Attachment 1: LIV Comments regarding Surrogacy Inquiry

Introduction – Surrogacy

Surrogacy is not a new concept. 'Traditional surrogacy', involving the egg of a surrogate mother and the sperm of the commissioning (intended) father has been around for centuries. Technological advancements now make it possible for gestational surrogacy, which involves an embryo created by the intended father's sperm and the intended mother's egg (or donor egg and/or sperm) to be implanted in a surrogate.

Gestational surrogacy means that it is quite possible for neither the commissioning parents nor the surrogate mother to have any genetic link with the child. When the surrogacy arrangement has an international, or even an interstate element, complicated questions arise in relation to:

1. The legal identity of the child's parents;

2. Which process should be followed to determine the child's legal parents (parentage); and

3. The child's nationality.

Resolving these questions often involves applying legal rules that might be quite different in the home country of the surrogate and the home country of the intended parents. "It is very likely that there will a serious conflict of laws that will have consequences for matters such as nationality and immigration"[1]. In some cases this results in children born of gestational surrogacy arrangements being left, as one UK Judge stated, "marooned, stateless and parentless[2]" in a legal sense.

Summary - Regulation of Surrogacy

The regulation of surrogacy in Australia is prescribed by both Commonwealth and State laws. Although the approach differs in detail as between states, generally speaking parties in Australia are prohibited from engaging in commercial surrogacy while altruistic surrogacy (where surrogate mothers receive some reimbursement for costs associated with the surrogacy) is permitted in certain (very limited) circumstances prescribed by relevant (and differing) legislation in each State.

The current limitations involved in altruistic surrogacy mean that:

[1] Nicholls, M "Legal Problems with International Surrogacy Arrangements", 21 October 2013 http://www.rtc.org.au/events/docs/Michael%20Nicholls%20presentation%20Probs%20with%20Int%20Surrogacy%20Arrangements.pdf

[2] Justice Hedley, **X & Y (Foreign Surrogacy),** Journal of International Law [insert reference]

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- the surrogate mother is nearly always left out of pocket; and

- many potential intended parents actively seek out the services of commercial surrogates in other (including less regulated) jurisdictions as a means of fulfilling their desire to create a family even when it is illegal in their jurisdiction to do so.

The dangers to the surrogate mother and children born of such arrangements was highlighted in 2015 following the highly publicised “Baby Gammy” case[3] in which intended parents from Western Australia engaged in a commercial surrogacy arrangement in Thailand and following the birth of twins, one of whom (Gammy) suffered from Down Syndrome, chose to only collect the child without Down Syndrome and leave Gammy with the Thai surrogate mother.

Another 2015 case which highlighted the risks of commercial surrogacy was the 24 year old Japanese father Shigeta Mitsutoki who fathered 15 children in Thailand through commercial surrogacy arrangements with 11 Thai surrogate mothers[4] (the "Baby Factory" case). Since these cases there has been widespread international condemnation of commercial surrogacy arrangements and countries including Nepal, Thailand and India have since moved to ban commercial surrogacy arrangements. Thailand, for example, now restricts surrogacy to altruistic arrangements to blood relatives who are married and infertile. In India, it is now restricted to heterosexual married couples who have been married for 2 years and who are from a place where surrogacy is legal.

It is clear that even when the activity is criminalized, parties continue to seek out commercial surrogacy arrangements. In the wake of Thailand, Nepal and India restricting overseas commercial surrogacy, there were media reports of increases in Australians turning to countries such as Mexico and Cambodia to meet the demand[5].

This places even greater pressure on the Australian government to reform existing surrogacy arrangements within Australia to ensure Australians do not actively seek out commercial surrogacy arrangements in other, especially less regulated, countries which places surrogate mothers and children born of such surrogacy arrangements at risk.

Summary - Reform Required

Surrogacy should therefore be regulated rather than shut down to, “… protect the vulnerable from inevitable exploitation”[6]. Some commentators have argued that commercial surrogacy should be legalized in Australia so there is greater regulation and protection available for surrogate mothers and children born of surrogacy arrangements. Others argue that unless a

[3] http://rightnow.org.au/topics/children-and-youth/international-commercial-surrogacy-in-the-post-gammy-world/

[4] http://www.theguardian.com/lifeandstyle/2014/aug/23/interpol-japanese-baby-factory-man-fathered-16-children; http://www.smh.com.au/world/bangkok-baby-factory-includes-twins-from-australian-womans-eggs-20140817-105146.html

[5] http://www.smh.com.au/world/somebody-has-to-be-the-icebreaker-aussies-seeking-babies-turn-to-cambodia-20151027-gkjfj5.html

[6] http://rightnow.org.au/writing-cat/surrogacy-whose-reproductive-liberty/

domestic commercial surrogacy market is economically competitive with overseas markets, Australians will continue to seek out commercial surrogacy in cheaper, (seemingly) more convenient and less regulated jurisdictions. It is noted that the overwhelming majority of international jurisdictions prohibit commercial surrogacy – see Annexure 2.

What is clear is that the current regulation of altruistic surrogacy (regulated by state legislation differing across Australian jurisdictions) urgently requires reform to at least allow for 'compensated' altruistic gestational surrogacy in which the surrogate mother is properly compensated and not left out of pocket as a result of being an altruistic gestational surrogate for intended parent/s.

Domestic

On a domestic level, the LIV advocates reform is urgently required to:

1. Allow surrogate mothers to be properly compensated by the intended parents for being a surrogate mother in an altruistic gestational surrogacy arrangement. At present, there are inflexible inconsistent approaches between the states as to which expenses the intended parents can 'reimburse' the surrogate mother. This results in the surrogate mother nearly always being left out of pocket even when the intended parents wish to cover those costs. Where there is a dispute there is currently no clear or cost effective manner or even a proper venue for such disputes to be resolved;

2. Remove the discrimination faced by people seeking to be intended parents on the basis of their gender, relationship status and/or sexual orientation (and ensure access to artificial reproductive technology across Australia reflects the diversity of modern Australian families);

3. Create a national register of persons interested in being an altruistic surrogate mother and de-criminalise the advertisement of such persons (it is noted that a proposal for such a database, to be accessed by IVF clinics and not publicly available, is currently before the South Australian parliament);

4. Ensure that a consistent national approach to surrogacy is implemented throughout Australia (including removing restrictions currently required in some states for the surrogate mother and the intended parents to be resident in the same state and adopting a consistent approach regarding the criminalisation of engaging in commercial surrogacy overseas);

5. Create a streamlined court process for intended parents who do engage in overseas commercial surrogacy arrangements to apply to the Family Courts for a declaration of parentage or parenting orders (provided the surrogacy arrangements meets minimum safeguards, discussed further below).

6. Amend the *Family Law Act 1975* (Cth) to provide the Family Court with unequivocal jurisdiction to make a declaration of parentage in surrogacy cases when the Court considers it is in the best interests of the child. This should apply to Federal law and, for domestic surrogacy which may require the State and Territories to refer their powers to the Commonwealth.

7. Introduce legislative reform at state or federal level to ensure and protect the privacy of the child born of surrogacy arrangements.

International

At an international level, the LIV considers the most effective means of regulating international surrogacy arrangements is for individual nations to enter into bilateral agreements. This would reduce the inconsistency between practices in different countries to ensure no child is left without a clear process by which parentage and nationality can be determined.

The LIV recommends further consideration be given to establishing an international convention specifically dealing with surrogacy (similar to the International Adoption Convention) which could be established to provide a framework to allow states to enter into such bilateral agreements.

All of these recommendations are discussed in more detail further below.

Comments in response to Specific Terms of Reference

The role and responsibility of states and territories to regulate surrogacy (international and domestic)

With an increasingly limited global market for adoption, surrogacy will continue expanding. Lack of adequate regulation of international surrogacy can lead to exploitation of surrogates. The variety of domestic and international responses to surrogacy has led to a widespread forum shopping where couples seeking to have a child through surrogacy travel from one country to another, purposely choosing "surrogacy-friendly" jurisdictions as their destinations. Cross-border travel for the purpose of hiring a surrogate mother has been termed as "procreative tourism". By and large, the majority of "procreative tourists" are childless Western couples attracted by "low-cost" surrogacy services and a "ready availability of poor surrogates" in such places as India, Eastern Europe and South America.[7] Procreative tourism has been likened to 'reproductive prostitution'. Some academics and commentators have drawn parallels between procreative tourism and child trafficking[8] .

Surrogacy is a global issue which requires international cooperation to ensure that vulnerable women, particularly in less developed parts of the world are not exploited by the desire of people from economically advantaged countries to have their own biological children.

Australians are already reported as the largest client market for international surrogacy arrangements[9]. This is likely due to:

- the complicated and conflicting nature of Australian surrogacy laws,
- the prohibition on commercial surrogacy,
- the discriminatory laws that exclude same sex and single intended parents in a number of Australian States, and
- the continual decline in the number of children available for adoption both in Australia and overseas.

The main western country in which commercial surrogacy is legal is the United States of America where it is legal in six States including California and Florida. The costs involved in surrogacy in USA, including the legal costs, are prohibitive for many couples.

Australia has an obligation, both with respect to the Australian women intending to be surrogates, but also to the children born of surrogacy arrangements, to properly regulate domestic altruistic gestational surrogacy.

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[7] Trimmings, K and Beaumont, P, "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level", Journal of Private International Law, Vol 7

[8] Ekman, K "Surrogacy is child trafficking" , Festival of Dangerous Ideas 30-31 August 2014 https://www.youtube.com/watch?v=MztUOFCX9Uc&list=PLKKWbWvkO0GA-X2QzlGwvgvdbOWHUHp19

[9] http://hrlc.org.au/regulating-surrogacy-in-australia/

Australia also has an obligation, to the extent possible, to regulate international commercial surrogacy which is accessed by Australians and to ensure that when commercial surrogacy is entered into, children born of those arrangements are not left "marooned, stateless and parentless[10]".

Differences in existing legislative arrangements

For more information about the different approaches adopted across each jurisdiction in Australia see Annexure 1.

In short, while surrogacy is governed by state legislation across all states and territories generally speaking in all jurisdictions:

- parties are prohibited from engaging in commercial surrogacy; and
- only altruistic surrogacy is legal in some, very limited, circumstances once eligibility criteria is met with respect to both the surrogate mother and the intended parents.

In some states, namely NSW, Queensland and ACT and WA it is a criminal offence to engage in commercial surrogacy regardless of the country in which it occurs.

Process to enter into surrogacy arrangement

The process for intended parents to enter into surrogacy arrangements was summarised as follows by Jacky Campbell and Evelyn Young in an article published in 2013 for the International Academy of Matrimonial Lawyers and TVED network[11]:

- *"They must first locate a person willing to act as a surrogate who meets the legislative requirements, and engage an authorised Assisted Reproductive Treatment ("ART") provider. Given the restrictions on advertising for a surrogate and the ban on commercial surrogacy, this is one of the biggest hurdles faced by commissioning parents. Most States and Territories have a ban on publication so the people who use internet forums to find a surrogate may be committing an offence. Newspapers seem unaware that the prohibition on publication is the same as under s 121 of the Family Law Act 1975. In most jurisdictions the surrogate is required to be at least 25 years of age and already have children of their own.*

[10] Justice Hedley, X & Y (Foreign Surrogacy), Trimmings, K and Beaumont, P, "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level", Journal of Private International Law, Vol 7

[11] Campbell, J "Surrogacy: top toeing through a legal minefield" http://www.tved.net.au/index.cfm?SimpleDisplay=dsp_searchProduct_ts.cfm&PC=SUR/14/MAR&Type=3&webcpd=true

- *They must undergo counselling. In all States and Territories, both the commissioning parents and surrogate parents must undergo counselling sessions prior to commencing treatment, however this requirement can be waived in particular circumstances.*

- *They must obtain legal advice. In all States and Territories bar the Australian Capital Territory, both sets of parents must receive legal advice regarding their respective legal rights, entitlements and obligations and the consequences of the surrogacy arrangement. This requirement can be waived in particular circumstances.*

- *In Victoria and Western Australia, approval must be obtained from the regulatory body after approval by the relevant IVF clinic. In practice, this means that waiver of the requirements for counselling and legal advice is unlikely to occur as they will be required by the IVF clinic.*

- *Once the child is born, the surrogate mother is considered to be the child's parent. If the surrogate has a partner and that partner consented to the procedure, that partner will also be considered at law to be the child's parent. To replace the surrogate parents with the commissioning parents as the child's legal parents, an application to the State or Territory Court must be made. In Victoria this is referred to as an Application for a Substitute Parentage Order. There are a number of matters the Court must be satisfied of prior to making the order. For example, in Victoria, before making the order the Court must be satisfied that:*

    - *Making the order is in the best interests of the child.*
    - *The surrogacy arrangement was commissioned with the assistance of an ART provider.*
    - *The Patient Review Panel approved the surrogacy arrangement before the surrogacy arrangement was entered into.*
    - *The child was living with the commissioning parents at the time the application was made.*
    - *The surrogate parents did not receive any material benefit or advantage from the surrogacy arrangement.*
    - *The surrogate mother freely consented to the making of the order.*

    A practical difficulty arises with respect to this final stage, as in most States and Territories the application cannot be brought until 28 days after the child's birth and must be brought within 6 months of the child's birth.

    An application outside of these dates requires the leave of the Court. As a result, everyone is left in a "limbo" period, where the commissioning parents have the care of

the child while the legal responsibility for the child rests with the surrogate parents. In practical terms, this means that the surrogate parents need to be readily contactable to ensure they can authorise any medical treatment.

Another option is to have a Medical Treatment Power of Attorney. In rare cases, it may be necessary to apply to the Family Court for an urgent order for parental responsibility to be made in favour of the commissioning parents pending the making of a parentage order in the State or Territory court.

Once an order is made with respect to a child born as a result of a surrogacy arrangement under a prescribed law of a State or Territory, to the effect that the child is a child of one or more persons and that each of one or more persons is a parent of a child, that order applies for the purposes of the Family Law Act[12] and therefore for other purposes such as social security and immigration.

<u>Complications</u>

Because of the disparity between the various State and Territory legislative mechanisms for regulating surrogacy arrangements, complications can arise where, for example, the commissioning parents and surrogate live in different jurisdictions or a Parentage Order is sought to be made in a State or Territory other than the one in which the child was born. Some States have addressed this by introducing legislation that recognises interstate Parentage Orders. For example, in New South Wales, s 25B of the Births, Deaths and Marriages Registration Act 1995 (NSW) provides that if an interstate Parentage Order is made in relation to a person who has a birth certificate issued in New South Wales, that interstate Order may be registered in New South Wales. In most States and Territories a Parentage Order will not be granted unless both the commissioning and surrogate parents live in that State or Territory, the procedure is commissioned with an ART provider in that State or Territory, and the child is born in that State or Territory.

In light of these problems, and the challenges faced by international commercial surrogacy, it may be time to adopt a unified, national approach to surrogacy arrangements.

This sentiment was echoed by the Honourable Nahum Mushin, former Justice of the Family Court, at a seminar titled "Surrogacy and Adoption: Pitfalls and Promises" hosted by Monash University on 2 October 2013. He posed the question whether all surrogacy arrangements ought to be brought under the Family Law Act."

For more information about the different approaches adopted across jurisdictions internationally see Annexure 2.

[12] Section 60HB(1).

Medical and welfare aspects for all parties involved, including regulatory requirements for intending parents and the role of health care providers, welfare services and other service providers

Consent and Conflict of Interest Issues (ART clinics)

In terms of consent issues and the ART clinics, valid consent must be obtained from all relevant parties in relation to specific procedural treatment. As a person's ability to cope with surrogacy changes throughout the arrangement depending on other life events, all parties should be encouraged to advise the clinic of stresses and life-changing events which arise after the assessment. In the experience of some of our members, some parties may not advise a clinic of changed circumstances because of a concern that they will not be able to continue in the surrogacy program.

Conflicts of interest also arise where the individuals are both accessing the same clinic for counselling services. There may be times when both the intended parents and the surrogate should be referred to separate external services in the event of a dispute or conflict. Although a clinic can use "Chinese walls", separate external services may, in some circumstances, be preferable and should be at the cost of the intended parents. It is noted that in some jurisdictions, e.g. Tasmania, there is only one ART clinic.

Counselling

There are significant psychological ramifications when a woman bears a child for someone else.[13] Surrogates are likely to experience emotional distress when giving the child to the intending parents.[14] For example, important maternal bonding may occur between the surrogate and foetus/newborn[15]. Although the surrogate may not want to keep the child, she may feel responsible for the welfare of the child.

There is also evidence that surrogates may live with the psychological burden of giving up their gestational child for many years afterwards, experiencing feelings of guilt or anger or even depression.[16]

The role of counselling is important in preventing many of the welfare issues arising from surrogacy. However Australian law requires extensive counselling before the arrangement is made,[17] and sometimes after the pregnancy before a parentage order is granted.[18] LIV

[13] Henaghan, M. 'International Surrogacy Trends: How Family Law is Coping', *Australian Journal of Adoption*, 7(3) 12.

[14] Tehran, HA. S. Tashi, N. Mehran, N. Eskandari, TH Tehrani, 'Emotional Experiences in Surrogate Mothers: A Qualitative Study' (2014) *Iranian Journal of Reproductive Medicine* 2014, 12(7) 471, 472.

[15] Tieu, M. 'Oh Baby Baby: The Problem of Surrogacy' *Bioethics Research Notes* 19(1) March 2007, 2; 'Emotional Experiences in Surrogate Mothers: A Qualitative Study' *Iranian Journal of Reproductive Medicine* July 1, 2014, 472.

[16] Ibid

[17] *Assisted Reproductive Treatment Act 2008* (Vic) s 43; *Surrogacy Act 2010* (NSW) s 35(1); *Surrogacy Act 2010* (Qld) s 22(2)(e)(ii); *Surrogacy Act 2012* (Tas) s 16(2)(f)(i); *Family Relationships Act 1975* (SA) s 10HA(2)(vi) and (vii); *Parentage Act 2004* (ACT) s 26(1)(e); *Surrogacy Act 2008* (WA) s 17(3)(i) and (ii).

members also note that while a person may seem able to cope with a surrogacy arrangement when the initial assessment as to suitability occurs, this may change. The ART clinic needs to be aware that the personal circumstances of the parties may change. For example, a person's ability to cope with a particular procedure or his or her reaction to the conception or birth of the child may change depending upon other life events such as births, deaths and changes in their primary relationships. These events may impact on the surrogate (or intended parents) ability to cope. Extra support, including counselling, may be needed to assist the surrogate and the surrogate's relationship with the intended parents. All parties should be encouraged to advise their clinic of stresses and life-changing events which arise after the assessment. In the experience of members, some parties may not advise a clinic of changed circumstances because of a concern that they will not be able to continue in the surrogacy program."

However, in regards to transnational commercial surrogacy, a survey of 137 respondents in Australia and NZ seeking and undertaking commercial surrogacy with providers found that only 10 of these respondents had received any jurisdiction specific counselling. In Australia although counselling is required prior to the making of any arrangements for surrogacy,[19] counselling should be required throughout the whole process.[20]

Role of health care providers, welfare services and other service providers

The National Health and Medical Research Council (NHMRC) 'Draft ethical guidelines on the use of assisted reproductive technology in clinical practice and research' provide ethical guidelines to ART providers. These require such providers:

1. not to practice, promote or recommend commercial surrogacy;
2. to assess the ethical acceptability of non-commercial surrogacy on a case-by-case basis, including concerns about risks to the wellbeing of the parties involved;
3. to provide relevant information to facilitate an accurate understanding of the ethical, social and legal implications of the arrangement as well as the medical, psychological and social risks and benefits arising under the arrangement;
4. to provide counselling to discuss the social and psychological implications for the person who would be born as a result of the arrangement and the potential significance of biological connections for the person born as a result of the arrangement;

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[18] *Surrogacy Act 2010* (NSW) s 35(2); *Surrogacy Act 2012* (Tas) s 16(2)(f)(ii).

[19] *Surrogacy Act 2010* (NSW) s 35; *Surrogacy Act 2010* (Qld) s 22(2)(e)(iv); *Assisted Reproduction Treatment Act 2008* (Vic) ss 40, 43; *Parentage Act 2004* (ACT) s 24(3)(e); *Family Relationships Act 1975* (SA) s 10HA(2)(vi); *Surrogacy Act 2012* (Tas) s 16(2)(f); *Surrogacy Act 2008* (WA) s 17(c)(i).

[20] Tieu, M. 'Oh Baby Baby: The Problem of Surrogacy' *Bioethics Research Notes* 19(1) March 2007,

2; 'Emotional Experiences in Surrogate Mothers: A Qualitative Study' *Iranian Journal of Reproductive Medicine* July 1, 2014, 472.

5. to obtain valid consent from all relevant parties;
6. to provide reimbursement of 'verifiable out-of-pocket expenses'; and
7. to provide persons born from donated gametes with information about the donated gamete.[21]

The current guidelines are written from the perspective of the intended parents rather than the surrogate. There is also no exhaustive comprehensive list of what constitutes a variable out of pocket expense.

Under the previous draft ethical guidelines the language of the prohibition in regard to commercial surrogacy led to confusion and anxiety such that doctors not only declined to provide care and advice to commissioning parents in respect of transnational commercial surrogacy arrangements, but also declined to discuss it at all.[22] The Draft Guidelines[23] improve on this by providing that there is an ethical obligation to provide appropriate advice and health care even where they have made a decision to enter into surrogacy arrangements overseas. However, Milbank argues these could go further by encouraging local fertility professionals to provide both information and care directed towards risk reduction.[24]

Other Medical and Welfare Issues

Commissioning parents may experience difficulties in securing legal parentage of the children or citizenship for them, or in even being able to return home with them.[25] This raises concerns about the welfare of the children born as a result of such surrogacy arrangements.[26] When children born overseas through surrogacy are not brought before the courts so that the commissioning parents can obtain legal parentage, the children are left with no legal link to their commissioning parents.[27] Yet our members report that in many such cases, due to the fact that commercial surrogacy is viewed as an offence, commissioning parents prefer to stay underground rather than risk being prosecuted.

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[21] The National Health and Medical Research Council, *Draft ethical guidelines on the use of assisted reproductive technology in clinical practice and research. Public consultation — 2015* Canberra: NHMRC, 2015. http://consultations.nhmrc.gov.au/public_consultations/assisted-reproductive-tech (accessed 19 Jan 2016) 38-39.

[22] Milbank, 'Responsive Regulation of cross-border assisted reproduction' 23 *Journal of Law and Medicine* 346, 359.

[23] http://consultations.nhmrc.gov.au/files/consultations/drafts/artdraftethicalguidelines150722.pdf

[24] Milbank, 'Responsive Regulation of cross-border assisted reproduction' 23 *Journal of Law and Medicine* 346, 360.

[25] 'Barriers for domestic surrogacy and challenges of transnational surrogacy in the context of Australians undertaking surrogacy in India' 137.

[26] 'Barriers for domestic surrogacy and challenges of transnational surrogacy in the context of Australians undertaking surrogacy in India' 137.

[27] Berkovic, N., 2014, 'Judicial chiefs call for lifting of domestic ban on commercial surrogacy' *The Australian* http://www.theaustralian.com.au/business/legal-affairs/judicial-chiefs-call-for-lifting-of-domestic-ban-on-commercial-surrogacy/news-story/9233b7205b3222ee28073f25e0709ce5

Overseas commercial surrogacy can leave the children with little or no ability to track down their birth parents, especially given the lack of regulation and provisions requiring the keeping of records in the states in which the surrogacy arrangement took place. The history of adopted and "stolen" children in Australia and the psychological studies of the impact of lack of knowledge of parentage is applicable to children born of surrogate arrangements, particularly those using donated genetic material. Whilst the registration of births from domestic surrogacies has taken this research into account, the criminalisation of commercial surrogacy means that there is no central or adequate register to enable these children to trace the donors or surrogates.

There are also medical and welfare issues for the surrogate mother and child arising from the practice of multiple implementation (in which more than one embryo is transferred into the surrogate). While multiple implementation is not caused by commercial surrogacy it is strongly associated with it, because it increases the likelihood of a pregnancy, and in doing so it hastens the process and boosts the "success" rates of clinics and agencies, ART clinics in Australia are strictly regulated in relation to such issues as the number of embryos that can be used in IVF procedures to limit multiple births which have higher risks for the surrogate mother and child. The same cannot be said for overseas clinics, particularly in less regulated jurisdictions. "It is far from coincidental that the majority of reported Australian and UK cases concerning births through surrogacy in India, Thailand and the Ukraine involve twins (and several more involve two singletons to two different surrogates in simultaneous arrangements with the same intended parents)." [28]

Issues arising regarding informed consent, exploitation, compensatory payments, rights and protections for all parties involved, including children.

Informed Consent and Exploitation

In cases of overseas commercial surrogacy arrangements, the Family Court of Australia has considered the question of whether a surrogate mother has given informed consent to the arrangement in cases such as *Mason v Mason* [2013] Fam CA 424. In that case the court was concerned that the affidavit evidence of the Indian surrogate was written in English and witnessed only by her thumb print. The Court required translation of all documents into Hindi and evidence that they had been read aloud to the surrogate in that language.

For altruistic domestic surrogacy arrangements in Australia, state or territory legislation provides strict requirements for ensuring informed consent of the surrogate. As it is illegal in most jurisdictions in Australia to advertise that the offering of, or seeking the services of, a surrogate most intended parents turn to friends or family members to act as a surrogate. It is arguable that the existing relationship between the intended parents and the prospective surrogate may amount to a form of duress, coercion, undue influence or otherwise impact on the extent to which the prospective surrogate is willingly and voluntarily entering into the arrangement.

[28] 'Rethinking "Commercial" Surrogacy in Australia, Prof Jenni Millbank, University of Technology Sydney Faculty of Law, 2015 at 13-14

In the case of *Ellison* Justice Ryan considered submissions by the AHRC and Independent Children's Lawyer about best practice principles applicable to surrogacy cases. Her Honour said:

> "*I agree that the position of the birth mother requires close attention to ensure that she has given free and informed consent and has not been subjected to exploitation, coercion or undue influence and that her rights have been adequately protected. This can be problematic in cases that involve cross-border arrangements in which the birth mother may be difficult to locate and in which there may be complexities with communication. The Court must also be able to determine that the subject child or children are who the applicants say. It is thus vital that the Court has sufficient evidence before it so that these issues can be determined with a high degree of certainty."*

Some LIV members consider that if commercial surrogacy was legalised in Australia, then strict regulation could be imposed to ensure the informed consent of the surrogate and that she had not been exposed to exploitation. However, there is also a strong argument that a legalized commercial surrogacy market in Australia would not be effective at reducing the rate of Australians engaging in commercial surrogacy in less regulated overseas jurisdictions unless our market could compete economically with overseas markets, i.e. the cost for engaging a commercial surrogate would need to be competitive with the cost of engaging a commercial surrogate overseas. It is unlikely given the medical and legal costs involved in undertaking IVF in Australia.

There are also concerns that transnational commercial surrogacy arrangements lead to the exploitation of socio-economically disadvantaged women in developing countries who are acting as surrogates.[29] There are cases of Indian mothers being forced to have multiple caesarean sections before being abandoned to die from birth complications, while poor and generally illiterate women in Southeast Asia are exploited by 'middle men' or held against their will and raped.[30]

Compensatory payments

At present the law regulating payments made to surrogate mothers in domestic arrangements is framed in terms of 'reimbursing' the surrogate mother for costs they incurred

[29] 'Barriers for domestic surrogacy and challenges of transnational surrogacy in the context of Australians undertaking surrogacy in India' 137; Ory et al, n 6, p 113; International Federation of Social Workers, *Cross Border Reproductive Services 2012*, http://ifsw.org/policies/cross-border-reproductive-services; Ehrlich RS, "Taiwan Company Accused of Trafficking Vietnamese Women to Breed", *Washington Times* (6 March 2011); Palattiyil G, Blyth E, Sidhva D and Balakrishnan G, "Globalization and Cross-border Reproductive Services: Ethical Implications of Surrogacy in India for Social Work" (2010) 53 Int Soc Work 686.

[30] Berkovic, N., 2014, 'Judicial chiefs call for lifting of domestic ban on commercial surrogacy' *The Australian* http://www.theaustralian.com.au/business/legal-affairs/judicial-chiefs-call-for-lifting-of-domestic-ban-on-commercial-surrogacy/news-story/9233b7205b3222ee28073f25e0709ce5

in relation to the pregnancy. Reimbursement implies that the surrogate is required to bear the upfront costs and then seek repayment from the intended parents. Compensation, on the other hand, is a payment (usually money) to someone in recognition of loss, suffering or injury.

Whilst it is reasonable in principle to provide reimbursement of verifiable out-of-pocket expenses, this restriction is too limited and too unclear. It does not expressly cover such matters as pregnancy clothes, post-birth care, childcare (for the surrogate's own children to allow her to attend medical and legal appointments) and legal costs for disputes bout the payment of expenses (noting expenses for legal disputes about the surrogacy arrangement are already covered). The emphasis on avoiding the payment of expenses which could be considered to be commercial surrogacy or an incentive to the surrogacy arrangement, is often used as a reason by intended parents to refuse to pay the reasonable expenses of the surrogate. This has been the experience of our members.

Most legal disputes in Australia related to surrogacy arrangements arise from disputes in relation to the surrogate mother's expenses, including:

- Lack of consensus as between the surrogate mother and the intended parents and their lawyers as to precisely which expenses will be, or could be, covered (and when);
- The process by which the reimbursement will be made;
- Lack of understanding as to the variables involved which may change the nature and ultimate cost of the surrogacy arrangement;
- Lack of an inexpensive efficient process by which disputes about reimbursement of expenses can be resolved outside of court proceedings.
- Lack of a venue to resolve disputes requiring intervention by a Court. For example, the County Court of Victoria refused to resolve such a dispute.

Practical Examples

Below are some examples of issues about payments which our members face in practice:

- experienced intended parents refusing to pay for the legal advice of the surrogate who is required to swear an affidavit for the court process (the child is already born and in the care of the intended parents).The intended parents had their own legal advice but did not want to pay for the surrogate's legal advice;
- dispute about private health insurance being cut off after birth by the intended parents for the surrogate without any notice;
- intended parents who have refused to pay for expenses such as post-pregnancy

shorts, petrol to the hospital and childcare.

What is an allowable cost?

There is a range of exceptions for allowable costs associated with the surrogacy arrangement, and the Courts and the legal profession in each State and Territory have differing views as to what monies can legally be reimbursed to the surrogate. For example, in Victoria the *Assisted Reproductive Treatment Act 2008* (Vic) provides for the surrogate parents to be reimbursed for the "prescribed costs" actually incurred by them as a direct consequence of entering into the surrogacy arrangement. "Prescribed costs" are defined as:

- Any reasonable medical expenses that are not recoverable under Medicare, health insurance or another scheme;
- Legal advice obtained as required under the Act; and
- Travel costs related to the pregnancy or birth.

There are further costs that do not fall into the category of "prescribed costs" in Victoria but which nonetheless do not appear to offend the legislation, so long as the costs have been actually incurred, are directly related to the surrogacy and the reimbursement of these costs does not put the surrogate parents in a better financial position than they were before they entered into the surrogacy arrangement.

Although it refers to insurance directly related to the procedure and pregnancy, the Victorian legislation is not specific enough to say whether it covers health insurance, life insurance, sickness and accident insurance and for what period after the birth. Given that medical issues related to the pregnancy can still arise during the postpartum period, should insurance continue to be paid by the intended parents for the surrogate until three months after the birth, six months after the birth or indefinitely if a medical condition arose as a result of the pregnancy or the procedure? This needs to be clarified.

Tasmania has a detailed list of allowable expenses which includes travel, accommodation and actual loss of earnings for specified periods. By contrast, in South Australia, the only allowable expenses are those connected with the pregnancy, the birth or care of the child, counselling or medical services in connection with the surrogacy agreement, and legal services in connection with the agreement.

Precisely what expenses are covered and how they are calculated is uncertain. For example:

- are travel costs calculated on the Australian Taxation Office rate?

- Must medical expenses be authorised by a doctor or can they be recommended by a pharmacist, physiotherapist, naturopath or other health professional?

- If the commissioning parents incur expenses looking after the surrogate's children, are these offset against the costs incurred by the surrogate?

- If there is a dispute about expenses, are the surrogate's legal costs of the dispute covered?

Intended parents can (and our members report that in their experience intended parents do) misuse the threat of criminal prosecution and argue that the surrogate will profit from the arrangement. The surrogate should not be out of pocket because of the arrangement. The intended parents should not be able to obtain a significant advantage from the surrogate agreeing to carry their child for them and then not meet the reasonable expenses incurred by the surrogate as a result of the surrogacy arrangement.

Suggested Reform (compensatory payments)

The LIV recommends that reform be made to allow surrogate mothers to be properly compensated by the intended parents for being a surrogate mother in an altruistic surrogacy arrangement and consideration be given to require the intended parents to pay for expenses upfront, to lessen the burden on the surrogate mother seeking reimbursement later.

Specifically, it would assist parties when considering whether or not to enter into an altruistic gestational surrogacy arrangement in Australia if:

1. A guideline could be produced which lists the type of expenses, and requires both parties to obtain estimates in relation to the potential costs that may be incurred for each type of expenses. At present this type of information is being provided by legal practitioners, However, without specific legislative guidance in this respect, legal practitioners are limited in the advice they can provide to their clients as to whether or not a reimbursement falls within the definition of 'reasonable expenses' within the respective state. This lack of specificity about what is a 'reasonable expense' is confusing to parties, particularly when they receive different legal advice from different practitioners.

   While guidelines would assist, the legislation would still need to retain sufficient flexibility to allow for the intended parents and the surrogate mother to agree on reimbursement for expenses which arise in relation to that specific surrogacy. For example, a surrogate mother who experiences a difficult stressful pregnancy may be recommended by her medical practitioners to reduce stress. The intended parents may wish to pay for her to attend a day spa or holiday to assist her reduce stress. It is not clear whether this form of reimbursement or compensation would fall outside the scope of 'reasonable expenses'. Noting the criminal consequences which may follow in some jurisdictions if the expense is held not to be reasonable, the LIV suggests that most lawyers advise their clients against such a payment to err on the side of

caution even though it may be an issue which both the surrogate mother and intended parents desire to effect. In this example, the involvement of lawyers creates a dispute and serves to limit the desirability of parties to enter into surrogacy arrangements in Australia.

2. Each state and territory adopted a consistent approach with respect to these expenses. For example, the reimbursement of life insurance premiums paid by the intended parents for the benefit of the surrogate and her family during the period of the surrogacy seems a reasonable expense related to the surrogacy. However, in South Australia if this reimbursement was made it converts the arrangement into commercial surrogacy which is a criminal offence[31].

3. A consistent definition of 'commercial surrogacy arrangement' applied for all states and territories within Australia. For example, currently In Victoria a surrogate mother "must not receive a material benefit or advantage" as a result of a surrogacy arrangement[32] . In NSW[33] and Tasmania an arrangement is a commercial surrogacy arrangement if it involves the provision of a "fee, reward or other material benefit or advantage" [34] In these jurisdictions, the section clearly states that an arrangement is not commercial surrogacy if the only fee, reward or other material benefit or advantage provided is for the reimbursement of birth mother's surrogacy costs. It would assist if the NHMRC guidelines used the same terminology of language to promote consistency (the draft guidelines use the term 'verifiable out of pocket expenses' and specifically defines 'non-commercial' surrogacy as an arrangement whereby the surrogate receives no financial compensation or inducement beyond reimbursement of verifiable out of pocket expenses directly associated with the surrogacy procedure or pregnancy[35].

Resolution of Disputes about payment of expenses

The NHMRC guidelines recommend that these be resolved through solicitors, which increases the costs of both parties without necessarily solving the dispute. The surrogate may be out of pocket for many small expenses, such as travel, maternity clothing, child care and medical expenses, which total a considerable sum for a low-income, sometimes single, parent who cannot afford to pay legal costs which may not be recovered.

The suggestion that each patient be encouraged to seek independent legal advice before reimbursements are given will increase the legal costs incurred by the parties. Our members note that some of their cases involve disputes about relatively small costs. If the surrogate is not in a strong financial position she may be very keen to have those small expenses

[31] http://www.sbs.com.au/news/insight/tvepisode/surrogacy

[32] S 44 – Assisted Reproductive Treatment Act 2008 (Vic)

[33] http://www.austlii.edu.au/au/legis/vic/consol_act/arta2008360/s45.html

[34] S9 Surrogacy Act 2010 (NSW); s8 Surrogacy Act 2012 (TAS)

[35] Page 38, http://consultations.nhmrc.gov.au/files/consultations/drafts/artdraftethicalguidelines150722.pdf

reimbursed for the sake of her own family unit. However, she may not be able to pay the costs of a lawyer if the intended parents refuse to pay for her lawyer. She will be at a significant disadvantage if the intended parents pay for their own lawyer.

There should be a better, low cost process for determining these disputes. Members have tried to arrange for mediation, but the lack of access to mediation services and mediators with experience in dealing with surrogacy arrangements has been an additional barrier. Members report that the County Court of Victoria has recently declined to resolve such a dispute.

The LIV welcomes the opportunity for further discussion about potential dispute resolution mechanisms specifically developed for the complex needs of parties considering surrogacy arrangements.

Power Imbalances between intended parents and surrogate mothers

It is reasonable to say that verifiable out-of-pocket expenses should be reimbursed, but there needs to be clear unequivocal guidance about expenses which can be reimbursed. Clear guidance will help to redress the potential power imbalance between intended parents and often vulnerable surrogate mothers. In the experience of our members, the intended parents seem to have the upper hand which can mean that the surrogate is out-of-pocket and as a result may suffer emotionally and financially from the surrogacy process and its aftermath. She may be left without access to counselling and legal services, or with bills for these services. The surrogate is often in a far more vulnerable position than the intended parents and will often be more financially unstable than the intended parents.

In addition to clearer guidance, greater checks on the financial ability of the intended parents to pay for the reasonable expenses of the surrogate are needed to ensure that surrogate mothers receive the payments to which they are entitled.

Risks and health consequences of pregnancy

Surrogacy is not "renting a uterus" for a nine month period. Pregnancy and childbirth, and hence surrogacy, impact on the bodily integrity of the surrogate, placing her under a constant commitment for the period of gestation and under risk of lasting physical and emotional effects.[36] Risks can involve potentially serious medical consequences or even death.[37] The surrogate herself is forever changed physically, mentally, emotionally as well as financially as a result of the experience.

[36] Newson, A. 2016 'Compensated Transnational Surrogacy in Australia: Time for a comprehensive review' *Med Journal of Australia* 204(1) 33-35, 33.

[37] Henaghan, M. 'International Surrogacy Trends: How Family Law is Coping', *Australian Journal of Adoption*, 7(3) 12.

The intended parents should be at least permitted but ideally required to provide adequate compensation for the surrogate for the risk and the lifelong consequences the decision has on her and her family which is ultimately made for the benefit of the intended parents.

Rights and protections for all parties (including children)

It is important that any approach prioritises the rights of children and has the best interests of the child as the primary consideration.

Advocates of commercial surrogacy support to the choices of intended parents on the basis on human rights. For example, advocates cite "rights to reproductive autonomy", "the right to found a family", and the "right to respect for family life". Professor John Tobin[38] has observed that the human rights of intended parents such as the right to reproductive autonomy, the right to found a family, and the right to respect for family life, are often referred to by commercial surrogacy advocates, but their substance and interaction with the rights of the child is rarely explored.

The application of human rights usually involves the balancing of rights. Consequently, it is important to consider not only the rights of the intended parents and the surrogate, but also the rights of the child.

Children's Rights

The best interests' principle is widely accepted in international law and is enshrined in the Convention on the Rights of the Child. The Convention provides that the child has the right to have his or her best interests taken as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere (Article 3(1)). The UN Committee on the Rights of the Child has explained that:

> The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child.[39]

Sale of Children

Article 2 of the Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography states that:

> "*Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration*"

[38] Tobin, J "To prohibit or permit what is the human rights response to the practice of international commercial surrogacy" , International & Comparative Law Quarterly 2014

[39] UN Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013), (CRC/C/GC/14), [4].

Professor Tobin argues[40],

> *"…'that this broad definition almost certainly includes commercial surrogacy. A surrogacy contract is a contract for services – what is sold is not the child at all, but rather a gestation service or some form of uterine rental. This argument incorrectly assumes that the payment merely relates to gestation, rather than the transfer of the child. If this were true, the contract would be fulfilled when the surrogate gives birth to a live child, irrespective of whether that child is eventually transferred into the care of its intended parents. The better view (and one which even commercial surrogacy advocates acknowledge), is that surrogacy contracts are mixed-purpose contracts, including both a service component (the gestation) and the transfer of the child. It is this second component which falls foul of the Optional Protocol."*

Privacy Concerns

Although most Australian jurisdictions have legislation to restrict the publication of proceedings and the identification of parties to a surrogacy arrangement or a child[41], the interpretation at these non-publication provisions are unclear and could be clarified..

Using the Victorian example, the heading refers to "publication of proceedings" whereas section 33(2) refers to "surrogacy arrangement". These provisions could be clarified to refer in the heading to "surrogacy arrangements" and by making clear that they apply to the publication of details of any part of a surrogacy arrangement, not solely to details of court proceedings.

Our members report that, frequently, clients seem to be unaware of this section. The proliferation of online surrogacy groups and forums heightens the risk for potential breaches.

Although there are serious penalties for breaches of section 33(2), there appears to be no enforcement of the section. This makes it even more difficult to convince clients of the necessity to maintain privacy. Whilst many clients, particularly intended parents, are keen to tell their stories in the media or are approached through forums by media outlets, their decision to go public may later impact upon the child, who is not part of the decision-making process.

There is also an issue as to whether publication on restricted online forums amounts to publication. In the view of some of our members, the section should be amended to provide that such publication is in breach of the section. The forums, both public and restricted, provide an avenue where disputes can be aired and can incite on-line bullying and harassment.

[40] Ibid.

[41] E.g. section 33 of the *Status of Children's Act 1974 (Victoria)*

Other Rights (International law)

Human rights recognised in the other articles of the International Convention on the Rights of the Child that are affected by surrogacy include:

1. Children to be registered immediately after birth and have the right from birth to a name, to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. (Article 7);

2. The right to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful influence. (Article 8);

3. The right not to be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, that such separation is necessary for the best interests of the child (for example in a case involving abuse or neglect of the child by parents) (Article 9);

4. Australia, as a party to the Convention, relevantly has obligations to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form (Article 35).

Conflict of laws

The lack of regulated international surrogacy arrangements between countries can result in a conflict of laws in relation to the child's parentage and/or nationality. In short, it can result in children born of international surrogacy arrangements being 'legal orphans' (that is, not having a legal parent).This has been more prevalent following the increased use of gestational surrogacy in which the surrogate mother (and sometimes also the intended parents) have no genetic link to the child. There are also complex issues concerning a child's right to acquire a nationality, in particular where that child would otherwise be stateless (Article 7, Convention), when they are born overseas in an international surrogate arrangement.

Legal uncertainties, inconsistencies and lack of regulation

Lawyers are not arbiters of morals. However, lawyers are concerned by the ethical and human rights issues issues arising from commercial surrogacy, particularly where it takes place in jurisdictions that are poorly regulated, do not have adequate protections for surrogates and children and the risk of exploitation is high. It appears that the majority of women agreeing to be surrogates in developing countries are extremely poor and have limited education.

It is clear that the current regulatory environment appears to be largely defective due to legal uncertainty. This uncertainty leaves children born as a result of international surrogacy arrangements in a legal void regarding their parentage and nationality unless and until Family Court orders are made.

Further, the criminalisation of overseas commercial surrogacy by New South Wales, Queensland and the ACT appears to have been a largely ineffective deterrent, as couples continue to seek overseas surrogacy arrangements[42]. This may in part be due to mixed messages from the Australian Government, which has condemned commercial surrogacy at an international level[1], yet is arguably condoning it indirectly by not prosecuting parties who have engaged in commercial surrogacy, including high profile figures and celebrities in those jurisdictions in which it is a criminal offense. .

An additional deficiency in the current system is that it places judges exercising jurisdiction under the *Family Law Act* in an extremely difficult position. In particular, it places the Court in the uneasy position of making parenting orders affecting a surrogate mother's parenting rights, in circumstances where the Court has little or no capacity to examine whether the surrogate mother's consent to relinquish the child was freely given, and whether the surrogacy arrangement was free of exploitation. It further requires the Court to essentially act contrary to public policy and the wider policy considerations surrounding surrogacy, as the Court's primary obligation pursuant to the *Family Law Act* is to ensure that the child's best interests are met. As a result, once a child is born and is in Australia and an application for parenting orders is before the court, it is arguably too late to penalise the commissioning parents as it is unlikely to be in a child's best interests for their parents to be prosecuted.

Another dilemma arises where the genetic material of a person with a different cultural background is used. There may be future cultural and socialisation issues for children born as a result of overseas commercial procedures if the country of origin is different from that of the commissioning parents, as there is no requirement for the intending parents (unlike with overseas adoptions) to assist the child with knowledge and acceptance of the country from which the genetic material was obtained. By contrast, some parents seek overseas surrogacy so they can access genetic material of the same racial background to one or both parents, which may be unavailable in Australia.

As there may be no counselling requirements for surrogacy arrangements in the overseas jurisdiction (and the *Family Law Act* requirements for counselling in the case of parenting orders involving third parties are usually accepted as being impractical in the circumstances) these children do not have the same protections as children adopted from overseas or born from domestic surrogacy arrangements. In Queensland, the intended parents seeking a domestic parentage order need to demonstrate their understanding of the social, psychological and legal implications of the surrogacy arrangement and the making of a parentage order. Other States and Territories do not have this requirement, but have differing requirements for counselling and legal advice before the commencement of the surrogacy procedure and a best interests test for the domestic parentage order.

[42] http://hrlc.org.au/regulating-surrogacy-in-australia/

Cases

Examples of real cases highlight the issues that can arise from international surrogacy include:

English Case of X & Y (Foreign Surrogacy)

A set of twins were born to a surrogate Ukrainian family to give to a family from the United Kingdom (UK), with the sperm having been provided by the British male.[43] The laws in Ukraine afforded legal parenthood to the British couple rather than the Ukrainian couple, while the British laws gave the Ukrainian surrogate couple legal parenthood.[44] Thus parental status was lost for both couples and the child was left without legal parents or any rights to citizenship.[45] This meant the British couple could not remain in Ukraine but the children could not be brought back to the UK. Eventually an order was made outside the normal rules to allow them to bring the children in so they could apply for a parental order.[46] As a result, the children were, in the words of Mr Justice Hedley, "marooned, stateless and parentless, whilst the couple could neither remain in the Ukraine nor bring the children to the UK"[47]. In that case the court, however, noted that grant of a parental order did not automatically confer nationality.

This situation arose because there are three different tests for determining legal parenthood in surrogacy situations which apply in different jurisdictions.[48] The birth test accords legal status as the mother to the woman who gives birth to the child, even if she is biologically unrelated to it, while on the genetics test the child's parents are determined on the basis of genetics such that the surrogate mother will only be regarded as the legal mother of the child where there has been traditional surrogacy.[49] There are also potential issues on the genetics test where there has been an anonymous sperm donation.[50] On the third test, the intent test, the intent of the parties as expressed in the surrogacy arrangements determines legal parenthood status.[51] In this case, the legal the starting-point was orphaned, stateless children.

The Balaz case (Germany and England)

A German couple, Mr & Mrs Balaz, commissioned a surrogate pregnancy in India using Mr Balaz's sperm and a donated egg. Twins were born in 2008, and Indian birth certificates were issued naming Mr & Mrs Balaz as their parents. German authorities refused to recognise the birth certificates as establishing either parentage or German nationality

[43] 631
[44] 631
[45] 631
[46] 631
[47] *Re X and Y (Foreign Surrogacy)* 2009 1 FLR
[48] 630
[49] 630
[50] 630
[51] 631

because surrogacy is illegal in Germany. Mr & Mrs Balaz then tried to get Indian passports for the children. That application was refused because they did not have an Indian "parent". So the children were stateless. The Indian birth certificates were then recalled and Mrs Balaz was replaced with the Indian surrogate mother as the children's "mother", although Mr Balaz was still identified as the "father". Although the nationality of the children was now recognised as Indian because they were born on Indian soil to an "Indian mother" (which meant that a surrogate mother was now recognised as a legal mother) the Indian passport authority continued to refuse the children passports.

It was not until December 2009 that India's highest court urged the Indian authorities to consider non-judicial avenues and suggested adoption as a possible solution. But that was not possible, because requirements of neither the 1993 Hague Convention on Inter-Country Adoption nor Indian domestic law had been met, because the children had been neither orphaned nor abandoned.

Eventually, after some two years, Germany issued the children with visas and they were able to leave India on the basis that Mr & Mrs Balzac would formally adopt them in Germany under German law.

Lack of international regulation

There is a void in the international regulation of surrogacy arrangements, as none of the existing international instruments contains specific provisions designed to regulate this emerging area of international family law.

Regulation about surrogacy arrangements must be centred on the rights of children and what is in the best interests of the child. This is similar to the approaches adopted in Australia in both federal family law and state child protection law.

Relevant Commonwealth laws, policies and practices (including family law, immigration, citizenship, passports, child support and privacy)

Surrogacy is complicated – medically and legally. In Australia it involves consideration of both Commonwealth and State laws, for example, family law (federal), artificial reproduction technology legislation and adoption law (state and territory based).

The current state of the law on surrogacy in Australia precludes, in most cases, intending parents who undertake commercial surrogacy being able to obtain parentage orders to declare them as parents as distinct from obtaining parenting orders (e.g. "that the child live with the applicants") and parental responsibility orders. It also has implications for the children born of illegal surrogacy arrangements who do not have legally recognised parents."

Below is a list of all the laws potentially relevant to a surrogacy in Australia[52]:

Commonwealth

Family Law Act 1975 (Cth)	Limited application to surrogacy matters noting surrogacy is governed by state legislation. "*Parent", "child"* especially in ss60H and 60HB, parenting presumptions. Note s60HB of the Family Law Act recognises transfer of parentage in state and territory laws. This status of parentage under the *Family Law Act* is adopted in other Federal Acts such as the *Child Support (Assessment) Act* 1989 and the Australian Citizenship Act 2007.
Child Support (Assessment) Act 1989 (Cth) *ss 5, 20*	*"Parent", "eligible child"* by reference back to *Family Law Act*
Child Support (Registration and Collection) Act 1989 (Cth)	
Australian Citizenship Act 2007 (Cth) – s16	"Citizenship of *"child"* born to Australian *"parent"* overseas"
Australian Passports Act 2005 - s.11:	Issuing of passports to child in absence of consent of those with "parental responsibility"
National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research*, 2007	Licensing, prohibition of IVF clinics engaging in commercial surrogacy nor advertising surrogacy services
Prohibition of Human Cloning for Reproduction Act 2002, s.21	Ban on commercial trade in eggs, sperm, embryos, max penalty 15 year imprisonment.

Relevant State Laws (not comprehensive)

ACT	Parentage Act 2004	Parenting presumptions, regulation of altruistic surrogacy, ban of commercial surrogacy
	Births, Deaths and Marriages Registration Act 1997	Altering birth register
	Human Cloning and Embryo Research Act	Ban on commercial trade in

[52] Prepared with reference to table summarising this legislation prepared by Stephen Page of Harrington Family Lawyers. (http://www.harringtonfamilylawyers.com/)

	2004, s.19	eggs, sperm, embryos, max 15 years imp.
NSW	Surrogacy Act 2010 (NSW)	Regulation of altruistic surrogacy, ban of commercial surrogacy
	Assisted Reproductive Technology Act 2007	Regulation of IVF clinics
	Births, Deaths and Marriages Registration Act 1995	Altering birth register
	Human Cloning for Reproduction and Other Prohibited Practices Act 2003, s.26	Ban on commercial trade in eggs, sperm, embryos, max 15 years imp
	Status of Children Act 1996	Parenting presumptions
NT	No specific surrogacy laws in NT	
	Births, Deaths and Marriages Registration Act 1997	*Not* altering birth register
	Status of Children Act 1996	Parenting presumptions
QLD	Surrogacy Act 2010 (Qld)	Regulation of altruistic surrogacy, ban of commercial surrogacy
	Status of Children Act 1978	Parenting presumptions
	Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003, s.17	Ban on commercial trade in eggs, sperm, embryos, max 15 years imp.
	Births, Deaths and Marriages Registration Act 2003	Altering birth register
SA	Family Relationships Act 1975 (SA)	Parenting presumptions, regulation of altruistic surrogacy, ban of commercial surrogacy
	Assisted Reproductive Treatment Act 1988 (SA)	
	Consent to Medical Treatment and Palliative Care Act 1995 (SA)	
	Advance Care Directives Act 2013 (SA)	
	Births, Deaths and Marriages Registration Act 1996	Altering birth register
Tasmania	Surrogacy Act 2012 (Tas)	Regulation of altruistic

		surrogacy, ban of commercial surrogacy,
	Births, Deaths and Marriages Registration Act 1999	Altering birth register
	man Cloning for Reproduction and Other Prohibited Practices Act 2003, s.20	Ban on commercial trade in eggs, sperm, embryos, max 15 years imp
	Status of Children Act 1974	Parenting presumptions
Victoria	Assisted Reproductive Treatment Act 2008 (Vic)	Regulation of altruistic surrogacy, ban of commercial surrogacy
	Status of Children Act 1974 (Vic)	Parenting presumptions, parentage orders
	Prohibition of Human Cloning for Reproduction Act 2008, s.17	Ban on commercial trade in eggs, sperm, embryos, max 15 years imp.
	Births, Deaths and Marriages Registration Act 1996	Altering birth register. Note: there is no stated ability to recognise interstate parentage orders.
WA	Surrogacy Act 2008 (WA)	Regulation of altruistic surrogacy, ban of commercial surrogacy
	Artificial Conception Act 1985	Parenting presumptions
	Interpretation Act 1984 (WA)	
	Human Reproductive Technology Act 1991 (WA)	Ban on commercial trade in eggs, sperm, embryos, max 15 years imp
	Family Court (Surrogacy) Rules 2009	
	Surrogacy Regulations 2009	
	Births, Deaths and Marriages Registration Act 1998	Altering birth register

Relevant Practices

Travelling overseas for commercial surrogacy

Statistically, Australians comprise the greatest number of people actively seeking out surrogacy arrangements in other countries. A recorded 420 citizenship applications for children born through commercial surrogacy arrangements from 2008-2012, and 394 babies

born in India to Australian citizens in 2011 alone[53]. The major commercial surrogacy destinations for Australians were India, Thailand and the United States (California in particular), with Canada also an increasingly popular destination[54].

Even though it is clearly a criminal offence in NSW, Queensland and ACT for residents to engage in commercial surrogacy arrangements anywhere in the world, hundreds of couples have from these jurisdictions engaged in this and very few prosecutions have actively been pursued. In *Dudley and Anor & Chedi* [2011] FamCA 502 the Queensland registry of the Family Court referred the commissioning parents to Queensland's Director of Public Prosecution for prosecution.

The criminalisation of extra territorial commercial surrogacy by some Australian State and Territory parliaments, has not had any notable effect of deterring Australians from undertaking commercial surrogacy and it certainly has not addressed the concerns about exploitation of surrogate mothers or lack of informed consent.

Such criminalisation has, in some cases, deterred intended parents from applying to Courts for parenting orders or legal recognition as parents, leaving children whose primary carers are not recognised as having rights, obligations and responsibilities as parents. This can be detrimental to the child in circumstances requiring proof of parentage or parental responsibility such as applying for passports and obtaining rights to an inheritance from their intended parents. Even if one commissioning parent is on the birth certificate but the other is not, this could be problematic if the parent who is on the birth certificate died or if the parties separated.

For example, one LIV member noted that they are aware of at least one couple who did not seek a Family Court order because of the risk of criminal prosecution. The intended father was on the birth certificate but the intended mother had no status. This would be particularly problematic if the intended father died or the parties separated.

Stephen Page, Harrington Lawyers (QLD) has stated that "in 2012, 1000 children were born in Thailand and India to Australian surrogate parents. Of that, only 3 children were registered under the provision in the Family Law Act so that the intended parents were legally (under Australian law) the parents of the children.[55]"

Family Law Issues arising from commercial surrogacy overseas

In Australia, intended parents who have undertaken commercial surrogacy overseas have to date been faced with uncertainty of the law in relation to the Family Court's power to make declarations of parentage for an intended parent who is not on the birth certificate of a child born overseas, even though they may be genetically linked to the child. The Courts are then

[53] http://hrlc.org.au/regulating-surrogacy-in-australia/

[54] http://hrlc.org.au/regulating-surrogacy-in-australia/

[55] http://www.sbs.com.au/news/insight/tvepisode/surrogacy

required to consider whether a parenting order and orders for parental responsibility will be in the best interests of the child. Inconsistency in outcomes for family law decisions has also arisen due to ambiguities in the *Family Law Act 1975 (Cth)* regarding jurisdiction to make parentage orders where there is inconsistent state law.

In the case of *Dennis v Pradchapet [2011] Fam CA 123*, three children were born as a result of two separate international surrogacy arrangements entered into by the same intended parents, but a successful declaration of parentage was made in relation to only one of the three children, due to the wide discretion given to the court as a result of conflicting and incomplete laws.

In the case of *Re Michael (Surrogacy arrangements)* (2009) 41 Fam LR 694, at 34 Justice Watts stated that it was the legislative intent of s60HB of the *Family Law Act* to grant the status of parents to the providers of genetic material in a surrogacy arrangement if that was consistent with an order made in accordance with State legislation. However if the State law did not so provide, it was Parliament's intention that they not be recognised as parents. Consequently the provisions of s60H(1)(d) of the Family Law Act then apply and a child is not to be considered a child of those who have provided genetic material.

The importance of Justice Watts' judgment is two-fold. Firstly, His Honour's conclusions indicate that the same fact scenario could potentially lead to a different result in other States of Australia depending on legislation governing surrogacy arrangements in that State. Secondly, there needs to be serious consideration given to the provisions of the *Family Law Act* and whether s60H should be amended to make it clear it has no application in surrogacy cases.

In the Family Court case of *Ellison v Anor & Karnchanit [2012]* FamCA *602* at para 88 Justice Ryan highlighted the tension between public policy considerations and other considerations that arise under the Family Law Act (when asked to determine whether to make a declaration of parentage in an overseas surrogacy arrangement) including what is in the best interests of the child. Her Honour cited the same dilemma as expressed by Hedley J (in the United Kingdom) in *Re X and Y (Foreign Surrogacy)* 2009 1 FLR …

> "*I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order..."*

From a practice management point of view, Ryan J summarised the best approach to international surrogacy applications in *Ellison* 2012 (at paragraph 134 to 140) as follows:-

1. Ensure an Independent Children's Lawyer is appointed to represent the child;

2. Obtain affidavit evidence from the applicants and the birth mother;

3. Independent evidence regarding the child's identification should be put before the Court;

4. Evidence with respect of the birth mother including:

    a) Proof that legal advice and counselling was provided;

    b) Evidence that the surrogacy agreement was entered into prior to conception;

    c) Indicate that the surrogate provided informed consent;

    d) Evidence of the surrogate's view following the birth;

    e) Evidence of the surrogate's intention, if any, to have a relationship with the child

    f) Have a family report prepared;

    g) Produce evidence of the legal regime in the overseas jurisdiction regarding the surrogacy agreement and the rights of the birth mother.

Subsequent judgments on international surrogacy cases have not followed all the practice management suggestions in *Ellison* where the Court was satisfied that the evidence showed the child was in "very good hands": See *Fisher-Oakley v Kittur* [2014] FamCA 123 per Justice Cronin.

Immigration Law Issues arising from commercial surrogacy overseas

Overseas commercial surrogacy has consequences in the immigration sphere.

For example, in Australia s8 of the *Australian Citizenship Act 2007* (Cth) enables citizenship to be granted to a child born as a result of a surrogacy arrangement, but only if parentage is transferred under Australian legislation – which would exclude an international arrangement, and one in which the surrogate was paid. Although Commonwealth courts have taken a somewhat relaxed view about the requirement to adhere to the rules, and have tended to put the child's welfare first, as far as they can, civil law jurisdictions have been much stricter.

Even if a "parental order" is made, it does not necessarily mean that other countries will recognise it. That is because there is no reciprocity between countries when it comes to

recognising the results of surrogacy arrangements. They are not, for example, covered by the 1996 Hague Convention on the Protection of Children because it does not deal with parentage.

So even if a couple has an order from a court conferring parentage upon them, it does not mean that other countries will regard them as the child's parents, a problem that might not come to light for many years. Recognition on the birth certificate is more important for the child and the child's future than some of the Family Court's judgments which confer only parental responsibility, suggest.

Improvements that could be made to enable the Commonwealth to respond appropriately to this issue (including consistency between laws where appropriate and desirable) to better protect children and others affected by such arrangements

Elaborating on suggested reforms

Further to the reforms noted above, the LIV makes the following comments:

Register of Willing Surrogate Mothers

One of the difficulties in engaging in altruistic surrogacy in Australia is locating a surrogate mother who satisfies the strict criteria required by the respective surrogacy law. In most states it is illegal to advertise services or to advertise that you seek the services of an altruistic surrogate. For example, in Victoria, *s45 Assisted Reproductive Treatment Act 2008 (Vic)*[56] provides that a person must not publish, or cause to be published, a statement, advertisement, notice or document that a person is willing to enter, arrange, benefit under a surrogacy arrangement (or seek another to do any of the above). The penalty is 240 penalty units or 2 years imprisonment or both. Despite this, many altruistic surrogacy arrangements in Australia are the result of people interested in surrogacy connecting via a surrogacy related interest group (often an internet forum). This practice adds significant delay to the time it may otherwise take for intended parents to locate a surrogate mother. Many people who eventually turned to overseas commercial surrogacy (even when illegal), did so because they knew of no one who was suitable.

Intended parents who do have an existing relationship with a potential surrogate mother, tend to turn to friends or family members (i.e. a mother or a sister offers to be surrogate for their daughter/sister who is unable to have children). This can be problematic as such relationships can be strained by the surrogacy experience and result in that family member not being as involved in the life of the intended parents and accordingly the child which may not in the best interests of the child ultimately born of that surrogacy arrangement. There are also issues of potential duress, undue influence which may affect the provision of valid consent (discussed above).

[56] http://www.austlii.edu.au/au/legis/vic/consol_act/arta2008360/s45.html

South Australia has recently sought to address this issue by introducing (as part of their proposed State Framework for Altruistic Surrogacy[57]) a surrogate register of women who are willing to act as a surrogate mother. It is proposed that the Surrogate Register will not be available for public inspection but instead only be accessed by "approved medical institutions" to assist clients who have met the criteria to enter into a surrogacy arrangement find a suitable and willing surrogate mother.

Creating the surrogacy register would minimise the difficulty of finding a willing and reliable surrogate[58].

Issues with implementing a national approach to surrogacy

In this debate on reforms to surrogacy law "most important of all is the child, who must be assured of their safety, citizenship and identity. It is also crucial in the case of commercial surrogacy, that the surrogate mother not be commodified and that the significant bond between the child and the surrogate mother be recognized." [59]

In recent years there has been significant law reform in Australia at a state level in two aspects, to:

1. Recognise the use of IVF for surrogacy; and
2. Provide regimes for transfer of parentage from the surrogate to the commissioning parent.

However if a child is born overseas through a commercial surrogacy arrangement, the commissioning parents are unable to access the state based transfer of parentage regimes and may be unable to apply for Australian Citizenship of the child under the relevant Act due to the ambiguities regarding the definition of "parent and child". Citizenship of the child is usually obtained by descent from one of the intended parents. If there is no genetic link (e.g. donor egg and donor sperm), then further proof is required to obtain citizenship for the child.

The current legal framework in Australia leaves ambiguity about the definition of a parent. The *Family Law Act* 1975 should be amended to provide the Family Court with unequivocal jurisdiction to make a declaration of parentage in (domestic and international) surrogacy cases when the Court considers it is in the best interests of the child. See constitutional issues below.

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[57] https://www.legislation.sa.gov.au/LZ/V/A/2015/FAMILY%20RELATIONSHIPS%20(SURROGACY)%20AMENDMENT%20ACT%202015_15/2015.15.UN.PDF

[58] SA House of Assembly Reading Speech June 2015 http://www.adrianpederick.com/media/2015%20Speeches/Family%20Relationships%20(Surrogacy)%20Amendment%20Bill_04%20June%202015.pdf

[59] See Pascoe CFM Speech "The Rise of the Surrogate Parenting: Family Law and Human Rights implications in Australia and Internationally 10 October 2011.

Constitutional Issues

The Commonwealth Government lacks the constitutional power to enact legislation dealing with surrogacy law on a national, consistent basis. Therefore unless the States refer the necessary legislative powers to the Commonwealth, then "the best result would be if States and Territories continue to move towards a uniform position in relation to the legality of surrogacy arrangements and the definition of 'parent and child'" [60]

However, some LIV members cosnider that Australia's human rights treaty obligations, namely under the Convention on the Rights of the Child may form a basis for the Commonwealth to introduce national legislation in relation to surrogacy (under the external affairs power), provided that the policies to be implemented were consistent with relevant international law.

To be held valid by the High Court under the external affairs power,[61] a law must be "reasonably capable of being considered appropriate and adapted to implementing the treaty"[62]. Problems arise, for example, if the legislation exceeds what is reasonably required to satisfy Australia's obligations under the Convention;[63] perhaps if the legislation does not comply with *all* the obligations of the treaty or if the treaty expresses some vague goal or ideal rather than prescribing a more specific course of action to be taken by signatory states[64].

Altruistic surrogacy in Australia when done through a recognised ART clinic has provided some protection to intending parents who seek legal recognition as parents through state and territory "transfer of parentage" legislation. Panels such as the "Patient Review Panel" in Victoria provide regulation as to the procedure for approval of surrogacy arrangements. However the lack of regulation or legislative clarity in relation to "reasonable expenses" for the surrogate has led to surrogates not being adequately protected for recovery of expenses incurred through the surrogacy arrangement where they were not agreed in advance or unforeseen e.g. loss of income from employment, no private health insurance for the surrogate.

Furthermore, "a surrogacy arrangement in Australia is generally not enforceable. This means that a surrogate who refuses to hand over the baby cannot be forced to under the

[60] Pascoe CFM Speech ibid
[61] Williams, George, "The Constitution and a National Industrial Relations Regime [2005] DeakinLawRw 26

[62] This requirement was expounded in Commonwealth v Tasmania (Tasmanian Dam Case), (1983) 158 CLR 1 and was endorsed in Victoria v Commonwealth (Industrial Relations Act Case), (1996) 187 CLR 416, 487 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

[63] Victoria v Commonwealth (Industrial Relations Act Case), (1996) 187 CLR 416, 488: "It would be a tenable proposition that legislation purporting to implement a treaty does not operate upon the subject which is an aspect of external affairs unless the legislation complies with all the obligations assumed under the treaty."

[64] Victoria v Commonwealth (Industrial Relations Act Case), (1996) 187 CLR 416, 487 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

agreement. If she refuses to do so, the only remedy for the intended parent(s) is to apply to the Family Court for a parenting order that the child live with them".

International Surrogacy Convention

In an article entitled "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level"[65], authors Katarina Trimmings and Paul Beaumont argue that:

- Like surrogacy today, in the 1980s, international adoption was a morally sensitive issue.

- The co-operative framework on cross-border surrogacy should be based on the template of the highly successful 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption ("the Adoption Convention").

- The Adoption Convention has been one of the most effective instruments in the area of international protection of children. In order to produce a document that will effectively tackle the problem of cross-border surrogacy, it is imperative to ensure that both the "supply countries" and the "demand countries" are actively involved as they were in the process of establishing the Adoption Convention

- The Convention should be based on two fundamental principles: the principle of the best interests of the child and the principle of biological connection.

- Within this multilateral framework, detailed regulation should be left to bilateral agreements between Member States. The Convention would give Member States maximum flexibility to agree on details of international surrogacy arrangements, including issues such as suitability of "intended parents", suitability of a surrogate mother, and payments in surrogacy arrangements. The Convention would only set minimum standards and would not prevent state parties from setting higher standards for international surrogacy arrangements.

[65] Trimmings, K and Beaumont, P, "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level", Journal of Private International Law, Vol 7 p627

The authors also note that the primary goals of the Convention should be to:

1. Develop a system of legally binding standards that should be observed in connection with international surrogacy arrangements;

2. Develop a system of supervision to ensure that these standards are observed; and

3. Establish a framework of co-operation and channels of communication between jurisdictions involved.

Cross-border surrogacy arrangements could be channeled exclusively through state-licensed agencies both in the country of origin and in the receiving country. Recognition of cross-border surrogacy agreements commissioned either privately or through unauthorised intermediaries should be strictly opposed (outlawed). This may send a clear message to potential intended parents and encourage surrogacy arrangements only through authorised agencies, as is the case with international adoption.

Other Comments

Surrogacy and Adoption

While adoption and surrogacy have a number of features in common (e.g. as institutions of family law adoption and surrogacy can be viewed as "two possibilities on a menu of choices to pursue in [infertile couples'] quest for children", adoption and surrogacy are often seen as being very different and the use of adoption to support surrogacy is seen as inappropriate. For example, "The principle behind surrogacy is to provide a child for those unable to have their own. The principle behind adoption is to provide a new family for a child who cannot be raised by their birth family."

In applications to the Family Court of Australia involving overseas commercial surrogacy arrangements, the current state of the law is that the intended parent may apply for parenting orders, as distinct from parentage orders, (See *Mason v Mason [2013] FamCA 424* at 33-34) and if the intended parent wishes to be recognised as the child's parent on the birth certificate, they can apply to the Family Court for leave to commence adoption proceedings. See for example *Re Michael (Surrogacy Arrangements) (2009) 41 Fam LR 694*. Adoption is dealt with by the states and territories and involves a rigorous procedure.

Commercial vs altruistic surrogacy in Australia

Some commentators have called for the Australian government to allow well-regulated domestic commercial surrogacy market as a proposed solution to counteract the harms of unregulated international commercial surrogacy.

However, research indicates there are few indicators that this approach works, for example:

- Although 18 US states allow commercial surrogacy, Americans remain well represented among the consumers of international commercial surrogacy. There are also reports that surrogate business is thriving "underground[66]".

- Secondly, trends in Australian usage of international commercial surrogacy reveal a tendency among intended parents to favour cheap and convenient destinations. An Australian commercial surrogacy market would not be a viable alternative for intended parents if it cannot compete with cheaper and less-regulated jurisdictions. Otherwise, intended parents may continue to seek cheaper, seemingly more convenient destinations and avoid the hassle of rights-focused regulation[67].

Further, it is possible that children born via commercial surrogacy may feel commodified, especially where the arrangements were commercial rather than altruistic. One child born of surrogacy complained: "How do you think we feel about being created specifically to be given away? … I don't care why my parents or my mother did this. It looks to me like I was bought and sold."[68] The NHMRC 'Draft ethical guidelines on the use of assisted reproductive technology in clinical practice and research[69]' continue to treat commercial surrogacy as ethically unacceptable because of its potential for exploitation and commodification of the reproductive process.

As argued above, it is submitted that consideration be given to "compensation" for the surrogate. Professor Jenni Millbank proposes that "Payment of reasonable compensation could be understood as compensation for loss and for risk encompassing "burden" and "inconvenience" measures used for other health volunteers."[70]

The concept of "professional intermediaries" in Australia is also worth consideration (that is, an intermediary which provides information exchange, mediated contact, matching of donors and recipients e.g. in relation to embryo donation). Lawyer Natalie Gamble contends that most UK parents undertaking surrogacy in the United States do so "not to access something they cannot do at home, but rather [for] speedy, professional and "looked after" services".[71]

According to Millbank: "Australian surrogacy regulation to date has ignored the results of social science research and the experience of comparable jurisdictions in favour of assumptions that rest upon an unsustainable altruistic/commercial dichotomy of care and market. As a result, most Australians are undertaking surrogacy abroad, in conditions that

[66] https://assets.hcch.net/upload/wop/gap2012pd10en.pdf

[67] http://rightnow.org.au/topics/children-and-youth/international-commercial-surrogacy-in-the-post-gammy-world/

[68] Usha Rengachary Smerdon "Crossing Bodies, Crossing Borders: International Surrogacy Agreements Between the United States and India" 39 *Cumberland Law Review* 15 at 60

[69] National Health and Medical Research Council

[70] Rethinking "Commercial" Surrogacy in Australia" Prof Jenni Millbank, UTS, Sydney March 2015

[71] See Millbank (2015) Ibid

are less safe and less protective of the interests of surrogates, parents and children than they would be if they were undertaken domestically."[72]

The LIV suggests that Australian legislators should look for guidance to countries or states which more successfully regulate 'compensated' surrogacy such as California in the USA.

In California the practice for decades had provided for pre–birth declarations of parentage which have been used for consent based orders in commercial surrogacy arrangements. The new provision in the Californian Family Code effective from 2013 "requires that agreements for gestational surrogacy are in writing, dated and witnessed and must be entered into prior to the conception attempt. As long as both intended parents and surrogate are independently legally represented and all parties attest to the accuracy of the agreement (under penalty of perjury) then the Statute renders the agreement presumptively valid… and once filed with the court, establishes the parent- child relationship to the exclusion of any general parentage presumptions."[73]

As noted by Millbank:

> "*The established Australian context of overarching health care regulation and family law as well as specific surrogacy laws would prevent risky reproductive treatments and contracts that purport to inhibit women's reproductive autonomy or determine the parental status or physical custody of resulting children. In Australian assisted reproductive practice there are very high clinical and ethical standards operating in tandem with specific legislation in several states and binding ethical guidance nationally*."[74]

Australia's International Obligations

The rights of children must be a primary consideration in surrogacy arrangements and subject to appropriate protection. [19]. Having ratified the Convention on the Rights of the Child in December 1990, Australia must ensure that all children enjoy the rights set out in the Convention. The specific articles of the Convention applicable to surrogacy are outlined above.

Australia is also a party to the International Convention on Civil and Political Rights (ICCPR). Relevant articles pertaining to surrogacy include:

[72] See Millbank (2015) Ibid at 17

[73] Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy" by Jenni Millbank (2013) 27(2) Australian Journal of Family Law

[74] Millbank 2015 at p14

- The protection of the family as the natural and fundamental group unit of society (Article 23) and,

- Consistent with the Convention, the right of every child to be registered immediately after birth, to have a name and to acquire a nationality (Article 24).

Right to information

Important to protecting the welfare of children born as a result of donated gametes is protecting their right to information about their genetic parents. The *Convention on the Rights of the Child* recognises the child's right to know and understand his or her history and identity and it may be important to a child's psychological health to have such information. Studies in the United States have found that most donor-conceived adults believed that access to information about their genetic parents is an essential right.[75] Knowledge of one's genetic history may also be important in understanding and preventing disease, such as when there is a family history of bowel cancer or the like. Knowledge of such a history might allow preventative action to be taken, whereas in the absence of this information a person born of a surrogacy arrangement will likely fail to take any preventative action, therefore potentially resulting in worse outcomes.

This issue is dealt with by the Victorian *Assisted Reproductive Treatment Act 2008* s 5(c) which provides that children born as a result of donated gametes have a right to know information about their genetic parents. In Victoria ART providers are required to keep records of genetic information to which the children can apply to gain access. In NSW applicants are required to provide all registrable information and to register the birth of the child.[76]

There are issues with recognising international surrogacy agreements where such records are likely to be unavailable,[77] particularly when the intended parents are forced to stay underground due to the criminal prohibition of commercial surrogacy arrangements.

Adequacy of Information currently available to interested parties to surrogacy arrangements (inc. the child) on risks, rights and protections

At present, there is a variety of information available to parties seeking information about surrogacy but not one central location where they can obtain information about all aspects of surrogacy, including legal, medical, psychological (emotional), moral (e.g. where it is intended to seek out overseas surrogacy arrangements and financial. To obtain a more complete picture of what surrogacy involves requires an interested and well-educated person

[75] Millbank, J. 'Responsive regulation of cross-border assisted reproduction' 23 Journal of Law and Medicine 346, 362.

[76] *Surrogacy Act 2010* (NSW) ss 37-8.

[77] *Regulating Surrogacy in Australia* Human Rights Law Centre http://hrlc.org.au/regulating-surrogacy-in-australia/

to trail through varied websites, each from different angles with different agendas and piece together tidbits of information obtained from each.

Without an obvious central location for information about surrogacy, interested parties often turn to unregulated baby forums for general information about surrogacy. The unregulated information available on forums is often inaccurate, usually based on a lay person's understanding of some aspects of surrogacy (i.e. not a comprehensive summary of all the medical, legal and ethical issues that arise when considering surrogacy) and contributes to the preconceptions held by both surrogate mothers and intended parents which may not reflect the reality of surrogacy arrangements. While internet forums can be informative and helpful (by providing a user perspective on the issue), it is no substitute for a 'one stop shop' style government regulated website explaining in plain English all of the complicated aspects relating to surrogacy arrangements that may affect Australians.

For example, information currently available includes:

Private Sources

- Surrogacy Australia is an incorporated not for profit membership association for people considering using surrogacy arrangements which provides general information on altruistic and commercial surrogacy[78] and refers people to other information sources and forums. This website flags some cost issues surrounding Medicare's position regarding costs incurred with surrogacy arrangements.

- IVF Australia website has "Preparing for surrogacy" guide[79] relevant for parties in NSW. It is not clear from the website that the information is for NSW parties only and that laws and procedure differ between states.

- IVF Clinic websites contain some information about surrogacy in the context of the permitted altruistic surrogacy arrangements relevant to the state in which the clinic operates (e.g. Monash IVF http://monashivf.com/treatment/treatments-available/surrogacy/ and and Melbourne IVF https://www.mivf.com.au/fertility-treatment/ivf-donor-program/surrogacy).

Government Sources

- Queensland Government website (Births, deaths and marriages and divorces) contains general information about surrogacy laws in that state, as well as information about costs of surrogacy and obtaining a parentage order[80].

[78] http://www.surrogacyaustralia.org/

[79] http://www.ivf.com.au/fertility-treatment/donor-program/surrogacy

[80] https://www.qld.gov.au/law/births-deaths-marriages-and-divorces/surrogacy/

- The Victorian Government's Better Health Channel also contains some basic information about surrogacy[81] and generally highlights how complex it can be and refers people to Victorian Assisted Reproductive Treatment Authority (VARTA), their local IVF clinic and doctor, Surrogacy Australia or to a lawyer for further information and advice.

- VARTA website contains more detailed information and resources for interested parties. For example, there is a domestic surrogacy arrangement legal checklist[82] and copies of research reports and studies available.

- In WA, the Legal Aid (WA) website[83] contains legal information about surrogacy in WA and refers interested parties to Reproductive Technology Council website and Family Court of WA website.

- The Reproductive Technology Council website provides basic information about costs of surrogacy, legal requirements, IVF service providers for parties in WA.

- The Family Court of WA website (as the Court which has jurisdiction in WA under the Surrogacy Act 2008 (WA) outlines the court process parties are required to follow to comply with the legal requirements for altruistic surrogacy.

- Commonwealth Department of Immigration and Border protection website has a fact sheet outlining generic information about international surrogacy arrangements and how it may impact on immigration.

Suggested Improvements

There should be at least one government agency with a comprehensive website for Australians which summarises the legal arrangements for surrogacy in Australia and international jurisdictions and highlights some of the social and ethical (as well as legal) issues that may arise when engaging in surrogacy (particularly for those intended parents interested in information about international commercial surrogacy) and include anonymised case examples from decided cases (both in Australia and overseas) to highlight the real problems faced by parents . This may assist anyone interested in becoming either an intended parents or a surrogate to make a more informed decision about engaging in surrogacy and the risks and difficulties associated with it. It may also assist to dispel some

[81] https://www.betterhealth.vic.gov.au/health/healthyliving/surrogacy

[82] https://www.varta.org.au/resources/brochure/domestic-surrogacy-arrangement-legal-checklist

[83] http://www.legalaid.wa.gov.au/InformationAboutTheLaw/FamilyRelationshipsChildren/AdoptionSurrogacy/Pages/Surrogacy.aspx

commonly held myths about surrogacy by providing a more accurate entry point for interested parties to obtain information about what to expect.

Information Sharing between Commonwealth and states and territories

Any proposed law reform for surrogacy on a Commonwealth level needs to be shared with States and Territories given that the power to make laws in this area has been delegated predominately to the States and Territories. To have a uniform coordinated approach requires information sharing on policy initiatives.

Conclusion

Surrogacy is a complicated issue – medically and legally.

Legally, it intersects with a number of different areas. Ideally more time than permitted under this Inquiry is required to give justice to the depth of suggested law reforms to address the issues raised in relation to surrogacy arrangements on a domestic and international level.

The LIV would welcome the opportunity to provide further feedback on this topic and to be consulted in relation to any proposed legislative reform in relation to surrogacy.

Further Information

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