Submission to the Australian Law Reform Commission

Reform of surrogacy laws

Submission in response to the Issues Paper, June 2025

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My expertise

I am an Emeritus Professor of Law (and sometime Dean of Law) at the University of Queensland. I am a specialist in family law and child protection. I chaired the Family Law Council from 2004-2007. I was President of the International Society of Family Law from 2011-2014, and have therefore some knowledge of the position on surrogacy in other jurisdictions.

Summary

This submission concerns the experience in Australia of regulating surrogacy, with particular attention to an issue which lies at the very heart of law reform in this area. What should the consequences be if people do not comply with the law, either concerning altruistic surrogacy or because they engage in a commercial surrogacy arrangement either domestically or overseas?

As a matter of practice, and notwithstanding laws criminalising commercial surrogacy in every state and territory, there are almost no consequences that flow from disobeying the law. Indeed, the federal government, and independently of the government, the Federal Circuit and Family Court of Australia (FCFCOA), often aid and abet the circumvention of state and territory laws criminalising international commercial surrogacy. In this submission, I explain the reasons why this is so. Essentially, once a baby has been brought into the world, there have to be people recognised as having parental responsibility for him or her. The child, if born to an Australian father, is also entitled to citizenship.

Yet even when referrals are made, as they have been, to prosecuting authorities, no prosecutions eventuate. To the best of my knowledge, there has never been a prosecution of any person engaging in commercial surrogacy, or assisting in the arrangement of commercial surrogacy, despite hundreds of such cases being known to occur each year and a small cottage industry of professionals practising in various ways in arranging or advising upon surrogacy.

It follows that in practice, if not in theory, commercial surrogacy, both domestically and overseas, is not only permitted in Australia; it is almost entirely unregulated, despite there being numerous laws on the books. There are no effective measures in place to ensure that children born to an Australian father will not have been carried in the womb by a woman who is living under conditions of slavery.

Apart from anything else, this complete failure to enforce laws that have only recently been enacted and have widespread acceptance in the community, is a rule of law issue.

The ALRC, if it makes recommendations for reform, is going to have to address this very serious problem. At the very least it needs to make proposals for reform that will ensure that federal law works harmoniously with state and territory laws giving effect to a common legislative intent across state, territory, and federal Parliaments, and providing practical measures that require immigration authorities to act appropriately in support of the enforcement of those laws.

Introduction: The community consensus on commercial surrogacy

Any law reform recommendation to permit commercial surrogacy is likely to be highly controversial in the community.

The ethical position that has informed the law for at least 35 years in Australia is that altruistic surrogacy should be lawful, at least with some regulatory controls, but commercial surrogacy should be illegal. This is a position which was agreed afresh as recently as 2009 by the Joint Working Group of the Standing Committee of Attorneys-General, the Australian Health Ministers' Conference and the Community and Disability Services Ministers' Conference. They agreed upon a nationally consistent approach to the issue of surrogacy, and laws were enacted around this time in the various State Parliaments, mostly in around 2010.[1]

There is no reason to believe that the current view in the community has changed, notwithstanding the advocacy of small but vocal minorities. The Standing Committee on Social Policy and Legal Affairs report, *Surrogacy Matters* (2016) recommended that commercial surrogacy remain unlawful. That recommendation was accepted by the federal Government when it published its response in November 2018. It said:

> While recognising that the substantive regulation of surrogacy arrangements is the responsibility of the states and territories, the Government agrees in principle with the Committee's recommendation that commercial surrogacy should remain illegal in Australia. Acknowledging the exploitation risks to the child and surrogate mother, as evidenced in some international commercial surrogacy arrangements, the Government agrees with the principle of commercial surrogacy remaining illegal under domestic law. The Government recognises the serious risks of exploitation and human rights violation in some overseas jurisdictions conducting commercial surrogacy. The Australian Capital Territory, New South Wales and Queensland have extraterritorial provisions prohibiting Australian residents engaging in international commercial surrogacy. At the Commonwealth level, Australia has comprehensively criminalised human trafficking, slavery and slavery-like practices, including servitude and forced labour. These offences have extended geographical jurisdiction and could apply to international commercial surrogacy arrangements that involve the exploitation of the surrogate mother or the child.

[1] Standing Committee of Attorneys-General, Australian Health Ministers' Conference and Community and Disability Services Ministers' Conference Joint Working Group, A Proposal for a National Model to Harmonise Regulation of Surrogacy (2009). This is available, inter alia, here.

The Allan Review of surrogacy law in Western Australia, published in January 2019[2] likewise recommended that commercial surrogacy should remain illegal. The majority of submissions supported a continuation of that prohibition.

It is difficult to imagine that there has been much change in public opinion since the time of these reports and responses.

Altruistic surrogacy

The conditions and restrictions on altruistic surrogacy vary from state to state. Some are more restrictive than others. Western Australia,[3] and South Australia, for example, do not allow for parentage orders to be made in favour of same-sex couples and impose restrictions on the eligibility of heterosexual couples affected by infertility or at risk of giving birth to a child affected by a genetic disorder or disease. In other states, the law is more liberal in terms of its conditions. For example, s.30 of the *Surrogacy Act 2010* (NSW) restricts surrogacy to cases of "medical or social need". A Bill is being prepared this year in Western Australia to reform the law on altruistic surrogacy, but commercial surrogacy will remain forbidden.

All of the state laws allow surrogates to receive reasonable expenses, and what constitutes reasonable expenses is spelt out in considerable detail.[4]

While there are differences in matters of detail between the laws of the various states and territories, it can be said as a generalisation that there are various restrictions on eligibility to enter into a recognisable altruistic surrogacy arrangement, and there are quite substantial requirements that must be satisfied before a couple can obtain a transfer of parentage under these state laws. There are serious offences that might be committed under these laws by couples who fail to comply with the law, and professionals providing advice and support may also commit offences.

The position in Commonwealth law

The *Family Law Act 1975* (Cth) confirms that the decisions about how to regulate surrogacy are matters for state law, and whatever position is reached under state law is recognised under Commonwealth law.[5] It follows that surrogacy arrangements will lead to parental status being conferred under the FLA if the commissioning couple have had parental status conferred by a court under a state law: s 60HB. This provides:

> 60HB. Children born under surrogacy arrangements
>
> (1) If a court has made an order under a prescribed law of a State or Territory to the effect that:
>
> (a) a child is the child of one or more persons; or
>
> (b) each of one or more persons is a parent of a child;
>
> then, for the purposes of this Act, the child is the child of each of those persons.

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[2] Prof. Sonia Allan, *Independent Review of the Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (2019).

[3] *Surrogacy Act 2008* (WA).

[4] See e.g. *Surrogacy Act 2010* (NSW), s.7.

[5] *Bernieres & Dhopal* [2017] FamCAFC 180.

Commercial surrogacy overseas

The law in Queensland (*Surrogacy Act 2010*), New South Wales (*Surrogacy Act 2010*), and the ACT (*Parentage Act 2004*) specifically make it a criminal offence for parents to be involved in commercial surrogacy arrangements contracted overseas. In some other jurisdictions such as South Australia and Western Australia, an offence may be committed within the jurisdiction as a consequence of international commercial surrogacy arrangement.

Notwithstanding these laws, in recent years there has been a substantial increase in both heterosexual and same sex couples bringing back children to Australia from other countries where the child has been born to a surrogate mother. I am grateful to Mr Stephen Page for collecting the data on this and assisting me to understand the practices in Australia. He records that he has actively assisted as a legal practitioner in more than 1750 surrogacy cases, many of them involving commercial surrogacy overseas. Below is data he provided in a 2023 paper.[6]

Table 2: Comparison of domestic and international surrogacy, Australia 2009-2021

Year	Domestic Surrogacy Births	International Surrogacy Births
2009	14	10
2010	11	<10
2011	19	30
2012	172	266
2013	28	244
2014	29	263
2015	44	246
2016	38	204
2017	51	164
2018	74	170
2019	61*	232
2020	76*	275
2021	NK	223

Clearly, there has been a massive increase in international commercial surrogacy arrangements since 2009, when the state and territory ministers all agreed on the broad parameters of regulation, including a complete ban on commercial surrogacy. While some of those commercial surrogacy

[6] Stephen Page, Surrogacy Laws in Australia And New Zealand, Paper given at the Fertility Nurses Association of Australasia conference, Gold Coast, 3 June 2023.

arrangements are entered into in countries such as the US that can be expected to have reasonably effective regulation, many others have been entered into in countries that are much poorer and where regulation, if it exists at all, is limited.

India used to be a country to which many Australians went for commercial surrogacy, but the Indian Government cracked down on the industry. In 2012 there were 227 children born to Australians through surrogacy in India, but by 2021, there were none. Thailand also used to be a big centre for the industry. In 2016, there were 199 children born to Australians through surrogacy in Thailand. By 2021, there were only 8. This follows public concern arising out of a couple of cases. The first was the Baby Gammy case, (in which the commissioning parents took only one of two children home to Australia, leaving a disabled child behind; it turned out the male was a convicted child sex offender).[7] The second was the discovery of a 'baby factory' in 2014. Nineteen children were born through surrogacy for just one man, Mitsutoki Shigeta, the son of a Japanese dot com billionaire. As a consequence, Thailand changed its laws to enact substantial restrictions on surrogacy. The law only allows altruistic surrogacy commissioned by a married couple and where the surrogate is a relative of one of them. Nepal has also closed down its industry.

This is a pattern. An industry grows up in a developing country. Either there are scandals in that country as there were in Thailand, or the government becomes worried about the morality of the industry and moves to shut it down. Typically, the industry just sets up elsewhere, or commissioning parents go elsewhere to find a friendly jurisdiction. Prior to the Russian invasion, Ukraine had become the largest providing country for surrogacy. There is regulation, but it is estimated that two-thirds of Ukraine's surrogacy industry has been operating illegally.[8]

Systemic non-enforcement

How is it that there could be hundreds of such arrangements contracted overseas each year? At least some of these will be for couples in NSW, Queensland or the ACT, jurisdictions in which it is a criminal offence to engage in such a commercial surrogacy arrangement.

The answer is that there has never, ever been a prosecution. The law on the books may say that commercial surrogacy is illegal; but in practice it is not.

The Department of Home Affairs

The lack of enforcement begins with the federal government. What typically happens, as I understand it, is that an application is made to the Department of Home Affairs to determine whether the child is entitled to citizenship under s.16 of the Australian Citizenship Act 2007. A DNA test will be enough to confirm the genetic parentage of the father. From citizenship, of course, flows many rights such as entitlement to Medicare.

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[7] See *Farnell & Anor and Chanbua* [2016] FCWA 17 .

[8] https://www.balcanicaucaso.org/eng/Areas/Ukraine/Surrogate-motherhood-and-exploitation-in-Ukraine-203929.

When a child is born through surrogacy, the guidance that the Department gives to officers considering such an application for Australian citizenship by descent is to focus on whether the requirements for granting citizenship have been satisfied. I understand that they are told not to focus on whether there has been a breach of State or Territory surrogacy laws. Of course, in most such applications it may be obvious that the child was born from commercial surrogacy.

The application by an Australian genetic father for citizenship of a child born overseas is the one occasion when a governmental authority in Australia is bound to know, or reasonably suspect, that a child has been born through illegal commercial surrogacy. And they do know this. They take steps to confirm the identification of the surrogate in order to make sure the child has not been trafficked, which is commendable. However, apart from this they turn a blind eye to illegality, and thereby collude with flagrant breaches of the law of the states and territories.

As I understand it also, the Department does not involve itself in any exploration of the conditions in which the surrogate has carried the child to term. There is, apparently, no exploration of the wellbeing of the mother or the fairness of the surrogacy arrangement. It is irrelevant to the Department's work. That is understandable in so far as nothing in the Australian Citizenship Act requires the Department to engage in exploration of such issues, nor to play a role in enforcing the law of the Australian states and territories concerning commercial surrogacy. However, it has the effect in practice that a national agreement, emerging from a Joint Working Group of the Standing Committee of Attorneys-General, the Australian Health Ministers' Conference and the Community and Disability Services Ministers' Conference, is in practice not enforced at the federal level.

It follows from this that if it is the eventual recommendation of the ALRC that international commercial surrogacy be legalised under certain conditions, it is essential that the Department of Home Affairs, the Australian Federal Police and the Department of Foreign Affairs all play an active role in seeing that those conditions are strictly adhered to, making sure that Australians do not engage in illegal commercial surrogacy arrangements any more than they engage overseas in the sexual exploitation of children or the trafficking of women for sex.

A fortiori, if it is the eventual recommendation of the ALRC that commercial surrogacy continue to be prohibited, the Department of Home Affairs, the Australian Federal Police and the Department of Foreign Affairs must be actively involved in making sure that Australians do not engage in a practice overseas that is prohibited domestically. The de facto acceptance by the Department of Home Affairs of international commercial surrogacy, irrespective of the circumstances of the pregnancy and the treatment or exploitation of the surrogate mother, is unacceptable. If the federal government has no intention of enforcing whatever laws are eventually agreed on this issue, it would be more honest to have no law at all.

Two recommendations would seem to follow from this. The first is that if the law is to continue to prohibit or restrict commercial surrogacy, whether entered into within Australia or overseas, the Department of Home Affairs needs to be a mandatory reporter if it knows or reasonably suspects that the child has been born as a result of illegal commercial surrogacy. If the eventual recommendation is to allow international commercial surrogacy which meets certain legal

requirements and ethical standards, then the Department of Home Affairs must be actively involved in checking whether all those requirements have been met in the course of processing an application under s.16 of the *Australian Citizenship Act 2007*.

The position adopted by state prosecution authorities

In four cases, *Dudley & Chedi,*[9] *Findlay and Anor & Punyawong*[10] *Seto & Poon*[11] and *Lloyd & Compton*,[12] judges of the Family Court (or its successor, the FCFCOA) have reported commercial surrogacy arrangements to the relevant prosecutorial authorities. There have also been referrals of lawyers involved to relevant authorities. In none of these cases, to the best of my knowledge, has any action occurred.

The position adopted by these three judges is a minority one. There have been a lot of cases in the family courts since 2009 where couples have sought to achieve through orders under the Family Law Act an outcome that they could not get under the state surrogacy laws. In most such cases, no referral for prosecution has been made. On the issue of the potential for prosecution under Queensland law, Ryan J said in *Ellison and Anor & Karnchanit*,[13] (at para [3]):

> [T]he *Surrogate Parenthood Act 1988* (Qld) in which State the applicants and children live, asserts extraterritorial effect and renders the applicants liable to prosecution and potentially imprisonment for up to three years. Of course, imprisonment of the applicants would see two much loved children (from the children's perspectives) inexplicably separated from the only people they have known as parents. The potential for long term psychological and emotional harm to the children were such an event to come to pass is obvious. Thus, so as to ensure that the Court could get to the truth, each applicant was granted a certificate pursuant to s 128 of the *Evidence Act 1995* (Cth).

It may well be that the DPP in the various states has taken the same view as Ryan J – that prosecution is not in the public interest. Of course, conviction for an offence under surrogacy laws does not necessarily mean that any party will be imprisoned. Indeed, such an outcome might reasonably be considered to be unlikely.

If the DPP in each State takes the view that, for whatever reasons, the law of the State should not be enforced, he or she, in a practical sense, adopts the view that commercial surrogacy should be lawful. Perhaps a state or territory DPP might respond by saying that s/he reserves the right to prosecute in egregious cases. It might be thought that the Farnell case was one such matter. David Farnell was the Australian man involved in the "baby Gammy" surrogacy case. It was revealed during the controversy that he had a prior criminal history, including more than 20 convictions for

[9] [2011] FamCA 502.

[10] [2011] FamCA 503.

[11] [2021] FamCA 288.

[12] [2025] FedCFamC1F 28

[13] [2012] FamCA 602.

child sex offences dating back to the 1980s. He had served a term of imprisonment.[14] Despite public outcry and concerns about the welfare of the children involved, he was not prosecuted in relation to the surrogacy arrangement by the Western Australian authorities. The Family Court of Western Australia ultimately ruled that Gammy's twin sister, Pipah, could remain living with Farnell and his wife. Orders were made giving them parental responsibility for her. It follows that neither Mr Farnell nor his wife suffered any legal consequences or detriments from having engaged in a commercial surrogacy arrangement in Thailand.

Achieving legal surrogacy through the Family Law Act

As the Farnell case illustrates, commissioning parents can achieve through orders under the Family Law Act, an outcome that they could not achieve because of the prohibition of commercial surrogacy under state laws. To be clear, there is really no need for couples to get an order from *any* court giving effect to the surrogacy arrangement. Once the child is brought into Australia, and his or her citizenship recognised by the Department of Home Affairs on account of the citizenship of his genetic father, there is nothing more that legally is necessary.

The other intending parent will not be a parent in law, but in practice that may not matter very much. Life is manageable even if the other parent is, in law, only a step-parent. Many blended families operate perfectly well with only one parent formally having parental rights. Unless someone challenges it, or legal parenthood arises for some other reason, life can continue very much as normal. School permission notes can be signed by either parental figure; the child can be taken to the doctor, and consent to medical treatment given, without anyone needing to ask or thinking to require proof, that the parental figure involved is a legal parent. If the surrogate mother is not asserting any parental rights (and that will almost invariably be the case where the child was born through international commercial surrogacy) the fact that she remains legally a parent is neither here nor there. Services Australia will not pursue her for child support, for example.

Orders for parental responsibility

However, in recent years, many commissioning couples have brought applications seeking a parental responsibility order for both of them under the (federal) Family Law Act. Almost invariably, an order for equal shared parental responsibility is made (and whatever parental rights the surrogate mother may have removed), notwithstanding that the child was born as the result of an international commercial surrogacy arrangement.

The reason why in almost all cases, the courts have allowed the couple to achieve, through parental responsibility orders, essentially the same as they are prohibited from achieving under state or territory law, is that there is now a baby or small child to be cared for. Ryan J, in *Ellison and Anor & Karnchanit* at para [87], explained why she disregarded the couple's criminal misconduct:

> Without a doubt a matter such as this raises public policy issues, namely the potential for a declaration of parentage to potentially subvert (in part) at least the spirit of law in Queensland in

[14] https://www.abc.net.au/news/2014-08-06/baby-gammys-father-convicted-on-more-than-20-child-sex-charges/5653502.

> relation to commercial surrogacy. However, the AHRC is demonstrably correct in its submission that "the court is faced with having children in front of it and needs to make orders that are in the best interests of those children, and at that stage it's probably too late to ask whether – or to inquire into the legality of the arrangements that had been made. The court really needs to take children as it finds them".

At paras [91] to [92] she wrote:

> In the exercise of my discretion, I am unable to give greater weight to public policy considerations of the type discussed in *Dudley & Chedi* in priority to the children's interests.
>
> Lest it be overlooked, irrespective of how State law views the applicant's actions, the children have done nothing wrong.

Mary Keyes and Richard Chisholm have commented adversely on this view, saying that the logic of the judge's position is that "if the proposed orders will benefit the children before the court, the orders must be made regardless of the criminality of the arrangement, and regardless of whether the mother and egg donor were subjected to duress or fraud".[15]

Parentage and parental responsibility

Technically, there is a distinction between an order declaring parentage, or transferring parentage, and one for parental responsibility. Grandparents or aunts and uncles could be given parental responsibility without being legal parents, in circumstances where the birth parents are unable to care for their child or unfit to do so. Ryan J in *Ellison and Anor & Karnchanit* at para [91] thought legal parentage had significance for the child "in establishing his or her lifetime identity". She derived this from a High Court decision concerning DNA testing to establish genetic parenthood. Of course, it may be very important to a child, for example, an adopted child, to know who her birth mother and father are. That reasoning does not extend to those declared by the artificial operation of the law to be 'parents' when in the ordinary meaning of the word, they are not.

The reality is that the distinction between parentage and parental responsibility is almost immaterial in practical terms. Perhaps it could matter in an area such as succession law where the deceased has not made a will, but for the most part, the distinction is unimportant.

In any event, the genetic father may be given an order declaring parentage as well as an order for he and his partner to have parental responsibility. The current law is not entirely clear on this. In *Bernieres & Dhopal* [2017] FamCAFC 180, the Full Court of the Family Court held that if the child was born through surrogacy, the biological father was not recognised as the legal father unless he could be so recognised under state surrogacy legislation. In that case, given the arrangement could not be so recognised, the biological father was treated in law as not being a parent under the *Family Law Act*. Consequently, the Full Court ruled, "there is no question that the father is the child's biological father, but that does not translate into him being a parent for the purposes of the Act."

Bernieres & Dhopal was decided a couple of years before the High Court judgment in *Masson v Parsons*. The case was one where a sperm donor male was intended to have a substantial role in the

[15] Mary Keyes and Richard Chisholm, 'Commercial Surrogacy — Some Troubling Family Law Issues' (2013) 27 AJFL 105 at 131.

life of a child being brought up by a lesbian couple. The man had been involved with the child for many years before the dispute with the lesbian couple arose. Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ (the plurality) held (at [26]) that:

> Although the Family Law Act contains no definition of "parent" as such, a court will not construe a provision in a way that departs from its natural and ordinary meaning unless it is plain that Parliament intended it to have some different meaning. Here, there is no basis in the text, structure or purpose of the legislation to suppose that Parliament intended the word "parent" to have a meaning other than its natural and ordinary meaning.

It seems likely that *Bernieres & Dhopal* is inconsistent with this reasoning, but there has been no occasion for the Full Court to consider the matter.

The High Court decision has been applied in a number of cases that have concerned surrogacy arrangements and in which one of the commissioning couple is the genetic father of the child. In these cases, the genetic father has been declared to be the legal father in such circumstances: *Seto & Poon* [2021] FamCA 288; *Tickner & Rodda* [2021] FedCFamC1F 279; *Gallo & Ruiz* [2024] FedCFamC1F 893. Surprisingly, in none of these cases (all of which involved surrogacy arrangements that could not be recognised under state surrogacy law) was there any discussion of *Bernieres & Dhopal*, although in *Gallo & Ruiz* it is at least mentioned in a footnote. As judges sitting at first instance, their Honours should have considered themselves precluded from making a declaration of parentage in favour of the biological father because of that Full Court decision. If the reasoning is incompatible with *Masson v Parsons*, then the proper course is to make a case stated to the Full Court.

By way of contrast to these cases, in *Lloyd & Compton* [2025] FedCFamC1F 28, another case involving illegal commercial surrogacy, Carew J held that she was bound by the Full Court's decision in *Bernieres & Dhopal*. She refused to make a declaration of parentage. The case was brought by a heterosexual couple, living in Queensland, who had commissioned a child through overseas commercial surrogacy. The lawyer representing them had failed in various respects to comply with the rules concerning the information that should be given to the court, but it probably wouldn't have mattered too much if they had followed the procedural rules. Carew J said she would not make the orders for parental responsibility sought because it would circumvent the requirements of Queensland law. She reported the matter to the Director of Public Prosecutions for Queensland.

Carew J took a principled stand by refusing to give the couple, through federal law, the outcome they were prohibited from achieving under state law. I cannot think of another case where the judge has refused to make orders for parental responsibility in favour of a commissioning couple, however limited the information is before the court concerning the circumstances of the surrogacy, and even in circumstances where the surrogate mother and egg donor could have been subjected to duress or fraud.

Is there any reason to be concerned that this could be happening? Yes. There is every reason for concern about practices in some countries, not necessarily because we know that women are acting as surrogates under conditions akin to slavery, but because we have little reason to believe that they are not. Ryan J, in *Ellison and Anor & Karnchanit* (at [4]-[5]) sets out some reasons for concern,

quoting a paper by Chief Federal Magistrate Pascoe, who was later to become Chief Justice of the Family Court.

Nor is it only less developed countries in which the issues may arise. In 2023, the Mediterranean Fertility Institute in Crete was raided by Greek police amid serious allegations of human trafficking, illegal adoptions, and fraudulent IVF treatments. The clinic was accused of exploiting at least 169 women from countries such as Ukraine, Romania, and Georgia. These women were allegedly coerced into becoming surrogate mothers or egg donors and were kept under surveillance. Many of the women involved may not have fully consented to the procedures or understood the terms of their involvement. The scandal affected around 100 Australian couples, some of whom had embryos stored at the clinic or were expecting children through surrogates there.[16]

There have also been various scandals concerning the surrogacy industry in Ukraine. A company operating in the Ukraine, BioTexCom, claims to have held 25 percent of the global surrogacy market as at 2018.[17] It is the largest of several fertility companies operating in Ukraine. The CEO of the company has been investigatedc for child trafficking and tax evasion.[18] The ABC has reported on the issues in Ukraine, including a case of a disabled child abandoned by American commissioning parents.[19] An article in Princeton's Journal of Public and International Affairs in 2020 summarised the issues in that country:[20]

> In most surrogacy contracts, women give up all rights related to controlling their pregnancies. While there is no large-scale data, surrogates report undergoing forced abortions of fetuses unwanted by clients, significant underpayment, unsafe and oppressive living environments provided by surrogacy agencies, poor health care for both birth and pregnancy-related complications, and long-term physical damage due to the surrogacy process (Roache 2018). There is also reported psychological damage, with some surrogates feeling forced to violate their deeply held moral beliefs due to financial pressure.

The Irish government has sought to legalise international commercial surrogacy by creating a system for pre-approval of the surrogacy arrangement before conception.[21] However, in May 2025

[16] See https://www.9news.com.au/world/mediterranean-fertility-institute-surrogacy-scandal-greece/4f5a7885-3bcd-42d1-88eb-ab6ae3d014d0; https://7news.com.au/news/world/australian-newborns-detained-as-fertility-clinic-accused-of-human-trafficking-c-11686755.

[17] https://english.elpais.com/elpais/2018/09/27/inenglish/1538051520_476218.html

[18] https://www.geneticsandsociety.org/biopolitical-times/risky-business-company-behind-stranded-surrogacy-babies-also-promoting; elpais (above).

[19] Hawley, Samantha. 2019. "Damaged babies and broken hearts: Ukraine's commercial surrogacy industry leaves a trail of disasters." ABC News. https://www.abc.net.au/news/2019-08-20/ukraines-commercial-surrogacy-industry-leaves-disaster/11417388.

[20] Emma Lamberton, 'Lessons from Ukraine: Shifting International Surrogacy Policy to Protect Women and Children' Journal of Public and International Affairs, May 1 2020.

[21] Assisted Human Reproduction Act 2024.

it delayed implementation of the scheme because of concerns that it would be contrary to EU laws prohibiting the trafficking of women.[22]

As a consequence of concerns about the exploitation of surrogates and child trafficking, Ryan J, in *Ellison and Anor & Karnchanit* established detailed steps that should be followed to ensure that the court has all the information it needs. Many of these have now been incorporated into Rule 1.10 of the Federal Circuit and Family Court Of Australia (Family Law) Rules 2021. That makes it much less likely that the court will make Orders in circumstances where a child has been trafficked or the egg donor or surrogate mother subjected to duress, but this is only a safeguard for those cases where the commissioning couple bring the matter to court to try to get orders declaring parentage or for parental responsibility. The great majority do not do so, and so the kind of matters that ought to be of grave concern to Australian authorities would go unexamined, notwithstanding that the fact of commercial surrogacy is well-known.

Evidence of matters of concern from the Family Court cases

The Family Court cases give some indications of the scale of the problem, and how little commissioning couples from Australia, who may act in good faith, may actually know about the surrogate they have employed. In many of these cases there can be no reason for confidence that the egg donor or the surrogate has been treated properly.

One illustration is *Wilkie & Mirkja*.[23] The case concerned a surrogate birth in India. The child was conceived by a donated egg which was then fertilised with sperm from one of the male partners. It was placed in the womb of a woman to be the gestational mother. The applicants, a gay male couple, had never met her. The woman needed to be served with documents for the case to proceed, but the solicitor in Mumbai who had organized the surrogacy found that the mother's address 'did not exist'.

The court said that attempts to serve her with the documents would be futile, since there were 'no indications as to her status or intellectual capacity' that would enable it to find that a newspaper advertisement would bring the application to her attention. We can have no idea whether this woman was exploited and to what extent. There would have been no way of knowing whether she was held in conditions of slavery or otherwise ill-treated by the organisers of the surrogacy. The court could also have absolutely no confidence that she understood what she was signing by way of documents - or indeed that the signature on those documents was even hers.

Another such case is *Mason & Mason and Anor*.[24] The Masons, a gay couple, sought parenting orders in relation to twins, born in 2011 to a surrogate mother in India. On the agreement, Ryan J commented as follows:

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[22] Darragh Kelly, Irish Independent https://www.independent.ie/videos/department-of-health-has-delayed-enacting-the-international-surrogacy-provisions-of-the-ahr-act-over-concerns-that-they-will-breach-eu-law-banning-human-trafficking/a644377922.html

[23] [2010] FamCA 667.

[24] [2013] FamCA 424.

> It is not necessary to summarise the entire agreement but it should not pass without comment that the provisions which limit the birth mother's ability to manage her health during the pregnancy and make decisions about delivery of her babies, are troubling. It is also troubling that this 29 page document is written in English. It is signed by the applicant and, because she is illiterate in English and Hindi, the mother's attestation is her thumb print. There is nothing in the document which suggests that before the birth mother signed it that it was read and translated to her…
>
> Although it caused some inconvenience, at the Court's insistence, the Application for Consent Orders and other documents filed in these proceedings were translated and served on the birth mother. This resulted in two affidavits supposedly sworn by her which suggest that she consented to orders that the applicant and respondent have equal shared parental responsibility and that the children live with them. Again, the affidavits were written in English and bore her thumb print. There was no evidence that those documents were translated or that she understood their contents before she placed her thumb print. Eventually, an affidavit was received from Mr S, who is an advocate and notary public in India. He affirmed that he read the documents to the birth mother in Hindi and she acknowledged their content.

The Court had no reason for any confidence that this woman was properly treated in the course of the pregnancy. Indeed the harsh conditions of the contract would point to the likelihood that she was not well-treated, and could have experienced considerable exploitation. In neither case could the Court have been satisfied that the woman was properly remunerated for her surrogacy work, even by the standard of living of her country.

In *Dudley & Chedi,*[25] Watts J observed that the material presented in the proceedings was "starkly deficient" in providing any detail of the financial arrangements entered into between the applicants and:

- The surrogate mother;
- The Thai clinic;
- The donor of the eggs;
- The surrogate mother's independent lawyer; and
- Their own lawyers.

He also had no evidence as to what, if any, safeguards were in place to protect the surrogate mother from emotional or financial harm.

These cases involved surrogacy arrangements in India and Thailand. Neither country provides the opportunity for such commercial surrogacy for Australian couples any more. The low-cost providers of international commercial surrogacy just move on to other places where regulation is limited or non-existent.

The cases cited above, together with other known cases of scandal, indicate that we have no way of knowing how many of the children born to surrogate mothers overseas and brought back into Australia have been born in circumstances that involve exploitation of the mother or grave

[25] [2011] FamCA 502.

breaches of human rights. Nor have we any reason for confidence that the mother has understood her legal position and given fully informed consent to relinquishing her parental rights. For all the immigration authorities know, she may not have understood much about the legal agreement. The position may well be different in those few countries where commercial surrogacy is well-regulated; but even in such countries, the fact that there is proper regulation does not mean that it has been complied with.

This is not to say that the majority of children born through commercial surrogacy and brought back to Australia have been born to surrogate mothers in circumstances that give rise to serious concerns. My point is rather, that as I understand current processes, there is no way of knowing how many surrogate mothers of children brought into Australia have suffered from explotation through onerous contracts, forced caesarians, poor remuneration (or remuneration not actually provided in accordance with the contract) or even conditions akin to slavery.

Options for regulation

A starting point for considering whether and how to reform the law is to recognise that in practice, commercial surrogacy, whether occuring in Australia or commissioned by Australians in overseas locations, is almost entirely unregulated. This is so notwithstanding detailed statutes in all state and territory laws purporting to regulate it. But for the limited checks by the Department of Home Affairs when applications are made for citizenship for the baby, it would be reasonable to say there is no practical regulation of surrogacy.

It would also be reasonable to say that throughout Australia, commercial surrogacy is legal; not because the law says so – it says the opposite – but because those who are in charge of enforcing the law, that is, the police and the prosecutorial authorities, treat it as if it were legal. Within the limits of their role, the staff of the Department of Home Affairs also treat it as if it were legal.

This raises fundamental issues about governmental commitment to the rule of law. If the law passed by Parliament says one thing, and the executive government, together with independent prosecutorial authorities, choose not to enforce the law passed by Parliament at all, then it must be questioned whether the executive government is committed to the rule of law in that area at all. The view taken by some judges, whose authority depends upon their commitment to uphold and enforce the law, is also concerning.

A major reason for this lack of enforcement is that many people actually want it to be legal. They don't want adverse consequences for commissioning couples, whether they are infertile heterosexual couples or gay men. One may, of course, have every sympathy for the couples involved, for whom infertility may be experienced as a great loss. There are many who would support the aspirations of LGBTQ+ organisations, but particularly those representing gay men, that would like to see as few obstacles as possible to commercial surrogacy.

The lack of support for the current societal consensus on prohibiting commercial surrogacy is arguably reflected in the ALRC's terms of reference which require it to consider "how surrogacy arrangements made outside of Australia should be addressed by Australian law" and how

"citizenship, visa and passport requirements for children born of surrogacy overseas be aligned" without recognising the current context – that most of these overseas surrogacy arrangements are made in violation of existing laws and are contrary to the intent of all state and territory laws. While not all states and territories specifically criminalise overseas commercial surrogacy arrangements, no Parliament in Australia has said that domestic commercial surrogacy arrangements should be prohibited while overseas arrangements are absolutely fine.

So a fundamental question that has to be faced is whether the ALRC should support the current status quo, and make commercial surrogacy entirely legal, whether organised in Australia or overseas. That would recognise what is happening in practice. Engaging in commercial surrogacy carries no adverse consequences for the commissioning couple other than that only the genetic father has legal parenthood unless the FCFCOA can be persuaded to give parental responsibility to both (which it almost always will).

I anticipate that the ALRC could not possibly reach that conclusion. Even the most libertarian and irresponsible Western country could not contemplate giving legal recognition to commercial surrogacy arrangements in circumstances where either the egg donor, the surrogate or both were living under conditions of slavery or otherwise subject to duress.

That leads me to the second fundamental question. If there is either continuing prohibition of commercial surrogacy, or it is made lawful only under strict conditions, what consequences ought to follow from the breach of those rules? There is no point having consequences similar to the current laws, for we have already seen that no-one has ever been prosecuted and in other respects, the law has not been enforced. Commissioning couples have been able to achieve, under the Family Law Act, almost all that they are prohibited from achieving under the Surrogacy Acts. Nor have there been any consequences for lawyers who might reasonably be accused of aiding and abetting a criminal enterprise or engaging in a conspiracy to commit a crime.

Whatever the ALRC recommends by way of regulation, there will be a baby, together with a birth mother who has no interest in caring for the child (and in most cases will be in another country). That child will need to have people with parental responsibility.

The strongest position that might be taken is that if a child is brought into the world in breach of surrogacy laws, this should be treated as a conclusive indication that the commissioning parents are not fit to parent and the child should be surrendered for adoption. That position could be enforced under Australian citizenship law by providing that the Government should not admit any newborn child to the country, or otherwise grant him or her citizenship rights, if after investigation, it is shown that the child has been brought into the world through surrogacy arrangements in breach of Australian law. The consequence would, in all probability, be that the child would be taken into the care of child protection authorities in that country and put up for adoption there. Realistically, no surrogacy arrangement would occur, and no child be brought into the world at all. It would not be in the interests of the commissioning couple, the surrogate mother nor the business people who arrange surrogacy, to enter into a surrogacy arrangement with an Australian couple in circumstances where that child could not live with that couple in Australia.

I am not recommending that this position be taken; I am only indicating the kind of consequence which would, in practice, bring to a complete end Australian involvement in illegal and unethical commercial surrogacy.

I recommend that the ALRC consider how other countries approach this issue and enforce the law. A recent summary of the position in several countries has been written by an American surrogacy agency.[26]

Conclusion

Unless there is a willingness to prosecute or otherwise enforce the law, then a child could be born in the context of the most egregious violation of the surrogate mother's human rights, and de facto the arrangement will be lawful. Effectively, there is no regulation at all in Australia, whatever the law says, and even if the woman was carrying the child in conditions of slavery.

This is not an acceptable situation; but it is where the ALRC review needs to begin; and grappling with these issues will, undoubtedly, be an onerous task.

[26] https://www.gatewaysurrogacy.org/countries-where-surrogacy-is-illegal-a-global-legal-overview/