Discussion Paper:

REVIEW OF SURROGACY LAWS

Australian Law Reform Commission

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Dr Damian Adams (PhD) is a published medical research scientist with numerous peer-reviewed journal articles, including research on donor conception, a reproductive technology treatment that is often used in surrogacy. He has completed a PhD at Flinders University investigating the welfare outcomes for donor-conceived people. He is the world's foremost expert on the quantitative physical and mental health outcomes for donor-conceived people, conducting the first systematic reviews of perinatal outcomes for donor-conceived neonates and being the only academic to publish quantifiable physical and mental health outcomes in adult donor-conceived people. His thesis also included surrogacy-conceived people in some of the data.

Dr Adams presented evidence along with donor and surrogacy-conceived people to the United Nations in Geneva in 2019 for the 30th anniversary of the UN Convention on the Rights of the Child in the session on Children's Rights in the Age of Biotechnology. The group, including Dr Adams, formulated the 'International Principles for Donor Conception and Surrogacy' also known as the Geneva Principles (Appendix 1).[1]

Furthermore, he has presented at international conferences and symposia on donor conception, has been regularly sought out for media interviews, and has provided evidence to federal and state inquiries into donor conception in Australia. Dr Adams was also involved in the Assisted Reproductive Treatment (Posthumous Use of Material and Donor Conception Register) Amendment Act 2024 (the ART Amendment Act), and the 2009 amendments to the South

[1] International Principles for Donor Conception and Surrogacy. https://surrogacy360.org/wp-content/uploads/2020/04/International-principles-for-donor-conception-and-surrogacy.pdf

Australian Assisted Reproductive Treatment Act 1988, for which he was mentioned in Hansard on numerous occasions. Additionally, he has provided evidence for court proceedings in Canada on donor conception, as well as for Colorado's Senate Bill SB22-224, which led to Colorado's Donor-conceived Persons and Families of Donor-conceived Persons Protection Act.

Dr Adams is donor-conceived himself and therefore holds a unique position of understanding the implications of assisted reproductive technologies on those created both personally and also scientifically/academically.

Preamble:

In all instances of the Discussion Paper's 'Proposals' and 'Questions' regarding a review of surrogacy laws in Australia, the welfare of the child created must be paramount and follow the 'International Principles for Donor Conception and Surrogacy' (Appendix 1) and the United Nations Convention on the Rights of the Child (UNCRC).[2] Under no circumstances should the welfare of the child be subjugated to the desires and wishes of adults who are seeking to have a child. It should always be remembered that there is no right to a child,[3] but rather people have procreative freedom,[4] which, unfortunately, not everyone can enjoy without assistance. With no right to a child, the welfare and rights of children must always be paramount. Additionally, the Discussion Paper supports this position itself, whereby it describes on page 10, 'The proposals aim to foreground and prioritise the rights of the child, as enshrined in the Convention on the Rights of the Child, to which Australia is a party.'

I will address the Proposals and Questions hereafter.

Not all Proposals or Questions will be addressed, only those that impact the welfare of the child.

Proposal 1

Surrogacy should be regulated with substantial consistency across states and territories through a coordinated and harmonised set of Commonwealth, state, and territory laws. This should be achieved through Option 1.4 Hybrid Legislation. The overarching principles and guidance need to

[2] UN. Convention on the rights of the child. Geneva: United Nations; 1989.
[3] Palazzani, L. (2020). Reproductive technologies and the global bioethics debate. Phenomenology and Mind, 17, 150–162.
[4] Robertson, J.A. 1983. Procreative liberty and the control of conception, pregnancy, and childbirth. Virginia Law Review 69(3): 405–464.

be uniform across all States and Territories through Commonwealth legislation; however, integrating them into State and Territory frameworks and other legislation is better achieved at that level. Subsequently, a mix of referred and applied will provide the optimum mix.

Proposal 2 (Question A)

A National Regulator is indeed required to set standards, ensure compliance, have oversight and improve community awareness. There is much that can be learnt from the regulation and oversight of Assisted Reproductive Technology in Australia. The Reproductive Technology Accreditation Committee (RTAC) is responsible for 'setting standards for the performance of ART through an audited Code of Practice and the granting of licences to practice ART within Australia'.[5] In principle, such a regulatory body should be able to provide the oversight and guidance needed, but evidently, this has been majorly flawed.

The 2010 Federal Senate Inquiry into Donor Conception Practices in Australia raised serious concerns regarding RTAC's ability to regulate the Assisted Reproductive Technology industry.[6] RTAC is run under the auspices of the Fertility Society of Australia, meaning the industry itself conducted regulation and policing, and was therefore not independent. In effect, this resulted in poor compliance and a lack of transparency, as seen in the plethora of horrific stories appearing in the media in recent years. Only after repeated breaches of acceptable standards did one State regulator impose licence conditions on an IVF clinic, which could be argued to have occurred far too late and could have been avoided if proper regulation and oversight had been in place. Any regulatory body needs to be completely independent of the surrogacy industry, provide publicly available annual reports, and be audited by external bodies that report to the Federal Government, as safeguards.

Any Surrogacy National Regulatory body (National Regulator) would need to ensure that it followed Child Welfare Paramountcy principles as the acceptable minimum, prioritising Child Welfare over the wishes of recipient parents and any industry bodies. Unlike RTAC, which has historically prioritised the IVF Industry and recipient parents' desires over the right of donor-

[5] RTAC. https://www.fertilitysociety.com.au/art-regulation/rtac/
[6] SLCARC. Donor conception practices in Australia. Australia: Senate Legal and Constitutional Affairs References Committee, Commonwealth of Australia; 2011.

conceived children, highlighting a continual failure to honour the UNCRC and to continue to ignore learnings from Adoption and the Stolen Generation.

Additionally, the design principles need to follow the Geneva Principles outlined in Appendix 1 (see Appendix for more details pertaining to each point), primarily in relation to surrogacy:

- Pre-Conception Screening and Post-Birth Review
- The Right to Identity and to Preserve Relations
- Record Keeping, Birth Records, and Access to Information
- Prohibitions on commercialisation (commodification of the child and surrogate)
- Prohibitions on transnational surrogacy and donor conception
- Family limits
- Requirement for Counselling and Legal Advice
- Transfer of Legal Parentage

Proposal 3 (Question B)

Minimising overlap with other organisations, such as Assisted Reproductive Technology service providers, can be achieved by regulating the roles each organisation takes in the process. Problematically, concerns have been raised about organisations that have a vested interest (for example, arguments against counsellors from ART clinics providing counselling to recipient parents, please see the South Australian Report of the review of the Assisted Reproductive Treatment Act 1988) [7] in providing support services. When services are provided for profit, there is an increased risk that the child's welfare will be subjugated to ensure profitability. Subsequently, the South Australian Government did not appoint fertility counsellors from ART clinics to provide counselling and support for people who have registered on the Donor Conception Register, but instead appointed an independent body (Relationships Australia), which specialises in navigating complex relationships such as adoption reunions, to handle this function.

If Surrogacy Support Organisations (SSOs) are 'for profit' this would contravene Principle 14 of the Geneva Principles that states "The participation of paid intermediaries or agents in arranging surrogacy and/or recruiting or procuring women or donors of gametes for surrogacy or gamete

[7] Allan S. Report of the review of the Assisted Reproductive Treatment Act 1988. Australia: Sonia Allan for the South Australian Minister for Health; 2017.

donation for profit, should be prohibited on the basis that their participation increases the risks of the sale and/or trafficking of women and children."

On this basis and the precedent set by the South Australian government, any SSO must not be 'for profit' but also independent. An SSO provided by the government and which is subsequently highly regulated would then provide a mechanism to ensure a reduction in overlap of functions, but also reduce the risk of commodification or women and children.

I posit that the proposal to allow SSOs to be established privately is likely to commercialise surrogacy further and that their establishment does not necessarily equate to reducing barriers, but rather the statement of 'reducing barriers' highlights a position of putting intended parents' wishes above the welfare of the child and is subsequently not acceptable. While it is indeed vitally important that intended parents and surrogates receive support and guidance to help them 'comply with laws to ensure that surrogacy arrangements can go ahead safely and without exploitation', the private SSO (even a capped fee model) is more likely to be an antithetical approach.

Proposal 4 and 5 (Question C)

It is agreed that Proposal 4 is a necessary stipulation of any legislation. Proposal 5 should be handled by the National Regulator. As outlined above for Proposal 3, a private SSO (whether capped or for-profit) creates conditions for the exploitation and commodification of women and children. A National Regulator that honours the Geneva Principles is therefore the only acceptable option.

Proposal 6

As described above, an SSO does not comply with the Geneva Principles and, therefore, it is argued, is not an option. If, however, legislation is passed that raises the interests of intended parents above the welfare of the child and surrogates, by creating SSOs, then criminal sanctions should be enforced for compliance. Criminal sanctions can be imposed under current legislation against ART clinics that operate under a regulatory framework. SSOs should not be treated differently.

Proposal 7

Assisted Reproductive Technology, whether IVF or donor conception, has historically been subject to misunderstanding, shame and demonising in the community. Education and increased media coverage have reduced stigma regarding this. Therefore, Proposal 7 is supported in principle, provided that the welfare of the child and their rights to information regarding the surrogate and or any donor of reproductive material (sperm, eggs or embryos) are appropriately honoured under the UNCRC and Geneva Principles. Which includes educating recipient parents of the child's rights and that the birth certificate contains appropriate documentation showing that the child was born from a surrogacy agreement (with or without donated reproductive material) and that the names of the surrogate and all progenitors are listed on the birth certificate, as now occurs in the state of South Australia.

Not only do complete birth certificates comply with the UNCRC and the Geneva Principles, but it respects the child as a human being who will grow up to be an adult and who should not be lied to or have their origins hidden. The deception of origins in this manner has been shown in adoption, the Stolen Generation and in the donor-conceived to be harmful to the child.[8]

Proposal 8

Considering that intended parents who use surrogacy have often paid considerable financial amounts to undertake surrogacy, it is unclear how the proposal of implementing civil sanctions would be a deterrent. Stephen Page, a surrogacy lawyer in Australia, stated that typically, surrogacy costs in 2022 are somewhere between $40,000 - $70,000.[9] If the civil penalty is anywhere between $5,000 and $20,000, perhaps even higher, it is clear that this is unlikely to be a deterrent.

Commercialisation equates to trafficking and commodification. This contravenes the UNCRC and must be punishable by criminal convictions. The simplified notion that criminalisation will drive things underground and therefore should be repealed does not apply to many other areas of our society. As an example, trafficking of women for the illegal sex trade is criminalised, but there are no calls for that to be repealed and reduced to a civil offence. The answer is actually to enforce the

[8] Adams DH. Conceptualising a child-centric paradigm: do we have freedom of choice in donor conception reproduction? J Bioeth Inq. 2013;10(3):369-81.
[9] Page S. The Cost of Surrogacy in Australia. https://pageprovan.com.au/the-cost-of-surrogacy-in-australia/

law. When society observes that the law is not enforced, there will be those who seek to take advantage of it. Rather, in this instance, education as put forward in the Discussion Paper (Proposal 7) is a better option than repealing.

Proposal 9

Geneva Principle 15 opposes international surrogacy, especially when it contravenes local laws. It states, "It is not in the best interests of the child to be conceived or born in circumstances in which the 'intending parents' have circumvented or breached laws within their own country by engaging in cross-border assisted reproduction, including but not limited to donor-conception and/or surrogacy. States that prohibit such practices should include extraterritorial prohibitions in their laws. States that allow such practices should limit access to their own citizens."

It is not the intention of those who created the Geneva Principles (Surrogacy and Donor-Conceived people) that Principle 15 be circumvented by repealing criminal offences and replacing them with civil offences, or by having a surrogacy arrangement to enable international surrogacy. Furthermore, allowing international surrogacy to occur impacts Article 8 of the UNCRC:

> "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference."[2]

Article 8 ties into the Geneva Principles dealing with 'The Right to Identity and to Preserve Relations',[1] insofar as it is difficult ensure that the surrogate's identity is being made available to the child and that it is difficult for the child to form a relationship with the surrogate and any siblings if the child wishes to. The human need to identifying information and to potentially form relationships with progenitors and siblings has been a critical welfare issue for adoptees[10] and also donor-conceived people.[11] These concepts and rights surrounding them have been central to

[10] Wrobel, G. M., Grotevant, H. D., Samek, D. R., & Von Korff, L. (2013). Adoptees' curiosity and information-seeking about birth parents in emerging adulthood: Context, motivation, and behavior. International Journal of Behavioral Development, 37(5), 441–450.

[11] Scheib, J.E., M. Riordan, and S. Rubin. 2005. Adolescents with open identity sperm donors: Reports from 12–17 year olds. Human Reproduction 20(1): 239–252; Jadva, V., T. Freeman, W. Kramer, and S. Golombok. 2010. Experiences of offspring searching for and contacting their donor siblings and donor. Reproductive Biomedicine Online 20(4): 523–532; WADC. 2020 We Are Donor Conceived Survey Report. We Are Donor Conceived; 2020. (Accessed December 07, 2025. Available from: https://www.wearedonorconceived.com/2020-survey-top/2020-we-are-donor-conceived-survey/.)

Federal and State Inquiries on donor conception[12] and adoption.[13] The importance of these family relations, the removal of the child and also the withholding of identifying information and the inability to form relationships with their biological family have been central to Federal apologies to the Stolen Generation, Forced Adoptees and Child Migrants. However, we often fail to observe the parallels when it comes to the use of reproductive technologies, surrogacy and the use of donated reproductive material (sperm, eggs and embryos).

The allowance of international surrogacy is therefore incongruent with the implementation of child welfare best practices. Even if the supply of local surrogates cannot meet the demand, we as a society should not be subjugating the rights of the child to meet such demand.

Proposal 10

Legislation should indeed prohibit individuals and organisations, including SSOs, from:

a. intentionally or recklessly facilitating, inducing, or procuring (including by advertisement), or attempting to facilitate, induce, or procure, the involvement of a person in a prohibited domestic or unregistered overseas surrogacy arrangement; or

b. intentionally or recklessly coercing or attempting to coerce (by pressure, force, or fraudulent means) the involvement of a person in any surrogacy arrangement.

Compliance with legislation should be enforced with criminal sanctions, as is the case in various ART legislation.

Proposal 15

In accordance with the response to Proposal 9, international surrogacy should not be allowed, whether it occurs as a result of Australian citizens or permanent residents undertaking a surrogacy agreement overseas, or foreign nationals undertaking a surrogacy agreement here in Australia. In

[12] VLRC. Inquiry into access by donor conceived people to information about the donors. Australia: Victoria Law Reform Committee, Victorian Government Printer; 2012; SLCARC. Donor conception practices in Australia. Australia: Senate Legal and Constitutional Affairs References Committee, Commonwealth of Australia; 2011; NSW Parliament, Law and Safety Committee. Managing information related to donor conception; 2013.
[13] Senate Legal and Constitutional Affairs Committee. Inquiry into the Effectiveness of Australia's Adoption Laws: Final Report. Parliament of Australia. 2023.

both instances, allowing international surrogacy contravenes Geneva Principle 15 and UNCRC Article 8. State or territory legislation imposing residency requirements should remain in-place and not be repealed.

Proposal 16

Current counselling in surrogacy and also donor conception is substandard when it comes to informing the gestational mother (surrogate) of the increased risks to their health.[14] There is an increased risk of gestational complications, including preeclampsia, for a mother who carries a child conceived with a donor egg[15] or donor sperm,[16] which is the case in both forms of surrogacy (traditional and gestational).

Preeclampsia is a leading cause of maternal and foetal morbidity and mortality. It not only has immediate impacts perinatally but is associated with long-term health complications for the mother and child, which can adversely affect them for life.[17] For the gestational mother, preeclampsia is also associated with poorer mental health outcomes.[18]

For the child, a pregnancy complicated by preeclampsia is associated with an increased risk for the child to be born small for gestational age or to suffer intra-uterine growth retardation,[19] both of which are associated with the Developmental Origins of Health and Disease (DOHaD) phenomenon.[20] Children born as a result of being born small for gestational age or having intra-uterine growth retardation are more likely to have adverse health trajectories into adulthood,

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[14] Adams D. Child welfare paramountcy: the donor conception paradox. Flinders University, 2020.
[15] Tranquilli AL, Biondini V, Talebi Chahvar S, Corradetti A, Tranquilli D, Giannubilo S. Perinatal outcomes in oocyte donor pregnancies. J Matern Fetal Neonatal Med. 2013;26(13):1263-7; Klatsky PC, Delaney SS, Caughey AB, Tran ND, Schattman GL, Rosenwaks Z. The role of embryonic origin in preeclampsia: a comparison of autologous in vitro fertilization and ovum donor pregnancies. Obstet Gynecol. 2010;116(6):1387-92; Schwarze JE, Borda P, Vasquez P, Ortega C, Villa S, Crosby JA, et al. Is the risk of preeclampsia higher in donor oocyte pregnancies? A systematic review and meta-analysis. JBRA Assist Reprod. 2018;22(1):15-9.
[16] Kyrou D, Kolibianakis EM, Devroey P, Fatemi HM. Is the use of donor sperm associated with a higher incidence of preeclampsia in women who achieve pregnancy after intrauterine insemination? Fertil Steril. 2010;93(4):1124-7; Smith GN, Walker M, Tessier JL, Millar KG. Increased incidence of preeclampsia in women conceiving by intrauterine insemination with donor versus partner sperm for treatment of primary infertility. Am J Obstet Gynecol. 1997;177(2):455-8.
[17] Cheng SB, Sharma S. Preeclampsia and health risks later in life: an immunological link. Semin Immunopathol. 2016;38(6):699-708.
[18] Gangi, F. E., Faramarzi, M., Bouzari, Z., Khafri, S., Bazgir, M. R., & Netadj, M. (2025). Psychological Distress and Maternal Outcomes in Women With Pre-eclampsia: A Retrospective Case-Control Study. Health science reports, 8(8), e71133.
[19] Proctor LK, Kfouri J, Hiersch L, Aviram A, Zaltz A, Kingdom J, et al. Association between hypertensive disorders and fetal growth restriction in twin compared with singleton gestations. Am J Obstet Gynecol. 2019;221(3):251.e1-.e8.
[20] Barker DJ. The fetal and infant origins of adult disease. BMJ. 1990;301(6761):1111.

including diabetes, heart disease and obesity.[21] Those born from a preeclamptic pregnancy are also at increased risk for neuro-development disorders such as autism and ADHD.[22]

I could list publication after publication, study after study, highlighting the multitude of risks to both the mother and child, both perinatally and longitudinally associated with maternal complications of pregnancy, specifically preeclampsia, which has been repeatedly shown to increase in incidence with the use of donated gametes/embryos as occurs in all surrogacy arrangements. However, the critical point is that these are poorly communicated or explained to the surrogate or intended parent.

There are, however, ART methods that can be implemented in treatment cycles to reduce the risk of preeclampsia, yet these are rarely offered. These include:

1) Donor sperm treatments should be conducted with a period of immune system tolerance treatments without the possibility of pregnancy in an attempt to reduce preeclampsia.

2) Donor oocyte/embryo treatments should involve HLA and killer immunoglobulin-like receptor matching between the oocyte donor and recipient mother in an attempt to reduce preeclampsia.[15]

Due to these increased risks, it is proposed that the requirement for a surrogate to have previously carried a pregnancy (unless instances of special circumstance are met as outlined in Proposal 16) should be maintained.

Proposal 17

An independent medical practitioner is vitally important to ensure appropriate counselling regarding the increased risks outlined in Proposal 16 and that suitable medical assessment is provided to any prospective surrogate. Any medical practitioner with a vested interest in the process, such as a medical practitioner from the IVF clinic undertaking the treatment, is inappropriate.

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[21] Agarwal, P., Morriseau, T. S., Kereliuk, S. M., Doucette, C. A., Wicklow, B. A., & Dolinsky, V. W. (2018). Maternal obesity, diabetes during pregnancy and epigenetic mechanisms that influence the developmental origins of cardiometabolic disease in the offspring. Critical Reviews in Clinical Laboratory Sciences, 55(2), 71–101.

[22] Kong, L., Chen, X., Liang, Y., Forsell, Y., Gissler, M., & Lavebratt, C. (2022). Association of Preeclampsia and Perinatal Complications With Offspring Neurodevelopmental and Psychiatric Disorders. JAMA network open, 5(1), e2145719.

Proposal 18 (Question D) and Proposal 19 (Question E)

Geneva Principle 2 stipulates the requirement for independent mandatory pre-conception assessment for both surrogates and intended parents:

"2. Pre-conception assessments and screening of donors, intended parents and potential surrogate mothers, and post-birth review of the best interests and human rights of the child born as a result must occur in every case of surrogacy and donor conception."

The pre-conception assessment, as outlined in Geneva Principle 2, is to determine whether the intended parents do not present an unacceptable risk to the child and would therefore include both psychological and criminal assessments (Proposal 19). This would align with numerous ART clinics that screen gamete donors for a criminal history, while adoptive parents have criminal history checks prior to being allowed to become an adoptive parent in Australia. Surrogacy, in effect, is another form of adoption, whether it is by one parent (if a donor gamete is used or the surrogate is a traditional surrogate), or both parents (if a donor embryo or donated sperm and egg are used).

Question E – the criminal history check should be aligned with those implemented in adoption for consistency.

Proposal 20

As the intent of this submission is to ensure that the welfare of the child is paramount, I will not comment on the structure or legality of surrogacy arrangements undertaken within Australia (except for where noted earlier regarding overseas surrogacy arrangements, which have clear implications for child welfare issues). It is disappointing to see that the rights of the child to know their genetic and gestational origins, including their right to access registered information, are put last on the list presented in the discussion paper. This highlights how child welfare is often placed after the interests of adults rather than being the first point to be stipulated.

In terms of Proposal 1e, it is agreed that the intended parents must receive legal advice informing them of the child's right to knowledge of their genetic and gestational origins and that this follows best practice for the welfare of the child.

Proposal 21 (Questions F and G)

Evidence from donor conception outcomes, which has been ongoing for longer than surrogacy and therefore has more research available, shows that the partner's experience, psychological well-being and subsequent interaction with the child impacts the welfare of the child.[23] Furthermore, in instances where there is a lack of biological connection to the child, some people have reported stress, anxiety and shame, which can affect their relationship with their partner and the child.[24] Researchers have therefore suggested that counselling, including ongoing counselling, is vitally important for parents to navigate this landscape.[25]

Subsequently, regarding Question F, yes, the surrogate's partner (if any) must undergo mandatory counselling. Additional counselling (Question G) must be available post-birth to continue to support families and the position that the welfare of the child and their rights are paramount. While research shows that in donor conception, counselling when the child reaches adulthood can be beneficial, it is unclear if making this mandatory rather than voluntary for such an extended period will provide increased benefits.

Proposal 33

Article 8 of the UNCRC stipulates that states must preserve the child's identity, nationality and family relations, and not deprive them of any elements of their identity. It is clear from the UNCRC, adoption and donor-conception legislative changes, as well as the apology to the Stolen Generations and Forced Adoptions, that birth registrations are a vital part of a person's identity.

Geneva Principle 9 reaffirms this position by stating: "All children's births should be notified to and registered with the appropriate competent authority in the Nation State of birth. Truth in registration, noting the child is donor-conceived and/or surrogacy-born, must occur. Birth records must be maintained in perpetuity and for future generations that recognise biological, social, and birth parents."

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[23] Blake, L., Jadva, V., & Golombok, S. (2014). Parent psychological adjustment, donor conception and disclosure: a follow-up over 10 years. Human reproduction, 29(11), 2487–2496.
[24] What it's like to use donor sperm when dealing with male infertility. https://healthymale.org.au/health-article/removing-secrecy-around-sperm-donation
[25] Widbom A, Isaksson S, Sydsjö G, Skoog Svanberg A, Lampic C. Positioning the donor in a new landscape-mothers' and fathers' experiences as their adult children obtained information about the identity-release sperm donor. Hum Reprod. 2021 Jul 19;36(8):2181-2188.

For Australia to fulfil its obligations under the UNCRC and to follow the Geneva Principles, it needs to legislate that a surrogate's identifying details be recorded on the birth register, in addition to the identifying details of any gamete/embryo donor(s). Only by mandatorily recording identifying information of all parties involved, intended parents, surrogates, AND donors can the rights of the child be appropriately catered for. Anything less is a violation of their rights to their full identity.

Furthermore, states that enable the hiding of such information by not mandating full details of all parties perpetuate the hiding of the truth, which has been shown to be damaging to adoptees and donor-conceived people, and also reduce the intended parent's ability to be virtuous parents under a Neo-Aristotelian virtue ethics framework.[9]

It is therefore recommended that Option 33.1 be implemented and issued from birth, but it must also contain the identifying details of any donor.

Proposal 34 (Question R) and Proposal 35

Registers are currently in practice in some states in the area of donor conception. Subsequently, a Surrogacy Register should also be implemented to align with donor-conception practices. However, what should be considered is whether a Surrogacy Register is linked to or included in any Donor Registry, as donor gametes are typically used. Having separate registers increases the difficulty for any child to access information. It risks vital information being missed (e.g., not passing on medically important health information that may affect the welfare of the child and/or any other surrogacy/donor-conceived siblings).

As ART providers are currently providing information to donor registers, it would be a simpler approach to have them also add surrogacy details to the records they submit to any register. Currently, Option 35.2 would be easier to implement, as there are already state-based donor conception registers; however, these registers are already showing limitations in providing information across borders, resulting in welfare issues for donor-conceived people. Subsequently, a national register is an optimal solution (Option 35.1), but it should still be included with donor conception (e.g., a national register that covers both surrogacy and donor conception). It is nonsensical to separate them.

Proposal 36

Criminal sanctions are already legislated in various areas of information under state-based donor conception legislation. Therefore, it is proposed that Option 36.2, criminal sanctions, be imposed, as this will better protect the child's rights.

Proposal 37

As described previously, overseas surrogacy arrangements create considerable issues in terms of ensuring the welfare and rights of the child are appropriately catered for and therefore should not be allowed. Arguments to the effect that there are not enough local surrogates to cater for demand and that intended parents will go overseas are not a sufficient argument.

Many overseas surrogacy regions that involve paid surrogacy are exploitative, with surrogates poorly treated, and the only reason that they are undertaking surrogacy is that they are poor and need the money. The fact that rich or economically stable women account for a small proportion of surrogates highlights that it is often an exploitative arrangement in foreign countries, where it is not done altruistically, as occurs in Australia.

As a society, we have a higher demand for many things that we are unable to meet the supply for, including organs such as kidneys or bone marrow and even something simple like blood. It is illegal to pay for these in Australia, as it is unethical and leads to commodification and exploitation. Surrogacy and donor conception are no different. Enabling and promoting overseas surrogacy, which in many instances is for profit, fosters an exploitative model that leads to commodification and therefore a trade in children, which contravenes UNCRC Article 35, which prohibits the “sale, or traffic of children for <u>any purpose</u>” *(emphasis added)*. The Geneva Principles also call for “Prohibitions on transnational surrogacy and donor conception” due to the welfare and ethical issues it raises in relation to both the child and the surrogate.

Overseas surrogacy arrangements cannot be supported on child rights, welfare (child and surrogate), commodification and exploitative grounds.

Conclusion

National surrogacy legislation is long overdue, and this discussion paper is welcomed. It is, however, concerning that in some instances, the desires of intended parents are elevated above the rights of the child as stipulated under Federal and State Legislation, international covenants (UN Convention on the Rights of the Child), which Australia has ratified, and the Geneva Principles (International Principles for Donor Conception and Surrogacy).

The welfare of surrogates has also been poorly catered for, with insufficient counselling of the long-term health risks for themselves that are associated with pregnancies complicated by gestational complications such as preeclampsia, which have a higher incidence in surrogacy and in the use of donated gametes.

Intended parents are also poorly counselled on the increased risks of preeclampsia and the long-term health risks to the child and the surrogate as a result of a pregnancy complicated by preeclampsia.[15]

Assisted Reproductive Technology clinics fail to routinely undertake procedures that can reduce the risk of preeclampsia, such as repeated donor sperm exposure prior to conception or tissue type matching of the egg donor to the recipient, which would foster child and surrogate welfare principles.[15]

In all questions regarding surrogacy, the first answer must involve the rights and welfare of the child, which must override any desires or wishes of intended parents. Only when that occurs have we achieved best practice when it comes to surrogacy.

The Geneva Principles are presented hereafter in Appendix 1.

Appendix 1.

International Principles for Donor Conception and Surrogacy

Purpose:

The International Principles for Donor Conception and Surrogacy (the Principles) have been drafted to provide minimum standards for laws and practice in Nation States where surrogacy and/or donor conception are already permitted or tolerated. The Principles require strict regulation of such practices to uphold the human rights and best interests of people born as a result, in accordance with the principles universally agreed to by Member States as per the United Nations Convention on the Rights of the Child (UNCRC), the most successful human rights treaty in history.

Background:

Donor conception is the commonly used term for the practice of intending parents using third party gametes (such as third party sperm, egg or embryos) to create their own child(ren).

Donor conception also applies to people who are born via surrogacy arrangements, where one or more gametes do not come from the intending parents. These surrogacy-born people are also donor-conceived. The birth mother in surrogacy may or may not be related to the child she carries and births, but she is always also important to the person born as a result.

The Principles are based on the recognition that regardless of the type of assisted reproduction used, all donor-conceived people and people born of surrogacy have a fundamental human right to their full and true identity, a right to preserve relations with their families, and a right not to be bought or sold as enshrined in the UNCRC and other international instruments.

The Principles originally arose out of a presentation by the drafters at the Conference on the 30th anniversary of the UNCRC, at the Palais des Nations, Geneva, November 19, 2019. They are informed by the lived experience of the drafters as donor-conceived. They respond to practices past and present that have impacted and/or continue to impact their lives. Many feel that they are the products of an international industry in human eggs, sperm, embryos and wombs which profits from human life – their lives. Yet as of this writing there is no jurisdiction in the world that fully protects the human rights of donor-conceived or surrogacy-born people despite all UN Member States having signed, and all but one having ratified, the UNCRC.

The Principles are also informed by extensive engagement by the drafters in advocacy on behalf of their community at local, national and international levels, and examination of laws and policy that directly impact them and their genetic, social and gestational families. In addition, the drafters draw upon their professional legal, communications, policy, social services, scientific and other qualifications and experience to inform their work.

In drafting the Principles, it is recognised that many countries maintain prohibitions on assisted reproduction including surrogacy and/or donor conception, as contrary to their values and the human rights of men, women and children. The Principles are not intended to be used to condone, widen or to encourage such practices. Rather, they are intended to set minimum standards that should be adhered to by nations that already permit such practices, and to require strict regulation where such practices occur. They are relevant to all donor-conceived people, including those born of surrogacy – past, present, and future.

Former and current initiatives to formulate policy and/or principles on donor conception and surrogacy by government agencies and not-for-profits are unacceptable. They have failed to adequately consult with donor-conceived and surrogacy-born people. They often choose to ignore the voices of donor-conceived and surrogacy-born people who do not support certain practices in favour of the interests of the fertility industry and intending parents. All policy-making, both national and international, henceforth must include meaningful consultation with a broad representation of donor-conceived and surrogacy-born persons in recognition that the people created by reproductive technology are overwhelmingly those most affected by it.

These voices need to be heard, listened to, and acted upon.

We call upon all governments, agencies, and lawmakers to hear directly from this constituency, to recognise the rights of donor-conceived and surrogacy-born people and to enact laws that uphold and implement the following principles.

The Principles:

Best Interests and Human Rights of the Child Paramount

1. The best interests and human rights of the child who will be or has been born as a result of donor conception and/or a surrogacy arrangement must be the paramount consideration in all relevant laws, policies and practices and in any judicial and administrative decisions relating to donor conception and surrogacy.

Pre-Conception Screening and Post-Birth Review

2. Pre-conception assessments and screening of donors, intended parents and potential surrogate mothers and post-birth review of the best interests and human rights of the child born as a result must occur in every case of surrogacy and donor conception.

The Right to Identity and to Preserve Relations

3. All donor-conceived and surrogacy-born people have an inalienable right to identifying information about all of their biological parents, regardless of when or where they were conceived or born.

4. All donor-conceived and surrogacy-born people have an inalienable right to identifying information about all of their biological siblings, be they half or full siblings, regardless of when or where they were conceived or born.

5. All surrogacy-born people have an inalienable right to identifying information about their surrogate mother, regardless of when or where they were conceived or born.

6. All donor-conceived and surrogacy-born people have the right to preserve relations with biological, social and gestational families, regardless of when or where they were conceived or born. Such relations should be able to be maintained if mutually agreeable.

7. Anonymous donation of gametes and embryos, and anonymous surrogacy must be prohibited.

Record Keeping, Birth Records, and Access to Information

8. Comprehensive and complete records of the identity and familial medical history of all parties involved in the conception and birth of donor-conceived and surrogacy-born people must be kept. Such records must be held by each Nation State in which the conception and birth is commissioned and/or occurs, in perpetuity and for future generations. Verification of the identity of donors, surrogate mothers, and intending parents must occur.

9. All children's births should be notified to and registered with the appropriate competent authority in the Nation State of birth. Truth in registration, noting the child is donor-conceived and/or surrogacy-born, must occur. Birth records must be maintained in perpetuity and for future generations that recognise biological, social, and birth parents.

10. All donor-conceived and surrogacy-born people have the right to be notified of their status and to access records pertaining to their identity, familial medical history, and birth registration.

11. Parents should be encouraged and supported to tell their children of their donor-conceived or surrogacy-born status as early as possible, and preferably from birth. This should be coupled with efforts to reduce stigma related to infertility.

Prohibitions on commercialisation of eggs, sperm, embryos, children and surrogacy

12. All forms of commercialisation of eggs, sperm, embryos, children, and surrogacy must be prohibited. This includes, but is not limited to any kind of consideration (payment or other consideration) for a) the recruitment of potential donors and/or surrogate mothers; b) gametes or embryos; c) 'services', time, effort, 'pain and suffering' related to the conception, pregnancy and/or birth of a child, or termination of pregnancy.

13. The sale and trafficking in persons and/or of gametes in the context of assisted reproduction and surrogacy must be prohibited.

14. The participation of paid intermediaries or agents in arranging surrogacy and/or recruiting or procuring women or donors of gametes for the purposes of surrogacy or gamete donation for profit, should be prohibited on the basis that their participation increases the risks of the sale and/or trafficking of women and children.

Prohibitions on transnational surrogacy and donor conception

15. It is not in the best interests of the child to be conceived or born in circumstances in which the 'intending parents' have circumvented or breached laws within their own country by engaging in cross-border assisted reproduction, including but not limited to donor-conception and/or surrogacy. States that prohibit such practices should include extraterritorial prohibitions in their laws. States that allow such practices should limit access to their own citizens.

Extraterritorial prohibitions should be enforced.

16. It is not in the best interests of the child to be intentionally separated from their genetic families by geographical, linguistic or cultural barriers. As such, inter-country transfer of gametes should also be prohibited.

Family limits

17. To avoid the risk of consanguineous relationships, and the psychological impact of an unlimited number of potential siblings, the number of families that may be created using one donor's gametes should be limited to five.

Requirement for Counselling and Legal Advice

18. Independent counselling and legal advice must be a requirement prior to entering into donor conception and surrogacy arrangements. All parties to donor conception and/or surrogacy must be able to give their informed consent after receiving information about the processes involved, material risks, legal and financial implications and their rights and responsibilities. All information must be delivered in a language the person receiving the counselling and advice can understand. All decisions must be made autonomously and free from duress, coercion, and/or exploitation.

19. The provision of counselling and legal advice must always uphold and convey the best interests and human rights of the child(ren) born to be the paramount consideration.

Transfer of Legal Parentage (Surrogacy)

20. Upon the birth of a child conceived as a result of a surrogacy arrangement, the child should share the birth mother's nationality to avoid the situation that a surrogacy-born child is 'stateless', and records to this effect must be kept.

21. Transfer of legal parentage in cases of surrogacy from a surrogate mother to 'intending parent(s)' should never be automatic nor based solely on intention. Intending parent(s) do not have a right to exclusive legal parentage or parental responsibility of a child born through surrogacy, regardless of any expenses they may have incurred through the process. The surrogate mother must never be compelled to relinquish the child(ren) she has given birth to.

22. Where a surrogate mother has carried the full genetic child of another couple and does not wish to relinquish the child, legal parentage of the child should be determined by a Court dependent on the best interests of the child.

23. Enforcement of contractual terms that purport to transfer legal parentage is not consistent with the best interests or human rights of a child.

Posthumous Use of Gametes

24. Gametes or embryos which a) have been retrieved posthumously from a person, or b) are stored by a clinic on behalf of a person who has since died must never be used in donor conception or surrogacy arrangements, regardless of whether any consent had been given by the person from whom those gametes were obtained prior to their death.

Commentary:

The Principles express the common view of the members of the November 2019 UN presentation on The Rights of the Child in the Age of Biotechnology as part of the 30th anniversary conference on the UNCRC.

The Principles recognise that, pursuant to the UNCRC, donor-conceived people and people born of surrogacy have a fundamental human right to:

● as far as possible, know and be cared for by their parents (Article 7);

● preserve their identity, nationality and family relations, to not be deprived of any elements of their identity, and to seek State assistance to re-establish their identity (Article 8);

● maintain personal relations and direct contact with both parents on a regular basis (Article 9);

● express their views in all matters affecting them (Article 12); and

● seek, receive and impart information and ideas affecting them (Article 13).

Most importantly, ALL children have a fundamental human right not to be bought or sold.

Donor-conceived people and people born of surrogacy also have the right to:

● have their rights in the Convention respected by States Parties without discrimination of any kind, irrespective of the child's birth or other status (Article 2); and

● have the best interests of the child as the primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3).

States Parties should undertake all appropriate legislative, administrative and other measures for the implementation of these human rights as recognised in the UNCRC (Article 4).

As noted in the background to this document, all policy-making, both national and international, must henceforth include meaningful consultation with a broad representation of donor-conceived and surrogacy-born persons, as they are the population overwhelmingly affected by the practice of third-party reproduction.

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