

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

13 August 2025

The Commissioner  
Australian Law Reform Commission  
PO Box 209  
Flinders Lane  
Victoria 8009  
Email: [surrogacy@alrc.gov.au](mailto:surrogacy@alrc.gov.au)

Dear Commissioner,

**Re: SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION – REVIEW OF AUSTRALIA’S SURROGACY LAWS**

I would like to first thank you for accepting my late submission to this Australian Law Reform Commission’s review of Australia’s surrogacy laws (“Law Review”). As I believe you are aware, I have stage four (terminal) cancer and am facing a very poor prognosis (end of life). I was away in England visiting family when the deadline for this review fell and since I returned to Australia, I have started a new chemotherapy and daily radiation too. However, I wanted to make the time to do a brief submission as I think it is so important for my daughter, born through surrogacy, to other families through surrogacy and to those who will face infertility and surrogacy in the future. Unfortunately, I do not have the capacity to address all 27 Terms of Reference, but I will do my best to address those which I feel are most pertinent and/or where I feel I can offer the most input from my own lived experience.

In addition, I refer you to two previous submissions I have made regarding state level law changes (for ease and completeness I have attached these (and these can be used in a de-identified manner too) and I also agree broadly with the position of the Health Consumers’ Council (WA) Inc. (HCC) as I have written submissions on behalf of HCC.

I am making this submission to contribute to the Law Review as I am a parent through surrogacy with experience both of domestic and an international journey. I seek that my submission **be published but de-identified**.

**1. If you or someone close to you has had personal experience of surrogacy, please describe:**

- **What parts of your experience were positive?**
- **What parts of your experience were negative?**
- **What could be improved and how?**

I am a parent through surrogacy, and my daughter was born in 2017 in the USA. I was also an Intended Parent (IP) through domestic surrogacy in 2019, but our second pregnancy did not result in a live birth.

Broadly speaking, my husband and I found the whole surrogacy process to be stressful and difficult. We felt quite alone and unsupported (that is by the “system”, law and our clinic) and it took us a long while to find our feet. We have no regrets obviously, our daughter is our world, but it really could have been so much easier.

### **First journey (USA)**

The first thing to point out is that for most people, surrogacy is a last resort. People want to make a baby the regular way, this extremely stressful and expensive journey relying on a third party is rarely a first choice! After 13 rounds of Assisted Reproductive Technology (ART) ourselves, we had little money or energy left and we really needed as much help as we could get but the opposite happened. It was like our clinic became afraid (of the law and the Reproductive Technology Council (RTC)) as soon as it became clear that we might need surrogacy. The clinic’s Donor Manager came across to us as wary or even afraid of the law and RTC and as if she wanted to distance herself from our case. She made it very clear that she could not be seen to be profiting from anything to do with surrogacy. She told us we could advertise so long as it is free (and suggested one publication for parents which she did not seem to know much about in term of readership) but did not have any other ideas of how to find a surrogate and she did not have any suggestions of resources or groups. I believe law changes here in WA need to abolish the RTC, remove much of the red tape around surrogacy and work to be open about and even promote the concept of domestic altruistic surrogacy such that it allows clinics to be more supportive to clients when they need to find out more about laws, options and services. It seems this is being dealt with on a State level as I am pleased to report that the WA Assisted Reproductive Technology Bill 2025 was introduced to Parliament in WA today (13 August) which is excellent for West Australians, but I think the point remains valid as we consider harmonisation and laws at a federal level. In addition, when we put new regulatory bodies in, we need to exercise caution in terms of powers and give more trust back to our highly skilled health professionals running clinics.

After we had exhausted any familial options and tried and failed with a friend in WA, I think the lack of assistance from the clinic and the lack of information about where to go to find a surrogate plus my fast-deteriorating fertility (I was in early menopause at age 33) were the reasons we had to start looking overseas for surrogacy. It took us a while to find a Families Through Surrogacy (now Growing Families) seminar in Perth but once we did, we were able to learn more about our options and for domestic surrogacy and these seemed very limited.

Other things that made things hard for me were the rules around fertility preservation and not being allowed to make embryos without a surrogacy agreement in place.

The lack of legal parentage for WA children born via international surrogacy is another big pain point for us. It was not enough of a deterrent as we spoke to many people who assured us it would not be an issue in practice in everyday life, because I am a UK citizen we knew we could do the parentage process there and also because we were so desperate to have a child but I do know that it did and does continue to cause us anxiety. It is also discriminatory and not in the best interest of the child not to be treated like any other child (I agree with the statement in the issues paper that says child should not be disadvantaged due to the circumstances of their birth).

I will go so far as to say that this issue is a human rights issue (see also question 3) as it leaves a child like my daughter as if she has no parents. In the absence of a parentage order, I believe WA law still sees our daughter as the surrogate’s but that cannot be as our surrogate has

signed a pre-birth order giving up any parenting rights and she has no desire to be a parent. So that means if our surrogate is not a parent and neither my husband [REDACTED] nor I is a parent, then our daughter [REDACTED] is an orphan! As I face terminal illness knowing that upon my death, my daughter would not be recognised as “my daughter” and automatically inherit from me, I find this whole situation even more upsetting. I hope the WA law passes, and they come up with an easy (not expensive or overly protracted) parentage system in my lifetime but to be honest I think that is unlikely (time wise and given my terminal illness). New federal law should have one parentage process in all states/territories and should be open to ALL Australian children born through surrogacy – they all deserve parents!

On a federal level it is also utterly unfair in my opinion that the same medical treatment (In Vitro Fertilisation (IVF), Intracytoplasmic Sperm Injection (ICSI) or Frozen Embryo Transfer (FET)) is covered by Medicare ordinarily but not if it is for the purpose of surrogacy. This is discrimination against people who cannot carry and needs changing asap.

### **Second journey (domestic)**

I should start by saying that it was my dream to do a domestic surrogacy. It was what I wanted from the very beginning as I imagined experiencing the pregnancy vicariously, going to appointments, a lifelong friendship and Aunty like relationship with my child. It is what we had tried for, but we just found the Facebook process of trying to meet someone too challenging (see previous submissions). Once we found the Australian Surrogacy Community and the Western Australian Surrogacy though, [REDACTED] and I became very involved, not just in supporting people online but also in person. I regularly met up with people new to surrogacy and tried to guide them regarding where to find information, resources and help and I shared what I knew about both domestic and overseas surrogacy. We organised many community catch ups and became very well known in WA so people would reach out to me/us. This was all genuine and organic and I never said I was actively looking for a surrogate or considering a sibling journey, a) because [REDACTED] was still young and b) because I was conscious that there were plenty of people who were still looking to have their first child and I thought one of the available want to be surrogates in our little group would want to help them. However, low and behold a family approached us and said they would like to carry a sibling for us and it was like a dream come true. [REDACTED] was only six months old and the would be surrogate friend was actually still having one more baby of her own so we agreed to get to know one another more and spend time together and if that worked then jump through all the surrogacy agreement hoops (counselling etc.) and then make a baby together. We became very close to the family and spent time together with our children every week for over a year before we then started the journey which then encountered significant problems and things went wrong.

I am sorry to say that there were also a lot of negatives around our second journey, domestic surrogacy with another (different) clinic in WA. Our doctor was amazing, but the clinic was poorly geared up for surrogacy (despite being one of the State’s main providers). There were regular mix ups about who was getting information following blood tests and things (surrogate or me) and a lack of due process. The surrogate would often request they call me (and give her express medical permission) but for all except one nurse this was a problem. Then, our journey was an absolute disaster as our surrogate and her husband had unprotected sex mid-way through the fertility cycle, AFTER taking drugs to boost ovulation and then, a couple of days later, they had our embryo transferred without telling anyone what they had done. She ended up pregnant and also admitting to a nurse that she was worried because she had unprotected sex at the wrong time and then after analysing the timing, the clinic doctors concluded there was absolutely no way of knowing whose baby it was until such a time as genetic testing was possible. The whole time was extremely stressful, heartbreaking in fact.

All the counselling we did beforehand and the fact that we thought the surrogate was a friend but never spoke to us again, was just even more traumatic. [REDACTED] had started to see their four little girls as pseudo cousins and then suddenly they disappeared from our lives. We believe our surrogate and her husband knew full well not to have sex and we had actually spoken to both husband and wife about it, but at the same time, it should be known that the clinic did provide FET instructions to the couple which just tell you to refrain from intercourse for certain days, not for the whole period as they are instructions written for a couple trying to make a baby together. The unprotected sex had apparently taken place one day before the no sex window described in the instructions. It is disappointing that the clinic did not have surrogacy specific instructions, particularly given the delicate nature of surrogacy and because we had to pay more for everything because it was surrogacy (including additional administrative fees) so it surely makes sense that the clinic should provide surrogacy specific instructions. In my view we need more competition between providers, more clinics interested in and practicing surrogacy and also more regulation around standards (without scaring clinics with a watch dog approach).

Surrogacy is complex and it brings together two families, ideally for life. I am therefore, not against counselling for teams, in fact I am for it. However, it should be noted that despite paying for each of the four members of our team (surrogate and her husband and myself and [REDACTED] to have the required psychological testing and then going to many mandated counselling sessions with the RTC approved counsellor, our journey not only went wrong but the things which we discussed in counselling did not happen in terms of how we would talk it out and how we would address issues and our surrogate never spoke to us again. I understand people are people and these things are never full proof, but I think new laws need to take this into consideration and make recommendations for steps in surrogacy journeys rather than set out strict laws. In WA, the way the RTC either is or has been or how it is a portrayed but clinics (as a body to be feared) puts people off domestic surrogacy. The RTC's mandatory approval process is too much red tape and has been compared by some as feeling almost like a criminal check. People should not be treated like this, remembering that people from all walks of life and moral standings (even those lacking in moral standing) procreate naturally all the time. We must have some checks and balances, but it needs to be kinder as currently it is barrier. Furthermore we need to trust our skilled clinicians to guide their patients as to the right steps and I think the new WA bill recognises this. I think there can and should be a recommendation for legal advice and counselling but that we need to use professionally qualified people with experience and trust that, not rule that they need to be RTC (or whatever regulatory body) approved. I think a clinic should be able to request the steps to be followed as they want the best outcome of the journey but if for some reason they are not and a baby is born, the parentage order cannot be based on the steps. Even if it was not done in a best practice way, it is not in the best interests of the child to live "without parents" because of this.

For our domestic journey, paying expenses to our surrogate felt hard and became a negative aspect of the journey. We wanted to pay not just the surrogate's but her husband's time off work if it was for us (either he was doing an appointment for us or he was looking after his own kids so she could) but we were told that was not allowed by our lawyer. Again, there was a felling fear of the RTC and the law and being punished and it did not feel right. I think we need to make the law make sense (this does not – he had to take time off work as his kids needed looking after as she had to go to clinic) and also, in the absence of compensated surrogacy, at the very least be generous to make sure the surrogate and her family are not out of pocket at all (whilst also ensuring IPs are not taken advantage of). See question 15 for more detail.

## 2. What reform principles should guide this Inquiry?

I like the reform principles laid out in the Terms of Reference; they resonate with us (my husband and I). Other points, which fit within the ethos of the principles named, which I would like to note are:

- **Best interests of the child.** Again, make it make sense and do not do (or threaten) things like sending parents to jail or fining them for desperately try and have a child. This helps no-one, least of all the child.
- Supporting all Australian would-be parents **without discrimination**. WA needs to fix things the most here regarding gender, gender identity, relationship status and sexual orientation discrimination but there are also things like the Medicare surrogacy rebate (or lack thereof). All people with a desire to have a family should be treated equally.
- **Harmonisation** for equal opportunities as well as less complicated and a better patient experience.
- **The patient voice – nothing about us without us.** This inquiry should allow time and budget to really talk to people who have done journeys both domestically and overseas and really hear the sorts of struggles (and positives). Those with lived experience are the experts and give the most insight and understanding into the complexities in this space so to make it better, we really need to listen.
- **The right reviewers** – the right people need to head up this inquiry. It should not be led (as some in the past have been) by people with biases on the topic going into it. The reviewers need to be open minded and also spend time getting to understand the topic/space. Anyone conducting community conversations should be appropriately trained too – that is a focus discussion should not be leading, and the facilitator should not make their personal opinion known. I have participated in inquiries on this topic in WA where the facilitator (who was also the reviewer) made her strong views on the topic very clear, made me feel like a criminal for going overseas and then and actually insulted me by undermining my position as a mother (she was speaking about unenforceable contracts and separation from the surrogate mother as a traumatic issue failing to acknowledge the traumatic issues around separating from a biological mother). This is not a safe space to hear lived experience stories.

## 3. What do you think are the key human rights issues raised by domestic and/or international surrogacy arrangements and how should these be addressed?

Firstly, WA surrogacy law is in direct contradiction of our sex discrimination laws and that is a human rights issue, but I think enough said on that, particularly because the Bill is now in parliament to change this. Across Australia I think we need to allow ART and surrogacy services for all.

The key issue for children born through international surrogacy is this issue that in some states they can never be recognised as the children of their parents (parents in practice and usually biologically too). See question 1.

Another human rights issue is that we are putting our people at risk by sending them overseas (either because they are banned in WA or because things here in Australia are so hard that they feel forced). See my previous submissions and question 15 for more detail on our journey but America was a last resort for us, and it was mentally, physically and financially draining.

No one wants to live in an Airbnb for the birth of their child, to be in a foreign country away from all their support networks and fly across the world when the baby is three and a half weeks old. We also considered other countries (India) and things that were really out of our comfort zone out of sheer desperation. One agency in Canada messed us about a bit too. We were not conned or fleeced but IPs can be and predators know they are desperate. I note that there is a human rights list of the Issues Paper but there is nothing about IP exploitation and I am sure this happens often or at the very least I think it's fair to say IP can be and are taken advantage of sometimes. I think people know they are desperate and some agencies in some jurisdictions persuade, coerce and overcharge. In the years since our daughter was born, IPs have had to navigate travel in a global pandemic and war in a popular surrogacy destination and some people have even been caught up with unethical clinics unsafe cross border arrangements. People are putting themselves at risk and doing things which may be precarious or even dangerous because they are desperate and I believe this is a human rights issue in itself. We must protect our people.

Some of the rules around fertility preservation (and again this may be mainly WA, I am not sure) feel discriminatory (against those born without a uterus for example) and altogether too blasé to a point where it becomes a human rights issue. For me the concept of motherhood is so intrinsically linked to my personhood and by that I mean my ability to live in society and be (without an unbearable level of psychological distress) that it feels absolutely wrong that a committee could tell me (as a 33 year old woman) that I cannot preserve my fertility when there is the technology to do it. This does not feel like medical best practice to me. I believe our national laws need to really allow freedom in this space so we are not taking away people's right to parenthood and this matter of fertility preservation must be handled very carefully.

#### **5. What do you think are the main barriers that prevent people from entering into surrogacy arrangements in Australia, and how could these be overcome?**

See question 1 for issues regarding our journey but in summary I believe the main barriers are:

##### **It is too hard to find a surrogate in Australia.**

If we set aside the current discrimination in WA and presume the Bill will be passed to allow gay men and single men to do surrogacy in WA, then this (too hard to find a surrogate) is the main issue, I think. Sheer desperation and a lack of time is the reason people go overseas and unless we find ways to increase the number of surrogates here and make them and IPs more accessible to one another, people will keep going overseas.

The first thing we need in this space are laws and bodies that do not terrify people (including clinic staff) so that the clinics we have can be more supportive and helpful to those seeking surrogacy.

Next, we need more general population education and awareness around surrogacy. No, it's not illegal but if people do not know that then people are not inspired to become surrogates (unless it comes up for someone they know). Education in primary care is also necessary. I have had a GP tell me surrogacy is illegal here and she was adamant even when I tried to explain to her about (legal) altruistic surrogacy.

We need to do away with laws which ban advertising for a surrogate, this is not helpful. We need some sorts of matching and support organisations in my opinion (see question 11) and some regulation of bodies working in this space.

Finally, I think we really would benefit from a compensated model (see question 17) and that really this is the only thing that would make a material difference to keep most/more people on our shores.

**The process is too complicated, onerous and intensely regulated.**

Every state and territory varies here but that is case in point for the first problem – the law in Australia is very confusing (sometimes even for the lawyers in my experience)! It would really help the patient experience if we could have one set of laws across the country. Harmonisation should also then address equal opportunity such that all people have access to the same services.

In some states/territories, certainly in WA, the regulatory body has gotten rather too onerous and powerful. I say this as I experienced the way the nurses, administration staff and Donor Coordinator in my two clinics used in WA would talk about the RTC, because of the way people in our WA Surrogacy Community (of which I am a long standing and active participant) talk about it and from my own experience trying to join the committee but not being accepted. I think that whilst there obviously needs to be regulation of the fertility industry and the clinics operating but beyond that we can and have to trust our clinics and health professionals to make the necessary assessments around treatment needed or not needed and recommendations regarding steps towards a surrogacy agreement etc. This does not need to be done by an external body and no “approvals” per se should be required in my opinion. On the whole I agree with many of the steps which are required for surrogacy in WA, for example the counselling but some might be not necessary every time (like the independent psychology assessment) and some are definitely not necessary (like the waiting period). Regardless I think what steps are needed can be recommended by clinical professionals, not a regulatory body. I think our journey which went so wrong, is case in point that a regulatory body does not provide any additional safeguards for parties involved.

Should new laws establish some sort of advisory council and/or clinic regulator, I urge you to remember the importance of the lives experience voice and consumer representation. When consumer representatives have handed their notice in at the RTC, the committee has not been quick with trying to find or appointing another representative but rather left vacancies for many months. Regarding my personal experience of wanting to join the RTC, I have applied to be the consumer representative multiple times but I believe I am not being considered (am being rejected but not even told why as such) possibly as I have been overseas for commercial surrogacy and there are members of the committee who disapprove of that. We did 13 cycles of ART in WA before we were told we needed surrogacy, I have lived experience of domestic and international surrogacy, I work in health advocacy, I identify as being from a Culturally and Linguistically Diverse background and am considered somewhat of an expert in engaging with diverse communities and I have come as recommended to the RTC by the HCC twice (with the support of a doctor who is on the RTC committee). It seems strange that I never got a position or even an interview or call back. We need consumer representation on any new panel or body that is created, and representatives should have a broad range of experience and be well supported to attend meetings.

**Contracts are not enforceable.**

I have had many conversations with surrogates, IPs, surrogacy legal professionals and also those running surrogacy inquires regarding enforceable contracts. There seems to be a lot of resistance due to the surrogate’s bodily autonomy and not “forcing” her to relinquish a child. I do understand this and also am conscious that if things were to move to a more compensated

model, we need to ensure we are not tying payments to the relinquish aspect. However, I would argue that the surrogate and IPs have entered into an agreement where from the outset the child is not the surrogate's, and she would not actually be able to keep it. If she later decided she wanted to and tried (unlikely) then the family court would get involved and I believe likely rule that the best interests of the child are for it to go to its planned/commissioning/biological parents. Whilst I would never want to cause trauma to a surrogate struggling to "give up" a child, I could also not "give up" my (biological) child and just let her be brought up by someone else, I would fight for her until the end. With that in mind, I would prefer the child handover part of our Australian surrogacy contracts to be enforceable.

If this is not possible however, I think there are options to educate around this so an unenforceable contract sound like less of a risk because I know that the lack of enforceable contracts really does put some people off doing surrogacy here. We know that if a surrogate wanted a baby, she would simply have one and that surrogates do not want to keep babies but desperate IPs may already have feelings of anxiety around not getting their baby and they may be feeling inferior or similar due to infertility. For many the risk of having to give up a child would just feel too much to even try. If contracts remain not enforceable then I think better education around why they are not and what it means would be helpful to keep people onshore (with faith that the system works). See question 9 for more detail.

#### **The birth certificate and parentage process takes too long.**

I think this side of things puts IPs off more than the lack of enforceable contracts and I think it put some surrogates off too. The surrogate (and her partner) the legal parents at birth and I think if pre-birth orders were an option here, that would be better for all parties. If that remains off the table then I think it's important to expedite the processes to get the child where they belong, that is with their parents and also to use common sense in the interim. I have heard of hospitals here in Australia who know full well it's a legal and contractual surrogacy but they will not let the parents leave the hospital with the baby so the surrogate has to leave holding the baby and then they do a car park handover! I know of a case here in Perth where a GP would not see a newborn baby with his mother but made the surrogate come in and register the child. These sorts of things do not help anyone, a new family just wants to get on and be "normal". They are as sleep deprived as any other new parents, they do not need extra work, and they do not need to feel less than or like they are not parents. It's extremely distressing to go through the journey of infertility and surrogacy and then have your child not be recognised as yours, to not be a legal parent and you can feel very helpless and even inferior to not be able to take your child to the doctor; it's invalidating and in some cases humiliating. Then there is the surrogate who has done all this hard work, has just given birth and now likely just wants to be with her own family and rest and recuperate in the fourth trimester and she is forced to help the parents go to a GP – this does not make good sense! It is my understanding that the surrogate and her partner then have to register the birth, again unfair on her and again the parents are at her mercy, and I have heard cases of people dragging their feet here too. Then there is the process of the parentage order which varies in all states and territories and is confusing and often expensive and long. It is not fair to leave all parties in limbo for nine/ten months which from my memory of a time when I had friends doing this (five and eight years ago) was about the time it took. I think when we are talking about a child without legal parents, we need to get rid of waiting periods (I think some states have a one month wait which is unnecessary and rather silly to suggest as if there is a cooling off period and a surrogate can just choose not to give up the baby or that parents can choose not to take it on!) and expedite the process.



## 9. Should surrogacy agreements be enforceable?

As mentioned above (see question 5), I believe the lack of enforceable contracts are a barrier to domestic surrogacy in that they scare people. Desperate IPs are worried the surrogate will try and keep their baby. In reality, we know that this rarely, if ever, happens and that if a surrogate wanted another baby, she would have one. In an ideal world, as a former IP, I would like the relinquishment of the child part of a surrogacy contract to be enforceable as the idea that someone else could “keep” my biological child does not bear thinking about, even if it is very unlikely that that would ever happen. In a previous law review focus group, the facilitator told me that enforceability was an issue because it would not be fair to forcibly separate the “surrogate mother” and baby and spoke about her mental health etc. but she could not see how it would equally not be fair to separate me from my biological child and what that would do to my mental health. In terms of the best interests of the child, she did not seem to be considering this wholly and we do need to think here about the planned family and genetics too. However, I do understand enforceability is an issue because it is a woman’s body over which she has bodily autonomy – we cannot force her to do anything and nor would we want to. If we cannot enforce the handover part of the contract, if that is “impossible”, I think this is okay, but more education is needed. If IPs understood things better, that in reality a surrogate will not want to or try to keep the baby and if they did, a court would not let that happen, I think this issue would be less of a deterrent.

It is my understanding that the financial reimbursement parts of the contract are in most if not all jurisdictions, enforceable already and I think that is fine. Financial matters need to be transparent, agreed by all parties and on the whole backed up by receipts.

Another aspect of the contract we need to consider is the clauses around the surrogate’s behaviour and actions during pregnancy and even treatment (I sometimes wonder if we should have written something about intercourse in the contract as they did in America). However, these aspects are really not enforceable. In our experience of using an “enforceable” contract in the USA, it really makes no difference. At the end of the day, we are talking about a woman’s body over which she has choice, agency and full bodily autonomy and that does not really change whether there is an enforceable contract or not. Really if a surrogate wants to do something to her body or you baby, she has the ability and you are quite powerless as IPs, which is the reality of surrogacy.

I really struggled with being so far from our surrogate and pregnancy in the US. Our surrogate definitely made dietary choices I would not have made if I was pregnant and I believe she may even have stopped taking her folate this was really hard for us. She also took a medication which is prohibited in pregnancy but luckily it was taken a matter of days off where it could have really damaged the baby’s lungs. We found out by pure chance (it came up in conversation) and we were able to speak to our doctor to have a chat to our surrogate but, even though she was in breach of contract there was nothing we could do about it. She was pregnant with our child, it would not be helpful to try and issue her a breach notice! I think what is really important with these things is the conversations about behaviour during pregnancy – to talk about alcohol and drugs and sugar and whatever else matters to the parties and I think for many IPs it is helpful to (be allowed to) write them into the contract. Even if they are not enforceable in the contract it gives peace of mind and encourages parties to do the right thing and declare things. Our surrogate here in Perth took mental health medication which is not recommended for pregnancy when she was pregnant and struggling or embarrassed that she did not know with whose baby and although, as above, she never spoke to us directly, she did ask the doctor to call us about this medication and let us know,

because we had had a conversation about wanting to be across medications after what we went through with surrogacy number one. The call from the doctor which informed prescription of the not recommended medication was distressing to hear but at the same time positive to receive in that at least we were across what was happening.

As such, I would argue for more balanced and detailed contracts but have no definite position on enforceability of this aspect. My recommendation (see question 4 above) is to talk to people with lived experience and work out a contract template that allows for more detail on surrogate behaviour, even if it is not enforceable.

## **11. What are the gaps in professional services for surrogacy in Australia?**

### **Matching agencies**

I believe this is the major gap in the Australian setting which exists in all other markets. I believe matching agencies really are necessary to help those who do not have a friend or family member who can help and thus are trying to meet a person who wants to be a surrogate. I believe Surrogacy Australia Support Service (SASS), which was established more recently, after our time, is facilitating some introductions but it doesn't have a lot of sign-ups and is not actually matching per se. I think the main meeting place is still the Australian Surrogacy Community Facebook page (which was the main place when we went through our journey). The problem with the Facebook page is that it can feel quite competitive and intense (see previous submissions) and also that it is managed by volunteer moderators so there is often limited capacity and thus things can be easily missed or take longer and there are sometimes issues and people with different ideas about Facebook etiquette. To have any hope of keeping Australian IPs on shore, there needs to be a facility or multiple facilities for matching IPs and surrogates, a self-managed community Facebook page is simply not enough and really does not cater those who are unable to use social media for a whole variety of reasons or many people from Culturally and Linguistically Diverse backgrounds.

We should also consider organisations whose sole function is to pair surrogates and IPs but as we do that, we need to look at regulation of that industry too (to keep an eye on best practice, exploitation and costs). In my view, good agencies do not just pair an available surrogate and an available IP or IPs or base it on geography. At the very least they should be looking at key values and views on things like termination and an even better agency should find out a bit more about the parties and match based on common life values and interests a little such that there is a chance of a better and more enduring relationship. I am not 100% on how agencies would work financially but if we have compensated surrogacy then it goes hand in hand with agency fees and if we do not then perhaps it is a not-for-profit model but either way Australian IPs need help finding surrogates.

### **A register**

I think clinics could keep a register of interested parties or we could consider a central register in each State/Territory. Even if there are matching agencies, this can be a clinic starting point which may end up being quite fruitful. Anecdotally I know that there are often women who struggled with fertility issues themselves who would then like to help others in a pay it forward sort of way.

### **A regulator to keep an eye on agencies and clinics from overseas who are coming to sell their services to Australian IPs**

We would not be where we are today with our beautiful daughter without having had the help of Growing Families (formerly Families Through Surrogacy). Happening upon one of their

free webinars in Perth is the way we found out about various international surrogacy markets and heard more about domestic surrogacy and found the Australian Surrogacy Community. Sam Everingham has done some commendable work in my opinion. However, my understanding is that they are now more of a concierge service, and I am not sure of their financial model and how exactly they select their partners and exhibitors. Who is monitoring the markets they select to showcase and the providers they (or others) recommend? I think it is important we monitor not just this organisation but any others like it which may pop up in order to make sure we are protecting Australian families.

### **Surrogacy guidance in general**

Australian fertility creation lawyer Sarah Jefford and Growing Families Founder Sam Everingham have taken it upon themselves to create surrogacy guides for Australian IPs and surrogates which is fantastic, but I think we need more of a national, health department approach on this so Australians have somewhere trusted to go in terms of reliable and impartial information. Alternatively, or in addition, the clinics could take a more active role in guidance and support.

### **Surrogacy professionals**

To improve surrogacy for Australian families I think we need better professional education in this space, and we need to try and actively increase the number of skilled people working in the industry. I have already described how our clinic did not even have basic cycle instructions for our surrogate (despite the increased fees) and how our previous clinic basically told us we needed surrogacy and then sent us on our way to come back when we had someone to carry for us. Each State/Territory needs a couple/few (depending on size) clinics with a real surrogacy specific set up in order to properly support people and have successful journeys.

I agree with the Issues Paper in saying that professional services like lawyers, psychologists and counsellors are lacking in this space and in a small state like WA, we often ended up having to use national providers who then turn out not to be as ofay with the WA rules. We need to actively try and recruit and upskill professionals in this space. In order to support this, we need to increase general/public awareness/knowledge of surrogacy too (see question 25).

I have not chosen to answer question 13 about regulation on advertising at this time but I will say that we need to allow advertising in order to increase surrogate and IP matches and domestic journeys. At the moment the different rules on advertising in each State/Territory are really confusing and in WA, it seems that because a clinic must not be seen to be profiting from surrogacy, clinics live in fear of advertising which is really not helpful. IPs need to be able to advertise their need and search for a surrogate, a surrogate should be able to advertise her desire to carry if she wants to and clinics should also be able to advertise for surrogates in my view.

### **14. What entitlements, if any, should be available to surrogates and intended parents?**

- Medicare – this should be as available as it is to others going through fertility treatment or pregnancy. There should not be the current lack of Medicare rebate for IVF/ICSI because it is surrogacy and there should be no restrictions related to the reason for treatment (i.e. no different treatment if it is medical infertility, unexplained infertility or social infertility) other than perhaps some limitation when it there is advanced maternal age (from a statistics, cost and fairness standpoint).

- Right to share medical records – I understand a surrogate must have bodily autonomy but if she makes the choice to share her medical information with the IPs then she should have the right to do that and clinics should accept that without making it an ordeal. In our experience, some nurses were willing to share information and some refused which was just hassle for everyone.
- Surrogates should not be out of pocket at all so parties should be allowed to reimburse them for anything they lose or miss out on due to the fertility treatment or pregnancy. This should be allowed to include time off work for both surrogate and partner and babysitters etc. There should be sensible regulation of this space with allowance for IPs to treat the surrogate to food shopping or ready meals or maternity clothes without getting into trouble or worrying about such.
- Parents need the right to parent their baby once it is born. That may sound obvious, but I mean they need to be allowed to get on with it, get a Medicare card, register at the GP and look after their own child without administration help from the surrogate. Conversely, surrogates have been through enough and have the right to be left alone (administratively).
- Paid parental leave from Centrelink which is the same as other families who have had children by another means. This should be granted with ease from Centrelink, but we have many stories in the community where staff at Centrelink were not across surrogacy and wrongly state that either IPs or surrogates are not entitled to parental leave, and they send people away. Training is needed here.
- Business should provide parental leave from work as per any other employee (noting that the surrogate would not be caring for a child so her leave for medical recovery would be much shorter and that parents are caring immediately following the birth).

#### **15. How could the process for reimbursing surrogates for reasonable expenses be improved?**

The process could be improved by being more understanding to the fact that this journey is complex and there are many parties involved so it should make sense and not be so heavily “policed” that there is fear from parties involved about being criminalised for trying to get a babysitter. Sensible, compassionate and no surrogate out of pocket and no IPs taken advantage of would be the goal and I think for that to happen it is simply a question of talking to people to find out what needs to be included and then come up with sensible guidelines on the proof that may or may not be required for certain items. Ultimately the IPs and surrogate would need to talk and agree based around the guidelines.

The process can and should be the same across all states and territories so it’s fair for all and so it’s easier for those going through a journey. Right now, I can tell you that even lawyers confused!

I am wary of cap amount because in some jurisdictions (e.g. Canada which we also have experience of, we went with an agency there and matched with a surrogate who later turned out not to be medically fit) these seem to have become a way of blurring the lines between altruistic and compensated surrogacy (i.e. there is a payment for “expenses incurred” but the expense amount is known beforehand and it is the maximum allowed).

I think the process for expenses should be as transparent as possible and also as simple as possible whilst protecting all parties. If surrogacy remains altruistic and thus costs low, I’d say money is trust is unnecessary hassle for an already hard process but at the same time I

understand why the trust gives peace of mind and we had to use it in the US. I think receipts and / or proof such as payslips should be kept for the larger value things but there should be a small amount allowed without receipts (for things like parking).

**16. Do you support a) compensated surrogacy and/or b) 'commercial' surrogacy? You might want to consider whether you agree with how we have described compensated and 'commercial' surrogacy?**

Yes, I fully support compensated surrogacy in Australia. I say "compensated" as my interpretation of this is that it should not be a free market where any price goes as that does commodify children, put IPs at serious risk of exploitation and risk attracting surrogates who are "doing it for the money". Compensated surrogacy would allow for a payment for time without making it such a large amount of money that a surrogate is solely motivated by money. That said, in my view, knowing many surrogates personally, altruistic, compensated and commercial, women are rarely motivated solely by money for this. A woman tends to carry as she is motivated to help (but also does not want to be out of pocket and the money is an allowance for her time).

My main driver for supporting some form of financial compensation is that I just do not think we will ever keep up with demand otherwise. I could not stop until I was a mother, I would have done almost anything, and I went to countries and considered things I was not comfortable with, all because I was desperate to have a child. We started off with a work colleague here in Australia and then she had a health problem. We travelled to India and were sat in a doctor's office when the Indian Government sent a notice out saying that they were no longer allowing surrogacy for international IPs. Now in hindsight I was not comfortable with all the practices in some of the clinics and agencies in India and I am glad we could not do it there in the end but we were considering something out of our comfort zone because we were so desperate. We then signed up with an agency in Canada and had a surrogate who was lovely but did not end up passing her medical. We then later found out that the agency has been dishonest about something regarding her medical history. By this stage my sister's twins were a bit older, and she considered being our surrogate, so we ended up going to a clinic in the USA (where she was living). When that didn't work out, out of sheer desperation and exhausted we ended up with an agency in the most expensive US state but the one with arguably the most surrogacy experience and the one with arguably the easiest processes (pre-birth orders etc.).

Whilst I think 13 ART cycles before surrogacy and then four countries and possible surrogates is a lot for one couple to handle, we are lucky compared to IPs in war zones, navigating travel though COVID lockdowns and IPs crossing borders and bending rules and getting into all sorts of strife due to desperation and too big a risk taking, trusting people they shouldn't, being taken advantage of and / or pure bad luck. In the community we regularly hear about people who cannot reach their babies or who cannot leave the countries they are in and get back to Australia. By making surrogacy so hard here in Australia (or still here in WA at the time of writing making it impossible for some people to access) we are putting out citizens at risk by sending them overseas into often dangerous and always financially difficult situations and this is simply not good enough, it feels unethical to me. I believe the demand for surrogacy is always going to exceed supply (particularly in WA when demand will soar when the law changes to include gay men and single people and others currently discriminated against due to gender or sexual orientation) so the only way to even try to get enough surrogates to keep the majority of people onshore, is to make it possible for surrogates to be compensated.

In terms of why I support compensated surrogacy, well, everyone else gets paid, why not the surrogate (who is doing the most work!)?! I do not believe many women could do it just for the money; surrogates must be motivated by human kindness, a desire to make and complete families and altruism. I believe she can be motivated by all these things but also still receive a payment just like a doctor likely enters medicine, not just for the money but also because he/she/they want to help people. Many caring professionals involved in surrogacy can be full of kind people but ones who also get paid for their time. It does not make sense to me that every other person in the chain of people required to put the agreement in place and bring the baby into the world, the doctors, nurses, psychologists, lawyers etc. is paid but not the one doing the most “work”.

An argument against compensated and commercial surrogacy is always exploitation of women but I would argue that not paying them is the most exploitative practice. It is important that free market commercial surrogacy does not get used as a way to coerce women into doing a surrogacy or that it does not wrongly attract women too motivated by money, but I do not see reasonable compensation as anything but a plus.

Another argument against is often about commodifying children but we need to remember we are compensating for the surrogate’s time (plus dedication, energy, care etc.) not for her to relinquish the child. The payment happens whether there is a live birth or not and is paid in instalments based on time.

**17. If Australia was to allow for compensated or ‘commercial’ surrogacy, how could this be implemented.**

I do not have the capacity to go into detail here, but we need to look at examples from overseas and the most important ones to look at would be the UK, Canada and certain US states. The UK and Canada count themselves as altruistic models but there are interesting and different ways of counting reasonable expenses. One has agencies which charge to match IPs and surrogates, and one does not and whilst I understand this is not the question, it all flows into how the model works. There are many states in the US which seem to do it well (for example California where we had a good experience in many ways and did think the pre-birth order worked well) and some that have seemingly cumbersome processes. There is also some evidence to suggest payments are getting out of control in California. If Australia is considering some form of compensated or commercial surrogacy then there needs to be an analysis of different jurisdictions pros and cons and a detailed examination how all the parts play into one another.

**18. What are the main problems with the requirements and processes for obtaining legal parentage for a child born through domestic and/or international surrogacy?**

I struggle a little with the surrogate’s partner being on the birth certificate, this does not make sense to me (or many surrogate partners who I know) and I think this review should look at a workaround for this.

The primary problem with the parentage process is the time it takes and specifically there being no pre-birth option, the waiting period before an application can be made, even post birth and the time it takes to be granted. I have not obtained a parentage order myself, but I also hear it can be administratively burdensome and expensive. See also question 5. We must remember that in the absence of a parentage order over this period, parents have no legal relationship to the child which compromises the rights of the child.



As for legal parentage for those born through international surrogacy, the main problem is that there is (currently) no way (in WA) for us to do it! This is a really uneasy position for us to be in as parents, and it is emotionally charged too (to know that the state I live in and will likely die in does not recognise me as my daughter's Mum). It is also unfair and not in the best interests of the child and is a human rights issue in this regard (see question 3).

Again, we must remember that in the absence of a parentage order over this period, parents have no legal relationship to the child which compromises the rights of the child and in this case we are not even talking about months but years or forever! It is honestly quite unbelievable that our seven-and-a-half-year-old daughter is not our "daughter" according to WA law in my opinion and this is not how Australia should be treating its citizens. I would say the later for the best interest of the child even if we had done something criminal but in WA it is my understanding that going overseas for commercial surrogacy is not against the law so we really should not be being punished for it. I do have a huge problem with the States and Territories that do criminalise going overseas for compensated/commercial surrogacy, see question 24 for details.

Although we do not have issues day to day (and have registered our daughter in school and with Medicare) we cannot get a passport for her without our surrogate's permission (see question 19) and when I pass, she will not be legally acknowledged as my daughter. The passport issue does just not make sense for us and causes unnecessary complication and hassle but I genuinely do not understand how it can be when a proper legal process has already been followed. How can WA insist on recognising someone as a parent when they have said that they are not a parent (in a court of law in a country with a reputable legal system)? If our surrogate has renounced her parental rights, then surely signing our daughter's passport application is in direct contradiction of this? See also questions 1 and 14.

There needs to be a process to legalise the Australian children being born overseas to Australian parents. They are loved children who have a right to have their parentage recognised and anything less is not good enough. The process should not be too cumbersome, lengthy or expensive considering what families have already gone through. Ideally there should be a template, so IPs do not need more costly legal advice.

My final problem is also the different parentage laws and processes in different states, again confusing and not fair and equal.

#### **19. How could the process for intended parents to become the legal parents of children born through surrogacy be improved?**

The key thing here is that all children born via surrogacy, wherever the surrogacy took place have the right to have their parents recognised as their parents and there needs to be a process to allow this to happen. This process cannot be based on compliance; this is not in the best interests of the child.

In terms of how it can happen, the speed with which things can be done is of the utmost importance too. In an ideal world I think it should be a pre-birth process, why not as the surrogacy agreement and who will be the parents is arranged from the start? If it could be an administrative process, I am pro that but if it has to be judicial then it needs to be simple to do and/or with clear instructions and support available for IPs so it is not too hard or overly expensive.

**20. What, if any, are the main problems with obtaining the following documents for a child born through international surrogacy:**

- a) **Australian citizenship.**
- b) **an Australian passport; or**
- c) **an Australian visa.**

- a. **Australian citizenship** takes so long it is generally impossible to obtain this in order to leave an international surrogacy destination and this is not ideal. I know for us we were not wanting US citizenship but of course is automatic. We would not have bothered with a US passport, but we could not have stayed in the US for the amount of time it would have taken to obtain Australian citizenship and then a passport for our daughter. We were staying in an Airbnb, and we were neither working nor settling into our home as a family; we wanted to get home asap so we got an expedited US passport for our daughter, simply so we could travel. I do think there should be a separate and quick process for surrogacy so people can travel as Australians. The preference to travel with the baby as an Australian would, in my view be based around family, patriotism and other more social aspects as well as the practical side of timing as some countries/US states do not offer expedited passports like USA State of California does as well as the fact of the baby then arriving home Australian means he/she can get Medicare straight away etc.
- b. **Australian passport** – due to the lack of parentage process we had to ask our American surrogate to sign our daughter's passport application. Understandably she could not fathom why she needed to do this, she had gone to a Californian court to renounce her parentage rights, she signed a surrogacy agreement, she really strongly felt she did not have the right or need to the hassle (of the form and accompanying certified documents) but she did it for us. Then, five years later, when our daughter's passport expired, we had to ask her again. This time she remained adamant that she should not sign, and we accepted this and had to fill in forms as such to explain to the Passport Office. This whole thing should not be AT ALL as we are both our daughter's biological and social in practice parents as well and it is our right to get her passport for her!
- c. **Australian visa**  
We did not have any problems getting a tourist visa for our daughter to travel to Australia with her US passport, but it was a shame we had to do it that way as above. Then we got back to Australia we had an issue when we had to take her to Perth Children's Hospital in an emergency – as she was not yet a citizen we were charged as overseas visitors on a visa.

**22. What is the best way to approach differences in surrogacy regulation between or within jurisdictions?**

I am aware that law harmonisation is something which is talked about and perhaps wished for in many different aspects of Australian life and law and I think due to Australia's relatively small population size, it is important to try not to confuse people and make things harder for them. At the moment, some of the vastly different laws in our states and territories make things at best confusing and at worst grossly unfair and discriminatory. We have people relocating to access services which should be accessible to all. People need fair and equal access and treatment wherever in Australia they are and should not have to relocate for treatment. I think that surrogacy could be regulated



at a federal level and then the day-to-day processes managed at a state level by local clinics, hospitals and courts of law.

**24. Should the law have a role in discouraging or prohibiting certain forms of surrogacy?**

I believe that improving surrogacy in Australia will naturally work to discourage overseas surrogacy but there will always be some people who go overseas (for speed or they see it as easier etc.) but I do not think the law has a role here. Generally, in life, when we travel, we abide by the laws of the country we are in and I do not understand how this is not the case with surrogacy, how certain Australian state's laws try to control what happens overseas too. I think the suggestion in the Issues Paper regarding safeguards coming from other extra-territorial laws which cover major things like slavery and human trafficking is a sensible one.

I do not think it is fair to criminalise all forms of compensated or commercial surrogacy. I agree that it could be counterproductive or cause harm to criminalise either by driving practices underground as mentioned in the issues paper or because fines or jail time or the threat of these is not in the best interests of the child/new family. The law has a role to keep Australians onshore where possible by improving the domestic surrogacy process here and the Health Department has a role to better inform and support Australians to go to the right (safest and most robust markets) places if going overseas and how to look out for themselves and what to look out for etc. That way, when children are born overseas, we can be surer it was in an ethical manner which was in the best interests of all parties. However, if and when things go wrong or families need help overseas then it is our responsibility (that of the law and Government) to look after these Australian children.

**25. Do you think there is a need to improve awareness and understanding of surrogacy laws, policies, and practices?**

Yes! Then we would hopefully attract more surrogates. Plus, it is important to normalise surrogacy so children do not feel excluded and as it can be hard to be a new parent through surrogacy when people understand it so little or think it's illegal (even some medical professionals).

**26. Are there any important issues with regulating surrogacy that we have not identified in the Issues Paper? Do you have any other ideas for reforming how surrogacy is regulated?**

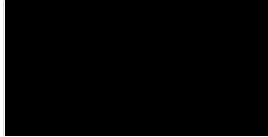
It is important we choose the reviewers carefully; they should not be biased and feel too strongly one way or another (see questions 2 and 9). Speaking to those with lived experience is paramount but we need to plan community conversations with appropriate time and budget and use experienced, not biased facilitators, and create safe spaces for conversations. This will give better, more reliable data.

Thank you for considering my submission.

Yours faithfully,



## Appendix 1 – My submission to the 2018 Review



16 March 2018

The Program Manager  
Reproductive Technology Unit  
Patient Safety & Clinical Quality  
Clinical Excellence Division  
Department of Health  
189 Royal Street  
PERTH WA 6004

Dear Associate Professor Allan,

**Re: Independent review of the Human Reproductive Technology Act 1991 and Surrogacy Act 2008**

My name is [REDACTED] and my daughter [REDACTED] was born to an American surrogate some 12 weeks ago. My husband and I could not be happier but it was a long, emotional journey and I really struggled with having a surrogate and pregnancy so far away. Our joy as new parents is also shadowed with uncertainty as [REDACTED] is not yet an Australian citizen and from our understanding, we are not recognised in Australia as her legal parents. We have used every penny of our savings, borrowed a large amount of money from my parents and are left with personal loans and paying interest only on our mortgage just to become parents. In my opinion this is largely because the law of our country / state was not able to accommodate our surrogacy needs.

Regarding the Human Reproductive Technology Act, I find it to be:

- 1) Outdated and potentially causing long term psychological and psychosocial damage to our population
- 2) Discriminatory

Page 1 of 15

Consistent with the 2016 Parliamentary Inquiry<sup>1</sup>, I find WA surrogacy law to be:

- 1) Inconsistent
- 2) Discriminatory
- 3) Unsupportive
- 4) Risky

I make these, albeit bold, statements having had first hand, lived experience and in the following submission I will attempt to illustrate these points by telling my story (in blue text). Where I have also read papers which illustrate my point of view, I have also provided these references in support of my argument. I thank you in advance for reading my somewhat lengthy submission.

### **Human Reproductive Technology Act 1991**

#### ***1) Outdated and potentially causing long term psychological and psychosocial damage to our population***

*In February 2014, recently married, age 33 and trying for a baby, I was diagnosed as being in Premature Ovarian Failure ("POF" or "early menopause"). The first problem my husband and I faced was fertility specialists not being willing to even try In Vitro Fertilisation ("IVF") stating that I was too progressed into menopause. The general recommendation was that I needed an egg donor. However, the WA clinics did not have egg banks and were unable to help me find a donor.*

In my opinion the lack of egg donors in Australia is for similar reasons to the lack of surrogates – because we do not compensate these wonderful women. I think we need a compensation system which is appropriately regulated such that women are not exploited. This seems to work in other developed countries such as the UK which has a fixed fee as well as expense compensation and a seemingly organised and regulated system for making information available to donor conceived people<sup>2</sup>. Australia, in my opinion, is behind the times as the UK, majority of Europe, US and Canada all have egg banks and / or donor registers.

*When we eventually did find a doctor willing to try IVF on us, the recommendation was that I do a few egg collection cycles to collect as many eggs as I could as they were fast running out. However, I was told that the Code of Practice of the Human Reproductive Technology Act in WA prohibits multiple egg collections for the purpose of freezing. We had to apply to the Reproductive Technology Council of Western Australia ("RTC") for a special exemption. My case was pretty extreme so the exemption was granted but in this day and age, where the technology to delay having children is available, it seems strange that we do not allow this in Western Australia (WA). In fact, I think it's counterproductive as if we prevent (often career) women from forward planning and preserving their fertility, we (as a state) are only going to have to pay for their (less successful) IVF down the*

line. I think WA needs to in a sense modernise and align with the rest of the world in this regard, if a woman wants to preserve her fertility by harvesting eggs (and paying for it herself) she should be allowed to do so.

There are also the psychological and psychological implications to consider. For me, I feel the role of motherhood is intrinsic with womanhood the literature shows this as being the case for many women<sup>3</sup>. I use the term *"long term psychological and psychosocial damage"* in my title for this section because psychological distress, stress, depression, anxiety and experiencing social stigma and a feeling of incompleteness are just some of the main issues experienced by couples (and in particular women) in a 2010 literature review on the experience of infertility<sup>4</sup>.

## **2) Discriminatory**

The Human Reproductive Technology Act, in conjunction with the Surrogacy Act, discriminates against women with non functional or absent wombs by not allowing them to access IVF (see notes on Surrogacy Act below).

## **Surrogacy Act 2008**

### **3) Inconsistent**

In my opinion the lack of a consistent surrogacy legal framework throughout the country of Australia is the biggest problem with surrogacy law. It is difficult for your 'average Aussie' to make sense of what is allowed and not allowed in each state, whose law applies (the surrogates or the Intended Parents ("IPs")), what are allowable expenses and what are not? I find it astonishing that some states make it a criminal offence to engage in compensated surrogacy overseas and others do not. It took me a long time to work out what I was and was not allowed to do in my state and it was all very overwhelming as I did not know who to ask. In the end what helped was finding the Not for Profit Families Through Surrogacy (FTS) but that did not happen for me until a few months into our journey. Through attending FTS seminars I met people who had been through the process who offered advice and recommend surrogacy lawyers. That said, even Australian surrogacy lawyers disagree on some matters (such as parental orders for parents through international surrogacy). I belong to a couple of Australian Surrogacy online support groups and I have seen, firsthand, people asking questions such as whose law applies (surrogates' or IP's) in a cross border arrangement and accusing others of law breaking for placing an advert for a surrogate (in some jurisdictions there are bans on advertising but this is not banned in WA so long as placing the advert did not cost money). My husband and I feel that the inconsistent law makes an already distressing situation worse.

#### 4) Discriminatory

I harvested eggs and made embryos for my own use as originally 'all' I had been diagnosed was early menopause. There was no reason to think I could not carry a child. However, if it had been known I needed a surrogate, I would not have been allowed to make embryos, unless I had a surrogacy agreement in place. This seems nonsensical. My only opportunity to have a biological child could be taken away by the WA government as my eggs were running out and it would likely take two plus years to find a surrogate. What about my friends with Mayer-Rokitansky-Küster-Hauser syndrome (MRKH) that is women born without a womb? Admittedly these women likely know from a young age they will need a surrogate but they may not be in a relationship or in place in life where they can look for or find one so does that mean their eggs should be left to just 'expire'?! This is discriminatory.

*I actually faced this issue myself in a roundabout fashion. After about four successful egg collection cycles, I had two failed cycles (no eggs collected) so we decided to move on to having a Frozen Embryo Transfer. However, this is where we came upon the second issue – my lining. My uterine lining just would not grow despite numerous cycles and all sorts of (in some cases experimental) treatments. It started to become apparent that my lining might never be thick enough to have an embryo transfer and towards the end of my last cycle but before the doctor cancelled it, I called the donor coordinator at our clinic and made my first verbal enquiry into surrogacy. Then, low and behold, four follicles (equivalent to four eggs) were visible on my next scan. It was a shock as I had not had any / many follicles in a number of months. Although the doctor cancelled the transfer, I asked the clinic to remove the eggs. I was told no because I did not have a surrogacy argument in place and I had mentioned surrogacy a few days prior! So, my possibly last genetic material in the world was effectively being thrown away because of WA surrogacy law. We were heartbroken.*

The issues of Medicare rebates (or lack of) for surrogacy is also discriminatory. We pride ourselves on healthcare for all and an equitable public health system<sup>5</sup> and yet a woman born without a womb cannot access Medicare rebates for her IVF. This is discrimination. I do understand that health economics is complicated and that with the rising costs of healthcare, to give money for one thing invariably means taking it away from another<sup>6,7</sup>. Therefore, I would suggest putting an age and number of cycles limit on IVF which can be claimed on Medicare. By my understanding, at the moment, a woman in her mid 40s could have the state fund an endless number of IVF cycles even though the chances of success are low and yet a woman born without a womb can never claim from Medicare. Whilst this has not affected me personally I think it is unfair and hence why I raise the matter. Of course my suggestion only works if we give older women the chance to fund more cycles



if they so desire and (the quest to become a parent can be overwhelming and I do not think we have the right to deny anyone this) and women the right to freeze their eggs early on.

The biggest piece of discrimination is in WA not allowing gay people engage in surrogacy. I am heterosexual so I cannot offer firsthand experience so I will not dwell on this matter but suffice to say it is outrageous discrimination. The Australian people have recently voted for same sex marriage thereby they acknowledge that families can be of all different make ups. WA needs to bring its surrogacy law in line with the times. It is worth noting that although more research is no doubt needed, there is a growing body of evidence to show that outcomes for children of gay parents are comparable to their counterparts of heterosexual parents.<sup>8,9</sup>

### **5) Unsupportive**

#### ***What is it like to be an Intended Parent through surrogacy?***

Studies have shown that requiring surrogacy due to infertility can be psychologically devastating<sup>10</sup>. Baring in mind surrogacy is a last resort for most women, they feel incomplete and constantly preoccupied with the quest for motherhood.<sup>10-12</sup>

For IPs who are lucky enough to have a pregnant surrogate, the research shows that the majority of IPs experience anxiety. This is in general concern over how the pregnancy will progress<sup>12</sup> and a struggle with loss of control (concerns about surrogate physical exertion and diet etc.)<sup>11,13</sup>.

*Personally, receiving a diagnosis of never having a biological child was the worst day of my life. Then working full time and doing thirteen Assisted Reproductive Technology cycles was tough and accepting that I needed a surrogate was confronting. The search for a surrogate was the hardest task I have ever endured, particularly when I was focused on trying to find a surrogate locally. I thought I would feel happy and relieved when our surrogate [REDACTED] was finally pregnant and I was to an extent but it was not an easy nine months. There were issues with receiving medical information in a timely manner which was difficult to cope with as excited but nervous expecting parents. There was also an issue when our surrogate took an over the counter medication which can actually be harmful in pregnancy. There was the stress and discomfort of being away from home and living out of a suitcase in an Air BnB during our first weeks as parents. Flying across the world with an unvaccinated three and a half week old was extremely nerve wracking and not medically advised. A week after we returned home (third week of January) I lodge an application for [REDACTED] Australian citizenship but I have not heard anything yet so [REDACTED] does not have Medicare which puts additional financial pressure on us. Her tourist visa runs out in a few days so I will apply to renew but we hope the application is processed by the time that new visa runs out as my understanding is that only one onshore renewal is possible.*

### ***Surrogacy in WA***

WA has apparently only had ten surrogacies in the last decade and approximately 500 babies born overseas via surrogacy in the same time!<sup>14</sup> I believe our laws are pushing WA IPs overseas as our laws do not support local surrogacy. Surrogacy research together with the recent Parliamentary Inquiry<sup>1</sup>, shows Australians, in general, to want to enter into surrogacy arrangements in Australia for a variety of reasons including proximity to family and support networks and reduced financial burden compared to offshore arrangements.<sup>1</sup> However, the vast majority of Australians are going overseas for surrogacy as they have no choice due to marital status or sexual orientation, due to a complex and lengthy process, the unenforceability of surrogacy contracts and for the legal certainty that offshore arrangements can provide in regards to parentage<sup>1,15,16</sup>. WA is the only state which does not allow gay couples to pursue surrogacy and is criticised for being the lengthiest approval process.

In addition, WA does not support its residents going overseas for surrogacy. In fact, I would say that reality of WA surrogacy law is that it creates an unsupportive health system. I can testify that the stress and loneliness of this journey is amplified by WA surrogacy law as follows....

### ***Parental rights following local surrogacy***

Even though I have not been through this personally, as long and drawn out parental rights process was a factor in our preference for overseas surrogacy I feel I am well placed to comment. The WA surrogate and her partner are the legal parents of the child at birth regardless of a surrogacy agreement. Surrogacy law in practice means that hospitals refuse to release the child to its biological parents (who were always the IPs). The result is our surrogate teams doing a weird handover of baby in a hospital car park and that is simply not right! Then, it takes so long for parentage orders to be processed that we have parents of a new child who need their surrogate's permission every time they need to take the child to the doctor! I have friends here in WA who had a baby via surrogacy and they were waiting some nine months to get the parental rights to their child. Luckily they had a sympathetic GP who allowed them to consent for their son but when the mother wanted to enrol in daycare and she could not, needed her surrogate to do it. Now of course she could have asked her surrogate but she did not on principal, after all, she had done enough already! The parentage process needs to be timelier.

### ***Surrogacy 'red tape'***

WA has been knocked (in my circles and the media) for having a lengthy process compared to other states / territories. As previously mentioned I feel the need to have a surrogacy contract in place before starting IVF is overkill and is seriously affecting people's chances of success and I also think

the three month cooling off period is unnecessary. However, I think the requirement for individual and joint counselling is a good idea. Psychological testing and police checks are, in my opinion, good for peace of mind when parties were not known to each other prior to surrogacy. This is not an easy journey and a unique relationship between families is created so I think it's good to make sure everyone is on the same page and is fully prepared. Realistically, some overseas jurisdictions take shortcuts here which I can testify can cause issues. The process would no doubt be more manageable if there were professionals available to help teams navigate it (see below).

### ***Lack of knowledgeable health professionals and matching agencies***

People (including medical professionals such as my General Practitioner (GP)) do not even realise surrogacy is legal in WA! Others (including another GP at the same practice) do not really understand what it is or the types of surrogacy. Fertility clinics are not allowed to help you so as an IP; you have absolutely no idea where to go. If you are lucky enough to manage have a child via surrogacy, here or overseas, you are unfortunately met with shock, lack of understanding and confusion from our health community. In my opinion, we need to educate counsellors, psychologists and health professionals such that parents via surrogacy, children via surrogacy and surrogates do not get starred at like they have two heads when they interact with our health or human services departments. Furthermore, the desire to have a family is normal and surrogacy is a beautiful and generous gift but unfortunately negative surrogacy stories like 'Baby Gammy' tend to be the majority of media coverage so a health promotion campaign which informs the community would not only ease pressures on families involved in surrogacy but also potentially increase the number of surrogates in WA.

*When we were eventually told by our doctor that surrogacy was our only option, we met with the donor coordinator at our fertility clinic in Perth. If we did not have a friend or family member to be a surrogate for us she had no real suggestions as to where to find one. It turns out that the main way IPs and Surrogates are connecting here in Australia is via Facebook and the donor coordinator had no idea of the existence of these forums. Or if she did not, she did not tell us about them. My understanding of this is that clinics are not allowed to make money from the surrogacy process due to our laws and matching agencies are forbidden so what happens is an extreme distancing of infertility professionals from all things surrogacy, my understanding is that clinics fear prosecution for matching or advising on surrogacy.*

*Not being a Millennial means that turning to social media to find a surrogate did not even occur to me or my husband! At the stage of our first diagnosis we did not have any friends or family willing to help so we conducted an internet search and found out that India was a big market for surrogacy so we looked into pursuing surrogacy there. However, whilst we were in India on a reconnaissance*



mission, the Indian government shut surrogacy down for foreigners. At that point I made our fertility struggles known at my place of work for the first time. A beautiful colleague / friend came forward and said she would be a surrogate for us. Around the same time I came across FTS and attended a seminar in Perth where I met a local surrogate and intended Mother who opened my eyes to a world of altruistic surrogacy for strangers and told me about the Facebook support groups. Fast forward five months and the fertility clinic identified a medical problem with my work colleague and suggest she was not a good candidate for surrogacy.

It was at that point that I decided to venture in the world of a trying to use Facebook to find a match.

The Australian Surrogacy Community (ASC) is a fantastic and community of kind and supportive people. By their very nature surrogates are kind and generous and IPs are strong, determined and tenacious and can relate to our struggle in a way that my other friends cannot. As such being a part of this community has enriched my life but the few months which I spent looking for a surrogate online were some of the worst of my life. The pressure is intense and the competition fierce. The community is run by volunteers and there are rules. Due to the ratio of surrogates to IPs (4:1 currently is my educated guess looking at the population of our Facebook group) IPs are not allowed to contact surrogates, they are to post their story and are advised to be 'active' and support others and a surrogate will find them. Back when I joined the rule was that you could contact surrogates but you could only private message them after first publically asking permission. Well what would happen is that a surrogate would post her story and then IPs would jump in with their sob story. I felt our story was pretty sad (by this stage we had done thirteen cycles) but it felt like I was being trumped by women who had suffered multiple miscarriages or had stillborn children. It actually was a sometimes quite disgusting competition for who had the sadder story. As for being 'active' on the community, I became obsessed with this. By this stage I had given up work and decided to study full time and my husband would come home from work to find I had spent a solid seven hours on Facebook! It was not good for my mental health. It is true that people do meet like this, I know people who have, but how are these people getting picked? What is the 'right' thing to say? How much is down to luck and timing? Does your profile picture matter? How much is race a factor and do some surrogates discriminate (even if unknowingly and unintentionally)? There are people who have been looking and been active in the community for two or three years and yet have no match, why? The pressure to interact in a way that will get you noticed is extreme. As we had been told my numerous doctors that my eggs were likely poor quality, we were keen to meet someone quickly and try and if it did not work then move on to adoption (the two processes must be mutually exclusive) so the pressure was immense and my time was running out.

Another issue with the online Facebook community is that it relies on good behaviour and does not offer any protection. It does not protect surrogates from being overwhelmed and inundated with request from desperate IPs. IPs are also exposed and vulnerable to people with non genuine intentions, to being strung along for months and years and being let down.

I think that Australia needs an official and safe way of registering IPs and surrogates. There should also be matching or introduction services which aid in this daunting process. Agencies or clinics which facilitate matching can be regulated and Not for Profit if the preferred but I believe this online community run by self appointed volunteers cannot continue. I believe Australia should look at Canada as an example here. Canada allows altruistic surrogacy only but allows matching agencies which means people have a much increased chance of finding a surrogate.

### ***Lack of compensation for surrogates***

I believe one of the main reasons it is so hard to find a surrogate here in WA is that these women are not allowed to be compensated. Jurisdictions where compensation is allowed have far more surrogates.

Altruism versus financial compensation is one of the most controversial aspects of surrogacy and those who are opposed to commercial surrogacy tend to take an ethics moral approach arguing that women are "prostituting their maternity"<sup>17</sup> and children are "commodified"<sup>18</sup> or an ethics human rights and feminist approach which argues that women in developing countries are being "exploited"<sup>18</sup> and that they often forced into surrogacy by their husbands<sup>19</sup>. On the flip side, many human rights activists and feminists would argue that it is a woman's right to do what she sees fit with her body, including carrying a child for another and it is also her right to be valued for the work she is doing.<sup>20-22</sup> The issue of remuneration has been found to be a multifaceted one but in general the amount received by surrogates is seen as a token, not sufficient to compensate for the act and therefore it screens out those motivated solely by money.<sup>23</sup> Research from Canada, America and the UK has found that surrogates are neither poor, nor pressured into surrogacy.<sup>24</sup> Intentionally artificially low payments may not be the case in developing countries which may be a factor in the closure of markets such as India.<sup>25</sup>

The recent Parliamentary Inquiry<sup>1</sup> into surrogacy suggested that compensated surrogacy would allow for exploitation of women. Exploitation may be an issue in developing countries but I do not think that would be the case here where the playing field is more level. I think we are closer to exploiting women by not paying them as per the aforementioned human rights and feminist arguments. Everybody else in the process gets paid, the doctors, the psychologists, the embryologists, the counsellors, the lawyers. Why should the women who are doing all the 'heavy lifting' not get paid? Additional measures to combat exploitation could include psychological testing,

rules around surrogates being employed or at least not being on benefits and artificially low payments relative to the act.

If the WA government really believes compensated surrogacy is not the way to go (I am realistic and understand this is an unlikely change at this stage when the rest of the country is not there yet) then I think it should at least consider a more lenient system of allowable expenses. Again I use the example of Canada which allows altruistic surrogacy only but also allows reasonable expenses to a capped amount. I believe this, combined with the presence of agencies and media support, is why Canada does hundreds of surrogacies every year compared to Australia's 20<sup>16</sup>.

### ***Gaps in the law around international surrogacy***

It is not illegal to go abroad for (compensated or non-compensated) surrogacy if you are a WA resident. However, when you return with your baby, the foreign birth certificate is not recognised by Australia. When we eventually ended up going with an American surrogate through an agency (after my sister who was going to do it in the US pulled out) the lawyers we spoke to could not agree on whether we needed to go to court in Australia to gain parental rights or not! This is SO confusing! I have attended surrogacy conferences and witnessed panel discussions where lawyers argued about this and I have seen written articles where some lawyers recommend it and some do not<sup>26</sup>! My husband and I found this whole situation extremely stressful and overwhelming as we really did not know where we stood.

Then in September 2017, when we were already pregnant in the US, the whole situation got worse when an Australian couple were denied parental rights to a child (biologically related to the father) by the Family Court simply because they had gone abroad for compensated surrogacy.<sup>27</sup> They appealed and were still denied indicating to those of us with children via international surrogacy that we would never be able to gain the parental rights to our children according to Australian law. So my child is my biological child and that of my husband too. We care for her, educate her, provide for her and love her deeply. However, according to Australian law we are not parents. Our surrogate has no desire to parent her, she never did and signed those rights away in an American court. So [REDACTED] is an orphan?! This is outrageous and really a human rights issue – creating an orphan for no good reason!! This urgently needs changing.

My recommendation is for WA to accept foreign birth certificates where the surrogacy has been done properly in an approved jurisdiction. If the WA government feels it is not possible to accept these foreign birth certificates and surrogacy agreements then at the very least please make an official court process which we can go through to become legal parents, rather than leaving us in this legal vacuum!

## **6) Risky**

### ***Australian risk***

In WA a surrogacy 'contract' is not legally binding (hence why it is called an agreement not a contract) which puts all parties at risk. As already highlighted, an IP will always have some level of fear of the surrogate not relinquishing the child. The reality is that this is very unlikely to happen but what about legal recourse if she aborts or harms the child or puts herself or the baby in danger?

Our WA surrogates also assume too much risk. What if they are put on bedrest, who will provide for their family? What if they have lasting medical problems following the pregnancy, who will cover expenses for those? Are the parents liable for life or where does their responsibility end? What if a woman loses her reproductive organs through the process? These are all things which are addressed in American surrogacy contracts and I believe should be addressed here in WA.

### ***International risk***

Studies also show that generally Australians prefer domestic arrangements<sup>1,16</sup> and that by going overseas Australians for surrogacy assume more legal risks, health risks, financial risks, stress and psychological risks.<sup>16,28,29</sup> I have summarised some of these below.

#### ***Legal issues***

Although this does not apply to WA, it is worth noting that Australian IPs are breaking their own state laws to access surrogacy.<sup>29</sup> This highlights the desperation and lengths people will go to. There is no international law for surrogacy (like there is for child adoption and child abduction)<sup>30</sup> which can put all parties at risk. Although there have been no such Australian cases to date, there have been cases of children born via surrogacy to German, Japanese and British IPs (to name a few) who are stateless.<sup>20,25,30,31</sup>

#### ***Health issues***

Stafford-Bell et al have showed that rates of multiple birth and prematurity and significantly higher in extraterritorial surrogacy arrangements than in Assisted Reproductive Technology procedures undertaken in Australia.<sup>32</sup> Some surrogacy destination countries have poorly regulated (medical) environments<sup>21</sup> which adds to the risk for all parties. I was not comfortable with some of the clinics in India but had the law change not occurred I would have gone ahead in India out of pure desperation. My friend's twins died shortly after birth in India due to a lack of Neonatal Intensive Care Unit facilities.

#### ***Financial issues***

In 2014 India and the US were the most common countries where Australian IPs undertook surrogacy arrangements.<sup>16</sup> India has now shut down and the average cost in the US was AS\$172,347



(2014)<sup>16</sup> suggesting that only those with substantial financial assets (or debt) can access overseas surrogacy.

#### *Support and psychological issues*

The Australian Parliamentary Inquiry suggested counselling as mandatory<sup>1</sup> as studies have shown it to be necessary.<sup>10-12,13</sup> However, surrogacy, by its very nature is less conducive to support needs being met. In a study entitled "Intended Parents' Motivations and Information and Support Needs When Seeking Extraterritorial Compensated Surrogacy", Hammaberg *et al*<sup>29</sup> found that participants received no counselling and navigated the complex world of surrogacy primarily through the use of surrogacy agency websites and through networking with others who had been through the experience. The research found that less than half of participants had sought information from health professionals in Australia due to perceived negative reactions and / or real negative reactions potentially due to the professional guidelines relating to Assisted Reproductive Technology practice which forbid clinics from facilitating commercial surrogacy agreements.<sup>29</sup> These guidelines may deter some professionals from engaging with patients who seek information about compensated surrogacy<sup>29</sup> (as I personally experienced).

Personally I have seen firsthand that WA surrogacy laws are forcing its residents to go overseas and in doing so WA residents are putting themselves and their families at huge risk. I already mentioned that I considered doing something I wasn't comfortable with in India because I was desperate and I personally know some WA parents through surrogacy who have done some pretty risky and scary sounding things (including relocating pregnant surrogates across international borders). Many of these people are not generally risk takers and are certainly not law breakers but they are forced to make tough decisions out of sheer desperation. For me the strongest argument for legalising compensated surrogacy is, as Millbank says, harm minimisation<sup>28</sup>, protecting our people.

*I can tell you that for me personally, going overseas for surrogacy was an absolute last resort. I have mentioned financial stress that will affect my family for the rest of our lives. The reality is that surrogacy is big business in other countries and IPs are desperate by their very nature so they are sitting ducks for con artists and people out to make a buck. I feel IPs are often 'bled dry' and taken advantage of. I found the experience of a long distance surrogate pregnancy stressful and I spent much of the pregnancy anxious. I worry about whether our American surrogate will maintain contact and remain in our lives (we hope she will). I worry about the outstanding legal uncertainty every day. Facing the issue that my home country does not recognise us as legal parents, I live in fear that my daughter will need some life saving surgery and the Australian doctor will tell me I need my surrogate's permission!*

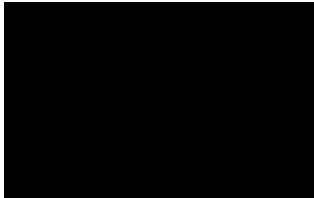
## Conclusion

In conclusion I propose the following changes:

- National law
- Women allowed to harvest eggs for the purpose of preserving fertility
- Medicare rebate for (fertility treatment) for surrogacy
- Access to IVF when the IPs are ready, not necessary to have a signed surrogacy agreement
- Education for health professionals and the wider community on surrogacy
- Provision of counselling and support services for people going through surrogacy, whether domestic or international
- Expedition of family court and immigration processes for surrogacy
- Gay men allowed to peruse surrogacy
- Agencies to facilitate matching
- Compensated surrogacy
- Acceptance of foreign birth certificates

I thank you for reading and I look forward to your response.

Yours sincerely,



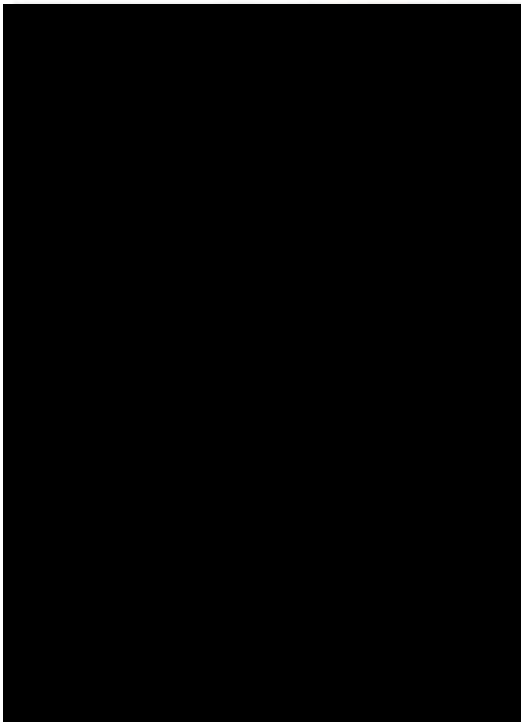
## References

1. Partiment of Australia. [Internet] Inquiry into surrogacy. Canberra ACT; 2016 [cited 10 Mar 2018]. Available from: [http://www.apph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/inquiry\\_into\\_surrogacy](http://www.apph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/inquiry_into_surrogacy)
2. Human Fertilisation and Embryology Authority. Code of Practice [Internet]. [cited 2018 10 Mar ]. Available from: <https://www.hfea.gov.uk/code-of-practice/>
3. Ulrich M, Weatherall A. Motherhood and Infertility: Viewing Motherhood through the Lens of Infertility. *Fem Psychol.* 2000;10(3):323-336.
4. Greil AL, Slauson-blevins K, McQuillan J. The experience of infertility: a review of recent literature. *Sociol Health Illn.* 2010;32:140-162.
5. Baum F. Politics and Ideologies: The Invisible Hands of Public Health. In: *The New Public Health*. In. 4 ed: Oxford Uni Press; 2008.
6. Mooney G. Economics and Australian Health Policy. In. Sydney: Allen & Unwin; 18998.
7. Duckett SJ. The Australian Health Care System. 3rd ed. South Melbourne VOUP.
8. Anderssen N, Amlie C, Ytteroy EA. Outcomes for children with lesbian or gay parents. A review of studies from 1978 to 2000. *Scand J Psychol.* 2002 Sep;43(4):335-51.
9. Walter RS. A Review and Critique of Research on Same-Sex Parenting and Adoption. *Psychological Reports.* 2016 2016/12/01 [cited 2018/03/12];119(3):641-760.
10. Van Den Akker O. The importance of a genetic link in mothers commissioning a surrogate baby in the UK. *Hum Reprod.* 2000;15(8):1849-1855.
11. Papaligoura Z, Papadatou D, Bellali T. Surrogacy: The experience of Greek commissioning women. *Women and Birth.* 2015 12//;28(4):e110-e118.
12. MacCallum F, Lycett E, Murray C, Jadv V, Golombok S. Surrogacy: The experience of commissioning couples. *Hum Reprod.* 2003;18(6):1334-1342.
13. Kleinpeter CB. A model of parents' experiences with surrogacy arrangements. *Fertil Steril.* 2002 4//;77, Supplement 3:S14.
14. 9 News. Surrogacy Shake Up [TV Programme]. [updated 15 Mar 2018]. Available from: <https://www.facebook.com/9NewsPerth/videos/1978914948787322/?q=9%20News%20Perth%20surrogacy>
15. Johnson L, Blyth E, Hammarberg K. Barriers for domestic surrogacy and challenges of transnational surrogacy in the context of Australians undertaking surrogacy in India. *Journal of law and medicine.* 2014;22(1):136.
16. Everingham SG, Stafford-Bell MA, Hammarberg K. Australians' use of surrogacy. *Med J Aust.* 2014 Sep 1;201(5):270-3.
17. Cannell F. Concepts of Parenthood: The Warnock Report, the Gillick Debate, and Modern Myths. *Am Ethnol.* 1990;17(4):667-686.
18. Standing Committee of the Attorneys-General Joint working Group. A proposal for a national model to harmonise regulation of surrogacy
19. Saxena P, Mishra A, Malik S. Surrogacy: Ethical and Legal Issues. *Indian J Community Health.* 2012;37(4):211-213.
20. Dr Paula Gerber KOB. Surrogacy, Law and Human Rights. Ashgate Publishing Limited; 2015.
21. Millbank J. Rethinking "Commercial" Surrogacy in Australia. An interdisciplinary forum for ethical and legal debate. 2015;12(3):477-490.

22. Shapiro J. For a Feminist considering surrogacy, is compensation really the key question? *Wash Law Rev* [Article]. 2014 12//;89(4):1345-1373. Available from: lft
23. Ragoné H. chasing the blood tie: surrogate mothers, adoptive mothers and fathers. *Am Ethnol*. 1996;23(2):352-365.
24. Stark B. Transnational surrogacy and international human rights law. *ILSA J Int Law*. 2012;18(2):369-386.
25. Crockin SL. Growing families in a shrinking world: legal and ethical challenges in cross-border surrogacy. *Reprod Biomed Online*. 2013 12//;27(6):733-741.
26. Jefford S. Overseas Surrogacy – Do I need an Australian lawyer? [Internet]. Gaffney Law; 2018 [updated 24 Feb 2018; cited 2018 13 Mar]. Available from: <http://www.sarahjefford.com/overseas-surrogacy-need-australian-lawyer/>
27. Page S. Australian Surrogacy and Adoption Blog [In: Family Court: couple who went overseas for surrogacy are NOT the parents. Issue 13Mar, 2017
28. Millbank J. Rethinking “Commercial” Surrogacy in Australia. *J Bioeth Inq*. 2015;12(3):477-490.
29. Hammarberg K, Stafford-Bell M, Everingham S. Intended parents’ motivations and information and support needs when seeking extraterritorial compensated surrogacy. *Reprod Biomed Online*. 2015 11//;31(5):689-696.
30. Howard S. Taming the international commercial surrogacy industry. *BMJ*. 2014;349.
31. Gamble N, Ghevaert L. International surrogacy: payments, public policy and media hype. *Family Law*. 2011;41:504-507.
32. Stafford-Bell MA, Everingham SG, Hammarberg K. Outcomes of surrogacy undertaken by Australians overseas. *Med J Aust*. 2014;201(6):330.
33. Pashmi M, Tabatabaie S, Ahmadi S. Evaluating the experiences of surrogate and intended mothers in terms of surrogacy in Isfahan. *Iran J Reprod Med*. 2010;8(1):33-40.

## Appendix

Our gorgeous daughter (two loving parents, not an orphan!).





## Appendix 2 – My submission to the 2022 WA Review



4 September 2022

ART Secretariat PO Box 8172  
Perth Business Centre PERTH WA 6849  
By email to: ART.Secretariat@health.wa.gov.au

CONFIDENTIAL - TO BE PUBLISHED ANON

Dear ART Secretariat,

**Re: Contemporary Assisted Reproductive Technology and Surrogacy Legislation for Western Australia – anonymous submission**

I am writing in response to the Contemporary Assisted Reproductive Technology and Surrogacy Legislation for Western Australia public discussion paper on behalf of the Ministerial Expert Panel ("the discussion paper"). I thank you in advance for your time taken to read my comments and for you for your work to update these two important pieces of legislation.

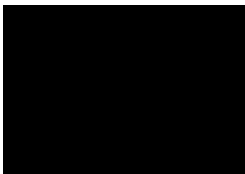
I write to you as a mother through surrogacy and active member of the WA Surrogacy Community. The views I express here are my own and those of my husband [REDACTED] too. We have developed these views through our (my) own lived experience of infertility including 13 rounds of non-surrogacy related Assisted Reproductive Technology in Western Australia, surrogacy in Western Australia (with no live child resulting) and surrogacy in the USA (resulting in the birth of our daughter).

I also have lived experience of a chronic and systemic condition and am a frequent user of health services. I am passionate about patient centred care and patient partnership in care. I have a Master of Public Health degree.

Where possible, I have supported my views with specific examples. **We would prefer these comments be published anonymously please.**

Thank you for taking the time to read my submission.

Yours sincerely,



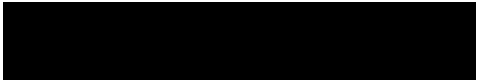


## **Regulation of clinics that provide ART**

**We support the abolition of the Reproductive Technology Council (RTC) and establishment of a co-regulatory form of legislation with a “softer touch” approach but powers to audit and inspect clinics.**

Not working in the industry and not being familiar with all the legislation I cannot comment on the specifics but it certainly sounds like the industry codes of practice which already exist (those set out by the National Health and Medical Research Centre and others) and the framework of legislation which sits alongside these are enough governance for the industry without the Reproductive Technology Council's (RTC's) additional code. I noted the rather negative comments about the RTC from providers and patients alike in the Allan Review and my own experience of the RTC (once to be allowed to make and freeze more embryos due to impending premature ovarian failure and once with a surrogacy application) was one of administrative burden and time delay and the fact that I had to apply combined with the attitude of the clinic (particularly the first clinic where I made my embryo made me feel things were unfair and I felt unsupported (by the legislation) right from the outset. We got the impression of fear of the RTC as a watchdog body to be feared, at least three times from our first clinic. First was in relation to embryo creation, then another time when I was trying to do a FET, many months after my first egg collection and some months since my last successful egg collection. My lining would not grow enough for a transfer but there were follicles there which I naturally wanted removed as it was unexpected and joyous that they were there. We had had our first (very introductory and brief) conversation about surrogacy just days before as it was starting to look like my lining would never grow enough to even reach the minimum for an embryo transfer. The only way the doctor would remove and fertilise the eggs was if I agreed to have one transferred back, even though we knew it was as good as throwing it in the bin. This was because there is a rule about not making embryos for surrogacy unless there is a surrogacy agreement in place as we had had a conversation about thinking about surrogacy. They were willing to put us through the emotional, physical and financial pain of a transfer that had no way of resulting in a pregnancy because the RTC would not allow removal of the eggs otherwise. This highlights the issues in the law and also the feeling around and powers of the RTC. The next time I saw that fear of the RTC, even more so, was when surrogacy came up and the donor coordinator refused to give us any information to even point us in the direction of where to go next for surrogacy as she was afraid of being seen to be profiting from surrogacy and thus breaking the law.

In terms of what powers and functions a new body should have, we support information on research, advice on ethical issues and reviewing cases where treatment is denied. We question the need for a patient review panel at all but concede it is perhaps needed for matters such as posthumous use of gametes. We do not see why the RTC (or a new body in lieu) needs to approve surrogacy. We are all for the process of surrogacy involving many different steps pre-transfer, counselling individually and together, etc. etc. However, we can trust our professional, accredited clinics to tick off the steps and improve a group for surrogacy without needing to go an external body (and causing unnecessary delay, cost and angst). We implore you to ensure any new body requires mandatory reporting of adverse events and also has the power to appoint inspectors and conduct audits, perhaps regular audits for clinics to be permitted to do complex treatments like surrogacy. Despite the current regulatory system being thought of as too onerous, our experience with our second clinic, the one we did our surrogacy with was quite disappointing in that the clinic did not provide enough information about steps, process or costs up front and did not have administrative processes (procedures, instructions, paperwork) to support surrogacy. For example, every time we got a blood test result, who would get a call (surrogate or intended mother or both and in what order) would vary depending on the day of the week and nurse in charge. It makes sense that they call the surrogate first, it's her body and she is the patient. If she then asks that the Intended Parents be notified then it shouldn't be too hard.




There are no legal implications with explicit permission given and why does one have to pay more for the same procedures if there are for surrogacy if it's not for this additional administration. However, for some nurses it was just too hard. Another, more sobering example came when our surrogate started her medications on day two, had unprotected sex with her husband, ovulated, had our embryo transferred and then ended up pregnant with no one knowing whose baby it was. This was the most awful time for all involved and even after everything I have gone through in my life, it nearly broke me. Whilst we never made a complaint as we like and respect our doctor and I heard her tell our surrogate to abstain from intercourse, our surrogate blamed the information she was given and she does have a point that it was not up to scratch. We were very hurt by what our surrogate and her husband did and how they handled it but that does not mean the information was acceptable. Our surrogate was sent (in the mail) a FET Information Sheet which had in big, red writing, not to have sex after a certain day of the month. They did so the night before which was obviously silly (given the proximity to the disallowed period and ovulation not being an exact science and given she was trying to carry a baby for someone else) but the fact is that she was within the "safe" time for a normal FET. It only became an issue because she ovulated earlier than expected and because she was trying not to get pregnant with her own partner but with our embryo. The information the surrogate was given was for any FET cycle (which would be used for any couple trying to conceive) and was not specifically created for surrogacy. Despite the current regulatory system being thought of as being too onerous, the above is an example of where there is clearly not enough oversight and external regulation. I think the challenges of a committee which is not independent enough from the clinics it is governing is also reflected here. This is not necessarily a surmountable problem in WA but I think careful thought should be given to assembling a structure and procedure which allows for independent audit of premises and practices. Perhaps those practices which are allowed to undertake complex processes like surrogacy should be accredited.

#### **Access to ART**

Changing ART legislation as proposed will align it with the Sex Discrimination Act and the law of other states and territories. We do not condone discrimination of any kind and as such we support equitable access to ART for all people.

We are really quite ecstatic to think that discriminatory laws will finally be removed. We have many gay friends who have been forced overseas for surrogacy as it is prohibited in WA and this puts them at risk of exploitation and financial hardship and is not in the best interests of the child. We also know a single man who has embryos with his deceased wife and the support of her parents and his and he should be allowed to work with a surrogate. We know women with MRKH who have not been allowed to make embryos until a surrogacy agreement is in place, all the while their eggs are aging and their fertility and chance of having a family declining. The ART regulations around impending infertility have impacted us directly. They were surmountable for us but still, we should not have had to apply to anyone to make and freeze our embryos when I was in menopause at 33 years of age.

We support the suggestion of gender inclusive language. On the matter of language, we believe the term "surrogate mother" to be outdated (no longer widely used internationally) and definitely not a preferred term in the community (or research). The surrogate does not wish to be the mother and never was one to this child. The term "surrogate mother" suggest she is a mother who gave up her child and surrogates do not see it that way and neither do the genetics say so either, in many cases. The Intended Parents are the parents and to call anyone else so can be challenging or even offensive to them, particularly to mothers. I would ask you to consider a term other than surrogate mother in the legislation and accompanying policy and propose "surrogate".



### **Management of donor conception**

We support the right of all donor conceived people to know their genetic origins and any legislation which allows that to happen.

We have no direct experience of donor conception but our own views on genetics and family together with hearing/reading accounts from donor conceived people allow us equivocally to support the right of these people to know their genetic origins (their heritage, ethnicity, identity). We recognise the challenges around previously granted donor anonymity as well as the logistical issues around old data and how to present and store the information going forward. We do in theory support the idea of a birth certificate addendum or integrated birth certificate with appropriate measures taken to protect medical data. There is one exception we make to the agreement of the proposal in the discussion paper and that is with reference to the same addendum process being in place for children being born via gestational surrogacy. Our daughter has known her birth story since birth, we continue to tell her in an age-appropriate fashion and she knows her surrogate. So, we would have no issue with her having a “different” birth certificate in terms of hiding anything from her but rather than because it’s not necessary. She has no genetic link to her surrogate, she is made from us, her parents. As such, even if she were to find out later that she was born through surrogacy, there is nothing “missing” per say. She has not had her ethnicity, or genetic traits or family medical history hidden from her. I am not saying it is acceptable to keep a secret like being born via surrogacy, not being carried by your mother but it is not the same level of secret as your mother not being your biological mother. We have discussed this with many people who have different experiences, with and without use of donation, with and without use of surrogacy and people from different professions including counsellors and a genetic counsellor too and all agree, knowing you were born via gestational surrogacy is not necessary in the same way as donation. If we understand the proposal correctly then even if the donor conceived person decides at 16 that they do not wish to access any further information, their birth certificate, even pre-16 would have been different and had a note about more information on there. We considered whether it mattered either way, whether we would be okay with our daughter having the birth certificate addendum, as she knows anyway and we have decided that it does matter. We would not want her to be “different” any more than is necessary as this opens her up to discrimination, we do not think it’s necessary for her to have to share her birth story with everyone who needs her birth certificate for identification purposes (what would be do for example if we wanted her to go to a Catholic school who would not accept her if they saw this?) and furthermore infertility is our story, it’s not hers. Thank you for speaking to others on this specific aspect of the proposal if necessary and for considering not including gestational surrogacy in the birth certificate addendum group.

We will further address this in the section on surrogacy law but we recommend counselling around telling your child about their conception / birth or even classes around “a time to tell” and “how to tell” be compulsory as part of any surrogacy or donor conception journey. This is important but it is a matter to be dealt with through counselling, not birth records.

### **Storage of gametes and embryos**

We support following the NHMRC guidelines in this regard.

### **Posthumous use of gametes**

We support reform to allow the posthumous use of gametes in WA in line with the NHMRC guidelines and, importantly, to bring WA in line with other states and territories. The criteria listed in the Discussion Paper seem logical to us (although we have no direct experience in this regard). We agree

[REDACTED]

the surviving spouse or partner should be the only person able to make the request for posthumous retrieval of gametes but the deceased person's family and/or close networks should be considered and questioned if there is any question around the deceased's wishes.

Broadly speaking we are pro any changes which are about alignment of WA and national harmonisation. Even if we do not have specific experience of the issue, we know what it is like to experience confusion, feelings of inequity or unfairness. Furthermore, the lack of uniform laws has led to fertility tourism in our networks.

#### **Genetic testing of embryos**

We support following the NHMRC guidelines in this regard. We also support repeal of the RTC approval for genetic testing due to the unnecessary time delay caused for intended / prospective parents. The Allan Review recommendations for tissue matching make sense. An alternative to an independent body (if such a body need not exist) would be a multi-step process involving counselling or approval by two licensed fertility specialists or similar.

#### **Research involving human embryos**

We support aligning legislation with the Commonwealth in this regard. Embryo research is so important for advancement in this field. As Intended Parent / parents we would not donate our excess embryos and would rather they be used for research rather than be allowed to succumb.

#### **Effectiveness of add on treatments**

We support the investigation into efficacy of experimental treatments and how this is presented to consumers.

Consumers in this space are very vulnerable and therefore transparency is extremely important. A traffic light system sounds consumer friendly but regardless of what system is used, the important things are passing on enough information to the consumer in a consumer-friendly way and allowing the consumer to ask questions and be a partner in the final decision. Some consumers may be keen to try things even if they are not known to be particularly effective.

We tried DHEA, Human Growth Hormone (HGH), Co-enzyme Q10, Vitamin D and melatonin, all straight away and all at the same time as our doctor told us were good for egg quality. At the time we were so, so desperate to have a child and to try anything we didn't really care that no real detail or statistics on success were given to us about these treatments. In hindsight this is not good practice. It worked for us as we got embryos and in the end we had a child but if we were still childless, we may have been more upset about not being given any information. None of these treatments were covered by Medicare and HGH in particular was expensive. Our doctor also referred us for acupuncture.

I believe I was the first person in WA to undergo uterine scratching to see if it would help thicken the lining for transfer. Our doctor was clear to explain that the studies on this method were divided and success rates questionable, but we were willing to try.

Following our egg collections and unsuccessful Frozen Embryo Transfers, having done our own research online and spoken to doctors overseas we went looking for a doctor in Perth who used IVIG and Intralipids, the efficacy of which was undiscussed. We were pleased that after a certain number of unsuccessful treatments the doctor told us it wasn't working and encouraged us to stop (rather than continuing to take our money).



Even though the above-mentioned uterine treatments did not work, we will never regret trying, perhaps as we needed to be sure we tried everything (that is in our nature). We believe our care was suitable for us as our doctors understood our desperation to be parents and need to try. However, we recognise that blindly trying things is not best practice and whilst we had the money to be able to choose to spend and it was right for us but would not be right for everyone. Therefore, we advocate for change in this area. Transparency is key but coupled with no rudimentary cut offs for when people can try add on treatments or not. We saw three other doctors in WA and two overseas (so five in total) before the Perth doctor we found was willing to try IVF. This is likely because I had a Follicle Stimulating Hormone so high that it seemed I was so far into menopause (at age 33) that I was unlikely to have success. However, for me, being a mother was intrinsically tied to my self-worth and the doctor who finally said, "We will try" was all I needed and, even though she is not the person who in the end gave us our daughter through surrogacy, she is still the person I credit for our family, for my life really.

### **Emerging technology**

We support engaging in national consultations on emerging technology.

This is a fast-moving field and it's important to stay on top of developments. We have a friend whose daughter passed away with mitochondrial disease and this is preventable with mitochondrial donation so we support this.

### **Reciprocal IVF**

We support reciprocal IVF and embryo transfer for non-medical reasons.

In line with our support for all people to become parents if they so wish, regardless of gender or sexual orientation we support reciprocal IVF or egg sharing. Without egg sharing in WA we are only discriminating against lesbian couples.

### **Surrogacy Law**

#### **Application Process for Surrogacy**

We support the proposed pre-requisites for surrogacy but do not think an external body need approve. We support more clearly defined reimbursements for surrogates and some additions in that regard. We concur that the unenforceability of surrogacy arrangements should remain.

We support the various steps which have to be completed for surrogacy to be allowed to progress. Having been through journeys in the USA and Australia and having tried to start the process with a friend and a family member, we know how challenging surrogacy can be. We therefore think joint and individual implications counselling is of paramount importance. We think that having the various steps, which adds time to the process is also valuable as it assists parties with making sure they know one another and are their ideas are aligned, as far as possible. We also support the idea of counselling throughout the pregnancy – even if there are no issues per se, there is a lot to process. It must be noted that surrogacy has a different level of complexity and possible issues due to the coming together of at least two families. We believe the steps suggested are good for risk mitigation, but it should be noted that it is not full proof, no process is full proof. As mentioned earlier, our surrogate was pregnant with no idea whose child it was. When she realised what she had done, that is had unprotected sex in the fertile window and had our embryo transferred, she called the nurse and surrogacy coordinator at the clinic, she did not tell us directly even though we were supposedly very good friends, speaking daily and seeing one another and hanging out as families weekly. She never

[REDACTED]

spoke to us again and refused to attend counselling with us at every point over the following weeks, whilst she was pregnant (pregnancy did not stick, in the end was counted as an early chemical pregnancy as opposed to a miscarriage) and afterwards. When she spoke to others she apparently showed no concern for us or the implications on us but how what had happened (not what she had done) reflected on her. By all accounts (from her letter to us and from the clinic's reports, we never spoke to her again) she was distraught and mortified about being pregnant with an unknown child and what to tell people as she had made a big deal on social media and to family and friends about being an altruistic surrogate. Unfortunately, she was so distressed she ended up being prescribed benzos which are not recommended in pregnancy. This was despite us having done the psychological assessment and counselling and all the steps. We support the Allan Review suggestion to review the requirement for a psychological assessment as the current assessment requires a particular personality test which is perhaps too generic, it did not bring up any red flags. We do wonder if a more person-centred patient history and psychosocial assessment might have identified any red flags.

Although we support the steps, once they are carried out, we do not think an external body (like the RTC) should need to approve. Our clinics are to be regulated and perhaps even accredited to allow surrogacy and they are staffed with professionals. We must therefore trust that a clinic can tick off the prerequisites and clear for surrogacy treatment to take place. Having an external body just causes delay and administration burden and contributes to the feeling that surrogacy in WA is "too hard".

We believe counselling for intended parents should discuss how to tell the child their birth story and how and when to share with others (like school). We also suggest at least one post birth counselling session for the whole team (surrogate and parents).

We support the Allan Review notion to not limit counsellors as needing to be "approved" but believe surrogacy support is quite unique and there needs to be a way to measure qualifications and experience to make sure consumers are dealing with the right professionals and discussing all the necessary matters

In regard to expenses, we found notable gaps in terms of what is specified in WA law. Although maternity clothes are not specified, our lawyer deemed these okay within reason. However, she would not let us pay our surrogate's husband's loss of earnings even when he took time off to look after their four children so the surrogate could attend an appointment for us. This does not seem fair. We think WA should allow "other reasonable expenses" like other states and territories.

We do believe the unenforceability of surrogacy should remain. I am changing my stance relative to my submission to the Allan Review in this regard. At the time I felt it was not fair to have it that the surrogate could keep the child and it filled intended parents with fear. Even though intended parents know that surrogates do not want to keep the child and that never happens, particularly with gestational surrogacy, it is still fear inducing. That said I now understand better that we need it to be unenforceable to allow the surrogate to keep her bodily autonomy and for the best interests of the child, not saying that isn't likely going with his/her intended and likely biological parents but to make sure the interests stay above any contract. A contract is also commoditising. We are happy for any of these reasons to be cited in the legislation (or more likely it's underlying policy). We do not submit to the argument that it is to do with the negative impacts that removal of a child from its birth mother (and not those who said this in the Allan Review were largely anti surrogacy all together). In the face-to-face consultation, when I spoke up for enforceability, Associate Professor Allan asked me to consider the mental health and trauma for the "birth mother" being forced to give up a baby and said no mother should be forced into this. I was so stunned I was silent for a while and then at the end of the session I posed the question back to her and asked her to consider the mental health and trauma implications of me being forced to give my biological child up. We had not long before had a

[REDACTED]

conversation about the importance of genetics when discussing donor conception. I explained that my daughter is my flesh and blood, she looks like me, she acts like me, my mini me. She is my daughter. I could not and would not give her up, even to the woman who was kind enough to carry her for me. We reject any suggestion that this would not be equally traumatic for biological parents and reject mention of surrogate mental health in regard to unenforceability of contracts.

### **Welfare of the Child**

We agree with the position of the discussion Paper that a welfare assessment is required, we disagree with the Allan Review.

We agree with the Discussion Paper that similarly to above and the requirement to have an external body approve surrogacy, we feel that the combination of medical assessment, counselling, and patient psychosocial history assessment by staff in the fertility clinic should be enough to identify concerns about the wellbeing of the child born from any surrogacy arrangement. Any more is not only an additional administrative burden to no benefit (as Victoria found when they introduced a criminal and child protection screening) but it is also offensive and discriminatory towards consumers who require surrogacy as no other ART consumers, or indeed would be parents are required to have this check.

### **Advertising and Brokers**

We support any measures which look to raising awareness of surrogacy laws and support that clinics should be allowed to advertise to recruit altruistic surrogates. We also query the somewhat grey area of not for profits operating as matching agencies and ask for clarification on this issue. We support these sorts of agencies.

Raising awareness of surrogacy laws will destigmatise and normalise. It will support the children and families created through surrogacy as they will likely face less exclamations of disbelief that it is legal here when they utilise everyday services such as the GP, Medicare and school. Furthermore, it will help to destigmatise surrogacy and finally and arguably most importantly it will help toward increasing the interest in becoming an altruistic surrogate. People do not think of looking into becoming a surrogate if they think it's illegal in their state or country, which in our experience is often the case.

We support any legislation which will make it easier to find a surrogate here in WA and thus reduce the need to go overseas. We are glad consumers in WA have always been allowed to publicly declare they are looking for a surrogate or "advertise" so long as there is no cost involved. We support clinics now being allowed to advertise in the hope that this will increase the amount of surrogates but we are unsure that this will work too well (where will they advertise as with their (largely infertile) client base is unlikely to yield too much and will they be inclined to go further afield as whilst they will benefit financially from any surrogacy business brought in, they can make similar money in a far easier fashion with non-surrogacy ART?). We also think more is needed to really recruit enough surrogates and have much chance of keeping consumers on shore. From this point of view, we believe there is a need for brokers or matching agencies. We do understand the thinking behind this being a "slippery slope" towards commercial surrogacy and in itself going against the ideal of not commoditizing. However, we still believe they are necessary. They also do not need to be profit making if the thing is this better protects the sanctity of altruism. Brokers (as opposed to the clinics conducting the treatment who are largely at the moment, "holding all the cards") are independent and more transparent. With an independent matching agency, surrogates and Intended Parents can state their expectations without fear of rejection.

In Australia the majority of matching surrogates and Intended Parents is happening through a Facebook Page, the Australian Surrogacy Community. When we started out there were certain rules



[REDACTED]

about conduct on that page e.g you could not write to a surrogate directly (and rightly so). You were expected to be “seen” as active on the pages and by that it felt like you were expected to comment multiple times a day and post regularly. I spent an unhealthy amount of time on social media, hoping to be “seen” and working myself into a frenzy trying to impress women who I hoped would carry a child for me. It took a toll on my mental health and I neglected my studies and other relationships and aspects of my life because I was “desperate”. There was a terrible power imbalance. I once phrased something “wrong” (according to a one particular surrogate) and people jumped on me. People try to outdo one another like they do on any other social media platform and there are some people and some gestures which are more genuine than others. We might think that by avoiding brokers we leave altruistic relationships to develop organically but this is often far from the truth with a lucky few managing to match easily and the rest spending months or years trying to get noticed. Unfortunately too, due to the reality of life and human nature, people being drawn to people who look like them etc. I believe there are culturally and linguistically diverse people who will never be “picked” and others who may feel the brunt of weight stigma or ableism.

The UK has three membership organisations which match, all are not for profits, we may look to this model for inspiration. In fact, that has already been done in the recent creation of the [REDACTED]. This service seems to be exactly what is needed but I am not clear as to whether it’s not for profit. I query whether [REDACTED] is allowed under the proposed new surrogacy legislation, clarity is needed here. Intended Parents have to pay to join (~\$1000) and this is for a mentoring session and “potential introduction to a surrogate” so even if it’s not labelled as that, it’s a matching agency. We believe [REDACTED] should be able to be used by West Australians (presuming it’s a charity). We are not averse to private brokers being considered as well and suggest looking to Canada for further ideas in this regard but we are also not absolute on this. Our concern is less about the commercialising slippery slope (we did surrogacy in the USA as you are aware) but rather of Intended Parents being exploited. We had a bad experience with a Canadian agency who hid details about a surrogate’s medical history in order to try to get us to match quickly and pay the fee. The Allan Review makes numerous references to the exploitation of children and surrogates which is obviously wrong and not what anyone wants but the review seems to notably fail to acknowledge exploitation of Intended Parents. It is the latter who are desperate, often too trusting and willing to give and/do anything so it is these very vulnerable consumers who end up getting exploited, particularly when engaging in international surrogacy. We feel strongly that we need to do more to support them in domestic surrogacy, which would include advisory bodies, support and matching agencies, not just leaving everything to the clinics.

#### **International Commercial Surrogacy Arrangements**

We do not support criminalising commercial surrogacy overseas. We believe this is not in the best interests of West Australians and specifically surrogacy consumers or the children born through surrogacy and as criminalising stigmatises surrogacy.

We note that in the states where there is already an extra-territorial provision for international commercial surrogacy. It is not working as a deterrent as people are still do it. Many people are not afraid to do it, we even know government workers who have engaged. There has never been a prosecution as this is not in the best interests of the child born. If my understanding of this Discussion Paper is correct then the proposal is not a fine for WA (noting this will never be in the best interests of the child) but rather that the lack of ability to get parentage will be deterrent enough. Our experience is that people engage often without knowing this or certainly without understating it and hearing from the people before them that it does not have any implications.



One reading the Allan Review it is clear that she believes going from Australia for overseas commercial surrogacy is already illegal as below:

...“It would not be appropriate for the State to then endorse practices elsewhere (for example via recognition of legal parentage orders in cases of international surrogacy) that do not meet the standards agreed upon for citizens within the State or by those who choose to uphold the law rather than circumvent or **breach** it.”

...“That the Western Australian Government considers whether it is necessary to make explicit provision in the relevant legislation that states that the transfer of **legal parentage is not available** in circumstances in which a child has been born as the result of an international commercial surrogacy arrangement that **offends the law in Western Australia**.”

However, the understating of many consumers (us included), including those who get professional legal advice (us included) is that there is no extraterritorial application of the law in WA and it is not illegal like it is in NSW, QLD or ACT. Please see below screenshot from the current Department of Home Affairs Website, no mention of WA.

<https://immi.homeaffairs.gov.au/citizenship/become-a-citizen/by-descent/international-surrogacy-arrangements>

Screenshot taken on 4 September 2022

## Check the law and seek legal advice

In some countries international surrogacy is illegal or strictly controlled. Learn where international surrogacy is illegal from the Department of Foreign Affairs and Trade [SmartTraveller](#).

In some Australian states and territories it is an offence for a resident to make a commercial surrogacy arrangement outside Australia.

Jurisdiction	Legislation	Penalty
Australian Capital Territory	Parentage Act 2004	Maximum penalty: 100 penalty units, imprisonment for 1 year (or both)
New South Wales	Surrogacy Act 2010	Maximum penalty: 2,500 penalty units in the case of a corporation, or 1,000 penalty units or imprisonment for 2 years (or both) in any other case
Queensland	Surrogacy Act 2010	Maximum penalty: 100 penalty units or imprisonment for 3 years

Before you make an international surrogacy arrangement, you should seek independent legal advice about the law related to international surrogacy arrangements, in both Australia and the other country.

If it is in fact meant to be illegal (if the lack of ability to get parentage is meant to tell you that) then it's actually better if it was phrased with a penalty (fine) so people fully understand. A fine clearly shows something is illegal but the parentage matter (which is not well understood as above) does not. If consumers thought it was illegal it might deter some of them. Others, as we have seen in other states are not deterred. For those that are not deterred, they have their reasons, they are not doing it out of what they consider to be much choice so we believe they have the right to be supported with parentage (we know this is a Commonwealth issue however) and not being made criminals. Note, we believe all children have the right to parentage and encourage you to support WA to push for that at

[REDACTED]

national level. Regardless of what the decision is on fines, consumers need further clarity on the parentage matter.

I am a law-abiding citizen to the tee. It is not in my upbringing or nature to break or even circumvent any rules so if I thought it was illegal, I would have been deterred. However, I was also desperate to have a child and by this stage we had exhausted all other options and had embryos and a clinic in the US and my sister was living there and she hoped to be a surrogate for us so I would have found a way to do surrogacy in the US even if it meant moving back to the UK. It would not have been good for our family if we had to uproot our lives and work here, but we would have done it if it meant having a family. This gives you an idea of the lengths some people will go to.

Although we do not support criminalising under any circumstance, we should point out that the real issue is if brokers and matching agencies continue to be prohibited. As the Allan Review points out, the main reason people go abroad is access to surrogates.

If the MEP does decide to apply an extra territorial aspect to surrogacy law then we urge you to be clear how it applies. Is it just to "commercial" surrogacy and by whose definition is that? The Allan Review makes it clear that she believes surrogacy in Canada is not actually altruistic and that was our experience too. Our agency (biggest in Canada) quoted us a fixed fee based on the experience of a surrogate (number of times she had done it) which is exactly like America. Our understanding is that Canada has cracked down on making sure it's legitimate expenses more now but the fact still remains that private, profit making businesses take fees for matching in Canada which goes against our law currently and the ethos of our law. An extraterritorial application of the law is complex in itself. Is America allowed? Or is it only certain states in the US? If so, who advises consumers where they can go and where they cannot? What if my sister has been able to do it for me (for free obviously) when she was living in the US? What about cases like that of [REDACTED] here according to the press the surrogate agreed to an altruistic arrangement where previously she had been a commercial surrogate? How do we prove this? Do we need to? Where do we draw the line?

To conclude our stance on this topic we would like to point out that the person chosen to conduct this independent review was/is very openly and publicly anti commercial surrogacy. Associate Professor Sonia Allan has written and presented on this topic previously. I realised this only after looking her up after attending the face-to-face conversation. At that conversation, Associate Professor Allan got visibly upset at the mere mention of commercial surrogacy which did not provide the sort of environment conducive to those around the table who had engaged to discuss their experiences. So, it is possible some of these issues have not been given fair, unbiased consideration.