MONASH University | CASTAN CENTRE FOR HUMAN RIGHTS LAW

Review of Surrogacy Laws: Response to Issues Paper

Submission to the Australian Law Reform Commission

Prepared by

Professor Melissa Castan
Director, Castan Centre for Human Rights Law

Mr Scott Walker
Research Fellow, Castan Centre for Human Rights Law

July 2025

Contents

Part 1: Background **2**
1.1 About the Castan Centre for Human Rights Law 2
1.2 This submission 2
Part 2: A human rights-based approach **2**
Part 3: Human rights principles **3**
3.1 The rights of the child 4
3. 2 The rights of the surrogates 5
3.3 The rights of the intended parents 6
Part 4: Compensated surrogacy arrangements **6**
Part 5: Conclusion **8**

Part 1: Background

1.1 About the Castan Centre for Human Rights Law

The Castan Centre for Human Rights Law (**Castan Centre**), based in the Faculty of Law at Monash University in Melbourne, Victoria is a research, education and policy centre which aims to create a more just world where human rights are respected, protected and fulfilled, allowing all people to flourish in freedom and dignity. In 2025, the Castan Centre is celebrating its 25th anniversary, having been founded in 2000 and named in honour of lawyer and human rights advocate Ron Castan AM QC.

1.2 This submission

Academic Members of the Castan Centre hold a variety of views on the issue of surrogacy. This submission addresses the human rights engaged by surrogacy and how these issues relate to the question of compensated surrogacy arrangements. This submission does not represent the views of all Academic Members of the Castan Centre.

Part 2: A human rights-based approach

A surrogacy arrangement 'is one in which a "surrogate" carries and gives birth to a child with the express, pre-conception intention that the child be parented by another'.[1]

As the Inquiry's Terms of Reference and the Issues Paper makes clear, consideration of the human rights of children born through surrogacy, surrogates, and intended parents are central to the Inquiry itself and there is a clear intention that '[r]eforms protect and promote the human rights of all involved

[1] Ronli Sifris and Stephen Page, 'Australian Surrogacy Law; Recommendations for Reform', in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australian* (Thomson Reuters Lawbook Co, 2021) vol 2, 81.

and centre the best interest of the child as the most important consideration'.[2] Section 24(1) of the *Australian Law Reform Commission Act 1996* (Cth) also requires that any recommendations are consistent with Australia's international obligations, including the international human rights treaties to which Australia has agreed to be bound. It is therefore useful to begin by considering, broadly, what a human rights-based approach to surrogacy might look like. Developing a human rights-based approach to surrogacy provides an important way of assessing proposed legislative and regulatory responses to surrogacy.[3]

There is no universal definition of a human rights-based approach. Nevertheless, such approaches have their origin in sustainable development discourse and tend to have a number of common elements, namely: the participation of rights-holders in decision-making processes; clear links to human rights; accountability for duty-bearers with respect to human rights; respect for principles of equality and non-discrimination of rights holders; the empowerment of rights-holders to understand and enjoy their human rights, and participate in decision-making and the formulation of laws, policies, and practices that impact upon them; and transparency for all stakeholders involved.[4] What is clear from different conceptions of the human rights-based approach is that it is 'based on respect for the fundamental dignity and humanity of all people and is framed in terms of justice and rights'.[5]

A central component of a human rights-based approach is that it re-frames persons involved in a particular issue as rights-holders. Applied to surrogacy, the starting premise is that the child, surrogates, and intended parents are each rights-holders. This moves beyond seeing these individuals as parties to a particular agreement, but as autonomous rights-bearers, empowered to see their rights realised. For the child, it requires that their best interests be a primary consideration. So understood, a human rights-based approach seeks to 'promote, protect and fulfil human rights' in practice and enable the integration of international human rights norms, standards, and principles into the development of law, policy, and practice at a domestic level.[6] A human rights-based approach recognises that 'unequal power relations and social exclusion deny people their human rights' and seeks to directly overcome this imbalance.[7]

Part 3: Human rights principles

A number of human rights are engaged in surrogacy arrangements: the rights of the child born as a result of the arrangement, the rights of the surrogates and the rights of the intended parents. While the

---

[2] Australian Law Reform Commission Paper, *Review of Surrogacy Laws: Issues Paper* (Issues Paper No 52, June 2025), 7.

[3] For a useful overview of the theoretical approaches raised by the question of surrogacy not canvassed in this submission, see: Kate Galloway, 'Theoretical Approaches to Human Dignity, Human Rights and Surrogacy', in Paula Gerber and Katie O'Bryan (eds), *Surrogacy Law and Human Rights* (Routledge, 2015).

[4] See, eg, 'Human Rights Based Approach', *Swedish International Development Cooperation Agency* (Web Page) <https://www.sida.se/en/for-partners/methods-materials/human-rights-based-approach>.

[5] Kevin Bell and Jean Allain, 'Homelessness and Human Rights in Australia', in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2022) vol 2, 241, 266.

[6] SIDA (n 4).

[7] Ibid.

individuals involved in a surrogacy arrangement may share a common objective, each party has distinct rights that need to be protected. Any legislative and policy response to surrogacy, which is compliant with a human rights-based approach, will therefore need to reconcile each of these potentially competing rights.

The Issues Paper provides a useful overview of the rights engaged in respect of each individual within a surrogacy arrangement and we here discuss some aspects in further detail.

3.1 The rights of the child

There are a number of relevant human rights to consider in respect of the child born as a result of a surrogacy arrangement. The fundamental starting point is that in the development of legislative and policy responses to surrogacy and in the regulation of surrogacy itself the best interests of the child must be the primary consideration.[8] Nevertheless, the test of the best interest so the child 'is not a concrete concept, nor can it be subject to one definitive interpretation'.[9] Rather, the importance of the principal in this context lies in it being a primary consideration, as explicitly required by the *Convention on the Rights of the Rights of the Child* ('CRC').[10] The Committee on the Rights of the Child ('CRC Committee') has articled this right of the child to have his or her best interests taken as a primary consideration to function as a substantive right, a fundamental interpretive legal principle, and a rule of procedure:

(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for states, is directly applicable (self-executing) and can be invoked before a court.

(b) A fundamental, interpretive legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests;

[8] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1) ('CRC').

[9] Claire Fenton-Glynn, 'Surrogacy and the "Best Interests Principle"', in Nigel Lowe and Claire Fenton-Glynn (eds), *Research Handbook on Adoption Law* (Edward Elgar Publishing, 2023), 53.

[10] Ibid.

> what criteria it is based on; and how the child's best interests have been weighed against other considerations, be they broad issues of policy or individual cases.[11]

Accordingly, the best interests of the child must be central to both the work of the ALRC in the conduct of its inquiry and in the ultimate recommendations for law reform made.

Of course, the rights of the child are not limited to the duration of the surrogacy arrangement but extend beyond that arrangement across the child's life. As a party to the CRC, Australia is also obliged to 'ensure to the maximum extent possible the survival and development of the child'.[12] As The CRC Committee has emphasised, this must be understood in a holistic manner and in conjunction with the other provisions of the CRC, such as the right to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play, as well as through respect for the responsibilities of parents and the provision of assistance and quality services.[13] To this end, the preamble to the CRC provides also that the child 'for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.[14]

The identity and relationship rights of the child are also central. Article 7 of the CRC provides that a child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire nationality and, as far as possible, the right to know and be cared for by his or her parents. Central to the regulation of surrogacy is who, in human rights law terms, is the 'parent' of the child born as the result of a surrogacy arrangement and whether the CRC is capable of being read in such a way that it is inclusive of intended parents. Article 16 of the CRC is illustrative in this regard, which recognises the diversity of the 'family' and requires that the 'term "family" ... be interpreted in a broad sense to include biological, adoptive or foster parents, or where applicable, the members of the extended family or community as provided by local custom'. Article 8 of the CRC further provides that the child has a right to preserve his or her identity. This right certainly suggests that any legislative response to surrogacy includes certainty as to the identity of the child's parents, given the centrality to an individual's identity of the child-parent relationship.[15] In a different (although related) context, the CRC Committee has expressed the view that the right of a child to identity includes the ability to access information about their biological family.[16] Thus, in the context of a surrogacy arrangement this is highly suggestive of the child having a right to know the identity of the surrogate and any sperm and egg donor involved.

---

[11] Committee on the Rights of the Child, *General Comment No 14: On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, para 1)*, UN Doc CRC/C/GC/14 (adopted 20 September 2006) para 6 ('*General Comment No 14*').

[12] CRC (n 8) art 6(2).

[13] Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7/Rev.1 (adopted 20 September 2006) para 10.

[14] CRC (n 8) preamble para (f).

[15] *Mennesson v France application no. 65192/11, 26 June 2014 at [80]. See also Labassee v France, application no. 65941/11, 26 June 2014*

[16] Committee on the Rights of the child, *General Comment No 14* (n 11) para 55-7.

The right of non-discrimination is also relevant here. To this end, Article 2 of the CRC provides that children are entitled to the rights set out in the CRC without discrimination on any ground. This means that a child born as a result of a surrogacy arrangement must enjoy the same rights of the CRC as any other child.

3. 2 The rights of the surrogates

A number of human rights are engaged in respect of the surrogates. Central to the right of the surrogate mother is the right to bodily integrity. Article 7 of the *International Covenant on Civil and Political Rights* ('ICCPR') provides that no one shall be subjected to cruel, inhuman or degrading treatment or be subjected without consent to medical or scientific experimentation. In this regard, the UN Human Rights Committee has emphasised that the aim of this provision is 'to protect both the dignity and the physical and mental integrity of the individual'.[17] This is closely related to the right to autonomy under Article 17 of the ICCPR. To be able to make a free and informed choice, the legal and regulatory scheme must ensure that there are protections against exploitation. This must include an awareness of and mitigation against the risks of the power dynamics between the surrogates and the intended parents. This is discussed further in Part 5 below.

3.3 The rights of the intended parents

The intended parents are also owed a number of human rights obligations. This includes the right to found a family.[18] Read consistently with prohibitions against discrimination on the ground of sexual orientation, gender identity or intersex status, this right has a potentially wide operation.[19]

This prohibition on discrimination means that LGBTQIA+ people cannot be treated less favourably when it comes to accessing surrogacy, simply by reason of their sexual orientation, gender identity or intersex status. Western Australia is the only jurisdiction which bars same-sex couples from accessing surrogacy, only allowing single women and different sex couples to access surrogacy.[20] Professor Sonia Allan's 2019 review into the *Surrogacy Act 2008* (WA) and the *Human Reproductive Treatment Act 1991* (WA) recommended, among other things, that discriminatory provisions within Acts that prevent access to surrogacy on the basis of sex, relationship status, gender identity, intersex status, or sexual orientation, be repealed or amended as a matter of priority.[21] Such amendments have not been enacted.

---

[17] Human Rights Committee, *General Comment No. 20: Article 7*, UN Doc HRI/GEN/1/Rev.1 (adopted 10 March 1992) para 30.

[18] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 23(2) ('ICCPR').

[19] See Ibid art 2, 26.

[20] *Surrogacy Act 2008* (WA) s 19.

[21] *Independent Review of the West Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (Report, January 2019) vol 2, 62 (recommendation 3).

This prohibition against discrimination extends also to the rights of persons with disabilities under the *Convention on the Rights of Persons with Disabilities*.[22] In addition, the right to privacy in respect of the intended parents,[23] includes 'the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose'.[24] Of course, this right (like all others) must be balanced against the rights of other parties involved.

Part 4: Compensated surrogacy arrangements

The question of compensated surrogacy arrangements is one of the most contentious aspects of Australia's surrogacy laws. All Australian jurisdictions which regulate surrogacy,[25] prohibiting compensated surrogacy arrangements while allowing some form of *altruistic* surrogacy.

Those who have taken this position argue that compensated surrogacy should not be seen as inherently exploitative and altruistic surrogacy as inherently non-exploitative. Indeed, although 'in certain circumstances compensated surrogacy may be exploitative, particularly in developing countries where a surrogate may be "poor, illiterate and uninformed of her rights", altruistic surrogacy may also raise questions relating to the extent to which a woman is exercising her own free will to become a surrogate', such as the application of undue pressure.[26] The separation of the question of exploitation from the question of compensation is necessary, particularly in a country like Australia which has a strong social safety net to protect vulnerable individuals. It is also incorrect to suggest that altruism and compensation are opposed to each other: a woman may believe that she deserves adequate compensation for her reproductive labour and the associated risks, while also being primarily motivated by altruistic reasons for entering into the surrogacy arrangement.[27]

One view is that the insistence that women undertake surrogacy only for free and cannot be paid for 'reproductive labour inherent in gestating and birthing a child … is exploitative and perpetuates the patriarchal tradition of failing to pay for "women's work"'.[28] It is possible that the regulation of domestic compensated surrogacy arrangements in Australia 'would reduce the number of Australians travelling overseas to access surrogacy arrangements with all the incumbent risk and stress, because surrogacy would become accessible in Australia'.[29] By bringing the regulation of all surrogacy arrangements within the jurisdiction of domestic Australian law, appropriate protections can be put in place which protect all parties to the arrangement.

---

[22] Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008)..

[23] ICCPR (n 17) art 17..

[24] *SH and others v Austria* [GC], Application no. 57813/00, 3 November 2011 at [82], dealing with article 8 of the European Convention on Human Rights, which is equivalent to article 17 of the ICCPR.

[25] Sifris and Page (n 1) 82.

[26] Ibid 90.

[27] See Anita Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (2015) 23 *Journal of Law and Medicine* 333; Karen Busby and Delaney Vun, 'Revisiting *The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law* 13, 52-55.

[28] Sifris and Page (n 1) 90.

[29] Ibid 91.

Another view is that compensated surrogacy is the commodification and sale of a child prohibited by Article 25 and Article 1 of the Optional Protocol. John Tobin argues that the allowance of compensated surrogacy 'amount[s] to the sale of a child, in which case, international human rights law requires that the practice be prohibited'.[30] However, Paula Gerber and Katie O'Byrne argue that properly regulated commercial surrogacy arrangements do not amount to the sale of a child; payment to a surrogate being more akin to the payment to a fertility specialist in the context of IVF: namely, payment for a service provided and not payment for a child.[31]

These distinct views each depend upon assumptions about the arrangements for surrogacy and the formal regulatory framework in place which differs dramatically across different jurisdictions. When there is a real choice on the part of the surrogate, as is the position under current Australian law, it does not amount to the sale of a child or the giving up of bodily autonomy by the surrogate.

The CRC Committee has failed to adopt a clear position on the question of compensation. In its 2013 Concluding Observations on the United States, the Committee asserted that surrogacy, if not properly regulated, amounts to sale of children.[32] The Committee voiced a similar sentiment in its subsequent 2017 Concluding Observations on the United States in which it expressed concern 'that widespread commercial use of surrogacy in the State party may lead, **under certain circumstances**, to the sale of children' [emphasis added].[33] In its 2014 Concluding Observations on India, the Committee stated that '[c]ommercial use of surrogacy, **which is not properly regulated**, is widespread, leading to the sale of children and the violation of children's rights' and that legislation should 'regulate and monitor surrogacy arrangements' and criminalise 'the sale of children for the purpose of illegal adoption, including the misuse of surrogacy' [emphasis added].[34] These comments suggest that the CRC Committee does not view all compensated surrogacy arrangements as constituting the sale of a child but only those circumstances involving 'the misuse of surrogacy'. It may be that this approach by the Committee is influenced by the rules regarding compensation or other factors, such as the presence or absence of appropriate legislation to protect the rights and interests of all parties, most importantly that of the child.[35] Finally, as highlighted above, we underscore that the United Nations Special Rapporteur on the sale and sexual exploitation of children has viewed surrogacy with an extremely critical eye, yet even she

---

[30] John Tobin, 'To Prohibit or to Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63 *International and Comparative Law Quarterly* 318, 326.

[31] Paula Gerber and Katie O'Byrne, 'Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy' in Paula Gerber and Katie O'Byrne (eds), Surrogacy, Law and Human Rights (Ashgate, 2015) 81.

[32] United Nations Committee on the Rights of the Child, *Concluding observations on the second periodic report of the United States of America submitted under article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography*, UN Doc CRC/C/OPSC/USA/CO/2 (2 July 2013) 8 [29(b)].

[33] United Nations Committee on the Rights of the Child, *Concluding observations on the third and fourth periodic reports of the United States of America submitted under article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography*, UN Doc CRC/C/OPSC/USA/CO/3-4 (12 July 2017) [24] (emphasis added).

[34] United Nations Committee on the Rights of the Child, C*oncluding observations on the combined third and fourth periodic reports of India*, UN doc CRC/C/IND/CO/3-42 (7 July 2014) 12 [57(d)], 13 [58(d)].

[35] For further discussion of the human rights issues raised by compensated surrogacy arrangements see: Ronli Sifris, Karinne Ludlow and Adiva Sifris, 'Commercial Surrogacy: What Role for Law in Australia?' (2015) 23 Journal of Law and Medicine 275, 283-284.

has conceded that 'commercial surrogacy could be conducted in a way that does not constitute sale of children.'[36] No doubt, the ALRC Commissioners will look closely at this report by the Special Rapporteur including where the Special Rapporteur examined the distinction between exploitative and non-exploitative arrangements.

Part 5: Conclusion

We recommend that law reform in this area be framed in terms of the human rights engaged by each party to the arrangement (each of whom have distinct human rights considerations) and Australia's obligations under human rights law to respect, protect, and fulfil the human rights of the child, surrogate, and intended parents in a balanced manner and consistent with the dignity and autonomy of each person. The Australian legal system has the capability and necessary frameworks to regulate compensated surrogacy in a way that addresses the risks of exploitation while also appropriately protecting the rights and interests of all parties'.[37] Even if compensated surrogacy was to be considered as a 'contextual wrong', rather than prohibiting parties from entering into such an arrangement, Australian law 'should be trying to ensure that the requisite domestic regulation is in place so that arrangements can be adequately supervised and controlled'.[38] Indeed, failing to regulate this issue adequately domestically opens up an unregulated international surrogacy system as an undesirable alternative for individuals whose only way to start a family is through surrogacy. There are also ways to facilitate a compensated surrogacy arrangement which can mitigate the risks of commodification, such as through the use of trust accounts and other arrangements, as seen in jurisdictions like Israel.[39]

Thank you for the opportunity to make this submission on the Issues Paper for the *Review of Surrogacy Laws*. We trust that this submission is of assistance. Please do not hesitate to contact us should you have any questions or wish to discuss these matters further.

[36] Report of the Special Rapporteur on the sale and sexual exploitation of children to the Human Rights Council (15 January 2018) UN Doc A/HRC/37/60.
[37] Sifris and Page (n 1) 91.
[38] Claire Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24(1) Medical Law Review 59.
[39] Ibid 71-2.