



**Submission to Family Law Act Review**

**June 2018**

**By Surrogacy Australia**

## 1. ORGANISATIONAL GOALS

Surrogacy Australia is a non-profit national consumer organisation registered in Victoria which has set itself the following goals for the three years 2018 – 2020.

- Increase Australian community understanding of altruistic surrogacy and its benefits
- Significantly raise the proportion of Australian intended parents engaging in domestic surrogacy
- Ensure children born via surrogacy to Australians have their intended parents recognised as their legal parents from birth

## 2. OVERVIEW OF BEST PRACTICE SURROGACY FRAMEWORK

Our recommended framework takes into account key publications globally, including the UN General Assembly Human Rights Council's January 2018 Report<sup>1</sup>, the Australian government's Surrogacy Matters report<sup>2</sup> (2016) and the American Bar Associations Model Act governing ART (2018).

Surrogacy Australia advocates for an Australian surrogacy framework that

- Maintains altruistic surrogacy as the optimal means to safeguard the interests of the unborn child, surrogates and intended parents
- Mandates the use of known donors so children can access their donor history and contact details at a suitable age
- Ensures written surrogacy agreements and counselling to be a mandatory requirement before any surrogacy arrangement can proceed.
- Applies Medicare rebates to surrogacy-related IVF where there is a medical need
- allows higher expense reimbursements for egg donors, to attract more women as donors, allow a higher level of donor screening and hence higher IVF success rates.
- Provides for surrogate expenses to be extended to cover all surrogacy related expenses in States where this is not the case.
- Provides State-specific legislation to allow for advertising for surrogates by a non-profit organisation.
- Provides State-specific legislation to allow for a non-profit surrogate and intended parent screening, matching & support service to better support Australian arrangements

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<sup>1</sup> UN General Assembly 26 Feb – 23 March 2018, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, A/HRC/37/60

<sup>2</sup> Commonwealth of Australia. (April 2016) Surrogacy Matters Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements, House of Representatives Standing Committee on Social Policy and Legal Affairs

- Revises the relevant legislation so that an Australian child born via international or domestic surrogacy can have their Intended Parents promptly recognised as their legal parents.

### 3. BACKGROUND

Australian surrogacy policy aims to protect the rights of surrogates and children. However it is failing in this objective. As Millbank notes, Australia's 'present laws are still based on assumption, anecdote, and speculation, not on evidence'.

Australian laws and policies were written assuming only close friends and family members would act as surrogates. Further, state laws were laid down with a distinct lack of consultation with surrogates and intended parent themselves. The current legislative framework around surrogacy is causing preventable psychological harm and financial distress to hundreds of Australians annually.

### 4. Legal Recognition of Parentage Following International Surrogacy

#### *The Problem*

Despite being named on an overseas birth certificate as the father or mother, and being recognised under the Australian Citizenship Act 2007, intended parents of children born to surrogates overseas (whether biologically related or not) they are recognised simply as gamete providers/donors, and have no legal status as a parent. Where a third-party gamete was sourced, the non-biological parent also has no status as a parent at law.

In 2017 in the decision of *Bernieres and Anor & Dhopal*, the Full Court of the Family Court confirmed that the parentage of children born of surrogacy arrangements entered into overseas cannot be resolved within the present *Family Law Act 1975* (Cth)<sup>3</sup> The result of this decision is that the legal parentage of thousands of Australian children of surrogacy arrangements which do not comply with the strict requirements of State laws remain in doubt<sup>4</sup>.

This means that their biological (& social) parents may:

- not have the authority to make decisions about their child's education and medical care;
- not be able to travel abroad with the child;
- face legal complications should they separate or divorce;
- face difficulties with issues of inheritance and pensions; and
- need to find and involve the surrogate in future decisions involving their child.

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<sup>3</sup> The Court also held that, as a matter of statutory construction the more specific s 60HB, which refers explicitly to state parentage orders for children born under surrogacy arrangements, prevails over the more Court's more general discretion in s 69VA. See *Bernieres and Anor & Dhopal* [2017] FamCAFC 180 (1 September 2017)

<sup>4</sup> *Bernieres and Anor & Dhopal* [2017] FamCAFC 180 (1 September 2017).

Recognising parents through surrogacy as legal parents is in the best interests of children, because it facilitates transparency and avoids motivations of parents to conceal/not be open about their use of surrogacy, which is damaging to children.

Other western democracies make provision for legal parentage for children born via international surrogacy. For example in the UK the parental order process takes place after birth and involves the family court, and a court appointed social worker, providing a valuable safeguard for the best interests of the child. Parental order applications are heard by a High Court judge.

The criteria for a parental order following surrogacy in the UK environment are:

- IPs must be over 18 years old;
- IPs must be married, in a civil partnership or living as partners in an enduring relationship (the Government intends to introduce legislation to allow single people to apply);
- the surrogate, and her partner if they are married or in a civil partnership, must give consent (no earlier than 6 weeks after the birth of the baby);
- the child must have been conceived artificially and be genetically related to one of the IPs;
- the child must be living with the IPs;
- IPs must apply within 6 months of the birth of the child;
- At least one of the IPs must be domiciled in the UK; and
- the surrogate should be paid no more than reasonable expenses, unless authorised by the court.

The vast majority of international surrogacy cases considered in England and Wales are straightforward and it is rare that a parental order to transfer parenthood to the IPs is not considered in the best interests of the child<sup>5</sup>.

### *The Solution*

Revise the Australian Family Law Act so that a child born overseas through surrogacy can efficiently have their Australian Intended Parents recognised as their legal parents without the need for court time, where<sup>6</sup>

- their name appears on the foreign birth certificate
- there is documentary evidence of a surrogacy arrangement
- The child has been granted Australian citizenship
- order is subject to the best interests of the child;
- Provision is made for when the parties change their minds;
- Evidence of the surrogate mother's full and prior informed consent;

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<sup>5</sup> Health Ethics, Population Health, Global & Public Health (2018) [The surrogacy pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales](#)

<sup>6</sup> based on Ryan J in *Ellison and Anor & Karnchanit* [2012] FamCA 602 to ensure compliance with Australia's international human rights obligations

- Evidence of the surrogacy agreement, including any sums paid;
- whether the intending parents have acted in good faith in relation to the surrogate
- Evidence of the intending parent/s actions in relation to ensuring the child will have access to genetic, gestational and cultural origins;