



8 February 2016

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

Dear Committee Secretary,

Please accept the attached submission from the Castan Centre for Human Rights Law regarding the inquiry of the **House of Representatives Standing Committee on Social Policy and Legal Affairs** into surrogacy arrangements.

This submission was prepared on behalf of the Centre by Dr Ronli Sifris, Dr Karinne Ludlow and Dr Adiva Sifris. The submission includes two attachments – the first is a special issue of the *Journal of Law and Medicine*, edited by Drs Sifris, Ludlow and Sifris and devoted to the issue of surrogacy. The second is a book chapter entitled “Surrogacy and Human Rights: Contemporary, Complex, Contested and Controversial” by Katie O’Byrne and Prof. Paula Gerber. It is from the book *Surrogacy, Law and Human Rights* (Ashgate 2015), edited by Prof. Gerber and Ms O’Byrne. We also recommend the full book to the Committee and in particular the following chapters:

- Chapter 4 – ‘Through the Looking Glass: A Proposal for National Reform of Australia’s Surrogacy Legislation’;
- Chapter 5 – ‘Extra-Territoriality and Surrogacy: The Problem of State and Territory Moral Sovereignty’; and
- Chapter 6 – ‘Souls in the House of Tomorrow: The Rights of Children Born Via Surrogacy’.

If you wish to receive an electronic copy of the main submission, please contact the Centre

We are glad, of course, to answer any questions you may have regarding the submission, and should you require, we would be happy to provide oral evidence to the Committee.

Yours sincerely

Professor Sarah Joseph  
Centre Director  
Castan Centre for Human Rights Law  
Law Faculty  
Monash University

**Faculty of Law**  
Monash University, VIC 3800, Australia  
15 Ancora Imparo Way, Clayton campus, Clayton  
Telephone +61 3 9905 3327 Facsimile +61 3 9905 5305  
castan.centre@monash.edu  
www.law.monash.edu.au/castancentre



**MONASH** University  
Castan Centre for Human Rights Law



**Castan Centre for Human Rights Law  
Monash University  
Melbourne**

**Submission to the Australian House of Representatives Standing  
Committee on Social Policy and Legal Affairs inquiry into  
Surrogacy Arrangements<sup>1</sup>**

Prepared by:

Dr Ronli Sifris, BA/LLB (Hons) (Monash University); LLM (New York University); PhD (Monash University); Senior Lecturer in the Monash University Faculty of Law and Associate of the Castan Centre for Human Rights Law.

Dr Karinne Ludlow, BSc/LLB (Hons) (Monash University); PhD (Monash University); Senior Lecturer in the Monash University Faculty of Law.

Dr Adiva Sifris, BProc (University of the Witwatersrand); LLM (Monash University); PhD (Monash University); Senior Lecturer in the Monash University Faculty of Law.

Date: February 2016

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<sup>1</sup> This submission is drawn from the following article published by the authors: Ronli Sifris, Karinne Ludlow and Adiva Sifris, 'Commercial Surrogacy: What Role for Law in Australia?' (2015) 23 *Journal of Law and Medicine* 275. It also contains extracts from the following articles published by the authors: Adiva Sifris 'The Family Courts and parentage of children conceived through overseas commercial surrogate arrangements: A child centred approach' (2015) 23 *Journal of Law and Medicine* 396; Karinne Ludlow 'Genes and gestation in Australian regulation of egg donation, surrogacy and mitochondrial donation' (2015) 23; Ronli Sifris, 'Commercial Surrogacy and the Human Right to Autonomy' (2015) 23 *Journal of Law and Medicine* 365.

## **Executive Summary**

We commend the Attorney-General, Senator The Honourable George Brandis, for responding to the urgent problem of the regulatory and legislative aspects of international and domestic surrogacy arrangements.

Our submission will address numbers 1, 3, 4 and 5 of the Inquiry's Terms of Reference and make a number of final conclusions, those conclusions being set out immediately below. For the assistance of the Committee, we also enclose a copy of a special issue on commercial surrogacy of the *Journal of Law and Medicine* published in December 2015 (edited by, and with contributions from, the authors) and Chapter one of the recently published book edited by Paula Gerber and Katie O'Byrne entitled *Surrogacy, Law and Human Rights* (2015, Ashgate).

## **Final Conclusions and Recommendations**

1. Legislation addressing surrogacy between Australian jurisdictions is fragmented, uncertain and inconsistent.
2. The status and protection of Australian families created through surrogacy (particularly compensated surrogacy) is less than that for Australian families created using other reproductive methods because neither state parentage legislation nor Australian family law reflects the intentions of those involved in the surrogacy, at the time of that arrangement, or responds adequately to their rights and interests.
3. The *Family Law Act 1975* (Cth) fails to provide the Family Courts with the tools needed to determine parentage in compensated surrogacy cases resulting in family law's current confusing and shambolic state.
4. As part of its response to the urgent need for law to play a thoughtful role in responding to surrogacy, Australia must look within to resolve the issues relating to compensated surrogacy arrangements. All forms of surrogacy, both altruistic and compensated, should be permitted and regulated.
5. The human rights of all parties involved in surrogacy, altruistic or compensated, are best protected through appropriate regulation rather than absolute prohibition. Appropriate regulation is therefore the most effective way for Australia to fulfil its international human rights obligations.
6. The problems identified should be addressed by a consistent national approach, beginning with the overturning of legal prohibitions on compensated surrogacy. A consistent national approach could ideally be achieved by the states referring their legislative power in respect of surrogacy to the Commonwealth. Alternatively, uniform mirroring legislation in all Australian jurisdictions should be passed. Referral of responsibility to the Commonwealth is the preferred model because of the compulsory and necessary interaction between state and federal law, via the family law and particularly the *Family Law Act 1975* (Cth).
7. Pre-conception parenting arrangements should be enforced. A statutory presumption of legal parentage by the intending parent(s) upon the birth of the child would address some of the problems currently being experienced in the family law realm.
8. A national regulator should be created to oversee the implementation of uniform surrogacy legislation which covers both altruistic and compensated surrogacy arrangements as well as, if necessary, the interactions of federal and State legislation.

## 1. Introduction

The August 2014 story of Baby Gammy in Australian newspapers told the public of a baby, Gammy, born as a result of a compensated surrogacy arrangement between an Australian couple and a Thai surrogate. During the pregnancy, testing revealed that the surrogate was carrying twins and that one of the twins had Down Syndrome. After the birth of the twins, the Australian couple took the healthy twin back to Australia with them and left the other twin, Gammy, in Thailand.<sup>2</sup> This saga precipitated significant debate among the general public regarding the question of surrogacy and whether compensated surrogacy should remain prohibited in Australia. As noted by the *Roundtable on Surrogacy Report*, the terminology around surrogacy is a sensitive issue and differs between jurisdictions.<sup>3</sup> This submission uses the term compensated surrogacy where a woman is compensated for being a surrogate beyond reimbursement of the costs incurred and intending parent(s) to refer to the person or persons for whom the child is carried by the surrogate.

The legislative journey towards the recognition of surrogacy arrangements in Australia and stories such as that of Baby Gammy are an example of the ‘pull and push’ effects of change, the colloquial name for the inextricable link that exists between changes in demography, changes in societal attitudes and changes to the law.<sup>4</sup> A circular process evolves, with subtle movements on the demographic landscape leading to cultural and legal changes. Inevitably, changes in societal attitudes follow which result in further legal and demographic movements. Legal and cultural changes may evolve in no particular order with various events, episodes and happenings providing the necessary catalyst.<sup>5</sup> Importantly, for changes in the law to be effective, a change in culture and societal attitudes is required.<sup>6</sup> Stories like the Baby Gammy saga as well as testimonies of public personalities who have entered into surrogacy arrangements<sup>7</sup> have led the mainstream public to begin debating the issue of compensated surrogacy and have highlighted the urgent need for legislative change.

## 2. Current Australian Law and Practice

### a) State and Territory legislative provisions

Legislative competence in respect of surrogacy arrangements remain with the states and territories. All Australian States and the ACT permit *altruistic* surrogacy and allow reimbursement of some of the surrogacy costs.<sup>8</sup> While not a comprehensive list, the Table below illustrates some of the significant differences in surrogacy regulation between jurisdictions. While some States have standalone legislation regulating surrogacy, others have amended wider legislation to include surrogacy, sometimes splitting surrogacy-related issues between more than one Act. If medical assistance is needed to achieve the child’s conception, regulation around the clinical practice of assisted

<sup>2</sup> For a discussion of the baby Gammy case see ‘Baby Gammy: WA parents of a girl born to Thai surrogate deny abandoning twin brother’, *ABC News* (online), 5 August 2014 <<http://www.abc.net.au/news/2014-08-04/wa-couple-denies-they-abandoned-baby-gammy/5644850>>.

<sup>3</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Roundtable on Surrogacy Report* (March 2015) [1.13-1.14].

<sup>4</sup> For further discussion in the context of changes to the law in Victoria in relation to lesbian parenting see Adiva Sifris, ‘Lesbian Parenting in Australia: Demosprudence and Legal Change’ (2010) 28 *Law in Context* 8.

<sup>5</sup> See Gerald Torres, ‘Legal Change’ (2007) 55 *Cleveland State Law Review* 135; and Lani Guinier, ‘Courting the People: Demosprudence and the Law/Politics Divide’ (2009) 89 *Boston University Law Review* 539.

<sup>6</sup> See Tom Stoddard, ‘Bleeding Heart: Reflections on Using the Law to Make Social Change’ (1997) 72 *New York University Law Review* 967.

<sup>7</sup> See, for example, Amy Corderoy, ‘High-profile surrogate family welcomes push to change laws’ *The Sydney Morning Herald* (online) 28 October 2010 <<http://www.smh.com.au/national/highprofile-surrogate-family-welcomes-push-to-change-laws-20101027-173x0.html#ixzz3x6PO8Dhw>>.

<sup>8</sup> The Northern Territory has not passed legislation regulating surrogacy.

reproductive technology must also be met. In Australia, four States – New South Wales, South Australia, Victoria and Western Australia – have legislation regulating assisted reproductive technology generally, the other jurisdictions leave such matters to self-regulation by the profession.<sup>9</sup> For those Australians travelling overseas for surrogacy services, there is an even wider diversity of regulations (or lack thereof) regarding assisted conception.

**Table: Comparative Table of Australian Surrogacy Legislation**

State	Legislation	Definition and types of surrogacy arrangement	Prohibition Against Compensated Surrogacy	Parentage
ACT	<i>Parentage Act 2004</i>	<p>ss 23, 24C, 40:</p> <p><b>“Substitute parent agreements”:</b> A contract/agreement under which a woman agrees to become or attempt to become pregnant; and that the child born as a result of a pregnancy will be taken to be the child of someone else; or</p> <p>A woman who is pregnant agrees that a child born as a result of the pregnancy will be taken to be the child of someone else.</p> <p><b>“Commercial substitute parent agreements”:</b> A substitute parent agreement under which a person agrees to make or give to someone else a payment or reward, other than for expenses connected with the pregnancy or the birth/care of the child born as a result of the pregnancy</p>	<p>s 41: prohibits intentionally entering commercial substitute parentage agreements</p> <p>s 45: offence has extraterritorial application</p>	<p>Surrogate (and partner) is parent until parentage order made (ss 7-11)</p> <p>Intending parents can be (s 24):</p> <ul style="list-style-type: none"> <li>- Married</li> <li>- Heterosexual de facto</li> <li>- Same-sex de facto</li> </ul>
NSW	<i>Surrogacy Act 2010</i>	<p>ss 5, 9, 23:</p> <p>Surrogacy arrangements:</p> <p><b>“Pre-conception”:</b> Woman agrees to become/ try to become pregnant and will transfer parentage of the child to another person/s.</p> <p><b>“Post-conception”:</b> Pregnant woman agrees that parentage of the unborn child will be transferred to another person/s.</p> <p><b>“Commercial”:</b> Provision of a fee, reward or other material benefit or advantage is made to a person to enter into or agree to a surrogacy arrangement, to give up the child of a</p>	<p>s 8: prohibits entering into commercial surrogacy arrangements</p> <p>s 11 - offence has extraterritorial application</p>	<p>Surrogate (and partner) is parent until parentage order made (s 39)</p> <p>Intending parents can be (s 5(6)):</p> <ul style="list-style-type: none"> <li>- Married</li> <li>- Heterosexual de facto</li> <li>- Same-sex de facto</li> <li>- Single</li> </ul>

<sup>9</sup> *Assisted Reproductive Technology Act 2007* (NSW); *Assisted Reproductive Treatment Act 1988* (SA); *Assisted Reproductive Treatment Act 2008* (Vic); *Human Reproductive Technology Act 1991* (WA).

State	Legislation	Definition and types of surrogacy arrangement	Prohibition Against Compensated Surrogacy	Parentage
		<p>surrogacy arrangement or to consent to the making of a parentage order.</p> <p><b>“Altruistic”</b>: The only fee, reward or other benefit or advantage is provided to reimburse the mother’s surrogacy costs.</p>		
QLD	<i>Surrogacy Act 2010</i>	<p>ss 7, 10, 56:</p> <p>Woman agrees to become, or try to become, pregnant with the intention that the child born is treated as the child of the other person/s. The birth mother will also relinquish custody and guardianship of the child to the other person/s. The other person/s must agree to permanent responsibility for the child.</p> <p>Must be a pre-conception, non-commercial surrogacy arrangement</p>	<p>s 56: prohibits entering into commercial surrogacy arrangements</p> <p>s 54(b): offence has extraterritorial application</p>	<p>Surrogate (and partner) is parent until parentage order made (s 17)</p> <p>Intending parents can be (ss 7-9):</p> <ul style="list-style-type: none"> <li>- Married</li> <li>- Heterosexual de facto</li> <li>- Same-sex de facto</li> <li>- Single</li> </ul>
SA	<i>Family Relationships Act 1975</i>	<p>ss 10H, HA(2)(ix):</p> <p><b>“Commercial”</b>: Illegal to enter into a contract or receive valuable consideration for surrogacy or to induce another to enter into such an arrangement.</p> <p><b>“Permitted arrangements”</b>: A surrogacy arrangement is permitted and recognised if the surrogate mother agrees to become or seek to become pregnant and to surrender custody of and rights in relation to, a child born as a result of the pregnancy, to two other persons (the commissioning parents).</p>	<p>S 10G: surrogacy contract is illegal and void</p>	<p>Surrogate (and husband if any) is parent until parentage order made (ss 7, 8, 10C-E):</p> <p>Intending parents can be (s 10HA):</p> <ul style="list-style-type: none"> <li>- Married</li> <li>- Heterosexual de facto (together for at least 3 years)</li> </ul>
TAS	<i>Surrogacy Act 2012</i>	<p>ss 5, 8:</p> <p><b>“Surrogacy arrangement”</b>: An arrangement for a female person (birth mother) to seek to become pregnant and give birth to a child; and the child to be treated as the child of a person/s other than the birth mother (the intended parent/s). Does not include arrangements that came into place after the birth mother was already pregnant.</p> <p><b>“Commercial”</b>: If it provides for a person to receive a payment, reward or other material benefit or advantage (other than the reimbursement of the birth mother’s surrogacy costs) for the person</p>	<p>s 40: prohibits entering into commercial surrogacy arrangements</p>	<p>Surrogate (and partner) is parent until parentage order made (s 26)</p> <p>Intending parents can be (ss 4-5):</p> <ul style="list-style-type: none"> <li>- Married</li> <li>- Heterosexual de facto</li> <li>- Same-sex de facto</li> <li>- Single</li> </ul>

State	Legislation	Definition and types of surrogacy arrangement	Prohibition Against Compensated Surrogacy	Parentage
		or another person: agreeing or entering the arrangement; giving up a child born as a result of the arrangements; or, consenting to the making of a parentage order.		
VIC	<i>Assisted Reproductive Treatment Act 2008</i> ; <i>Status of Children Act 1974</i> (where indicated)	s 39: <b>“Assisted reproductive Treatment (ART)”</b> : A registered ART provider may carry out a procedure on a woman under a surrogacy arrangement only if the surrogacy arrangement has been approved by the Patient Review Panel.	s 44(1): prohibits surrogate receiving material benefit or advantage as a result of surrogacy arrangement	Surrogate (and partner) is parent of child (s 19 <i>Status of Children Act 1974</i> )  Intending parents can be (s 22 <i>Status of Children Act 1974</i> ): <ul style="list-style-type: none"><li>- Married</li><li>- Heterosexual de facto</li><li>- Same-sex de facto</li><li>- Single</li></ul>
WA	<i>Surrogacy Act 2008</i> ; <i>Artificial Conception Act 1985</i> (where indicated)	s 3: An arrangement for a woman (the birth mother) to seek to become pregnant and give birth to a child and for a person/s other than the birth (the arranged parent/s) to raise the child. Does not include arrangements entered into after the birth mother was already pregnant unless it is in variation of a surrogacy arrangement involving the same parties.	s 8: prohibits entering into surrogacy arrangement that is for reward	Surrogate (and partner) is parent until parentage order made (ss 5-7 <i>Artificial Conception Act 1985</i> )  Intending parents can be (ss 17, 19): <ul style="list-style-type: none"><li>- Married</li><li>- Heterosexual de facto</li><li>- Single (women only)</li></ul>

As illustrated in the above Table, compensated surrogacy is prohibited in all Australian jurisdictions except the Northern Territory where surrogacy is not regulated.<sup>10</sup> In contrast, all Australian States permit *altruistic* surrogacy and allow reimbursement of some of the surrogacy costs (which may include medical, legal and/or counselling costs) although how this is expressed and what is included in such costs varies between jurisdictions. Victorian legislation, for example, allows reimbursement of prescribed costs incurred as a direct consequence of surrogacy arrangements.<sup>11</sup> State legislation also varies in whether and when any agreement to reimburse a surrogate’s costs is enforceable. Much of the debate around compensated surrogacy concerns what is being paid for – the woman’s services in gestating and birthing the child, the baby, or the surrender of parentage rights.<sup>12</sup> Linked to that debate is whether the woman is exploited and can give proper consent when there is financial reward to be gained.<sup>13</sup> Internationally, the differences in legal responses to

<sup>10</sup> See *Surrogacy Act 2010* (Qld) s 56; *Surrogacy Act 2010* (NSW) s 8; *Parentage Act 2004* (ACT) s 41; *Assisted Reproductive Treatment Act 2008* (Vic), s 44; *Surrogacy Act 2012* (Tas) s 40; *Family Relationships Act 1975* (SA) s 10H; *Surrogacy Act 2008* (WA) s 8.

<sup>11</sup> *Assisted Reproductive Treatment Act 2008* (Vic) s 44.

<sup>12</sup> Merryn Elizabeth Ekberg, ‘Ethical, Legal and Social Issues to Consider When Designing a Surrogacy Law’ (2014) 21 *Journal of Law and Medicine* 728, 729.

<sup>13</sup> For a discussion of the human rights implications of commercial surrogacy arrangements see Part 3 below and Paula Gerber and Katie O’Byrne (eds) *Surrogacy, Law and Human Rights* (2015, Ashgate).

surrogacy, including compensated surrogacy, are even greater.<sup>14</sup> These differences in legal responses to surrogacy have resulted in reproductive ‘tourism’, with people travelling within Australia or overseas to jurisdictions where it is easier (or more cost effective) to enter into surrogacy arrangements than in their jurisdiction of origin.<sup>15</sup> This reality raises numerous questions, including whether the current regulation of surrogacy in Australia, and in particular the prohibition on compensated surrogacy, should be retained.

The most significant Australian professional regulation regarding surrogacy is the NHMRC *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2004, as revised in 2007). Current Guidelines provide that it is ‘ethically unacceptable to undertake or facilitate surrogate pregnancy for commercial purposes’.<sup>16</sup> These Guidelines are under review but the draft 2015 version continues to provide that it is unethical to pay for surrogacy, adding that it is ethically unacceptable to provide payment that acts as an incentive.<sup>17</sup> A later Guideline provides that it is ethically unacceptable to practice, promote or recommend “commercial surrogacy” because of the potential for exploitation and commodification of the reproductive process.<sup>18</sup> However, the draft Guidelines now go on to clarify that if patients make an autonomous decision to use an international surrogacy arrangement (compensated or not), clinicians’ ethical obligations to provide appropriate advice and care remain.<sup>19</sup> It is difficult to assess whether, if the laws around compensated surrogacy were to change, the ethical guidelines would also change. Appendix 3b of the Draft Guidelines discusses the possibility of beginning to pay Australian women for donating eggs but does not address compensated surrogacy. Although the reasoning suggested around payment of egg donors would apply equally to compensated surrogacy, this is not offered as a relevant consideration for the public to deliberate.

In light of the above discussion, it is submitted that legislation addressing surrogacy between Australian jurisdictions is fragmented, uncertain and inconsistent, and there is an urgent need for clear and consistent legislation regulating both altruistic and compensated surrogacy arrangements which should be overseen by a national regulator.

### **b) Altruistic Surrogacy Arrangements: State parentage laws**

All States and the ACT provide that the surrogate and her partner, if any, is/are the child’s legal parent(s) at the birth of the child unless and until the intending parent(s) apply for a transfer of legal parentage after birth. State legislation creates a formal legal process to enable that transfer. The prerequisites for transfer of parentage from surrogate (and her partner) to intending parent(s) vary greatly between States. In addition to requiring that the surrogacy arrangement not be a compensated one and that the intending parent(s) be living in the State concerned, some States (namely ACT, South Australia and Victoria) also require that a child conceived as a result of assisted conception be conceived in the relevant State if an application for an order transferring legal parentage of the child

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<sup>14</sup> See, for example, Helier Cheung, ‘Surrogate babies: Where can you have them, and is it legal?’, *BBC News* (online), 6 August 2014 <<http://www.bbc.com/news/world-28679020>>.

<sup>15</sup> For a discussion of Australians travelling overseas to enter into surrogacy arrangements see Sam Everingham, ‘Use of Surrogacy by Australians: Implications for Policy and Law Reform’ in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

<sup>16</sup> Guideline 13.1.

<sup>17</sup> Guideline 3.6.

<sup>18</sup> Guideline 8.7.

<sup>19</sup> Guideline 8.7.2.



from the surrogate to the intending parent(s) is to be made.<sup>20</sup> These prerequisites add further complication, discussed in subsection c) below, in the face of the reality that compensated surrogacy prohibitions are driving intending parents to travel outside their home jurisdiction to access surrogacy.

Other significant prerequisites for transfer of legal parentage by the State courts (all with their own particular exceptions) include that the surrogate be of a particular age (at least 18 years in South Australia and New South Wales or 25 years in Queensland, Tasmania, Victoria and Western Australia),<sup>21</sup> and that the application for transfer be made within a defined time frame ranging from not less than 4 weeks after birth in Queensland and South Australia to not more than 6 months after birth in all States.<sup>22</sup>

The automatic endowment of legal parentage of children born through surrogacy on the surrogate (and partner) has a number of important disadvantageous consequences that support amendment of the current law so that intending parent(s) are endowed with legal parentage upon the birth of the child. There should be a rebuttable presumption that the intending parent(s) are endowed with legal parentage upon the birth of the child absent extenuating circumstances. These disadvantageous consequences include:

1. First, the child must be raised by people who cannot be her/his legal parents and cannot make particular decisions regarding the child's welfare until a prescribed period has passed. This may leave some children particularly vulnerable and, it is submitted here, is not in their best interests. This arises because of the compulsory delay in all jurisdictions before which a parentage transfer can occur and because whether the child is living with the intending parents is a relevant consideration in all jurisdictions (in three States, Queensland, Tasmania and WA, co-habitation is a requirement before parentage transfer can occur).<sup>23</sup>
2. Secondly, it is inconsistent with society's expectations regarding legal parentage as demonstrated in its regulation of the parentage of donor-conceived children. For donor-conceived children, legislation in all jurisdictions legally severs the genetic link between donor and child and clarifies that gestational mothers of donor-conceived children are their legal mothers without any formal legal process needing to be followed.<sup>24</sup> This approach is generally thought to be appropriate because the gestational mother is the (or one of the) person(s) intending to parent the child and it reflects the view that it is usually in the child's best interests that the person who intends to parent them be recognised as legal parent, regardless

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<sup>20</sup> *Parentage Act 2004* (ACT) s 24(a); *Family Relationships Act 1975* (SA) s 10HA(2)(b)(viii)(A); *Status of Children Act 1974* (Vic) s 22(1)(b).

<sup>21</sup> *Surrogacy Act 2010* (NSW) s 27; *Surrogacy Act 2010* (Qld) s 22(2)(f); *Family Relationships Act 1975* (SA) s 10HA(2)(b)(ii); *Surrogacy Act 2012* (Tas) s 16(2)(c); *Assisted Reproductive Treatment Act 2008* (Vic) ss 39 and 40(1)(b) and *Status of Children Act 1974* (Vic) ss 17(1) (definition 'surrogacy arrangement') and 20(1); *Surrogacy Act 2008* (WA) ss 16(1) and 17(a)(i).

<sup>22</sup> *Parentage Act 2004* (ACT) s 25(3); *Surrogacy Act 2010* (NSW) s 16; *Surrogacy Act 2010* (Qld) s 21(1); *Family Relationships Act 1975* (SA) s 10HB(5); *Surrogacy Act 2012* (Tas) s 15; *Status of Children Act 1974* (Vic) s 20(2); *Surrogacy Act 2008* (WA) s 20.

<sup>23</sup> *Parentage Act 2004* (ACT) s 26(3)(a); *Surrogacy Act 2010* (NSW) s 33; *Surrogacy Act 2010* (Qld) s 22(2)(b); *Family Relationships Act 1975* (SA) s 10HB(9)(a); *Surrogacy Act 2012* (Tas) s 16(2)(j)(i); *Status of Children Act 1974* (Vic) s 22(1)(c); *Surrogacy Act 2008* (WA) s 21(2)(e).

<sup>24</sup> See Australian Senate, Legal and Constitutional Affairs References Committee, *Donor conception practices in Australia* (February 2011).

of genetic parentage.<sup>25</sup> Although the legislation around parentage in surrogacy also requires transfer decisions to be made in the child's best interests, the current approach has the opposite result and does not reflect the intentions of all parties' at the time the surrogacy is arranged. The gestating mother, the surrogate, is not the intending mother but legislation makes her the child's legal parent. As well as being problematic for the surrogate, who has no desire to be the child's legal parent, current law also means that families' reproductive choice to use surrogacy inevitably causes them to go through the economic and social costs of seeking court approval of parentage transfer. Consequently, the current law benefits no one and is to every body's detriment.

3. Finally, all State and ACT legislation instructs state courts considering parentage transfer applications that genetic relationships are relevant but does not clearly explain how so. Putting to one side the issue of whether a surrogate is a genetic parent,<sup>26</sup> no legislation clearly explains the prioritisation between genetic and intending parentage. ACT, SA, Victoria and WA require the intending parents to be genetically related to the child to become the legal parent and/or no genetic relationship between surrogate and child for that to happen.<sup>27</sup> WA goes the furthest, albeit in limited circumstances, allowing intending parents to override a surrogate's claim to legal parentage and have parentage transferred away from her if there is a genetic relationship between intending parents and child and not between surrogate and child.<sup>28</sup> In Queensland and Tasmania, legislation provides that children born through surrogacy arrangements have the same status, protection and support regardless of whether there is a genetic relationship between the child and any other parties to the arrangement.<sup>29</sup> Genetic relationship is not defined. When making a decision on parentage transfer, courts in NSW, Queensland and Tasmania may consider an independent counsellor's report which could address genetic relationship issues and in NSW and Tasmania this is expressly required to be included.<sup>30</sup> The Tasmanian legislation expressly includes arrangements for the child to have contact with 'a person, other than an intending parent, who has provided some of the child's genetic material' as a matter that a court may request the report to address. In NSW a report must accompany transfer applications which includes contact arrangements between the child and his or her biological parent(s). In light of legislative responses to donor conception which attribute parentage based on intention rather than genetics, legislation should make it clear that intending parents should be given priority because they are the intending parents, regardless of whether they are also genetically connected to the child. This would help to

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<sup>25</sup> See Susan B Boyd, 'Gendering Legal Parenthood: Bio-genetic Ties, Intentionality and Responsibility' (2007) 25 *Windsor Yearbook of Access to Justice* 63 regarding competing claims of intentionality and genetic ties in legal parenthood.

<sup>26</sup> For further on this see Karinne Ludlow, 'Genes and gestation in Australian regulation of egg donation, surrogacy and mitochondrial donation' (2015) 23 *Journal of Law and Medicine* 378.

<sup>27</sup> *Parentage Act 2004* (ACT) s 24(b) and (d); *Family Relationships Act 1975* (SA) s 10HA(2)(viii)(B) (see exception in s 10HA(5)); *Status of Children Act 1974* (Vic) s 22(1)(b) (applicable only to conceptions involving assisted reproductive treatment (ART) providers. Such procedures are required to be pre-approved and one prerequisite for pre-approval is the absence of a genetic link between surrogate and child (subject to exceptions). See s 40(1)(ab). If an ART provider is not involved, parentage transfer is possible notwithstanding any genetic link between surrogate and child); *Surrogacy Act 2008* (WA) s 21(3) and (4) (this is applicable in limited circumstances).

<sup>28</sup> *Surrogacy Act 2008* (WA) s 21(3) and (4).

<sup>29</sup> *Surrogacy Act 2010* (Qld) s 6(2)(b)(ii); *Surrogacy Act 2012* (Tas) s 3(2)(b)(ii).

<sup>30</sup> *Surrogacy Act 2010* (Qld) s 22(2)(i) but see s 23(2); *Surrogacy Act 2010* (NSW) s 17(3)(d); *Surrogacy Act 2012* (Tas) s 18(2)(d).

eliminate inconsistencies between law relating to assisted reproduction and law relating to surrogacy.

The current legal status and protection of Australian families created through surrogacy is less than that for Australian families created using other reproductive methods because neither state parentage legislation nor Australian family law reflects the intentions of those involved in the surrogacy, at the time of that arrangement, or responds adequately to their rights and interests. The below discussion reveals the difficulties faced by the Family Court when faced with applications for parentage in surrogacy cases. The arguments set out above are also generally applicable to compensated surrogacy arrangements. However as will become apparent, in circumstances where the parties enter into compensated surrogacy arrangements the situation is exacerbated. Where an altruistic surrogacy arrangement is entered into pursuant to s 60HB of the *Family Law Act 1975* (Cth) ('the FLA') an order of the state courts providing that the intending parents are the parents of the child will be recognised for family law purposes.

### **c) Compensated Surrogacy**

Compensated surrogacy, where a woman is compensated for being a surrogate beyond reimbursement of the costs incurred, is expressly or impliedly prohibited in all Australian jurisdictions.<sup>31</sup> Two States (New South Wales and Queensland) and the ACT provide that the prohibition of compensated surrogacy operates extraterritorially.<sup>32</sup>

### **d) Family law**

Gestational surrogacy is the most common form of surrogacy in proceedings before the Family Courts. Usually the (or one of the) intending father(s) will be the genetic father of the child.<sup>33</sup> However, it is possible that both intending parents are genetically related to the child. For parties who have entered into compensated surrogacy arrangements, whether in Australia or overseas, the only path to legal recognition as a parent is to apply to the Family Courts<sup>34</sup> for orders recognising them as the child's legal parents (*parentage* orders). In some instances intending parents do not apply for parentage orders but in order to raise their children apply to the Family Courts for *parenting* orders including orders for parental responsibility. Orders for parental responsibility enable the recipients to make long-term decisions regarding the welfare of the child, such as where and with whom a child will live.<sup>35</sup>

The outcome of an application to be declared the legal parent of a child born as result of a compensated surrogacy arrangement is largely speculative with unpredictable and contradictory results. The provisions contained in the FLA are designed to accommodate state court approved altruistic surrogacy arrangements not compensated surrogacy arrangements which are prohibited.<sup>36</sup>

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<sup>31</sup> See *Parentage Act 2004* (ACT) s 41; *Surrogacy Act 2010* (NSW) s 8; *Surrogacy Act 2010* (Qld) s 56; *Family Relationships Act 1975* (SA) s 10H; *Surrogacy Act 2012* (Tas) s 40; *Assisted Reproductive Treatment Act 2008* (Vic), s 44; *Surrogacy Act 2008* (WA) s 8.

<sup>32</sup> *Surrogacy Act 2010* (NSW) s 11; *Surrogacy Act 2010* (Qld) s 54(b); *Parentage Act 2004* (ACT) s 45.

<sup>33</sup> In the vast majority of cases appearing before the Family Court, an egg will be donated by an anonymous donor.

<sup>34</sup> Reference to the Family Courts includes the Federal Circuit Court of Australia and the Family Court of Western Australia.

<sup>35</sup> See *Family Law Act 1975* (Cth) s 64B. If a parent is regarded as the legal parent of the child, parental responsibility for that child is automatic.

<sup>36</sup> The issues regarding surrogacy arrangements are highlighted in the case of *Re Michael Surrogacy Arrangements* (2009) 41 Fam LR 694 where an altruistic surrogacy arrangement was entered into using gametes from both intending parents. At that stage altruistic surrogacy was not legal in NSW and the couple applied to

Further, where the facts reveal the existence of an international compensated surrogacy arrangement, details regarding the circumstances surrounding the arrangement may be sparse, the capacity of the surrogate for autonomous decision-making on parentage transfer may be questionable and there is seldom (if ever) a contradictor before the court.<sup>37</sup>

Family law, like state parentage legislation discussed in b) above, supports the legal recognition of the social parentage of children conceived through various means of assisted conception, but does not do the same for children born via compensated surrogacy arrangements. This means that the status and protection of Australian families created through surrogacy is less than that for Australian families created using other reproductive methods. It also means that family law fails to respond adequately to the interests and rights of such children (discussed in section 3 below) to have their social family legally recognised.

The FLA may arguably contain a number of provisions which may be used to establish a legal relationship between the intending parents and the child. The first relevant provision is s 60HB. This section provides that where a state or territory court makes an order transferring parentage from the surrogate to the intending parent(s), then for the purposes of the FLA the child is a child of those persons. The conventional interpretation of this legislation has been that as it expressly refers to state and territory legislation, it is limited to altruistic surrogacy arrangements entered into in Australia and is thus not relevant to compensated surrogacy arrangements.<sup>38</sup> The second relevant legislative provision contained in the FLA is s 60H which deals with the parentage of children born through assisted conception. This section is problematic as in the case of married couples and couples living in a de facto relationship s 60H(1) provides for the surrogate and her partner to be regarded as the parents of the child, which is clearly an anathema to the concept of surrogacy. In the case of a single woman who is a surrogate, s 60H(3)] is open to contradictory interpretations. Contrary to state legislation (the restrictive approach) which severs the relationship between donor and child, an enlarging approach allows for the donor of semen to be recognized as a parent of a child.<sup>39</sup> Consequently, if an enlarging approach is adopted, the donor (intending father) may be regarded as the legal parent of the child. Finally, the FLA contains a number of general presumptions of parentage which, coupled with s 69VA of the FLA, enables the Court to make a declaration of parentage for the purposes of Commonwealth law. It is unclear whether these presumptions have any application to compensated surrogacy arrangements entered into within or outside Australia.<sup>40</sup>

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adopt the child. Watts J was unable to make orders for adoption and pointed out at this early point that the legislation was in dire need of amendment.

<sup>37</sup> In *Ellison & Anor & Karnchanit* (2012) 48 Fam LR 33 in order ascertain the circumstances of the arrangement Ryan J granted the applicants certificates under s 128 of the *Evidence Act 1995* (Cth) which granted them privilege from self-incrimination. In this decision, Ryan J set out a number of 'Best Practice Principles' one of which the appointment of an Independent Children's Lawyer to represent the child's best interests [132-139]. For a discussion of this case see Anita Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (2015) 23 *Journal of Law and Medicine* 333. In *Mason & Mason and Another* [2013] FamCA 424 Ryan J expressed her concern that the surrogacy contract comprised of a '29 page document written in English...and because the mother is illiterate in English and Hindi, the mother's attestation is her thumb print' [4].

<sup>38</sup> See for example, *Ellison and Anor & Karnchanit* (2012) 48 Fam LR 33 and *Mason & Mason and Another* [2013] FamCA 424, *Green-Wilson & Bishop* [2014] FamCA 1031 and *Bernieres and Anor & Dhopal* [2015] FamCA 736.

<sup>39</sup> Cronin J *Groth v Banks* (2013) 49 Fam LR 510.

<sup>40</sup> For further discussion of the approach of the Family Courts including the application of the various presumptions of parentage contained in the FLA see Adiva Sifris, 'The Family Courts and Parentage of Children Conceived through Overseas Commercial Surrogacy Arrangements: A child centred approach' (2015) 23

Different approaches have emerged in the Family Courts to the interpretation of the legislation and its application to compensated surrogacy, as exemplified in the cases of *Dudley and Chedi*<sup>41</sup> and *Dennis and Pradchaphet*.<sup>42</sup> These cases involved the same heterosexual Queensland couple who, through international surrogacy arrangements, had three children born on the same day to two different mothers. The three children were conceived using Mr D's semen and ova from an anonymous donor.<sup>43</sup> The intending parents brought two separate applications for parenting orders. In *Dennis*, orders were made by consent granting parental responsibility to the functional parents. However, during the course of providing reasons for judgment, Stevenson J made a finding that the biological parent Mr D was a parent of the child.<sup>44</sup> However, in *Dudley*, Watts J made orders for parental responsibility, but simultaneously referred the papers to the Director of Public Prosecutions for consideration of whether to prosecute the intending parents.<sup>45</sup>

The debate surrounding the parameters of the FLA and the scope of the provisions relating to parentage further intensified and culminated in the decision of Ryan J in *Ellison and Karnchanit*.<sup>46</sup> In this decision, Ryan J found that the intending father was the biological father of twins and on that basis made an order pursuant to s 69VA of the FLA declaring the intending father a parent of the child for the purposes of Commonwealth law.<sup>47</sup> However, in an interesting development, Ryan J in *Mason and Mason* recanted from her position in *Ellison* and revisited her interpretation of the relevant sections.<sup>48</sup> She concluded that where a child is conceived through assisted conception an order *cannot* be made pursuant to s 69VA declaring the biological father the legal parent of the child. Thus the parentage of children must be determined by reference to State legislation.

However, Johns J has since taken up the cudgels and made orders pursuant to s 69VA, declaring the biological father the legal parent of a child born through an overseas compensated surrogacy arrangement. In *Green-Wilson and Bishop*, her Honour, sitting in the Melbourne Registry of the Family Court, made orders declaring Mr X Green-Wilson the father of the child born in India.<sup>49</sup> Her Honour distinguished the legal matrix of this decision from that in *Mason*. According to Johns J, unlike the NSW legislation (which applied in *Mason*) and which specifically “prohibits” compensated surrogacy,<sup>50</sup> the Victorian legislation states “a surrogate mother must not receive any material benefit or advantage as a result of a surrogacy arrangement”.<sup>51</sup> On this basis, her Honour reasoned that the

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*Journal of Law and Medicine* 396. Details regarding the approach of the Family Courts have been extracted from this article.

<sup>41</sup> *Dudley and Chedi* [2011] FamCA 502.

<sup>42</sup> *Dennis and Pradchaphet* [2011] FamCA 123.

<sup>43</sup> “Mr D” is used to signify Mr Dudley and Mr Dennis, as they are the same person.

<sup>44</sup> *Dennis and Pradchaphet* [2011] FamCA 123 [18].

<sup>45</sup> *Dudley and Chedi* [2011] FamCA 502 [44]. See *Findlay and Punyawong* (2011) 46 Fam LR 302, where Watts J also referred the case to the relevant authorities. For a discussion of the outlawing of commercial surrogacy, see Anita Stuhmcke, “The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions” (2015) 23 *Journal of Law and Medicine* 333.

<sup>46</sup> *Ellison and Karnchanit* (2012) 48 Fam LR 33. See, for example, *Johnson v Chompunut* [2011] FamCA 505; *Hubert and Juntasa* [2011] FamCA 504; *Gough and Kaur* [2012] FamCA 79.

<sup>47</sup> *Ellison and Karnchanit* (2012) 48 Fam LR 33, [73]. For further discussion of the case, see Gillian Triggs and Graeme Edgerton, “Rights of the Child” (2013) 51 *Law Society Journal* 57; Philippa Trowse, “Surrogacy – Competing Interests or a Tangled Web” (2013) 33 *Qld Lawyer* 199.

<sup>48</sup> For extensive criticism of *Ellison*, see Trowse, n 47.

<sup>49</sup> *Green-Wilson and Bishop* [2014] FamCA 1031. Such orders were made notwithstanding that the surrogate was either married or in a de facto relationship. If s 60H(1) applied the surrogate and her partner would have been deemed the parents of the child.

<sup>50</sup> *Surrogacy Act 2010* (NSW) s 8.

<sup>51</sup> *Assisted Reproductive Treatment Act* (Vic) s 44(1).

Victorian legislation failed to prohibit compensated surrogacy. Johns J also made reference to the NSW legislation “covering the field” in respect of the parentage of children born via surrogacy arrangements,<sup>52</sup> whereas the Victorian legislation “is silent” ie there is no direct prohibition against compensated surrogacy.<sup>53</sup> According to Johns J, a lacuna in the law is thus created and where a child is born via compensated surrogacy, this allows for an order to be made declaring the biological father the legal parent of the child. Most recently, Berman J in *Bernieres and Dhopal*, sitting in the Melbourne Registry, declined to follow Johns J. He refused to make an order declaring the biological father a parent of the child born via a gestational commercial surrogacy arrangement in India.<sup>54</sup> His Honour was not satisfied “that the definition of a parent should be extrapolated because of a legislative vacuum”.<sup>55</sup>

The cases set out above provide examples of the dilemma facing the Family Courts and the contradictory results to which those seeking parentage orders are exposed. Whilst it is not practical or possible to examine every published decision relating to compensated surrogacy in the space of this submission, an examination of the jurisprudence relating to compensated surrogacy arrangements indicates that two divergent paths have evolved. In those decisions where declarations of parentage have been made in favour of the biological intending parent, emphasis is placed on the biological father-child relationship.<sup>56</sup> In those situations where such a declaration is refused, State provisions will be regarded as providing the only legal path to parenting for children born via surrogacy. As no state or territory legislation recognises compensated surrogacy, it cannot be recognised for purposes of the FLA.

A summary of the jurisprudence in the Family Courts appears to reveal the following:<sup>57</sup>

- I. There is general consensus that s 60HB of the FLA does not apply to compensated surrogacy arrangements (*Ellison*,<sup>58</sup> *Mason*,<sup>59</sup> *Green & Bishop*<sup>60</sup>).
- II. If the surrogate is *partnered*, and the intending father is genetically related to the child different outcomes may be forthcoming.
  - a. Orders for parental responsibility may be made in favour of the intending parents (*Bernieres and Anor & Dhopal*);<sup>61</sup>
  - b. Alternatively an order may be made pursuant to s 69VA of the FLA declaring the biological parent a legal parent and orders for parental responsibility made in favour of both intending parents (*Green & Bishop*).<sup>62</sup>
- III. If the surrogate is *single* and the intending father(s) is genetically related to the child different outcomes may be forthcoming depending on whether the judicial officer hearing the

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<sup>52</sup> *Green-Wilson and Bishop* [2014] FamCA 1031 [40].

<sup>53</sup> *Green-Wilson and Bishop* [2014] FamCA 1031 [44].

<sup>54</sup> *Bernieres and Dhopal* [2015] FamCA 736.

<sup>55</sup> *Bernieres and Dhopal* [2015] FamCA 736 [121]. See also Thornton J, in *Cowley and Yuvaves* [2015] FamCA 111 [32], who avoided in engaging in the debate as there was no application for a declaration of parentage.

<sup>56</sup> See, for example, *Ellison & Anor & Karnchanit* (2012) 48 Fam LR 33; *Green-Wilson & Bishop* [2014] FamCA 1031. See also *O'Connor v Kasemsarn* (2010) FamCA 987, where Ainslie-Wallace J found that the intending father was a parent but because there was no application for parentage she made orders for parental responsibility.

<sup>57</sup> Adiva Sifris, ‘The Family Courts and Parentage of Children Conceived through Overseas Commercial Surrogacy Arrangements: A child centred approach’ (2015) 23 *Journal of Law and Medicine* 396, 403-404.

<sup>58</sup> *Ellison and Anor & Karnchanit* (2012) 48 Fam LR 33.

<sup>59</sup> *Mason & Mason and Another* [2013] FamCA 424.

<sup>60</sup> *Green-Wilson & Bishop* [2014] FamCA 1031.

<sup>61</sup> *Bernieres and Anor & Dhopal* [2015] FamCA 736.

<sup>62</sup> *Green-Wilson & Bishop* [2014] FamCA 1031.

application prefers an enlarging (*Re Mark*,<sup>63</sup> *Groth & Banks*<sup>64</sup>) rather than a restrictive (*Gough & Kaur*,<sup>65</sup> *Mason*<sup>66</sup>) approach to s 60H(3).

- a. If a restrictive approach is adopted it is likely orders for parental responsibility (as opposed to parentage orders) will be made in favour of the intending parent(s). (*Mason*)<sup>67</sup>
  - b. If an enlarging approach is followed it is possible that a parentage order will be made in favour of the genetic father and orders for parental responsibility in favour of both intending parent(s) (*Ellison*)<sup>68</sup>
- IV. If the forum where the application is heard is in a state or territory where the prohibition on compensated surrogacy legislation extends extra-territorially it is likely that orders will be made for the intending parent(s) to have parental responsibility rather than legal parentage (*Ryan J Mason*).<sup>69</sup> Furthermore, the matter may be referred to the Director of Public Prosecutions (*Dudley & Chedi*).<sup>70</sup>
- V. If the matter is heard in a jurisdiction where there is no express prohibition against compensated surrogacy such as in Victoria there are once again two possible outcomes.
- a. Orders may be made pursuant to s 69VA of the FLA declaring the intending father a parent of a child (*Green & Bishop*).<sup>71</sup> In these circumstances the child will have one legal parent with orders conferring parental responsibility on both parents.
  - b. Alternatively, orders granting the intending parents parental responsibility will be made (*Bernieres and Anor & Dhopal*).<sup>72</sup>

Thus the outcome of an application dealing with the parentage of children born through compensated surrogacy arrangements is dependent on the conflation of a number of factors, a situation which is legally, morally and socially unacceptable. In light of the above discussion, it is submitted that:

- Throughout Australia uniform legislation should be enacted regulating compensated surrogacy arrangements.
- The bifurcation of legislative powers between the states and the Commonwealth has resulted in contradictory, inconsistent legislation. Uniform laws are urgently required to regulate this area preferably by way of referral of powers from the states to the Commonwealth but at the very least through the enactment of uniform mirroring legislation between the states and the Commonwealth.
- Appropriate safeguards should be introduced to protect the surrogate and the intending parent(s) but generally preconception parenting arrangements entered into between the intending parent/s and the surrogate mother/couple should be enforced.

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<sup>63</sup> *Re Mark* (2004) 31 Fam LR 162.

<sup>64</sup> *Groth & Banks* (2013) 49 Fam LR 510.

<sup>65</sup> *Gough & Kaur* [2012] FamCA 79.

<sup>66</sup> *Mason & Mason and Another* [2013] FamCA 424.

<sup>67</sup> *Mason & Mason and Another* [2013] FamCA 424.

<sup>68</sup> *Ellison and Anor & Karnchanit* (2012) 48 Fam LR 33.

<sup>69</sup> *Mason & Mason and Another* [2013] FamCA 424.

<sup>70</sup> *Dudley & Chedi* [2011] FamCA 502.

<sup>71</sup> *Green-Wilson & Bishop* [2014] FamCA 1031.

<sup>72</sup> *Bernieres and Anor & Dhopal* [2015] FamCA 736.

### 3. Human Rights Perspectives and Australia's International Human Rights Obligations

#### a) Summation

The adoption of a rights-based approach to the question of compensated surrogacy requires an analysis from the perspective of the child, the surrogate and the intending parents. The preponderance of discussion around the human rights implications of compensated surrogacy has centred on the rights of the child resulting from a surrogacy arrangement with substantial discourse also focusing on the rights of the surrogate. There has been very little discussion of the rights of intending parents. The rights of all three parties are considered below. We believe that the human rights of all parties are best protected through appropriate regulation rather than absolute prohibition and that regulation, rather than prohibition, is the most effective way for Australia to fulfil its international human rights obligations.

#### b) Rights of the Child

One point of agreement between proponents and opponents of compensated surrogacy is the need to give primacy to the rights of the child resulting from a surrogacy arrangement but the question of whether compensated surrogacy violates those rights is arguably the most contentious aspect of a rights-based analysis of this vexed subject. The interest theory of children's rights may be invoked to justify changes to Australian law on the basis that a child resulting from a surrogacy arrangement has a right to demand the legal recognition of his or her 'functional family' and that on this basis the intending parents should be regarded as the child's legal parents.<sup>73</sup> This right is based not only on the increase in the number of Australians entering into overseas surrogacy arrangements,<sup>74</sup> but also the discrimination which such children are forced to endure as a result of the failure of the law to recognise their intending parent(s) as legal parents. Examples of such discrimination include the fact that parental responsibility ends when a child turns 18 whereas parentage endures so long as the parent-child relationship exists. Parentage may have significant benefits for children expressed for example, in the law of succession where entitlements on intestacy rest on proof of kinship. Further, when making parenting orders the FLA (s 60B) places emphasis on the importance of legal parentage which becomes particularly relevant if parties separate. In addition in the event that the intending parents separate, the claiming of child support may be particularly problematic as it may only be claimed from a legal parent not from one who only has parental responsibility. This argument, addressing the consequences of a failure to recognise intending parents as parents, is related to the argument that 'receiving States' should recognise the citizenship of children resulting from overseas surrogacy arrangements. In fact, the United Nations Committee on the Rights of the Child (CRC Committee) has expressed concern regarding this issue of child statelessness, stating that measures should be taken to ensure that children resulting from overseas compensated surrogacy arrangements are not rendered stateless.<sup>75</sup>

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<sup>73</sup> Adiva Sifris, 'The Family Courts and Parentage of Children Conceived through Overseas Commercial Surrogacy Arrangements: A child centred approach' (2015) 23 *Journal of Law and Medicine* 396.

<sup>74</sup> See Sam Everingham, Martyn Stafford-Bell and Karen Hammarberg 'Australians use of Surrogacy' (2014) 201 *Medical Journal of Australia* 330.

<sup>75</sup> United Nations Committee on the Rights of the Child, *List of Issues in Relation to the Combined Third and Fourth Periodic Reports of Germany*, 65<sup>th</sup> sess, UN Doc CRC/C/DEU/Q/3-4 (10 July 2013) 2 [7].



Discussion of compensated surrogacy from the perspective of the rights of the child invariably focuses on the *United Nations Convention on the Rights of the Child* (CRC).<sup>76</sup> Australia ratified CRC in 1990, and in 2007, it ratified the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*<sup>77</sup> thereby binding Australia to the terms of these treaties under international law. The articles that have been the subject of much debate in this context are article 35 of CRC and article 1 of its Optional Protocol.<sup>78</sup> Article 35 requires States to take all measures ‘to prevent ... the sale of Children for any purpose or in any form’. Article 1 of the Optional Protocol prohibits the sale of children.<sup>79</sup> Accordingly, whether compensated surrogacy arrangements constitute the sale of children lies at the core of the heated argument. For example, John Tobin argues that commercial surrogacy constitutes the sale of a child.<sup>80</sup> In his words, ‘there is a strong argument to suggest that commercial surrogacy arrangements amount to the sale of a child, in which case, international human rights law requires that the practice be prohibited.’<sup>81</sup> In contrast, Jason K M Hanna argues that there is no sale of a child in a commercial surrogacy arrangement as the exchange of money is for the surrogate’s services (i.e. carrying and birthing the child) rather than for the child itself.<sup>82</sup> Similarly, Paula Gerber and Katie O’Byrne argue that properly regulated commercial surrogacy arrangements do not amount to the sale of a child and do not violate other articles of CRC.<sup>83</sup> In our submission, the better view is that compensated surrogacy does not amount to the sale of a child. It is a contract for services rather than a contract of sale.

The CRC Committee has yet to adopt a clear and definitive position on this question. In its 2013 Concluding Observations on the United States, the Committee stated that surrogacy, *if not properly regulated*, amounts to sale of children.<sup>84</sup> In its 2014 Concluding Observations on India, the Committee noted that ‘[c]ommercial use of surrogacy, *which is not properly regulated*, is widespread, leading to the sale of children and the violation of children’s rights’ and that legislation should ‘regulate and monitor surrogacy arrangements’ and criminalise ‘the sale of children for the purpose of illegal adoption, including the *misuse of surrogacy*.’<sup>85</sup> These statements suggest:

1. that the CRC Committee places a high level of importance on the proper regulation of compensated surrogacy arrangements; and

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<sup>76</sup> opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>77</sup> opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).

<sup>78</sup> *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 35; *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 1.

<sup>79</sup> Article 2(a) of the Optional Protocol states: ‘Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.’

<sup>80</sup> See for example John Tobin ‘To Prohibit or to Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?’ (2014) 63 *International and Comparative Law Quarterly* 318, 335–38.

<sup>81</sup> John Tobin ‘To Prohibit or to Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?’ (2014) 63 *International and Comparative Law Quarterly* 318, 326.

<sup>82</sup> Jason Hanna, ‘Revisiting child-based objections to commercial surrogacy’ (2010) 24 *Bioethics* 341.

<sup>83</sup> Paula Gerber and Katie O’Byrne, ‘Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy’ in Paula Gerber and Katie O’Byrne (eds), *Surrogacy, Law and Human Rights* (Ashgate, 2015) 81.

<sup>84</sup> United Nations Committee on the Rights of the Child, *Concluding observations on the second periodic report of the United States of America submitted under article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography*, UN Doc CRC/C/OPSC/USA/CO/2 (2 July 2013) 8 [29(b)].

<sup>85</sup> United Nations Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of India*, UN doc CRC/C/IND/CO/3-42 (7 July 2014) 12 [57(d)], 13 [58(d)] emphasis added.

2. that the CRC Committee does not view *all* compensated surrogacy arrangements as constituting the sale of a child but only those circumstances involving ‘the misuse of surrogacy’ (precisely what this means is unclear).

In addition to the question of whether compensated surrogacy arrangements result in the sale of a child in contravention of CRC, other issues relating to the rights of a child resulting from a surrogacy arrangement concern the right of a child to know his or her identity. The CRC Committee has addressed this issue by simply recommending that children born through surrogacy ‘have access to information about their origins’.<sup>86</sup> It is submitted that the difficulties in obtaining identifying information with respect to overseas surrogacy arrangements (in certain instances) in fact bolsters the argument in favour of legalising compensated surrogacy in Australia, where laws relating to the provision of identifying information apply in the context of donor eggs and sperm.<sup>87</sup> Further, in a victory for intending parents, the European Court of Human Rights (in two recent decisions against France)<sup>88</sup> decided that a child’s ‘right to establish details of their identity as individual human beings, which includes the legal parent-child relationship’, forms a part of the right to respect of private life enshrined in article 8 of the *European Convention on Human Rights*.<sup>89</sup> As such, the Court held that (having regard to the principle that the best interests of the child must always be paramount) France’s refusal to recognise the legal relationship between children born through international surrogacy arrangements and their genetically-related intending fathers violated article 8 of the Convention. Further, the Court has stated that it is generally in a child’s best interests to remain in his or her family environment and that removing a child from such an environment simply because the child was born as a result of an illegal surrogacy arrangement would be to disadvantage the child unjustifiably.<sup>90</sup> According to this line of reasoning, a children’s rights approach to the question of compensated surrogacy would favour recognition of the parentage of intending parents.

Finally, questions relating to the rights of a child resulting from a surrogacy arrangement arise when that child is abandoned due to disability or sex (for example). Such issues are demonstrated by well-publicised cases such as the 2014 abandonment of baby Gammy in Thailand and the 2012 abandonment of another baby boy in India.<sup>91</sup> The risks of such abandonment are especially apparent in environments where appropriate regulation is lacking.<sup>92</sup> Therefore, while these cases represent extreme (albeit tragic) cases rather than the norm, the fact that they exist bolsters the argument in favour of appropriate domestic regulation. Prohibition, as these challenging examples demonstrate,

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<sup>86</sup> United Nations Committee on the Rights of the Child, *Concluding observations on the second to fourth periodic reports of Israel, adopted by the Committee at its sixty-third session*, UN Doc CRC/C/ISR/CO/2-4 (4 July 2013) 9 [34].

<sup>87</sup> There are nevertheless differences between jurisdictions regarding availability of donor identity. See *Assisted Reproductive Technology Act 2007* (NSW) Part 3; *Assisted Reproductive Treatment Act 1988* (SA) Part 3 (although no register has been established); *Assisted Reproductive Treatment Act 2008* (Vic) Part 6; *Human Reproductive Technology Act 1991* (WA) Part 4, Div 5. For other jurisdictions see NHMRC *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2004, as revised in 2007), Guideline 6.

<sup>88</sup> *Menesson v France* 65192/11 (26 June 2014); *Labassee v France* 65941/11 (26 June 2014).

<sup>89</sup> See *Menesson v France* 65192/11 (26 June 2014) [96].

<sup>90</sup> *Paradiso and Campanelli v Italy* 25358/12 (27 January 2015).

<sup>91</sup> For a discussion of the baby Gammy case see ABC News (online), above n 2. For a discussion of the India case see Samantha Hawley, ‘Commercial surrogacy: Senior judge calls for investigation over claims Australian couple abandoned baby boy in India’, *ABC News* (online), 8 September 2015 <<http://www.abc.net.au/news/2015-06-23/judge-calls-investigation-claims-couple-abandoned-surrogate-baby/6565012>>.

<sup>92</sup> Permanent Bureau, Hague Conference on Private International Law, *The Parentage / Surrogacy Project: An Updating Note* (February 2015) Annex II.

has not eradicated the practice of compensated surrogacy but has indirectly facilitated the creation of surrogacy arrangements in jurisdictions where appropriate regulation is lacking.

### c) Rights of the Surrogate

The second relevant site for impassioned discourse concerns the rights of the surrogate. The key arguments against compensated surrogacy from the perspective of the rights of the surrogate are that inherent in compensated surrogacy arrangements is the exploitation of the surrogate and that surrogacy commodifies the surrogate, reducing her to her womb.<sup>93</sup> These arguments have attracted much mainstream support such that many of the Australian Parliamentary debates around the regulation of surrogacy appear to presume that exploitation inheres in *compensated* surrogacy and concomitantly elevate *altruistic* surrogacy to a voluntary act infused with nobleness and compassion.<sup>94</sup> Such a perspective ignores the practical reality that women, such as the friends or family of those for whom pregnancy remains out of reach, may be subjected to enormous pressure to become an 'altruistic' surrogate and that such pressure may itself amount to a form of exploitation. For example, in the words of one Australian fertility specialist:

Everyone gets their knickers so much in a twist about commercial surrogacy, but ... I believe that money is perhaps one of the healthiest motivators you can have for doing most things. One of the things that we are starting to see is some really unpleasant pressure being put on close friends and relatives to act as surrogates because commercial surrogacy is banned.<sup>95</sup>

Indeed, the binary categorisation of surrogacy as either "commercial" or "altruistic" is inherently problematic.<sup>96</sup> For example, the empirical research in countries like the United States and the United Kingdom demonstrates that woman who become surrogates are primarily motivated by altruistic reasons but still expect to be appropriately compensated for their reproductive labour.<sup>97</sup> Thus surrogacy may be compensated and altruistic at the same time.

The connecting of compensation with exploitation is problematic as is the assumption that women who become compensated surrogates do so out of financial desperation. After all, the existing empirical research suggests that, in countries like the United States and the United Kingdom (which are socially and culturally similar to Australia) concerns relating to exploitation and commodification of surrogates is unfounded. The vast majority of surrogates make an informed, autonomous decision to enter into a surrogacy arrangement, do not regret this decision and (while not wealthy) are not motivated by financial distress.<sup>98</sup> Australia's current approach which embraces the prohibition of compensated surrogacy is a paternalistic approach that denies the autonomy rights of Australian women. The right to autonomy is viewed as forming a part of the right to privacy which is enshrined in article 17 of the *International Covenant on Civil and Political Rights*<sup>99</sup> (ICCPR). Australia ratified the ICCPR in 1980 and is therefore bound by the terms of this treaty under international law. It is

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<sup>93</sup> Ronli Sifris, 'Commercial Surrogacy and the Human Right to Autonomy' (2015) 23 *Journal of Law and Medicine* 365.

<sup>94</sup> Jenni Milbank, 'From Alice to Isabella: Exploring the Narratives and Norms of "New" Surrogacy in Australia' (2012) 21 *Griffith Law Review* 101, 125.

<sup>95</sup> Denise Rice, 'Surrogacy a Legal Maze', *The Sunday Times* (Perth), 17 June 2007, 68.

<sup>96</sup> Anita Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (2015) 23 *Journal of Law and Medicine* 333.

<sup>97</sup> Karen Busby and Delaney Vun 'Revisiting *The Handmaid's Tail*: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law* 13, 53-55.

<sup>98</sup> Karen Busby and Delaney Vun 'Revisiting *The Handmaid's Tail*: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law* 13.

<sup>99</sup> opened for signature 16 December 1966, 999 UNTS 171.

submitted that the right to autonomy enshrined in international human rights law includes the right to choose to be a surrogate. Therefore, this right should be protected by Australia's domestic laws, which should include appropriate safeguards to ensure that a decision to be a surrogate is a free and fully informed decision.<sup>100</sup> Such safeguards to a large extent already form a part of medical-law in Australia, as expressed in the doctrine of informed consent.

Another argument frequently invoked by opponents of compensated surrogacy relies on the view that such arrangements infringe the right to be free from discrimination. Discrimination against women is the most commonly cited form of discrimination given that all surrogates are women.<sup>101</sup> However, it is submitted that that a failure to compensate surrogates (in other words, an insistence that surrogacy be 'altruistic') is itself a form of discrimination as it perpetuates the patriarchal tradition of failing to pay for 'women's work'.<sup>102</sup> This in turn leads to the argument that the right to be compensated for the work of gestation should be conceptualised as falling within the human right to work.<sup>103</sup> Thus the argument may be made that surrogacy should be viewed as reproductive labour with appropriate remuneration attached to the provision of this service.<sup>104</sup> The right to work is enshrined in article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),<sup>105</sup> ratified by Australia in 1975. Therefore, Australia has an international legal obligation to act in accordance with this right.

To sum up, both proponents and opponents of laws which allow for, and regulate, compensated surrogacy claim that a human rights approach supports their position. The authors of this submission take the view that a woman's right to choose to be a surrogate, and to be appropriately compensated for doing so, falls within right to work and the right to autonomy enshrined in international human rights law. Having ratified both the ICESCR and the ICCPR, Australia is bound under international law to uphold these human rights.

#### **d) Rights of the Intending Parents**

Less commonly expressed is the argument that intending parents have a right to access surrogacy arrangements, based for instance on the right to privacy, right to found a family and right to be free from discrimination enshrined in the ICCPR.<sup>106</sup> Such an argument supporting the rights of intended parents may also be based on the right to reproductive health and the right to benefit from scientific progress enshrined in the ICESCR.<sup>107</sup> Others argue that intending parents may *desire* to create a child

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<sup>100</sup> Ronli Sifris, 'Commercial Surrogacy and the Human Right to Autonomy' (2015) 23 *Journal of Law and Medicine* 365.

<sup>101</sup> The right to be free from gender-based discrimination is enshrined in numerous treaties, most notably the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>102</sup> Julie Shapiro, 'Paying for Parenthood? Compensation of Surrogate Mothers and the Legal Assignment of Parental Rights' (Paper presented at the Law and Society Association Annual Meeting, Seattle, 29 May 2015).

<sup>103</sup> See *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 6.

<sup>104</sup> Jenni Millbank, 'Rethinking "Commercial" Surrogacy in Australia' (2015) 12 *Journal of Bioethical Inquiry* 447. As an alternative model, Millbank explores the possibility of payment as compensation for the financial and non-financial costs of being a surrogate.

<sup>105</sup> opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>106</sup> See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 15, 16, 17, 23, 26.

<sup>107</sup> See *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 12, 15.

through surrogacy but they have no *right* to do so.<sup>108</sup> Irrespective of whether intending parents have a right to access surrogacy arrangements, it is clear that the desire (and sometime desperation) to have a child may render them vulnerable to exploitation. Thus concern has been expressed that people who are desperate for a child will 'pay anything' for the opportunity to parent and will submit themselves to unconscionable conditions and requirements. Instances of exploitation of intending parents have been the subject of media reports. For example, the media recently reported on a clinic in Mexico involved in unscrupulous practices resulting in: intending parents paying thousands of dollars without receiving the promised services; the embryos of unsuspecting intending parents being held for ransom; and intending parents being lied to regarding the appropriateness of proposed surrogates.<sup>109</sup> Further, intending parents are not only vulnerable during the surrogacy journey itself but may continue to be subjected to unfavourable treatment when caring for their child. This is reflected in Australia's uncertain and confusing law relating to whether intending parents are deemed the legal parents of the child. It is therefore submitted that regulating compensated surrogacy so as to protect intending parents from exploitation and discrimination is a more appropriate legal response than absolute prohibition.

#### 4. Conclusion

Legislation addressing surrogacy between Australian jurisdictions is fragmented, uncertain and inconsistent. The current prohibition on compensated surrogacy arrangements throughout Australia fails to protect the human rights of any of the parties – the child, the surrogate or the intending parent(s) – and drives the practice overseas where a lack of appropriate regulation may lead to undesirable processes and outcomes. Further, the current prohibition on compensated surrogacy coupled with the Family Court's focus on the best interests of the child has led to an intractable quandary, with judges finding themselves in the intolerable position of having to choose between the letter of the law and an approach which recognises existing family formations in the best interests of the child. Given the progressive global increase in compensated surrogacy arrangements, including transnational surrogacy, this is not an issue that will disappear so long as the ostrich keeps its head in the sand. Accordingly, regulation, not prohibition, is the appropriate legislative response.

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<sup>108</sup> See for example Liz Bishop and Bebe Loff, 'Making Surrogacy Legal Would Violate Children's Rights', *The Conversation* (online), 21 August 2014 <<http://theconversation.com/making-surrogacy-legal-would-violate-childrens-rights-30716>>.

<sup>109</sup> See Jane Cowan and Bronwen Reed, 'Would-be parents fleeced, surrogates abandoned by Mexican surrogacy operation Planet Hospital', *ABC News* (online) 5 August 2014 <<http://www.abc.net.au/news/2014-07-08/would-be-parents-fleeced-by-mexican-surrogacy-operation/5572262>>; Caroline Cooper, Adam May and Anna Christiansen, 'Desperate for a baby: Scammed in global surrogacy's newest frontier' *Al Jazeera America*, 15 May 2014 (online) <<http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/14/desperate-for-a-babyscammedinglobalsurrogacysnewestfrontier.html>>.