

and electronic submission – 11 February 2016.

To the Standing Committee on Social, Policy and Legal Affairs,

**RE: THE INQUIRY ON THE REGULATORY AND LEGISLATIVE ASPECTS OF  
INTERNATIONAL AND DOMESTIC SURROGACY ARRANGEMENTS**

Thank you for the opportunity to provide a submission to the inquiry on the regulatory and legislative aspects of international and domestic surrogacy arrangements.

My Background

I am an Associate Professor of Health Law. I am currently employed as Head of the Department of Health Systems and Populations at Macquarie University, and also work as an independent consultant on health law issues. I make this submission in my personal capacity.

The position I present in the following pages is my own, based on over a decade of focused academic research, analysis, and consultation on matters related to assisted reproduction, donor conception, surrogacy, legal parentage, and adoption. This includes that I worked from 2003-2005 for the Law Reform Commission in Victoria on such issues; I have developed expertise in this area as a legal academic over a period of 12 years; I have been a Churchill Fellow, conducting research across Europe into information release to donor conceived people—during which time I was also privy to deep concern about international surrogacy expressed at all levels within the countries I visited.; and I have presented in the Hague on these matters to many delegates from all over the world who shared with me their views.

I have, most importantly, worked closely with children born as a result of assisted reproduction and donor conception, as well as having had significant contact with donors of gametes and recipient parents. Their insights and experiences have helped me to reflect deeply on current practices, the issues that they raise, and the impact such things have on the lives of women and children.

My Submission and Focus

It is my view that Australia *should not amend laws to facilitate or further condone international commercial surrogacy nor any form of commercial surrogacy domestically* (otherwise referred to as ‘compensated’ surrogacy or ‘for-fee’ or ‘for-profit’ surrogacy).

Recent emphasis upon legal parentage and citizenship in this context, driven by lobbying by agents and lawyers—all who have a financial interest in seeing a relaxation of Australia’s laws—is misplaced. It is driven by an industry that derives significant profits from surrogacy, and does not protect the rights of women or children.

While I empathise greatly for people who wish to have children as part of their family, I believe the broader issues raised by commercial surrogacy do not support it as a means for them to do so. I hope the inquiry leads to recommendations that reflect the view that such practices should be rejected, rather than suggesting ways to facilitate the commercial transactions that do not ultimately serve women or children.

My position is based upon all of the reasons presented in the following submission.

I note the submission is lengthy, but I have ventured to comprehensively discuss many issues relevant to the very broad terms of reference put forward by this inquiry. I have also taken time to present information about the risks and practices associated with commercial surrogacy, and to consider arguments and views concerning the multitude of issues they raise—beyond legal parentage and determination of citizenship for a child born as a result of such arrangements.

I thank you for your consideration,

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1. The role and responsibility of states and territories to regulate surrogacy, both international and domestic, and differences in existing legislative arrangements.

Australia is a federation. The Commonwealth has powers to govern certain matters as set out in section 51 of the Commonwealth Constitution. Other matters fall to States and Territories. States and Territories have separately elected governments, and pass legislation within their power for their respective constituencies. By the very nature of the federal and state system therefore, it is unsurprising that the Commonwealth, States and Territories, differ in terms of their powers and laws.

From time-to-time calls that the law should be uniform across Australia are made in a number of areas, for example upon health related matters such as end of life decision making or assisted reproduction, the law of negligence, or in areas of criminal law. The call has also been made in relation to surrogacy. Often such calls are made with an expression of wanting things to be ‘easier’ and ‘more consistent’, or ‘uniform’. However, while there are some occasions in which States and Territories may ‘refer’ their power to the Commonwealth, or pass uniform (or ‘mirror’) legislation to enable consistency across the country on a particular matter, this is not commonly done. I note that even when states/territories attempt to achieve uniformity this often fails—see for example the law of negligence; the regulation of health professionals and complaints; state/territory research involving human embryo and cloning regulation.

Whether all state and territory governments would agree to uniform legislation governing surrogacy would be something to see however, at present it is important to understand the current laws across Australia—and that due to our State/Federal system, it is unsurprising that they differ.

### State and Territory Regulation of Surrogacy

In general the regulation of surrogacy falls to the States and Territories. All states and territories have explicit legislation governing surrogacy, except for the Northern Territory (which adheres to NHMRC Guidelines, and does not generally provide for surrogacy arrangements nor transfer of legal parentage). States and Territories are also responsible for the regulation of other

relevant areas of law, for example assisted reproduction, abortion, laws pertaining to the status of children, and laws regarding the registration of births.

I provide very general summaries of the respective state and territory laws regarding surrogacy, assisted reproduction, abortion and birth registration on my website, Health Law Central see (<http://www.healthlawcentral.com/>). The Family Law Council also provided comparison tables of State and Territory surrogacy laws in Appendices E and F of its *Report on Parentage and the Family Law Act*, pages 163-171 in 2013. (Note amendments have since been made to South Australian laws—although I note they have not yet been operationalised). I will not repeat that information here, as I trust that the Inquiry and its secretariat will survey respective State and Territory laws, and detail how they compare and contrast.

I did however wish to make special note that Australia has seen numerous inquiries into surrogacy over decades,<sup>1</sup> that have involved extensive public consultation and debate, and have resulted in laws across the country that provide for:

- the paramouncy of the welfare and/or best interests of children born as a result of surrogacy and/or assisted reproduction, in a number of states;
- acceptance and regulation of *altruistic* surrogacy;
- *prohibitions on commercial surrogacy*, including that N.S.W., the A.C.T., and Queensland such prohibitions extend extraterritorially (which means it is illegal to enter into such arrangements in other jurisdictions also);
- the birth mother always being recognized as the legal mother in the first instance,
- the reimbursement of costs in altruistic arrangements for the ‘surrogate’ mother, where permitted, being limited to out of pocket expenses (expenses *actually incurred*)– and should not be ‘payment’ or ‘compensation’ or ‘reward’ above such expenses (noting variations among states regarding what is actually reimbursed);
- the surrogacy agreements being void and unenforceable (other than payment of reasonable expenses associated with the pregnancy) (Nb. should the parties change their mind, the birth mother could keep the child, or it would enter into our foster care system);
- residency requirements in a number of states for commissioning persons and/or ‘surrogate’ mother –which means there is a requirement that those engaged in the agreement must reside

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<sup>1</sup> In fact – at least nine over the past decade alone; and over thirty in total.

in the state in which the surrogacy arrangement takes place. Such requirements are seen as important to avoid people being flown in from overseas to engage in surrogacy;

- requirements for independent legal advice and counselling for both commissioning persons and ‘surrogate’ mother prior to agreement;
- prohibitions on acting as an agent/broker to procure a surrogacy agreement;
- restrictions on advertising in some states;
- age requirements for parties to the agreement (noting these vary from state to state);
- application for ‘substitute’ parentage orders to be made before a Court (at a state level), with conditions for meeting legal parentage requirements. (These laws again vary across jurisdictions – but are very clear and comprehensive within each state/territory that have laws).

### **I submit in relation to current State and Territory Laws:**

#### ***General Regulatory Requirements (Allowing Altruistic Surrogacy):***

I am in agreement with the above general regulatory approach to altruistic surrogacy taken in each state/territory that has enacted legislation.

I note that what lay behind recognition of altruistic surrogacy at the time that such laws were introduced was the recognition of situations in which family members, or very close friends, had agreed to act as an altruistic ‘surrogate’ mothers. There was also much discussion of the likelihood of ongoing connection between birth mother and child, and therefore its knowledge of the circumstances surrounding its birth and information about those involved. Restrictions on advertising and agents were put into place to avoid the expansion of ‘altruistic’ surrogacy to other arrangements that fell outside of such relationships and were more likely to involve the exchange of money, including for example, where agents might solicit women to engage in surrogacy in order to make a fee themselves.

Women and children were to be the focus of the law. This is highlighted for example in the statement made by the Victorian Law Reform Commission:

*Because surrogacy involves the relinquishment of a baby by the woman who gives birth to it, the commission views surrogacy as having important similarities to*

*adoption. As a community, we have learnt that in the past the adoption of children has caused significant grief and distress, both for the women who have relinquished their babies and for the children who have struggled with the emotional consequences of adoption. The commission recognises the differences between surrogacy and adoption, but does not want to ignore the lessons of the adoption experience in the context of surrogacy. The protection of children and surrogate mothers must be the primary concern of any law regulating surrogacy.*<sup>2</sup>

### ***Prohibitions on Commercial (Compensated or ‘For-Fee’) Surrogacy***

State and Territories have not passed laws that permit commercial (‘compensated’ or ‘for-profit’) surrogacy. I support continued prohibitions on commercial surrogacy.

I do not agree with any proposal to amend state and territory laws in a way that would permit or facilitate commercial/compensated/for-profit surrogacy; or enable international commercial surrogacy transactions to occur that would then be recognized in state.

I note, the Joint Working Group of the Standing Committee of Attorneys-General, Australian Health Ministers’ Conference and the Community and Disability Services Ministers’ Conference Proposal for a National Model to Harmonise Regulation of Surrogacy in 2009. While suggesting for harmony in laws across the country, that proposal maintained a policy position that commercial surrogacy should not be permitted in Australia. It said:

*The proposed model would not permit commercial surrogacy. That practice is already unlawful throughout Australia. It is judged that commercial surrogacy commodifies the child and the ‘surrogate’ mother, and risks the exploitation of poor families for the benefit of rich ones.*<sup>3</sup>

It further stated:

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<sup>2</sup> Victorian Law Reform Commission, Assisted reproductive technology & adoption. Position paper three, surrogacy, 2005, [3.18].

<sup>3</sup> Standing Committee of Attorneys-General, Australian Health Ministers’ Conference and Community and Disability Services Ministers’ Conference Joint Working Group, A Proposal for a National Model to Harmonise Regulation of Surrogacy (2009).

*The counselling requirement, together with the rule against commercial surrogacy, will preclude exploitative arrangements with third-world surrogates.*

Similarly, the Victorian Law Reform Commission in its review of surrogacy, said:

*Our view is that if altruistic surrogacy arrangements continue to be permitted in Victoria, the commissioning parents should be able to pay for or reimburse the expenses the surrogate incurs as a result of the pregnancy. However, it would be unacceptable for the surrogate to obtain any material advantage as a result of carrying and giving birth to the child. The possibility of deriving a financial benefit should not influence a woman's decision to become a surrogate mother. For this reason, we believe that payment should be limited to specified categories, namely medical and associated expenses, and should not cover any loss of earnings incurred by the surrogate.<sup>4</sup>*

The draft National Health and Medical Research Council Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research, has thus far maintained:

**8.7 Do not practice, promote or recommend commercial surrogacy**

*Commercial surrogacy is ethically unacceptable because it has the potential for exploitation and to commodify the reproductive process. Commercial surrogacy is illegal in Australia.*

*8.7.1 Clinics and clinicians must not practice, promote or recommend commercial surrogacy, nor enter into contractual arrangements with commercial surrogacy providers.*

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<sup>4</sup> Victorian Law Reform Commission, above n 2, [4.6].

I note that arguments that point to ‘low rates’ of altruistic surrogacy in Australia as a reason to support changes to the law to permit ‘compensated surrogacy’ are flawed. Low levels of altruistic surrogacy in Australia are an indication that without being able to entice women with an amount of money (‘compensation’) few women actually offer themselves for such agreements.

That there has been significant marketing to present commercial surrogacy as an option for people seeking children, and a ‘market’ ‘demand’ by people willing to pay for surrogacy, does not mean state and territory laws should be changed.

While many people may genuinely seek children to love and care for, the risks and realities for women, children and families remain—be they physical, psychological, in relation to commodification, sale, and/or trafficking of peoples, regarding access to information, or a combination of these things. Such risks and realities for women and children, far outweigh any ‘demand’ by people seeking to have children that ‘commercial’ ‘compensated’ ‘for-profit’ surrogacy is an ‘acceptable’ means of ‘family formation’. (I note I discuss all of these things further below).

### ***Harmonisation of Laws***

I do agree with the suggestions made in relation to current laws pertaining to surrogacy that there would be benefit in harmonizing state and territory laws across Australia (i.e. within the bounds of altruistic surrogacy).

I am also supportive of the Western Australian suggestion to further consider the harmonisation of parentage laws across States and Territories, including provisions dealing with children born as a result of the use of assisted reproduction and donor genetic materials. This might resolve inconsistencies across states and territories that permit altruistic surrogacy, but differ in requirements regarding who may be recognized as a legal parent and under what circumstances. Laws should not discriminate in this sense based on gender or sexual orientation.

That said, I think there is much still to be done, even in contexts that are deemed permissible in Australia, to ensure that children have knowledge about their method of conception, and access to information about all parties involved. There thus also needs to be harminisation of laws that allow for children to be notified about their method of conception, and to have access to information about any donor(s) and their ‘surrogate’ mother. In this sense,



Victoria to date has been the most progressive state, and may be considered as a model for legislation and practice regarding release of information to people born as a result of such practices.

Ultimately, I am also of the view that creating a legal fiction about a child's 'parents' does not assist in openness and honesty about the circumstances surround the child's birth, and that it is absolutely necessary to provide for recognition of its birth mother, and any gamete (egg/sperm) or embryo donor(s), as well as the people who will have parental responsibility for that child. Information must be recorded, and made available to a child, on request (including on request by those parenting the child and at a designated age for the child).

### **Federal Regulation**

There are also laws relevant to surrogacy at a Federal level.

#### ***Domestic Surrogacy Agreements***

The *Family Law Act 1975* (Cth) has, since 2008, included provision regarding *domestic* surrogacy arrangements. Section 60HB of the Family Law Act means that orders of state and territory courts that transfer the legal parentage of children who are born as a result of surrogacy arrangements are recognized for the purposes of legal proceedings under the Family Law Act.

#### ***International Surrogacy Agreements***

##### **Citizenship by descent**

A child born outside Australia as a result of a surrogacy arrangement is currently eligible for Australian citizenship by descent if, at the time of their birth, they had a parent who was an Australian citizen. Applications for Australian citizenship by descent are made to the Department of Immigration and Border Control (the Department), and are assessed according to requirements set out in the *Australian Citizenship Act 2007* (Cth) and the policy guidelines set out in the Australian Citizenship Instructions.

The Department provides the following further information concerning international surrogacy arrangements:

- Under the Department's citizenship policy, an application for citizenship by descent by a person under the age of 16 must be signed by a responsible parent.

- Determining parent-child relationships is 'a question of fact to be determined by the Department with regard to all the relevant circumstances.'
  - Generally DNA testing will establish the biological parent of a child – such testing carried out to approved standards 'is given substantial weight when determining if a person is a parent of another person'.
  - Other evidence that the parent-child relationship existed at the time of the child's birth may include, but is not limited to:
    - a formal surrogacy agreement entered into before the child was conceived
    - lawful transfer of parental rights in the country in which the surrogacy was carried out to the Australian citizen before or at time of the child's birth
    - evidence that the Australian citizen's inclusion as a parent on the birth certificate was done with that parent's prior consent
    - evidence that the Australian citizen was involved in providing care for the unborn child and/or the mother during the pregnancy, for example, emotional, domestic or financial support and making arrangements for the birth and prenatal and postnatal care
    - evidence that the child was acknowledged socially from or before birth as the Australian citizen's child, for example, where the child was presented within the Australian citizen's family and social groups as being the Australian citizen's child.

The Department notes that 'Evidence that the Australian citizen treated the child as his or her own from some point in time after birth would not by itself be evidence that the Australian citizen was the child's parent at time of birth, but it would lend weight to evidence of the types previously listed.'

Citizenship by descent cannot be approved by the Department if the decision-maker is

- not satisfied of the identity of the person the applicant is aged 18 years or older
- not satisfied that the person is of good character
- the person does not meet national security requirements.

The Department of Immigration emphasises genetic connection, the existence of a pre-conception surrogacy agreement, and the intent to parent – as determining 'the question of fact'

concerning ‘parental status’ – at least in so far as being able to sign the application for citizenship by descent.

**I submit that this is an unacceptable position to maintain.**

Granting citizenship by descent *should not be automatically conferred based on a DNA test and/or the other above listed considerations*. It creates a ‘back-door’ to bringing a child into Australia that has been born as a result of a commercial surrogacy agreement prior to any determination of legal parentage actually being made. It may also serve to keep people who have accessed surrogacy agreements abroad from making any further application to the Court – thereby bringing a child into the country with minimal scrutiny.

The consideration of the ‘surrogacy agreement’ by the Department appears to pay no regard to state and territory laws that prohibit commercial surrogacy arrangements, including extraterritorial prohibitions in some states. It also ignores the extensive requirements that Australia has considered necessary to ensure the safety of women and children by prohibiting commercial surrogacy, and providing for requirements to be met in order to allow for recognition of ‘parentage’.

Although there is an exception to granting citizenship if a person is not of ‘good character’ – this does not seem to be implemented in any sound way. Surely the breaking of Australian laws would be enough to conclude that a person does not satisfy the ‘good character’ test – and therefore citizenship by descent should be refused. Further, regarding the issue of ‘good character’—one may question how thoroughly this is checked, or on what basis it is determined. Examples such as that of the Farnells serve to highlight this issue they having entered the country with a baby girl, born as a result of a ‘surrogacy’ agreement, presumably having had her recognized as an Australian citizen and issued with a passport, despite Mr. Farnell being a repeat sex offender, and the couple having abandoned her twin brother in Thailand as a result of his having been born with Down Syndrome. This is but one example of people who have been let through our borders with a baby, where their ‘good character’ does not appear to have been investigated at all.

Passport

To acquire a passport for a child born as a result of surrogacy arrangement, the applicants must lodge a completed child passport application form (Child Passport Application

PC4 if lodging in Australia or Overseas Passport Application PC8 if lodging overseas), and provide all required documents at the passport interview (see the PC4 and PC8 for detailed instructions). A [Form B4 \[DOCX 63 KB\]](#) – *Child born through surrogacy* – must also be completed, which requires information about the surrogate mother, biological mother, biological father, addresses. Any false/misleading information used in a passport application may result in a criminal investigation.

Written consent must be provided by each person with ‘parental responsibility’ for the child, including the surrogate mother (also referred to as birth mother or gestational carrier), before a passport can be issued.<sup>5</sup> However, given our clear knowledge of the risks, commodification, exploitation, lack of safeguards, lack of investigations, and more in relation to surrogacy agreements that have taken place overseas, it seems little more than a ‘rubber stamp’ process to require the ‘surrogate’ mother’s signature on passport documentation.

Again, the issuing of a passport is unacceptable under such circumstances.

#### Family Law Application for Parental responsibility

Although it appears that citizenship by descent and a passport is conferred on a child born as a result of a surrogacy agreement based upon a rudimentary classification of the applicant as a ‘parent’ this does not in fact confer ‘legal parentage’ on the parties involved.

Surrogacy arrangements that are undertaken outside Australia that were commercial, that have not met counselling or legal advice requirements, or would otherwise not fulfil the requirements set out in State and Territory laws, would not be eligible for transfer of legal parentage under state and territory law. Some surrogacy arrangements that have taken place overseas therefore have seen the commissioning persons present before the Family Court applying for orders recognizing *parental responsibility* and orders that the child *may reside with the applicant(s)*. Such applications are determined on a case-by-case basis.

‘Parental responsibility’ orders do not confer ‘legal parentage’ but rather recognize in law that a person has parental responsibility for a child until they reach the age of maturity. Some problems have been identified in relation to lack of recognition of legal parentage—for example,

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<sup>5</sup> Some forms are only available from the DFAT passport website – see <http://dfat.gov.au/about-us/our-services/passports/Pages/applying-for-a-passport-for-a-child-born-through-surrogacy.aspx> accessed 30 January 2016.

regarding the entitlement for the child to inherit from the person that is not their legal parent dies intestate (without a will).

It is my submission however, that the focus in recent times on the ‘difficulties faced by intending parents’ to obtaining legal parentage of children born as a result of entering into overseas surrogacy agreements (*when they do not meet state or territory legal requirements for surrogacy*), has in fact taken focus off the primary concerns raised by the practice of commercial surrogacy. It is premised upon looking at the end point, without addressing the issues that have led to a child being in this position in the first place. In addition:

- legal parentage of a child should not be awarded in cases in which commercial surrogacy has occurred – in effect permitting what is not permitted in Australia;
- the fact that a child exists should not be enough to grant parental responsibility or status to someone that has engaged in practices that are not permitted by law in our own country; and
- the determination of parentage should not be underpinned by market transactions.

There has been much discussion and at times criticism of Family Law Court decisions that have conferred legal parentage upon commissioning persons, despite the surrogacy agreements being commercial, and/or against domestic laws. I do not propose to discuss such decisions in detail here, as this has been done extensively elsewhere. I do however note the comments of Professor Tobin regarding the problems with any approach in which the law prohibits a practice, and yet Courts ‘outline the principles that are necessary to ensure legal recognition of, and by implication, legitimacy for the practice’. Tobin refers to this as ‘signal failure’, and indicates that continued recognition of legal parentage in such circumstances is unsatisfactory and unsustainable.<sup>6</sup> I agree with Tobin’s analysis.

That said, some scrutiny of any overseas arrangement, or arrangement that does not meet state and territories laws is still necessary. I submit that in circumstances in which State and

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<sup>6</sup> John Tobin, “To Prohibit Or Permit: What Is The (Human) Rights Response To The Practice Of International Commercial Surrogacy?” *International and Comparative Law Quarterly* 63(2) (2014): 340, 349. (Professor Tobin is an internationally renowned human rights expert, and child advocate. He is Professor of law at Melbourne University Law School).

Territory requirements for surrogacy have not been met,<sup>7</sup> that the Family Court should continue to have the power to further consider the question of ‘parental responsibility’ and/or ‘legal parentage’ on a case-by-case basis. However, given that such an application already does not meet State and Territory laws, I propose that a higher level of scrutiny must be required. The following requirements would be consistent with Australian law and with close scrutiny of a surrogacy agreement that does not meet state/territory laws:

- a. a presumption against the granting ‘parental responsibility’ and/or ‘legal parentage’ to commissioning person(s) in the case of commercial surrogacy arrangements;<sup>8</sup>
- b. live testimony/interviews of all parties involved including the ‘surrogate’ mother, which will enable evidence gathering, and assessment of the agreement, and what would be in the ‘best interests’ of the child; (I do not see how a signature (or a thumb print) on a page is enough to satisfy the Court that a woman has agreed to the arrangement)
- c. the application being made no less than six weeks and no more than six months after the child’s birth; (to allow the birth mother time to change her mind)
- d. evidence regarding:
  - i. the jurisdiction in which the surrogacy arrangement took place;
  - ii. the names, addresses, date of birth, nationality of any ‘surrogate’ mother(s), egg donor(s), sperm donor(s), and/or embryo donor(s) used;
  - iii. how the ‘surrogate’ mother, and/or donor(s), were recruited;
  - iv. details of any clinic(s), hospital(s), or other facility at which the respective people (surrogate mother; donors; commissioning persons) underwent medical procedures and/or were treated, including details of
    1. practice standards and compliance with any regulatory requirements or guidelines of any such place;

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<sup>7</sup> Note for example, this includes domestic altruistic arrangements that may have taken place interstate. It would also enable scrutiny of arrangements that are claimed to have been ‘altruistic’ but that may in fact have been ‘compensated’ ‘commercial’ ‘for-profit’. It would also provide for ‘compensated’ or ‘commercial’ arrangements albeit there would be a presumption against granting the commissioning person(s) parental responsibility or ‘legal parentage’ orders.

<sup>8</sup> Consideration need be given as to whether this presumption should be irrebuttable. I have left this open as it may be preferred to leave final discretion to the Court; and/or not to create a law that could be interpreted as creating a complete bar to ever recognizing a child’s nationality or parentage. (The latter might be interpreted as overstepping Australia’s margin of appreciation in regard to certain human rights law. See further discussion of *Mennesson* below).

2. any fees paid to the fertility service providers, and/or people, agents, companies associated therewith, noting details of what such fees and receipts;
- v. independent legal advice provided to the ‘surrogate’ mother; the person(s) making the application; and any partners of such people, including details of:
1. the names, qualifications, and registration status of the respective providers of such legal advice;
  2. evidence of any relationship with the fertility treatment providers, agents or intermediaries;
  3. the type of advice provided, including for example whether the parties were informed of all legal rights and not just provided information regarding the surrogacy ‘contract’ (for example, rights to claim compensation for negligent treatment; etc); and
  4. any fees paid to the providers of legal advice, including signed costs agreements, and details of who paid such fees (noting in the case of the legal advice provided to a potential ‘surrogate’ mother and/or donor of reproductive materials, in which commissioning person(s), agents, intermediaries, clinics, or otherwise paid such fees, a sworn undertaking that such advice was not affected by a conflict of interest);
- vi. independent counselling provided to all parties, (including ‘surrogate’ mother; egg, sperm and/or embryo donors; the person(s) making the application; and any partners of the previous listed people), detailing
1. the names, qualifications, and registration status of the respective providers of such counselling;
  2. evidence that the providers of such advice do not have a relationship with the fertility treatment providers;
  3. evidence of the type of counselling, its frequency, and purposes of counselling;
  4. evidence that such counselling included discussion of a child’s right to identity, knowledge about the circumstances of its birth, and its genetic and biological heritage; and

5. any fees paid to such counsellors, (noting in the case of counselling provided to a potential ‘surrogate’ mother, in which commissioning person(s), agents, intermediaries, clinics, or otherwise paid such fees – a sworn undertaking that such advice was not affected by a conflict of interest);
- vii. full details of any agent or intermediary or other person(s) or organisation used to arrange or facilitate the surrogacy agreement (and the legality of such arrangements); detailing
  1. the names, qualifications, and registration status of any such person(s) or organisations;
  2. any relationship with the fertility treatment providers that any such person(s) or organisations had or have;
  3. the role such agents, intermediaries or other person(s) or organisations (eg.
    - International agents/agencies that liaise with foreign couples and clinics;
    - agent-facilitators overseeing surrogacy/’surrogate’ mother;
    - neighbourhood/local recruiter); and
  4. any fees paid to agents/intermediaries/facilitators/other person(s) or organisations;
- viii. the surrogacy agreement – including details of who drafted the agreement, any negotiations that took place among the parties to the agreement, any changes to the agreement that were made, whether the agreement was translated into any other languages, how the agreement was communicated to all parties involved, and any other matter the Court/Authority requires;
- ix. the surrogate mother’s name, address;
- x. the number, name and address of any other children the ‘surrogate’ mother has;
- xi. the surrogate mother’s full and prior informed consent, and how such consent was obtained;
- xii. whether the surrogate mother has undergone prior surrogacy arrangements, and if so, the number of children that have resulted (and whether there is ongoing contact with such children);



- xiii. any payment made to the surrogate mother, including reimbursement of expenses associated with the pregnancy, birth, and/or post-natal care, and evidence of receipts for such expenses; or evidence of any other payments that she received either directly or indirectly;
- xiv. any pre-existing relationship between the 'surrogate' mother and the commissioning person(s);
- xv. whether the arrangement was a 'traditional' or 'gestational' arrangement, and in both cases evidence of who else provided gametes;
- xvi. the number of embryos implanted in the woman;
- xvii. the number of fetuses that resulted;
- xviii. any reduction of pregnancy that occurred and, in such circumstances, evidence of the woman's counselling by an independent counsellor and her consent to such reduction;
- xix. the pre-natal care that the surrogate mother received;
- xx. the post-natal care and follow up that the surrogate mother has and will receive;
- xxi. the mode of delivery at birth, and if a caesarean, evidence that this was necessary for the well-being of the woman and/or child;
- xxii. any complications with the pregnancy or birth, and how they were addressed;
- xxiii. details of the number of attempts at surrogacy made prior to the arrangement before the court, including details of
  - a. any other treatment of women in the attempt to cause a pregnancy;
  - b. any pregnancies that resulted in miscarriage, abortion, or stillbirth;
  - c. details of the names and addresses of all of the women used;
  - d. details of the care provided to any such woman who experienced treatment, miscarriage, abortion or stillbirth were given;
- xxiv. a family study having been conducted on the commissioning person(s) (applicants for 'legal parentage');
- xxv. criminal record and child protection checks on the commissioning person(s);
- xxvi. details of how the child will have access to information concerning the child's genetic, gestational and cultural origins;
- xxvii. details of any contact arrangements or plans for contact that have been made for contact between the child with the surrogate mother, donors of genetic materials,

- and/or siblings or other children (this includes other related or unrelated children associated with the ‘surrogate’ mother, including any child that lives with her and may have witnessed the pregnancy), and how such contact will be maintained;
- xxviii. details of any support services available for, and follow-up with, all parties, including the children of respective families involved;
- xxix. the legality of any such agreement entered into, and/or the payment of money to any of the parties involved (including agents, etc). (In cases in which an illegal transaction has occurred the appropriate authorities should be notified).

I note however that in regard to transfer of ‘legal parentage’ generally there are also other questions that should be explored surrounding the current approach of creating ‘legal fictions’ about parentage. Perhaps we need some new way of recognising ‘new family formations’ more along the lines of an ‘open adoption’ (noting that one would still expect that such formations fall within the accepted bounds of the law). It appears quite strange that everyone is arguing for something that emulates ‘traditional nuclear family structures’ and erasing everyone else who was involved – this is most likely not good for children. Further consideration might therefore be given to whether all parties need be recognized and in what manner this might take place.

Note also that the above list of considerations would not resolve issues further discussed below, and that further laws, policies and procedures are needed to end practices that commodify women and children and/or place them at risk in a multitude of ways.

2. 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.

There are medical and welfare aspects raised by surrogacy for all parties involved, including physical and psychological risks to women, children and families. These must be considered before discussing ‘regulatory requirements for ‘intending parents’. The role of ‘health providers’ should be to ensure the health, safety and well-being of any person they ‘treat’ (or use) in such procedures. Health care providers, welfare services, and other ‘service’ providers, also have obligations to any child that results.

## Women who are used as ‘surrogate’ mothers

Women who are commissioned as ‘surrogate’ mothers face a number of medical and welfare risks directly related to the practice of surrogacy. Some risks may have ‘mild’ consequences if they eventuate, while others can be severe, life threatening, and/or lead to death or significant disability. Some risks are faced by surrogates regardless of the form of surrogacy, some are more likely in commercial surrogacy arrangements, and some only apply in the latter circumstances. In the following paragraphs I note physical and mental health risks. The risks of women being exploited or trafficked for the purposes of commercial surrogacy (and/or egg donation) are also very important here, and are discussed further below in relation to the term of reference no (3). Physical and mental health risks include those that result from:

- **Injections of Fertility Medication and Associate Reactions:** these may include hot flushes, feeling down or irritable, headaches, and restlessness.
- **Pregnancy:** including but not limited to
  - exhaustion
  - nausea (mild to very severe)
  - indigestion
  - constipation
  - weight gain
  - bloating
  - backaches
  - difficulty sleeping
  - breast pain
  - higher blood pressure
  - hormonal mood changes
  - stretch marks
  - loose skin
  - varicose veins
  - abdominal/vaginal muscle weakness
  - pre-eclampsia
  - placenta Previa
  - pubic symphysis dysfunction
  - gestational diabetes
  - anemia embolism
  - cardiopulmonary arrest
  - placental abruption
  - miscarriage
  - molar pregnancy
  - future infertility
  - permanent disability
  - death.

- **Abortion (may be referred to as ‘fetal reduction’ in surrogacy cases)**

- **Surgical Abortion**

- Retained contents: 1-2% of cases, further surgical procedure may be required.
- Trauma to the Cervix: Occurs in less than 10% of cases
- Perforation of the Uterus: 1-4 women per 1000 can be affected. May require a surgical repair, and rarely a hysterectomy (complete removal of the uterus)
- Severe bleeding requiring a transfusion: up to 2 in every 1000 women
- Cervical Stenosis: Approximately 1 in 500 women will develop a small amount of scar tissue at the opening of the uterus.
- Psychological Disturbances
- Infection: Up to 10% of women may experience an infection of the fallopian tubes or uterus. Infection can result in infertility if left untreated.
- Retained products of conception: This may cause prolonged or heavy bleeding and can require a repeat curette to be undertaken. Symptoms include pain, heavy or prolonged bleeding or the passing of clots.

**Selective Reduction:** refers to the situation in which particular fetuses are aborted but others are left to remain. This has been said to occur in surrogacy situations when commissioning persons only want one child or two, but multiple pregnancies have occurred. Women who undergo selective reduction have a significant rate of premature labor. About 4-5% of women undergoing selective reduction also miscarry one or more of the remaining fetuses.

- **Caesarian Sections:**

- above-average blood loss
- blood clots in the legs
- infection in the lining of the uterus
- a longer stay in hospital (three to five days, or 72 to 120 hours, on average)
- pain around the wound
- problems with future attempts at vaginal birth
- a need for a caesarean section for future births

- complications from the anaesthetic
- wounds pulling apart or getting infected
- inability to lift anything heavier than a baby for six weeks or more

There are extensive examples of ‘surrogate’ mothers being required to undergo caesarian sections, with some clinics in overseas jurisdictions with rates of between 80-100%. Such caesarian sections may be timed to suit commissioning person(s) ability to travel to the country in which the ‘surrogate’ is to give birth, and have nothing to do with medical need.

- **Vaginal Birth:**

- Perineal Tear (tearing of the skin between the vagina and rectum, requiring stitches and can take months to repair) (Note - Third and fourth degree tears can affect a woman’s normal bowel, bladder and sexual functions short term and in some cases, permanently.)
- Fistula
  - a tubelike passage linking the vagina and rectum. Symptoms of this include the passing of flatus and/or faeces through the vagina. Infection can result.
- Episiotomy
  - a cut made into the perineum to enlarge the vaginal opening. This is done to help the baby be born. An episiotomy involves the same muscle and tissue as a 2nd degree tear (described above). However some episiotomies can extend further, and when this happens they might be described as a 3rd or even a 4th degree tear depending on their severity.
- Excessive blood loss
- Permanent disability
- Death
- **Psychological Distress** is sometimes associated with A.R. T. procedures.
- **Carrying Multiples:** carrying multiple foetuses in utero involves increased risks to the health of the mother and the unborn babies.
- **Post-Partum Depression after Delivery** - sadness and depression after delivering the child/children. This can range from mild to severe, short to long-term. It may require medication and/or hospitalization in some circumstances.

- **Risks associated with carrying a pregnancy conceived using a donated egg (ED)**

Van der Hoorn et. al 2010 found that

*ED pregnancies have a higher risk of maternal morbidity. Multiple studies document that ED pregnancies are associated with a higher incidence of pregnancy-induced hypertension and placental pathology. ... During pregnancy, both local and systemic immunologic changes occur and in ED pregnancies these changes are more pronounced. There is almost no information in the literature on the long-term complications of ED pregnancies for the mother.<sup>9</sup>*

- **Risks of pregnancy and birth in developing nations** – note women serving as ‘surrogate’ mothers, particularly in areas that have high levels of maternal mortality, must be understood to face significant risk—even before consideration is given to the ways in which procedures associated with surrogacy further threaten their health. A woman’s lifetime risk of maternal death is 1 in 4900 in developed countries, versus 1 in 180 in developing countries. In countries designated as fragile states, the risk is 1 in 54.<sup>10</sup>
- **Long term Psychological Effects** – the long term psychological effects of acting as a ‘surrogate’ mother and relinquishing the child are unknown. Some women report not having any regrets, others may be deeply distressed. One fertility clinic in the U.S. that provides surrogacy states:

*Most agencies will extensively screen surrogates and require regular counseling. The major emotional risk associated with surrogacy is the surrogate becoming attached to the unborn baby. Because the baby grows inside the ‘surrogate’ mother just as it would with any other pregnancy, it is very easy to develop emotional ties and form a bond that can be difficult to sever when the baby is born, despite the Surrogate having no genetic relation to the baby.*

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<sup>9</sup> M.L.P. van der Hoorn, et al. ‘Clinical and immunologic aspects of egg donation pregnancies: a systematic review’ (2010) 16(6) *Human Reproduction Update* 704.

<sup>10</sup> World Health Organisation, Maternal Mortality, Updated November 2015, available at <http://www.who.int/mediacentre/factsheets/fs348/en/> accessed 31 January 2016.

While of course counselling for all parties in any surrogacy agreement is a must, it is of concern that the surrogacy industry promotes regular counselling to ‘help’ or ‘ensure’ the women they ‘select’ are ones that will relinquish the child and to make sure that such women do not bond with a child as it grows in their bodies. Such counselling is fraught with ethical issues, and the long-term impact upon women is again unknown. I note the statement of a Chinese broker reported in the New York Times: *“Our liaison staff tells them every day that the baby in your stomach isn’t your baby,” Mr. Huang said. “A nice way of putting it is emotional comfort; less nice is brainwashing.”*

### **Risks associate with lack of aftercare**

There is no evidence that women who become pregnant pursuant to a surrogacy agreement are receiving adequate follow up care in regard to miscarriage, abortion, still-birth, post-natal depression, the relinquishment of a child.

### **Women who undergo egg retrieval (eg. ‘egg ‘donor’’s’ and/or commissioning female)**

- **Blood drawing** - mild discomfort and some risk of developing a bruise at the needle site.
- **Fertility Drugs** pose risks including (but not limited to)
  - moderate weight gain
  - mood changes
  - stomach pressure
  - headaches
  - allergic reaction
  - Ovarian Hyper-Stimulation Syndrome (OHSS) of the ovaries (5% chance in any cycle). OHSS can lead to
    - enlarged ovaries and an increased susceptibility to develop blood clots necessitating hospitalization.
    - the development of fluid in the abdomen or lungs
    - kidney failure
    - other organ failure

- stroke
- an enlarged hyperstimulated ovary rupturing necessitating general anesthesia and major surgery with all associated risks
- loss of one or both ovaries
- in extreme cases death
- lasting effect on pelvic organs including pain irregular menstrual function or impairment of future fertility
- possible link between fertility drugs and ovarian cancer (although more evidence needed).
- **Antibiotics** there is a risk of possible allergic reaction which, in rare cases, may be severe.
- **Ultrasound guided egg retrieval** may include:
  - mild to moderate discomfort after the procedure
  - bleeding
  - infection
  - injury to the bowel or blood vessels
  - surgery may be necessary to repair damage to internal organs or to control significant internal bleeding (i.e. hemorrhage).
- **Risks associated with anesthesia necessary for the egg retrieval.**
- **Torsion** which involves twisting of an enlarged ovary resulting in sudden onset of severe abdominal pain. Onset during exercise or other agitating movement is common.
- **Psychological Distress** - sometimes associated with assisted reproductive technology procedures.
- **Inconvenience** - monitoring procedures during the period of stimulation, and the time needed to perform the egg retrieval itself will result in a certain amount of inconvenience and lost time.
- **Potential Long Term Risks** – egg donation is a relatively new procedure that has not had significant research conducted on the long term risks and/or outcomes. Some studies however have suggested that there may be a risk between donation and infertility, cancer, and possible longer term psychological impacts.



Diane Beeson and Abby Lipman, U.S. based academics who have long examined issues surrounding the physical risks and consequences of surrogate pregnancy and egg donation to women, state:

*In view of the absence of longitudinal studies of women who have been exposed to fertility drugs for long enough and in large enough numbers to provide definitive findings, and the existence of some data suggesting increased overall risks of cancer (Reigstad, et al., 2015) as well as higher rates of cancers of specific organs, including ovaries (van Leeuwen, et al., 2011; Horlyck, 2015), breast (Pappo, et al., 2008; Reigstad, et al., 2015), thyroid (Hannibal, et al. 2008; Pazaitou-Panayiotou, et al., 2014) and the central nervous system (Reigstad, et al., 2015), it would seem appropriate to follow the Precautionary Principle. This might include a moratorium on commercial activities that expose healthy young women to fertility drugs.*<sup>11</sup>

### Children born as a result of surrogacy agreements

- **Physical Risks Associated with Mode of Conception:** Infants conceived following IVF are more likely to be born preterm, be of low birth weight and to be a twin or higher order multiple than spontaneously conceived infants. A number of studies over the past decade have confirmed this. Including that:
  - A systematic review of studies conducted on birth defects as a result of IVF suggests that infants born following ART treatment are at increased risk of birth defects, compared to spontaneously conceived infants.
  - A major U.S. study also found that infants conceived using IVF have a slightly higher rate of major birth defects (6.2% as opposed to 4.4% in naturally conceived children). However, the cause was unknown, and it was concluded that further research was required to determine whether the cause is secondary to problems inherent in the infertile couple and/or factors associated with some aspect of the treatment.

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<sup>11</sup> Extract obtained via advance viewing of a chapter to be published in a book on surrogacy being edited by Miranda Davies, and published by Zed Books (UK) in 2016.

- In 2012, a study conducted by the Robinson institute of South Australia found the increase in birth defects associated with IVF was associated with the causes of infertility (such as obesity and age). However, the study also found that ‘the increased risk for a number of other treatments could not readily be explained by patient factors.’<sup>12</sup>

Studies continue to investigate the impact of a variety of assisted reproductive treatments on children born as a result of such treatment.<sup>13</sup>

- **Risks associated with Removal from Birth Mother** – the long term impact on children born as a result of surrogacy arrangements being removed from their birth mother shortly after their birth is unknown, and has not been studied. However, see also psychological risks below.
- **Risks associated with lack of breast-feeding** – medical recommendations for breast-feeding are that exclusive breast-feeding should occur for the *first six months after birth*; and breast-feeding *in combination with solid foods until at least age 1*. The removal of the child from its birth mother usually means that it will not be breastfed. Commercial infant formulas don't contain the immunity-boosting elements of breast milk. For most babies, breast milk is also easier to digest than formula.
- **Psychological Risks:** Although there is a sparsity of research on the long term impacts of surrogacy on children born as a result a study by Golombok et. al. (Cambridge University), found that surrogacy children showed higher levels of adjustment difficulties at age 7 than children conceived by gamete donation. The researchers concluded that the absence of a gestational connection to the mother may be more problematic for children than the absence of a genetic link.<sup>14</sup> Note – this is but one study. Research on the outcomes for children born via

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<sup>12</sup> Michael J. Davies, Vivienne M. Moore, Kristyn J. Willson, Phillipa Van Essen, Kevin Priest, Heather Scott, Eric A. Haan, and Annabelle Chan, ‘[Reproductive Technologies and the Risk of Birth Defects](#)’ (2012) *N Engl J Med* 366:1803-1813 DOI: 10.1056/NEJMoa1008095.

<sup>13</sup> See for example, Marino JL, Moore VM, Willson KJ, et al. Perinatal outcomes by mode of assisted conception and sub-fertility in an Australian data linkage cohort. *PLoS One*. 2014;9(1):e80398;Hansen M, Kurinczuk JJ, Milne E, et al. Assisted reproductive technology and birth defects: a systematic review and meta-analysis. *Hum Reprod Update*. 2013;19(4):330–353; Pinborg A, Wennerholm UB, Romundstad LB, et al. Why do singletons conceived after assisted reproduction technology have adverse perinatal outcome? Systematic review and meta-analysis. *Hum Reprod Update*. 2013;19(2):87–104.

<sup>14</sup> Susan Golombok, Lucy Blake, Polly Casey, Gabriela Roman and Vasanti Jadva, Children Born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment (2013) 54(6) *Journal of Child Psychology and Psychiatry*.653-660.

surrogacy and/or gamete donation has been said to be methodologically flawed; and is in general, significantly lacking.

- **Risks of being procured for sexual abuse and/or trafficking** – for discussion of this point see further below.
- **Risks of being abandoned if not what commissioning person(s) wanted** – we have seen two recent examples of this in Australia, in which Australian commissioning parents abandoned a child born as a result of a surrogacy agreement that they did not want – in the first instance, because the child had Downs Syndrome, the couple choosing to keep his sister; in the second, a child was abandoned because he was a boy and the couple wanted to keep only the female sister. The long term consequences of such actions are likely to significantly impact the abandoned child as well as the sibling that the commissioning persons have chosen to keep.
- **Risks concerning lack of information about genetic heritage and birth mother** – the long-term psychosocial impacts upon those conceived via egg, sperm and/or embryo donation of not having access to information about their genetic heritage, mode of conception, and/or birth mother has been increasingly recognized. (Note, while there has been recognition in Australia of the importance of information for donor conceived people, many such people remain without information. Clinics often do not disclose information on request; and Qld, the ACT, the NT and Tasmania do not have any legislation upholding a right to information at all.)

### Families and children of ‘surrogate’ mothers

- **Risks to the psychological and emotional well-being of other family members**

Being a ‘surrogate’ mother does not just affect the woman who is pregnant and agrees to relinquish the child. Surrogacy agreements may impact her immediate family as well.

The ‘surrogate’ mother’s children, husband or partner, parents, and other family members may also develop an attachment to the unborn baby. Some clinics in the U.S. warn that it can be very difficult for any or all of these people to distinguish or separate their feelings about the baby from the knowledge that the ‘surrogate’ mother has entered into an agreement to relinquish the child. It may be particularly difficult for children who watch their mother’s pregnancy, and then see the child given to somebody else, and/or to know that the baby will not be a part of their life after it is born.

In a study conducted by Lopamudra Goswami with 25 women (nineteen Hindu and six Christian) who had served as gestational mothers in Anand, Gujarat, India, in which most said they became surrogates for the money, typically in hopes of using the payment to build a house, reported the comment of a seven year old boy, who was in the room while his mother was being interviewed, who said, *'We don't need the money; can we just keep my brother?'*

This may be different in cases where the arrangement has been altruistic.<sup>15</sup> For example, in a study conducted with the children of 'surrogate' mothers in the U.K. that remained living with her, Jadva and Imrie reported that most surrogates' children (86%, n=31) had a positive view of their mother's surrogacy—whether or not she had used her own eggs.<sup>16</sup> (Note: Many of the children interviewed referred to the other child as their 'half-brother' 'half-sister' or 'cousin'). However, Jadva and Imrie note limitations of their study as the sample size was relatively small and not all children chose to take part, therefore their views cannot be known (i.e. the study may not be representative); in addition, there may have been some bias from the inclusion of siblings from the same family. They also note that given the differing procedures and legislation on surrogacy between countries in which surrogacy is legal, their findings can only be interpreted in the context of UK-based surrogacy arrangements.

### **Regulatory requirements for intending parents, health service providers, and welfare services.**

I return to the part of the Committee's term of reference that asks us to explore the 'regulatory requirements for intending parents and the role of health care providers, welfare services and other service providers.' I note that 'regulatory requirements for intending parents...' will not be the panacea to the issues raised by international commercial surrogacy. I submit that:

- 1) Regulations in Australia that permit the practice of altruistic surrogacy are acceptable under the conditions they currently prescribe (other than inequitable treatment of people based on their relationship status, and that harmonization might be preferred);

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<sup>15</sup> See V. Jadva and S. Imrie, 'Children of surrogate mothers: psychological well-being, family relationships and experiences of surrogacy' (2014) 29 (1) Hum. Reprod 90-96 first published online November 20, 2013 doi:10.1093/humrep/det410.

<sup>16</sup> Ibid.

- 2) Prohibitions on commercial surrogacy should be maintained and strengthened;
- 3) Extra-territorial laws prohibiting people from entering into commercial surrogacy abroad should be adopted across all States and Territories of Australia and enforced;
- 4) Laws should not discriminate based on gender identity or relationship status;
- 5) Commissioning person(s) should be subject to criminal record and child protection checks;
- 6) Health care providers should not expose a woman's health and well-being to unnecessary risk;
- 7) Welfare agencies should not support the transfer of children internationally or domestically, in return for payment;
- 8) Regulatory requirements should not be driven by lawyers, agents and industry that stand to make a great deal of money and profit;
- 9) Agents that are running businesses in which would-be-parents are enticed and marketed to, and connected with overseas providers of commercial surrogacy, for example via the running of 'conferences', should be prohibited from doing so – and such prohibitions should be enforced.

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

## CHILDREN

### *Issues regarding the Commodification; Sale; and/or Trafficking of children*

#### Australian's Prohibitions on Commercial Surrogacy

I draw to the attention of the Senate inquiry that in Australia, legislation exists in all states and the Australian Capital Territory, prohibiting commercial surrogacy,<sup>17</sup> based upon what has been said to be '*a deep discomfort with the commodification of children, women and reproductive*

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<sup>17</sup> See *Parentage Act 2004* (Tas); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Statutes Amendment Act (Surrogacy) Act 2009*; *Surrogacy Act 2012* (Tas); *Assisted Reproductive Treatment Act 2008* (Vic); *Surrogacy Act 2008* (WA).

*services' (amongst other things).*<sup>18</sup> Further, I note that in recent years, prohibitions concerning commercial surrogacy<sup>19</sup> have been listed by the Australian Government as being '*an explicit prohibition of the sale of children*' pursuant to Australia's obligations under the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPCC).<sup>20</sup>

Such a view flows from the Convention on the Rights of the Child, which requires that States Parties take 'all appropriate national, bilateral and multilateral measures to prevent the ... sale of or traffic in children for any purpose or in any form'.<sup>21</sup> Article 2 of the OPCC further defines the sale of children as 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration'.<sup>22</sup> Commercial surrogacy thus has been seen to fall within the definition of sale of a child as it is *an act or transaction* whereby a child *is transferred by any person* or group of persons (the surrogate, the clinics, the brokers) *to another* (the commissioning person(s)) *for remuneration or any other consideration*.<sup>23</sup>

I submit that: it would be unacceptable to change Australia's international position—which has formed part of its reporting to the UN—due to the market for commercial surrogacy that has grown in recent years for commercial surrogacy, and as a consequence of lobbying by lawyers and agents, or demands of the people who would be willing to procure a child in such a manner. In fact, if particular practices constitute the 'sale of children' under international law, State Parties to such law cannot escape their obligations by simply decreeing under their domestic law that they

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<sup>18</sup> Mary Keyes, 'Cross-border Surrogacy Agreements' (2012) 26 *Australian Journal of Family Law* 42.

<sup>19</sup> *Surrogacy Act 2010* (NSW), s 8.

<sup>20</sup> Attorney-General's Department (Commonwealth), Australia's response to the List of Issues – *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 4–5 June 2012, accessed 10 June 2014, available at <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/default.aspx>.

<sup>21</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 35.

<sup>22</sup> *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002), art 2(a).

<sup>23</sup> Note there have been issues raised in Australia regarding family law judges making legal parentage orders in transnational surrogacy cases, contrary to Australia's reported stance that laws against commercial surrogacy meet our obligations under the OPCC (and contrary to some state laws that prohibit entering into such agreements extraterritorially). In such situations the judges have deemed legal parentage as being 'in the best interests of the child' in the circumstances. Such orders do not resolve the question of sale or commodification, they simply reflect the difficult situation courts are faced with once a child is brought back into the country.

do not regard those practices as such, or by re-defining essential terms under domestic law contrary to how those terms are understood under international law.<sup>24</sup>

### **Flawed rationalisations used in attempts to separate the woman from the child**

The industry, agents, and some academic scholars, spend a lot of time trying to ‘rationalise’ the process of payment as something else, in attempts to either discount or move away from issues of the sale or commodification of children by framing the surrogate’s relationship to the child in particular ways. I submit that all such arguments are flawed attempts to separate the woman from the child, to deny commodification, and/or to justify some kind of payment to her. I will consider below some such arguments to further illustrate why this is so.

#### **Distinctions between ‘gestational’ and ‘traditional’ surrogacy: the argument that the woman is not in a position to ‘sell’ what is not hers?**

It has been argued that there is no sale or commodification involved in ‘gestational’ arrangements because of the lack of genetic relationship between surrogate and child.<sup>25</sup> For example, Larkey states that as the surrogate carries the genetic child of the commissioning person(s) and ‘has no biological connection to the child’, the surrogate is not the child’s ‘mother’ and therefore is ‘not in a position *to sell what is not hers*’.<sup>26</sup> Rather, payment is proposed to be for services rendered by the surrogate in providing the commissioning person(s) ‘*their*’ child.

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<sup>24</sup> D.M. Smolin, ‘Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry’s Global Marketing of Children’ (2015) (pre-publication version of article accepted for publication by the Pepperdine Law Review), available at [http://works.bepress.com/david\\_smolin/19/](http://works.bepress.com/david_smolin/19/). (I note that Australia’s international law obligations are discussed further below).

<sup>25</sup> It is now possible for a woman to become pregnant as a result of nine different combinations of possible use of eggs and sperm: (a) the egg and sperm of a commissioning heterosexual couple; (b) the egg of a commissioning woman and “donor” sperm; (c) the egg of a “donor” and the sperm of a commissioning male (be he part of a couple or a single person); (d) both “donor” egg and sperm (unrelated to the commissioning person(s)); (e) the egg of a “donor” and sperm from the surrogate’s partner; (f) her own egg and the sperm of a commissioning male; (g) her own egg and the sperm of a “donor”; or (h) her own egg and the sperm of her partner. (a)–(e) entail some form of ‘gestational’ surrogacy, in which the woman is not genetically related to the child; (f)–(h) entail what is often referred to as ‘traditional’ surrogacy, as the woman is genetically related to the child.

<sup>26</sup> Amy M. Larkey, ‘Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Contracts’ (2003) 51 *Drake Law Review* 608, 614.



However, there exists a logical flaw in trying to distinguish gestational surrogacy from instances of traditional surrogacy, in which a genetic connection does subsist between the child and the mother, in order to deny the ‘sale’ or ‘commodification’ of the child. That is, the logical conclusion of such arguments is that in cases of traditional surrogacy (the comparator), the child would be the surrogate’s and therefore she would be in a position to sell what is hers – namely, the child. Surely the act in both instances is the same, and thus the distinction fails.<sup>27</sup>

### **Attempts to deny a connection between a ‘gestational surrogate’ mother and child**

Larkey’s argument above, also illustrates something that has been done frequently in recent years, which is to deny that any connection exists between the ‘surrogate’ mother and child in circumstances in which the child has been created using other people’s gametes or embryos (be they those of ‘donors’ or the commissioning person(s)). The ‘surrogate’ mother in such circumstances is portrayed more like an ‘oven’ an ‘incubator’ or said to be like a ‘baby-sitter’, with payment being said to be for her ‘services’.

However such views completely ignore the connection between birth mother and child—that occurs regardless of genetic connection. The woman who carries the child—the birth mother—provides many biological resources during the pregnancy. As the pregnant woman breathes and feeds and her heart beats the child may grow, and is significantly affected (positively or negatively) by the biological environment in which it exists. During pregnancy, there is also a physical connection provided by the placenta, an organ built of cells from both the woman carrying the pregnancy and the foetus, which serves as a conduit for the exchange of nutrients, gases and wastes. Cells may additionally migrate through the placenta, and may have a broad range impacts on mother and child, from tissue repair and cancer prevention to sparking immune disorders.<sup>28</sup> There are also significant physical and psychological changes that take place within a pregnant woman’s body that cause her to bond with, and connect to the baby as it grows in utero (and vice versa).

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<sup>27</sup> There is also an absurdity if “donor” gametes or embryos derived from other than the commissioning person(s) are used, as this would lead to questions regarding *whose* child the surrogate is carrying, and after birth, handing over.

<sup>28</sup> Robert Martone, ‘Scientists discover children’s cells living in mother’s brains: The connection between mother and child is even deeper than thought’, *Scientific American* (4 December 2012), accessed 10 June 2014 at <http://www.scientificamerican.com/article/scientists-discover-childrens-cells-living-in-mothers-brain/>.



It is again invalid therefore to claim that ‘gestational’ commercial surrogacy resolves commodification issues<sup>29</sup> simply by denying a connection between the child and the ‘surrogate’ mother.

**“The baby is not hers – because she says so” – ‘compensation’ for ‘burden’ she bears...**

Some further arguments try to justify payment by suggesting we move beyond discussion of genetics and consider how the surrogate views herself. They too are unsatisfactory. For example, Millbank—a proponent for ‘compensated’ surrogacy—states:

*a baby created via surrogacy is not the baby of the birth mother, not because of the operation of contracts, or genetic link to intended parent(s) combined with lack of genetic link to the surrogate; rather the baby is not hers because she says so and believes this to be so, before, during and after the pregnancy in which she gestates that child into life.<sup>30</sup>*

The claim follows that it is only ‘fair’ for the surrogate to be compensated (beyond reasonable expenses) for the burden she endures by conceiving (or having an embryo implanted in her), carrying the pregnancy and bearing a child that she does not view as her own.<sup>31</sup> The view is similar to that espoused in the United States two decades ago by Ragone, who emphasised ‘intentionality’ and ‘choice’ of the surrogate, and separated out the biological function of conception, pregnancy and birth with the social function of parenting.<sup>32</sup>

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<sup>29</sup> Or other issues raised by commercial surrogacy.

<sup>30</sup> Jenni Millbank, ‘Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy’ (2013) 27 *Australian Journal of Family Law* 138–9. Note here Millbank refers to the work of A. Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice* (Farnham: Ashgate, 2013).

<sup>31</sup> Such distinctions have been discussed and debated for decades. They are reiterated in current day debates by those who suggest that commercial surrogacy should be made legal. For example, see Jenni Millbank, ‘Paying for birth: The case for (cautious) commercial surrogacy’, *The Guardian*, 22 September 2013. Note, Millbank does not go so far as to deny legal parentage for the birth mother, and is careful not to completely treat gestation and birth as irrelevant.

<sup>32</sup> H. Ragone, *‘surrogate’ motherhood: Conception in the Heart* (Boulder, CO: Westview Press, 1994), 127. Note the difference in current family formations to the arrangements studied by Ragone is that there may not be an intended social mother.

However views that the ‘surrogate’ mother does not consider herself as a ‘mother’, is simply ‘renting out’ her womb,<sup>33</sup> providing her ‘services’,<sup>34</sup> or being paid a moderate sum for the burden she bears,<sup>35</sup> and emphasis upon ‘choice’, ‘intent’, or a surrogate’s perception of self, have been seen by some as problematic,<sup>36</sup> and as a way to circumvent laws that prohibit the sale of children.<sup>37</sup> None of the views satisfactorily resolve concerns about the sale or commodification of the child. No matter what language is used to describe the transaction (including whether we call the commercial aspect of it ‘payment’, ‘compensation’ or a ‘gift’), no matter what the argued relationship of the woman called a ‘surrogate’ is to the child, the literal interpretation of the law is that the rendering of pregnancy and birth, and the delivery of a child to others *for remuneration or other consideration*, by definition, equates to sale or commodification.<sup>38</sup>

### **‘Stakes in the Child’, ‘Causal Roles’ and ‘Ownership’**

A final example is seen when people emphasise the commissioning person(s)’ ‘stake in the child’, their ‘causal role’ in its existence, or, other views regarding ‘ownership’ to escape arguments that commercial surrogacy involves the commodification or sale of children.

Recently, for example, Wilkinson, a U.K. based philosophy academic said the ‘suggestion that paid surrogacy is baby selling is questionable ...especially where there is a genetic link between one or even both commissioning parents and the child.’<sup>39</sup> He argues ‘in these cases, the commissioning parents have as much of a ‘biological stake’ in the child as the birth mother and

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<sup>33</sup> Joseph Pelzman, “Womb for Rent”: International Service Trade Employing Assisted Reproduction Technologies (ARTs) (2013) 21(3) *Review of International Economics* 387–400.

<sup>34</sup> Ibid.

<sup>35</sup> J. Millbank, ‘Paying for Birth: The case for (cautious) commercial surrogacy’.

<sup>36</sup> Susan Berke Fogel et al., ‘Invoking “choice” when discussing surrogacy as a feminist concern is a mistake’, *RH Reality Check*, 23 April 2014, accessed 10 June 2014, available at <http://rhrealitycheck.org/article/2014/04/23/invoking-choice-discussing-surrogacy-feminist-concern-mistake/>.

<sup>37</sup> Scott B. Rae, *The Ethics of Commercial ‘surrogate’ motherhood: Brave New Families?* (Westport, CT: Praeger Publishing, 1994), 17.

<sup>38</sup> Perhaps it is also here important to note that while there is some evidence that surrogates may psychologically distance themselves from the child they carry (see for example, Olga Van de Akker, ‘Psychological Aspects of ‘surrogate’ motherhood’ (2007) 13(1) *Human Reproduction Update* 53), research available on the long-term experience, views and outcomes for surrogates is limited. As such foreclosing the view of commercial surrogacy based upon even a present view of whether or not the surrogate views herself as ‘mother’ during or immediately after birth is problematic. In addition note that issues of commodification also apply to using a woman for the purposes of bearing a child for others in exchange for money (be it for her services, or otherwise).

<sup>39</sup> S. Wilkinson ‘Exploitation in international paid surrogacy arrangements.’ *J Appl Philos* 2015; Jul 14 [Epub ahead of print]. doi: 10.1111/japp.12138.

(even if gestation ‘trumps’ genetics) can reasonably claim that their situation is quite unlike that of an unrelated person who simply buys a stranger's baby.’ However, I note that such an argument merely reflects the view that genetic relatedness gives the commissioning persons a greater ‘interest’ in the particular child than ‘strangers’ may have; *it does not justify commercial transactions regarding the creation and birth of that child*. Similarly, when Wilkinson states further that ‘even where there is no genetic link, one might still argue that the commissioning couple have a morally transformative causal role in bringing the child into existence’, this does not of itself justify making payment for having done so.

However it is another of Wilkinson’s comments that at best illustrates a misunderstanding of the human rights definition of the sale of children. He states:

*Furthermore, since the commissioning parents will not normally own their children in a full-blooded sense of ownership (the children will not be slaves) talk of ‘baby selling’ is probably misplaced and misleading.*

I note in response that the sale of children, under a human rights law, relates to any exchange of money in return for a child—*no matter how it is treated, no matter who ‘owns’ the child, or whether no one ‘owns’ the child at all*. That is, the sale of children, under international human rights law, does not rely upon the person making the ‘transfer’ holding ‘legal title’ ‘ownership’ (‘full-blooded’ or otherwise) or even any ‘rights’ at all, over the said child; nor does it necessarily involve the child being ‘sold’ into slavery, or servitude, or trafficked for other purposes; rather, it involves *the transfer of the said child in return for remuneration or other consideration*.

Wilkinson’s arguments also do not resolve the issue of the child’s commodification—which is by its very definition the treatment of something (i.e. in this case a person) that cannot be ‘owned’ like a product that can be bought and sold. I refer to some of the statements below of children born as a result of such transactions.

**The People Born As a Result of Assisted Reproduction/Surrogacy – Listening to their Voices**

It is important here to note comments made by people born as a result of donor conception and surrogacy arrangements regarding their having been born as a result of transactions in which

money has changed hands. I argue that if some such people say they feel commodified, if they say they were bought and sold, if they tell us of the impacts upon them as a result of such ‘transactions’—little if any weight should be given to the arguments of an academic philosopher, a legal scholar, an agent, a clinician, or a lawyer, who attempt, via intellectualising or rationalising the process, to convince us otherwise.

Smerdon quotes one nearly 18-year-old boy born as a result of commercial surrogacy who wrote:

*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. You can dress it up with as many pretty words as you want. You can wrap it up in a silk freaking scarf. You can pretend these are not your children. You can say it is a gift or you donated your egg to the IM [(‘intended mother’)]. But the fact is that someone has contracted you to make a child, give up your parental rights and hand over your flesh and blood child. I don't care if you think I am not your child, what about what I think! Maybe I know I am your child.*

*When you exchange something for money it is called a commodity. ... Babies are not commodities. Babies are human beings. How do you think this makes us feel to know that there was money exchanged for us? Because somewhere between the narcissistic, selfish or desperate need for a child and the desire to make a buck, everyone else's needs and wants are put before the kids['] needs. We the children become lost ... .<sup>40</sup>*

Another adult woman, Jessica Kern, who was born as the result of a commercial ‘gestational’ surrogacy arrangement states:

*If all contracts are signed prior to the child being conceived, then it's said to be ok. If the contracts are signed during the pregnancy that by law is considered baby selling. As a product of surrogacy to me it doesn't matter when the paperwork was signed whether I was in the womb yet or not. Consider that in a traditional adoption the mother can sign the agreements while pregnant and have a small bit of time to*

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<sup>40</sup>Usha Rengachary Smerdon, ‘Crossing Bodies, Crossing Borders: International Surrogacy Agreements between the United States and India’ (2009) 39 *Cumberland Law Review* 60.

*change her mind after the child is born. When you buy the egg or the sperm you're not purchasing it for that! You're purchasing the child. Human beings Should Not be for sale.*

Alternatively, 14-year-old girl born as a result of gestational surrogacy said:

*... it doesn't really matter how I was born and that my mother didn't actually carry me. But it does matter that I am here. I am born.*<sup>41</sup>

I also draw the inquiry's attention to statements by donor-conceived people from Australia who provided me with their views on the payment for gametes and in relation to commercial surrogacy practices; some of which I read out to the parliament on their behalf during the previous roundtable held on this issue:

***Lauren:***

*Personally I felt dehumanised to discover that I was conceived as a result of a small commercial transaction that was given to my biological father for parting with his semen back in the 1980s. I feel like the product of this industry of baby making. I co-facilitate a support group for adult "donor" conceived people and this group has been attended by a man who felt so much like a commodity he had a bar code tattooed on the back of his neck. Payment can be given many names, including 'reimbursement' or 'moderate expenses'. However, where money changes hands, a transaction has occurred. The debate about commercial surrogacy illustrates a trend towards the commodification of children that fits into an overall philosophy of a market society in which everything can be bought and sold. State and Federal regulations have struggled to keep pace with these rapid changes. The focus tends to be on the commissioning parents and the 'joyous miracle baby' aspect of these stories and too often nobody asks probing questions such as "Does society condone baby trade?" Or, "What happens to these babies when they grow up to be adults?"*

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<sup>41</sup> Ibid.

***Myfanwy:***

*The sperm used to conceive me was sold for \$20 in 1977. My parents didn't just bring me home from the hospital, they bought me. While it might make us feel better to pay Australian women for their wombs and reproductive capacity instead of disadvantaged women overseas, it is no less exploitative. The only difference will be that the economic, social and psychological circumstances that lead an Australian woman to offer herself to the surrogacy market will be much less visible. We are not paying a woman for her time and inconvenience. We are paying her first and foremost for the child; the risk that she undertakes and the effects on her physical and mental health are secondary issues. There is a good reason prostitutes don't have sex with strangers for free. And there is a good reason few women are prepared to be altruistic surrogates. Compensation acts as the primary incentive for the woman to engage in providing a product for the consumer, however the true price of that product can never be paid or valued in monetary terms. The long term, omnipresent (often quiet and unacknowledged) subsequent loss incurred is borne not only by the woman but her existing family and ultimately the innocent child she delivers. Why are we rewarding the people who choose to break the current domestic law by exploring whether to permit and regulate commercial surrogacy here? If the only real answer to that question is because people are going to do it anyway then we should also legalise human trafficking, slavery, child prostitution and all the other practices that commodify human beings and their bodies. We should not be sanitising this practice, we should be sanctioning it.*

While there may be differing voices from those born as a result of surrogacy and donor conception practices, that *any* child born of such arrangements might feel that they have been 'bought' and 'sold' is nothing short of alarming. This must be acknowledged when determining whether we as a nation will accept any form of surrogacy that involves the exchange of money for a child. The current lobbying to see some form of commercial/compensated/for-profit surrogacy recognised (be it that which is conducted abroad or the suggestion that it be introduced in Australia) is clearly unsatisfactory when considered in such light.

### **Examples of children being treated like commodities: rejected, abandoned, or ‘returned’ for not meeting purchaser requirements**

We might look also to recent cases in which children have been abandoned, when they have not meet the expectations of the commissioning persons.<sup>42</sup> In the ‘Baby Gammy’ case, the Australian commissioning persons left a child with down-syndrome behind, while taking his healthy sister, reportedly asking for their money to be refunded. In another case, an Australian couple, decided to keep only one twin based upon its gender, and to leave the other one behind.

In relation to whether it would be any different if we permitted commercial surrogacy in Australia, I note there is no evidence that permitting commercial surrogacy in Australia would prevent such occurrences. It is possible that some people would still travel for reasons including, but not limited to, lower costs, sex-selection, a preference for not having contact with the surrogate mother or sperm/egg/embryo donor(s) after birth, and/or to avoid meeting other legal criteria.<sup>43</sup> It is also legal to relinquish children for adoption in Australia, and neither couple would have been obliged to care for a son they did not want here either.

### **Examples of the ‘Sale and Trafficking’ of Children**

It is also relevant to consider surrogacy that has involved payment to women to carry a child and then to hand it over, in light of situations that have been said to most clearly illustrate the sale and potential for, or actual of, trafficking of children. That is, while in many cases the commissioning person(s) may wish to procure a child that they will love and care for (and do appear to do so very well), the ability to procure a child by payment in commercial surrogacy arrangements, has given rise to clear examples of exploitation and abuse. I note recent examples as follows.

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<sup>42</sup> See for example Lindsay Murdoch ‘Australian Couple Leaves Down Syndrome Baby with Thai Surrogate’ *The Sydney Morning Herald* 1 August 2014, accessed 12 March 2015, available at <http://www.smh.com.au/national/australian-couple-leaves-down-syndrome-baby-with-thai-surrogate-20140731-zz3xp.html>; see also News Corp Australia, ‘Indian Surrogacy Saga: Australian Couple Abandons Baby in India’, *News.com.au* 9 October, 2014, accessed 12 March 2015, available at <http://www.news.com.au/world/indian-surrogacy-saga-australian-couple-abandons-baby-in-india/story-fndir2ev-1227084223406>.

<sup>43</sup> See <https://theconversation.com/factcheck-is-australia-legally-obliged-to-look-after-children-abandoned-after-commercial-surrogacy-43706>



- In June 2013, the Israeli National Council for the Child brought to the attention of authorities, an Israeli man, recognised by the authorities as a paedophile (and who had served time in prison for molesting children in his care), who had been given legal custody of a 4-year-old girl following an arrangement with a commercial surrogate in India. The child could not be removed from the man as he is considered her legal parent. Authorities were ‘closely monitoring her well-being while she remains in his care’.<sup>44</sup>
- Consider also the case of Mark Newton and Peter Truong, a US/Australian couple who ultimately procured a child via paid adoption in Russia, to exploit sexually. The couple, and numerous other men, abused the boy from 6 weeks to 6 years of age. Newton and Truong had engaged in numerous (failed) commercial surrogacy attempts before finding a woman who was already pregnant and willing to sell them her baby once it was born. Surrogacy nevertheless was a real and tried avenue by the men to procure the child.<sup>45</sup>
- In another Australian instance, a United States citizen married an Australian women, and subsequently engaged a Thai surrogate who provided them with twin boys. The boys were alleged to have been abused, and have been removed from the ‘father’s’ care with findings that he had a significant history of being involved in a ring of men who perpetuated sexual abuse upon women and children.
- The man who commissioned the Thai surrogate in the ‘Baby Gammy’ case (mentioned below), David Farnell, was also a convicted paedophile. Baby Gammy’s twin sister remains in his care.
- An investigative journalist for Vice also discovered in India (prior to foreigner access to surrogacy being shut down) that ‘extra’ Caucasian babies were for sale. The practice was described as follows:

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<sup>44</sup> See <http://www.irts.com.au/en/news/732.html> (accessed 10 June 2014).

<sup>45</sup> Department of Justice, United States Attorney Joseph H. Hogsett, Southern District of Indiana ‘Hogsett announces charges against four men in international child exploitation conspiracy’, 28 June 2013, accessed 10 June 2014, available at [http://www.justice.gov/usao/ins/press\\_releases/Pressrelease13/Newton.20130628.pdf](http://www.justice.gov/usao/ins/press_releases/Pressrelease13/Newton.20130628.pdf); *United States of America v Mark Jonathan Newton* (United States District Court, 1: 12-cr-00121-SEB-TAB, 25 June 2013).



*Western couples are taking advantage of the discounts international surrogacy offers. They get a baby gestated for them at a low price, and the women in third-world countries get more money than they could make in several years. To make the process more efficient, doctors often transfer more than one embryo to a surrogate. If she gets pregnant with multiples, sometimes the commissioning couple is not told. Nine months later, they fly in and get the one baby they paid for. The “extras,” however, are peddled on the black market. While the couple thinks they’re getting a miracle at a bargain price, they are unaware that their “extra” children are being sold to whoever is willing to pay.*

### **Intermediaries, agents, and the fertility industry**

NOTE: Given the central role played by intermediaries, agents, and the fertility industry, in commercial surrogacy arrangements it would of course be remiss to focus purely on whether the ‘surrogate’ mother is involved in the sale, commodification, and/or trafficking of the child. That is, regardless of arguments about how one should perceive the ‘surrogate’ mother’s role in the transaction, it must be recognised that there are clearly other people who may exercise significant control over the transfer of the child in return for remuneration or consideration. The above example of ‘spare’ babies discovered by Vice, is enough to illustrate this. I note here the differing levels of agents and intermediaries acting in transnational arrangements may include:

- International agents/agencies that liaise with foreign couples and clinics
- The agent-facilitator overseeing recruitment of the ‘surrogate’ mother and all processes during the pregnancy
- The neighbourhood/local recruiter (who may also be an ex-‘surrogate’ mother or egg donor).

At each stage of the process, agents and intermediaries are most often paid a fee or percentage of the surrogacy agreement or ‘cut’ of what is designated for the ‘surrogate’ mother.

### **What position should be taken?**

Whether ‘commercial surrogacy’ is seen as the purchase of a child, the purchase of reproductive labour, or the purchase of parental rights, they all involve the transfer, for a fee, of a

child from the woman, who carried it throughout pregnancy and birthed it, to the commissioning person(s). There is in all instances a failure to reasonably justify payment. There appears also to be indifference to, and/or ignorance of, the needs, interests and wellbeing of the child(ren) born as a result (in terms of their lived experiences of commodification, sale and/or trafficking). The industry just pushes one. I however question how we can possibly support a practice that ignores the interests of the children that are the very reason that the practice is said to exist in the first place.

Be it to procure a child that will be loved and cared for; or the creation of a child for its subsequent abuse, there are clearly issues regarding the sale and/or commodification of children in surrogacy arrangements in which money changes hands. In some cases there are also issues concerning their trafficking. The above discussed instances form part of the ‘evidence base’ that commercial surrogacy involves these very things. Perhaps needless to say that this is so whether or not the surrogate is a wholly autonomous and willing party to the transaction, or whether she is herself exploited in terms of the arrangement. In the latter instance, she could not be held morally culpable, but the nature of the transaction remains the same.

I submit that Australia:

- should not support any practice that serves to commodify children, and may be seen as contrary to the international and domestic stance against the sale and/or trafficking of children;
- should not pass legislation that serves to legitimise a practice that is contrary to our international law obligations (see above and below)
- should not pass legislation that is contrary to the interests and well-being of children; and
- has an obligation to enforce the laws it claims exist to protect children from exploitation, commodification, sale or trafficking—noting that doing so may deter some other people from engaging in commercial surrogacy arrangements in the future.

## WOMEN AS ‘SURROGATE’ MOTHERS

The following sections draw to the attention of the inquiry issues surrounding exploitation, social and financial pressures; reduced bargaining power and lack of consent; and notions of autonomy and free choice. The discussion presents that commercial surrogacy again raises

significant issues related to its practice, and its impact, not only on how individual women are treated, but on how women may be viewed and treated generally. I note at the outset, it is my position that if we are truly wanting to support women, see them achieve equality, independence, and empowerment, if we want to put an end to trafficking, and reject their commodification, then having them ‘serve’ to bear the children for others—in return for a ‘moderate fee’—is not how to do it.

### ***Exploitation: Human Trafficking of Women***

There is no doubt that in the global commercial surrogacy market poor and vulnerable women have been trafficked for use as surrogates for the profit of agents or brokers. For example, in 2012, Rotabi and Bromfield, provided a stark comparison between inter-country adoption and commercial surrogacy in Guatemala,<sup>46</sup> highlighting that

*in the global environment of assistive technology and the demand for babies ...  
Guatemalan women are at risk of human sales of their offspring in global surrogacy  
schemes...*

Drawing analogies to past practices in inter-country adoption rings, Rotabi and Bromfield noted schemes in which women (often teenage girls) were commonly called “breeders”, and were paid small amounts of money in exchange for their child by merchants.<sup>47</sup>

Notably, the European Parliament’s Joint Motion for a Resolution on Guatemala in July 2005 recognised such concerns. They stated that according to the Office of the Counsel for Human Rights, *the abuses occurring in Guatemala include forced or surrogate pregnancies, removal of children from their real mothers, substitution of documents, alteration of public records, and the existence of clandestine “nurseries” ...*<sup>48</sup>

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<sup>46</sup> Karen Smith Rotabi and Nicole Footen Bromfield, ‘The Decline in Intercountry Adoptions and New Practices of Global Surrogacy Global Exploitation and Human Rights Concerns’ (2012) 27(2) *Affilia* 139, 141.

<sup>47</sup> *Ibid*, 134.

<sup>48</sup> Official Journal of the European Union, ‘Trafficking in children in Guatemala: European Parliament resolution on Guatemala’ (P6\_TA(2005)0304), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:157E:0494:0495:EN:PDF> (accessed 29 August 2013).

The practices of commercial surrogacy in such places as they have occurred have clearly raised significant concerns about ‘human rights abuses, including human trafficking and violence against women’.<sup>49</sup>

The example of Guatemala is not unique. Cases of human trafficking of women to work as surrogates have been reported for decades in other places. For example, in

- 1995, young Polish women were recruited to travel to Holland, Belgium and Germany to work (illegally in some cases) as surrogates.<sup>50</sup>
- 2009, women from Myanmar were sold to Chinese men to work as surrogates. The women ‘had been lured to China in the hope of finding jobs’ but were instead paid \$250.00 to act as surrogates;<sup>51</sup>
- 2011, several Taiwanese, Chinese and Burmese people were arrested for allegedly running an illegal surrogacy ring in Thailand. In this instance, some of the 14 Vietnamese women being housed as surrogates, seven of whom were pregnant, had been tricked or forced into the arrangements and, according to the Public Health Minister, some had been raped;<sup>52</sup>
- 2011, three individuals in the United States were convicted of criminal charges relating to paying ‘surrogate’ mothers to be sent to the Ukraine for implantation with embryos, without any surrogacy arrangements in place. If the pregnancy continued into the second trimester, the unborn children were ‘sold’ to prospective parents under false representations that they were the result of legitimate surrogacy arrangements in which the original commissioning person(s) had ‘backed out’;<sup>53</sup>

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<sup>49</sup> Rae, above n 37, 129.

<sup>50</sup> Iris Leibowitz-Dori, ‘Womb for Rent: The Future of International Trade in Surrogacy’ (1997) 6 *Minnesota Journal of Global Trade* 329; Abi Daruvalla, ‘Poles Hired as Surrogate Mums in Illegal Trade’, *The Independent* (4 June 1995), available at <http://www.independent.co.uk/news/world/poles-hired-as-surrogate-mums-in-illegal-trade-1584960.html> (accessed 29 August 2013).

<sup>51</sup> Lucy Hornby, ‘China deports Myanmar women sold as surrogates’, *Reuters* (25 March 2009), available at <http://uk.reuters.com/article/2009/03/25/us-china-myanmar-idUKTRE52O1I720090325> (accessed 29 August 2013).

<sup>52</sup> ‘Thailand Police Investigate Baby Sales Ring’, *BBC News* (22 February 2011), available at <http://www.bbc.co.uk/news/world-asia-pacific-12575566> (accessed 29 August 2012); Center for Genetics and Society, ‘Thai Police Free Women From Surrogate Baby Ring’, *AFP* (24 February 2011), available at <http://www.geneticsandsociety.org/article.php?id=5606> (accessed 29 August 2013).

<sup>53</sup> Hague Conference on Private International Law, A Preliminary Report on the Issues Arising from International Surrogacy Arrangements Preliminary Document No 10 of March 2012. See also Federal Bureau of Investigation, ‘Baby-selling ring busted’ at <http://www.fbi.gov/sandiego/press-releases/2011/baby-selling-ring-busted> (accessed 29 August 2013).

- In Nepal, in 2015 the government shut down the commercial surrogacy trade which involved women coming to Nepal from India to act as ‘surrogate’ mothers for foreign commissioning persons. Young women from South Africa were also being flown in to undergo egg cell retrieval.

The above events happened in the modern day. It is therefore not outdated, or lacking evidence, to suggest that such risks and realities exist. These are extreme cases that include criminality and actual (or the potential for) abuse. They provide a stark illustration of the risks commercial surrogacy may pose, in both the developing and developed world—including the danger that ‘agents’ or third parties may use and traffic women and children for profit.

I note that some advocates for commercial surrogacy in Australia, point to the U.S. to hold it up as ‘different’ or as the ‘example of a system that works well’. I note the comments of Therese Erikson, the California based attorney who was jailed for sending women to the Ukraine to be impregnated and then subsequently presenting them to U.S. couples once they had reached their second-trimester of pregnancy as ‘surrogate’ mothers for whom the first arrangement had fallen through. Erikson said that ‘*surrogacy and adoption in California is a ‘billion-dollar industry’ that is ‘corrupt’*. Erikson also referred to her actions—named as a ‘baby selling ring’ by the FBI, and involving clear exploitation of women, as well as commissioning person(s)—as the ‘*tip of the iceberg*’.

Another Los Angeles based surrogacy lawyer, Andrew W. Vorzimer, said in 2014: *There are more scams and scandals in surrogacy now than I can ever recall seeing.*

However, the risks associated with commercial surrogacy do not end there. Even in more ‘routine’ cases, there exists concern about the extent to which women engaged as ‘surrogate’ mothers are influenced by social and economic pressures, are able to give free and informed consent, and are exploited through racial and cultural inequities.

### ***Social and Financial Pressures for Women***

Sociological studies of surrogates conducted in the past decade suggest that ‘financial motivation may be a primary factor in the decision to participate in surrogacy ... [and], because of

their financial status, commercial surrogates are susceptible to financial inducement and vulnerable to exploitation'.<sup>54</sup>

In the developed world, few nations permit commercial transactions, and thus perhaps the most looked upon nation is the United States, in which some states have permitted such practices for some time. There, early studies suggested that women acting as commercial surrogates are 'predominantly white, working class, of Protestant or Catholic background' with 30% of them being 'full-time homemakers, married, and with an average of three children'.<sup>55</sup> In 2005, Beckman and Ciccarelli reviewed twenty seven empirical studies conducted between January 1983 to December 2003 in the United States, and concluded that "'surrogate' mother's' family incomes are most often modest (as opposed to low) and they are from working class backgrounds'.<sup>56</sup> In 2007, Driabak et al. noted that the rhetoric in the United States that portrays the surrogate as a reasonably well-educated, financially stable woman motivated by altruism stands in contrast to reality.<sup>57</sup> Driabak found that sociological studies of surrogates conducted between 1997 and 2007 suggest that 'financial motivation may be a primary factor in the decision to participate in surrogacy ... [and], because of their financial status, commercial surrogates are susceptible to financial inducement and vulnerable to exploitation'.<sup>58</sup>

More recently reports from the United States indicate, that depending on the state, between 19% and 50% of women who act as commercial surrogates are military wives, with higher rates in larger states that have sizeable military establishments such as Texas and California. Lower earnings for military families (estimated to be at around \$30,000 per year), having to look after children, and the absence. of the husband who is serving overseas, may all influence engagement with commercial surrogacy, which may provide an extra \$25,000-\$30,000 to the family.<sup>59</sup>

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<sup>54</sup> Katherine Drabiak, Carole Wegner, Valita Fredland and Paul R. Helft, 'Ethics, Law, and Commercial Surrogacy: A Call for Uniformity' (2007) 35 *Journal of Law, Medicine and Ethics* 300, 301, 304.

<sup>55</sup> Helena Ragone, above n 32.

<sup>56</sup> Janice C. Ciccarelli and Linda J. Beckman, 'Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy (2005) 61 *Journal of Social Issues* 21.

<sup>57</sup> *Ibid.*, 304.

<sup>58</sup> Katherine Drabiak above n 54.

<sup>59</sup> Targeted marketing also takes place including statements that commercial surrogacy '...is the ultimate call of duty—military wives carrying a dream.' See for example websites such as 'Find a 'surrogate' mother – Military Wives and Surrogacy', accessed 16 February 2015, available at <http://www.findsurrogatemother.com/surrogacy/guide-for-surrogate-mothers/military-wives-and-surrogacy>.

In the United States (as with practices elsewhere), given the high costs of surrogacy and the fact that they do not usually have children yet, it is unsurprising to find that the commissioning persons are older, generally more educated and had higher incomes than ‘surrogate’ mothers and their partners.

In regions and countries where poverty is more pronounced, the disparities are even greater. For example, in a study conducted in 2012, by the Center for Social Research (CSR) in India, in which over 100 surrogates, as well as their families, commissioning person(s), clinics, agents, and other stakeholders, were interviewed, the overwhelming majority of surrogates indicated that they had decided to become a surrogate due to ‘poverty’.<sup>60</sup> The study found a system rife with problems and inequalities.<sup>61</sup> Concerns were raised about pressure from others (for example, brokers and/or husbands) for women to become surrogates as they may earn many times their husband’s yearly income for one surrogacy (noting, that this does not mean that women are paid well). In addition, the CSR study also highlighted a lack of transparency regarding the fees paid to surrogates and disparity between what the commissioning person(s) believe the surrogate is paid and what she is actually paid.<sup>62</sup> The CSR report concluded that ‘in reality the contract between the parties to surrogacy would not exist if the parties were equal’.<sup>63</sup>

Some other quotes from women in jurisdictions, which again demonstrate the need for money, and subsequent ‘choices’ made resound:

*At the time I was suffering a lot of financial problems and my husband told me I could sell a kidney to pay the debt. But I said no, I will do surrogacy. (Made in India, 2010).*

*In Israel, the most destitute group of surrogates sometimes mentioned that surrogacy was a better option for them than other options they had considered, such as selling a kidney. (Telman, 2010)*

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<sup>60</sup> 86.7 per cent in Anand, 88.6 per cent in Surat, and 100 per cent in Jamnagar. See Centre for Social Research, ‘surrogate’ motherhood: *Ethical or Commercial* (March 2012), 37–8, available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, accessed 16 February 2015

<sup>61</sup> Ibid.

<sup>62</sup> Note that payments to surrogates in India are arbitrarily decided by the infertility physician of the clinic or hospital, and generally range from 2 to 3.99 Lakhs (approximately US\$3,800–\$5,700). Ibid., 47.

<sup>63</sup> Ibid.



We should also be cautious about practices that are called ‘altruistic’ but that are actually commercial in nature. Here we might for example consider shifts in practices in Greece, where the number of women participating as ‘surrogate’ mothers in exchange for money has also reportedly risen. Due to wide interpretation given to ‘altruistic’ arrangements, remuneration starts at around 20000 Euros for ‘surrogate’ mothers, and it is also seen as a ‘profit making business’ for doctors. Thus, introducing ‘fluidity’ in interpreting ‘altruistic’ arrangements, leads to little more than commercial surrogacy arrangements. One commentator notes about the current situation in Greece:

*The socio-economic context also lends itself to commercial surrogacy. The unemployment rate among young people is currently estimated at about 50%. This has led to a rising number of young women offering to act as surrogates in order to generate income...Over half of the surrogates are foreign...35% from Eastern Europe and the ex-soviet union, and 21% from the Balkin states...17% had a work relationship (domestic workers) with the intended mother...<sup>64</sup>*

The above examples illustrate that it has long since been an issue that commissioning persons from relatively affluent economic backgrounds may intentionally, or unintentionally, take advantage of indigent women by offering a sum of money that such women desperately need and will not be able to refuse.<sup>65</sup> Such social and class issues are not limited, however, to financial disparities or needs; they impact upon the way in which surrogacy agreements (‘contracts’) are negotiated, and are reflected in the racial and cultural disparities rife in such transactions. Such concerns have been raised in relation to all regions in which commercial surrogacy is occurring.<sup>66</sup>

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<sup>64</sup> Konstantina Davaki, ‘Surrogacy arrangements in austerity Greece: policy considerations in a permissive regime’, pre-publication 2016 (editor Miranda Davies, for Zed Books).

<sup>65</sup> See, for example of early discussion on this point *In re Baby M*, 537 A.2d 1227, 1250 (NJ 1988).

<sup>66</sup> Note as discussed above that the author recognises differences amongst and between states. The financial starting point of some women in developing countries, for example, would be different to that of a surrogate in the United



### ***Reduced bargaining power and lack of informed consent***

The issue of social and financial disparities present in many commercial or ‘compensated’ surrogacy arrangements is closely linked to concerns about the ability of women who are engaged as ‘surrogate’ mothers to properly protect their interests when negotiating such agreements. Women in need of finance (and prospective parents experiencing the anguish of infertility or childlessness) may have diminished bargaining power when dealing with surrogacy agencies, or others who entice them to serve as ‘surrogate’ mothers.<sup>67</sup>

#### ***The notion of a ‘gift’***

Bargaining power may also be reduced by the view, justification or expectation that ‘surrogate’ mothers are really acting to ‘help’ others and are ‘giving’ women, motivated ultimately by altruism rather than desperation or financial need or gain. For example, Macklin argues that the fact that compensation may be the primary motive does not necessarily mean the women are being exploited, as the surrogate may derive other significant benefits from the arrangement—‘such as fulfillment of a desire to be altruistic’.<sup>68</sup> However, agencies may use notions of altruism to reduce the fee paid to the surrogate, and women may think that they must report that money is not their primary motivation.<sup>69</sup>

#### ***Independent representation***

In some cases, potential ‘surrogate’ mothers may, in addition, lack independent representation and therefore be more vulnerable to manipulation (by a broker/agent, the assisted reproductive clinic, or the commissioning person(s)) regarding not only price, but also the terms

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States. In the United States, the visible disparities may be less pronounced, and amounts paid are far greater – but as noted above, very affluent women do not generally act as surrogates in any such nations.

<sup>67</sup> Drabiak, above n 54, 304.

<sup>68</sup> Ruth Macklin, ‘What’s Wrong with Commodification?’ in Cynthia B. Cohen (ed), *New Ways Of Making Babies: The Case Of Egg Donation* (Indiana University Press, 1996), 106.

<sup>69</sup> See for example V. Jadva et. al., ‘Surrogacy: The Experiences of ‘surrogate’ mothers’ (2003) 18(10) *Human Reproduction* 2196, 2199 in which only one ‘surrogate’ mother of 34 interviewed reported payment as a motivating factor; H. Ragone, *‘surrogate’ motherhood: Conception in the Heart* (Westview Press, 1994), 57; J. C. Ciccarelli and L. J. Beckman, ‘Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy’ (2005) 61 *Journal of Social Issues* 21, 30 in which surrogates stated they would not have become a surrogate simply for the money, as it is ‘never enough’ and another woman echoing, ‘I’m not doing this for the money’ (as cited in Drabiak above n 54).

of the contract, including that the surrogate bears most of the risks.<sup>70</sup> In the abovementioned CSR study, it was found that surrogates were often illiterate and relied on clinics to inform them of the terms of the contract, without independent advice. When asked, ‘surrogate’ mothers could not explain or recall many of the terms of the contract they had entered into. Contracts were often not signed until mid-way through the fourth month of a pregnancy meaning the surrogates would bear all risks and losses if the pregnancy miscarried or was aborted due to fetal abnormalities. Clinics often were not party to the contract, allegedly to avoid accountability.

### ***Previous pregnancy or birth***

In some regions, where a requirement of previous pregnancy and birth does not exist, a potential surrogate may enter an agreement due to the offer of, what is to her, a large sum of money, without understanding the physical or psychological effects of acting as a ‘surrogate’ mother.<sup>71</sup> Such risks include that there is a higher maternal morbidity and mortality rate for women who use other women’s eggs than women who use their own eggs, and the potential for placing the surrogate in a situation where the baby’s life may be given priority over hers should complications arise.<sup>72</sup> In addition, Walker suggests that women who have not previously borne children could never really give informed consent to participate in a surrogacy agreement as they will not be able to predict the bond they may feel with the child.<sup>73</sup>

Note however that issues also exist regarding when women are required to have other children. Just because a woman has birthed a child, doesn’t mean she will be able to predict how she will feel giving (or selling) one to another person or couple.

### ***Compromised Autonomy***

A recent European Parliament study into surrogacy practices also noted that the autonomy of the ‘surrogate’ mother can be compromised throughout the process by her being required by the

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<sup>70</sup> Jennifer Rimm, ‘Booming Baby Business: Regulating Commercial Surrogacy in India’ (2009) 30 *University of Pennsylvania Journal of International Law* 1429, 1449.

<sup>71</sup> *Ibid*, 1443-44.

<sup>72</sup> M.L.P. van der Hoorn, et al. ‘Clinical and immunologic aspects of egg donation pregnancies: a systematic review’ (2010) 16(6) *Human Reproduction Update* 704; F. Olivennes. ‘Double trouble: yes, twin pregnancies is an adverse outcome’ (2000) 15(8) *Human Reproduction Update* 1663.

<sup>73</sup> Molly Walker, ‘Precommitment in Free-market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity’ (2005) 31 *Journal of Legislation* 329, 330.

commissioning person(s) and/or physicians to undergo sampling tests, amniocentesis or vaginal ultra-sound, to receive pressures to change her diet or lifestyle, or to terminate the pregnancy in case of a 'defective' foetus.<sup>74</sup>

***What can happen when a 'surrogate' mother refuses to terminate a pregnancy?***

The termination of pregnancies has been of late in the public eye—with prominent examples of when a 'surrogate' mother has refused to undergo such terminations being found in situations such as the Baby Gammy case in Thailand (that was referred to above):

*Gammy was born with Down syndrome and a congenital heart condition. He is a twin conceived as a result of a commercial surrogacy arrangement between an Australian couple and Pattaramon Chanbua a Thai national whose family was struggling to pay off debts. ...According to Ms Chanbua when it was discovered she was carrying twins she was offered an additional 70000 Baht (A\$2000). But when doctors further discovered one of the babies had Down syndrome she was told to abort the affected twin. She refused on religious grounds and after the twins' birth the Australian couple left with only the healthy girl.<sup>75</sup>*

and in the case of Chrystal Kelley, a single unemployed mother of two children, in the U.S.:

*On February 22, 2012, six days after [an ultrasound revealing that the child Kelley was carrying would suffer severe disabilities], Kelley received a letter. The parents had hired a lawyer... "You are obligated to terminate this pregnancy immediately," wrote Douglas Fishman, an attorney in West Hartford, Connecticut. "You have squandered precious time." On March 5, Kelley would be 24 weeks pregnant, and after that, she couldn't legally abort the pregnancy, he said. "TIME IS OF THE ESSENCE," he wrote. Fishman reminded Kelley that she'd signed a contract, agreeing to "abortion in case of severe fetus*

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<sup>74</sup> European Parliament, Director General for Internal Policies, Policy Department Citizen's Rights and Constitutional Affairs, *A Comparative Study on the Regime of Surrogacy in EU Member States* (2013).

<sup>75</sup> Excerpt: Sonia Allan, 'Baby Gammy Reveals Murky Side of Commercial Surrogacy', *The Conversation* 5 August, 2014 at <https://theconversation.com/baby-gammy-case-reveals-murky-side-of-commercial-surrogacy-30081>

*abnormality." The contract did not define what constituted such an abnormality. Kelley was in breach of contract, he wrote, and if she did not abort, the parents would sue her to get back the fees they'd already paid her -- around \$8,000 -- plus all of the medical expenses and legal fees.*

Kelley refused to abort, and fled to Michigan, a U.S. state in which she would be recognized as the legal mother. She subsequently gave the child up for adoption to parents who had experience in caring for severely disabled children.<sup>76</sup>

In many other cases, women acting as ‘surrogate’ mothers may not be in a position to refuse an abortion, keep the children, and/or flee; and while commercial agencies in the U.S. and beyond, emphasise ‘carefully selecting’ women who will not ‘back out’ of their ‘contractual obligations’—including having a termination when required—I submit that we should be questioning that practice too.

### ***Autonomy and Free Choice***

There are however also arguments that perpetuating the idea that women who wish to act as ‘surrogate’ mothers are unable to ‘contract’ (or make agreements) freely is paternalistic.<sup>77</sup> For example, Andrews and Elster state that it is ‘paternalistic to assume that individuals choosing to be ‘donors’ or ‘surrogate’ mothers are incapable of making rational, informed choices.’<sup>78</sup> They cite Richard Arneson who contends that ‘the thought that commercial surrogacy should be banned because the poor working women who mostly choose surrogacy are too incompetent to be entrusted to make their own decisions in this sphere has an ugly, elitist sound.’<sup>79</sup> Andrews and Elster argue that ‘such paternalism and elitism may do more to devalue, degrade, and exploit women than would payment for their reproductive products and services.’<sup>80</sup> Arneson argues that

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<sup>76</sup> Excerpt: Elizabeth Cohen, ‘Surrogate offered \$10,000 to abort baby’, CNN (2013) See further <http://edition.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/>

<sup>77</sup> Lori B. Andrews and Nanette Elster, ‘Regulating Reproductive Technologies’ (2000) 21(1) *Journal of Legal Medicine* 35, 41 .

<sup>78</sup> Andrews and Elster, above n 77, 41.

<sup>79</sup> R. J. Arneson, ‘Commodification and Commercial Surrogacy’ (1992) 21 *Philosophy and Public Affairs* 132 as cited in Andrews and Elster, above n 77, 41.

<sup>80</sup> Andrews and Elster, above n 77, 41.

provided no harm is done to others, prospective parents and potential surrogates should therefore be free to act (and contract) as they wish.<sup>81</sup> The emphasis should be upon the autonomy and free choice of those parties,<sup>82</sup> and upon results of some empirical studies which have concluded ‘that surrogates and commissioning couples are satisfied and enriched by the process’.<sup>83</sup>

Others have argued that the fact that a ‘surrogate’ mother’s decision may be influenced by financial need is not enough to discount the practice of commercial surrogacy as lacking decision making power. Pande, for example, quotes the realities of one 25 year old house-wife’s ‘compulsion’ to become a ‘surrogate’ mother:

*Who would choose to do this? I have had a lifetime’s worth of injections pumped into me. Some big ones in my hips hurt so much. In the beginning, I had almost 20-25 pills almost every day. I feel bloated all the time. But I know I have to do this for my children’s future...This is not work, this is majboori [a compulsion]. Where we are now, it can’t possibly get any worse...In our village we don’t have a hut to live in or crops in our farm. The work is not ethical, it’s just something we have to do to survive. When we heard of this surrogacy business, we didn’t have clothes to wear after the rain...and our house had fallen down. What were we to do?<sup>84</sup>*

Such compulsion is not viewed as leading the woman to be unable to make independent decisions, nor does it make her abhorrent, woeful or abnormal. She is simply doing what she must, and what she accepts.

However, I submit, that even if one accepts that some women may be making rational, informed, and free choices, or are ‘compelled’ to act as ‘surrogate’ mothers, there are still issues in commercial surrogacy situations concerning the sale and/or commodification of children; and

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<sup>81</sup> R.J. Arneson above n 79, 158.

<sup>82</sup> Ibid.

<sup>83</sup> Pamela Laufer-Ukeles, ‘Mothering for Money: Regulating Commercial Intimacy, Surrogacy, Adoption’ (2013) 8(4) *Indiana Law Journal*:Vol., Article 6. Available at:<http://www.repository.law.indiana.edu/ilj/vol88/iss4/6>.

<sup>84</sup> A. Pande, ‘Not an Angel, Not a Whore: Surrogates as Dirty Workers in India’ (2009) 16 *Indian Journal of Gender Studies* 141, 160.

associated risks of creating a market in which some children may be accessed for trafficking or abuse.

In addition, arguments such as those made by Andrews, Elster and Arneson (and others) concerning a woman's 'freedom' appear to ignore that there are many circumstances such freedom is constrained by significant financial struggles, poverty, unequal bargaining power, and social and cultural circumstances and pressures—all of which may manifest themselves in unacceptable ways in *both developed and developing countries*.

Rimm observes that the global surrogacy market 'adds another dimension to the already grim picture that surrounds modern global commercial surrogacy, by introducing the prospect of unacceptable racial distinctions between the commissioning and the commissioned parties.'<sup>85</sup> She argues that international surrogacy is 'especially problematic when performed at "bargain prices" for wealthy foreigners because it promotes the racist and imperialist view that it is acceptable to exploit and dehumanize women of different origins'.<sup>86</sup>

I submit that in such circumstances, the 'ugly elitism' to which Andrews and Elster refer arguably does not exist in calling for laws that support women and children by prohibiting practices that place them at risk, exploit them, commodify them, or prey on their vulnerabilities and needs, but rather exists in the financial, class and racial disparities, and/or cultural exploitation, found in many such arrangements.

### **Would it be any different in Australia?**

I believe it would be mistaken to believe that the inequalities, financial disparities, and class differences would be any different in Australia. Generally, we do not see wealthy women serving as 'surrogate' mothers.

I note again that the reported 'lack' of available surrogates for altruistic surrogacy arrangements in Australia is not an indication of a 'shortage', nor is it an indication that we need to 'encourage' more women, nor entice them via money, nor find ways in law to recognize arrangements that take place in countries using women of lower socio-economic status, single mothers, or differential race. It is an indication that most women do not wish to act as surrogates

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<sup>85</sup> Rimm, above n 70, 1446.

<sup>86</sup> Ibid.

nor be exposed to the multitude of risks described above, and only choose to do so in exceptional circumstances (for example for a close friend or relative), or in circumstances in which money is on offer.

It is a fallacy to think that just because most Australian women do not live in the same abject poverty as women in some of the nations in which surrogate mothers have been procured, that economic and class differentials would not exist or influence involvement if commercial (aka ‘compensated’) surrogacy were introduced here. Some professors who earn more than \$150,000 per annum, and doctors who earn two or three times that amount, appear not to understand just how much money \$10000 or \$30000 is to most other people in this country. In fact, such sums may be enough for a woman to make a decision to do what otherwise she would not have done.

Even if such a decision were to be rationalized, and said to satisfy notions of free and informed ‘consent’, this would not negate broader issues relating to the commodification of women’s reproductive capabilities, and/or of children, nor the other risks that practices surrounding commercial surrogacy pose.

Further, the issues raised do not just concern what one woman may decide, it leads to bigger questions of what we are willing to accept as a society in terms of how we view and treat women, the circumstances in which we are willing to procure children, and the impact the exchange of money in such circumstances may have on at least some of them in the long-term.

## COMMISSIONING PERSON(S)

### Commissioning Persons May also be Vulnerable

People who face infertility, inability to conceive or carry a child, or who cannot procreate due to being single or in same-sex relationships, may also be vulnerable. They may be ‘sold’ the idea that commercial (‘compensated’ or ‘for-profit’) surrogacy is simply a business transaction that can be performed with ease. They may be told they will achieve emotional fulfilment and a ‘family of their own’ using commercial ‘surrogate’ mothers who are really giving, altruistic women, who want to help (for a fee/compensation). Words such as ‘whole’ and ‘complete’ are constantly used in the marketing to such people. They are told that ‘every family starts with a



baby’ or that if they do not have a family they have ‘failed’, or that their family is ‘incomplete’. They are vulnerable to agents, lawyers, and an industry who all make a great deal of money from the fact that people want children.

They are shown pictures of happy families with babies, told they will ‘realise their dreams’ and embark on a ‘journey’. There is minimal presentation of stories that depict the ‘lack of success’ some people face, the repeated miscarriages, stillbirths, and other difficulties that may ensue after such arrangements. The large amounts of money that are required to achieve ‘success’ are downplayed, noting nothing can be found on websites of agencies to explain what happens when people ‘fail’ to achieve a birth and are unable to continue financially.<sup>87</sup>

We should be cognizant of not feeding into an industry that preys on people’s vulnerabilities and desperations, and sells them the ‘dream of having their ‘own’ family’ while ignoring all of the other consequences, risks and harms that may eventuate.

That commissioning persons may feel that they have achieved ‘success’ when they return home with a child, does not discount the broader issues raised by commercial surrogacy.

Introducing commercial surrogacy in Australia would also not address such issues.

### **Commissioning Persons – Relationships with ‘Surrogate’ Mothers**

It is here also important to reflect again on the difference in relationships that exist in altruistic as opposed to commercial arrangements.

The Inquiry should note that while some commissioning persons have managed to maintain relationships with commercial ‘surrogate’ mothers, and there are some anecdotal reports of children visiting them on occasion, the reality is that in commercial surrogacy situations, this does not always seem to be the case. The general view taken is that people are building a family of their ‘own’ and some reports indicate a lack of connection with the birth mother (and donor(s)).

In Daniella Dana’s book ‘Contract Children: Questioning Surrogacy’ there is a section (extracted below) that highlights some of the relationships, expectations, and attitudes between

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<sup>87</sup> One might also note here that families that choose not to have children, or that choose to engage in fostering or adoption of children that are not ‘their own’, are marginalized as a consequence of the media and marketing fray.



and toward ‘surrogate’ mothers and commissioning persons that may occur during and following commercial surrogacy arrangements (including those that occur in the United States). She writes:

Programs advise the couple about the importance of creating and maintaining the image of being a loving and devoted couple, who has the ideal marriage (except for their inability to have a child) and is ready to take a child into a perfect, idyllic home...*“It works for us because [the surrogate] cannot imagine hurting this couple whom she knows and likes so much”*

...

But ...Debbie [recalls]: *“I thought my couple and I would always be the best of friends. I imagined we’d always spend our holidays together—just one big happy family. I can’t believe that all along they planned to get rid of me once they had the baby.”*

...

Chesler adds: *“most contract couples are very grateful to their surrogate mother. They also want nothing more to do with her after the baby is safely “theirs”.”*

...

A Spanish gay father states: *“I prefer the procedure of India, I mean the procedure where I think the role of the mother is more in her place because, at least in couples I know who have done it in the United States, the mother becomes like a person of the family, like an aunt, and I think the roles get a little confused...”*

....

The surrogate mother’s feelings are often not reciprocated, as her presence can be a source of embarrassment once the family is constituted: *“After a time they might cut you off”* because *“thing change after birth”* observes a U.S. surrogate who had this experience...

...

Kaytlin Alexander warns [other potential ‘surrogate’ mothers] that future contact must be carefully negotiated: *“What are your expectations regarding contact before, during and after birth? ...You need to stand firm on your expectations.”* But she gives no illusion that a good relationship will hold: *“But be aware of this—just*

*because you expect it does not always mean it will happen...Prepare your heart for the possibility of broken promises. You may have heard or read about the many instances of couples promising their surrogates terms that sound like rainbows and sunshine. Unfortunately, in the end, all that some surrogates get is the rain.”*

Where there has been an exchange of money, it appears that some commissioning person(s) may feel that they do not ‘owe’ the surrogate mother anything. They have paid her, and do not expect to have to do anything else—there may be no obligation, in their eyes to maintain contact.

Many U.S. clinics in answer to the questions concerning contact with the ‘surrogate’ mother state something along the lines of:

*Even after the birth, some couples still stay in touch with their surrogates (Christmas cards, birthday cards, etc.), although for most couples and surrogates the relationship ends after the baby is born.*

This is confirmed via early U.S. based studies indicated contact diminishes over time – usually at the commissioning couples’ wish. For example, an early study of 10 surrogates in the U.S. found that 60% had no contact with the surrogacy family 10–15 years after the birth, an arrangement determined by the couple rather than the ‘surrogate’ mother, who was reported to have felt some degree of disappointment about the loss of the relationship (Reame et al., 1998). Another study in which 14 surrogates were interviewed 3–10 years after the surrogacy found that dissatisfaction with the arrangement increased for a minority of surrogates as contact with the surrogacy family started to diminish (Ciccarelli, 1997). (Note however that little empirical evidence is available about long-term contact and relationships between surrogates and surrogacy families, and the studies that exist often have small sample sizes. In fact, it appears little follow up or research has been done at all!)

In the U.K., in relation to altruistic surrogacy arrangements, a study of 33 families created through surrogacy found that 61% remained in contact with their surrogate 10 years after the surrogacy and 75% were happy with the amount of contact they had (Jadva et al., 2012); and a study published in 2014 of 34 families seven years after conception, showed similar results. This however is again a small sample, and particular to the arrangements in the U.K.

There is also little known about the contact arrangements or relationships between surrogate mothers and commissioning person(s) in international surrogacy arrangements. However anecdotal reports indicate that in cases in which women from developing nations have been used, there may initially be the occasional gift sent to an agency post birth (in the hope it reaches the surrogate mother), but there is often no direct contact at all. Over time, any contact that was occurring, ceases. Note also, in many such instances the commissioning persons and ‘surrogate’ mother do not speak the same language, and the woman lives in impoverished conditions, further reducing the likelihood of contact.

No data is currently available on the proportion of surrogates who undertake multiple surrogacy arrangements and their contact with the children born as a result (or the children’s contact with each other). This also merits further examination.

The above demonstrates issues regarding knowledge, information, and contact, with surrogate mothers, but also highlights just how little research or follow-up of commercial surrogacy arrangements has actually occurred. Surely it would be remiss to pass laws supporting such practices given this.

## OTHER MATTERS

### Market views; contract talk; and paid transactions

In the U.S. it has for some time been the practice to emphasise the *contractual* nature of commercial surrogacy arrangements. Such views have also become more prominent in Australia of late, and are reflected in the language used when considering the issue of ‘commercial’ (otherwise referred to as ‘compensated’) surrogacy. To provide but one example, in a paper recently published in the *Medical Journal of Australia*, Newson states:

*A handover clause also does not make surrogacy baby selling; it makes it a service contract with a success clause.*<sup>88</sup>

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<sup>88</sup> Ainsley J Newson, ‘Compensated transnational surrogacy in Australia: time for a comprehensive review’ 2016 204(1) *Med J Aust* 33-35.

The interpretation of the surrogacy ‘contract’ as such is used to dismiss arguments that commercial surrogacy is ‘baby selling’ by changing the nature of how one views the ‘contract’ between the commissioning person(s) and the ‘surrogate’ mother. However, even if one sees the transaction in these terms, it does not make it acceptable to ‘engage’ a woman to provide ‘services’ to bear children for other people with the ‘clause’ that she will be ‘compensated’ (paid) to do so upon the ‘success’ of the arrangement (i.e. the birth of the child).

I submit that neoliberal<sup>89</sup> and market views that permeate discussions, practice, and some people’s acceptance of ‘commercial’ (aka ‘compensated’) surrogacy are only reason for concern. The language of contract law, payment for ‘services’, ‘success clauses’ and ‘markets’ has a profound impact on how surrogacy is viewed. When advocates for ‘commercial’ surrogacy speak in such terms, they move people away from other issues and the human face of surrogacy; reducing it to a market transaction, upon which everyone simply agrees to the terms. (Of course absent of any possible agreement by the child to be born as a result).

Rather than accept such views as justifications for commercial surrogacy, we should be questioning them—pointing to the fact that even if we use such terms, surrogacy is an example of neoliberal ideology at its worst—exploiting people financially, using unstable outsourced ‘employment’, and requiring people to ‘work’ under oppressive conditions defined by the terms of ‘contracts’ or ‘service’ arrangements. Let’s also not forget that the ‘terms of contract’, which are said to simply convey the ‘intentions’ of the parties, include both the sale of the procreative ‘service’ provided by ‘surrogate’ mother(s) and possibly ‘donor(s)’—via exchanging money for human reproductive capabilities and items (such as eggs, sperm, or embryo(s))—*but also* the agreement to transfer ‘custodial rights’ to a child (whether such ‘transfer’ takes place prior to or after the child’s birth) as well as the ‘physical possession’ thereof.

### **What conclusion should be drawn?**

I submit that surely, whatever the ‘intent’ of the parties, the ‘willingness’, ‘freedom’ or otherwise of the ‘surrogate’ mother to contract, or to enter into a paid agreement, and regardless of the lawyerly attempts at renaming and reinterpreting what is actually going on, that the stance

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<sup>89</sup> In which the only legitimate purpose of the state is to safeguard individual, especially commercial, liberty.

must be taken that the creation and birth of a child, and the subsequent rearing of that child, should not be determined by market views or by the terms of a private commercial transaction or contract.

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

In relation to this term of reference my submission to the inquiry is:

- Commonwealth laws should reflect the stance against commercial surrogacy taken in all states and territories in Australia that legislate on the issue – and the majority of nations worldwide that have regulation.
- Descent by citizenship should not be a back-door to procuring a child via an international commercial surrogacy; and should not be granted without ‘legal parentage’ orders. (See discussion above regarding term of reference (1)).
- Children should have the nationality and citizenship of their birth mother – so that they are never ‘stateless’. Determination of who will care for the child, and who will be recognized as a legal parent must precede any transfer of citizenship.
- The Commonwealth should uphold its international obligations to prevent the sale and trafficking of women and children (as per discussion above and below).
- The Commonwealth should recognize the bigger implications and rights violations of commercial surrogacy practices, including international surrogacy arrangement, and that they trump any ‘right to privacy’ that exists. That is, while privacy is recognized in Australia it is not absolute.
- The right to family and a private life does not outweigh the human rights of women or children that are compromised by commercial surrogacy arrangements.<sup>90</sup> (Again, further discussed below)

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<sup>90</sup> Tobin, above n 6.

- The Commonwealth should recognize that there is no right to procreation, or to parenthood.
- The Australian Government should be cognizant of its history in supporting the procurement of children via unacceptable means – the stolen generation; forced adoptions; international commercial adoption; etc. – for which many of the practices that were utilized to ‘help’ and ‘support’ a women relinquish a child are also implemented in the case of surrogacy. It should not move forward to implement or support a system that is reminiscent of such practices.
- ‘Destination countries’ are closing their doors – prohibiting such practices, and saying no to the exploitation of their women. They are not opening up regulatory systems that support and facilitate commercial surrogacy and the international trade in children to meet the needs of adults or the financial interests of lawyers, agents, or industry. The Australian government should do the same.

### **The Family Courts**

- The Family Courts should protect the interests of children, and should uphold a presumption against granting parenting orders for people who have engaged in commercial surrogacy arrangements to procure a child. This would be consistent with other domestic and international law.
- I refer to the list I set out in regard to Terms of Reference (1) and suggest that such analysis would enable true assessment of the circumstances in which the pregnancy and birth occurred. Such assessment would enable consideration of whether laws were broken, exploitation, sale, or commodification occurred, and what is, in the circumstances of the case, really in the best interests of the child before the court—including perhaps it being placed with an alternate family that can meet the child’s needs.

We should also be cognizant of the adoption analogy, and that in Australia we uphold prohibitions on pre-birth contracts; the sale of parental rights; and the sale of children. We practice open adoption, and grant rights to information and original birth certificates showing the birth mother’s name in every state and territory. It is unacceptable to create another group of children who will be denied the same – under the guise of argument for ‘new family formations’ that result from ‘surrogacy’ that have been built on the very basis of all that we have learned not to work for the best interests of women and children in adoption situations.

In regard to the rhetoric that surrounds the call for the Commonwealth (and States and Territories) to recognize ‘*new* family formations’, I note Smolin’s<sup>91</sup> point that such calls do nothing but try to emulate historical notions of the *traditional* ‘nuclear family’ while erasing all other parties involved, and thus are deeply flawed. Smolin states the surrogacy movement sells a formula that emulates the ‘two-parent’ family form—giving preference to ‘intended’ ‘contracting’ ‘parent(s)’, and profit seeking intermediaries and fertility providers. This is not recognition of a ‘new family formation’ but rather its denial. The commercial surrogacy movement seeks legal rules that cut off the rights of ‘surrogate’ mothers, ‘donors’ and children, and as a consequence their access to information, their autonomy, and their relationships. Smolin contrasts this with development of law and practice in adoption has been in the opposite direction, increasingly recognizing that the law should not attempt to squeeze adoptive families completely into the legal form of the traditional exclusivist family, precisely because doing so requires destruction of the legitimate interests and rights of both original (birth) family members and adoptees.

## 5. Australia's international obligations

### International law engaged

There has been increasing discussion of the growing importance of international law generally, and its relevance to cross-border surrogacy arrangements. Both private international law, and public international law, have been said to be relevant.

In the private international law realm, cross-border surrogacy came to the attention of the Hague Conference on Private International Law in the early 2010s in relation to the issue of legal differences across nations leaving some children with ‘unresolved legal parentage’ and/or ‘statelessness’. This was identified as possibly placing such children at risk of suffering legal disadvantages, having their rights impeded, and being discriminated against due to the

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<sup>91</sup> David Mark Smolin is a professor of law at Cumberland School of Law in Birmingham, Alabama where he is the Harwell G. Davis Chair in Constitutional Law, director for The Center for Children, Law, and Ethics, former director of the Center for Biotechnology, Law, and Ethics, and faculty advisor for the Law, Science and Technology Society.

circumstances of their birth. In response there has been some suggestion and discussion of developing some kind of multi-lateral treaty to resolve such issues.

However transnational commercial surrogacy also raises matters relating to child welfare, exploitation of the vulnerable (particularly in the context of global economic disparities), health policy and regulation, and equality issues. Broader public international law considerations, including human rights considerations, are therefore also raised.

Here it is important to note that while the Hague Conference has recognised the importance of also including such considerations, Tobin has noted that it is not adequate just to see international human rights as ‘needs to be met’.<sup>92</sup> He points out that international human rights instruments are ‘not merely ‘needs to be met’, but rather they impose binding international legal obligations that states parties must comply with in good faith’. Second, ‘it may not be enough to acknowledge the relevance of international human rights to a private law multilateral instrument, because such an approach overlooks the threshold question of whether surrogacy arrangements are compatible with human rights law at all.’<sup>93</sup> Third, human rights as agreed upon by states that reflect a ‘moral conception of the relationship between state and individual, and what it means to live a life of dignity and self worth.’ We need therefore to take a substantive approach to analysing how to proceed.

### ***International human rights and surrogacy***

No international human rights instrument specifically addresses surrogacy, but a number may be relevant to the issues it raises. These include the International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);<sup>94</sup> and the Convention on the Rights of the Child (CRC).

It is useful, in the first instance, to identify which rights may be engaged in relation to the practice of surrogacy and/or issues raised by it and to consider how they might apply (and their relevance) to surrogacy arrangements—keeping in mind that such articles should not be

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<sup>92</sup> John Tobin, above n 6.

<sup>93</sup> Ibid.

<sup>94</sup> Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).



superficially applied; that International human rights law is complex; that some rights are not ‘absolute’; and that some rights may ‘compete’ and need to be balanced against one another.

*Rights relevant to ‘intending parents’*

The ICCPR states, ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence’. (Art 17) It defines the family as ‘the natural and fundamental group unit of society’ (Art 23) and states that it is entitled to protection by society and the State (Art 24(1)). The ICESCR contains similar language about the family (Art 10). To this end, it may be (and has been) argued that the right to reproductive health and autonomy, the right to found a family, and the right to respect for privacy and family life are relevant in the context of surrogacy.<sup>95</sup>

However, the content of such rights arguably does not provide an entitlement to enter into surrogacy agreements. The right to reproductive health could not be held to go so far as creating an entitlement to enlist the reproductive capacity of another woman to enable a person to bear children. Rather, the right has been identified to apply in the context of access to sexual and reproductive health education, information about the healthy spacing of children and an entitlement to have a healthy sex life.

While the ‘right to found a family’ may be argued to include modern family formations, however it again could not be said to create an obligation to provide women to those people who cannot bear children themselves.

The right to respect for privacy and family under Art. 17 of the ICCPR has however been recognised as a broad concept, that ‘encompasses...[among other things] ‘the right to respect for the decisions both to have and not to have a child’. To this end, ‘the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected ...’ Arguably, medically assisted procreation may include surrogacy. However, even if the right to respect to privacy and family life encompasses a right to enter surrogacy arrangements, this right is not absolute. It remains ‘subject to a states’ capacity (and potential obligation) to restrict this where it is reasonably necessary to (a) protect the rights of persons other than the intending

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<sup>95</sup> One may also raise the right to non-discrimination under the ICCPR, Articles 2 and 26, in relation to LGBTIQ access to reproductive services equivalent to those that are accessible by heterosexual couples.

parents and/or (b) protect public morality.’<sup>96</sup> Thus states must consider competing rights and the broader theme of public morality in any response to transnational commercial surrogacy.

### *Rights Relevant to Children*

The preamble of CRC, amongst other things, recognizes the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, and that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Article 3(1) also provides: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The following articles may be further engaged when considering surrogacy arrangements:

Article 7(1) provides for birth registration, and a right to know one’s parents. This requires that the child be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents. This accords with The ICCPR which states that ‘every child has the right to be ‘registered immediately after birth’ (Art 24 (2) and has the right to a nationality’ (Art 24(3)).

Article 8(1) relates to the preservation of identity, again requiring that States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

Article 9.1 requires States Parties to ensure that a child shall not 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. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

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<sup>96</sup> Tobin, above n 6.

Such articles raise a number of issues in relation to surrogacy arrangements. Many such arrangements take place in countries that do not honour a child's rights to information about their conception; they do not provide information about the providers of gametes (i.e. their genetic 'parents'); nor about the woman who carried and gave birth to the child (whether or not she is genetically related to them).

The child's right to be cared for by their parents 'as far as possible', leads to questions of who the 'parents' actually are.

Children's rights to preserve their identity, including nationality, name and family relations are impacted by how identity, nationality, name and family relations are determined—for example, whether they are determined by their link to their birth mother, the donor(s), commissioning person(s) – or all of them. Questions arise regarding the extent to which genetic connection matters, and why it appears to be answered differently when a commissioning person(s) sperm/eggs have been used as opposed to a donor. We might also ask whether the child's birth-place matters; whether the birth-place of any gamete donor(s) and/or the surrogate mother matter; and whether the birth-mother always the legal mother in first instance.

However, none of the above issues necessarily preclude or compete with the 'rights' of intending parents to family and private life, nor determine whether or not to accept any or all types of surrogacy. They do however call for much better systems to address and honour such rights.

The CRC also however raises issues about the sale of children. Article 35 of the CRC requires states parties to take 'all appropriate national, bilateral and multilateral measures to prevent the...sale of or traffic in children for any purpose or in any form'. Article 2 of the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography further defines the sale of children as 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration'. Using the ordinary meaning<sup>97</sup> of 'transfer', 'remuneration' and 'consideration' it is clearly arguable that a commercial surrogacy will fall within the definition of the sale of a child as it is *an act or transaction* whereby a child *is transferred by any person* or group of persons (the surrogate, the clinics, the brokers) *to another* (the commissioning person(s)) *for remuneration or any other consideration*. This is so

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<sup>97</sup> Pursuant to the interpretation method for treaties set out in the *Vienna Convention on the Law of Treaties*, Art 31.

regardless of how payments are made (for example, in monthly instalments), or presented as not being for the child, as ultimately, the child is exactly what the ‘contract’ is about. That is, whether ‘commercial surrogacy’ is framed as the purchase of a child, the purchase of reproductive labour, or the purchase of parental rights, they all involve the transfer, for a fee, of a child from the woman, who carried it throughout pregnancy and birthed it, to the commissioning person(s). There is in all instances a failure to reasonably justify payment.

When seen as something that meets the definition of sale of children, there is a strong case that commercial surrogacy is contrary to international law. In addition, moral objections to a practice seen to commodify children, or to compromise their human dignity, or well-being, is sufficient to fall within a state’s margin of appreciation to prohibit commercial surrogacy.

### *Rights Relevant to Women who may be engaged as ‘surrogate’ mothers*

International human rights issues are also raised in relation to women who are commissioned as ‘surrogate’ mothers. CEDAW requires ‘the proper understanding of maternity as a social function’ (Art 5b) and calls for special protection for women during pregnancy in work proved to be harmful to them. (Art 11.2) It also requires the provision of health services, and specifically to ensure services to women during pregnancy and post-natal confinement. (Art 12).

It is not clear whether CEDAW’s focus on the health of pregnant women is relevant to surrogacy arrangements, but such focus would not be inconsistent with the practice. The requirement here would be to ensure that women are treated well, and that they receive adequate health care pre- and postnatally.

In contrast CEDAW’s definition of maternity as a social function may preclude commercially contracted pregnancy. It would also preclude seeing (or regulating) the arrangement within some kind of ‘fair trade’ or ‘labour’ related model.<sup>98</sup> Non-commercial surrogacy arrangements, for example between relatives or friends, may nevertheless still be considered acceptable.

To the extent that CEDAW requires non-discrimination of women, one may argue either way. That is, some argue that that it is discriminatory not to allow a woman to do what she

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<sup>98</sup> This model has been suggested by Amitra Pande a South African academic.

wishes with her own body; others emphasise the social and economic disparities that exist—particularly in commercial surrogacy arrangements—and view the practice as entirely discriminatory and potentially coercive.

Financial disparities between women who serve as ‘surrogate’ mothers and those that commission them are also relevant. Prohibitions on commercial surrogacy may be seen as a way to prevent the exploitation of financially disadvantaged women; and/or to prevent coercion due to a woman’s poor financial status. Further, even if one argues that the woman has not been coerced, her relative financial disadvantage calls into question the justice of the arrangement.

## I. What Regulatory Approach Should be taken?

### i. *International regulation*

At a global level some have called for a multilateral, legally binding instrument that would establish a global, coherent and ethical practice of international surrogacy’.<sup>99</sup> However, a convention serves no purpose if States are not willing to ratify it.<sup>100</sup> Given that most countries prohibit the practice of commercial surrogacy, and that recent legislation in nations that have moved to regulate the practice have also taken this stance, it seems the only convention that would gain signatories is one that prohibits *commercial* surrogacy (or in other terms financial transactions in the context of surrogacy arrangements which involve financial gain).

Prohibitions on commercial surrogacy would also be consistent with the other international instruments discussed above (such as the UNCRC and OPPC), which explicitly

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<sup>99</sup> Katrina Trimmings and Paul Beaumont, ‘International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level’ (2012) 7(3) *Journal of International Private Law* 627, 623 citing T. Krim, ‘Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother’ (1996) 5 *Annals of Health Law* 193; Lebowitz-Dori, above n 50; S. Fiandaca, ‘In Vitro Fertilization and Embryos: The Need for International Guidelines’ (1998) 8 *Albany Law Journal of Science and Technology* 337; W. Davis and J. Dalessio, ‘Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating “Non-Traditional” Gestational Surrogacy Contracts’ (2000) 31 *McGeorge Law Review* 673; R. L. Lee, ‘New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation’ (2009) 20 *Hastings Women’s Law Journal* 275; and *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), 29.

<sup>100</sup> Hannah Baker, ‘A possible Future Instrument on International Surrogacy Arrangements: Are There Lessons to be Learnt from the 1993 Hague Inter-country Adoption Convention?’ in Katarina Trimmings and Paul Beaumont (Eds), *International Surrogacy Arrangements* 2013 (Oxford and Portland, Oregon), pp 417-418. Note, initial consideration was given by the Hague Permanent Bureau on Private International Law as to whether HIAC was applicable to commercial surrogacy, however it was determined that it was not due to the significant differences between adoption and surrogacy. It is also noted that the success of HIAC was made possible because the starting point was general international consensus that adoption is an acceptable practice in certain circumstances. Clearly this differs regarding commercial surrogacy, in that there is no such consensus.

prohibit the sale of children, and which prohibit the transfer of children in the somewhat analogous situation of inter-country adoption for financial gain (the HIAC). In addition, a prohibition on commercial surrogacy would be consistent with the European Parliament's Resolution on the Trade of Human Egg Cells (the European Resolution).<sup>101</sup> The European Resolution affirmed that payment for ova should be prohibited, recognizing that the harvesting of egg cells constitutes a high medical risk for the life and health of women;

- (a) the planned egg cell trade would exploit the economic situation of women who lived in impoverished regions; and
- (b) despite the possibility of serious effects on women's life and health, the high price paid for egg cells incites and encourages donation, given the relative poverty of the donors.

As commercial surrogacy poses virtually the same risks, it may be decided to recommend that it be similarly banned.

Tobin has also taken this view stating:

*the idea that the mere regulation of international commercial surrogacy is a pragmatic and functional response to the dilemmas associated with this practice is misplaced. On the contrary, in a global environment where prohibition of this practice remains the norm rather than the exception, it could be incongruous for prohibitionist states to ratify a multilateral treaty, which obliges them to recognise commercial surrogacy arrangements entered into in permissive jurisdictions. Thus, far from being a pragmatic and functional response, multilateral regulation is unlikely to be a realistic option in the current global environment...Indeed, if anything, a prohibitionist treaty is a far more realistic option and would be consistent with international human rights law, if it accepted that commercial surrogacy arrangements amount to the sale of a child. This conclusion may not provide comfort to those who have a legitimate and understandable desire to have children. Their desire, however, does not demand tolerance of a practice that arguably maintains gender inequality and potentially violates the rights of 'surrogate' mothers and the children to whom they give birth.*

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<sup>101</sup> European Parliament resolution on the trade in human egg cells, P6\_TA(2005)0074, adopted 10 March 2005.

I note that the argument that such a position might simply drive commercial surrogacy underground<sup>102</sup> is not in itself reason to establish a permissive regime. That is, while some argue that a ban would create a black market, others argue that laws that regulate surrogacy end up promoting it, and that even if surrogacy was ‘outlawed’ thereby driving it underground, ‘the number of surrogate arrangements would be miniscule compared to the explosive growth that would result from permissive regulation.’<sup>103</sup>

In fact what we have recently seen is that countries that were once ‘destinations’ have closed their doors, refusing to let their women be used as ‘wombs’ for the world, and prohibiting or restricting surrogacy practices on their own shores. This surely will lead to a decline in transnational arrangements, and lower the number of children who will be moved across borders—as the border authorities are on notice not to permit such things.

In the alternative, a convention that is permissive or facilitative in its approach, is likely to be rejected by the majority of nations that prohibit commercial surrogacy – which is the majority of nations worldwide. It could also be seen as extremely worrisome (if not completely unacceptable) for a nation to sign a convention that permits the use of commercial surrogacy abroad, but continues to ban such practices in its home country.

Whether or not an international convention is ultimately seen as necessary; or able to put an end to commercial surrogacy, or address the issues transnational surrogacy raises, the issues raised by surrogacy will not be resolved without also have strong domestic laws. It is to consideration of what these might be that the discussion now turns.

I return therefore to the issue of Australia’s international obligations. I submit

- The risks to women and children, real and potential, in any situation in which there are financial exchanges in relation to pregnancy and birth, create a situation in which commercial surrogacy is unacceptable;

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<sup>102</sup> Mary Keyes and Richard Chisholm, ‘Commercial surrogacy – some troubling family law issues’ (2013) 27 *Australian Journal of Family Law Issues* 105, at 132.

<sup>103</sup> Usha Rengachary Smerdon, ‘Crossing Bodies, Crossing Borders: International Surrogacy Agreements between the United States and India’ (2009) 39 *Cumberland Law Review* 60, 81-83.



- The sale and/or commodification of children and women makes commercial surrogacy unacceptable, and outweigh any right to ‘privacy’;
- Any laws or conventions to be supported by Australia, pursuant to their international obligations, should only be those that prohibit payment or remuneration or reward for surrogacy;
- Such laws should extend to prohibiting payment of agents, facilitators, and/or intermediaries (regardless of business structure);
- Strong and clear domestic laws, that are upheld and enforced, can determine the future of what occurs in terms of these practices;
- Our international obligations demand that we do not tolerate a practice that maintains gender inequality, and violates the rights of women and the children to whom they give birth.

6. The adequacy of the information currently available to interested parties to surrogacy arrangements (including the child) on risks, rights and protections

- There is information provided on the Department of Immigration and Border Protection website explaining the law, and risks of international surrogacy – including their process for granting citizenship by descent. (The flaws with this approach were discussed above – nevertheless, the point here is that the information is publically available).
- Government agencies such as the Victorian Assisted Reproductive Authority, the Reproductive Technology Council (WA) and other state health departments are also in a position to (and do) provide information about laws policies and practices associated with assisted reproductive treatment, surrogacy, and donor-conception.
- The Western Australia review of their surrogacy legislation noted that there was further opportunity to develop information resources and clear pathways to provide a better understanding of surrogacy legislation and policy for people in Western Australia. The same can be said throughout Australia.



- Children also have rights and interests to have information about the circumstances of their birth, their birth mothers, and their biological heritage. I have written about this extensively elsewhere,<sup>104</sup> have conducted research around the world on this matter,<sup>105</sup> and can provide further information to the inquiry on this point if wanted. Suffice here to say that international/commercial surrogacy is not a practice that has ever placed the interests or rights of children to such information first – and in fact has not even considered such interests or rights in many circumstances. In addition, Australia is still a long way off as a nation to achieving in access to such information for all children born as a result of such procedures – noting that while some states have laws requiring non-anonymous donation, and access to information, other states do not. The NMHRC Guidelines do not have legal force, and in many cases do not appear to be upheld by clinics on application for information by donor-conceived people.

I submit to the inquiry that more information is also needed in the public:

- that does not gloss over what is involved in commercial surrogacy arrangements;
- that discusses the reality of the trade that takes place in relation to human reproductive capabilities and materials (especially in relation to commercial surrogacy, and egg donation) – including the relative poverty women face; the risks to their physical and/or psychological health, the number of miscarriages, abortions and/or still-births; and lack of truly life-changing outcomes;

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<sup>104</sup> See for example, Sonia Allan, 'Access to Information about Donors by Donor Conceived Individuals: A Human Rights Analysis' (2013) 20 *Journal of Law and Medicine* 655; Sonia Allan, 'Deciding on access to donor-conception information' (2012) 37(4) *Alternative Law Journal* 272, 272; Sonia Allan, 'Donor Identification Kills Gamete Donation'? A Response to Professor Pennings' (2012) 27(12) *Human Reproduction* 3380; Sonia Allan, 'Donor Conception, Secrecy, and the Search for Information' 19(4) *Journal of Law and Medicine* (June 2012); Sonia Allan, 'Psycho-Social, Ethical and Legal Arguments For and Against the Retrospective Release of Information about Donors to Donor-Conceived Individuals in Australia' (2011) 19(1) *Journal of Law and Medicine* 354.

<sup>105</sup> See for example, Sonia Allan, A Cross-Jurisdictional Study of Regulatory Requirements and Practice Regarding the Recording of Donor Information and its Release to Donor Conceived People 2012 Report prepared for the Winston Churchill Memorial Trust. (Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2160627](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2160627) ).

- about empowering women in other ways than having them bear children for other people. That is, information should be given about proven ways for a woman to escape poverty or financial distress—which include such things as provide women with education; skills training; provision of clean drinking water; provision of higher wages (to both women and men); and the provision of good health care, including contraception.
- that many of the ‘pro-surrogacy’ advocates in Australia are in fact people who have accessed commercial surrogacy or assisted reproductive services themselves; or who are lawyers, agents, or providers of such services that may gain significant profit from the practice of commercial surrogacy;
- that this is not a ‘gay’ or LGBTIQ issue in the sense that decisions about what the law should be in relation to commercial surrogacy *should not* be based upon such things as the commissioning person(s) gender or sexuality. The opposition to commercial surrogacy should not be seen as opposition to LGBTIQ relationships or LGBTIQ parenting – it is not. Rather, it is based upon focusing upon women and children and the unacceptable practices that surround commercial surrogacy.

I also express my concern in relation to ‘conferences’ and ‘workshops’ that are run by ‘not-for-profit’ organisations, lawyers, and/or business in which would-be-parents are ‘educated’ about international and commercial surrogacy arrangements. At some such forums the people who (pay to) attend are simultaneously introduced to agents from ‘destination countries’; clinicians; and other people who will facilitate them to enter into commercial agreements. I note I am opposed to funding any such organisation or person(s) to run what are presented as ‘education seminars’ or ‘conferences’, but that may actually be sales presentations or marketing opportunities in which clients can be canvassed and profits made.

## 7. Information sharing between the Commonwealth and states and territories

- The Commonwealth should notify states and territories of people attempting to enter the country with children born as a result of international commercial surrogacy.
- States and territories should then enforce their laws.
- Information sharing about the identity of donors of gametes, embryos, and birth mothers, should also be shared across states and territories to enable the exchange of information by donor-conceived people, children born as a result of assisted reproductive technologies (including surrogacy), recipient parents, birth mothers, and donors.

## 8. The laws, policies and practices of other countries that impact upon international surrogacy, particularly those relating to immigration and citizenship.

I have for many years been engaged in research on laws, policies and practices of other countries regarding assisted reproduction, legal parentage, surrogacy, and adoption. In 2014-2015 I was commissioned by the Center for Genetics and Society to specifically survey all the laws around the world on surrogacy and egg donation.<sup>106</sup> Using the four broad approaches that have been used to categorise laws and policies of various nations regarding surrogacy by the Hague Conference,<sup>107</sup> I have below listed information drawn from that research to note the countries that prohibit all surrogacy arrangements; permit altruistic but prohibit commercial arrangements; do not regulate surrogacy specifically; and those that permit commercial surrogacy.

It is clear that the majority of jurisdictions that have regulation *prohibit commercial surrogacy*. Only a few permit commercial surrogacy; with a number of prior destination countries recently closing their doors to the practice and/or to foreign parties seeking surrogacy.

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<sup>106</sup> The United States [Center for Genetics and Society](#) were awarded a \$200,000 grant over two years by the [John D. and Catherine T. MacArthur Foundation](#) for their collaborative work on cross-border surrogacy and commercial egg retrieval. The grant was to build on efforts to bring a human rights and social justice perspective to the assisted reproduction industry.

<sup>107</sup> Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No. 10 of March 2012)

1. ***Jurisdictions that prohibit all surrogacy arrangements.***

A significant number of nations worldwide prohibit all surrogacy arrangements via laws, and/or policies, and/or religious decree. This includes Afghanistan, Albania, Algeria, Austria, Bahrain, Bangladesh, China (mainland),<sup>108</sup> Croatia, Egypt, El Salvador, Ethiopia, Finland, France, Germany, Iceland, Indonesia, Italy, Jordan, Kuwait, Malaysia, Maldives, Malta, Mauritius, Mexico (eg. Queretaro), Malodva, Morocco, Norway, Oman, Portugal, Qatar, Saudi Arabia, Serbia, Singapore, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Taiwan, Tajikistan, Tunisia, Turkey, Turkmenistan, the United Arab Emirates, some jurisdictions within the United States of America (for example, Arizona, District of Columbia), Vietnam and Yemen.<sup>109</sup>

The ethos underpinning such bans generally include such statements that generally view surrogacy as ‘*a violation of the child’s and ‘surrogate’ mother’s human dignity*’. Such jurisdictions often adopt the view that commercial surrogacy involves the commodification of women and children, and/or a multitude of other unacceptable risks and practices including (but not limited to) those of exploitation, sale, trafficking.

If surrogacy were to occur in any of these jurisdictions, the birth mother would be considered the legal mother of any resulting child, and the surrogacy arrangement would be void and unenforceable.

Criminal sanctions may apply to the parties involved in the arrangement or, more commonly, for any intermediaries and/or medical institutions facilitating the arrangement.

2. ***Jurisdictions that expressly permit and regulate ‘altruistic’ surrogacy, but prohibit commercial surrogacy.***

A number of other jurisdictions permit only altruistic surrogacy arrangements and provide criminal sanctions regarding commercial surrogacy.

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<sup>108</sup> Note that the law in China simply bans trade in fertilised eggs and embryos and forbids hospitals from performing surrogacy procedures. It is reported that such regulations are not adhered to by some. See for example, Xinhua, ‘China’s female lawmakers call for surrogacy ban’, *ChinaDaily.com* (3 August 2012), accessed 10 June 2014, available at [http://www.chinadaily.com.cn/china/2012-03/08/content\\_14782835.htm](http://www.chinadaily.com.cn/china/2012-03/08/content_14782835.htm).

<sup>109</sup> For further information about such countries, please see Center for Law and Genetics, BioPolicy Wiki, at <http://biopolicywiki.org/index.php?title=Countries> which was updated by the author regarding laws pertaining to surrogacy (among other things) in 2015 pursuant to being contracted as a consultant under a Macarthur Foundation Grant.

Such countries include Australia (all states and territories except the Northern Territory, where surrogacy is not practiced), Belarus, Belgium, Brazil, Bulgaria, Canada, Czech Republic, Denmark, Greece,<sup>110</sup> Hungary, Ireland, Latvia, Lithuania, some states in Mexico, the Netherlands, New Zealand, South Africa, South Korea, Thailand, the United Kingdom, Uruguay, and Peru. Hong Kong also prohibits commercial surrogacy, and does not recognise other surrogacy arrangements.

A number of these jurisdictions, allow reimbursement of ‘reasonable expenses’. This is generally limited to costs actually incurred – noting that places like the United Kingdom of late have been criticised for ‘blurring’ the lines and granting much higher payments (equivalent or more, in some cases, to what is paid to women involved in commercial surrogacy arrangements in other nations).

Under this approach there is also a ‘strong trend’ to permit only surrogacy arrangements where at least one commissioning person is genetically related to the child, and in some jurisdictions only ‘gestational’ surrogacy is permitted.

In several of these jurisdictions, women and commissioning persons must meet certain criteria before being able to enter into a surrogacy agreement. For the woman, criteria may include such things as age requirements, satisfactory completion of medical and psychological screening, having already had a living child and/or having completed her family, civil status and having received independent legal advice. (NB. That some of these requirements also raise issues of their own in some circumstances has been noted throughout this submission). For the commissioning person(s) criteria may include such things as infertility, a particular relationship status, criminal record and child protection checks, age, counselling, legal advice, residence requirements, and more.

### **3. *Jurisdictions that do not have specific laws governing surrogacy.*<sup>111</sup>**

Under this approach, there may be no direct legislation pertaining to the practice of surrogacy, or explicit prohibition in law regarding commercial surrogacy. This is the current situation in countries including (but not limited to) Argentina, Belgium, Brazil, the Czech

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<sup>110</sup> Note that in Greece, due to youth unemployment hitting over 50%, it has been reported that women are being enticed into surrogacy agreements by the offer of significant sums of money for arrangements that are represented as ‘altruistic’.

<sup>111</sup> The Hague referred to these countries as ‘largely unregulated’ – but in fact some of these countries eg. Argentina have guidelines; in some of these jurisdictions the Court has offered a view; and in others there exist laws that would prevent commercial surrogacy.

Republic, Ireland, Japan, Mexico (Mexico City) and some jurisdictions in the United States of America (for example, Michigan) and Venezuela.

However, these countries are not necessarily ‘destination’ countries for international commercial surrogacy, as the transfer of legal parentage to customers may not be possible. In these countries a contractual obligation for a surrogate mother to surrender a child to commissioning person(s) would be void and unenforceable under general law. The birth mother is the legal mother of the child. Also while in some such jurisdictions there is no specific regulation of surrogacy, commercial surrogacy is banned in a number of these jurisdictions either through express legal provision or general laws pertaining to, for example, child trafficking—for example, see Turkmenistan and Azerbaijan. Other jurisdictions have other laws, guidelines, or practice that govern their position on surrogacy, or have indicated an intention to pass laws as follows:

In Argentina the Courts have recognised an altruistic surrogacy arrangement, using a couple’s own eggs and a close friend who carried the child. Commercial surrogacy is prohibited, and specifically so for foreign people.

In Belgium, commercial surrogacy is prohibited on public policy grounds. Altruistic surrogacy is not regulated and is therefore possible. Contracts are not enforceable and adoption is required to transfer legal parenthood; a small number of such arrangements occur in the country each year. In 2010 a Belgium Court of Appeal recognised a commercial surrogacy agreement that had taken place in California, granting partial relief sought by the two men who had commissioned it.<sup>112</sup> The Court decided to recognize and give effect to the birth certificates issued in California in so far as they form the basis for the legal link between the female children and their biological father. The other male partner was not legally recognised as a ‘parent’. There was some indication that he would have to adopt the children in order to be seen as such. In general this reflects the position under Belgian law that filiation is a preliminary question to the determination of Belgian nationality and parentage.

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<sup>112</sup> Court of Appeal of Liège, 1<sup>st</sup> Chamber, ruling of 6 September 2010, docket No 2010/RQ/20.

In Brazil, altruistic surrogacy is permitted pursuant to guidelines in limited circumstances. The surrogate must be related to the commissioning husband or wife, but exemptions may be allowed by regional medical councils. No payment is allowed. Commercial practices associated with gamete or embryo donation or surrogacy are prohibited (Part IV and Part VII of the Resolution CFM No 1957, 2010).

In Ireland, consideration of laws to permit altruistic surrogacy, and prohibit commercial surrogacy, is ongoing.

In the Czech Republic, in 2015, a case concerning a boy born with ‘medical defects’, including congenital defects, including epilepsy and paralysis, was brought to light, following neither his birth mother, nor the commissioning persons, wanting him. He has been placed in a children’s home. The law does not permit surrogacy ‘as a business’ (i.e. commercial surrogacy). In ‘altruistic’ arrangements the commissioning couple pay medical expenses and health costs – although there is some indication that other payments may be made. In the law the birth mother is the legal mother. A biological commissioning father may be recognised as the legal father; a biological mother (i.e. a woman whose egg has been used) would have to adopt the child. If the birth mother does not wish to give up the child, she does not have to.

In Japan, the Japanese Society of Obstetrics and Gynecology prohibits any form of surrogacy (2003). In 2008, a committee of the Science Council of Japan made public a draft report that called for enacting a law to ban surrogate pregnancy and birth by law. The general view is that surrogate pregnancy arranged for profit should be punished—and that such punishment should be applied to the medical doctor who provided treatment, mediators, and commissioning persons, but surrogate mothers should be excluded. The birth mother is considered the legal mother of a child born as the result of a surrogate pregnancy. In cases of altruistic surrogacy, or special cases in

which Japanese people have engaged in surrogacy overseas, establishment of legal parenthood between a child born as a result of surrogate pregnancy and the commissioning married couple has been recognised by way of an adoption or a special adoption.

**4. *A permissive approach to surrogacy, including commercial surrogacy.***

Countries that take a permissive approach to surrogacy, including commercial surrogacy, are few. They include Armenia, Georgia, Israel,<sup>113</sup> Kazakhstan, Russia, Uganda, Ukraine, Liechtenstein and some states in the United States of America.<sup>114</sup>

In these jurisdictions commercial surrogacy is permitted and practised. Following a surrogacy arrangement, there are usually procedures in the State which enable legal parentage to be granted to one or both of the commissioning person(s); there may or may not be a domicile or habitual residence requirement for commissioning persons; and differences are found regarding who is permitted to enter into such agreements, and requirements such people must meet. That is, policy perspectives in the countries that permit commercial surrogacy vary, and do not mean that people can access surrogacy in all of these nations from abroad.

In Armenia, legislation allows foreign residents, couples (including same-sex and/or LGBT), and/or individuals to undergo surrogacy.<sup>115</sup> However, there have been proposals in Armenia for new laws to prohibit foreigners from hiring Armenian women to be ‘surrogate’

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<sup>113</sup> Israel authorises monthly ‘compensation payments’ to the surrogate for pain and suffering which are seen by many as thus placing it in the category of permissive states.

<sup>114</sup> There is affirmative case law or legislation allowing commercial surrogacy in California, Maryland, Massachusetts, Ohio, Pennsylvania, South Carolina (case law); and Alabama, Arkansas, Connecticut, Illinois, Iowa, Nevada, North Dakota, Oregon, Tennessee, Texas, Utah, West Virginia (statutes).

<sup>115</sup> Law of the Republic of Armenia "On reproductive health and reproductive rights of a human" №474 of 26.12.2002, Art 11-19.



mothers for them, because many believe that “the usage of Armenian women’s womb for giving birth to foreigners’ children is unacceptable.”<sup>116</sup>

In Georgia, ‘extracorporeal fertilization’ is permitted for heterosexual couples, in the case of infertility, to avoid transmission of genetic disease, and/or if the woman has no uterus, using the couple’s or donor gametes. In such circumstances a ‘surrogate’ mother has no legal rights over the child born. It has however been reported that experts and officials have become increasingly concerned about a lack of oversight, and have also considered banning surrogacy for a fee.<sup>117</sup>

In Russia the prospective parents must be a heterosexual couple or single woman, who meet certain medical criteria regarding inability to conceive, carry or deliver a child. Stipulations regarding who may act as a surrogate also exist (regarding age; requirement of previous health child; medical certification of good health; and signed permission from husband if married).<sup>118</sup> The ‘surrogate’ mother must not be the egg donor. Surrogate mothers are encouraged to see the arrangement as a financial one, and those who appear altruistically motivated may be rejected. Weis describes the policies of surrogacy agencies as being ground in the ‘notion that money-oriented women make better workers, as they will do whatever is necessary to maximise their profit. Emotional involvement and a friendly relationship between the intended parents and the

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<sup>116</sup> Gayane Abramyhan, "Birth Rights and Concerns: Issue of surrogate birthing raises debate," Society, [http://www.armenianow.com/society/36243/armenia\\_surrogate\\_mothers\\_legislation](http://www.armenianow.com/society/36243/armenia_surrogate_mothers_legislation)

<sup>117</sup> <http://www.eurasianet.org/node/68188>

<sup>118</sup> The use of ART is regulated by order No. 107H of the Ministry of Healthcare of Russia dated 30 August 2012, “On the Procedure for the Use of Assisted Reproductive Technologies, Contraindications and Restrictions to their Application.” (See <http://www.garant.ru/products/ipo/prime/doc/70218364/>).

surrogacy workers are considered messy and as having the potential to spoil both process and outcome.’<sup>119</sup> Russia has also seen proposals to prohibit surrogacy arrangements.<sup>120</sup>

The Ukraine, is currently promoted as a ‘destination’ country for transnational commercial surrogacy—in that it allows heterosexual married couples to access surrogacy, and register them on the child’s birth certificate. The registered ‘parents’ would however still have to apply for citizenship and a passport for the child in their home country.

In the above countries, it is very clear that financial hardship is a driving factor for women agreeing to act as surrogate mothers.

**‘Destination’ Countries Have Moved To Prohibit International and Commercial Surrogacy**

Absent uniform legislation worldwide, combined with the ability of some people to travel to countries in which commercial surrogacy may occur, over the past few years there has been increase in ‘fertility tourism’ and the potential for exploitation of women who are economically, socially or legally disadvantaged – many of whom live in developing nations.<sup>121</sup> The Permanent Bureau of the Hague noted in this regard in 2012 ‘[t]he unease expressed by some concerning the practice of engaging surrogates in States with emerging economies to bear children for more wealthy intending parents ... has dimensions similar to those discussed in the preparatory reports on inter-country adoption’.<sup>122</sup>

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<sup>119</sup> Christina Weis is PhD Candidate in Anthropology at the Reproduction Research Group at De Montfort University (UK). Her research draws on ethnographic fieldwork on commercial surrogacy in Saint Petersburg, Russia. See Christina Weis, ‘Workers or Mothers? The business of surrogacy in Russia’, 15 December 2015, available at <https://www.opendemocracy.net/beyondslavery/christina-weis/workers-or-mothers-business-of-surrogacy-in-russia>.

<sup>120</sup> <http://www.themoscowtimes.com/news/article/russian-lawmaker-proposes-ban-on-commercial-surrogate-motherhood/498901.html>.

<sup>121</sup> Leibowitz-Dori, above n 50, 329.

<sup>122</sup> Hague Conference of Private International Law, above n 107, 7.

Destination countries—such as Thailand, India, Nepal, and Mexico—have however increasingly responded not to open up and allow commercial surrogacy; but rather to shut them down.

In Thailand, the *Protection of Children Born of Assisted Reproductive Technologies Act 2014* was passed February 2015) to prohibit commercial surrogacy (Sect. 23); brokering, acting as a middleman, or arranging surrogacy agreements for reward; advertising and promotion of surrogacy arrangements; and the buying or selling eggs, sperm, or embryos. In country surrogacy agreements were also limited to those that occur between family members, and must be altruistic. The law passed 160-2 votes following several surrogacy scandals including the abovementioned Baby Gammy case, as well as another in which a Japanese man had fathered at least 15 babies using numerous Thai ‘surrogate’ mothers. A member of Thailand’s National Legislative Assembly said: *"This law aims to stop Thai women's wombs from becoming the world's womb."*

In India, there was first a move to restrict access by foreigners to surrogacy; and then, in November 2015, a letter from the Indian Council of Medical Research (ICMR) a government body officially ended surrogacy services for non-Indians, effective immediately. The letter was issued at the behest of the Health Ministry, and requires fertility clinics “not to entertain any foreigners for availing surrogacy services in India.” In addition, the Indian government banned the import of human embryos for IVF and Surrogacy purposes. In a notification dated October 26 the “Import policy of the item ‘Human Embryo’ ...has been changed from requiring a ‘No Objection Certificate’ from the ICMR to “Prohibited except for research purposes based on the guidelines of the Department of Health Research.” The government also advised the Supreme Court that foreigners “cannot rent a womb in India”. Surrogacy services would only be available for Indian couples, it had said in an affidavit filed before the apex court; and told the court that it decided to

prohibit the import of human embryo for the purpose of commercial surrogacy for foreigners. The Bureau of Immigration, Ministry of Home Affairs, India now provides on its website the following notice: Government of India guidelines dated 03.11.2015, the foreign nationals including OCI/PIO card holders are not allowed to commission surrogacy in India.<sup>123</sup>

In Nepal, in October 2015, three weeks after the country's Supreme Court issued an interim order to halt surrogacy in Nepal, a meeting of government ministers decided to ban surrogacy altogether. The Minister for Information and Communications Minendra Rijal announced that the government has banned surrogacy services in Nepal describing a situation the previous year in which several private hospitals had managed to secretly acquire a "permission letter" through the Personnel Administration Division (PAD), which is not an authorized division of the Ministry of Health and Population (MoHP), and started surrogacy services. He noted that Indian women had been flown into Nepal via 'agents' to serve as 'surrogate' mothers, and that this was not acceptable. The Minister said:

*"The government has rescinded its earlier decision to allow surrogacy services for foreigners in Nepali hospitals. From now onward, the hospitals cannot provide surrogacy services,"*

The Department of Immigration has also stopped issuing visas to the babies born to 'surrogate' mothers.

In Mexico in December 2015 the congress of the Mexican State of Tabasco approved a reform to the Civil Code, with 21 votes in favour and 9 against, banning surrogacy for foreigners, and limiting in country arrangements to heterosexual couples. The new law, which will come into effect in mid-2016, also prohibits agencies from offering services for surrogacy, including

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<sup>123</sup> See <http://boi.gov.in/content/surrogacy>

intermediaries acting between the ‘surrogate’ mothers and commissioning persons. The law also restricts surrogacy in country to require that intended parents be Mexican citizens, in a heterosexual couple, who must provide evidence via a medical certificate of an accredited institution that a woman is unable to carry a pregnancy herself. Among other requirements birth certificates will contain notation of the method of conception and birth being assisted by a legal surrogacy agreement. The commissioning persons will pay the private insurance, and expenses for the pregnancy, birth and recovery. All will be overseen by the Ministry of Health.

With options narrowing in terms of international surrogacy, agents, lawyers, and the industry, as well as some people seeking children via surrogacy agreements, have been lobbying continually for an opening up of local laws, to support their demands and/or interests. They also branch into other nations, in an attempt to access women in the next ‘destination’ country to serve as ‘surrogate’ mothers. Only a few countries remain. For example, the Ukraine continues to be advertised as a ‘favourable’ destination for heterosexual couples seeking commercial surrogacy arrangements. In addition, due to an absence of laws, agents and clinics have moved into Cambodia, selling it as a destination for gay people seeking surrogacy arrangements. Agencies are working hard to convince that country’s governments to pass laws to facilitate such arrangements, rather than shut them down. Undoubtedly, they will then lobby governments, to support them by facilitating transfer of parentage and recognizing surrogacy agreements from abroad.

In relation to the final term of reference, which asks for information regarding ‘laws of other countries that impact upon surrogacy, particularly those concerning citizenship and immigration’, the above information demonstrates that the majority of the world does not accept such arrangements. Furthermore, a number of countries—which were once seen as ‘destinations’—have moved to close international surrogacy down on their shores. This impacts on surrogacy arrangements by stopping them. I am in support of this stance.

## FINAL COMMENTS

I am concerned about the motivations of those people who have pushed for this Federal government inquiry—being lawyers, agents, clinicians, and advocates for ‘commercial’ or ‘compensated’ surrogacy, many of whom profit from the industry. Particularly I am concerned that the push by such people is to change laws to facilitate their arrangements and to open up surrogacy in Australia in a way that would not serve women and children. There appears an underlying assumption by some, that commercial surrogacy is an acceptable way to gain children – and that the primary issue is how to resolve ‘legal parentage’. I do not agree.

Having researched and reflected upon the practices within the surrogacy industry, in good conscience, I submit to the Federal inquiry that our Government should not facilitate or pander to the industry. Commercial surrogacy is not an acceptable way to gain children.

The question of legal parentage is one that is clearly important, but it does not preclude continued prohibitions against commercial surrogacy. Nor does it, or should it, take precedence over addressing other human rights issues raised by such practices. I therefore close my submission by reiterating that the ethical, legal, social, and human rights issues, as well as physical and psychological health risks (and impacts) upon women and children, raised by commercial surrogacy will not be resolved by ‘regulating’ such practices. The human rights issues, and the impacts of surrogacy on women and children, rather contain many compelling reasons to be opposed to such practice.

While I note that commissioning persons may too be vulnerable to the market that promises them a ‘way to realise their dreams’, and I acknowledge their struggles to have a family, my submission is that commissioning person(s)’ desires for children, and the willingness of some to break our laws and/or go to great lengths to get them, does not justify changing our laws in any way that opens up international and/or ‘commercial’, ‘compensated’, ‘for-profit’ surrogacy. Our government needs to address the issues raised by people flouting our laws, and breaching the human rights of women and children, rather than focusing upon facilitating such arrangements.

Primary emphasis on citizenship, passports, and legal parentage is misplaced.

On the issue of ‘compensation’, I note that Australian States and Territories have addressed this issue by only permitting altruistic surrogacy following numerous inquiries into the

issue. It is imperative in such circumstances to ensure that reimbursement of expenses *does not* act as a guise for ‘commercial’ ‘compensated’ or ‘for-profit’ arrangements. I do not agree with compensation for lost wages; or with a ‘small’ fixed ‘fee’ or ‘payment’ above reasonable expenses incurred.

I do hope that the inquiry does not move to recommend laws that will facilitate the practices of commercial surrogacy either domestically or internationally; nor that it adopts an approach that accepts recent shifts in arguments and/or slights of language (such as referring to ‘a more flexible approach to altruistic surrogacy’; ‘compensated’ or ‘for-fee’ surrogacy); nor that it suggests increased opportunities for marketing (eg. advertising), agent involvement or other practices that would serve to simply expand commercial surrogacy.

Focus should in fact be had upon how to address the actions of lawyers, brokers, other agencies, who make a business (and handsome profit) out of giving ‘advice’ to people and facilitating commercial surrogacy arrangements—particularly those who encourage or facilitate people to engage in commercial surrogacy that is against the laws of their state. They may further be responsible for placing the commercial transaction above the health, safety and well-being of women and children. I submit that the government should place bans on agents, intermediaries, and other external actors to surrogacy arrangements, profiting from their involvement, or deriving a fee. Similarly the practices of clinicians and ‘fertility’ providers need to be closely scrutinized.

I suspect that if the money was taken out of the industry, many of the agents, lawyers, and facilitators, who at present stand at the Government’s door asking it to support commercial surrogacy (of any kind in any guise), might not subsequently be so interested in convincing people that such surrogacy is OK. The issues raised by commercial surrogacy are significant for women and children. This is the reason the majority of nations that have laws on surrogacy, prohibit commercial (‘compensated’ or ‘for-profit’) surrogacy. I suggest that we in Australia, should be asking how to curb international commercial surrogacy practices, not how to facilitate them or adopt them on our own shores.

I thank you again for taking the time to consider my submission.

**Sonia Allan**