Submission to ALRC Surrogacy Law Review 2025

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1. Introduction

The separation of babies from their gestational mothers at or near to birth ("maternal neonatal separation" or "MNS" in scientific literature) is intrinsic to all forms of surrogacy.

The impact of MNS on babies, and indeed on all mammals, is well understood in science but may not be well understood by the general public.

This may because of the historical downplaying of the importance of this unique relationship.

In the twentieth century, the downplaying of the relationship between gestational mother and baby enabled and facilitated the en masse maternal-neonatal separations that produced the Stolen Generations and Forced Adoption phenomena.

Both of these phenomena – which caused significant widespread trauma to our community - were enabled and facilitate by bad policy and bad legislation.

As a consequence, State and Federal governments have delivered apologies for both, after time consuming State enquiries, Senate Enquiries or expensive Royal Commissions were first conducted.

The State of NSW has a duty to consider this history in its contemplation of the regulation of yet another en-masse cohort of people impacted by MNS so that it does not repeat the mistakes of the past.

This submission will inform the ALRC review panel of the impacts of MNS on infants and their future wellbeing, so the ALRC will not make the same mistake as past legislators

who did not adequately consider the impact of separation on the child, in its recommendations.

2. Hierarchy of stakeholder interests

When considering surrogacy law, the interests of children should not be considered subordinate to those of adult parties.

Nor should it be a case of "balancing stakeholder interests" because the priority of child interests is a precept of law developed due to the particularities of young children being unable to defend or speak up for themselves and the ease with which adult interests can be conflated with those of children, giving them no right of reply.

The best interests principle is enshrined in the UNCRC to which Australia is a signatory, and it is clear from the various domestic provisions relating to the best interests of the child that the legislation takes very seriously the best interests of the child as the 'paramount consideration'.

For example, when considering parenting orders, Australian courts must have regard to the best interests of the child as the paramount consideration[1] in S65AA of the *Family Law Act 1975*.

So, before the ALRC considers recommending or reaffirming any legislation that dictates an en-masse cohort of children will be separated from their gestational mothers at or near to birth, the ALRC should make the interests of those human beings its paramount consideration.

3. Best interests of the person created

Fortunately, establishing the best interests of the child at the time of separation – as well as their best interests in regards to their futures - in relation to surrogacy is easy due to what we know about the phenomenology of pregnancy, birth and human development.

And as babies have no understanding that they have initially been created from DNA foreign to the mother in which they are embodied and birthed, their best interests are identical to those of every other baby – both at the time that separation is considered and in providing the optimum conditions for future wellbeing - due to the unique and extraordinary phenomenology of pregnancy and birth which means that each baby is not only part of their gestational mother – it taking many months after birth for babies to even understand that she is separate from them – but already has a developed

[1] Subdivision BA of the Act devotes itself to the Best Interests of the Child in relation to the making of a parenting order (S60CA), how the best interests are determined by a court (S60CC), how the views of children are expressed and taken into account (S60CD, 60CE) and the risk of family violence and how that affects the best interests of the child (60CG).

physiological relationship with her that may be described as Love – regardless of the attitude of the birthing mother towards that baby.

For example, any desire to meet a donor arises much later in a person's life and is not an interest that occurs to a baby and so it has no bearing on what that person wants at or near to birth when their separation is contemplated.

This is because the interest to know one's donor is an interest that can be requested, managed and acted on by adult persons with agency: babies have no such agency and rely on adults to give them what they want, their range of protest restricted to crying, screaming, physical agitation, refusing food and sleep.

Furthermore, "what babies want" is instinctual and their instinct has been biologically determined throughout our evolutionary history so that what babies want is generally best for them, not only immediately (the colostrum, breast-milk, warmth, heartbeat, proximity, voice, face, smell, touch and synchronising regulatory systems of the gestational mother that the baby already knows and loves at birth as part of her or himself) but also in the long term of that individual.

Because having one's physiological systems regulated in this fashion provides the solid foundation for the continual development of a healthy para-sympathetic nervous system that provides feelings of security and well-being and enables individuals to better cope with the future traumas of life.

The above statements are backed up by the scientific evidence provided as follows.

a. Research proving that gestational mother-baby interactions are essential for babies' wellbeing

The importance of intrauterine and post-partum gestational mother-infant interactions in mammals has been demonstrated by over half a century of converging clinical and animal research.[i] [ii]

During the last phase of gestation, a baby can recognize her or his mother's voice and heartbeat[iii] and the smell of her placenta[iv] and both fetuses and newborns react preferentially to their mother's voice over that of other females.[v] Postpartum, babies respond to maternal odours beginning shortly after birth[vi] and search for eye contact with the gestational mother.[vii] Additionally, babies are able to recognize their mother's voice and heartbeat, likely due to prenatal exposure.

Babies exhibit searching and rooting (nuzzling) behaviours and, when placed on their mother's body after birth, wriggle up their mother's body using their 5 senses to locate

colostrum (known as the "breast crawl").[2] The mother's nipple has a distinct smell similar to the placenta, which helps the baby locate the breast and mother.[3]

A whole range of other interactions indicate skin-on-skin contact with her secures neonatal wellbeing.[viii] Skin-to-skin contact for 25 to 120 minutes after birth, early suckling, or both, positively influences mother-infant interaction one year later when compared with routines involving separation of mother and infant.[ix] Breastfeeding gives babies the best possible start in life[x] and the World Health Organization provides a comprehensive list of studies proving its benefits,[xi] recommending colostrum "as the perfect food for the newborn" with feeding to be "initiated within the first hour after birth," exclusive breastfeeding "up to six months of age, and continued breastfeeding along with appropriate complementary foods up to two years of age or beyond".[xii]

The above is a very minimalist summary of research proving the importance of post-partum gestational mother-infant interactions which are unique to the gestational mother and are not present with a substitute human being, donor or not.

b. Research proving that gestational mother-baby separation is traumatic for babies

Both primate and human studies show that maternal separation isn't only stressful to babies[xiii] but is a stressor the human neonate is not well evolved to cope with.[xiv]

Human studies have shown that even short-term maternal-neonate separation is stressful to babies, associating it with a dramatic increase in heart rate variability and a profoundly negative impact on quiet sleep duration, with an 86% decrease compared to when skin-to-skin with their mothers. [xv]

Preterm babies kept separate from their gestational mothers in humidity cribs have been shown to have bonding difficulties regardless of subsequent parental sensitivity.[xvi] It is now practice in hospitals that these babies are touched and held by the woman who gave birth to them – 'kangaroo care' – because it is recognised how much better these babies do compared to being kept away from their mothers after birth.

Dr. Barak Morgan, the author of a 2011 study, claims his research is a step towards understanding exactly why babies do better when nursed in skin-to-skin contact with their mothers. Dr. John Krystal, editor of Biological Psychiatry, states that Dr. Morgan's paper highlights the profound impact of maternal separation on the infant.

"We knew that this was stressful, but the current study suggests that this is a *major physiological stressor for the infant*," he says.[xvii]

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[2] Rachel Eddie, "Heartwarming video reveals newborn baby's natural instinct to 'breast crawl' - as they search for their mother's nipples HOURS after they are born," *Daily Mail Australia*, 11 April, 2016, http://www.dailymail.co.uk/femail/article-3533418/Newborn-baby-breast-crawl-instinct-mother-s-nipples-revealed-video.html#ixzz4eVSaDs9R

[3] R H Porter, J Winberg. "Unique salience of maternal breast odors for newborn infants PMID: 9989430 DOI: 10.1016/s0149-7634(98)00044-x https://pubmed.ncbi.nlm.nih.gov/9989430/

In animal research, separation from gestational mothers is a common way of creating stress in order to study its damaging effects on the developing newborn brain.[xviii]

c. Scientific proof that early childhood stress has been shown to have long-term neurodevelopmental effects.

Early childhood stress has been shown to have long-term neurodevelopmental effects.[xix]

The National Child Traumatic Stress Network, established by the US Congress, warns that many people wrongly assume that young age protects children from the impact of traumatic experiences.[xx] They claim a "growing body of research has established that… infants - may be affected by events that threaten their safety or the safety of their parents/caregivers, and their symptoms have been well documented" and they note that traumatic stress may be a response to "the sudden loss of a parent/caregiver."[xxi]

The National Scientific Council on the Developing Child at Harvard University agrees that "[s]cience does not support the claim that infants and young children are too young to be affected by significant stresses,"[xxii] noting that "[h]human studies with infants and children as well as animal studies have shown that adverse early infant experiences… can lead to short-term neurobehavioral and neurohormonal changes in offspring that may have long-term adverse effects on memory, learning, and behaviour throughout life."[xxiii]

In this way, early separation trauma is biologically embedded, influencing learning, behaviour and health for decades to come[xxiv] and perhaps beyond, as research in epigenetics has shown that stress in infancy can have intergenerational impacts on gene transcription.[xxv]

4. <u>Conclusions drawn by the above scientific evidence</u>

To suggest that in these many and various scientific studies performed over decades, the provision of a caregiver as a substitute for the gestational mother, related by DNA to the neonate or not, would completely prevent the impacts of separation on the neonate is both unsubstantiated and unreasonable.

A substitute mother, a donor, or a father, may perform damage control, the relationship formed perhaps minimizing some of the impacts of mother-loss, but it cannot prevent them, *because the impacts occur because of the loss of the gestational mother.*

And is it not simply unethical even to intentionally distress a baby if it is not required by life-saving medical or child protection reasons?

<u>To date, there are no studies at all that prove that separation from the gestational mother does not affect the neonate adversely, nor that human being in the long-term.</u>

And yet this must be the premise upon which any ethical acceptance of child removal for the purposes of any form of surrogacy is based.

A substitute mother, a donor, or a father, may perform 'damage control', the relationship formed perhaps minimising some of the impacts of mother-loss, but it cannot prevent this loss as the impact occurs because of the loss of the newborn's mother.

5. Recommendations for law reform

Testimony of people separated from their mothers at birth can be found in the submissions to the various enquiries and a Royal Commission conducted in relation to the Stolen Generations or Forced Adoptions. **These voices testify to the long-term and even intergenerational suffering caused by the separation of gestational mothers and babies.**

There is nothing to suggest that just because a baby has grown from an implanted embryo made from DNA foreign to the gestational mother, that such babies will be somehow miraculously be untraumatized by separatation from their gestational mothers – and it doesn't make any sense to claim so.

The only way forward to prevent history repeating itself in condoning and facilitating further unnecessary separation of babies from their gestational mothers, thereby causing them unnecessary distress and long-term trauma, is for **Australian law to catch up with the scientific field and expressly recognise the unique characteristics of the pre and post uterine relationship between the gestational mother and the baby she grows and births.**

Furthermore, Australian law must respect the rights of every child to remain with and be brought up by the woman whom they already know and love as their mother, as a part of her or himself from which they have not yet emotionally, psychologically or physiologically separated, and that always, for every single child, their "mother" is the woman whom has created that baby by taking them from embryo to fully formed infant, throughout nine months of symbiotic gestation.

In this way we can re-orientate societal norms that have so drifted away from the needs of the biological systems of infants and continues to subject the next generation to its cruelties and rights violations.

6. Conclusion

Other than the argument outlined above, there are a multitude of other reasons to outlaw surrogacy in its every manifestation, for example, the role of allowing legal surrogacy in increasing illegal surrogacy; the exploitation of, and danger to, women; and the commodification of children who become subject to a contract and a business.

But the consideration of the rights and wellbeing of the people produced under surrogacy contracts should be the paramount concern of the ALRC as well as Australian Governments.

What I have shown is that any form of legalised surrogacy is cruel to human infants, a violation of their human rights, and sets them up for future mental health difficulties as

they are forced to come to terms with the long-term physiological ramifications of their own separation trauma.

The use of the term "altruistic surrogacy" is dissembling, dishonest and an oxymoron because all forms of surrogacy are cruel to infants by entailing the separation of infants from their gestational mothers.

Commercial or "compensational" surrogacy, then, should be unthinkable to a modern society that assumes it is on some sort of path toward a greater or "better" humanity.

As for any argument that may be made by Surrogacy Australia that permitting and regulating commercial surrogacy in Australia will provide safeguards for the rights of children by preventing people taking them from overseas, it is obvious, when the rights and interests of newborn babies are prioritized and duly considered as they must be, that it is surrogacy itself which violates children's rights and functions against their interests.

Legalising commercial surrogacy only takes this commodification of people and the exploitation of women to its extreme. **Human beings should never be supported by government to be for rent or sale…. or "gift".**

The process of modernisation with its development of reproductive technologies, has been liberating in many respects, but without laws to prevent this process being taken to the extreme, liberation can be so relentlessly modernising as to cut people off from their own humanity and take away their reasons for living.

The definition of "gift" is a thing that is given without payment. Human beings are not gifts. Nor are they to be sold or exchanges – these 3 processes are dehumanising.

We either accede to what we can only call the violation of the rights of children and the trampling of their interests, by the trafficking of children "benevolently regulated," or we shut down the manufacturing enterprises that do the trafficking by creating explicit legislation that protects human infants from the trauma of separation.

7. <u>Addendum</u>

The National Apology to the Commonwealth's role in forced adoptions was delivered by the then Prime Minister Julia Gillard in 2013 and in that speech Ms Gillard states that the Commonwealth Government resolved to do all in its power to make sure **"these practices" are never repeated and that "the lessons of family separation" are remembered:**

> "We resolve, as a nation, to do all in our power to make sure these practices are never repeated. **In facing future challenges, we will remember the lessons of family separation**. **Our focus will be on protecting the fundamental rights of children and on the importance of the child's right to know and be cared for by his or her parents."**

As surrogacy is the practice of conceiving of babies for the purpose of separating them from their gestational mothers it goes directly against the above publicly stated intention of the Commonwealth of Australia.

With respect,

Dr Catherine Lynch.

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[i] Millie Rincón-Cortés and Regina Sullivan, "Early Life Trauma and Attachment: Immediate and Enduring Effects on Neurobehavioral and Stress Axis Development," *Frontiers in Endocrinology* 5 (2014): 33, https://doi.org/10.3389/fendo.2014.00033.

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[iv] H. Varendi, R. Porter, and J. Winberg, "Attractiveness of amniotic fluid odor: evidence of prenatal olfactory learning?" *Acta Paediatrica* 85, no. 10 (1996): 1223-27, https://www.ncbi.nlm.nih.gov/pubmed/8922088.

[v] Barbara Kisilevsky et al., "Effects of experience on fetal voice recognition," *Psychological Science* 14, no. 3 (2003): 220-24, https://doi.org/10.1111/1467-9280.02435; DeCasper and Fifer, "Of Human Bonding," 1174-76; Beauchemin et al., "Mother and Stranger," 1705-11; D. Querleu et al. "Reaction of the newborn infant less than 2 hours after birth to the maternal voice," *Journal de Gynécologie Obstétrique et Biologie de la Reproduction* 13, no. 2 (1984): 125-34; E. Ockleford et al., "Responses of neonates to parents' and others' voices," *Early Human Development* 18, no. 1 (1988): 27-36.

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[vii] Noboru Kobayashi, "Eye-to-eye Confirmation of the Mother-infant Love Bond - Part 1," *Child Research Net,* last modified January 1, 2002, http://www.childresearch.net/aboutCS/mediscience/19.html.

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[x] "Breastfeeding in the First Hours After Birth – Breastfeeding Series," Global Health Media Project, last modified July 31, 2015, https://www.youtube.com/watch?v=uMcgJR8ESRc&feature=youtu.be.

[xi] Bernardo Horta and Cesar Victora, "Long-term effects of breastfeeding: a systematic review," World Health Organization, last modified 2013, http://apps.who.int/iris/bitstream/10665/79198/1/9789241505307_eng.pdf?ua=1.

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