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**STANDING COMMITTEE ON SOCIAL POLICY
AND LEGAL AFFAIRS, SURROGACY INQUIRY**

Thank you for this opportunity to make a submission to this inquiry. We are all Professors of Law at the University of Technology Sydney and experts in health law, with particular expertise in assisted reproductive technologies including surrogacy.

Our research into surrogacy has addressed parentage and citizenship issues arising through international surrogacy and the regulation of surrogacy more broadly. Our publications of most relevance to this inquiry, which are provided via email, are:

Jenni Millbank

- 'Responsive Regulation of Cross Border Assisted Reproduction' (2015) 23(2) *Journal of Law and Medicine*, 346-365.
- 'Rethinking "Commercial" Surrogacy' (2015) 12 *Journal of Bioethical Inquiry* 477-490.
- 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27 *Australian Journal of Family Law* 135-169.

Other relevant research publications include:

- 'From Alice and Evelyn to Isabella: Exploring the Narratives and Norms of 'New' Surrogacy in Australia' (2012) 21 *Griffith Law Review* 101-136.
- 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?' (2011) 35 *Melbourne University Law Review* 165-207.

- Karpin and Millbank, 'Assisted Reproduction and Surrogacy in Australia' with Isabel Karpin in John Eekelaar (ed), *Routledge Handbook of Family Law and Policy*, Routledge 2014.

Anita Stuhmcke (recent publications include)

- 'Extra-Territoriality and Surrogacy: The Problem of State and Territory Moral Sovereignty' in Paula Gerber & Katie O'Byrne, (eds) *Surrogacy, Law and Human Rights*, Ashgate Publishing 2015.
- 'New wine in old bottles and old wine in new bottles: The judicial response to international commercial surrogacy in the UK and Australia' in Horsey K (ed) *Revisiting the Regulation of Human Fertilisation and Embryology*, Routledge 2015.
- 'The regulation of commercial surrogacy: The wrong answers to the wrong questions' (2015) 23(2) *Journal of Law and Medicine*, 331-346.

The factual and value based premise upon which our work rests:

- **Surrogacy is not a harmful practice to women who make an informed decision to undertake a pregnancy for a surrogacy arrangement and willingly relinquish a baby they do not regard as their own.**
- **Surrogacy as a valid method of family formation should be respected and supported through State action which enhances informed choice, encourages beneficial clinical and ethical standards and reduces demonstrably harmful practices.**
- **Overseas commercial surrogacy is the most common mode of surrogacy undertaken by Australian citizens and currently outnumbers domestic arrangements by around 15 to 1.**
- **Not all international arrangements are unsafe or unethical, but *in general* trans-national surrogacy raises the risk that Australian parents and children and overseas born egg donors and surrogates are exposed to less safe clinical and ethical standards.**
- **Payment is not an effective or accurate indicator as to whether a surrogacy arrangement is beneficial to the participants involved.**

- **Criminal prohibition is an ineffective and counterproductive response to unsafe or less safe family formation practices.**
- **There have been at least 26 public inquiries and 17 statutory enactments addressing surrogacy across the Australian states, territories and federal jurisdictions in the past 30-years. Yet surrogacy laws introduced in Australia to date have proceeded without any regard to the well-established evidence base from the social sciences on the experiences of intended parents and surrogate mothers in surrogacy families and the evolving research on children. It is time to consider this evidence carefully before undertaking further reforms.**

We were recently awarded a Discovery Grant from the Australian Research Council for 2015-18 examining the Australian experience of cross border reproductive treatment, including surrogacy. This project asks: what are the causes, and consequences of, Australians being excluded from, or choosing to evade, regulated assisted reproductive treatment? The research identifies barriers to the pathways into licensed assisted reproductive treatment and motivations for evasion of regulation through a series of interlinked case studies reflecting the life-cycle of family formation in assisted conception. The aim is to develop solutions for more responsive legal frameworks that encourage beneficial clinical and ethical practices and contain harmful ones through inclusion rather than exclusion.

In the course of our research we have developed links with Australian and international researchers in a variety of disciplines, and with lawyers, parents and community groups. Thus far we have conducted 23 interviews with Australian intended parents, surrogates, doctors and international brokers. In the course of our current research we have had occasion to view a number of surrogacy contracts, or hear about, arrangements involving Australians taking place in the US, Greece, Mexico, Canada, India, Nepal and Thailand.

Our preliminary findings are that:

- There is a widespread perception among intended parents that surrogacy is “too hard” or uncertain domestically
- There is a demonstrated difficulty in parents ability to recruit surrogates and donors within Australia
- A lack of clarity exists around fundamental practical issues such as kinds and amount of payment in domestic surrogacy arrangements
- Extraterritorial criminalisation in NSW, ACT and Qld has led to evasion, fear and secrecy
- There is an absence of accurate legal information for intending parents and surrogates concerning both domestic and international surrogacy arrangements

The proposals we make in our research work to date:

- 1. Preservation of the existing Australian laws on parentage which determine that the surrogate mother is the legal mother at birth. This is vital in order to centre her interests, in particular to preserve her ability to control her pregnancy and her informed consent to the transfer of custody and legal parentage of the baby after birth.**
- 2. Introduce a specific jurisdiction for the Family Court of Australia to *transfer* (rather than *declare*) legal parentage where current state surrogacy regimes render parents ineligible, with a fast track for those arrangements which meet established guidelines for good practice, and in tandem**
- 3. Introduce a new process for immigration in which citizenship by descent flows from parentage orders rather than precedes them.**
- 4. Introduce a carefully regulated domestic surrogacy system which allows for compensated surrogacy, as well as advertising and professional intermediaries to broker or arrange surrogacy.**
- 5. As much as possible this regulated domestic surrogacy system should be harmonized across all Australian jurisdictions.**

Please do contact us if you require any further detail.

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