131.

(3) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (2), a person who is an intended parent under the agreement is the child's parent if all of the following conditions are met:

(a) before the child is conceived, no party to the agreement withdraws from the agreement;

(b) after the child's birth,

(i) the surrogate gives written consent to surrender the child to an intended parent or the intended parents, and

(ii) an intended parent or the intended parents take the child into the intended parent's or parents' care.

(4) For the purposes of the consent required under subsection (3) (b) (i), the Supreme Court may waive the consent if the surrogate

(a) is deceased or incapable of giving consent, or

(b) cannot be located after reasonable efforts to locate the surrogate have been made.

(5) If an intended parent dies, or the intended parents die, after the child is conceived, the deceased intended parent is, or intended parents are, the child's parent or parents if the surrogate gives written consent to surrender the child to the personal representative or other person acting in the place of the deceased intended parent or intended parents.

(6) An agreement under subsection (2) to act as a surrogate or to surrender a child is not consent for the purposes of subsection (3) (b) (i) or (5), but may be used as evidence of the parties' intentions with respect to the child's parentage if a dispute arises after the child's birth.

(7) Despite subsection (2) (a), the child's parents are the deceased person and the intended parent if

(a) the circumstances set out in section 28 (1) [parentage if assisted reproduction after death] *apply,*

(b) before a child is conceived through assisted reproduction, a written agreement is made between a potential surrogate and a person who was married to, or in a marriage-like relationship, with the deceased person, and

(c) subsections (2) (b) and (3) (a) and (b) apply."

Statutory provisions enabling recognition by operation of law also occur in Manitoba, Ontario, Illinois, Pennsylvania, Russia, Ukraine, Georgia, Kazakhstan, and Kyrgyzstan, for example.

Intended parents would not have post-birth legal costs (and in NSW, NT and Queensland, counselling and assessment costs), nor having to pay a filing fee (which in NSW and Queensland is about $1,000) or two sets of birth certificates.

2. If the model is to allow compensated or commercial surrogacy, then pre-birth orders should be the norm, for all gestational surrogacy, including altruistic surrogacy (so to minimise avoidance). The volume of material required, and therefore the cost, is substantially less than that now required in most Australian States.

3. Not have to obtain approval from a statutory regulator at commencement, as is required in Victoria and Western Australia.

4. Not requiring the donor and partner to be a party to the surrogacy arrangement (and therefore having to find a known donor) as Western Australia, unique worldwide, requires.

Question 15: How could the process for reimbursing surrogates for reasonable expenses be improved? You might want to consider:

a) what expenses should be reimbursable;

b) how payment should be calculated;

c) if there should be limits on any amounts;

d) the process for reimbursement (for example, whether money should be kept in trust, whether there should be a requirement to produce receipts, etc.); and

e) any jurisdictions (either within Australia or overseas) that have processes for reimbursement worth learning from.

There is generally wide scope for reimbursement of expenses, although seemingly less than that in Western Australia. Recent changes in Victoria and the ACT to allow for the surrogate's partner to have time off, for example, are to be applauded. One uniform set of rules would be a vast improvement than the current 8 rules, which impact on interstate surrogacy journeys, adding to the cost for intended parents. In my view, US surrogacy agencies maintain robust practices to ensure that payments are in accordance with the agreements.

In the absence of a new category of trust accounts for surrogacy agencies, monies can be held in solicitors' trust accounts, and paid accordingly.

Question 16: Do you support:

a) compensated surrogacy; and/or

b) 'commercial' surrogacy?

You might want to consider whether you agree with how we have described compensated and 'commercial' surrogacy.

I support either. I submitted to the House of Representatives surrogacy inquiry 9 or 10 years ago putting a regulated cap of say $10,000 as the fee for the surrogate. Adjusted now, that would be $12,879, which seems on reflection to be remarkably low for the risk and commitment involved. If there is a regulated cap, it would need to be indexed.

Average weekly earnings are $2,047. If paid over 40 weeks, that is in excess of $80,000. That figure seems excessive.

If there is to be commercial surrogacy, then there ought to be clear guidelines, implemented by an appropriate authority, either a supervising court (as occurs in California) or the regulator of agencies, as to what is seen as the upper threshold as to what surrogates should be paid as their fee, before it is so high that it might be deemed exploitative of them. Enabling the fee to be too high, risks excluding many intended parents due to cost.

Experience shows that second time surrogates in the United States demand a higher fee than first time surrogates, although they have higher obstetric risk. There has been a significant increase in the fees of

surrogates in the United States since Covid. Pre-Covid, a first time surrogate in southern California (the most expensive destination) would have a fee of US$37,500 to US$42,000. Currently that is in the range of US$50,000 to $65,000, which is more expensive than other parts of the United States, such as the South or the Midwest. Some would be surrogates have demanded that they be paid US$100,000 as their fee, typically because they were immediately available, lived in Los Angeles, and were a second time surrogate.

On reflection, I would prefer to trust the market to determine the amount, subject to there being an upper threshold as determined by a regulator, or a supervising court.

Question 17: If Australia was to allow for compensated or 'commercial' surrogacy, how could this be implemented? You might want to consider:

a) how compensation should be calculated;

b) if there should be a limit on the amount of compensation;

c) who should set the amount of compensation;

d) the process for compensation (for example, whether it should be paid in monthly instalments, whether the money should be kept in trust etc); and

e) any jurisdictions (either within Australia or overseas) that have processes for How compensation worth learning from.

Discussed above. Surrogates in the United States, Canada, Colombia and Mexico, for example, are typically paid their fee (or expenses, in Canada) in monthly instalments during the pregnancy, with the last payment being made at or about the time of the child's birth. Payments are also made to them for their specified expenses. There are also extra payments if things go wrong, for example, multiples being born, D &C, loss of reproductive organs and the like. I can provide the Commission with examples of payments, if that assists.

Monies for surrogates should be paid through trust accounts. In the absence of legislation allowing surrogacy agencies to hold trust accounts, these trust accounts would be those operated by solicitors.

Question 18: What are the main problems with the requirements and processes for obtaining legal parentage for a child born through domestic and/or international surrogacy?

The current domestic process is based on the premise that the surrogate is the mother, and hence there should be 1-6 months during which the application is filed. Experience teaches me that most applications are lodged between 4 to 5 months post-birth, because intended parents have the care of their child, and are having little sleep. It is a remarkably slow process compared to other post-birth processes, such as Alberta (2-3 business days post-birth) and Ontario (when court orders are obtained), 2-4 weeks post-birth. The model of 1-6 months post-birth is copied form the United Kingdom, and ultimately derived from a constituency question of an MP in Westminster. For the child's sake, parentage should reflect the child's reality, and the intentions of the parties, and be effected quickly.

Internationally, there are three challenges about establishing parentage:

1. Citizenship/visa

2. Family law

3. Passport

18.1 Citizenship/visa

For Australian citizenship (or an Australian visa) , it is necessary to show that the child at birth had an Australian citizen parent. The effect of *H v Minister for Immigration and Citizenship* has been:

a) If the child is born in a country where parentage orders are made, for example, United States, Canada, Greece, South Africa, Mexico- the Department of Home Affairs tends to rely on those, and accompanying paperwork, such as the surrogacy contract, to establish parentage. Since the commencement of the *Family Law Regulations 2024* (Cth), s.10, and its effect on the *Family Law Act 1975* (Cth), s.69R, one would hope that this process for children born in recognised jurisdictions is less burdensome.

b) For countries where parentage occurs by operation of law, but the country is a known surrogacy destination, for example, Georgia, the Department tends to rely on the surrogacy contract, and related paperwork.

c) For countries that are not known surrogacy destinations, and where parentage orders are not made, the Department tends to rely on parentage testing to determine parentage.

It would be helpful for the Department to list on its website in a transparent way, even if it is only the countries recognised under the *Family Law Act 1975*(Cth), s.69R, and the acceptable form of proof of parentage, e.g., United States, court order granting parentage and birth certificate.

I would support a pre-check approval process for intended parents in obtaining citizenship and passports from Australian authorities before the birth of a child- so that when the child is born, citizenship and passport applications can be approved almost immediately. This would require loading up information to the relevant Departments at the earliest possible moment, for example from 16 weeks gestation upon obtaining a pre-birth order, and a co-operative fast track, involving both the Departments of Home Affairs and DFAT giving pre-approval.

18.2 Family law

Historically, the Family Court had mixed approaches to children born overseas by surrogacy, recognising parentage, or not, or saying its was unclear. This led to an odd outcome- that an arm of the Australian Government was clearly recognising the parentage of the child, but another arm was not.

Those who have become parents through adoption are automatically recognised as the parents. Adoption is the form of regulation of surrogacy in New Zealand, and in some United States states, either for both parents, or one of them, for example, in Florida, Hawaii, Iowa, Tennessee and Minnesota.

The odd situation then arose for those who had undertaken surrogacy in one of those US jurisdictions that the genetic father of the child was not, or was unlikely to be, a parent for family law purposes in Australia[217], but his partner, the non-genetic father, was a parent for family law purposes in Australia, under a second parent adoption, because of the effect of the *Family Law Act 1975* (Cth), s.4 definitions of *adopted*, *child*, *parent*. And yet the second parent only attained parenthood in that overseas jurisdiction because the genetic parent was recognised as a parent in that overseas jurisdiction[218].

However, that same second parent may not be recognised under State laws as a parent[219], and have to rely on s.109 of the Constitution to be recognised as a parent.

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[217] Because of the effect of *Bernieres & Dhopal* [2017] FamCAFC 180.
[218] The very issue identified in *Blake* [2013] FCWA 1, with a domestic step-parent adoption.
[219] For example, *Adoption Act 2000* (NSW), s.105.

About ten years ago, I devised registering US surrogacy orders under the *Family Law Act* as a workaround. These were costly, slow and risky. Two of these were unsuccessful, because the Court was of the view that they may have been commercial surrogacy, which was against public policy[220].

Since *Masson*, there has been clarity about who is a parent under family law, who gained parentage overseas, it being a question of fact:

- A man who provided his sperm who intended to be a parent of the child, and then parented: *Seto & Poon*, *Tickner & Rodda*, *Gallo & Ruiz*.
- It is likely that the non-genetic father through IVF, because he intended to parent the child: *Mizushima & Crocetti (No 3)*.
- A parent through an overseas court order: *W & T*.
- A parent recognised through operation of law overseas as a parent, irrespective of biology: *H v Minister*.
- Based on the same underlying test under the *Australian Citizenship Act* as that under the *Family Law Act*, the person has been recognised by the Australian Government as a parent because the child has been granted Australian citizenship by descent.

The greater difficulty has been where the overseas process did not seemingly involve the second parent. Those examples are:

- One parent alone was recognised on the birth certificate. Ten or more years ago, Australian children were born via surrogacy in India to gay Australian men who had a partner. The surrogacy contract was only with the biological father. The partner was rendered (and remains rendered) invisible.

- The biological father and the surrogate are shown on the birth certificate as the parents. The certificate does not reflect the child's reality. The other parent was rendered (and remains) invisible. Children born in North Cyprus (as per *Lloyd & Compton*), Guatemala, Peru, Malaysia, Thailand, and some jurisdictions in Mexico are examples of this.

Except for a step-parent adoption, and possibly the ability of the ACT and NSW Supreme Courts to make parentage orders in overseas commercial surrogacy arrangements, there is no method of removing the surrogate and substituting the partner. If a parenting plan has not been entered into, or the parties live in Queensland[221], then leave to adopt is first required under the *Family Law Act*, before the step-parent adoption is later made, up to 5 years later. It is a slow and expensive process. Leave to adopt, or the adoption may be declined based on public policy grounds.

There is no method, absent obtaining a parentage order either in the ACT or NSW, when there is a single intended parent, in removing the surrogate from the birth certificate. The ACT method is flawed, because there is no time limit for the extra-territorial offence there, with the result that applicants may incriminate themselves in making the application, and put themselves at risk of prosecution. S.128 of the *Evidence Act 1995* (Cth) only applies following the making an order by the Court, typically when a party is giving oral evidence, which is well after an affidavit has been executed.

18.3 S.69R *Family Law Act 1975* (Cth)

There was a transformative change on 13 December 2024, that has enabled many more people to be recognised as parents under the *Family Law Act* when they underwent surrogacy overseas. Prior to then,

[220] *Rose* [2018] FamCA 978; *Allan & Peters* [2018] FamCA 1063.
[221] *Adoption Act 2009* (Qld), s.92(1)(d).

the *Family Law Regulations 1984* (Cth) recognised, in reg. 25 for the purposes of s.110 of the Act (international maintenance obligations) various jurisdictions in schedule 2 of those regulations.

Section 69R of the Act provides:

> *"If a person's name is entered as a parent of a child in a register of births or parentage information kept under a law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, the person is presumed to be a parent of the child."*

No overseas jurisdiction was prescribed. Therefore, there was no presumption of parentage arising from any foreign birth certificate.

The *1984 Regulations* were replaced on 13 December 2024 by the *Family Law Regulations 2024* (Cth). Section 10 of the *Regulations* provides, relevantly:

> *"(1) For the purposes of the definition of* ***prescribed overseas jurisdiction*** *in subsection 4(1) of the Act, this section declares countries, or parts of a country, outside Australia to be a prescribed overseas jurisdiction for the purposes of provisions…*
>
> *Provisions relating to presumptions of parentage and proof of birth, parentage, death or marriage*
>
> *(3) Each country, or part of a country, specified in an item of the table in Schedule 2 as a reciprocating jurisdiction, and each jurisdiction prescribed in an item of the table in Schedule 4, is declared to be a prescribed overseas jurisdiction for the purposes of:*
>
> *(a) each provision of Division 12 of Part VII of the Act; and*
>
> *(b) section 102 of the Act.*
>
> *Note: This meaning applies in provisions of this instrument that are made for the purposes of those provisions: see subsection 13(1) of the Legislation Act 2003."*(emphasis added)

S.69R is in Subdivision D of Division 12 of Part VII of the Act. Accordingly, who is a parent according to any jurisdiction named in Schedules 2 and 4 is presumptively a parent under the Act. **Table 18** lists surrogacy jurisdictions where parentage is now recognised under s.69R. Prominent surrogacy destinations have been highlighted.

Table 18: Surrogacy jurisdictions where parentage is recognised under *Family Law Act 1975*, s.69R, *Family Law Regulations 2024*, s.10, schedules 2 and 4

Jurisdiction
Brazil
Canada- all except Quebec[222]
Colombia
Denmark[223]
Greece
Guatemala

[222] I am not aware of any Australian surrogacy birth ever having occurred in Quebec, despite over 200 Australian children being born through surrogacy in Canada, according to the Department of Home Affairs.
[223] Denmark is not a surrogacy destination. It is estimated that for every child born in Denmark through surrogacy, 19 are born overseas.

Jurisdiction
India
Israel
Kazakhstan
Kyrgyzstan
Kenya
Mexico
New Zealand
Republic of Ireland[224]
South Africa
Sri Lanka
Ukraine
United Kingdom
United States of America

18.4 Passports

DFAT takes the view that the surrogate is a parent for the purposes of the *Australian Citizenship Act 2007* (Cth), s.11(2), because she is the "natural" parent, as she gave birth. This ignores overseas law, for example a court order, which makes plain that she is not. One wonders whether DFAT has considered the impact of the *Family Law Regulations 2024* (Cth), s.10, on who is a parent.

DFAT's *"solution"* is for the surrogate to sign a form B5 consent to the issue of the passport. This works well after the birth of the child, but must be executed every time there is a renewal (typically, 5 years). Some DFAT officers accept the initial consent for renewal applications. Others do not.

The alternatives are obscure, and can be costly:

- Applying for dispensation under the *Family Law Act.*
- Obtaining a court order overseas that permits the child to travel internationally or for the intended parents to obtain a passport.
- Relying on the surrogate not having an ongoing relationship with the child.

The first option is rarely invoked as it is seen as costly and slow, with no certainty of outcome.

The second option only applies in *1980 Hague Countries* that are parties with Australia to that Convention. Clients of mine have had these orders issued in various US states, various Canadian provinces and in South Africa. Although each of Greece and Mexico are also parties with Australia to the Convention, the form of order in those countries does not allow for this order to be made. There has been resistance by some judges in the US and Canada to the making of these orders. For a colleague in Canada, I execute from time to time an affidavit for the benefit of the Canadian court setting out this obscure mess, in order to enable such an order to be made there. Recently, a client of mine had such an order refused by a US

[224] Ireland legislated for surrogacy in 2024.

court, as the judge does not believe that he has the jurisdiction to so order. After further representations, the Court made the order.

A solution may be to recognise overseas parentage under the *Family Law Act* by amending s.69R to "an" overseas jurisdiction, instead of "prescribed" overseas jurisdiction, and amend s.11(2) of the *Australian Passports Act 2005* (Cth) so that it is consistent with that recognition, but for the interim for DFAT to recognise as parents those who are presumed parents under s.69R (and conversely, *not* to recognise surrogates in those jurisdictions as parents under s.11(2) unless they too are presumed to be parents under the *Family Law Act*).

DFAT undertook a review of this issue in 2024. I do not know the outcome.

Question 19: How could the process for intended parents to become the legal parents of children born through surrogacy be improved? You might want to consider:

a) timing (for example, if the process happens before or after the birth of the child);

b) who makes the decision (for example, if it is an administrative or judicial decision);

c) if recognition should be automatic;

d) if the process should be different depending on the circumstances (for example, based on whether the surrogate has a genetic link to the child, the type of payment they received, and whether the surrogacy arrangement was in Australia or overseas);

e) whether intended mothers are or should be treated differently to intended fathers in legal parentage determinations;

f) whether the granting of legal parentage should depend on compliance with process requirements;

g) the importance of prioritising the best interests of the child; and

h) whether we can learn from the processes of any other countries.

The primary task must be to uphold the right of the child as to their identity, by a simpler and more certain process of parentage establishment. There could be:

a) an order made after the written surrogacy arrangement is entered into, but before pregnancy (a pre-conception order), the effect of which is at birth that the intended parents are automatically the parents[225]; or

b) an order made after the written surrogacy arrangement is entered into and after the pregnancy commenced (a pre-birth order)[226]; or

c) an order made *shortly* after the birth of the child, recognising the intended parents as the parents, provided certain prescribed requirements have been met[227]. In Alberta, for example, that order is

[225] As occurs in Greece, Israel and South Africa.
[226] As happens in many US states.
[227] For example, Texas, Florida and several Canadian provinces.

made 2 to 3 business days post-birth, not typically 5 or 6 months post-birth, as occurs here now[228]; or

d) by an administrative process with the Registrar of Births, Deaths and Marriages for eligible, gestational surrogacy matters. It would be used when there is not a dispute as to parentage, and an order is not required (for example, for international recognition). This process occurs in two US states[229] and three Canadian provinces[230], and has been recommended by Law Commissions in both the United Kingdom[231] and New Zealand. Its advantages are low cost, speed and certainty, it upholds the child's human rights (while protecting those of the surrogate and intended parents), and conserves judicial resources for only those cases where an order is needed[232].

Having experienced what I experienced following the birth of my daughter, and having seen limping parentage last for many months, it is necessary in my view to have certainty as to who are the child's parents upon birth. If the model to be adopted is of altruistic surrogacy only, then have automatic recognition of parentage by operation of law. If the model is to be compensated or commercial, then a pre-birth order for all gestational surrogacy, so that there is judicial oversight.

Given resourcing issues, I cannot imagine pre-birth orders being reasonably achievable by the Federal Circuit and Family Court of Australia, unless there are significant changes to its processes for these cases, both as to the *Act* and *Rules*, and who handles these applications. There would need to be changes to the *Family Law Act* to enable pre-birth orders to be made, and to the *Family Law Rules* to enable registrars to make those orders if they are consented to. A clear timeline should be mandated in the *Rules* as to when it is required for those applications to be disposed of, such as within 2 weeks from lodgment. Practitioners should be encouraged by the Court in its publications to lodge no later than 16 weeks gestation.

For the last almost 40 years I have lodged applications for consent orders for property settlement or parenting matters with the Court, to be determined by Registrars on the papers. The processing time takes 2 to 8 weeks, depending on resourcing. If a Registrar is newly appointed, then it is common for letters issuing requisitions to be attended to, so that they can satisfy themselves as to certain matters- a practice that does not occur with experienced Registrars. The issuing of requisitions slows the process down even further.

A disadvantage of the pre-conception process is that embryos are only created when authorisation is granted, without any certainty of pregnancy being attained. In a recent case from Greece, after my clients waited many months to obtain authorisation, on the second attempt at pregnancy with their surrogate, they were told that they had to start again with someone else. This means that after they have found another surrogate they have to start the pre-conception authorisation process all over again[233].

Where there has been traditional surrogacy, I have suggested above that as per the state of Washington, there be a pre-birth validation of the contract, and the ability within 48 hours of the birth for the surrogate to change her mind.

For overseas births, there ought to be a flexible court or administrative process to recognise both parents (or remove the surrogate from the birth certificate), where the parentage is not automatically recognised as per s.69R.

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[228] From my experience, most intended parents, confronted by lack of sleep and the existence of their baby, are slow to apply for parentage after their child is born.
[229] Illinois and Pennsylvania.
[230] British Columbia, Manitoba and Ontario.
[231] https://lawcom.gov.uk/project/surrogacy/ .
[232] I have prepared a comparison table of parental recognition by pre-conception order, pre-birth order, operation of law, contract and post-birth in many jurisdictions in Table 6.1 of my book, *International Assisted Reproductive Technology*, American Bar Association, 2024.
[233] From May 2025, surrogacy is not available to foreigners in Greece.

Question 20: What, if any, are the main problems with obtaining the following documents for a child born through international surrogacy:

a) Australian citizenship;

b) an Australian passport; or

c) an Australian visa.

I have identified most of these issues above. There are two groups of children I am especially concerned about. Australian-Chinese heterosexual couples have undertaken surrogacy in China. It is lawful for them to have done so, but the doctors commit offences in facilitating surrogacy there[234]. Typically, the intended parents do not meet the surrogate, or if they do, it might be a hurried 10 minute meeting, plus attendance at the birth. Typically, they are not told her name.

I wish to make plain that I do not condone these practices in China. They seem to be exploitative of all but the doctors concerned, and particularly exploitative of the surrogates and the children. I would hope that China either cracks down on this practice, or liberalises surrogacy.

The result has been that children have been born. The intended parents are recorded on the birth certificate as the parents. A Chinese birth certificate is unlike an Australian one. Australian courts peer behind birth certificates to determine parentage. Chinese birth certificates, by contrast, are determinative. The parents are sold a story that they will have a child and will be recognised as the parents, but then discover the peril for their children.

These intended parents are like many others who go to some overseas destinations armed with a lack of information, blinded by desperation to be parents, and beguiled by dodgy surrogacy agencies and doctors. They, too, have been exploited.

Applications have been made for Australian citizenship or permanent residence of the children. Typically, the children were conceived from sperm of the father and an egg from an anonymous donor. While the men have been accepted as a parent in citizenship applications under s.16(2) of the *Australian Citizenship Act 2005* (Cth), citizenship has been refused because the officer could not be satisfied as to the child's identity under s.17(3), because the surrogate could not be identified.

The result? The children are stuck in China, not able to enter Australia, either because they cannot obtain a visa or citizenship. Where one of the parents retains Chinese citizenship[235], the children can at least be educated and live as Chinese citizens.

In one particularly harsh case, twins were born. At the time they were 5. Their parents had taken Australian citizenship (and therefore were no longer Chinese citizens, and therefore had lost the ability to live in China). The children were stateless. One child was cared for by one grandmother in Shanghai, the other by the other grandmother in Beijing. For reasons outside their control, the children were not with their parents nor with each other.

I would hope that there are transitional provisions to allow these children to attain Australian citizenship or visas, given their unique circumstances and our international obligations to uphold these children's human rights.

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[234] *Administrative Measures for Assisted Reproductive Technology 2021*, Arts. 3, 22; Norms of Assisted Reproductive Technology 2003, Ethical Principles of Assisted Reproductive technology and Huiman Sperm Banks 2003, subsection5, part 3.

[235] China does not recognise dual citizenship.

Question 21: How could the process for obtaining these documents be improved?

The Australian Government must be given credit for helping bring home children quickly from surrogacy crises abroad, when the rules were changed suddenly:

- India, 2012
- India, 2014
- Thailand, 2014
- Nepal, 2015
- Cambodia, 2016
- Tabasco, Mexico, 2016
- Pandemic: 2021-2022
- Greece, 2023
- Argentina, 2024.

We should be proud of the efforts of our Government in what are the most difficult and trying circumstances.

For those whose child was born overseas through surrogacy in a country, like Mexico or Colombia, the process of obtaining Australian citizenship overseas typically takes about 4 weeks, and another 2 weeks to obtain an emergency passport to enable the child to return home. Since 2014, the process of bringing home a child from Mexico typically takes about 8 weeks, although in the pandemic that increased to 10 weeks. Since the pandemic, citizenship has been applied for online. The passport has been applied for by making an appointment at the Australian embassy.

In some countries, there is a lack of diplomatic representation, which has made the obtaining of the passport difficult. For example, many Australian children have been born in Georgia. The passport is obtained through the Australian embassy in Ankara.

For those undertaking surrogacy in Canada or the United States, the process is even quicker. Before and after the pandemic, the favoured method to come home is to obtain a Canadian or US passport for the child, download the ETA app on their phone, have that approved in 10 or 15 minutes, then bring their child back to Australia as a Canadian or American tourist- at which point the applications for citizenship and passports are then made.

During the pandemic, this method was not available. The Australian Government processed the applications for Australian citizenship while the parents and child were in Canada or the US within 1 to 7 business days, much shorter than the norm of 1 month.

There has been a trend noticeable by international colleagues of an ever increasing burden on Australian intended parents in the production of documents when applying for Australian citizenship and passports. An example has been since 2022 of requiring a notarised colour copy of Government issued photo ID with signature of the surrogate and a certified copy of the birth certificate of her partner. The reasoning is to comply with the requirement to establish the child's identity under s.17(3) of the *Australian Citizenship Act*. This requirement as to the ID is not provided for by statute or by regulation, but has come about from the unstated practices of the Department of Home Affairs. The purpose is to establish that the child has not been trafficked.

Even with low risk destinations such as the United States, it is not enough to merely supply the Court order to establish parentage. Officers require a copy of the surrogacy agreement, and preferably the whole chain:

- Retainer agreement of the egg donor agency
- Egg donor agreement
- Retainer agreement of the surrogacy agency
- Surrogacy agreement
- Court pleadings
- Court order
- Birth certificate
- Letter from the treating doctor setting out the genetic origin of the child.

One wonders what approach will now be taken, given the enlivening of s.69R of the *Family Law Act* since 13 December 2024.

Officers can become more concerned when there is not a genetic link, out of concern with trafficking. In some cases, this has resulted in substantive statutory declarations being produced, with many attachments, showing the history of the whole surrogacy journey.

Question 22: What is the best way to approach differences in surrogacy regulation between or within jurisdictions? You might want to consider:

a) the ways in which surrogacy regulation is inconsistent between jurisdictions;

b) if these inconsistencies are problematic;

c) any impacts of the differences between federal legal regimes (for example, citizenship law and family law);

d) if a judicial process for transferring legal parentage is retained, whether applications for parentage should be determined in state courts, the Federal Circuit Court and Family Court of Australia, or both;

e) how important it is that the approaches are harmonised or made more consistent; and

f) how any harmonisation could be achieved (for example, by regulating surrogacy at a federal level or through uniform or substantively consistent state legislation).

Interstate surrogacy journeys- where the intended parents live in one State and the surrogate in another- are common. The parties have to navigate inconsistent surrogacy laws. Most allowable expenses are now reasonably consistent between the States, but Western Australian remains an outlier. It may be that reforms finally occur there. Currently, the *Surrogacy Act 2008* (WA) does not appear to allow reimbursement of travel or accommodation. Therefore, if intended parents live in New South Wales but the surrogate lives in Western Australia, reimbursement of the surrogate's travel and accommodation to the IVF clinic in Sydney, while lawful in NSW, is illegal in Western Australia.

Entering into surrogacy arrangements should not be so hard. There should be uniformity of laws[236] throughout the country, as the House of Representatives called for nine years ago. Sadly, whilst the States and Territories have slowly and incrementally made changes to be consistent, the pace of change has been out of kilter with the reality of Australians undertaking surrogacy.

If there is to remain judicial oversight of surrogacy arrangements, which I call for in some cases, then:

1. Disputed cases should be before the Federal Circuit and Family Court of Australia/Family Court of Western Australia, as those courts deal with parenting disputes daily.

2. It should be at the election of the applicants as to non-disputed cases (e.g. for international recognition, or by consent) that these are in the Federal Circuit and Family Court of Australia or state or territory courts. This is because:

    a) Generally, state courts are quicker to hear applications than the FCFCOA. A parentage application in Queensland, for example, can be listed in 2 to 6 weeks. A non-disputed parenting application between sisters (where there was a pseudo-adoption, when one sister gave her child by an unknown father to her childless, infertile sister at birth[237]), by contrast took 8 months in the FCFCOA before it was heard and determined.

    b) State judges have much experience in dealing with children, albeit juvenile delinquents. They have shown much deftness of touch and sensitivity in dealing with parentage applications, which has been a pleasant surprise to an old family lawyer like me.

3. I ask that if there is to be a consent court transfer of parentage, that there be an actual court appearance, where if possible:

    a) the parties are able to appear in person (with the child and significant others, such as the child's siblings, children of the surrogate and her partner, grandparents)

    b) they are made to feel welcome

    c) the court maintains confidentiality of the proceedings

    d) immediately after determination, photos are able to be taken in the courtroom of such a momentous occasion.

Question 23: Is it appropriate for surrogacy arrangements to be subject to oversight? If so, what is the best approach? You might want to consider:

a) the need for a regulator or oversight body and what it could look like (for example, an administrative body or a tribunal);

b) if oversight should be national or state and territory based; and

c) which groups need oversight (for example, health professionals).

Although surrogacy is a legal process, ART is a medical process.

IVF clinics are regulated (currently inconsistently), by the NHMRC, RTAC and State and Territory Health Departments. That may soon change.

[236] I am not calling for a template of surrogacy agreements.
[237] Relative adoptions are not permitted in Queensland.

Fertility doctors are regulated in their billing practices for Medicare by Services Australia. Otherwise, they, fertility nurses and fertility counsellors are regulated by AHPRA.

I seek the regulation of surrogacy agencies, preferably by one body, such as RTAC or any successor, and the investigation and prosecution of predatory surrogacy practices, with he banning of the individuals and entities from undertaking surrogacy work.

I would hope that as part of the review of IVF regulation that there is also individual registration of embryologists, given the recent embryo errors reported by Monash IVF.

In sum, while there are legal issues, overall regulation of surrogacy should be undertaken by our various Health Departments, as it is by the federal Health Department in Canada. While surrogacy is a family law issue, the regulation of those associated with surrogacy, primarily IVF clinics, is the purview of health authorities.

If there is to be such a model, that there be protocols between that regulator and the Federal Circuit and Family Court of Australia/Family Court of Western Australia, or State and Territory courts, so that if there are concerning trends arising with surrogacy cases, these can be speedily addressed.

Question 24: Should the law have a role in discouraging or prohibiting certain forms of surrogacy? You may wish to consider:

a) if engaging in or facilitating certain forms of surrogacy, whether in Australia or overseas, should be sanctioned or criminalised;

b) the effect of using the criminal law to regulate certain forms of surrogacy; and

c) whether there are regulatory approaches preferable to the criminal law.

As I have said above, surrogacy should be decriminalised. Predatory surrogacy practices should be criminalised, as seen, for example, in the *Surrogacy Act 2019* (SA), s.25(1):

> *"(1) A person who, by threat of harm, or by dishonesty or undue influence, induces another to enter a surrogacy agreement is guilty of an offence.*
>
> *Maximum penalty: Imprisonment for 5 years."*

Aside from significant conflict of laws between Australia and overseas, there are three hurdles intended parents have to jump over to undertake surrogacy overseas:

1. Human cloning and human tissue laws.

2. Surrogacy criminalisation

3. Adoption laws

24.1 Human cloning and human tissue laws

Human cloning laws criminalise commercial egg donation with up to 15 years imprisonment, which in 6 of 8 jurisdictions can apply overseas, as seen in **Table 19**. As I said on **page 29**, about 75% of my clients who undertake surrogacy also undertake egg donation.

There are numerous reported cases of Australian intended parents undergoing surrogacy overseas, along with egg donation[238].

If my client base and the reported cases are representative of the whole, many of those undergoing surrogacy overseas are at risk of committing these offences. The human tissue offences may arise (except in Queensland[239]) by the surrogacy agreement making provision for supply of colostrum and breastmilk by the surrogate after the child is born.

TABLE 19– When Egg Donor laws may apply overseas

Jurisdiction	**Law**	**How it may apply overseas**
Commonwealth	*Prohibition of Human Cloning for Reproduction Act 2002*, s21	S.4 international trade and commerce
Australian Capital Territory	*Human Cloning and Embryo Research Act 2004*, s19 *Transplantation and Anatomy Act 1978*, s44	*Criminal Code 2002*, s64
New South Wales	*Human Cloning for Reproduction and Other Prohibited Practices Act 2003*, s16 *Human Tissue Act, 1983* s32	*Crimes Act 1900*, s10C *Crimes Act 1900*, s10C
Northern Territory	*Transplantation and Anatomy Act 1979*, s22E	*Criminal Code 1983*, s43CA
Queensland	*Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003*, s17 *Transplantation and Anatomy Act 1979*, s40	*Criminal Code 1899*, s12
South Australia	*Prohibition of Human Cloning for Reproduction Act 2003*, s16 *Transplantation and Anatomy Act 1983*, s35	*Criminal Law Consolidation Act 1935*, s5G
Tasmania	*Human Cloning for Reproduction and Other Prohibited Practices Act 2003*, s18 *Human Tissue Act 1985*, s27	N/A
Western Australia	*Human Reproductive Technology Act 1991*, s53Q	*Criminal Code 1913*, s12
Victoria	*Prohibition of Human Cloning for Reproduction Act 2008*, s17 *Human Tissue Act 1982*, s39	N/A

[238] For example, *Bernieres & Dhopal* [2017] FamCAFC 180; *Carlton & Bissett* [2013] FamCA 143; *Dudley & Chedi* [2011] FamCA 502; *Ellison & Karnchanit* [2012] FamCA 602; *Farnell & Chanbua* [2016] FCWA 17; *Lloyd & Compton* [2025] FedCFamC1F 28.

[239] The definition of *tissue* in Queensland since 2022 has excluded human milk: *Transplantation and Anatomy Act 1979* (Qld), s.4.

24.2 Criminalisation of overseas commercial surrogacy

Criminalisation of overseas commercial surrogacy is by both specific extraterritorial laws *and* longarm laws in the ACT, NSW and Queensland, and by longarm laws in the NT, SA and WA, as seen in **Table 20**. No one has ever been prosecuted, at least since 2010: see **page 73**.

TABLE 20 – How are Surrogacy Laws applicable overseas?

Jurisdiction	Surrogacy law	Extraterritorial law	Longarm law
Commonwealth	N/A		
ACT	*Parentage Act 2004*, s41	*Parentage Act 2004*, s45	*Criminal Code*, s64
NSW	*Surrogacy Act 2010*, s8	*Surrogacy Act 2010*, s11	*Crimes Act 1900*, s10C
NT	*Surrogacy Act 2022*, ss48 & 49	N/A	*Surrogacy Act 2022*, s8 *Criminal Code 1983*, s43CA
Queensland	*Surrogacy Act 2010*, ss56 & 57	*Surrogacy Act 2010*, s54	*Criminal Code*, s12
SA	*Surrogacy Act 2019*, s23	N/A	*Criminal Law Consolidation Act 1935*, s5G
Tasmania	*Surrogacy Act 2012*, s40	N/A	N/A
Victoria	*Assisted Reproductive Treatment Act 2008*, s44 *Assisted Reproductive Treatment Regulations 2019*, Reg 11, 11A	N/A	N/A
WA	*Surrogacy Act 2008*, ss8 & 11	N/A	*Criminal Code 1913*, s12

24.3 Criminalisation of overseas surrogacy via adoption laws

If the *form* of surrogacy parentage recognition overseas is via adoption[240], then intended parents can be caught by the various *Adoption Acts*, by paying for the surrogate's expenses, as seen in **Table 21**.

TABLE 21 – Australian Adoption Laws that apply to payment overseas

Jurisdiction	***Adoption Act***	Offence section	Application relating to overseas adoption
Commonwealth	N/A		
ACT	*Adoption Act 1993*	s.94	s.88

[240] For example, various US states and New Zealand.

Jurisdiction	*Adoption Act*	Offence section	Application relating to overseas adoption
NT	*Adoption of Children Act 1994*	s.69	s.67
NSW	*Adoption Act 2000*	s.177	s.177
Queensland	*Adoption Act 2009*	s.303	s.301
SA	*Adoption Act 1988*	s.28	*Criminal Law Consolidation Act 1935*, s.5G
Tasmania	*Adoption Act 1998*	s.107	s.102
WA	*Adoption Act 1994*	s.122	s.121
Victoria	*Adoption Act 1984*	s.119	s.116

It is thought by those living in Victoria and Tasmania, for example, that they are not at risk of ever committing an offence with their overseas surrogacy journey. That is simply not so, as the example of Harry and Will makes plain.

Harry and Will

Harry and Will are a married couple living in Victoria. They undertake surrogacy with Irene in Iowa. Irene is paid a fee of US$45,000 plus expenses. Irene is single.

Harry is the genetic father. Under Iowa law, Harry is recognised as the father[241]. In order for Will to be recognised as a parent under Iowa law, a second parent adoption has to be undertaken[242], which is required to be consented to by Irene[243].

In undertaking this journey, Harry and Will may have committed an offence under the *Adoption Act 1984 (Vic)*, s.199(1) by agreeing to make payment for or in consideration of the transfer of possession of the child with a view to the adoption of the child, by signing and sending the surrogacy agreement from Victoria, or sending the payment for the surrogate from Victoria: *Adoption Act 1984* (Vic), s.116.

State and Territory *Adoption Acts* should be amended so that payments to surrogates overseas (where the form of surrogacy is regulated by adoption) are excluded. As discussed above, criminalizing surrogacy is very much a "failed experiment". Where there is evidence of human trafficking, then there should remain vigorous efforts to bring the perpetrators to justice, in order to deter that evil.

Having a big stick as a tool available to the State in regulating surrogacy agencies should give a clear message as to what practices are acceptable, and what are not. Having a protocol between the FCFCOA and the Health Department should reduce the risk of information being confined to silos.

Question 25: Do you think there is a need to improve awareness and understanding of surrogacy laws, policies, and practices? You might think about how people currently find out about surrogacy, or the particular groups or professions who could benefit from improved education and information.

[241] *Iowa Code*, s.99.15(6)(a).
[242] *Iowa Code*, s.99.15(6)(f).
[243] *Iowa Code*, s.600.7.

A long complaint of intended parents, that I hear frequently, and was highlighted in several reviews, such as the 2016 House of Representatives inquiry, is a lack of reliable information about surrogacy for surrogates and intended parents by governments. The one government agency that had significant reliable information was that of VARTA- which has been abolished. Surrogacy is too often an after thought, passed between Attorneys-General Departments and Health, and seemingly often forgotten.

An example is our biggest State, NSW, where the information provided is woeful. On one page[244], NSW Health says this, buried down the bottom of the page:

> ***"Surrogacy***
>
> *The Surrogacy Act 2010 provides a framework for the Supreme Court to grant orders that transfer the full legal parentage of children from their birth parent/s to the intended parent/s under a surrogacy arrangement. The legislation sets out the requirements for the reporting of children born using a surrogate including the making of parentage orders.*
>
> *Intended parents must now register information about themselves, their child and the surrogate, as well as any person who donated eggs or sperm or embryos, with the Central Register before the NSW Supreme Court will make a parentage order.*
>
> *For more information refer to Surrogacy."*

On the linked[245] page there is this:

> ***Definition of surrogacy***
>
> *The Surrogacy Act 2010 defines a surrogacy arrangement as being:*
>
> *a. an arrangement under which a woman agrees to become, or to try to become, pregnant with a child and that the parentage of the child born as a result of the pregnancy is to be transferred to another person or persons (a pre-conception surrogacy arrangement), or*
>
> *b. an arrangement under which a pregnant woman agrees that the parentage of a child born as a result of the pregnancy is to be transferred to another person or persons (a post-conception surrogacy arrangement).*
>
> ***Central Register***
>
> *Since the commencement of the Surrogacy Act 2010 on 1 March 2011 the NSW Ministry of Health Central Register, established under the Assisted Reproductive Technology Act 2007, is used for the recording of certain information concerning surrogacy arrangements.*
>
> *The Central Register contains a range of information about ART procedures. Section 37 of the Surrogacy Act 2010 requires that information about surrogacy arrangements must be recorded in the Central Register before a parentage order can be granted by the Supreme Court. The information that is to be recorded in the Central Register is set out in Division 3 of Part 3 of the Assisted Reproductive Technology Act 2007.*
>
> ***Donor eggs or embryos***
>
> *In accordance with the mandatory information provisions in the Assisted Reproductive Technology Act 2007, where donated gametes or a donated embryo have been used in a surrogacy arrangement all relevant donor details must be provided to the Central Register by the ART Provider involved in*

[244] https://www.health.nsw.gov.au/art/Pages/default.aspx .
[245] https://www.health.nsw.gov.au/art/Pages/surrogacy.aspx .

the treatment. This mandatory information is able to be released to donor conceived children once they turn 18 years of age.

Application forms

- *Adult person born as a result of a surrogacy arrangement*
- *Central register - surrogacy arrangement registration"*

The lack of information speaks for itself. While NSW criminalises residents from undertaking commercial surrogacy overseas, nowhere does it give any help whatsoever about how to find a surrogate.

While the Commonwealth does a better job with its site, nowhere does it say how to find a surrogate. One would expect that the Commonwealth would not make a legal mistake on its website, but there it is:

> *"To be recognised as the legal parents of a child born through surrogacy intended parents must abide by the laws of the state or territory that they live in. These laws protect the human rights of surrogates, babies born of surrogacy and intended parents."*[246]

The site goes on to say:

> *"Legal parentage is usually not recognised in Australia for parents who commission a child under a commercial surrogacy arrangement, or otherwise don't follow the rules of the relevant state or territory surrogacy law."*[247]

Clearly the authors had not read such cases as *Seto & Poon* or *Gallo & Ruiz*. The information has not been updated to take into account the transformative change to s.69R of the *Family Law Act*.

Quite simply, there must be much better information provided by Governments for the benefit of intended parents, surrogacy and their partners, and those born through surrogacy, not only through websites, but engagement with social media, such as X, Facebook, Instagram, TikTok and WeChat. There should also be data published about overseas maternal mortality risks- see **page 89**.

Question 26: Do you have any views about the issues we consider to be in or out of scope?

Table 22 sets out an overview of Australia's surrogacy laws.

TABLE 22 – Australia's Surrogacy Laws

Jurisdiction	Law
Commonwealth	*Australian Citizenship Act 2007*, ss.8, 12, 16, 17 *Australian Passports Act 2005*, s. 11 ***Family Law Act 1975***, ss. 4, 60G, 60H(1), 60HB, 61E *Family Law Regulations 2024*, ss. 10, 49 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*, r. 1.10 *Health Insurance (General Medical Services Table) Regulations 2021*, clause 5.2.6

[246] https://www.surrogacy.gov.au/ .
[247] https://www.surrogacy.gov.au/surrogacy-in-australia/recognition-parentage-australia .

Jurisdiction	Law
	Migration Regulations 1994, schedule 2, clause 602.212 *Superannuation Industry (Supervision) Regulations 1994*, reg. 6.19A
Australian Capital Territory	*Adoption Act 1993*, ss.88, 94 *Criminal Code 2002*, s.64 ***Parentage Act 2004***
New South Wales	*Adoption Act 2000*, ss. 105, 177 *Assisted Reproductive Technology Act 2007*, ss. 15A, 41A-41M *Crimes Act 1900*, s.10C *Premier's Memorandum M2018-02 Support for employees engaged in altruistic surrogacy and permanent out of home care parenting arrangements* *Status of Children Act 1996* ***Surrogacy Act 2010*** *Surrogacy Regulation 2016*[248] *Uniform Civil Procedure Rules 2005, Part 56A*
Northern Territory	*Adoption Act 1994*, ss. 50, 67, 69 *Criminal Code 1983*, s.43CA *Status of Children Act 1978* ***Surrogacy Act 2022***
Queensland	*Adoption Act 2009*, ss. 92, 301, 303 *Assisted Reproductive Technology Act 2024*, ss.14, 15, 26(2), 28(2), 44(2)(j)[249] *Criminal Code*, s.12 *Status of Children Act 1978* ***Surrogacy Act 2010***
South Australia	*Adoption Act 1988*, ss. 21, 28 *Assisted Reproductive Treatment Act 1988*, ss.4A, 9(1)(c)(iva) *Criminal Law Consolidation Act 1935*, s.5G *Family Relationships Act 1975* ***Surrogacy Act 2019***
Tasmania	*Adoption Act 1988*, ss.59, 60, 102, 107 *Status of Children Act 1974* ***Surrogacy Act 2012***
Victoria	*Adoption Act 1984*, ss.66, 67, 116, 119 ***Assisted Reproductive Treatment Act 2008*** *Assisted Reproductive Treatment Regulations 2019*, regs. 10, 11, 11A

[248] Currently under review.
[249] Some of these provisions are expected to commence on 1 September 2025, and the balance by 1 March 2026.

Jurisdiction	Law
	Patient Review Panel, *Applications for approval of a surrogacy arrangement, Guidance note* (2024) ***Status of Children Act 1974***
Western Australia	*Adoption Act 1994*, ss. 121, 122, 136A, 136B, 136C, 136D, 138, 138A, 138B *Artificial Conception Act 1985* *Criminal Code 1913, s.12* *Family Court Act 1997* *Family Court (Surrogacy) Rules 2009* *Human Reproductive Technology Act 1992*, s.23 ***Surrogacy Act 2008*** *Surrogacy Regulations 2009* *Surrogacy Directions 2009*

Yours faithfully
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