Submission to the Australian Law Reform Commission review into Surrogacy Laws

Question 18, 20, 27 incorporated:
Are there any amendments that would assist the courts to determine the parentage of children born as a result of assisted reproductive technology, including surrogacy, where the state and territory Acts do not apply?

Every day babies are born as a result of a number of events from expecting families to unexpected pregnancies, Assisted Reproductive Treatment (ART) event is one of those events and should not be a hindrance for a baby to come into existence, every human has a right to life. A child's early traumatic life in an unstable family environment can be changed by foster carers, giving the child a positive environment and providing foster parents with great rewards. Similarly, a surrogate mother can attain moral rewards knowing she has helped to create a family that would otherwise not be here.

Various Surrogacy Arrangements and Difficulties

The difficulty with current surrogacy laws are that they vary across the states and territories thereby have impact on the children born as a result of ART and surrogacy. Genetic link between a parent and child in surrogacy arrangement is not always determinative of parentage. There are at least four scenarios with complications for children born as a result of ART:

1. Those who have genetic link to both intending parents with the use of a surrogate, where legal parentage is recognised as in the case of altruistic surrogacy. The surrogate may change her mind and keep the child.

2. Those who have genetic link to at least one of the parents, and legal parentage is recognised as in the case of the birth mother using donor sperm whose name appears on the child's birth certificate. This may lead to conflict in presumption of parentage.

3. Those who have genetic link to at least one of the parents, but legal parentage is not recognised as in the case of surrogacy commissioned overseas. A surrogate may challenge parentage as there are different laws on presumption of parentage in other countries.

4. In the case of commercial surrogacy, those who do not have genetic link to at least one of the parents, and legal parentage is not recognised as in

the case of surrogacy commissioned overseas followed by adoption procedure. These parents may face citizenship issues in Australia.

In the first scenario, the surrogate has all the rights to her child while being pregnant and after the child is born, she may change her mind and not handover the child to the intending parents unless there is a substitute parentage order. Even though she may have entered into altruistic surrogacy arrangement, those arrangements are not enforceable and the intended parents would then need to apply to court for parenting orders.[1] In the meantime the child may have already formed attachment to the surrogate if there are delays in the process.

In the second scenario, *Family Law Act*,[2] (FLA) section 60H(1)(d), provides that if a person other than the woman's married or de facto partner provided the genetic material for the child, then the child is not a child of that person. Hence section 60H(1)(d) prevents a sperm donor from being a parent of the child if he was not married or in a de facto relationship with the surrogate mother. If the sperm donor is further named on the birth certificate as a parent, then this would give him a presumption of parentage according to section 69R of the FLA. This illustrates a conflict in the presumptions of parentage between the surrogate mother's married or de facto partner, and the sperm donor who is named on the birth certificate.[3] This child may be caught in a family law dispute should the parties not agree on parenting or relocation arrangements.

In the third scenario, the children born as a result of commercial surrogacy would be disadvantaged as the intending parent who provide gamete cannot always assume legal parentage based on providing genetic material and having his name on the birth certificate of the child (issued overseas) as can be seen in foreign case laws, where parentage was challenged.[4] The parentage law in the parent's jurisdiction would ultimately prevail.[5] For example, the case of *X and Y*,[6] where the birth mother was held to be the legal parent of the child born to UK genetic parent unless parentage was transferred by UK courts.[7] The child was

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[1] *Re: Evelyn [1998] FamCA 2378.*
[2] *Family Law Act 1975.*
[3] Paul Boers, Surrogacy Arrangements: The Patchwork Legal Landscape, Nicholes Family Lawyers. The varied approaches of states and territories, page 6. http://www.nicholeslaw.com.au/articles/surrogacy-patchwork.pdf

[4] Millbank, Jenni, "The New Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls' (2011) Melbourne University Law Review 35, page 23. http://www.mulr.com.au/issues/35_1/35_1_5.pdf; http://connection.ebscohost.com/c/articles/66743538/new-surrogacy-parentage-laws-australia-cautious-regulation-25-brick-walls

[5] Ibid, page 24.
[6] *Re: X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) 9 December 2008.

[7] Millbank, Jenni, "The New Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls' (2011) Melbourne University Law Review 35, page 35.

unable to obtain UK citizenship without court orders hence was stateless for some time before getting a special permission of entry.[8] In contrast, Australian judges do not make discretion for such cases so there is no knowing of what happens to children in similar situations.[9]

It appears that children born overseas as a result of ART are not legal children of intended Australian parents despite genetic link or being named on the birth certificates under their state law or the FLA, however, the children are able to enter Australia with citizenship by descent.[10] [11]

In the fourth scenario, the position of single parents using ART was not the same as other parents. A minority group of people were not accounted for in ART legislation, single people who wish to have a child yet may not be infertile for the purposes of the legislation and not able to provide genetic material. They did not easily fall into a particular category of intended parents. Although the Parentage Act (through the Parentage (Surrogacy) Amendment Act 2024 (ACT), effective July 2024) had recently amended to remove the requirement for a genetic link to the child and allowed for single parents as well as couples it only applied to altruistic surrogacy arrangements and not commercial surrogacy

For example, to apply for parentage order following altruistic surrogacy, the fertility clinics in ACT adheres to strict guidelines which require among other things that the female intending parent must be clinically infertile.

Some of these intended parents have travelled overseas to meet their parenthood dream only to discover that their child will not be able to enter Australia due to citizenship issues which require citizenship by descent. These particular parents who have undergone ART with surrogacy and had foreign jurisdiction[12] declaring parentage could face their child being stateless if they do not obtain parentage orders in Australia. The process for these parents involves a greater scrutiny and verification than just genetic link to the child. This type of application may take significantly longer to decide than if there was a genetic link.[13] In the meantime the child could be stranded.

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http://www.mulr.com.au/issues/35_1/35_1_5.pdf;
http://connection.ebscohost.com/c/articles/66743538/new-surrogacy-parentage-laws-australia-cautious-regulation-25-brick-walls

[8] Ibid.
[9] Ibid, page 36.
[10] Ibid.
[11] Also see *Dennis v Pradchaphet* [2011] FamCA 123 and *Dudley v Chedi* [2011] FamCA 502.

[12] Such as in California, USA where surrogacy arrangements are fully enforceable. Cited in Paul Boers, Surrogacy Arrangements: The Patchwork Legal Landscape,
Nicholes Family Lawyers. The varied approaches of states and territories, page 18.
http://www.nicholeslaw.com.au/articles/surrogacy-patchwork.pdf
[13] Department of Immigration and Citizenship, Fact Sheet 36a - International Surrogacy Arrangements.

International Surrogacy and Parentage

For overseas surrogacy arrangements, there is no transfer of parentage mechanism as there is for altruistic surrogacy,[14] so a parentage order has to be sought but each state has a different requirement to obtain parentage orders. Most states requires that surrogacy arrangements be altruistic and courts are unlikely to grant orders in cross border cases.[15]

There are inconsistencies among the states and territories in that most states regard entering into commercial surrogacy overseas by intending parents ordinarily residing in each state of Australia as illegal while few others do not have explicit bans. The consequences of criminal sanctions on parents who violate surrogacy legislation may have an impact on their children. This is not in best interest of children as the there is no empirical research to support the argument that the surrogate is harmed, that the intended parents are harmed or the child is harmed.[16]

Section s60HB of FLA is very restrictive to all four groups of parents mentioned above in that it deals with children born under surrogacy arrangements. It only operates where a Court has made an order under a prescribed state or territory. The prescribed laws would be the state and territory surrogacy legislation which not only vary across the states but provide additional restrictive requirements.

Further inconsistencies between the citizenship Act and FLA.

The aim of the *Citizenship Act*[17] is to define 'Australian citizen' including the child of the Australian citizen. Similar to the FLA which does not have a central

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http://www.immi.gov.au/media/fact-sheets/36a-international-surrogacy-arrangements.pdf

[14] Paul Boers, Surrogacy Arrangements: The Patchwork Legal Landscape,
Nicholes Family Lawyers. The varied approaches of states and territories, page 10-14.
http://www.nicholeslaw.com.au/articles/surrogacy-patchwork.pdf

[15] Mary Keyes, Cross-border surrogacy agreements.
Australian Journal of Family Law 26, 2012. Page 36.

[16] Alexandra Harland, International Surrogacy, parentage provisions and the need for Australian law reform, 6th World Congress on Family Law and children's Rights, 17 March 2013. Page 12.

http://203.30.31.101/fl12/speaker%20papers/_papers/concurrent%20session%204/SP14_alexandra%20harland_%20international%20surrogacy,%20parentage%20provisions%20and%20the%20need%20for%20Australian%20law%20reform.pdf

[17] *Australian Citizenship Act 2007*

definition of ‘parent’ and child at federal level,[18] the *Citizenship Act* does not define the word ‘parent’ either. It only defines ‘responsible parent’ in section 6. The term 'responsible parent' has a wider definition than 'parent' as it includes people with parental responsibility.[19]

Section 8 of *Citizenship Act* previously relied on section 60H and HA of FLA to define a parent through ART and surrogacy. FLA then reflected state law on parentage (all of which exclude commercial surrogacy), but state laws cannot be accessed before the child enters Australia.[20] Now the citizenship can only be obtained by descent. Making this legislation inconsistent with state laws which infer parentage is not automatic by descent.

Immigration issues may force parents to seek parental responsibility orders rather than declared parentage in order to obtain citizenship for the child. The *Citizenship Ac*t only uses some of the FLA provisions where it thinks fit. In particular, it does not apply parentage presumption as in the FLA. Although, section 16 of *Citizenship Act* does not specifically refer to a biological parent, it requires a DNA test to be undertaken to establish parentage. Where parental order is obtained overseas, this does not infer automatic citizenship in Australia.[21]

Conclusion

Citizenship, ART and Surrogacy legislation doest not account for every parent as there is a wide range of parents with lived experiences. Given the inconsistencies across the states and territories for obtaining parentage orders the legislation is in need of integration and simplification at a state and national level by way of

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[18] Millbank, Jenni, “The New Parentage Laws in Australia: Cautious Regulation or ’25 Brick Walls’ (2011) Melbourne University Law Review 35, page 22.
http://www.mulr.com.au/issues/35_1/35_1_5.pdf;
http://connection.ebscohost.com/c/articles/66743538/new-surrogacy-parentage-laws-australia-cautious-regulation-25-brick-walls

[19] Alexandra Harland, International Surrogacy, parentage provisions and the need for Australian law reform, 6th World Congress on Family Law and children’s Rights, 17 March 2013. Page 16.

[20] Millbank, Jenni, “The New Parentage Laws in Australia: Cautious Regulation or ’25 Brick Walls’ (2011) Melbourne University Law Review 35, page 37-38.
http://www.mulr.com.au/issues/35_1/35_1_5.pdf;
http://connection.ebscohost.com/c/articles/66743538/new-surrogacy-parentage-laws-australia-cautious-regulation-25-brick-walls

[21] Alexandra Harland, International Surrogacy, parentage provisions and the need for Australian law reform, 6th World Congress on Family Law and children’s Rights, 17 March 2013. Page 14.

http://203.30.31.101/fl12/speaker%20papers/_papers/concurrent%20session%204/SP14_alexandra%20harland_%20international%20surrogacy,%20parentage%20provisions%20and%20the%20need%20for%20Australian%20law%20reform.pdf

balance and integration. Commercial surrogacy performed overseas remains limited for the minority groups.