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The Hon Justice Bromberg
President
Australian Law Reform Commission

By email: surrogacy@alrc.gov.au

Dear Justice Bromberg

Submission in response to the Discussion Paper: Review of Australia's surrogacy laws

I thank the Commission for having the opportunity to make a submission in response to the Discussion Paper.

There has clearly been an immense amount of effort undertaken in writing the Discussion Paper. The focus has clearly been on a workable, ethical model for surrogacy.

The Discussion Paper has, in my view, thoroughly examined many aspects of surrogacy regulation- and for the most part I agree with the proposals.

I am a lawyer in private practice. I am a dad through surrogacy, and I have suffered infertility. I have advised in over 2,000 surrogacy journeys[1] since 1988 as to their surrogacy journeys. My clients have come from across Australia and at last count 39 other countries. My clients have undertaken surrogacy both at home and abroad (and some, who have had more than one child, have had both domestic and international surrogacy journeys), including to every known surrogacy destination, past and present (including 37 US states and 8 Canadian provinces), and many that are not known surrogacy destinations.

Some intended parents have gone to surrogacy destinations that I would not recommend, and in some cases, when I was consulted early enough, I was clear that they should not go there. Nevertheless, they went there. For a variety of reasons- the hope that they would become parents, cost, ethnicity and nationality, they have chosen that destination. On many occasions, I have been able to dissuade clients from making poor choices with their surrogacy journey- by giving them independent information and advice, consistent with my professional duties to them.

I have been fortunate to act in many groundbreaking decisions that concern surrogacy, the two most recent of which were reported this year[2].

[1] In other words, close to 4,000 clients relating to surrogacy.
[2] *Re application under the Parentage Act 2004 (ACT)* [2025] ACTSC 294; *MA v PA* [2025] QChC 1.

Many of my clients undertaking surrogacy overseas did not realise that they needed to obtain Australian legal advice, until near the end, or after the end, of their journey. Often the information they obtained about where they should go for their journey came from other intended parents, via social media, or by social media promoters.

I have also been fortunate to be a member of various committees, in which I have been able to see the issues concerned from various viewpoints[3]. I have also written and presented about ART around the world, and been fortunate to write numerous articles, and a couple of books[4], among others.

In my spare time over 5 years I lectured about ethics and the law in reproductive medicine.

Even some undertaking a local surrogacy journey did not think to obtain legal advice until seemingly too late, such as in *MA v PA* [2025] QChC 1.

I am immersed in this area. Out of this vast experience, among the lessons that I have learnt are twelve:

1. The human rights of all the parties must be respected[5]. Consistent with this, surrogacy arrangements work when they involve mutual respect, communication and flexibility (especially because medical matters often do not go according to plan);

2. The sooner that intended parents, surrogates and their partners receive reliable information from a trusted source, the more likely that they will make a sound decision with their journey. Despite the efforts by my colleagues and me to provide information in the public sphere about surrogacy, there remains a lack of reliable, trusted information available to intended parents, surrogates and their partners. The Commonwealth and State and Territory have decided, for reasons best known to them, to provide a paucity of information about surrogacy- an issue that was identified as lacking a decade ago by the House of Representatives inquiry- but still not adequately addressed.

3. Australian intended parents want to undertake surrogacy at home, not overseas. As the numbers have demonstrated however, the vast bulk of children born to Australian parents through surrogacy have been born overseas.

4. Regulation of surrogacy and the establishment and recognition of parentage must be practical and workable.

5. The process of establishing parentage should not be unduly costly. Intended parents have outlaid tens of thousands of dollars, and some have outlaid hundreds of thousands, to become parents through their surrogacy journey. Further significant costs will impact on their ability to parent the child in the child's most vulnerable and costly year- its first.

6. Punitive approaches do not work, except to deter the worst behaviour, such as trafficking.

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[3] For example, Fertility Society of Australia and New Zealand, Secretary; International Academy of Family Lawyers, co-chair Sexual Orientation and Gender Identity Committee, member, Parentage Committee; American Bar Association, Assisted Reproductive Technologies Committee, international representative (since 2012); Academy of Adoption and Assisted Reproduction Attorneys, member of ART Resources Committee and International Committee; Society for Ethical Egg Donation and Surrogacy, member, International Committee; International Surrogacy Forum, co-founder.

[4] *When Not If: Surrogacy for Australians* (2022); *International Assisted Reproductive Technology* (2024).

[5] As I persuaded the South Australian government, with the result that there is now s.7(1)(a) of the *Surrogacy Act 2019* (SA): *"the human rights of all parties to a lawful surrogacy agreement, including any child born as a result of the agreement, must be respected."*

7. There is a lack of data about exploitation of overseas surrogates and children by Australian intended parents. The most recent data about potential exploitation is from 2014[6]. Almost 3,000 Australian children have been born via surrogacy since then.

8. In general terms, Australians should be very proud of the efforts of the Australian Government, and in particular the Department of Home Affairs, which has actively sought- through rigorous processes in applications for Australian citizenships and visas- to discover if a child has been born through surrogacy, and has sought to ensure that surrogates and children are not trafficked. These efforts are often overlooked.

9. Australians should be very proud that when there has been a surrogacy crisis somewhere in the world[7], officials of the Australian Government have worked tirelessly to ensure that the children's rights have been upheld- and worked to ensure that the children can come to Australia in a timely manner.

10. Nevertheless, some children fall between the cracks, and have been left Stateless. In the year ended 30 June 2024, 376 children born overseas through surrogacy applied for Australian citizenship, but citizenship was only granted to 361. It is unclear why there is this gap. A child that had been rendered Stateless has been recognised internationally, concerning a child denied entry to Australia[8].

11. Children travel overseas and are often entitled to more than one citizenship. There remains a lack of international recognition of parentage of children born through surrogacy.

12. People desperate to have children are on occasion taken advantage of. There ought to be clarity to them about what those referring them to surrogacy agencies overseas are being paid.

Support of proposals

I support the following proposals in the Discussion Paper as sensible, thoughtful and practical:

Proposal No	**Issue**
1.	Structure of regulation
2.	Regulatory framework, national regulator
3.	Establishment of surrogacy support organisations
4.	Pre-approval before pregnancy
5.	Approval process
6.	Compliance by surrogacy support organisations[9]
7.	Information by the national regulator (subject to my views about proposal 37)
8.	Penalty for domestic impermissible surrogacy
9.3.	Repeal extra-territorial surrogacy offences

[6] Concerning a case in India.
[7] India (2012, 2014), Thailand (2014), Nepal (2016), Tabasco (2016), Cambodia (2016), globally with the pandemic (2020-2021), Ukraine (2022), Mediterranean Fertility Institute (Greece) (2023), Argentina (2024).
[8] Constitutional Court of Colombia T-232/2024, cf. T-127/2024.
[9] Further comment below.

Proposal No	Issue
10.	Improper advertising or coercive behaviour- comment below
11.	Advertising
12.	Traditional and gestational surrogacy treated alike
13.	Need for surrogacy
14.	Ages of parties- subject to qualification as to the surrogate's maturity at [117]
15.	Citizenship/permanent residence of intended parent/s
16.	Prior pregnancy
17.	Independent medical clearance
18.	Psychological assessment of surrogate and intended parents
20.1	Legal advice
20.2	Written confirmation of that advice
22.	Requirements for a compliant surrogacy agreement
23.	Bodily autonomy of the surrogate
24.	Compliant agreements are enforceable
25.	Surrogate's reasonable expenses
26.	Payment for pain, suffering and risk
28.	End Medicare exclusion for surrogacy
29.	Medicare benefits for psychological assessments and counselling
32.	Transitional provision as to parentage
33.	Birth records
34.	Surrogacy register information
35.	Surrogacy register
36.	Compliance with the register

Responses to other proposals, and questions asked

A. Safeguards for the national regulator

The national regulator should have an oversight board, with input from stakeholders, the Commonwealth, State and Territory governments.

Members of the board could include:

- A representative of the fertility industry, such as a nominee of the Fertility Society of Australia and New Zealand.

- A fertility counsellor who has extensive surrogacy experience, who may be a nominee of ANZICA.

- Two consumer representatives, one of whom was a parent through surrogacy or was born through surrogacy, and the other was a surrogate.

- A lawyer who has experience with surrogacy.

There be a statutory review of the legislation after 5 years.

Surrogacy support organisations need to be registered and subject to audit and inspection. The regulator ought to have take down powers, similar to the *Assisted Reproductive Technology Act 2007* (NSW), s.57. Over time, once there are a number of surrogacy support organisations in existence, a Code of Practice could be devised, such as one that may be developed by the regulator in conjunction with, say, the Australian Commission on Safety and Quality in Health Care.

Question B: overlap of surrogacy support organisations

As the ANZARD data reveals, surrogacy is only a very small part of the work undertaken by IVF clinics. It is unlikely that IVF clinics will become surrogacy support organisations. Experience overseas demonstrates that IVF clinics will rarely set up surrogacy agencies:

- In the United States, although the numbers are unclear, it is likely that there are between 300 and 400 surrogacy agencies. I only know of two IVF clinics that have inhouse surrogacy agencies.

- In Canada, there are approximately 15 surrogacy agencies. None of those are operated by IVF clinics.

- In Mexico, it is estimated that there are approximately 60 surrogacy agencies. I am aware of only one IVF clinic that has an inhouse surrogacy agency.

Running a surrogacy agency is complex. It is quite a different process than that involved with standard IVF.

The Australian IVF industry is highly concentrated, with the four largest clinics having over 80% of the market[10]. They are largely fund owned, or in one case a public company. All are risk averse. It is most unlikely that these dominant players will wish to commence surrogacy support organisations.

As seen in the United States and Canada, for example, IVF clinics stick to what they do best- IVF, while surrogacy agencies match the intended parents and surrogates, and manage the surrogacy process.

Question C: who should approve surrogacy agreements?

I support that surrogacy support organisations approve surrogacy agreements, but for harder cases, refer them to the national regulator. In order to keep operating, surrogacy support organisations will need to demonstrate (both to the regulator and to consumers more broadly) that they undertake this work thoroughly.

[10] Virtus Health, Monash IVF, Genea, City Fertility. See: *ACCC v IVF Finance (No 2)* [2021] FCA 1295.

Proposal 6

Compliance by surrogacy support organisations

Regulation of IVF clinics is achieved by:

1. a process of continuous improvement, including audits and compliance with a code of practice

2. registration of IVF clinics

3. a take down power, and

4. if necessary criminal penalties.

The same would be effective for surrogacy support organisations, save that there should be oversight of the regulator.

As seen with the examples of the RTC in Western Australia and VARTA, a regulator needs to be properly resourced, and connected with the industry and consumers (but not captured by the industry). The RTC was not properly resourced. It was criticised for being disconnected with the industry it regulated. It has now been abolished. The VARTA board at one stage had several lawyers as members, but no fertility specialist, even though its sole purpose was to regulate Victorian fertility clinics. It, too, has been abolished, as it was perceived as being disconnected to the industry and consumers and ineffective.

Proposal 10: Improper advertising or coercive behaviour

I have become aware that some overseas surrogacy agencies pay a referral fee for clients being referred to them. This can be a substantial amount. I have recently been offered such a fee, but I declined. I do not receive referral fees.

A large agency operating in Mexico has as part of its retainer fee to pay intended parents US$1,500 for each subsequent referral. New intended parents are not told about that fee by parents through surrogacy who have gone to that agency, when the parents give a glowing report about that agency.

There should be a specific Commonwealth criminal offence for not disclosing a referral fee when referring a person to an overseas surrogacy agency.

Question D: who should undergo the psychological assessment?

Consistent with current practice, both intended parents, the surrogate and the surrogate's partner. By having that report, which all parties and the clinic receive, there is transparency. Any risks (such as lack of support of the surrogate by the surrogate's partner) are identified before the surrogacy arrangement is entered into. This is a vital step for me in identifying and reducing risks for my clients (and the child).

Proposal 19 and question E: criminal history checks

There are arguments either way about the utility of undertaking these. I support these being obtained. If adopted, those who have to provide the criminal history check should be the intended parents, surrogate and surrogate's partner. The check should include all the criminal history, so that there is transparency between the parties.

Some years ago, I acted for intended parents where the proposed surrogate, aged 27, had 10 years before engaged in a pub fight and glassed another patron. This fact was disclosed to my clients. The surrogate had learnt her lesson and become a model citizen, including become an approved carer for the Department of Child Safety. The surrogacy arrangement was a happy and successful journey.

Proposal 20.3: accreditation of lawyers who do surrogacy work

Very few lawyers specialise in surrogacy. There has been little consistent support of CPD topics by the various Law Societies, the Family Law Practitioners Association of Queensland, the Family Law Section of the Law Council of Australia, or the leading private CPD suppliers: although each has from time to time run CPD sessions concerning ART/surrogacy. The Section recently held a conference to do with surrogacy and donation, the first time it has done so.

Specialist accreditation requires that 25% of a practitioner's work is in that area, and that they have had 5 years full time practice. I gained my family law specialist accreditation in 1996. It was a rigorous process. I understand that about 70% of applicants for family law accreditation (the largest specialty) fail the process.

Much as I would love many other practitioners to do surrogacy work, in my view there are simply too few who do enough of this work who could be accredited.

I hope that accreditation in this area could be offered in the future. I hope that there is more consistency of support by the various organisations to CPD in this area, year by year, rather than being considered a marginal topic for which few practitioners are interested, being offered from time to time, but not consistently. If the training is not offered, there is no hope of more lawyers knowing what they are doing when they do this work.

Proposals 18 and 21: psychological assessment and counselling

I abhor the idea of splitting these processes. Western Australia has just legislated to end the split. Most intended parents also have to undertake donor counselling. Intended parents, surrogates and their partners should not have to endure seeing two (or three) counsellors before being given the green light to proceed.

The process of both actions, by one person, is what occurs in most States. It works well. Intended parents should not be subjected to systems abuse because they want to become parents.

Question F: should the surrogate's partner undergo implications counselling?

Yes, consistent with current practice. The partner plays a vital role in the process. Without the partner's active support of the surrogate, the surrogacy arrangement will likely fail.

Question G: should there be additional counselling requirements

Only if the respective party feels the need. Counsellors are clear that there should be counselling during the pregnancy. Most parties do not want it. They should not be forced to undertake it. If they wish to have counselling, their autonomy in doing so should be supported. Given that it is proposed that the agreements be enforceable, that has implications for the surrogate and partner that are not part of the current process. Surrogates in the US and Canada typically do not have counselling after having given birth, in part because they have entered into a binding contract. The process has a legal certainty of outcome.

Question H: should other matters be added or removed from surrogacy agreements?

Every surrogacy arrangement is unique. There is not a one size fits all surrogacy arrangement, and nor should there be a one size fits all surrogacy agreement. There is often a range of matters that are included:

- what expenses are payable (broad brush strokes, or specific)
- which doctor
- which hospital
- insurance for the surrogate
- subject to bodily autonomy, what should occur if there is a need for an abortion
- stillbirth
- registration of the birth
- death of the intended parent/s
- confidentiality
- estate planning for the surrogate and partner
- requirements if the surrogate needs to divorce first
- conflict resolution, such as negotiation, then mediation, then court

Question I: enforceability of lawful, non-compliant surrogacy agreements

Provided that there is substantial compliance, then the agreements should be enforceable. They should not be subject to specific performance. Enforcement should be discretionary (other than payment of money for the surrogate). Surrogates should not be left out of pocket. They should not be taken advantage of.

Question J: any other provisions that are unenforceable

Provisions specifying the hospital and birth arrangements are subject in any event to the surrogate's bodily autonomy. Who might be the guardian in the case of a party's death is unlikely to be enforceable.

Question K: how is enforcement achieved?

By negotiation, then mediation, then if necessary a court. All such disputes should be in the Federal Circuit and Family Court of Australia/Family Court of Western Australia, to ensure a consistency of approach. A money dispute would follow the court's current practices, including attempting mediation first. A dispute about the child would follow the court's current practices, including complying with s.60I. Who has parental responsibility and where the child resides is already determined if necessary by the Court.

Question L: should the national regulator or someone else set caps, including a monthly allowance?

Yes, by the regulator, under a regulation, and be indexed.

Question M: should there be payment for the surrogate's time, etc.?

Yes, as I have previously submitted. The amounts should either be negotiated between the parties, and/or capped by the regulator under a regulation.

Question 27: holding the funds in a trust account

I agree that moneys should be held in trust. In the United States and Canada, money is typically held in an escrow account, and sometimes attorneys' trust accounts, but never by the surrogacy agencies. There have been defaults by fraudulent surrogacy agency owners, and in one case a seemingly fraudulent escrow company owner.

In a similar way, with clear and firm regulation of solicitors' trust accounts, the money should be held in solicitors' trust accounts, and managed consistently with the terms of the agreement.

Proposals 30, 31 and question N: parentage arising from domestic surrogacy

I support these proposals, subject to intended parents being able to obtain a court order if they consider it desirable. I do not anticipate that this would be a common application.Typically, this will only occur if there is an international element (the child may subsequently live overseas, or have an entitlement to other citizenship). Auto recognition is available in British Columbia, Manitoba, Ontario and Illinois, for example, but I almost always recommend that my clients obtain a court order. It is much easier to persuade an official or a court as to the meaning of a court order, and much harder to take them through the pathway of overseas law in that jurisdiction as to the recognition of parentage.

In Europe, for example, the European Court of Human Rights' jurisprudence generally is much more favourable to recognition of the parentage of the child born overseas through surrogacy (and therefore entitlement to citizenship) when a court order has been obtained, than relying on process of law by statute.

Many if not most of the children born to my clients through surrogacy are eligible for multiple citizenship. It is not uncommon for children to have dual or triple citizenship. The largest entitlement of a child in one of my cases was to *six* citizenships.

Question O: factors for the court

The *Family Law Act 1975* (Cth) adequately sets out the factors under ss 60B, 60CA and 60CC. A further factor could be, subject to consideration of best interests, that there is a rebuttable presumption that the parentage of the child is consistent with that of the intention of the parties at the time they entered into the (binding) surrogacy agreement.

Question Q: parental leave

There is a lack of consistency about parental leave for surrogacy, whether for surrogates or the parents. Sometimes it is not mentioned. Other times it appears arbitrary as to its application. Surrogacy seems to have been considered in most cases, if at all, as an after thought.

Public servants in Queensland, for example, can obtain surrogacy leave that is consistent with that for other parenting or adoption leave, but public servants in NSW can only have leave for what is deemed altruistic surrogacy and only if they obtain an order form the Supreme Court. I addressed this in my earlier submission.

There needs to be consistency. There ought to be adequate leave for surrogates post-birth, say 6 weeks. There ought not be discrimination.

Proposals 37, 38 and questions P and U: going overseas and coming home

There are legitimate concerns about the possibility of exploitation of surrogates and the possibility of trafficking of surrogates and children. Aside from educating intended parents about making wise decisions, there ought to be clear guidance about places to avoid.

Many intended parents do not get legal advice until late in their journey or afterwards. They should not be penalised for ignorance. If one reads UK reported cases about those who undertake surrogacy, *many* cases refer to the ignorance of the intended parents about risks in the journey they embarked upon.

In my view, the proposal as suggested is likely unworkable. The idea of listing places that are approved has been tried twice before:

- South Australia
- Israel

On both occasions, it failed.

Ireland has also enacted laws to this effect, but I am advised by an Irish colleague that they are being implemented over the next two years. The assessing of approving (or not approving) overseas destinations has not yet commenced there.

South Australia

About a decade ago, in reaction to the Baby Gammy case, at the instigation of the Hon. John Dawkins MLC, South Australia mandated such an approval process[11]. The purpose was to specify the location of the overseas journey and to approve that location (or not), and if needed, the surrogacy agency involved.

Despite being legislated, the provision was never implemented. No Minister and no public servant was prepared to determine that a location was suitable (or not) or that an agency was suitable (or not). Nor were they prepared to list the criteria for approval or not. If a place or agency was approved, and it turned out bad, they would be blamed. If they refused a place or agency, they would be blamed. There was no expertise available to assess each place and agency or to set out clear criteria.

Israel

Israel took a similar approach. In order to satisfy Israeli requirements as to suitability (which were perceived as being particularly difficult and obstructionist), US surrogacy agencies decided to stop working with Israeli intended parents. Israeli intended parents were only a small portion of the market in the US (just as Australian intended parents are a small proportion of the market there). To seek approval was too hard. The result was that Israeli intended parents stopped going to the US.

Israel then as now allowed surrogacy. It discriminated against gay couples. It does not now. There was always (as there is now) a shortage of Israeli surrogates (similar to us).

The Israeli government in response took what I consider a better response. That was to allow Israeli citizens to undertake surrogacy where they want, but to list certain jurisdictions as high risk, to make it plain that if surrogacy journeys are undertaken there, it would be doubtful that the child would attain Israeli citizenship in any timely manner. The current places listed are Northern

[11] *Family Relationships Act 1975* (SA), s.10FA(3)(c).

Cyprus, Kenya and Albania[12]. The concerns expressed are about possible trafficking and exploitation.

In my view, this is a simpler, easier and cheaper (for the taxpayer) approach. Rather than question whether a place is suitable to be approved, and amass information about that place (which by the time of collation is likely to be out of date), have a list of those places which are not approved.

While the children will be able to still obtain Australian citizenship, consistent with the Convention on the Rights of the Child and the Palermo Protocol, the process is likely to be more highly scrutinised, and therefore considerably slower and more costly for the parents.

This would be an effective carrot and stick approach:

- More information about how to do surrogacy lawfully and ethically, but
- For those who go to the proscribed places that the journey will in effect be more painful, more costly and slower.

Creating families through surrogacy is at the cutting edge of society, medicine, and lagging behind, the law. It is an extraordinarily dynamic field.

I am immersed in this area. I am recognised internationally for my expertise. I deal with local and international surrogacy journeys every day, but I have difficulty keeping up with the pace of change internationally. Change is constant. I have little confidence that a regulator will be able to keep up with the pace of change, unless it is allocated significant resources by the taxpayer.

To illustrate the challenges, I give four current examples, all involving popular surrogacy destinations:

- there has been a significant change in the practice of surrogacy in Mexico arising from a Supreme Court decision in July which upheld the human rights of surrogates and the child. That outcome has had a ripple effect, which seems to be having different impacts in different Mexican states. I have not seen any media about that. Nor was I told by Mexican colleagues. I saw an oblique reference in a document sent by a Mexican colleague to a mutual client.
- there is a bill currently before the Colombian congress to ban surrogacy.
- there is uncertainty in the United States about whether or not the Supreme Court will uphold the President's birthright citizenship executive order, and if upheld, what happens next.
- Some Australian intended parents who went to Canada to undertake surrogacy have discovered, after waiting for years, that there are not enough surrogates, and have therefore undertaken hybrid journeys, with a surrogate in the United States or Mexico.

If approval is required, and to take the last example, they were registered to go to Canada, they would presumably then need to go back and get approval to go to the United States or Mexico.

The United States alone has 51 jurisdictions. Each has its own laws (some statute and some common law, and some neither) about the regulation of surrogacy. What may appear to be so, may not be the case on closer inspection. For example, California's *Family Code* requires an affidavit of relinquishment by the surrogate (and spouse) before the parentage order is made. It would seem

[12] https://www.gov.il/BlobFolder/dynamiccollectorresultitem/item-21-06-23/he/north_cyrprus_albania_kneya_surrogacy.pdf .

then that the surrogate (and spouse) is a parent. That view would be wrong. The parents are the intended parents. The surrogate (and partner) are merely the presumed parents.

While surrogacy is broadly accepted in the United States, there are often traps for the uninitiated. For example, a couple might undertake surrogacy in Florida, and discover they have committed an offence in Victoria to do with adoption. Some States are definitely not recommended for Australians, such as Louisiana, Nebraska or New York, or only sometimes, such as Iowa or Arizona. In Ohio, half the state is more welcoming to surrogacy than the other half, depending on the county.

Health insurance costs vary dramatically across the United States. In California, for example, health insurance costs can vary by county.

Surrogacy agencies in the United States are, with the exception of New York, unregulated. Most agencies operate ethically. However, Australians have lost money to fraudsters operating surrogacy agencies in the US. The fraudsters have been jailed, but the money is still lost.

Surrogacy agencies operating in Mexico are owned by entities or people from Mexico, the United States, Canada, Ukraine, Georgia, Australia and Spain, among others. Some are reputable. Others are not.

If the entity were to say that the US or Mexico was a good location, and intended parents then go to the wrong place or the wrong agency in the United States or Mexico, who are they looking to for compensation?

Bringing the baby home

The proposal is that within 3 months the intended parents apply to the Court for approval. This is based on the UK model. UK colleagues have told me that the process costs between £8,000 and £30,000 to obtain a parental order.

Similar to the lament by the Hon John Pascoe CVO AO that the Court here is caught between not approving of what destination the intended parents have been to, and the best interests of the child, my UK colleagues tell me that *not once* has the Court in the UK ever refused to recognise the parentage of the intended parents.

In other words, the intended parents would be subjected to significant cost in making an application to court, in addition to their significant costs in undertaking surrogacy overseas, at a time of the child's life (the first year) when the child's costs are the highest, for what will be a pre-determined outcome (a parentage order).

Many of my clients have had two children via surrogacy, and one couple had four children. The cost of going to court compounds with each journey.

The presumed idea for this is that the Court will add a layer of scrutiny, after the event, to their journey. By then the horse has bolted. The Department of Home Affairs and Department of Foreign Affairs and Trade have significant rigour in their efforts to ensure that the surrogate is not exploited and the child not trafficked:

- In destinations where a court order is not obtained, to require a DNA test to prove parentage, to comply with *Family Law Act* requirements, by an Australian DNA lab.

- In perceived higher risk destinations, to interview the surrogate, and if necessary her partner, (and in some cases all four parties, separately, at the same time, to minimise collusion) in person.

- To require for citizenship that the ID of the surrogate (and partner) is produced and matches that in the agreement.

- For the passport application, to require this material all over again- and to telephone the surrogate, to confirm her consent to the issue of the passport. This is even if the overseas court has said that her consent is not required.

Those processes, and the paperwork that comes with them has tended over the last few years to have become slowly and steadily more demanding. In the last few months, for example, DFAT has become more rigorous as to obtaining the surrogate's consent to the issue of the passport.

In Australia, there is no necessity for most intended parents to obtain a court order, because the *Family Law Act 1975* (Cth) already recognises them as the parents:

1. The biological father through surrogacy is a parent under the Act[13].

2. The child is born in a place where Australia recognises the parents by virtue of the affidavit in support, as to paternity (s.69T) or the birth certificate (s.69R): s.10 *Family Law Regulations 2024*. Of the five most popular countries in 2024 [fn. 136], Australia recognises[14] the parentage of the child in all of them[15] based on the birth certificate, except Georgia.

3. When the form of regulation overseas is by adoption[16], they are the parents: s.4.

The number of applications (376 children applied for citizenship in the year ended 30 June 2024 and 377 in the same period in 2025) to the Court would impose a significant resourcing issue.

What is proposed is that the parents must apply to be recognised, when they already are. How does that work?

You have suggested that to aid the process of coming the home that the surrogate relinquish the child. That statement evidences that despite the large resources that the Commission has properly poured into this report that you are still in the dark about international parentage. That also highlights that if you are not across this issue, how can a regulator be, when you have engaged this inquiry with such vigour?

In most of the common surrogacy destinations, either at or shortly after the birth of the child, the surrogate is not a parent. She cannot relinquish the child, because she is not a parent, as seen in **Table 1**.

Table 1: Is the surrogate a parent of the child at or around the time of birth/does she have parental responsibility?

Country	Parent/parental responsibility?

[13] *Seto & Poon* [2021] FamCA 279; *Tickner & Rodda* [2021] FedCFamC1F 288; *Gallo & Ruiz* [2024] FedCFamC1F 893.
[14] *Family Law Regulations 2024* (Cth), schedules 2 and 4.
[15] United States, Canada, Colombia, Ukraine.
[16] For one or both parents, for example, New Zealand, Florida, Hawaii, Iowa, Tennessee.

United States	No- either upon birth, or shortly after birth (between 2- 4 weeks in post-birth states).
Canada[17]	No, shortly after birth, between 2 days and 4 weeks.
Colombia	Although her name appears on the birth certificate, she is not a parent. The formality to remove her name takes 4-18 months post-birth.
Mexico	No, if a court order is made. Yes, if not court order is made. Court orders have been commonly made in the states in Australians undertake surrogacy since about 2022.
Ukraine	No, upon birth.

If the parents feel the need to be recognised as the parents under the Act they should be able to apply to the Court and are able to obtain a parentage order. I have no difficulty in that being the Federal Circuit and Family Court of Australia (and the Family Court of Western Australia). I support the FCFCOA having a national surrogacy list. No judge on any court had surrogacy expertise before appointment. I have confidence in State and Territory judges determining surrogacy cases. However, for the sake of consistency, it would be helpful (provided that there are sufficient resources) for the matters to be decided by the FCFCOA and FCWA.

Intended parents should not be limited to 3 months post-arrival in which to apply. This is an arbitrarily short period. Intended parents who do domestic surrogacy are typically given up to 6 months to apply, which can be extended if needed in most States. Most do not apply until 4 or 5 months post-birth. They are more focused on parenting a newborn- and sleep.

The report does not address how Western Australia ought to deal with this matter, given its exclusive jurisdiction over ex nuptial children, which is unlikely to be transferred to the Commonwealth.

Proposal 39: streamlining citizenship and passport applications

I support this, subject to my comments above about overseas surrogacy journeys. The UK does this. We could do worse than copy their approach.

Question V: extending Australian citizenship to children of permanent residents born overseas

I do not have a view either way.

Question W: retrospective process for stateless children

Yes, as I have advocated before.

By application to the Court, with confirmation of the identity of the child, but where there is an inability to confirm the identity of the surrogate. If Colombia can give citizenship to a child in order to prevent a child remaining stateless, then we can too.

Question X: a temporary visa to bring the child home

This would be an improvement on the current system, and would enable the child to be brought home quickly, with all applications for citizenship, passport and visa to be made within Australia.

[17] Except Quebec. No Australian has ever undertaken surrogacy in Quebec to my knowledge.

Most significantly, the child will not be left in limbo overseas. Its interests will be protected by getting "home" sooner.

Yours faithfully
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