



Australian Government
Attorney-General's Department

16/475

10 February 2016

Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Parliamentary Inquiry into Surrogacy—Attorney-General's Department Submission

On 3 December 2015, the Attorney-General, Senator the Hon George Brandis QC, asked the House of Representatives Standing Committee on Social Policy and Legal Affairs to inquire into and report into the regulatory and legislative aspects of international and domestic surrogacy arrangements. This letter provides the Attorney-General's Department submission to this inquiry.

The terms of reference state that the Committee will inquire and report on a broad range of issues, including domestic and international surrogacy, the role and responsibility of states and territories to regulate surrogacy, and a range of Commonwealth responsibilities. Surrogacy raises issues across a range of Commonwealth portfolios, including immigration, foreign affairs, health, and the Attorney-General's portfolio. This submission will address areas for which the Attorney-General's portfolio is responsible.

Australia's legal framework for surrogacy

Surrogacy is regulated by the states and territories. All jurisdictions (except the Northern Territory) have legislation dealing with surrogacy. All jurisdictions that have legislated on surrogacy have prohibited commercial domestic surrogacy. Overseas commercial surrogacy is also prohibited for residents of New South Wales, Queensland and the Australian Capital Territory.

On a federal level, the involvement of the Department of Immigration and Border Protection is to determine Australian citizenship by descent applications and visa applications made by persons born through surrogacy arrangements. The Department of Foreign Affairs and Trade is responsible for issuing Australian passports. The Attorney-General's Department has responsibility for several areas that relate to surrogacy including federal family law, human trafficking, private international law, public international law including human rights obligations, human rights policy, and privacy law.

Key issues for the Attorney-General's Department regarding surrogacy arrangements

1. Legal status of intending parents in Australia of a child born through surrogacy arrangements

The various state and territory Status of Children Acts are the principal legal sources that determine parentage in Australia.¹ State and territory laws provide for court orders recognising the parentage of intended surrogate parents, subject to conditions such as that the surrogacy arrangement was altruistic, age, residency and consent requirements, and requirements for counselling and legal advice, amongst others. Where these conditions are not met, it may not be possible for a parentage order to be made in favour of the intended surrogate parents. This most commonly occurs in relation to international surrogacy arrangements, but can also be true of domestic arrangements.

In cases in which recognition as parents under State or Territory law is not possible, parties have approached the family law courts (the Family Court of Australia, the Federal Circuit Court and the Family Court of Western Australia) to seek some legal certainty as to their relationship with the surrogate child. These have included applications for a range of orders under the *Family Law Act 1975* including leave to adopt a child, declarations of parentage, or orders for parental responsibility.

Recent decisions in the family law courts have highlighted a number of complexities in the present statutory framework.² Judicial officers have grappled with a number of issues in this area including, for example, the operation of the relevant provisions of Part VII of the Family Law Act and to what extent, if at all, public policy considerations, such as the illegality of the intending parents' conduct in engaging in a commercial surrogacy arrangements, are relevant to the court's determination of the child's best interests for the purposes of parenting orders made under the Family Law Act.

In December 2013 the Family Law Council undertook a detailed analysis of issues relating to surrogacy and parentage in the Family Law Act in their report, 'Report on parentage and the Family Law Act'. The Report can be found here:

<<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports>>.

A brief discussion of relevant provisions of the Family Law Act is at **Attachment A**.

2. The potential application of Australia's human trafficking and slavery offences in domestic and international surrogacy arrangements

In certain circumstances, Australia's human trafficking and slavery-related criminal offences could potentially apply to serious exploitation arising from domestic or international surrogacy arrangements.

Under section 271.4 of the Commonwealth *Criminal Code Act 1995* (the Criminal Code), it is an offence to organise or facilitate a child's entry into Australia, intending or reckless as to whether the child will be used to provide sexual services or will be otherwise exploited after entry. The trafficking in children offence has extended geographical jurisdiction, and therefore applies to

¹ See: *Parentage Act 2004* (ACT); *Status of Children Act 1978* (NT); *Status of Children Act 1996* (NSW); *Status of Children Act 1978* (QLD); *Family Relationships Act 1975* (SA); *Status of Children Act 1974* (Tas); *Status of Children Act 1974* (Vic). In Western Australia the statutory presumptions of parentage are in the *Family Court Act 1997* (WA).

² See for example: *Ellison and Anor & Karnchanit* [2012] FamCA 602, *Mason & Mason and Anor* [2013] FamCA 424, *Green-Wilson v Bishop* [2014] FAMCA 1031 and *Bernieres v Dhopal* [2015] FAMCA 736.

conduct within Australia, and to the conduct of Australian citizens and residents overseas. Domestic trafficking in children is separately criminalised under section 271.7 of the Criminal Code. The maximum penalty for trafficking in children is 25 years' imprisonment.

The Criminal Code also criminalises slavery, which is defined under section 270.1 as the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. In considering the slavery offences under section 270.3 of the Criminal Code, the High Court of Australia has determined that one of the critical powers attaching to ownership is the power to make a person an object of purchase (see *The Queen v Tang* [2008] HCA 39). It is arguable that the slavery offences could potentially extend to the sale of children in certain circumstances involving domestic or international surrogacy arrangements. The slavery offences have universal jurisdiction and maximum penalties of between 17 and 25 years' imprisonment.

Sections 270.5 and 270.6A of the Criminal Code criminalise servitude and forced labour respectively. These offences could potentially apply to an Australian citizen or resident who commissioned a surrogacy arrangement where he or she was aware there was a substantial risk that their surrogate may be exploited, and, having regard to the circumstances known to him or her, it was unjustifiable to take that risk. It is arguable that a surrogate may be considered to be in a condition of servitude or forced labour if she did not consider herself free to leave or cease providing her services because of the use of coercion, threats or deception. Coercion is defined broadly under section 270.1A to include abuse of a position of power or taking advantage of a person's vulnerability. The servitude and forced labour offences have extended geographical jurisdiction, and therefore apply to conduct within Australia, and to the conduct of Australian citizens and residents overseas. The maximum penalties for the servitude and forced labour offences are 20 and 12 years' imprisonment respectively.

3. International law

Surrogacy is not regulated by an international convention in either public or private international law. However, under public international law, there are a range of international obligations, particularly relating to human rights, which may be engaged by surrogacy practices. For example, States Parties have obligations to protect children's rights,³ rights relating to protection against arbitrary and unlawful interferences with privacy and rights to respect for the family⁴ and rights relating to health⁵ and to equality and non-discrimination.⁶ In addition, States Parties also have obligations to prevent exploitation and abuse of children,⁷ the sale of children and trafficking of women and children⁸ and to prevent and reduce statelessness.⁹

³ See generally, the *Convention on the Rights of the Child* [1991] ATS 4 done at New York on 20 November 1989, in force generally 2 September 1990, and for Australia, 16 January 1991 (CRC), and specifically, articles 3, 7 and 8. Also see article 24 of the *International Covenant on Civil and Political Rights* [1980] ATS 23 done at New York on 16 December 1966, in force generally 23 March 1976, and for Australia, 13 November 1980 (ICCPR).

⁴ See articles 17 and 23 of the ICCPR, article 5 and 16 of the CRC and article 10 of the *International Covenant on Economic, Social and Cultural Rights* [1976] ATS 5, done at New York on 16 December 1966, in force generally 3 January 1976, and for Australia, 10 March 1976 (ICESCR).

⁵ See articles 12 in the ICESCR, 24 of the CRC and 12 of the *Convention for the Elimination of All Forms of Discrimination Against Women* done at New York on 18 December 1979 [1983] ATS 9, in force generally 3 September 1981, and for Australia 27 August 1983 (CEDAW).

⁶ See article 26 of the ICCPR and article 2 of the CRC.

⁷ See articles 19, 21, 34 and 36 of the CRC.

⁸ See article 35 of the CRC, the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* [2007] ATS 6 done at New York on 25 May 2000, in force generally 18 January 2002, and for Australia, 8 February 2007, article 6 of CEDAW, the *United Nations Convention Against Transnational Organised Crime* done at New York on 15 November 2000 [2004] ATS 12, in

The extent to which these obligations are engaged will vary depending on the circumstances and how surrogacy is sought to be regulated. Australia's international human rights obligations only apply to people within its territory and subject to its jurisdiction. Australia believes that a high standard needs to be met before a State is considered to owe obligations outside its territory — which is not satisfied in all, or necessarily any, cases in which Australian officials are operating in foreign countries. Consistent with the principle of State sovereignty, the relevant international human rights obligations in respect of individuals involved in surrogacy will generally be those of the State in which the relevant practice occurs.

In relation to private international law, the Permanent Bureau of the Hague Conference on Private International Law has established an Experts' Group on Parentage / Surrogacy. The first meeting is being convened from 15 to 18 February 2016. The Attorney-General nominated Chief Judge John Pascoe AC CVO of the Federal Circuit Court of Australia as the Australian representative on the Group.

The purpose of the Experts' Group is to consider the feasibility of advancing work on the private international law issues surrounding the civil status of children, including issues arising from international surrogacy arrangements. In considering the feasibility of advancing this work, it is anticipated that the Experts' Group will:

- review existing legal frameworks on the establishment and contestation of parentage;
- identify the problem areas needing common solutions, and
- provide preliminary views as to the type and scope of a possible instrument in the field of, binding or otherwise, including whether specific scenarios warrant a particular focus or differentiated approach.

4. Privacy Law

Many of the privacy issues associated with surrogacy may not actually fall within the scope of the *Privacy Act 1988* (Cth) (Privacy Act). For example, the Privacy Act does not prevent individuals from making arrangements to share personal information with other individuals. Nor does it restrict Commonwealth agencies and certain private sector organisations subject to the Act from using or disclosing personal information where the individual concerned has consented. The Privacy Act also does not generally apply to State and Territory Government entities.

The Privacy Act is the principal piece of Commonwealth legislation protecting the handling of personal information about individuals. Most States and Territories, with the exception of South Australia and Western Australia, have equivalent legislation. Personal information is information or an opinion about an identified individual, or an individual who is reasonably identifiable from the information, whether the information or opinion is true or not, and whether the information or opinion is recorded in a material form or not. The Privacy Act defines certain kinds of personal information, including health information, as 'sensitive information', which is subject to higher protection under the Act.

force generally 29 September 2003, and for Australia 26 June 2004 (UNTOC), as well as the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime* done at New York on 15 November 2000 [2005] ATS 27, in force generally 25 December 2003, and for Australia 14 October 2005.

⁹ *Convention on the Reduction of Statelessness* [1975] ATS 46, done at New York on 30 August 1961, in force generally and for Australia, 13 December 1975.

The Privacy Act does not generally regulate the actions of individuals. Instead, it regulates the activities of Commonwealth agencies and certain private sector organisations (those with an annual turnover of \$3 million or more). The Privacy Act also applies to overseas private sector organisations that are deemed to have an 'Australian link' (s 5B(2)-(3)).

Importantly, all private sector organisations that provide a health service and hold health information are covered by the Privacy Act regardless of their annual turnover. Under the Privacy Act a 'health service' includes any activity that involves assessing, recording, maintaining or improving a person's health. For example, the Privacy Act would generally not allow a health service provider to disclose a surrogate's personal information to third parties (such as the biological parents of the foetus), unless the surrogate has consented to the disclosure or in certain other circumstances.

Additionally, agencies and organisations subject to the Privacy Act would have legal authorisation to disclose information about the surrogate to an 'enforcement body' (which the Privacy Act defines to include law enforcement agencies and agencies such as the Department of Immigration and Border Protection) if reasonably necessary for one or more enforcement related activities, including using or disclosing personal information to investigate alleged offences.

While State and Territory health services are not covered by the Privacy Act, they may be covered by relevant State and Territory legislation. Apart from relevant State and Territory complaints bodies, the national privacy regulator, the Office of the Information Commissioner (OAIC), may be able to investigate complaints about the mishandling of health information in an individual's eHealth record.

More broadly, the OAIC can receive privacy complaints from individuals and investigate potential breaches of privacy. For instance, if a health service provider disclosed personal information about a surrogate mother without first receiving consent, the mother could complain to the OAIC if she believed a breach of the Privacy Act had occurred.

The Department hopes this submission is of assistance to the Committee and would be pleased to provide further information if required.

Yours sincerely

Greg Manning
A/g Deputy Secretary/
Civil Justice & Legal Services Group

ATTACHMENT A

Relevant provisions of the *Family Law Act 1975*

Provisions relating to parentage for the purposes of the Family Law Act

The Family Law Act contains provisions dealing with parentage for the purposes of the Family Law Act in situations involving artificial conception procedures and surrogacy (sections 60H and 60HB). These meaning of 'parent' in the Family Law Act is frequently referred to in Commonwealth laws to inform the concept of parentage, but does not affect State or Territory laws.

Section 60H deals with the parentage where artificial conception procedures such as artificial insemination or in-vitro fertilisation have been used. Section 60H may be relevant in surrogacy cases because surrogacy usually involves the use of 'an assisted conception procedure'.

Subsection 60H(1) applies when the woman giving birth is married or has a de facto partner. The section provides that if the procedure was carried out with the consent of the woman and her partner, or according to a prescribed law of the Commonwealth or a state or territory, then child is a child of the woman and her partner for the purposes of the Family Law Act. Subsection 60H(1) also provides that if a person other than the woman and her partner provided genetic material, the child is not a child of that person.

Subsections 60H(2) and (3) apply regardless of whether the woman was married or in a de facto relationship. These subsections provide that if according to a prescribed law of the Commonwealth or a state or territory, a child born to a woman as a result of an artificial conception procedure is the child of the woman (60H(2)) or the child of a particular man (60H(3)), then the child is the child of the woman or that man for the purposes of the Family Law Act. These sections do not exclude a sperm donor (or donor of other genetic material) from being a parent.

Section 60HB recognises the parentage of a child born under surrogacy arrangements for the purposes of the Family Law Act where a court order has been made under prescribed state or territory laws to recognise parentage of the intended parents. However, section 60HB has no application in the case of international surrogacy arrangements as the relevant state and territory laws do not recognise overseas surrogacy or commercial surrogacy.

Declarations and presumptions of parentage for the purposes of Commonwealth law

Section 69VA of the Family Law Act provides the court with the power to issue a declaration of parentage. A declaration of parentage is conclusive evidence of parentage for the purposes of all Commonwealth laws. A parentage declaration under section 69VA is usually relevant in circumstances where the paternity of a particular child is in question. The family law courts may also find that someone is a parent under the general presumptions in Division 12, Subdivision D of the Family Law Act. These presumptions may assist a person who is a biological parent of a child born of a surrogacy arrangement, but may not assist a person who is not.¹⁰

Parental responsibility and parenting orders

The Family Law Act establishes the best interests of the child as the paramount consideration in determining parenting arrangements.

¹⁰ See: *Family Law Act 1975* s69P–69U.

An intending parent, including a non-biological surrogate parent, may approach the family law courts for orders for parental responsibility under section 61B of the Family Law Act. Such an order may grant intended parents parental responsibility for the surrogate child. This includes all duties, powers, responsibilities and authority which by law parents have in relation to children including the day-to-day care of and decision making for children in a number of areas. However, parental responsibility does not grant legal parentage and parental responsibility orders do not provide the same protection and certainty as a finding of legal parentage. The existing legal parents, the surrogate mother and possibly her partner (depending on the relevant legislation), continue to have parental responsibility for a child born as a result of a surrogacy arrangement unless a court order has expressly provided to the contrary. Any person concerned with the care, welfare or development of a child may apply for a parenting order. A parenting order, defined by section 64B of the Family Law Act, may also include orders providing for a child to live, spend time, and/or communicate with a particular person.