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**Submission: Review of the Family Law System**

Surrogacy Australia welcomes the Review of the *Family Law System being conducted by the Australian Law Reform Commission* and makes this submission in support of reforms to laws regulating birth registration and legal parenthood.

We understand from communication received 22 October 2018 from the Commonwealth Attorney General that ‘*the ALRC is having regard to the greater diversity of family structures in contemporary Australia, including children born as a result of surrogacy arrangements. The terms of reference for the review require the ALRC to consider reports relevant to the family law system, including reports ion surrogacy’.*

In making this submission, Surrogacy Australia draws on research and experience of the approximately three thousand Australian intended parents and surrogates who have pursued surrogacy in Australia and overseas and takes a harm minimisation approach which promotes the best interests of the child. We have also included de-identified case study quotes from parents and surrogates.

Surrogacy Australia is a national charity established for the public charitable purpose of supporting the health, education and psychological outcomes for those Australians with a social or medical condition which prevent them carrying a child, the altruistic surrogates who assist them and the children born via these arrangements.

## **Legal Recognition of Parentage following Domestic Surrogacy**

*The Problem*

Currently it is the Australian surrogate and her partner (if she has one) who are

* listed as parents on the birth certificate.
* recognised as the legal parents until a court process can transfer parentage

While there is a process to issue a new birth certificate and apply to the Family court for a transfer of parentage, this process is expensive, time-consuming and requires significant work for the Family law System it what is a non-adversarial matter. This inconveniences all parties and leaves the child in a situation where there is no legal parent residing with them in the six to twelve months required for the transfer of parentage.

Domestic surrogacy arrangements require many months of preparation, legal advice and counselling to ensure informed consent. Failing to respect that groundwork by insisting that the surrogate is the legal parent post birth is not in the best interests of the child.

Australian surrogates repeatedly report not wanting to be named on the birth certificate or as legal parent, given the administrative complications this entails. This reality also discourages intended parents and surrogates from engaging domestically.

Research conducted by Surrogacy Australia in 2013 with Australians undertaking surrogacy (Published in the MJA 1 September 2014) found the main reason for not proceeding with altruistic surrogacy was the perceived length of the process. A key reason for the lengthy process is the long lead time to establishment of parental responsibility post-birth. Such delays encourage Australians to engage in offshore surrogacy. Published research (MJA, 2014, 201: 1-4) has shown overseas surrogacy to be associated with a high proportion of multiple pregnancies and hence premature births. Such adverse outcomes could be avoided if the Australian surrogacy was an easier pathway to navigate.

Engaging in overseas surrogacy exposes Australians to practices and procedures which are not in alignment with Australian best practice, including use of anonymous donors, multiple embryo transfer, high twin rates, complications related to premature delivery and often a lack of any meaningful relationship between surrogate and intended parent.[[1]](#footnote-1),[[2]](#footnote-2)

*How Other Altruistic Jurisdictions Have Addressed this*

One of the key recommendations of the Surrogacy UK Working group on Surrogacy Law Reform was that Parental orders should be pre-authorised so that legal parenthood is conferred on intended parents at birth[[3]](#footnote-3). The UK government is currently considering just such changes.

Some Canadian provinces which have many years of experience of legislated altruistic surrogacy (eg Ontario and British Columbia), have introduced streamlined transfer of parentage processes that have no need for a court application or judicial approval post birth. The surrogate signs a statement of intent saying that she never intended to be the mother and that the Intended Parents are meant to be the only parents.

In British Columbia, the parents obtain legal parentage in the hospital immediately. That form is filed with vital statistics and a birth certificate is issued within two weeks. In Ontario, parentage may be obtained a few days after filing the application. Birth certificates are usually issued within several days.

Australian Chief Family Court justice John Pascoe has argued for such a process in Australia to keep these non-adversarial matters out of the already overloaded Family Court system.

***The Solution***

This process could be streamlined by changing legislation to automatically recognise the Intended Parents as the legal parents at birth, unless vetoed by the Surrogate, allowing the intended parents to be named on the birth certificate, the child’s Medicare card and making redundant a lengthy transfer of parentage via court processes.

**Parent Feedback**

*‘I have recently gone through surrogacy here in Australia. We are just in the process of getting the parentage order and can attest to how painful it’s been.*  *It is a huge ask for the surrogate to be legally responsible for the care of the child following birth. Surrogates are recovering physically and the last thing they should have to worry about is to assume legal responsibility for someone else’s child.*

*It has been very difficult to access Medicare, get a passport and collate all documentation for the parentage order. Not to mention the cost of this process. The legal system needs to rectify the definition of parent/birth mother specifically when there is genetic relation from the intended parents to the child and no acknowledgement of parentage. It seems odd that IPs through surrogacy can’t be defined as parents initially but recipients of egg donation can.’*

(QLD)

*‘Filling out forms - who fills out what - would be so much simpler if we were listed as parents from the get go. My partner’s mother carried for us so on the original birth certificate it was grandma and pop listed as parents. So my partner was legally his son’s brother. Soo weird.’*

 (NSW)

*‘Just little things like getting your child added to your Medicare card straight away would be a great benefit, I think …… was 10months before we could start claiming her benefits. I also found the process of going to court was unnecessary, and from memory the certificate we received stated a substitute parentage order, the word substitute doesn’t feel appropriate when you’re finally recognised as the child’s parents.’*

 (VIC)

*‘Such a long and costly process and the money (thousands) could be better spent on education etc for my child!*

 *‘The parentage order needs to be built into the pre birth process somewhere along the way, so even if you have to wait the 28 days to apply it is more of a rubber stamp process when you apply. After the birth people are tired, pockets are on empty, and basically it would be great for everyone to get a much needed refresh/reset instead of dragging through long, expensive and potentially draining legal process. What is the benefit to any party in the current system?*

(ACT)

*(Obtaining parentage is) a long, costly, emotional, confusing and extremely unnecessary process (for both parties).*

(NSW)

*The current process of late transfer of parentage is lengthy & costly and needs to change.  If all parties are in agreement that everyone has followed the Surrogacy Agreement then the original birth certificate should be issued in the IPs names. I am my babies mother in every day to day sense & have been their mum since their first breath. We were the first people to hold our babies, we did skin to skin, first baths, first nappy changes, everything a parent does for their child.*

*I am forever grateful to my friends/surrogate for their gift, (but) the current process to change birth certificates & late transfer of parentage is just an extra unnecessary burden for my surrogate’s family & for IPs. The difficulties faced of hospital admin/discharge; Medicare application delays; medical treatment payments as cannot bulk bill yet, passport applications to visit grandfather overseas; education applications; anything that requires a parental signature is challenging.*

*My friend should not have to be burdened with this additional paperwork & the legal responsibilities of their generosity. They have been kind enough to give us the gift of a family, she has done her nine months, frankly now they just want to focus on getting their family back to normal & not be burdened with this additional responsibility.*

*It is also a legally risky time, my surrogate children are still legally entitled to my surrogates family assets & this is not fair to their children. Also our Will says our assets go to our children, which until the later transfer of parentage is resolved is an issue if something were to happen to us. ……the difficulties created by the process of late transfer of parentage are unnecessary for surrogate families & IPs. IPs should have their names put on original birth certificate to overcome this.*

*Altruistic surrogacy is a challenging journey, for us there was a decade of disappointment & infertility challenges. Now we want to focus on the joy of being parents, which we already are in every way to our children, however niggling in the back of our mind is this transfer of birth certificate & ‘parentage’.*

*We have already overcome so many challenges to get to this point, we just want to rejoice that these are our children, and for IPs we are forced to wait another 6 months+ emotionally before our parentage is legally “real”, due to the late transfer of parentage process that is currently in place.*

 *There is a need for an improvement in the process, the current process is a financial burden ($20k to lawyer, I would rather spend on my child), at a time when we as IPs just want to focus on loving your children & finally have the normal family life others take for* *granted.*

(NSW)

*It’s hard enough feeling like a failure as a woman after many IVF transfers, two losses at 28 and 26 weeks …. we finally have a wonderful opportunity through an amazing friend, that we are not recognized immediately as the parents is just another hard hit to take.*

 (QLD)

**Surrogate Feedback**

*As a gestational surrogate I found having to register and be babies legal parent quite unsettling and uncomfortable. Particularly in regards to medical decisions, thankfully none arose before the parentage order went through. I was never her parent in any way. She has two beautiful parents that adore her, they should have been recognised from birth.*

 (QLD)

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*the paperwork, affidavits and having to write a letter giving my IPs permission to seek healthcare for S…. was annoying and unnecessary.*

(NSW)

*I would like to also have the birth certificate changed to parent one and parent two, to eliminate the need to nominate the gender of each parent (which is irrelevant). But I also think that the donor/s and surrogate should also be acknowledged on the form. I think this is important to recognise them but also for medical reasons, especially with regards to genetics.*

 (VIC)

*To have IP’s recognised as the birth parents without having to go through the transfer of parenting order would improve not only IP’s experiences but also surrogates. … Dealing with lawyers and answering their endless questions regarding your personal life post birth is exhausting and frankly the last thing you want to do when you are trying to rekindle your family routine and the former “you” post journey. I think it would also ease the concerns of both sides regarding any legal and medical decisions that need to be made straight away ….not to mention reduce the ridiculous costs involved in the whole process.*

(NSW)

## **Legal Recognition of Parentage Following International Surrogacy**

*The Problem*

At present, the Australian Family Law Act states that the intended parents of children born to surrogates overseas do not have the automatic right to be recognised as legal parents.

Despite being named on an overseas birth certificate as the father or mother, and being recognised under the Australian Citizenship Act 2007, the biological intended parent(s) are recognised simply as gamete providers/donors, and have no legal status as a parent under the Status of Children Acts. Where a third-party gamete was sourced, the non-biological parent also has no status as a parent at law.

Part VII of the *Family Law Act 1975* contains a number of provisions that can be used to recognise the parentage and grant parental responsibility orders for a child of a surrogacy arrangement. A parental responsibility order provides surrogate children with such protections as Medicare, medical treatment and family inheritance. Parental responsibility orders can provide commissioning parents with all of the day to day duties, powers, responsibilities and authority which by law parents have in relation to children.

In 2017 in the decision of *Bernieres and Anor & Dhopal,* the Full Court of the Family Court held that the parentage of children born of surrogacy arrangements entered into overseas or in Australia cannot be resolved within the present *Family Law Act 1975* (Cth)[[4]](#footnote-4).

As a result, in the context of international surrogacy arrangements, commissioning parents are unable to obtain a declaration of parentage from the Family Court[[5]](#footnote-5)

In its more recent decision in *Shaw & Lamb and Ors,[[6]](#footnote-6)* the Full Court re-emphasised that the Family Court is unable to recognise the parentage of surrogate children based upon State or Territory laws unless all of the requirements of any such laws are strictly satisfied.

Without a parental order Intended Parents are not the child’s legal parent under Australian law. This means that the main carer(s) for the thousands of children born via international surrogacy 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.

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.

***How Other Jurisdictions Have Addressed this***

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:

• Intended parents must be over 18 years old;

• Intended parents must be married, in a civil partnership or living as partners in an enduring relationship (the Government is introduce legislation to allow single people to apply);

• the surrogate, and her partner if they are married on 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 Intended parents;

• the child must be living with the Intended parents;

• Intended parents 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 surrogacy cases 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[[7]](#footnote-7).

 *The Solution*

Revise the Australian Family Law Act Section 60H 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, once the appropriate documents proving a surrogacy arrangement and surrogate consent have been provided.

We understand that under Section 51 of the Australian constitution there is no reason for the Family Law Act not to be able to override relevant State Acts on this important issue.

1. Everingham S, Stafford-Bell M & Hammarberg K. Australians Use of Surrogacy, MJA 2014; 201 (5), [↑](#footnote-ref-1)
2. Stafford-Bell M, Everingham S & Hammarberg K. Outcomes of surrogacy undertaken by Australians overseas MJA 2014; 201; 1-4. [↑](#footnote-ref-2)
3. Horsey, K., ‘Surrogacy in the UK: Myth busting and reform’ Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015). [↑](#footnote-ref-3)
4. 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) [↑](#footnote-ref-4)
5. *Bernieres and Anor & Dhopal* 2017] FamCAFC 180 (1 September 2017). [↑](#footnote-ref-5)
6. [2018] FamCAFC 42 (13 March 2018). [↑](#footnote-ref-6)
7. 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684275/surrogacy-guidance-for-intended-parents-and-surrogates.pdf) [↑](#footnote-ref-7)