Submission

to the

Review of Surrogacy Laws

by the

Australian Law Reform Commission

Email: surrogacy@alrc.gov.au
Website: https://www.alrc.gov.au/inquiry/review-of-surrogacy-laws/

by

FamilyVoice Australia

4th floor, 68 Grenfell St, Adelaide SA 5000
Telephone: 1300 365 965
Email: office@familyvoice.org.au
Website: www.familyvoice.org.au

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1. Introduction

FamilyVoice Australia is a national Christian advocacy group – promoting family values for the benefit of all Australians. Our vision is to see strong families at the heart of a healthy society.

2. Terms of Reference

The terms of reference for the inquiry are:

I, the Hon Mark Dreyfus KC MP, Attorney-General of Australia, having regard to

- *surrogacy providing Australians who are unable to give birth an opportunity to have a child;*
- *the medically, emotionally, financially and legally complex nature of surrogacy arrangements;*
- *the legislative responsibilities that states and territories have with regards to surrogacy laws, and current inconsistencies in legislative arrangements across Australian jurisdictions;*
- *the human rights of children born of surrogacy, their surrogate mothers and intended parents, and the risks commercial surrogacy can pose to vulnerable women and children;*
- *the increasing access by Australians to surrogacy arrangements and services overseas.*

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to s 20(1) of the Australian Law Reform Commission Act 1996 (Cth), a review of Australian surrogacy laws, policies and practices to identify legal and policy reforms, particularly proposals for uniform or complementary state, territory and Commonwealth laws, that:

- *are consistent with Australia's obligations under international law and conventions; and*
- *protect and promote the human rights of children born as a result of surrogacy arrangements, surrogates and intending parents, noting that the best interests of children are paramount.*

In particular, the ALRC is asked to consider:

- *how to reduce barriers to domestic altruistic surrogacy arrangements in Australia, including by ensuring surrogates are adequately reimbursed for legal, medical and other expenses incurred as a consequence of the surrogacy;*
- *how surrogacy arrangements made outside of Australia should be addressed by Australian law;*
- *what is the appropriate recognition of legal parentage in Australia for children born of surrogacy overseas, and how may citizenship, visa and passport requirements for children born of surrogacy overseas be aligned;*
- *the information that should be available to children born from surrogacy arrangements, including what information should be included on a child's birth certificate in order to meet Australia's human rights obligations under the Convention on the Rights of the Child.*

In undertaking its inquiry, the ALRC should consider Australia's human rights obligations and any findings and recommendations of the 2021 Working Group on Surrogacy Final Report to Attorneys-General and Relevant Ministers: Opportunities to achieve national consistency in surrogacy regulation in Australia, the 2016 House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters report and Australian Government response, the 2013 Family Law Council report on Parentage and the Family Law Act 1975, the 2009 report of the Standing Committee of Attorneys-General A Proposal for a National Model to Harmonise Regulation of Surrogacy, the UN Special Rapporteur on the sale and sexual exploitation of children 2019 Thematic study of safeguards for the protection of the rights of children born from surrogacy arrangements and 2018 Thematic study on surrogacy and sale of children, and relevant reviews of state and territory surrogacy legislation since 2017.

3. What is a surrogacy arrangement?

The *WA Surrogacy Act 2008* defines a **surrogacy arrangement** as:

> *an arrangement for a woman (the **birth mother**) to seek to become pregnant and give birth to a child and for a person or persons other than the birth mother (the **arranged parent** or **arranged parents**) to raise the child, but the term does not include an arrangement entered into after the birth mother becomes pregnant unless it is in variation of a surrogacy arrangement involving the same parties.*[1]

It is important to understand that surrogacy arrangements are made *prior to pregnancy*, and that any arrangement made *after pregnancy* does not fall under this definition.

4. Medical and welfare issues

Some people, such as US city councillor David Catania, see no problems with surrogacy. *Forbes* magazine comments:

> *For Catania, and many other supporters of surrogacy, it's a zero sum game: the parents get the child they so desperately want and the child is given life. Who could object to that?*[2]

While life is a good thing, and a desire for children is good, the circumstances in which children are brought into the world have significant implications.

Some surrogate children are genetically related to both commissioning parents, but in other cases donor gametes are involved. UK infertility doctor Peter R. Brinsden explains the different surrogacy processes:

> *When the intended host is inseminated with the semen of the husband of the 'commissioning couple', the procedure is known as 'straight surrogacy', or 'partial surrogacy'. The resulting child is genetically related to the host.*[3]

Thus, surrogacy is partial when the child is genetically related to the birth mother, who is then only a partial substitute or surrogate. Dr Brinsden continues:

> *When the sperm and oocytes of the "genetic couple", or "commissioning couple" are used and IVF is carried out on them and the resulting embryos are transferred to the host, this is known as "gestational surrogacy", "full surrogacy", "host surrogacy" or "IVF surrogacy". The "surrogate host" is genetically unrelated to any child born as a result of this arrangement.*

In full surrogacy, the birth mother is a full substitute, having no genetic relationship with the child.

4.1. Full surrogacy issues

When a commissioning couple arranges for an embryo to be created using *in vitro fertilisation* (IVF) and implanted in the surrogate mother's uterus with the intention of establishing a pregnancy, there are risks for the surrogate mother, the child and others involved.

Any pregnancy involves risks, but a surrogate pregnancy involves additional risks – physical, psychological and legal – that constitute a form of exploitation of the surrogate mother.

Maternal bonding

Surrogacy fails to take into account the natural bond formed between mother and child during pregnancy. This bond is a natural process stimulated by the hormone oxytocin associated with birth and breast feeding.[4]

A woman consenting to become a surrogate mother makes a decision – before the conception of the child – to relinquish the child she will bear. This decision is made when she is *not* subject to hormonal and other bonding influences. She is expected or required to act on this decision after the birth, when she *is* strongly influenced by bonding emotions. Binding a woman in advance, to a decision that may cause her profound distress later, is unjust to the woman.

Surrogacy arrangements also reduce a woman's experience of gestational motherhood to a mere bodily service. This depersonalising of the natural human experience of pregnancy may prove harmful to the birth mother, her family (including her husband and her children) and to the child she is carrying.

Surrogacy places the carrying mother at increased risk of emotional burden and trauma, with some mothers struggling to relinquish the link to their newborns that is created naturally in the pregnancy process. The presence of emotional pain, loss and despair for the surrogate mother can last a lifetime and lead to continuing suffering.[5]

The bond between a mother and her child is alluded to in the UN Declaration on the Rights of the Child:

> *The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security;* ***a child of tender years shall not, save in exceptional circumstances, be separated from his mother****.[6] (emphasis added)*

In the case of altruistic surrogacy, the problem may be exacerbated if the birth mother is going to continue to have any close contact with the child. This is likely to increase the bond for both mother and child.

Child abandonment

Best practice after-birth care says babies and mothers have a physiologic need to stay together as much as possible. Jeanette Crenshaw reports in the *Journal of Perinatal Education* that "unlimited opportunities for skin-to-skin care and breastfeeding promote optimal maternal and child outcomes."[7] Yet surrogacy arrangements override this scientifically proven best practice.

Myriam Szejer, a child psychiatrist and Jean-Pierre Winter, a psychoanalyst, write about the wounds of abandonment of a newborn child in the French journal *Liberation*:

> *"For the defenders of surrogacy, parental love will prevent the child from suffering from the after-effects of this mode of conception. It is forgotten that the prescription of in-vitro fertilisation (IVF) necessary for surrogacy is the equivalent of "an order to abandon one's child".*
>
> *The importance of epigenetics on the physical and psychological development of the fetus is known, as well as the emotional bond between the pregnant woman and the child she is carrying and the deleterious effects of the separation of mother and baby at birth. In order not to cut this link, doctors place the newborn on the mother's womb after delivery, so as to restore its antenatal benchmarks which are stored and recorded for him as identity. They invented kangaroo care, the "skin to skin" contact of mother and baby while in hospital, because it is in the early postpartum period that the foundations of self-image are built. Paediatricians and midwives have seen how these practices improved the prognosis of survival, length of*

> *hospitalization, and the success of breastfeeding. How could doctors now prescribe abandonment of the newborn child? It is not gametes that the newborn recognizes as mother, but the woman who bore him. We know that the wounds of abandonment junction as a bilateral amputation of Self. The most successful adoptions fail to erase the traces, conscious and unconscious of this abandonment, both for the psyche of the child and for the mother who gave up part of herself.*
>
> *In the case of surrogacy this separation is legally programmed and not the result of a tragedy of life, as in adoption."*[8]

Conflicts during pregnancy

Another risk for a surrogate mother is a conflict over whether she is free to make her own lifestyle and medical decisions during her pregnancy. What is her obligation when a disagreement arises with the commissioning parents?

In 2001 a UK surrogate mother carrying twins sued a Californian couple who renounced the contract when she refused to abort one of her unborn babies.[9] With no genetic link to the baby, will the birth mother have any rights over health issues that might lead to abortions?

Such a case is not unlikely, as assisted reproductive technology (ART) increases the risk of multiple births—alongside "sub-optimal outcomes for pregnant women and their offspring", such as disabilities.[10]

Children with disabilities

A child born with a disability may be rejected by the commissioning parents, and by the birth mother, with no one willing to take parental responsibility for the child.

Does this leave the birth mother solely responsible for the child? Does the husband or partner of the birth mother become the legal father in these circumstances? Are the commissioning parents responsible for child support payments?

Would it be lawful for a surrogacy arrangement to include a commitment by the surrogate mother to abort the pregnancy in the event of a prenatal diagnosis of disability or imperfection or the non-preferred sex?

The US case of "Baby Doe" illustrates these issues:

> *Mrs Judy Stiver, a Michigan housewife, agreed to bear a child for Alexander Malahoff and his wife for a fee of $10,000. All went well until the child was born, when it was discovered that he suffered from microcephaly - a condition whereby the child has an abnormally small head and often turns out to be mentally retarded. Mr Malahoff no longer wanted the child, and told the hospital to withhold treatment - Mrs Stiver also rejected the child, saying that there had been no maternal bonding. The hospital went to court and won permission to care for the child and the Michigan Department of Social Services fostered the child out.* [11]

The very fact of "commissioning" or "arranging" a child reduces the child to an object rather than a person in his or her own right.

In the case of sex selection, National Health and Medical Research Council (NHMRC) guidelines that prohibit sex selection are unenforceable overseas. But either overseas or in Australia, banning sex selection does not resolve the objectification of surrogate children, where commissioning parents can simply walk away from the 'deal'. [12]

Risks to other children

Surrogacy may harm other children related to the birth mother. Existing children of the mother acting as a surrogate may form a relationship with the new child in the mother's womb. These children may then suffer grief on learning that the unborn baby is to be given away. They may suffer anxiety, fearing that they too may be given away.

Surrogacy also undermines the status of children in general by allowing the very existence and life of the child to be the object of an arrangement between parties. The notion that a child's parentage can be determined by an arrangement or contract, rather than by birth or an adoption in the best interests of the child, is subversive of the child's right to identity and security.

Full surrogacy poses serious risks for the birth mother, the child and all others involved. It breaks the natural bond of a mother and the child she has borne. It has the potential to cause emotional distress to other children in the family of the surrogate mother. It undermines the value of human life – reducing the child to a mere object of an arrangement.

4.2. Partial surrogacy issues

Partial surrogacy, in which the child is genetically related to the surrogate mother, involves more risks than those associated with full surrogacy.

Maternal bonding

The natural bonding between a mother and the child in her womb and after birth is further strengthened when she knows the child is genetically related to her. In partial surrogacy, trauma of relinquishing the child after birth is likely to be greater than with full surrogacy.

The reality of such trauma is indicated in the Family Court of Australia case *Re Evelyn*, where the birth mother Mrs S is reported as follows:

> *It emerges from the material of Mrs S that she was struggling with the task of coming to grips with her decision to hand the child to the Qs. She attended grief counselling and had contact with a Relinquishing Mothers' Group. She says she came to the realisation that she could no longer abide by the arrangements. She says she was suffering emotionally as a result of the separation from her daughter and that, after much agonising, she concluded that it was better for herself, the child Evelyn and for her other children for Evelyn to be returned to her.*[13]

Another example is the birth mother "Rosie" from Brisbane, who tells of having been through "nothing but heartache and regret":

> *"As soon as the baby was born it all changed," the married friend of the couple said.*
>
> *"I was crying in hospital when he was having his first bath, I couldn't watch, I thought what the hell have I done?*
>
> *"I never thought having a child and giving him away would make me feel like this.*
>
> *"I regret everything, I don't regret Connor, I regret the decision very much, I just wish I'd never done it."*[14]

These examples indicate the strength of the mother-baby bond that may not be appreciated when the surrogacy arrangement is made.

Identity bewilderment

Children born as a result of a surrogacy arrangement are likely to share the "identity bewilderment" experienced by children born as a result of donor insemination. Recent accounts, written by adults who were conceived as a result of donor insemination, describe the profound problems of identity and belonging they experienced both as children and as adults.[15]

Some of these problems were related to secrecy – not being told the truth about their origins but sensing that they were different. However, problems also persisted after the truth was revealed or discovered, including a longing to know the absent genetic parent.

In a submission to the New South Wales Legislative Council Inquiry into Altruistic Surrogacy by Tangled Webs Inc., this group of donor-conceived persons argued, on the basis of their lived experience, that:

> *A child's best interests are served when it is conceived and gestated by, born to and nurtured by, one mother. To fragment maternal roles through ova donation/gestational surrogacy is to deny a child its entitlement to a whole mother.*[16]

The first detailed survey of children conceived by donor insemination, fittingly titled *My Daddy's Name is Donor*, compared outcomes and opinions of these children with children who were adopted and with children who were raised by their own biological parents.

From *My Daddy's Name is Donor*:

> *[Y]oung adults conceived through sperm donation are hurting more, are more confused, and feel more isolated from their families. They fare worse than their peers raised by biological parents on important outcomes such as depression, delinquency and substance abuse. Nearly two-thirds agree, "My sperm donor is half of who I am."*
>
> *Young adults conceived through sperm donation (or "donor offspring") experience profound struggles with their origins and identities.*
>
> *Sixty-five percent of donor offspring agree, "My sperm donor is half of who I am." Forty-five percent agree, "The circumstances of my conception bother me." Almost half report that they think about donor conception at least a few times a week or more often.* [17]

Commercial and "altruistic" surrogacy were raised by these donor-conceived people as problematic:

> *The role of money in their conception disturbs a substantial number of donor offspring. Forty-five percent agree, "It bothers me that money was exchanged in order to conceive me." Forty-two percent of donor offspring, compared to 24 percent from adoptive families and 21 percent raised by biological parents, agree, "It is wrong for people to provide their sperm or eggs for a fee to others who wish to have children."* [18]

They experience confusion, tension and loss:

> *Family relationships for donor offspring are more often characterised by confusion, tension, and loss.*
>
> *More than half (53 percent) agree, "I have worried that if I try to get more information about or have a relationship with my sperm donor, my mother and/or the father who raised me would feel angry or hurt."*

Notably, donor-conceived children suffer more identity bewilderment than adopted children:

> *Seventy percent agree, "I find myself wondering what my sperm donor's family is like," and 69 percent agree, "I sometimes wonder if my sperm donor's parents would want to know me."*

> *Nearly half of donor offspring (48 percent) compared to about a fifth of adopted adults (I9 percent) agree, "When I see friends with their biological fathers and mothers, it makes me feel sad." Similarly, more than half of donor offspring (53 percent, compared to 29 percent of the adopted adults) agree, "It hurts when I hear other people talk about their genealogical background."*
>
> *More than half say that when they see someone who resembles them they wonder if they are related. Almost as many say, they have feared being attracted to or having sexual relations with someone to whom they are unknowingly related. Approximately two-thirds affirm the right of donor offspring to know the truth about their origins. And about half of donor offspring have concerns about or serious objections to donor conception itself, even when parents tell their children the truth.* [19]

It must be kept in mind that surrogacy arrangements impose this fragmentation of parenthood on the child as a result of an intentional plan formed before the conception of the child, not unavoidably encountered through the exigencies of dealing, after the fact, with a crisis pregnancy.

Children deserve one full mother rather than intentional creation of a fragmented motherly role, namely through having a birth mother, commissioning mother and possibly a separate genetic mother.

These voices, because they most clearly represent the interests of those children who may be born as a result of surrogacy arrangements, should be sufficient to persuade significant restrictions on the practice of surrogacy in Australia.

Recommendation 1:

Since children are entitled to know their true biological origins, full records of donors of ova or sperm should be recorded on a child's birth certificate.

4.3. Issues with surrogacy for single persons

A surrogacy arrangement, either full or partial, for a single female or male commissioning parent, necessarily requires either a sperm donor or an egg donor. Such surrogacy involves the risks described above for full and partial surrogacy arrangements – and the additional risks of children being deprived of either father or mother role models.

Deprivation of a father role model

Decades of social science data reveal that fathers have a unique and important role in the development of children.

> *Fathers excel when it comes to discipline, play, and challenging their children to embrace life's challenges… Typically, fathers engender more fear than mothers in their children because their comparatively greater physical strength and size, along with the pitch and inflection of their voice, telegraph toughness to their children… Engaging in rough physical play with dad teaches children how to deal with aggressive impulses and physical contact without losing control of their emotions…*
>
> *Compared to mothers, fathers are more likely to encourage their children to take up difficult tasks, to seek out novel experiences, and to endure pain and hardship without yielding. Fathers are more likely than mothers to encourage toddlers to engage in novel activities, to interact with*

> *strangers, and to be independent; and as children enter adolescence, fathers are more likely to introduce children to the worlds of work, sport, and civil society.*[20]

Girls whose fathers left the family early (before age 5) were five times more likely in the US and three times more likely in New Zealand to become pregnant as a teenager compared to girls from traditional families.[21]

Male adolescents in all types of families without a biological father (mother only, mother and stepfather, and other) were more likely to be incarcerated than teens from two-parent homes, even when demographic information was taken into consideration in analyses. Youths who had never lived with their father had the highest odds of being arrested.[22]

Deprivation of a mother role model

Mothers also have a unique and important role in raising their children that is different from a father's role.

Professor of sociology William Wilcox discusses the care and love of a mother:

> *Mothers have a distinctive ability to understand infants and children. Mothers also excel in interpreting their children's physical and linguistic cues. Mothers are more responsive to the distinctive cries of infants. They are better able than fathers, for instance, to distinguish between a cry of hunger and a cry of pain from their baby, and better than fathers at detecting the emotions of their children by looking at their faces, postures, and gestures… adolescents report that their mothers know them better than their fathers do.*
>
> *… mothers are better able than fathers to read their children's words, deeds, and appearance to determine their emotional and physical state. This maternal sensitivity to children helps explain why mothers are superior when it comes to nurturing the young, especially infants and toddlers. Because they excel in reading their children, they are better able to provide their children with what they need—from a snack to a hug—when they are in some type of distress.*[23]

Psychologist A. D. Byrd adds:

> *The critical contributions of mothers to the healthy development of children have been long recognized. No reputable psychological theory or empirical study that denies the critical importance of mothers in the normal development of children could be found.*[24]

Charles H. Zeanah, Professor of Psychiatry and Clinical Pediatrics at the Tulane University School of Medicine commented on maternal deprivation as follows:

> *ethological attachment theory, as outlined by John Bowlby ... 1969 to 1980 ... has provided one of the most important frameworks for understanding crucial risk and protective factors in social and emotional development in the first 3 years of life. Bowlby's (1951) monograph, Maternal Care and Mental Health, reviewed the world literature on maternal deprivation and suggested that emotionally available caregiving was crucial for infant development and mental health.*[25]

A surrogacy arrangement to satisfy the wants of a single male or female commissioning person is never in the best interests of the child, since it creates a child who will be deprived of either a father or mother role model.

Surrogacy also compromises the long-term self-identity of surrogate-born children, and the physical and psychological wellbeing of such children and their birth mothers.

Recommendation 2:

Single parenthood surrogacy should be banned because it deprives a child of either a father or mother role model.

5. Exploitation and protection issues

5.1. "Altruistic" and Commercial Surrogacy

The Reproductive Technology Council, established to help regulate assisted reproductive technology in WA, defines altruistic surrogacy as:

> *a practice whereby a woman agrees, for no financial gain, to become pregnant and bear a child for another person or persons to whom she intends to transfer the child's care at, or shortly after, the child's birth. (Specific expenses incurred, associated with the pregnancy and birth, may be reimbursed).*[26]

The lack of "financial gain" sets it apart from commercial surrogacy where a woman bears a child for financial gain.

Payments under "altruistic" surrogacy

All states in Australia require "altruistic" surrogacy arrangements, prohibiting surrogacy for commercial arrangements. However, they allow for reimbursements to be made to the birth parents for costs associated with the surrogacy.

For example the WA *Surrogacy Act 2008* allows reimbursement of expenses which include medical expenses, earnings foregone, psychological counselling, or health insurance.

Under section 6(3)(b) of the WA Act, a birth mother is allowed to receive two months paid leave. The average weekly total cash earning for women working full-time in November 2024 is $2,027.20 in the public sector and $1,739.30 in the private sector.[27] If they are given the lesser of these two figures as a wage over two months in an "altruistic" arrangement, they would receive approximately $14,000. This paid maternity leave could be on top of employer paid leave, as well as government parental leave pay.[28]

On top of this, medical expenses that are taken out because of the surrogacy arrangement are usually considered reasonable. Health insurance for pregnancy and IVF can cost around $267 - $348 a month.[29] But this comes with a 12 month waiting period so that for the required wait, plus time to get pregnant, and pregnancy, the costs will reach into the thousands of dollars.

Nefariously, the power is put in the hands of the commissioning parents. If they don't want to pay for a working woman, they can seek a jobless woman. If they don't want a woman who insists on private health care, they can choose a woman who would settle with public health care. Websites like Surrogate Finder or Surrogate Sisters or even Facebook could facilitate this.[30] This is why even "altruistic" arrangements are commercial in nature.

Recommendation 3:

Surrogacy arrangements that are supposedly altruistic nevertheless include commercial elements that allow commissioning parents to choose the cheapest womb. Those involved are still commodified and the practice should not be lawful.

Gamete donation

Some surrogacy arrangements involve the use of donor sperm. In these cases, the way sperm is collected should be carefully considered.

Australian fertility clinic *Fertility First* markets one of their benefits as follows:

> *Becoming a sperm donor is a generous and life changing thing to do and will give you the rare opportunity to do something totally altruistic for someone.*
>
> *Providing donor sperm is the most precious gift of all to the recipient women – from this they can have a child which would have been impossible otherwise.*[31]

Fertility First further states that:

> *In Australia, it is against the law to profit from the donation of sperm as per the NSW Human Tissue Act 1983 and NHMRC Ethical guidelines on the use of assisted reproductive technology in clinical practice and research 2007. However, we do reimburse sperm donors for their time and travel expenses.*[32]

If children are "the most precious gift", why is it okay for money to be the motivation to donate sperm?

Donor-conceived people report that "it bothers me that money was exchanged in order to conceive me" and that "it is wrong for people to provide their sperm or eggs for a fee to others who wish to have children."[33]

IVF Albury offered travel reimbursement packages valued at $7,000 to Canadian men to come to Albury and make ten donations over a two-week period.[34]

If sperm donation is meant to be genuinely altruistic, all payments for donors, including egg donors who could similarly profit, should be prohibited.

But even if sperm donation was not profitable, commissioning parents are encouraged to shop around for the right male donor. IVF Australia provides patients with access to a pool of potential de-identified [sperm] donors and enables them to pick a donor based on answers to an "in-depth" questionnaire.[35] This process of researching, selecting, and buying a child is unmistakably like just another purchase, even without money exchanging hands, and contributes to the commodification and loss of dignity of children.

Recommendation 4:

To decrease the commodification of children, all payment for gamete donation and any selection process of gamete donors should be prohibited.

Payments under commercial surrogacy

Commercial surrogacy involves rewarding a woman for the use of her womb.

Some people believe that the legalisation of commercial surrogacy will end exploitation, as Esther Han argued in the Sydney Morning Herald:

> *Australia should legalise commercial surrogacy to stop the exploitation of poor women.*[36]

The argument is that to restrict payments to poor (possibly overseas) women gives them no recognition for their dangerous and time-consuming act. A reward is due payment for their services, that would enable them to start a business or improve their standard of living.

Yet in that same article it is rightly argued that those same poor women can still be exploited:

> *Melbourne-based bioethicist Leslie Cannold opposes commercial surrogacy, insisting [the] same exploitative elements suffered by women in developing countries could exist in Australia under Mr Pascoe's proposed system. "We should not create a situation in which we coerce people economically," she said.*

The exploitation manifests itself through family pressure and coercion on one of their younger relatives to be a surrogate, or, exploitation of an infertile couple's desperation to have a child. There is also no guarantee that the poor surrogate woman will actually get the money, with their family, middle-men, or corruption working against them.

Stephen Page, "one of Australia's leading surrogacy lawyers", gave an example that he thought would be resolved if commercial surrogacy were legalised:

> *Ron and Margaret live in Adelaide. They undertake surrogacy in Adelaide. During the pregnancy, Ron and Margaret separate. Neither want the resulting child. What happens to the child? They are not legally obliged to take the child as there is no contract. The child would be the child of the surrogate and her partner as a matter of law, although the child is genetically the child of Ron and Margaret. The surrogate and her husband could either keep the child or put it up for adoption. If they decide to keep the child, they might be able to sue Ron and Margaret for damages for issue estoppel, but are unable to receive child support, and the basis for the payment of damages is based on Ron and Margaret having property or income that can be recovered against.*
>
> *The only way that this perception can be adequately dealt with is by allowing commercial surrogacy to occur in Australia…*[37]

But the problem of an unwanted child is not dealt with by allowing Australians to commercially benefit from surrogacy. Attaching a commercial benefit to surrogacy only increases the commodification of children.

Page's scenario leads more naturally to the conclusion that all surrogacy arrangements are inherently unstable and that they should be discouraged or prohibited.

Commercial surrogacy is unethical because it reduces the worth of a child to a sum of money. The child is reduced to a "transaction". A mother's womb is reduced to a rental arrangement. This is also dangerous because if the birth mother is not satisfied for any reason with the financial process, there is no other motive for her to keep the baby in good health (or even alive, if abortion is an option for her).

Christopher White, Director of Education and Programs at the Center for Bioethics and Culture, summarises the situation:

> *for surrogate children, this is nothing short of the buying and selling of children—a modern form of human trafficking.*[38]

State laws that make surrogacy arrangements for reward illegal are therefore to be commended.

Recommendation 5:

Surrogacy arrangements for reward should be kept illegal to help keep children free from commodification.

International commercial surrogacy

The Department of Immigration and Border Protection has defined international surrogacy as:

> *a surrogacy arrangement involving a surrogate mother who lives in an overseas country. This includes surrogacy involving either an altruistic or commercial arrangement.*[39]

If surrogacy arrangements in Australia are fraught with dangers, international arrangements are even more so. This is because relational connections are usually weak, financial transparency can be unattainable, and law enforcement is more likely to be corrupted.

The sheer physical distance between the surrogate and the commissioning parents is such that a relationship is difficult to establish.

Lowering the relational connection increases the chance of commodification and exploitation of birth mothers. Financial transparency is important too because without it, any payments made could be taken by a middle-man.

With regard to commercial surrogacy arrangements, not all states have legislation making it an offence to enter into overseas commercial surrogacy arrangements. The Australian Government advises on a its Surrogacy website:

> *The surrogacy laws in New South Wales, Queensland and the Australian Capital Territory make it a criminal offence for their residents to travel overseas and engage in commercial surrogacy. Penalties include fines or imprisonment.*[40]

As argued earlier, "altruistic" surrogacy is too similar to commercial surrogacy to be considered beneficial to children and society.

The Commonwealth should consider options to prevent would-be commissioning parents contracting overseas surrogacy arrangements – whether commercial or "altruistic".

Recommendation 6:

Overseas commercial and so-called "altruistic" surrogacy arrangements should be prohibited in order to protect the fundamental rights of children and prevent the exploitation of vulnerable women.

5.2. Protections for the child

The "best interests of the child"

Most surrogacy (and adoption) literature refer to making arrangements in the "best interests of the child". This involves making value judgments on the best environment for children. Compassion for others dictates we care for families who have gone through a divorce and now live with one parent. However, intentionally bringing a child into a single parent family that may already be fragile and stressed is not in the best interests of the child.

Consequently, when Queensland's *Surrogacy Act 2010* was drafted, the Queensland Government proposed to:

> *make it a criminal offence, punishable by up to 3 years imprisonment, for intended parents who are gay, lesbian, single or in a de facto relationship of less than 2 years to enter into or offer to enter into an altruistic surrogacy arrangement.*[41]

The best family environment for a child

A large body of social science research confirms the near universal belief, across times and cultures, that man-woman marriage is the best environment for raising children. Children flourish best on a range of indicators (including educational outcomes, school misbehaviour, smoking, illegal drugs, and alcohol consumption, sexual activity and teen pregnancy, illegal activities and psychological outcomes) when they are raised by their biological mother and a father in a publicly committed, lifelong relationship.[42]

A few examples of particular research findings illustrate this general conclusion.

Children who are raised by their natural or adoptive married parents are likely to be much healthier than the children of divorced parents or the children of single parents who were never married. The evidence shows that being born into a secure man-woman marriage gives the average child great advantages in health, happiness, longevity and career success over children born into less fortunate circumstances.[43]

Divorce and unmarried child-bearing have negative effects on children's physical health and life expectancy.[44] The health advantages of man-woman marriages remain, even after taking socioeconomic status into account.[45] Even married parents who fight often have happier and healthier children than divorced parents.[46, 47, 48]

Remarriage generally does not help the children of divorce. Children in "blended" families are many times more likely to be the victims of physical violence or sexual abuse than children who live with both natural parents,[49, 50, 51] and they are far less healthy, happy and successful in the long run.[52]

Since cohabiting couples break up more frequently than married couples divorce, the risks to children of cohabiting parents are greater.[53] Studies show that children raised in families containing one non-biological parent are many times more likely to be abused than children raised by both biological parents.[54, 55]

Some states allow any married and de facto couples to initiate a surrogacy arrangement. However, the above research shows that man-woman marriage, not cohabiting relationships, is the best environment for children to be raised. To allow de facto couples to enter into surrogacy arrangements is not in the best interests of the child and should not be permitted.

Recommendation 7:

If the best family environment for the child is the measure, and if surrogacy is not prohibited, married heterosexual couples with a record of long-term relational stability should be the only family structure permitted to enter into surrogacy arrangements.

Single and lesbian women

Most Australian states allow single women to enter a surrogacy arrangement. These provisions would also implicitly make a woman in a lesbian relationship eligible to be a commissioning parent.

As argued above, decades of social science research show that the best interests of a child require both father and mother role models. Yet, in conflict with the available evidence, state acts provide for children to be deliberately conceived and born in sub-optimal circumstances.

The inclusion of a single woman as an "eligible person" allows the act of deliberately raising a child without a father. It is never in the best interests of a child to grow up without knowing their father, and without having a male role model in their lives.

> ***Recommendation 8:***
>
> ***If surrogacy is not prohibited, the eligibility of a single woman to become a commissioning parent in a surrogacy arrangement should be removed, since this would deliberately deprive the child of a father role model.***

Single and homosexual men

Most states allow single men to be eligible for seeking a parentage order.

A South Australian homosexual couple "Mark and Matt" went to Thailand for their children. They argue:

> *There is not a part of parenting that is gender specific.*[56]

However, as argued above, this assertion contradicts the available evidence. Furthermore, the UN Convention on the Rights of the Child provides as follows:

> ***Article 7(1)***
>
> *The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*

Allowing a male parent intentionally to raise a child without a mother would deny the child's "right to know and be cared for" by his or her mother, in breach of the Convention.

Therefore, as the interests of a child are best served by receiving the care of his or her mother for healthy development, single or same-sex men should not be entitled to seek a parentage order.

Children's well-being is adversely affected by being deprived of either a mother or a father. Fathers and mothers make different contributions to a child's upbringing. Neither can adequately substitute for the other.[57]

In the light of this evidence, it is unconscionable to continue to validate arrangements made before the conception of a child, that may result in that child being the subject of a parentage order in favour of a single person or a same-sex couple.

> ***Recommendation 9:***
>
> ***If surrogacy is not prohibited, the eligibility of a single man to become a commissioning parent in a surrogacy arrangement should not be permitted, since this would deliberately deprive the child of a mother's care.***

Strength of commissioning parent's relationship

Some states' surrogacy acts are not consistent with similar legislation such as adoption law.

The WA *Surrogacy Act 2008* provides no requirements for the strength of a commissioning couple's relationship, requiring only that "at least one arranged parent has reached 25 years of age" (section 19(1)). However, the current WA adoption law includes a requirement on the longevity of the commissioning parents' relationship:

> *If in a marriage or de facto relationship, the relationship must have existed for at least 3 years.*[58]

The reason for this requirement is to protect the child from entering into a dysfunctional or potentially short-lived family. Greater maturity in a relationship facilitates greater stability.

Recommendation 10:

If surrogacy is not prohibited, in order to facilitate the most stable relationship for a child, a commissioning couple, in keeping with adoption law, should have been in a relationship for at least 3 years.

Strength of relationship between commissioning couple and birth mother

Requiring a previous relationship between the commissioning couple and the birth mother would reduce the risk of exploitation as it reduces the risk of a dehumanised faceless transaction from occurring.

Recommendation 11:

If surrogacy is not prohibited, the commissioning parents should be required to have known the birth mother for at least 2 years.

Unknown donor siblings

Donor-conceived children report a real concern about the possibility of becoming romantically involved with an unknown donor sibling.

> *Nearly half - 46 percent - of donor offspring, but just 17 percent of adopted adults and 6 percent of those raised by their biological parents, agree, "When I'm romantically attracted to someone I have worried that we could be unknowingly related."*[59]

For example, Western Australian guidelines currently limit the number of families that each sperm donor can provide sperm for to five.[60] Depending on the geographical elements – whether the families live in a city or in a small country town – the statistical chance of such encounters varies.

However, the problem is more fundamental than the issue of possible consanguine romantic relationships. In the normal course of human life, some men father children to two or more women. Obviously the more women with whom a man has children, the more complex are the familial relationships created.

With sperm donation, these complex familial relationships are intentionally created. It is unjust to the children so conceived to have siblings intentionally created in up to 4 other families.

Such siblings have no real chance of getting to know each other until they have all turned 18. This is reckless and thoughtless. It cannot be justified by adult desires for children. If sperm donation is not banned altogether, then the use of the sperm from any one man should be limited to one family only.

Recommendation 12:

If surrogacy is not prohibited, the sperm donated by any one man should only be used by one family, in order to prevent the intentional conception of donor siblings who would be raised apart from one another.

Genetic origin

Donor-conceived children have a right to know their biological and genetic origin, including full identifying information about their genetic parents. This information should be available on their birth certificate.

This right should not be dependent on the date of the procedure which led to their conception or on any guarantees of anonymity given to sperm donors in the past. No one – neither clinic nor the state – has the right to offer anonymous fatherhood to a man in order to obtain sperm to conceive a child.

Recommendation 13:

If surrogacy is not prohibited, all donor conceived children should have full identifying information about their genetic parents recorded on their birth certificate.

5.3. Protections for the birth mother

Forcible removal

Section 21(2) of the WA *Surrogacy Act 2008* mandates counselling, legal advice, consent and a plan for a birth parent. However Section 21(3) dispenses with these requirements in some circumstances:

> *In circumstances identified in subsection (4) or if the court is satisfied that a birth parent is deceased or incapacitated or that the arranged parents have been unable to contact a birth parent despite having made reasonable efforts to do so …*

This seems reasonable, except for the circumstances identified in subsection (4), which are:

> *(a) The birth mother is not the child's genetic parent; and*
>
> *(b) At least one arranged parent is the child's genetic parent.*

This means that, if the birth mother is not the child's genetic parent, she does not have to consent to the parentage order, and, possibly against her will, could have the child she bore forcibly removed by court order.

The rights of the genetic parent are arbitrarily elevated above the rights of the birth mother. This suggests that the birth mother is just a tool to be used by the genetic parents.

Recommendation 15:

If surrogacy is not prohibited, in order to protect the rights of a birth mother, surrogacy legislation should ensure that birth mothers cannot have their babies forcibly removed from them.

Natural births

Section 24 of the WA *Surrogacy Act 2008* provides that any parentage order concerning a child who is the subject of a surrogacy arrangement can only be made if it also applies to a "living birth sibling" of that child, defined as "a living brother or sister born as a result of the same pregnancy as the child".

But this provision does not take into account the possibility that harm may arise if more than one baby is conceived where only one baby was desired. In 2001 a UK surrogate mother carrying twins sued a Californian couple who disavowed the contract when she refused to abort one of her unborn babies.[61]

A surrogate mother impregnated by IVF may, at more or less the same time, become pregnant to her husband by natural intercourse. A child conceived in this way would meet the proposed definition of a "living birth sibling". In this case, the effect of the law would be to require the handover to the arranged parent or parents of a natural child of the surrogate parents.

A similar situation occurred in Adelaide:

> *When Highbury couple Georgia and Gavin Stockham discovered they were expecting triplets, they thought their IVF treatment had been particularly successful.*
>
> *It wasn't until the triplets were born that blood tests revealed they were actually identical twins plus one – meaning at least one of the trio was conceived naturally.*[62]

This scenario also raises the possibility that even a pregnancy of a single baby may be the result of natural intercourse between the surrogate mother and her husband.

What would be the legal situation if subsequent paternity testing found the arranging father was not the genetic father of the child even though he had provided sperm for a reproductive procedure that was supposed to result in the conception of the surrogate child? Could he disown the child and hand it back to the birth mother and the actual genetic father?

Does the actual genetic father have any legal rights to a child conceived naturally but mistakenly thought to be conceived pursuant to a surrogacy arrangement?

Recommendation 16:

If surrogacy is not prohibited, genetic testing of the child after birth should be required to confirm the genetic parentage of the child before a parenting order is made.

The court should be prevented from making a parentage order in favour of the commissioning parents in relation to a child that is the naturally conceived child of a surrogate mother and a man other than the arranging father.

Parentage orders

Section 27 of the WA *Surrogacy Act 2008* describes the ability of the court to discharge a parentage order on the basis that it was obtained by fraud, under duress, or another exceptional reason.

An explicit exceptional reason should exist in the case of a birth mother becoming emotionally connected to the child.

The birth mother should be allowed to change her mind, being consistent with section 7 of the same act, "surrogacy arrangement not binding". This is also consistent with the WA *Adoption Act 1994*, which wisely gives control to the birth mother, and allows a 28-day period for revocation:

> *(1) If only one person is required to consent to a child's adoption, the person may not revoke her or his consent after 28 days from the day on which the form of consent was delivered under section 18(1)(e).*
>
> *(2) If 2 or more persons are required to consent to a child's adoption, the persons who have consented may not revoke their consents after 28 days from the day on which all required forms of consent have either been delivered under section 18(1)(e), or have been dispensed with.*[63]

Recommendation 17:

If surrogacy is not prohibited, any surrogacy legislation should incorporate protections for the birth mother similar to those in adoption acts, allowing the birth mother a month revocation period.

6. The adoption alternative

There are many heart-breaking stories that give occasion for families and couples to seek surrogacy to expand or start a family, as this anecdote from US celebrity Melissa Harris-Perry shows:

> *I had lost my uterus to fibroids five years earlier, so we turned to surrogacy as a way to have our own biological child.*[64]

Surrogacy can appear an attractive option to a childless couple because it provides a genetic link to commissioning parents.

But for those families who desperately want children, they could be better helped with open adoptions. Open adoptions are different from past closed adoption practices. Open adoptions are where parents and children of both families remain in contact with each other, and background knowledge of culture and heritage is retained and grown.

The difference between surrogacy and adoption

Surrogacy is different from adoption. Adoption is an arrangement made some time *after* the birth (or perhaps conception) of a child. The parents can freely decide to give up their parental role and allow other person(s) to become the legal parent(s) of the child.

In surrogacy the child, who does not exist, is brought into existence as the result of an agreement between the commissioning parents (or parent) and the birth mother *before* the child is conceived. The child is the object of this arrangement, essentially treated as a "deliverable commodity" for the commissioning parents.

Surrogacy and adoption, while similar, have significantly different priorities.

Adoption primarily serves the needs of an existing child for parents who can raise him or her. Adoption may also serve the needs of relinquishing parents who freely decide that they are not able to raise a

child, and the needs of well-balanced, healthy and committed childless couples who wish to raise a child. However, the needs of the relinquishing parents and adopting parents are secondary. The primary concern in adoption is the best interests of an existing child.

Surrogacy reverses the order of these concerns. It primarily serves the wishes of the commissioning parent(s) to procure a child. It makes a plan that deliberately fractures the child's identity and family by separating the biological mother from her child. Surrogacy serves the interests of the commissioning couple by ignoring or downplaying the natural bonding of a child to the birth mother during pregnancy as well as his or her lifelong needs for a sense of identity, family and belonging.

Justice Paul Cronin of the Family Court of Australia raised these identity problems in a ruling on a case involving commercial surrogacy on 4 Feb 2014:

> *...this Court needs to be cautious and scrutinise these arrangements carefully [because of] the philosophical argument that children who are born to women under these circumstances can be seen to be either abandoned by their birth mothers or indeed crassly sold by their birth mothers.*[65]

Table 1 below shows these differences.

Table 1: Differences between surrogacy and adoption

Adoption	Surrogacy
Arrangement made after birth	Arrangement made before birth
Child's needs considered paramount	Parents' wants considered paramount
Reproduction is tied with parenting, keeping human dignity	Reproduction is separated from parenting, commodifying reproduction

Surrogacy does not consider the best interests of children paramount, as the children's needs are secondary to the desires of adults.

Open adoption

Open adoption should be considered as distinct from past closed adoption practices. An open adoption refers to the genetic and receiving family knowing each other openly. This is contrasted with a closed practice where the genetic family did not know the receiving family.

Jeremy Sammut from the Centre for Independent Studies argues in *The Madness of Australian Child Protection* that Australia's adoption taboo comes from forced removals and adoptions last century. He also argues it is directly at odds with trying to preserve the original family.[66]

But today, past mistakes have been learned from, and open adoptions are practiced. Many other countries around the world practice successful open adoptions.

Recommendation 18:

Since adoption has fewer medical, legal or ethical problems than surrogacy, open adoptions should be encouraged by legislative and regulatory changes.

7. UN Convention on the Rights of the Child

Nationality

Differences in laws between different countries can lead to situations where children are left with no nationality at all, as immigration solicitor Claire Wood notes:

> *The current diversity in surrogacy laws can, and does, lead to some children being born stateless.*[67]

This affects both commercial and altruistic surrogacy arrangements, and is in direct contravention of many international agreements, such as the UN Convention on the Rights of the Child, Article 7 (1):

> *The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*[68]

Statelessness is not an issue for children born to an Australian citizen but if Australians go overseas to purchase a child illegally, the Department of Immigration and Citizenship may refuse to grant citizenship.[69] Overseas, if the surrogacy arrangement is illegal, that country may not necessarily grant citizenship to any children born through the arrangement.

Natural parentage

Article 7 (1) also states the child has a "right to know and be cared for by his or her parents" to "as far as possible". If the "parents" in question relate to the birth parents, surrogacy arrangements intentionally breach this requirement, as they break the maternal and familial bonds created through pregnancy and the first few weeks of birth.

The difficulty of this Article is that surrogacy arrangements by their very nature create multiple parents for any one child. This allows some room for interpretation. Extreme caution should be taken before trying to argue the "parents" are the commissioning parents rather than the birth parents. Article 8 faces the same issues as 7 (2).

Article 9

Article 9 (1) deals with separation of children explicitly:

> *States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.*

This article allows the lawful separation of children in extreme circumstances such as abuse, neglect or divorce of the parents. Surrogacy arrangements however, sometimes occur in cases of infertility, and sometimes for "social" issues, such as for same-sex couples.

As argued in the section "The difference between surrogacy and adoption", such an arrangement is no longer made in the interests of the child, but in the interests of the commissioning parent(s). Surrogacy primarily serves the wishes of the commissioning parent(s) to procure a child. It makes a plan that deliberately fractures the child's identity and family by separating the biological mother from

her child. Surrogacy serves the interests of the commissioning couple by ignoring or downplaying the natural bonding of a child to the birth mother during pregnancy as well as his or her lifelong needs for a sense of identity, family and belonging.

Therefore, all forms of surrogacy directly impinge upon Article 9 (1) of the UN Convention on the Rights of the Child.

8. Conclusion

There is no justifiable case for allowing surrogacy. Surrogacy is not an appropriate response to the desire of adults to procure a child outside of a normal human relationship.

The distress of married couples unable to successfully conceive and bear a child deserves sympathy, but cannot justify laws that fail to protect the best interests of children and to uphold the natural dignity of motherhood.

Nevertheless, the grief experienced by childless couples is a real and growing problem as the incidence of infertility in Western nations increases. More needs to be done to promote greater public awareness of factors that have led to an increase in infertility over recent decades – such as delayed childbearing, abortion (especially multiple abortions), and promiscuity and associated sexually transmitted infections, such as chlamydia.

Adoption would enable many more infertile, married couples to raise a family and should be encouraged.

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