Submission to the Australian Law Reform Commission - Review of Surrogacy Laws

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Introduction

I welcome the opportunity to make a submission to the Australian Law Reform Commission's review of surrogacy laws in Australia. This review is timely and important in addressing such an important area. Surrogacy arrangements are not new to Australia to the world and the discussion around them raises important issues around bodily autonomy, family, children and how states and governments can adequately regulate the ever developing reproductive technologies.

It is my understanding that Australian laws are inconsistent and don't really reflect the changing family dynamics and the experiences of those who are involved in the practice of surrogacy, whether it be domestic or international.

Background

I write this submission as an academic working in the area of family law and with great interest in how Australian law reform affects Pacific legal systems. My interest in this area stems from having previously contributed to a Research Handbook on Surrogacy on the Law, writing on surrogacy in the Pacific.[1]

I am particularly interested in the impact of surrogacy laws on culturally diverse communities, the cross-border implications of surrogacy and the rights of children born through surrogacy. My submission will answer the questions highlighted in the Issues Paper, particularly the following:

- Reimbursing and compensating surrogates
- Legal parentage of children born through surrogacy

I will speak to these in the context of Pacific communities in Australia and the impact that surrogacy laws might have on them.

Impact of surrogacy laws on Pacific communities in Australia

[1] Unaisi Narawa 'Surrogacy in the Pacific' in Katarina Trimmings, Sharon Shakargy, Claire Achmad, *Research Handbook on Surrogacy and the Law* (eds), 2024, ElgarOnline, pp 491-502.

It is important to note that Pacific cultures hold collective and relational understandings of family, and these may differ from the understanding of family and legal models of parentage in Australia. Pacific Peoples are known for their generous and reciprocal nature when it comes to caring for each other and for outsiders and a feature of surrogacy that could be seen as already present in the Pacific is the fact that there are many parties involved in a common objective, the objective being the birth of a child to parents who would otherwise not have children.

Kinship and parenthood are not solely defined by biological ties or formal legal recognition which may come into tension within rigid legal frameworks in Australia. This is especially so where the definitions may be different in culture, for example, parentage and custody and even the severance of contact between surrogate and child.

The lack of awareness around the legal requirements on surrogacy could mean that there might be more informal arrangements which lack the legal recognition. This exposes all parties to legal uncertainty. For Pacific Peoples, it is not common to have formal (legal) arrangements made and that structural barrier when it comes to accessing legal advice and fertility services, will often restrict people from seeking legal advice. This affects legal parentage because of the conflict between the formal surrogacy laws and those in custom.

This was seen in the 2011 case *Tomas and Anor Murray*[2] which involved an adoption case but is still relevant to the discussion on surrogacy. In the case, an adoption arrangement had been made under custom and although formalised later through the court, the biological mother decided not to proceed with the adoption. There had to be cross-border considerations because the Samoan Courts ended up being involved in the matter.

> '*The child had been promised to her great aunt and uncle (Tomases) before her birth in 2007.In 2008, a Samoan court made an adoption order in favour of the Tomases and the child and her mother (Murray) travelled to Sydney in 2009. On arrival in Australia, Murray informed the Tomases that she had changed her mind and would return with the child to Samoa which resulted in the Tomases filing an application for the child to remain in Australia. Murray returned on her own to Samoa and obtained an order from the District Court of Samoa for the discharge of the adoption. Loughnan J stated that despite the adoption not meeting requirements under Australian law, it did not make it an illegal adoption. In its ruling, the court made it clear that the case highlighted breaches of the Hague Convention on Intercountry Adoption, the Convention on the Rights of the Child, and the Convention against Transnational Organised Crime (trafficking in persons). There was also the issue of the passport which*

[2] [2011] FamCA 641.

appeared to have been obtained under fraudulent means which has the potential of allowing children to move across borders without the relevant checks.'[3]

This is an adoption case but it demonstrates the possibility of similar cases concerning surrogacy.

In custom, it is critical to note that maintaining family lineage is important and the arrangements are driven by relational ethics rather than financial incentives or even legal considerations. There are also critical issues around reimbursement and compensation within surrogacy laws. Pacific cultures are guided by reciprocity so gift giving, service etc and part of the relationships and those who take on the responsibility of, in this case, carrying a child, are acknowledged and taken care of. The Australian legal framework may not recognise these customary forms of compensation which could inevitably criminalise or invalidate cultural practices. Surrogacy laws in this regard should be flexible enough to distinguish between exploitation and culturally appropriate acts.

Conclusion

I am not aware of the extent to which Pacific voices have been involved in this review but I can note from experience that their voices are often excluded from family law reform discussions in Australia. I believe that this inquiry is an opportunity to remedy that. Lawmakers should engage more with Pacific communities in Australia including churches, youth groups, health advocates and family networks, of which there are many. It might be worth considering the provision of legal pathways for individuals who are engaged in culturally grounded surrogacy to seek formal recognition without being penalised for the lack of formality.

This ensures an inclusive and equitable process that allows for the experiences and values of Pacific communities in Australia to be taken into account. It is easy to create a 'one size fits all' reform, but that would mean that critical voices are excluded. Instead Australia should recognise its diverse background and minority communities in Australia. This is especially critical considering the transnational kinship ties between Australia and Pacific Peoples.

[3] Unaisi Narawa 'Surrogacy in the Pacific' in Katarina Trimmings, Sharon Shakargy, Claire Achmad, Research Handbook on Surrogacy and the Law (eds), 2024, ElgarOnline, pp 491-502.