Review of Surrogacy Laws

Submission to the Australian Law Reform Commission

23 January 2026

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Australian Human Rights Commission

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Overview

Introduction

1. This submission is made in response to the Australian Law Reform Commission's (ALRC) *Discussion Paper: Review of Surrogacy Laws* (Discussion Paper).[1] It is framed through the lens of international human rights law and is intended to assist the ALRC in developing reform proposals that are consistent with Australia's international human rights obligations and long-standing public policy settings.

2. In this review the ALRC has focused on 'how best to regulate surrogacy, rather than whether it should be allowed as a practice at all'.[2] The Commission has adopted this framing while recognising that surrogacy is intrinsically an issue that engages complex human rights considerations and about which there will be a range of different views within the Australian community.

3. For example, the Commission stated in its submission to the 2016 *Surrogacy Matters* parliamentary inquiry (2016 Inquiry Submission):[3]

> Surrogacy arrangements raise difficult issues of public policy. For some people, a surrogacy arrangement provides the only opportunity for them to have a child that they are biologically related to. Studies in the United Kingdom suggest that children born as a result of local altruistic surrogacy arrangements generally grow up in loving families and are well adjusted.
>
> By contrast, in many cases international commercial surrogacy arrangements present a range of serious human rights concerns. In many countries, surrogacy is unregulated or poorly regulated.
>
> International surrogacy arrangements can have a significant impact on the rights of children born as a result of these arrangements. Unregulated arrangements raise real concerns about trafficking of children. Even where there is some regulation, differences in legal regimes between countries can mean that some parent-child relationships are not recognised which can have a significant impact on children's other rights such as rights to citizenship, passports, medical treatment, inheritance, and child support. In extreme cases, there are risks of children becoming stateless. Lack of appropriate regulation of assisted reproductive treatment in some countries can also mean that children are not able to obtain information about their origins. Women who act as surrogate mothers are often at risk of exploitation, including trafficking, and there are real concerns about whether they are able to give free and informed consent to the arrangements.

4. The Terms of Reference ask the ALRC to consider 'how to reduce barriers to domestic altruistic surrogacy arrangements in Australia'.[4] This recognises the long-standing domestic prohibition on the practice of commercial surrogacy in

Australia.[5] This submission is framed accordingly and does not understand the inquiry to be engaging with the question of whether this prohibition should be overturned.

5. This submission is guided by four core principles articulated in the *Surrogacy Matters* report published following the 2016 Australian parliamentary inquiry into surrogacy (Surrogacy Matters Inquiry).[6] Those principles remain a sound and authoritative foundation to guide a human rights-based approach to reform, namely:[7]

    - that the best interests of the child should be protected (including the child's safety and well-being, and the child's rights to know about their origins)
    - that the surrogate mother is able to make a free and informed decision about whether to act as a surrogate
    - that sufficient regulatory protections are in place to protect the surrogate mother from exploitation, and
    - that there is legal clarity about the parent-child relationships that result from the arrangement.

6. The Commission also refers to its 2016 Inquiry Submission. Much of that submission remains relevant to the questions being considered by this Inquiry. A copy of the 2016 Inquiry Submission has previously been provided to the ALRC and is attached for reference (as Annexure A).

7. A range of regulatory approaches could be taken to address the issues raised in the Discussion Paper, the *Issues Paper: Review of Surrogacy Laws* (Issues Paper),[8] and this submission. Rather than proposing a particular regulatory regime, the Commission 'suggests that particular proposed responses can be tested against these guiding principles to determine whether they are appropriate and compliant with human rights'.[9]

8. The submission outlines the Commission's in principle support of key proposals outlined in the Discussion paper, including nationally consistent laws (Proposal 1), a national regulator (Proposal 2), and a surrogacy register (Proposals 34 & 35), with the overarching proviso that any resulting reforms must not weaken (directly or indirectly) Australia's domestic prohibition on commercial surrogacy, and that core human rights safeguards must be prioritised.

Recommendations

9. The Commission makes the following recommendations.

Recommendations

1. Any legislative reforms arising from this Inquiry should include a requirement for an independent statutory review to be conducted approximately 5 years after commencement, with specific attention to human rights impacts.
2. A nationally consistent surrogacy framework should expressly require the best interests of the child to be the paramount consideration in all decisions that are made under the framework.
3. Barrier reduction should focus on streamlining processes and improving consistency while retaining safeguards that address human rights risks.
4. A nationally consistent surrogacy framework should be introduced, with core safeguards and rights established in statute.
5. Any reforms to surrogacy regulation should be expressly designed and implemented in a manner consistent with existing anti-discrimination laws, having regard in particular to the unique vulnerabilities and gendered risks experienced by women within surrogacy.
6. Any National Regulator should have clearly defined statutory functions focused on standards, oversight and compliance with strong accountability mechanisms.
7. Surrogacy Support Organisation (SSO) should be limited to support functions and should not be empowered to make determinations that confer or deny legal rights or status.
8. The prospective approval of surrogacy agreements should be supported, but in a manner that ensures approval decisions affecting legal rights are exercised by accountable public authorities under clear statutory criteria, with SSOs limited to preparatory or advisory roles.
9. Reimbursement and cost-recovery arrangements should be clearly defined in legislation, limited to objectively verifiable expenses and losses, and subject to transparent oversight to preserve the existing domestic prohibition of commercial surrogacy in Australia.
10. Reforms to overseas surrogacy arrangements should prioritise the protection of children's rights while maintaining strong regulatory incentives against participation in exploitative arrangements.

11. A national surrogacy register should be introduced. It should be publicly administered, securely maintained and designed to ensure lifelong access to origin information for people born through surrogacy, subject to robust privacy safeguards.

1 Human Rights Framework

This section outlines the human rights principles that must guide any reform of Australia's surrogacy laws and explains how human rights analysis provides a structured basis against which proposals to reduce barriers or increase access must be assessed for necessity, proportionality, and long-term impact.

Methodological Approach and Framing

10. International human rights law provides a legitimate and necessary framework for regulating complex and ethically sensitive practices such as surrogacy. Human rights analysis must however be applied with precision and restraint. Not every interest asserted in the surrogacy context amounts to a legally protected right, and not every burden justifies deregulation.

11. The State's obligations in this area are not limited to refraining from interference with rights. Australia also bears positive obligations to prevent foreseeable harm, to regulate private conduct where there is a real risk of exploitation and to ensure that children are not rendered legally vulnerable by regulatory gaps.[10] Reforms should therefore be incremental and evidence-based, with a clear preference for prevention over ex-post remediation.

12. To this end, we emphasise the importance of embedding mechanisms for evaluation and review within any reformed regulatory framework. Surrogacy regulation operates at the intersection of evolving social practice, medical technology, and human rights norms. It is therefore prudent, and consistent with good legislative practice, to provide for a statutory review of any reforms within a defined period. A review approximately five years after the commencement of any new legislative framework would allow Parliament to assess whether reforms have in fact reduced exploitation, improved outcomes for children, and delivered legal clarity without generating unintended consequences.

Recommendation 1: Any legislative reforms arising from this Inquiry should include a requirement for an independent statutory review to be conducted approximately 5 years after commencement, with specific attention to human rights impacts.

Australia's International Human Rights Obligations

13. The Terms of Reference specifically highlights the importance of reform proposals to be 'consistent with Australia's obligations under international law and conventions' and 'protect and promote the human rights of children born as a result of surrogacy arrangements, surrogates and intending parents, noting that the best interests of children are paramount'.[11]

14. The normative debate about the legitimacy and limits of surrogacy remains unresolved at the international level. There is presently no binding international human rights treaty that regulates surrogacy as a practice. The most sustained multi-state effort has come through the Hague Conference on Private International Law (HCCH), whose *Parentage/Surrogacy Project* has, since 2015, examined cross-border parentage issues raised by international surrogacy arrangements.[12] The HCCH confirms that no global consensus exists on whether – or how – surrogacy should be regulated, and highlights the private international law problems created by divergent domestic approaches, including limping parentage,[13] risks of statelessness, and identity rights for children born via surrogacy. The work of the HCCH concentrates on recognition and continuity of legal parentage across borders, rather than endorsing or proscribing surrogacy itself.[14]

15. Both the Issues Paper and Discussion Paper outline the range of human rights that are relevant when considering surrogacy law reform, including the various international treaties that Australia is a party to.[15] These instruments impose binding obligations to respect, protect, and fulfil the rights of children, women, and other participants in surrogacy arrangements.

16. In this context, the regulation of surrogacy cannot be approached as a purely private or contractual matter. It engages questions of status, identity, bodily integrity and vulnerability that fall squarely within the scope of Australia's international human rights obligations.

17. Recent reports by international human rights experts have underscored that surrogacy raises complex and unresolved human rights risks, particularly for women and girls in situations of vulnerability. The UN Special Rapporteur on violence against women and girls recently highlighted evidence that surrogacy arrangements can involve structural exploitation, coercion, and gender-based violence, especially where economic inequality, cross-border arrangements, or weak regulatory frameworks are present.[16] While the Special Rapporteur has urged States to move towards banning all forms of surrogacy in light of these risks, their report provides a detailed articulation of the safeguards required to prevent harm where surrogacy occurs. These safeguards include robust consent standards, protection against financial coercion, effective oversight mechanisms, and access to remedies.

18. Complementary concerns have been raised by the UN Special Rapporteur on the sale and sexual exploitation of children, who has warned that certain commercial surrogacy practices may, in substance, amount to the sale of children if they prioritise contractual and financial arrangements over the best interests and rights of the child.[17]

19. International human rights law does not prescribe a single, binding approach to the lawfulness or regulation of surrogacy. While some UN Special Rapporteurs have highlighted significant risks of exploitation and urge abolition, other human rights bodies adopt a more pluralistic approach, recognising that States retain discretion to permit surrogacy as one pathway to family life, provided robust safeguards are in place. Jurisprudence on the right to family life and equality emphasises that family forms evolve and that where surrogacy is lawful, regulatory frameworks must ensure non-discrimination, protection of children's rights, and effective oversight to prevent abuse.[18]

20. Taken together, these analyses do not reduce the surrogacy debate to a binary question of permissibility but instead reinforce that any Australian legal framework permitting surrogacy must be anchored in stringent human rights protections, transparency, and accountability to mitigate well-documented risks of exploitation and abuse.

The Rights of the Child

21. The *Convention on the Rights of the Child* (CRC) is particularly relevant to the regulation of surrogacy because surrogacy arrangements directly affect children's rights from birth, including their legal status, identity and protection from harm. Article 3 of the CRC requires that the best interests of the child 'shall be a primary consideration' in all laws and decisions affecting children.

22. This is a substantive legal obligation, and not purely a rhetorical aspiration. In practice, this means that surrogacy laws must prioritise children's welfare, legal certainty, and long-term interests, over competing adult interests.

23. From a human rights perspective, the best interests principle supports reforms that provide early and certain legal parentage, protect children from commodification or sale, ensure access to information about genetic and gestational origins, and prevent statelessness or limbo. Barriers to the recognition of intended parents, where those parents are the child's social and psychological family, may place children at risk of discrimination and undermine their rights to identity, family life, and legal security.

24. This was recently highlighted in the *Key Considerations: Children's Rights and Surrogacy* briefing note that was published by UNICEF and Child Identity Protection in 2022.[19] The briefing note emphasised that '[c]hildren born through surrogacy, especially [International Surrogacy Arrangements], are at risk of multiple human rights violations …' and that children born through surrogacy have the same rights as all other children under the CRC. While recognising that States will have individual positions on surrogacy, the briefing note stated 'all States have a duty to protect the human rights of all children born through surrogacy without discrimination, including ensuring appropriate legal and

regulatory frameworks exist at the national level to protect and promote their rights'.[20]

25. The Discussion Paper appropriately centres children's rights, and this submission strongly supports that framing as the correct starting point for considering reform in this area.

26. The Discussion Paper recommends that, when deciding declarations of legal parentage (Proposals 30 and 31), the Federal Circuit and Family Court of Australia must treat the best interests of the child as the paramount consideration. Given the significant rights involved in surrogacy arrangements, we consider there is a strong justification for applying this requirement across the entire framework, rather than limiting it to specific decisions.

27. This approach would align with existing Australian practice in areas where children are most affected, such as family law.[21] Further, Article 21 of the CRC states that the best interests of the child must be the paramount consideration in the context of adoption. The impact of surrogacy on children warrants adopting the same standard here.

Recommendation 2: A nationally consistent surrogacy framework should expressly require the best interests of the child to be the paramount consideration in all decisions that are made under the framework.

Reducing Barriers within Human Rights Parameters

28. The Terms of Reference ask the ALRC to consider how barriers to domestic altruistic surrogacy arrangements in Australia might be reduced, with the Discussion Paper identifying complexity, inconsistency, and lack of support as barriers to domestic surrogacy. From a human rights perspective, this task must be approached with substantial care. The removal of barriers is not an end in itself. The relevant question is whether existing barriers are necessary and proportionate to the prevention of harm, and whether they can be refined without undermining core safeguards.

29. A rights-respecting approach requires that any reduction in regulatory burden be assessed for necessity and proportionality. For example, changes to financial arrangements should be carefully assessed to ensure that they do not create inducements that compound inequality and undermine genuine consent,, and safeguards relating to screening, counselling and consent should not be characterised as mere administrative obstacles where they needed to address real risks. Reforms that increase accessibility at the cost of weakening protections for women or children would be difficult to reconcile with Australia's international obligations.

Recommendation 3: Barrier reduction should focus on streamlining processes and improving consistency while retaining safeguards that address human rights risks.

2 National Regulation

This section examines the need for a nationally consistent regulatory framework for surrogacy, addressing the current fragmentation across jurisdictions and its implications for rights protection, legal clarity and regulatory oversight. It assesses key institutional and legislative design questions, including the role of a National Regulator, the scope of Surrogacy Support Organisations, and mechanisms for approval, accountability and safeguarding. The section also considers specific regulatory elements – such as reimbursement, overseas arrangements and registers – to ensure that any national framework strengthens human rights protections while maintaining Australia's existing domestic prohibition on commercial surrogacy.

National Consistency

30. The proposal for nationally consistent surrogacy laws is strongly supported from a rule-of-law perspective. The current patchwork of state and territory regimes undermines legal certainty, increases the risk of inadvertent non-compliance, and may encourage reproductive travel, including engaging with overseas arrangements that have weaker safeguards.

31. A nationally coordinated framework – whether achieved through referred powers, mirror legislation, or applied law – should clearly articulate rights and obligations in primary legislation, limit reliance on broad and discretionary powers, and ensure meaningful parliamentary oversight of delegated instruments. National consistency should service legal clarity and rights protection, rather than administrative convenience alone.

Recommendation 4: A nationally consistency surrogacy framework should be introduced, with core safeguards and rights established in statute.

Consistency with anti-discrimination laws

32. Any reform of surrogacy laws must be undertaken in a manner that is consistent with Australia's existing anti-discrimination law framework. This is not merely a matter of policy coherence, but a legal necessity. Anti-discrimination statutes give domestic effect to Australia's international obligations to ensure equality before the law and protection from discrimination, including on the grounds of sex, disability, martial or relationship status, sexual orientation, gender identity, family responsibilities, race, and age.[22]

33. Surrogacy regulation engages these protected attributes in multiple ways. Intended parents may include people with disabilities that affect fertility or pregnancy, same-sex couples, single people, or people in non-traditional family structures. Surrogates may experience discrimination linked to sex, pregnancy

or family responsibilities. The distinct and often gendered role that women occupy in the surrogacy context highlights the importance of ensuring strong protections for their rights and wellbeing. Children born through surrogacy may also face differential treatment if legal parentage or recognition frameworks are not designed with equality principles in mind. Reform proposals must therefore be assessed carefully to ensure that they do not introduce unjustifiable distinctions or indirect discrimination.

34. Australia's anti-discrimination law framework permits differential treatment where it is reasonable, proportionate and directed to a legitimate aim, such as the protection of children from harm or abuse or the prevention of exploitation. Human rights law does not require identical treatment in all circumstances. Rather, it requires that any differentiation be grounded in evidence, pursue a legitimate objective, and impair rights no more than is necessary to achieve that objective. This is particularly relevant in the surrogacy context, where safeguards may legitimately apply differently to surrogates, intended parents, and intermediaries due to differences in vulnerability, power, and risk exposure.

35. For example, proposed reforms that create new institutional actors or approval pathways – such as Surrogacy Support Organisations (SSOs) or administrative parentage mechanisms – must operate within, and not displace, existing anti-discrimination obligations. Private or semi-private bodies exercising functions under statute should be clearly subject to anti-discrimination law, with accessible avenues for review and complaint. Failure to do so risks creating regulatory gaps in which discriminatory practices could occur without effective accountability.

36. While overseas surrogacy arrangements may involve jurisdictions with different anti-discrimination standards, Australia's engagements with these systems must remain anchored in our own legal and human rights obligations (including anti-discrimination laws). Any reforms relating to overseas surrogacy arrangements should be guided by these principles, helping to ensure that overseas practices do not inadvertently lead to discriminatory outcomes within the Australian system.

Recommendation 5: Any reforms to surrogacy regulation should be expressly designed and implemented in a manner consistent with existing anti-discrimination laws, having regard in particular to the unique vulnerabilities and gendered risks experienced by women within surrogacy.

A National Regulator

37. The Discussion Paper proposed establishing a National Regulator (or alternative institutional arrangement) to perform a wide range of functions, including standard-setting, licensing and oversight of SSOs, maintenance of registers, registration of overseas arrangements, and public education. This followed the Issues Paper emphasising the need for nationally coherent oversight settings to remedy current gaps and support safe, transparent domestic arrangements.[23]

38. The identification of systemic gaps in oversight is well founded. Evidence before the Surrogacy Matters Inquiry demonstrated that regulatory requirements 'vary across state borders' and that for intending families 'this may frustrate their efforts to find a suitable surrogate, and results in inconsistent approaches that at times lack the full suite of protections and checks for all parties'.[24] That inquiry further highlighted that existing state-based regulatory mechanisms are fragmented, reactive, and often engaged only after a child has been born, leaving courts to resolve matters in circumstances of legal non-compliance or uncertainty.

39. Both the Issues Paper and Discussion Paper have confirmed that oversight and harmonisation issues identified in earlier reviews remain unresolved, underscoring the need for coordinated, proactive regulation.

40. From a human rights perspective, the creation of a national oversight body has the potential to strengthen prospective safeguards, promote consistency and reduce the risk of exploitation. Centralised standard-setting may also assist in addressing inconsistencies in cost recovery, counselling requirements, and information provision that currently operate as barriers to domestic surrogacy and incentivised overseas arrangements. Comparable regulatory models exist in Australia where specialised oversight has been established in response to ethically sensitive practices, with one clear example being the Australian Organ and Tissue Authority (OTA).

41. However, the breadth of functions contemplated in Proposal 2 warrants careful scrutiny. A National Regulator exercising evaluative or quasi-adjudicative functions must be institutionally independent, operate under clear statutory criteria, and be subject to robust accountability mechanisms. In particular, care must be taken to avoid conferring broad discretionary powers without adequate legislative guidance, as this risks inconsistency, opacity, and erosion of legal certainty for children and adults alike. Human rights-compliant regulation requires not merely oversight, but lawful, transparent and reviewable decision-making.

42. The Commission supports establishing a National Regulator whose core functions are confined to standard-setting, SSO licensing and compliance monitoring, maintenance of registers, and education. Caution is warranted in

relation to proposals that would involve the Regulator in individualised determinations affecting parentage or eligibility, particularly where those determinations may have irreversible consequences for children or result in ongoing supervision of private family arrangements. Where such determinations are unavoidable, they should be tightly circumscribed, supported by merits review, and guided by express statutory principles aligned with the best interests of the child being the primary consideration.

43. There is a risk that an overly expansive regulatory mandate could lead to mission creep or unnecessary intrusion into private decision-making. A clear institutional design, grounded in statutory clarity and limited discretion, is therefore preferable.

Recommendation 6: Any National Regulator should have clearly defined statutory functions focused on standards, oversight and compliance with strong accountability mechanisms.

Surrogacy Support Organisations

44. There is merit in addressing the practical barriers faced by intended parents and surrogates, particularly the difficulty of navigating complex legal and medical processes. Structured support may reduce reliance on overseas arrangements with weaker safeguards.

45. A central concern with the proposed introduction of Surrogacy Support Organisations (SSOs) is that introducing intermediary organisations, including those that operate on a for-profit basis, may create incentives for facilitation to be prioritised over safeguarding. In addition to profit motives, organisational structures – such as performance indicators tied to the number of arrangements facilitated or agreements approved – may also create pressures that favour the promotion of surrogacy arrangements over rigorous safeguarding.

46. This concern is heightened by proposals that would allow SSOs to approve surrogacy agreements or make determinations that effectively confer access to legal parentage pathways. These functions involve evaluative judgments about consent, eligibility and compliance that directly affect legal rights and status. Conferring such powers on private or semi-private facilitators raises significant rule-of-law concerns. An instructive analogy may be drawn with the migration system: migration agents assist applicants in navigating the migration system, but they do not determine validity, confer status, or make binding decisions. Those determinations remain with public decision-makers subject to statutory duties and review.

Recommendation 7: SSOs should be limited to support functions and should not be empowered to make determinations that confer or deny legal rights or status.

Approval of Surrogacy Agreements

47. The Discussion Paper proposes a system of pre-conception approval for surrogacy agreements as a prerequisite for accessing assisted reproductive treatment and the administrative pathway to parentage (Proposals 4 and 5). This represents a significant shift from the current framework, which largely relies on post-birth judicial processes to regularise arrangements that may not have complied with legislative requirements at the outset.

48. From a child-centred and preventative perspective, prospective approval of surrogacy agreements has merit. Evidence before the Surrogacy Matters Inquiry demonstrated that reliance on post-birth court orders places children in legally precarious positions and constrains judicial discretion once a child has already been born. Prospective approval aligns with international best practice by shifting regulatory attention to informed consent, eligibility and safeguards before irreversible consequences arise.

49. However, the design of the approval process is critical. The Discussion Paper proposes that approval be undertaken primarily by SSOs, with limited review by the National Regulator. This raises concerns about consistency, independence, and the legal character of approval decisions. Approval is not a purely procedural step; it involves evaluative judgments about consent, voluntariness, eligibility, and compliance that directly affect access to legal parentage pathways. These judgments directly engage a range of human rights and obligations and must therefore be exercised by bodies with appropriate public accountability.

50. In addition, approval processes must be timely, accessible and proportionate. Excessive delay or procedural complexity risks creating new barriers that undermine the stated objective of reducing reliance on overseas surrogacy. Empirical research cited in the Discussion Paper indicates that uncertainty and delay are significant drivers of reproductive travel. A human rights compliant approvals system must therefore balance rigour with efficiency.

Recommendation 8: The prospective approval of surrogacy agreements should be supported, but in a manner that ensures approval decisions affecting legal rights are exercised by accountable public authorities under clear statutory criteria, with SSOs limited to preparatory or advisory roles.

Requirements for Screening and Advice

51. Proposals 17 – 21 in the Discussion Paper outline proposed requirements for medical screening, psychological screening, criminal history checks, independent legal advice and counselling requirements for intended parents and surrogates. These proposed requirements provide important checks and balances to address power imbalances, support informed and voluntary consent, and reduce the risk of coercion, exploitation and harm. These safeguards are foundational to protecting dignity, autonomy and wellbeing in arrangements that have significant physical, emotional and legal consequences.

52. With respect to Proposal 19, the Commission supports Option 19.1 and the requirement for intended parents to undergo a criminal history check before engaging in a surrogacy arrangement. That should be a mandatory requirement regardless of whether the proposed arrangement is domestic or overseas. This safeguard is essential to ensure that children born through surrogacy are not placed at foreseeable risk of harm and that, in circumstances where parental responsibility is being consciously transferred or created through a legal process, appropriate screening occurs.[25]

53. A criminal history check in this context should be focused on screening for serious and relevant offending (for example, sexual offences, violence against children, or significant family violence related conduct) that evidences a demonstrable and ongoing risk to a child. It would need to be designed and applied in a proportionate, evidence-based and non-discriminatory manner, recognising that criminalisation patterns disproportionately affect some communities (such as First Nations communities).

54. It is important to emphasise that screening and advice requirements are *not* being recommended on the basis of any suggestion that intended parents in surrogacy arrangements inherently pose any greater risk to children. Rather, they reflect the State's responsibility to safeguard children in all contexts where it regulates the creation or transfer of parental responsibility, consistent with approaches taken in adoption and other child-centred regulatory regimes.

55. It is also important to recognise that this particular safeguard is not being recommended more broadly as a limitation on general access to Assisted Reproductive Technologies (ART). Rather, it is considered relevant in this specific context given the nature of surrogacy itself. Unlike other ART procedures, surrogacy involves a deliberate legal process through which the state transfers or creates parental responsibility, placing it closer to adoption and permanent care – contexts in which background checks have long served as accepted child-protection measures.[26]

56. Taken together, the safeguards proposed in Proposals 17 – 21 reflect a proportionate, rights-based response to the vulnerabilities inherent in

surrogacy. Their consistent and careful application is essential to ensuring that any lawful surrogacy framework operates with effective checks and balances and with human rights protection at its core.

Valid Surrogacy Agreements

57. Proposals 22 and 23 recognise that clear and carefully defined requirements for valid surrogacy agreements are an important safeguard given the human rights risks associated with surrogacy, including risks of coercion, exploitation and harm. Specifying validity criteria and mandatory content helps promote clarity, manage expectations about legal effect, and ensure agreements operate as protective regulatory instruments rather than as mechanisms that entrench power imbalances.

58. In particular, the inclusion of an explicit and mandatory statement confirming the surrogate's right to bodily autonomy and bodily integrity is a critical safeguard and should be supported. Such a requirement makes clear that a surrogacy agreement cannot confer decision-making authority over a surrogate's body or medical care, and reinforces respect for dignity and autonomy throughout the pregnancy.

Financial Reimbursement and Cost Recovery

59. The clarification and expansion of reimbursable costs is among the most sensitive aspects of the proposed reforms. The Discussion Paper proposes expanded and clarified reimbursement of surrogates' costs, including recognition of broader categories of loss and the possibility of hardship payments (Proposals 25 – 27). These proposals respond to evidence that current reimbursement frameworks leave some surrogates financially disadvantaged and may deter participation in domestic surrogacy.

60. From a human rights perspective, ensuring that surrogates are not financially harmed by pregnancy undertaken for others is consistent with dignity, bodily autonomy and substantive equality.[27] The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) obliges States to protect women from exploitation while recognising their agency, and reimbursement of genuine expenses is not inherently inconsistent with that obligation.[28] Evidence from the Discussion Paper indicates that while current frameworks allow reimbursement of some pregnancy-related costs, significant gaps remain – particularly inconsistent coverage of lost income, medical expenses not subsidised by Medicare, and other commonly incurred or extraordinary losses – prompting Proposals 25 and 26 to provide for full cost-recovery and optional hardship payments to address these unmet financial impacts.[29]

61. At the same time, international human rights bodies have warned that financial inducement can compromise the voluntariness of consent, particularly where economic vulnerability is present.[30] The distinction between reimbursement and profit is therefore not merely semantic but foundational to Australia's domestic prohibition on commercial surrogacy. Without clear statutory limits and transparency mechanisms, expanded reimbursement risks blurring that boundary in practice and exposing women to undue inducement, even if commercial surrogacy remains formally prohibited.

62. The Commission supports clearer articulation of reimbursable expenses in primary legislation, supplemented by detailed guidance issued by a National Regulator. Reliance on delegated instruments alone risks inconsistency and legal uncertainty. Auditability and transparency are also essential to maintaining public confidence and preventing exploitation. Any expansion of reimbursable costs must be approached with care to avoid undermining Australia's existing domestic prohibition on commercial surrogacy.

Recommendation 9: Reimbursement and cost-recovery arrangements should be clearly defined in legislation, limited to objectively verifiable expenses and losses, and subject to transparent oversight to preserve the domestic prohibition on commercial surrogacy.

Overseas Surrogacy and Children's Rights

63. The Discussion Paper proposes enhanced regulation of overseas surrogacy, including registration of arrangements, approval of certain destinations, and streamlined pathways for citizenship and documentation (Proposals 37 – 39). These proposals respond to well-documented risks associated with overseas surrogacy, including exploitation of women, child trafficking concerns, and prolonged legal uncertainty for children.

64. Australia's international obligations include positive duties to prevent, investigate and address foreseeable harms linked to exploitation when Australians engage in cross-border practices that create heightened risk.[31] International human rights oversight bodies have consistently cautioned that cross-border commercial surrogacy presents significant dangers of coercion, compromised consent, and exploitation, particularly in contexts of economic vulnerability.[32] Evidence before the Surrogacy Matters Inquiry similarly identified instances of abandonment, coercion and inadequate consent in overseas arrangements, underscoring the need for robust domestic measures to mitigate these risks.[33]

65. At the same time, children born through overseas surrogacy are rights-holders independent of the legality or ethics of the arrangements that led to their birth. They must not be penalised for circumstances beyond their control. Uncertainty

about parentage is not a mere technicality; it bears directly on the child's rights to identity, nationality, and care. Streamlined pathways for citizenship and legal recognition should be framed in a manner that protects children's rights without legitimising exploitative practices or weakening domestic safeguards.

66. The challenge for reform in this area is to strike a careful balance: protecting children's rights without legitimising or incentivising exploitative overseas practices. Measures that regulate outcomes must be coupled with strong disincentives, transparency requirements, and approached in a manner that avoids undermining Australia's domestic prohibition on commercial surrogacy.

Recommendation 10: Overseas surrogacy reforms should prioritise protection of children's rights while maintaining strong regulatory incentives against participation in exploitative arrangements.

Registers, information and the right to identity

67. The Discussion Paper proposes national registers and birth certificate annotations to support the rights of people born through surrogacy to access information about their genetic and gestational origins (Proposals 33 – 36). Evidence from donor-conceived persons, adoptees, and people born through surrogacy indicates that lack of access to origin information can cause long-term psychological harm and undermine a person's sense of identity.[34] Australian experiences with donor registers demonstrates that early, accurate record-keeping is essential to ensuring meaningful access in later life.[35]

68. These measures must also ensure that children born through overseas surrogacy have the same right to access information about their genetic and gestational origins as those born in Australia. A national register would provide a reliable mechanism for preserving this information, while recognising that there may be gaps or inconsistencies in overseas records.

69. However, registers must be designed with care. Privacy, data security, and proportionality are essential to maintaining trust among surrogates and intended parents and meeting human rights obligations.[36] Overly intrusive disclosure requirements may deter participation in domestic surrogacy or encourage non-compliance. Access frameworks must also be age-appropriate and supported by counselling where necessary. Consistent and strong privacy protections are needed across both domestic and overseas surrogacy settings.

70. The Commission supports a national register administered by a public authority, with clear statutory rules governing access, correction of records, and privacy safeguards. Fragmented or privately held records would undermine the very rights the register is intended to protect.

Recommendation 11: **A national surrogacy register should be introduced. It should be publicly administered, securely maintained, and designed to**

ensure lifelong access to origin information for people born through surrogacy, subject to robust privacy safeguards.

Endnotes

[1] Australian Law Reform Commission, *Discussion Paper: Review of Surrogacy Laws* (Discussion Paper 89, November 2025).

[2] Australian Law Reform Commission, *Discussion Paper: Review of Surrogacy Laws* (Discussion Paper 89, November 2025), 9 [31].

[3] Australian Human Rights Commission, *Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements* (Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, 17 February 2016), [4] – [6].

[4] Australian Law Reform Commission, *Review of Surrogacy Laws: Terms of Reference* (6 December 2024). <https://www.alrc.gov.au/inquiry/review-of-surrogacy-laws/terms-of-reference/>.

[5] See, for example, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (April 2016), Recommendation 1.

[6] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (April 2016).

[7] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (April 2016), Recommendation 2; Australian Human Rights Commission, *Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements* (Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, 17 February 2016), Recommendation 1.

[8] Australian Law Reform Commission, *Issues Paper: Review of Surrogacy Laws* (Issues Paper 52, June 2025).

[9] Australian Human Rights Commission, *Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements* (Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, 17 February 2016), [8].

[10] See, for example, *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), arts 3, 4, 6 and 19; Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013), 562.

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[11] Australian Law Reform Commission, *Review of Surrogacy Laws: Terms of Reference* (6 December 2024). <https://www.alrc.gov.au/inquiry/review-of-surrogacy-laws/terms-of-reference/>.

[12] Hague Conference on Private International Law, *Parentage / Surrogacy Project* (Website). <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

[13] Limping parentage refers to situations 'where different legal parentage is established according to the laws of different States': see Australian Human Rights Commission, *Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements* (Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, 17 February 2016), [193].

[14] See, for example, HCCH Experts' Group on Parentage / Surrogacy Project, *Final Report: The feasibility of one or more private international law instruments on legal parentage* (November 2022), 9 [14].

[15] See Australian Law Reform Commission, *Issues Paper: Review of Surrogacy Laws* (Issues Paper 52, June 2025), 8-10; Australian Law Reform Commission, *Discussion Paper: Review of Surrogacy Laws* (Discussion Paper 89, November 2025), 10-12.

[16] UN Special Rapporteur on Violence Against Women and Girls, *The different manifestations of violence against women and girls in the context of surrogacy,* UN Doc A/80/158, 14 July 2025. <https://docs.un.org/en/A/80/158>.

[17] UN Special Rapporteur on the Sale and Sexual Exploitation of Children, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, including Child Prostitution, Child Pornography and other child sexual abuse material,* UN Doc A/HRC/37/60, 26 February 2018. <https://docs.un.org/en/A/HRC/37/60>.

[18] See, for example, UN Human Rights Committee, *General comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23)),* UN Doc HRI/GEN/1/Rev.9 (Vol I) (1990); UN Human Rights Committee, *General Comment No 18: Non-discrimination,* UN Doc HRI/GEN/1/Rev.9 (Vol I) (1989); HCCH Experts' Group on Parentage / Surrogacy Project, *Final Report: The feasibility of one or more private international law instruments on legal parentage* (November 2022).

[19] UNICEF and Child Identity Protection, *Key Considerations: Children's Rights and Surrogacy* (Briefing Note, 2022). <https://www.child-identity.org/unicef-and-chip-briefing-note-on-childrens-rights-and-surrogacy/>.

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[20] UNICEF and Child Identity Protection, *Key Considerations: Children's Rights and Surrogacy* (Briefing Note, 2022). <https://www.child-identity.org/unicef-and-chip-briefing-note-on-childrens-rights-and-surrogacy/>.

[21] See, for example, *Family Law Act 1975* (Cth), ss. 60CA, 67L, 67V.

[22] See, for example, *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), *Age Discrimination Act 2004* (Cth).

[23] Australian Law Reform Commission, *Issues Paper: Review of Surrogacy Laws* (Issues Paper 52, June 2025).

[24] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (April 2016), (v).

[25] See also Australian Human Rights Commission, *Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements* (Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, 17 February 2016), [102]; Megan Mitchell (National Commissioner for Children), 'Time to Strengthen our Lax Surrogacy Laws', *The Newcastle Herald* (29 September 2014).

[26] See, for example, Australian Human Rights Commission, *Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements* (Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, 17 February 2016), [98] – [103].

[27] *Convention on the Elimination of All Forms of Discrimination Against Women,* opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), arts 1 – 3; Committee on the Elimination of Discrimination against Women, *General Recommendation No. 24: Article 12 (Women and Health),* UN Doc A/54/38/Rev.1, ch 1 (1999), [21] – [22].

[28] *Convention on the Elimination of All Forms of Discrimination Against Women,* opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), arts 6 & 11; Committee on the Elimination of Discrimination against Women, *General Recommendation No. 24: Article 12 (Women and Health),* UN Doc A/54/38/Rev.1, ch 1 (1999), [21], [27].

[29] Australian Law Reform Commission, *Discussion Paper: Review of Surrogacy Laws* (Discussion Paper 89, November 2025), 45 – 49.

[30] UN Special Rapporteur on Violence Against Women and Girls, *The different manifestations of violence against women and girls in the context of surrogacy,* UN

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Doc A/80/158, 14 July 2025. <https://docs.un.org/en/A/80/158>; UNICEF and Child Identity Protection, *Key Considerations: Children's Rights and Surrogacy* (Briefing Note, 2022). <https://www.child-identity.org/unicef-and-chip-briefing-note-on-childrens-rights-and-surrogacy/>.

[31] See, generally, Committee on the Elimination of Discrimination against Women, *General Recommendation No. 24: Article 12 (Women and Health),* UN Doc A/54/38/Rev.1, ch 1 (1999), [13] – [17], [21], [27]; UNICEF and Child Identity Protection, *Key Considerations: Children's Rights and Surrogacy* (Briefing Note, 2022). <https://www.child-identity.org/unicef-and-chip-briefing-note-on-childrens-rights-and-surrogacy/>.

[32] UN Special Rapporteur on Violence Against Women and Girls, *The different manifestations of violence against women and girls in the context of surrogacy,* UN Doc A/80/158, 14 July 2025. <https://docs.un.org/en/A/80/158>; UNICEF and Child Identity Protection, *Key Considerations: Children's Rights and Surrogacy* (Briefing Note, 2022). <https://www.child-identity.org/unicef-and-chip-briefing-note-on-childrens-rights-and-surrogacy/>.

[33] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (April 2016), 22 – 24.

[34] UNICEF and Child Identity Protection, *Key Considerations: Children's Rights and Surrogacy* (Briefing Note, 2022). <https://www.child-identity.org/unicef-and-chip-briefing-note-on-childrens-rights-and-surrogacy/); Australian Institute of Family Studies (AIFS), *Past Adoption Experiences: National Research Study on the Service Response to Past Adoption Practices* (2012).

[35] Senate Legal and Constitutional Affairs References Committee, *Donor Conception Practices in Australia* (February 2011), chpts 3 & 6; Queensland Parliament, Legal Affairs and Safety Committee, *Inquiry into matters relating to donor conception information* (Report No. 33, August 2022).

[36] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, (entered into force 23 March 1976) art 17.

Australian Human Rights Commission

Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements

AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON SOCIAL POLICY AND LEGAL AFFAIRS

17 February 2016

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs in its Inquiry into Surrogacy.

2. The Commission participated in the earlier Roundtable on Surrogacy held by the Committee on 5 March 2015.

2 Summary

3. The Commission welcomes the opportunity to make a submission to this inquiry.

4. Surrogacy arrangements raise difficult issues of public policy. For some people, a surrogacy arrangement provides the only opportunity for them to have a child that they are biologically related to. Studies in the United Kingdom suggest that children born as a result of local altruistic surrogacy arrangements generally grow up in loving families and are well adjusted.[1]

5. By contrast, in many cases international commercial surrogacy arrangements present a range of serious human rights concerns. In many countries, surrogacy is unregulated or poorly regulated.

6. International surrogacy arrangements can have a significant impact on the rights of children born as a result of these arrangements. Unregulated arrangements raise real concerns about trafficking of children. Even where there is some regulation, differences in legal regimes between countries can mean that some parent-child relationships are not recognised which can have a significant impact on children's other rights such as rights to citizenship, passports, medical treatment, inheritance, and child support. In extreme cases, there are risks of children becoming stateless. Lack of appropriate regulation of assisted reproductive treatment in some countries can also mean that children are not able to obtain information about their origins. Women who act as surrogate mothers are often at risk of exploitation, including trafficking, and there are real concerns about whether they are able to give free and informed consent to the arrangements.

7. A human rights based approach provides one way of assessing proposed legislative and regulatory responses. In this submission, the Commission sets out a number of guiding principles to assess such responses. These are drawn from an analysis of the interrelated human rights of the children born as a result of surrogacy arrangements, the surrogate mother and the intended parents.

8. Through this submission, the Commission does not seek to be prescriptive about all of the particular legislative or regulatory decisions that should be made. Often, a range of legitimate regulatory responses is open. Instead, the Commission suggests that particular proposed responses can be tested against these guiding principles to determine whether they are appropriate and compliant with human rights.

9. The submission deals separately with domestic and international surrogacy arrangements. In relation to each, the submission considers how those arrangements are currently regulated by Australia. It then sets out options for changes to their regulation in the future.

10. In relation to domestic arrangements, altruistic surrogacy is lawful and regulated by State and Territory law (with the exception of the Northern Territory which does not have laws in relation to surrogacy). Commercial surrogacy is prohibited throughout Australia (again, with the exception of the Northern Territory).

11. In relation to international arrangements, three Australian jurisdictions extend their prohibition on commercial surrogacy to arrangements that are entered into by their residents outside Australia. With the exception of those extraterritorial prohibitions on commercial surrogacy, there is currently no regulation by Australia in relation to international surrogacy arrangements (whether altruistic or commercial).

12. The Commission notes that difficulties in accessing lawful altruistic surrogacy arrangements in Australia has contributed to a significant number of people travelling overseas for surrogacy. Almost all cases where Australians enter into a surrogacy arrangement overseas involve commercial arrangements. One issue to be considered is whether it is possible to make access to safe, well-regulated domestic surrogacy arrangements easier, so that there is less incentive for people to enter into potentially less well regulated arrangements elsewhere.

13. This submission identifies two areas in which improving access to domestic arrangements would be consistent with the Commission's proposed guiding principles. These relate to improving access to information about surrogacy arrangements, and ensuring that same sex couples are provided with equivalent access to surrogacy arrangements as that provided to heterosexual couples. The submission also recommends screening of intended parents in a way that is consistent with adoption and foster care arrangements.

14. In relation to future regulation of international surrogacy arrangements, this submission considers the potential regulatory options of prohibition and regulation. The Commissions submits that (as with domestic surrogacy) if international surrogacy is to be permitted, then it needs to be appropriately regulated to adequately protect the rights of any children born as a result of a surrogacy arrangement and the rights of the surrogate mother.

15. The first step in that process would be for the Commonwealth to undertake a systematic review of both the structure and enforcement of regulatory regimes in countries where Australians engage in surrogacy arrangements, for the purpose of determining whether these regimes satisfy the Commission's proposed guiding principles.

16. If the Commonwealth determined that those guiding principles were satisfied, then there are a range of unilateral, bilateral and multilateral regulatory options available to Australia in order to establish minimum human rights standards for

international surrogacy arrangements and to ensure that children have certainty about their legal status and are protected from potential harm.

3 Recommendations

17. The Australian Human Rights Commission makes the following recommendations.

Recommendation 1

In the development of any regulatory regime dealing with surrogacy, the following guiding principles be followed:

a. the best interests of the child are protected (including the child's safety and well-being and the child's right to know about his or her origins)

b. the surrogate mother is able to make a free and informed decision about whether to act as a surrogate

c. sufficient regulatory protections are in place to protect the surrogate mother from exploitation

d. there is legal clarity about the parent-child relationships that result from the arrangement.

Recommendation 2

The Commission recommends that States and Territories renew their efforts to achieve consistency between their surrogacy laws and thereby increase the certainty for people considering surrogacy.

Recommendation 3

The Commission recommends that States and Territories consider adopting the recent South Australian amendments relating to advertising, the creation of a register of surrogate mothers, and the publication of a framework which provides clear information about the surrogacy process.

Recommendation 4

The Commission recommends that South Australia and Western Australia move to provide equivalent access to surrogacy arrangements for same sex couples as is provided for heterosexual couples.

Recommendation 5

The Commission recommends that States and Territories include criteria in their surrogacy legislation that are directed at the suitability of intended parents. Such criteria should include, as a minimum, criminal record checks and working with children checks. If international surrogacy arrangements are to be permitted, such checks should also form part of the regulation of those arrangements.

Recommendation 6

The Commission recommends that the Commonwealth undertake a systematic review of the structure and enforcement of regulatory regimes in countries where Australians engage in surrogacy arrangements, for the purposes of determining whether these regimes meet the requirements made in recommendation 1 and informing a decision about the appropriate regulatory response by Australia.

Recommendation 7

The Commission recommends that if the Commonwealth decides to permit some form of international surrogacy arrangements, then the following amendments be made to Commonwealth law to clarify parent-child relationships that result from those arrangements:

a. a clearer definition of 'parent' be inserted into the *Family Law Act 1975* (Cth);

b. a federal Status of Children Act be introduced that:

    i. includes the power to make orders about the status of children and legal parentage for the purpose of all Commonwealth laws (recommendation 6 of the Family Law Council); and

    ii. specifically deals with applications for transfer of parentage in surrogacy cases where State and Territory Acts do not apply (recommendations 12 and 13 of the Family Law Council);

c. s 60H of the *Family Law Act 1975* (Cth) be redrafted to make it clear that it does not apply to surrogacy arrangements (recommendation 14 of the Family Law Council).

Recommendation 8

The Commission recommends that the Commonwealth continue to engage with the Hague Conference on Private International Law in relation to the potential for an international convention dealing with the regulation of parentage and surrogacy.

Recommendation 9

The Commission recommends that the Commonwealth engage with countries where Australians engage in surrogacy arrangements, for the purpose of determining whether bilateral agreement can be reached on the regulation of parentage and surrogacy.

4 Surrogacy and human rights

4.1 What is surrogacy?

18. Surrogacy involves an agreement pursuant to which a woman agrees to bear a child for another person or couple.

19. The terminology that is used to describe the participants in a surrogacy arrangement, and the arrangement itself, is contested.[2] The woman who gives birth to the child is commonly referred to as the 'surrogate mother' and the other parties to the agreement are commonly referred to as the 'intended parents' or 'commissioning parents'.

20. Surrogacy can take a variety of forms.[3] 'Genetic' surrogacy involves the use of the surrogate mother's egg and, usually, the intending father's sperm. 'Gestational' surrogacy occurs where the surrogate mother does not contribute her own genetic material. The intended parents may provide either eggs or sperm, or both; or gametes may be donated by other people who are not directly involved in the arrangement. This means that a child born as a result of a surrogacy arrangement may be genetically related to both, one or neither of the intending parents.

21. The majority of surrogacy arrangements entered into by Australian intended parents involve gestational surrogacy and are with a surrogate mother in another country. Data from the Department of Immigration and Border Protection suggests that since 2011 there have been approximately 250 applications each year for citizenship by descent for a child born as a result of an international surrogacy arrangement.[4] In the much smaller number of domestic surrogacy arrangements, most also seem to involve gestational surrogacy.[5]

22. Typically, intended parents seek to have a child through a surrogacy arrangement so that they can have a child who is genetically related to at least one of them. They may be unable to conceive a child themselves as a result of infertility or unable to carry a child as a result of some other medical condition. They may be a same sex couple or a heterosexual couple where one intended parent is transgender or intersex. They may not wish to or may not have access to adoption.

4.2 Human rights issues in surrogacy arrangements

23. An obvious feature of surrogacy is that it involves the active participation of a group of people with a common objective. Each of the people involved in the process, including, centrally, the child born as a result of the arrangement, have rights that need to be protected. Developing a policy response to surrogacy using a human rights based approach requires the reconciliation of these potentially competing rights.

(a) Rights of the intended parents

24. Human rights law recognises the right to found a family.[6] This right should be read consistently with prohibitions against discrimination on the grounds of sexual orientation, gender identity or intersex status.[7] Further, the right to privacy and family has been interpreted to include 'the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose'.[8] However, because surrogacy involves contingent decisions by each of those involved in the arrangement, it cannot be said that intended parents as parties to that arrangement have a positive and unqualified right to have a child through a surrogate. They may have the freedom to do so provided the rights of others, in particular the surrogate mother and any children born as a result of a surrogacy arrangement, are adequately protected.

(b) Rights of the surrogate mother

25. From the point of view of a prospective surrogate mother, it is necessary that she is able to make a free and informed decision about whether to be a surrogate mother. The surrogate mother has a right to bodily integrity, one of the most fundamental of human rights. Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) relevantly provides that no one shall be subjected to cruel, inhuman or degrading treatment or be subjected without consent to medical or scientific experimentation.[9] The United Nations Human Rights Committee has emphasised that the aim of this provision is 'to protect both the dignity and the physical and mental integrity of the individual'.[10]

26. In order for a prospective surrogate mother to be in a position to make a free and informed choice, it is necessary that there are sufficient regulatory protections in place to protect her from exploitation. These regulations must take into account differentials in power relationships between the surrogate mother and other parties to the arrangement such as the intended parents or facilitators of the arrangement. One objection made to commercial surrogacy arrangements is that they have the potential to result in exploitation where such imbalances in power exist. A prospective surrogate mother may be induced through the promise of payment to enter into an arrangement without sufficient protections for her or for the child born as a result of the arrangement. It may be that she would not have agreed to such an arrangement if those power imbalances did not exist.

27. There have been example of serious human rights abuses involving women being trafficked for the purpose of surrogacy.[11] A person's vulnerability to trafficking is increased by poverty, violence and discrimination.[12] Australia is a party to the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* (Anti-Trafficking Protocol)[13] which supplements the *Convention Against Transnational Organised Crime*.[14] Article 3 of the Anti-Trafficking Protocol defines 'trafficking in persons' as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

The Anti-Trafficking Protocol provides that 'exploitation' shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

28. Commercial surrogacy arrangements are considered in more detail later in this submission.

(c) Rights of the child

29. From the point of view of children born as a result of a surrogacy arrangement, there are a range of relevant human rights to be considered.[15] This section of the submission briefly deals with: the right to development, identity and relationship rights, non-discrimination, and the right to be safe and free from harm or exploitation. Issues in relation to exploitation and whether commercial surrogacy contravenes the prohibition on sale of children are considered in more detail later in the context of a discussion about international commercial surrogacy.

30. A threshold question is whether surrogacy arrangements necessarily have an adverse impact on children. One of the fundamental values[16] in the *Convention on the Rights of the Child* (CRC) is that in actions concerning children the best interests of the child shall be a primary consideration.[17] States also have an obligation to ensure to the maximum extent possible the survival and development of the child. Tobin notes that in the context of surrogacy arrangements there is a tendency to assume that a child's separation from his or her gestational mother is harmful to his or her development and therefore contrary to his or her interests.[18]

31. The Committee on the Rights of the Child has emphasised that the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play, as well as through respect for the responsibilities of parents and the provision of assistance and quality services.[19] The preamble to the CRC provides that the child 'for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.

32. In the United Kingdom, Golombok has led a longitudinal study of the psychological adjustment of children born through reproductive donation and through domestic altruistic surrogacy.[20] This study examined children born to two parent heterosexual families as a result of surrogacy, egg donation, donor insemination and natural conception at ages 1, 2, 3, 7 and 10. The study found higher levels of adjustment problems for surrogacy children at age 7, compared with children conceived by gamete donation. However, the children in surrogacy families were still generally well-adjusted, with the mean score on the strengths and difficulties questionnaire (SDQ) within the normal range and similar to the UK population mean for 7 year old children. The difference in adjustment was not present at ages 3 or 10.

33. Subsequent analysis by one of the study's authors concluded that '[i]n terms of children's psychological adjustment, … children born using surrogacy do not experience psychological problems. Longitudinal analyses of the data suggest that children born using surrogacy may experience more difficulties around the age of seven years compared to children born using other forms of assisted reproduction … however this difference disappeared by age 10 years and may be a result of more surrogacy children being aware of their birth in comparison to children born using gamete donation'.[21]

34. The study concludes that its findings 'add to the growing body of research suggesting that biological relatedness between parents and children is not essential for positive child adjustment'.[22] There are a range of other matters that are more important for children's development in early childhood, including attachment and bonding with parents or other caregivers in a physically and emotionally safe environment.[23]

35. This research suggests that surrogacy itself is not harmful to children. However, the study was limited to domestic, altruistic surrogacy arrangements including a significant number of cases where there was ongoing positive contact between the child and the surrogate mother.[24] As noted above, international commercial surrogacy arrangements have the potential to raise a range of additional issues.

36. A second human rights issue for children relates to identity and relationship rights. Article 7 of the CRC provides that a child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. A question that arises in surrogacy arrangements is: who are the child's parents? This may involve some combination of the surrogate mother, the intended parents, and donors of genetic material. In the context of the right of the child to family life protected under article 16 of the CRC, the Committee on the Rights of the Child has recognised the diverse ways in which families can be formed:

> The term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom.[25]

37. The right of a child to know and be cared for by his or her parents strongly suggests that any regulatory regime relating to surrogacy should provide certainty to the child as to the identity of his or her parents. A recent decision of the European Court of Human Rights concerning the right to respect for private life held that 'an essential aspect of the identity of an individual is at stake where the legal parent-child relationship is concerned'.[26]

38. Further, article 8 of the CRC provides that the child has the right to preserve his or her identity. A child's identity will include information about his or her origins. The Committee on the Rights of the Child has confirmed that in cases of adoption, separation from or divorce of parents, children's right to identity includes the opportunity to access information about their biological family.[27] In the context of surrogacy, this suggests that a child born as a result of a surrogacy arrangement has a right to know the identity of the surrogate and

any egg and sperm donor.[28] Social science research shows the importance for donor conceived people of understanding their genetic origins and provides strong support for this interpretation of articles 7 and 8.[29]

39. A third human rights issue for children relates to non-discrimination. Article 2 of the CRC provides that children are entitled to the rights set out in the Convention without discrimination on a number of grounds including 'birth or other status'. Arguably, this includes discrimination against children born as a result of a surrogacy arrangement.[30] One issue that arises in this context is the recognition of parent-child relationships. Legal parentage is important because it impacts on the ability of children to access a variety of other rights including rights relating to citizenship, to Medicare and medical benefits, medical treatment, passports, inheritance, workers compensation entitlements, child support and identity.[31] Non-discrimination against children born as a result of surrogacy arrangements in having their relationship with their parents recognised (and thus other rights addressed) was a key aspect of the Commission's submissions in the case of *Ellison & Karnchanit* [2012] FamCA 602.[32]

40. A fourth human rights issue for children relates to protection from exploitation. Article 19 of the CRC provides that States must protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse while in the care of parents, legal guardians or any other person who has the care of the children. Other articles of the CRC aimed at protection of children from particular kinds of exploitation are articles 32, 34, 35 and 36. These rights are relevant when considering issues about the suitability of intended parents. Victoria requires each party to a surrogacy arrangement to undergo criminal record checks and a child protection order check.[33] Similar requirements have also been proposed by the Permanent Bureau to the Hague Conference on Private International Law as part of its project on parentage and surrogacy.[34] This issue is considered in more detail later in this submission.

(d) Consequences of human rights on regulatory decisions by states

41. There is a variety of legislative and regulatory responses that States can take in relation to surrogacy. These range from complete prohibition at one extreme, through to some form of regulation, and a laissez faire approach at the other extreme. Different approaches may be necessary depending on whether the subject is domestic or international surrogacy arrangements or whether the subject is altruistic or commercial arrangements.

42. The Commission does not seek to identify the most appropriate position for Australia to take, but submits that if surrogacy is to be permitted, then it needs to be appropriately regulated to adequately protect the rights of all parties and in particular the rights of the surrogate mother and any children born as a result of a surrogacy arrangement.

43. Based on this brief review of human rights principles, the Commission makes the following recommendation.

Recommendation 1

In the development of any regulatory regime dealing with surrogacy, the following guiding principles be followed:

a. the best interests of the child are protected (including the child's safety and well-being and the child's right to know about his or her origins)

b. the surrogate mother is able to make a free and informed decision about whether to act as a surrogate

c. sufficient regulatory protections are in place to protect the surrogate mother from exploitation

d. there is clarity about the parent-child relationships that result from the arrangement.

44. These principles provide a way of assessing whether any proposed regulatory measure is appropriate. It may be that in some circumstances it is not possible for a regulatory regime to meet these criteria. In those circumstances, states would be justified in adopting a prohibitionist stance.

45. The following sections deal with the way in which domestic and international surrogacy is currently regulated in Australia and the legislative and regulatory options available to Australia, bearing in mind these guiding principles.

5 Current regulation of domestic surrogacy in Australia

46. In Australia, each State and Territory with the exception of the Northern Territory has specific laws dealing with surrogacy. While there are similarities between the regimes, each one contains different requirements about who can enter into a surrogacy arrangement and the necessary preconditions for an arrangement.

47. The Family Law Council[35] and Johnson[36] have recently described in detail the differences between the regulatory regimes in each State and Territory and created comparative tables of relevant provisions. This submission does not seek to recreate the detail of that analysis. Rather, the Commission focusses on some of the most significant similarities and differences.

48. One key similarity between surrogacy laws in Australia is that they permit only 'altruistic' surrogacy. This means that the surrogate mother is not entitled to financially profit from the arrangement. The surrogate mother is generally entitled to be reimbursed for her reasonable costs associated with the pregnancy and with giving effect to the surrogacy arrangement. This may include medical costs, legal costs and in some cases loss of earnings as a result of taking unpaid leave where the surrogate mother was unable to work on medical grounds related to the pregnancy.

49. Altruistic surrogacy is contrasted to 'commercial' or 'compensated' surrogacy. Commercial surrogacy is considered in more detail below in the context of international surrogacy agreements.

50. Another key similarity between surrogacy laws in Australia is that they provide for the transfer of parentage from the surrogate mother (and her partner, if applicable) to the intended parents. The transfer of parentage is effected by a court order following an application after the birth of the child. This is a consent based system. Surrogacy arrangements are not enforceable but in some cases the surrogate mother can require payment of her reasonable costs even if the rest of the agreement is not performed. The fact that surrogacy arrangements are not enforceable means that if the surrogate mother were to change her mind after the birth of the child, she would not be required to relinquish it.

51. There are a number of preconditions that must be satisfied before the court may make an order transferring parentage. These preconditions vary from jurisdiction to jurisdiction but typically they require:

    a. a surrogacy agreement that was entered into prior to conception;

    b. legal advice to the parties about the nature and effect of the arrangement;

    c. counselling for the parties;

    d. minimum ages for the surrogate mother and intended parents (ranging from 18 to 25 years).

52. Other preconditions that are imposed by only some jurisdictions include:

    a. the surrogacy arrangement is limited to gestational surrogacy (not genetic surrogacy);

    b. at least one of the intended parents is a genetic parent of the child;

    c. there is a demonstrated medical or social need for the surrogacy arrangement;

    d. the surrogate mother must have previously given birth to a live child.

53. One significant difference between Australian jurisdictions is who can be an intended parent. In New South Wales, Queensland, Tasmania and Victoria, intended parents can be married, de facto (either same sex or heterosexual) or single. In the Australian Capital Territory, single people cannot be intended parents. In Western Australia, single women (but not single men) can be intended parents and same sex couples cannot be intended parents.[37] In South Australia, neither single people nor same sex couples can be intended parents.[38] In some jurisdictions there are similar restrictions on adoption by same sex couples.

6 Options for future domestic regulation: increase consistency and certainty domestically

54. The fragmentation of surrogacy arrangements throughout Australia and the multiple and varied requirements in each jurisdiction have made it difficult for intended parents in Australia to enter into domestic surrogacy arrangements.[39]

55. This difficulty has been increased through restrictions on public statements about surrogacy. Most jurisdictions make it a criminal offence to make certain kinds of public statements about surrogacy arrangements, including the publication of a statement that a person is willing to act as a surrogate mother or that a person is willing to enter into a surrogacy arrangement.[40] Those restrictions inhibit the ability of prospective intended parents to find a person willing to act as a surrogate mother, and the ability of women willing to act as surrogates from finding prospective intended parents.

56. Greater consistency between the requirements of each State and Territory would significantly increase the certainty of the system. The first section below considers previous attempts at legislative harmonisation.

57. In any process of harmonisation, choices would need to be made about which provisions should be adopted. In this submission, the Commission does not seek to be prescriptive about all of these choices. However, the Commission submits that the choices should be informed by the guiding principles set out in recommendation 1.

58. Three particular issues are analysed using this framework: identifying people willing to enter into surrogacy arrangements, restrictions on access to surrogacy for same sex couples, and screening of intended parents.

59. The difficulty in accessing lawful surrogacy arrangements in Australia has contributed to a significant increase in the number of people travelling overseas for surrogacy.[41] One issue to be considered when assessing the criteria for domestic arrangements is whether it is possible to make access to safe, well-regulated domestic surrogacy arrangements easier, so that there is less incentive for people to enter into potentially less well regulated arrangements elsewhere.

60. Similarly, it is worth considering other forms of family formation such as domestic adoption and foster care arrangements. Either increasing access to these arrangements or encouraging greater uptake of these forms of family formation may reduce the incentive to engage in international commercial surrogacy.

6.1 Previous attempts at national consistency

61. There have been some attempts to achieve national consistency in relation to surrogacy over the past six years.

62. In January 2009, a Joint Working Group of the Standing Committee of Attorneys-General (SCAG), the Australian Health Ministers' Conference and

the Community and Disability Services Ministers' Conference published *A Proposal for a National Model to Harmonise Regulation of Surrogacy*.[42] The proposal was focussed on altruistic surrogacy.

63. Following public consultation, Ministers comprising the SCAG agreed to a set of 15 draft principles upon which model provisions for the regulation of surrogacy could be based. A copy of these principles is set out at Annexure A to this submission.

64. These draft surrogacy principles were endorsed by the SCAG in November 2009 and referred to the Australian Health Ministers' Conference and the Community Services Ministers' Conference to consider. Following this referral, progress on harmonisation appeared to stall. The history of these developments was set out on the website of the Law Crime and Community Safety Council, an archive of which is still available.[43]

65. There were press reports of a meeting on 22 May 2015 between seven State and Territory Attorneys-General. A working group was reportedly to be created to examine 'whether a national legislative response to the issue of international surrogacy should be pursued, including any further work on harmonisation of surrogacy and parentage laws as they relate to international surrogacy'.[44]

66. The Commission is not aware of any further work at the State and Territory level towards the harmonisation of surrogacy laws.

67. Aside from the SCAG principles, there have been attempts by others to develop proposed models which bring together the various State and Territory laws.[45]

Recommendation 2

The Commission recommends that States and Territories renew their efforts to achieve consistency between their surrogacy laws and thereby increase the certainty for people considering surrogacy.

6.2 Identifying people willing to enter into surrogacy arrangements

68. One example of how current restrictions on domestic surrogacy could be reconsidered relates to prohibitions on certain kinds of public statements about surrogacy.

69. Most jurisdictions make it a criminal offence to engage in advertising about surrogacy arrangements. It has been suggested that these restrictions on advertising are intended to 'safeguard against the commercialisation' of surrogacy arrangements.[46] Some restrictions do appear to be addressed to this goal and prohibit, for example, advertisements that seek to induce people to act as surrogates or advertisements that state that a person is willing to arrange a surrogacy arrangement.

70. Most jurisdictions however also contain restrictions on public statements that are much broader. For example, in New South Wales, Queensland, Victoria and the Australian Capital Territory, it is a criminal offence to publish the fact that a person is willing to act as a surrogate mother or that a person is willing to enter into a surrogacy arrangement.[47]

71. Those restrictions inhibit the ability of prospective intended parents to find a person willing to act as a surrogate mother, and the ability of women willing to act as surrogates from finding prospective intended parents.

72. In Western Australia, the advertising offences are limited to publishing a willingness to make a surrogacy arrangement for reward.[48] Advertising for an altruistic surrogacy arrangement is legal.[49] In Tasmania, it is an offence to compile information for payment, with a view to its use in making a surrogacy arrangement (but compiling such information for free is not prohibited).[50]

73. An alternative and more targeted approach to these issues was recently taken in South Australia.

74. In July 2015, South Australia repealed its previous offence provisions relating to advertising and replaced them with offences relating to brokering surrogacy contracts or inducing someone to enter a surrogacy contract for valuable consideration.[51] These changes suggest a narrower targeting of issues of concern. The concern appears to be not merely the provision of information about the surrogacy process but the facilitation of a commercial enterprise where people (particularly third party facilitators) profit from surrogacy. Commercial surrogacy remains prohibited, but it is now easier for people in South Australia to find out about lawful, altruistic surrogacy.

75. As part of the South Australian amendments, a register is to be created to contain the names of women willing to be surrogates.[52] It is not necessary to be entered onto the register in order to be a surrogate, but the aim of the register is to make it easier for prospective intended parents to find someone willing to be a surrogate.

76. The South Australian amendments also provide for the Minister to prepare a State Framework for Altruistic Surrogacy.[53] The framework is to contain certain information including:[54]

    a. the requirements for entering into a surrogacy agreement;

    b. the circumstances in which a person can lawfully arrange a surrogacy agreement on behalf of someone else;

    c. the circumstances in which a person can advertise for the services of a surrogate mother;

    d. details of how the register of women willing to act as a surrogate mother is to be kept and maintained;

    e. information about how in vitro fertilisation procedures are able to be provided in respect of altruistic surrogacy.

77. As part of the second reading speech for the Bill introducing these amendments, Mr John Gardner MP said:

> Often it is the ability to find a willing surrogate that presents the biggest hurdle for couples seeking to have a child through this method. However, by establishing a 'surrogacy register', these reforms will improve access to potential surrogates across South Australia, hopefully diminishing this barrier and increasing the viability of surrogacy as an option for those who cannot conceive naturally.[55]

78. The impact of increasing assess to domestic arrangements on the incentive to travel overseas was also recognised:

> This bill would do a good measure to make [surrogacy] more accessible in South Australia thereby reducing the level of people who are seeking to access surrogacy overseas … .[56]

79. The South Australian amendments will make it easier for people in South Australia to access lawful surrogacy arrangements and to be better informed about surrogacy generally. They are likely to decrease the incentive for people to travel outside of the State or overseas to engage a surrogate. At the same time, restrictions on advertising have been more clearly targeted to the activities of third party brokers of surrogacy arrangements.

80. These amendments appear to be consistent with the guiding principles set out in recommendation 1 above. On the questions of the best interests of children and preventing the exploitation of surrogate mothers: facilitating access to safe, well-regulated surrogacy arrangements in South Australia is likely to reduce the incentive for people to enter into potentially less well regulated arrangements elsewhere. On the question of free and informed consent: the new advertising restrictions are more focused on activities which have the potential to coerce surrogate mothers into agreements for reward. Further, the State Framework for Altruistic Surrogacy is likely to improve surrogate mothers' access to relevant information which will allow them to make informed choices.

Recommendation 3

The Commission recommends that States and Territories consider adopting the recent South Australian amendments relating to advertising, the creation of a register of surrogate mothers, and the publication of a framework which provides clear information about the surrogacy process.

6.3 Access to surrogacy for LGBTI people

81. Another example of how current restrictions on domestic surrogacy could be reconsidered relates to prohibitions in Western Australia and South Australia on same sex couples being intended parents. The Commission has considered this issue previously in the *Resilient Individuals* report.[57]

82. The key issue here is one of discrimination and whether it is justifiable to exclude same sex couples from access to surrogacy on the same terms as heterosexual couples.

83. Social science research indicates that discrimination against same-sex couples in family formation cannot be justified on the basis of the wellbeing of children. The 2013 Australian Government Report, *Same-sex parented families in Australia*, reviewed over 40 years of national and international research into the emotional and physical wellbeing of children from same-sex parent families. The report found that the research supports positive outcomes for children in same-sex parented families. Children in such families do as well emotionally, socially and educationally as their peers from heterosexual couple families.[58]

84. Relevant non-discrimination principles in international human rights law are found in articles 2 and 26 of the ICCPR. These rights were the basis for amendments to the *Sex Discrimination Act 1984* (Cth) (SDA) in 2013,[59] pursuant to which it became unlawful to discriminate against people in various areas of public life on the grounds of sexual orientation, gender identity or intersex status.[60]

85. Following these amendments, there is the potential for State and Territory laws to be invalid if they are inconsistent with the SDA because they discriminate on the basis of sexual orientation, gender identity or intersex status. However, as a result of regulations passed pursuant to s 40(2B) of the SDA, States and Territories were given an initial period of 12 months to ensure that their laws were consistent with these new federal provisions.[61] This period has since been extended twice.[62] The regulation is currently due to expire at the end of 31 July 2016.

86. Some steps have been taken towards removing legislative discrimination against same sex couples in accessing surrogacy in South Australia.

87. The Chair of the South Australian Parliament's Social Development Committee made the following observation in 2011 when tabling a report on same-sex parenting:

> Same-sex parents are no different than other parents in wanting the very best for their children. Removing legislative inequality is a very significant step in lessening the discrimination and social exclusion experienced by these parents and their children. All children, irrespective of the family units into which they are born or live, deserve the full protection of the law.[63]

88. More recently, the South Australian Government has developed a LGBTIQ Inclusion Strategy[64] and asked the South Australian Law Reform Institute to undertake an audit of all South Australian laws and regulations to identify discrimination on the grounds of sexual orientation, gender, gender identity or intersex status. One of the issues that the Institute identified as impacting on LGBTIQ people is access to surrogacy arrangements.[65] The Institute intends to conduct further research and issue further detailed recommendations with respect to:

> The current legal framework relating to recognised surrogacy arrangements. Options for consideration include replacing Part 2B of the *Family Relationships Act 1975* (SA) with a separate Act regulating surrogacy in South Australia, similar to the *Surrogacy Act 2012* (Tas).[66]

89. Allowing same sex couples to access surrogacy arrangements on the same terms as heterosexual couples is consistent with Australia's human rights obligations. It is also consistent with the guiding principles set out in recommendation 1 above. As noted above, discrimination against same-sex couples in family formation cannot be justified on the basis of the wellbeing of children.

Recommendation 4

The Commission recommends that South Australia and Western Australia move to provide equivalent access to surrogacy arrangements for same sex couples as is provided for heterosexual couples.

90. The Commission notes that single people can be intended parents in most States (New South Wales, Queensland, Tasmania and Victoria) and that single women can be intended parents in Western Australia. In South Australia and the Australian Capital Territory, single people cannot be intended parents and the same is true of single men in Western Australia. There does not seem to be a cogent reason for prohibiting single parent families when they occur as a result of a surrogacy arrangement. The Commission expects that this is another area that could be addressed through the process of national harmonisation of surrogacy laws.

6.4 Screening of intended parents

91. All children, regardless of how their family is formed, are at risk of being harmed by bad parenting.

92. In Australia, people wanting to adopt or become foster parents are required to undergo screening to test their suitability to be parents. This typically includes criminal record screening and a working with children check.

93. For example, in New South Wales, a person making decisions about the adoption of a child is to have regard to the best interests of the child, both in childhood and later in life, as the paramount consideration.[67] One of the factors to be considered in determining the best interests of the child is 'the suitability and capacity of each proposed adoptive parent, or any other person, to provide for the needs of the child, including the emotional and intellectual needs of the child'.[68]

94. A person must not be assessed as suitable to be approved to adopt a child unless the person (and every other adult living at the same address) has a current working with children check.[69] Other suitability requirements are prescribed by regulation.[70] These include a nationwide criminal record check and a check of certain information held by the New South Wales Department of Family and Community Services.[71]

95. The same suitability requirements are imposed in relation to international adoptions.[72] This is consistent with Australia's obligations under the Hague Convention on Intercountry Adoption.[73] Article 5(a) of the Convention provides that an adoption shall take place only if authorities in the receiving State have

determined that the prospective adoptive parents are eligible and suited to adopt.

96. It appears that Victoria is the only Australian jurisdiction that requires each party to a surrogacy arrangement to undergo criminal record checks and a child protection order check.[74] (The Victorian requirement applies in all cases where a woman is seeking to have a child through an assisted reproductive treatment; the Commission's submissions are confined to the issue of surrogacy.)[75] Similar requirements have been proposed by the Permanent Bureau to the Hague Conference on Private International Law as part of its project on parentage and surrogacy.[76] Western Australia requires a report from a clinical psychologist that each of the parties to the surrogacy agreement are psychologically suitable to be involved in the agreement.[77] In each of Victoria and Western Australia, surrogacy agreements must be approved by an independent panel.[78]

97. These issues were considered by the Council of Australian Governments in 2009 as part of the proposed model to harmonise surrogacy law in Australia.[79] At the time, COAG did not recommend screening for intended parents. Rather, COAG preferred what it described as a 'least interventionist' approach which relied on compulsory counselling (required in each jurisdiction) to identify any possible safety issues for children, which could then be raised with the ethics committee before a surrogacy procedure was approved. The COAG approach seems to have treated surrogacy arrangements as more similar to assisted reproductive treatment or natural conception on the one hand, than to adoption or foster care on the other hand.

98. There are differences between adoption and surrogacy arrangements and the Commission does not suggest that the regulation of both be identical.[80] However, there are also significant similarities. In the case of each of surrogacy, adoption and foster care arrangements, there is a regulatory regime administered by the State which provides for the transfer of parental responsibility for children.[81] By contrast, in the case of children who are conceived naturally, or intended parents who use assisted reproductive treatment, there is no transfer of parental responsibility. Further, as noted in section 4.2 above, the fact that a transfer of responsibility for parentage is required in surrogacy arrangements means that the rights of intended parents are necessarily contingent. Intended parents do not have a positive and unqualified right to have a child through a surrogate. The rights of the intended parents must be balanced against the rights of any child born as a result of the surrogacy arrangement and the rights of the surrogate mother.

99. In the case of surrogacy, the laws in each Australian jurisdiction make clear that the surrogate mother (and in some cases her partner) is the child's parent at birth. Parental responsibility is transferred through consent based court orders provided certain criteria have been met.

100. The involvement of the State in this process of regulating the transfer of parental responsibility brings with it the obligation to ensure that the best interests of the child are a primary consideration. As article 3 of the CRC says:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

101. Assessment of the child's best interests must also include consideration of the child's safety.[82] This includes the right of the child to protection against injury or abuse while in the care of parents or legal guardians.[83] The CRC provides that these obligations extend to the taking of preventative measures.[84] The Committee on the Rights of the Child has clarified that:

> Applying a best-interests approach to decision-making means assessing the safety and integrity of the child at the current time; however, the precautionary principle also requires assessing the possibility of future risk and harm and other consequences of the decision for the child's safety.[85]

102. The Commission considers that there are additional preventative measures that could be taken in Australia to lessen the risk that children born as a result of surrogacy arrangements are placed with parents who may pose a risk to their safety. In particular, the Commission considers that equivalent legislative and administrative safeguards should apply for the protection of the safety of children in surrogacy arrangements as apply in adoption and foster care arrangements. The Commission therefore recommends that States and Territories include criteria in their surrogacy legislation that is directed at the suitability of intended parents. Such criteria should include, as a minimum, criminal record checks and working with children checks. If international surrogacy arrangements are to be permitted, such checks should also form part of the regulation of those arrangements. Similar recommendations have been made in previous inquiries into surrogacy, including by children's guardians.[86]

103. This recommendation is not made on the basis that prospective intended parents who seek to have a child through surrogacy are more likely to be a risk to children than other kinds of intended parents. Rather, it acknowledges the responsibility of the State to ensure the safety and well-being of children in all cases where it regulates the transfer of parental responsibility.

104. If the Commission's proposal were to be accepted, this would have an impact on the rights of intended parents, in particular their right to privacy. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. This means that, in order for any interference with privacy to be permissible, it must be a requirement imposed by law and one that is not arbitrary. In this context, arbitrariness relates to the reasonableness of the interference with the person's right to privacy and its compatibility with the purposes, aims and objectives of the Covenant.[87] As applied to the present situation, a requirement for a criminal record check and a working with children check would have some consequences for the privacy of intended parents. However, the burden of obtaining these checks in order to obtain approval as a prospective intended parent is not onerous. A requirement to conduct such checks in all cases is likely to be of significant benefit if it is effective in some cases in identifying people who should not be granted approval (or if such people are discouraged from making an application to be approved as an intended parent). The Commission considers

that this additional burden can be justified as reasonable and proportionate to the aim of mitigating the potential risk of harm to children to be transferred into the care of the prospective intended parents.

Recommendation 5

The Commission recommends that States and Territories include criteria in their surrogacy legislation that are directed at the suitability of intended parents. Such criteria should include, as a minimum, criminal record checks and working with children checks. If international surrogacy arrangements are to be permitted, such checks should also form part of the regulation of those arrangements.

6.5 Compensated arrangements?

105. The surrogacy regime in all States and Territories is premised on altruistic surrogacy arrangements. The prohibition on commercial surrogacy has been driven by a concern that it involves the commodification of children and risks the exploitation of surrogate mothers, particularly in situations where there is an imbalance of power and women may be coerced by the promise of financial reward to act as a surrogate against their own interests and the interests of any child born as a result of the arrangement.[88]

106. There have been suggestions by some commentators that it is appropriate to review the criminalisation of commercial surrogacy.[89] Others have suggested that allowing compensated surrogacy arrangements within Australia would further dissuade prospective intended parents from engaging in less well regulated arrangements overseas.[90] It is said that a prohibition on financial compensation to a woman who agrees to be a surrogate mother, other than reimbursement of her actual expenses, fails to recognise both the significant effort and the risk involved in her agreeing to carry a child for someone else.[91]

107. Proposed models suggest a payment which recognises the effort and risk involved for the surrogate mother in carrying and giving birth to a child, while not being so high that it would amount to an 'improper inducement'.[92]

108. The Commission does not make any recommendations about the proposal for commercial or compensated surrogacy in Australia.

7 Current Australian regulation of international surrogacy

109. Almost all international surrogacy arrangements will be commercial arrangements. Commercial surrogacy arrangements are prohibited throughout Australia.[93] At present, three jurisdictions in Australia prohibit their residents from engaging in international commercial surrogacy. However, these criminal prohibitions have to date not been enforced.

110. At the Commonwealth level, there does not appear to be a policy in relation to international surrogacy (whether altruistic or commercial) and the default position is a laissez faire approach. Commonwealth agencies responsible for granting citizenship and passports are not required to, and do not, make

decisions based on whether or not a child has been born as a result of a surrogacy agreement. This means that intended parents who engage in surrogacy overseas will typically be able to obtain citizenship and an Australian passport for their children which will allow the children to return to Australia with the intended parents.

111. A very small proportion of intended parents approach the Family Court of Australia or the Family Court of Western Australia and seek orders to regularise their relationship with the children born as a result of an international surrogacy arrangement. The orders sought are usually parenting orders which provide who the child is to live with and who is to have parental responsibility for the child. In some cases, intended parents also seek parentage orders which are declarations of parent-child relationships. As discussed in detail by the Family Law Council, the *Family Law Act 1975* (Cth) (Family Law Act) is currently ill equipped to deal with these applications.[94] This comment applies equally to the *Family Court Act 1997* (WA) (Family Court Act).

112. Each of these aspects of the current regulation of international surrogacy arrangements are considered in more detail below.

7.1 Criminal prohibitions

113. New South Wales, Queensland and the Australian Capital Territory each have criminal offences for entering into a commercial surrogacy arrangement which extend to arrangements entered into by their residents outside of the jurisdiction (including outside of Australia). There is no criminal prohibition on altruistic surrogacy arrangements entered into overseas. However, intended parents entering into altruistic surrogacy arrangements overseas will not be entitled to obtain orders under State and Territory regimes for the transfer of parentage to them unless they have complied with all of the requirements of the relevant State and Territory laws.

114. In New South Wales it is an offence to enter into, or offer to enter into, a commercial surrogacy arrangement.[95] A person will be liable to be prosecuted for this offence if they are ordinarily resident or domiciled in New South Wales,[96] or if the offence is committed wholly or partly in New South Wales or has an effect in New South Wales.[97] The maximum penalty is a fine of up to $275,000 for a corporation or $110,000 for an individual or imprisonment for up to 2 years (or both).[98] It is also an offence to advertise certain matters in relation to surrogacy arrangements and these offences also have an extraterritorial effect. If the advertisement relates to an altruistic arrangement, the maximum penalty for an individual is $11,000. If the advertisement relates to a commercial arrangement, the maximum penalty for an individual is $110,000 or up to 2 years imprisonment (or both).

115. In Queensland it is an offence to enter into, or offer to enter into, a commercial surrogacy agreement.[99] A person will be liable to be prosecuted for this offence if they were ordinarily resident in Queensland at the time the act was done.[100] The maximum penalty is a fine of up to $11,000 or imprisonment for up to 3 years. Other offences, which also have extraterritorial effect, relate to

advertising, giving or receiving consideration for, or providing technical, professional or medical services in relation to a commercial surrogacy arrangement.[101]

116. In the Australian Capital Territory it is an offence to intentionally enter into a 'commercial substitute parent agreement'.[102] A person will be liable to be prosecuted for this offence if they were ordinarily resident in the Australian Capital Territory at the time the offence was committed.[103] The maximum penalty is a fine of up to $75,000 for a corporation or $15,000 for an individual or imprisonment for up to 1 year (or both). Other offences, which also have extraterritorial effect, relate to advertising, procuring or facilitating a commercial substitute parent agreement.

117. There have not been any reported Australian prosecutions under these provisions for engaging in international commercial surrogacy arrangements, despite high-profile cases in the courts and in the media involving residents of New South Wales, Queensland and the Australian Capital Territory.[104]

118. In June 2011, Watts J in the Family Court of Australia referred two cases involving intended parents from Queensland who had engaged in commercial surrogacy arrangements in Thailand to the Director of Public Prosecutions to consider prosecution under the previous offences provisions in the *Surrogate Parenthood Act 1988* (Qld).[105] The DPP did not proceed with prosecutions. Since the judgment in those two cases, there do not appear to have been any other applications by intended parents from Queensland to the Family Court of Australia for parenting orders to regularise their relationship following an international surrogacy arrangement.[106]

119. However, this does not mean that Queenslanders have stopped engaging in surrogacy arrangements overseas. For example, in a 2014 case involving a Queensland couple, parenting orders were sought from the Family Court following a relationship breakdown.[107] The judgment noted that the parents' second daughter had been born as a result of a commercial surrogacy arrangement in 2011.[108] It does not appear that any application for parenting orders had been made following her return to Australia in July 2011 prior to the breakdown in the relationship.

120. As a proportion of the number of international surrogacy arrangements taking place (see paragraph 21 above), there have been few cases brought to court in any event (a few dozen cases since *Re Mark* in 2003). Some potential reasons for this are considered below.

7.2 Applications for passports and citizenship

121. In a number of early surrogacy cases, children had obtained passports of the country in which they were born (often Thailand) and travelled to Australia on an Australian visa before an application to the Family Court was made.[109] In some of these cases, the applicants submitted that at least part of the reason for approaching the Court for parenting or parentage orders was to assist them in obtaining Australian citizenship for their children.[110] Now, it appears to be more common for children born as a result of an international surrogacy

arrangement to be able to obtain Australian citizenship by descent and an Australian passport before travelling to Australia.[111] Potentially one reason for the small numbers of applications to the Federal Court for parenting orders is that if intended parents are able to obtain citizenship and a passport for their child allowing the child to travel to Australia they may then see little benefit in approaching the court to confirm that they have parental responsibility.[112]

(a) Citizenship applications

122. A person who was born outside of Australia to an Australian citizen is entitled to make an application for Australian citizenship by descent.[113] In circumstances where citizenship by descent is sought for child, the Minister must approve the application provided the Minister is satisfied of the identity of the child and that the child does not raise security concerns.[114]

123. The person applying for citizenship must show that one of their parents is an Australian citizen. The definition of 'parent' for the purposes of the *Australian Citizenship Act 2007* (Cth) (Citizenship Act) is broad. The Full Court of the Federal Court held in *H v Minister for Immigration and Citizenship*[115] that the term 'parent' as used in s 16(2) of the Citizenship Act was not limited to biological parents, and had its ordinary English meaning. The Court observed that the term is used today to signify a social relationship to another person and reflected a widespread contemporary awareness of families that include non-biological parent-child relationships.[116] The Court considered that being a parent within the ordinary meaning of the word was a question of fact and may depend on various factors, including social, legal and biological factors.[117]

124. The Commonwealth agency responsible for administering the Citizenship Act is the Department of Immigration and Border Protection (DIBP). The policy of DIBP is to grant citizenship by descent where at least one intending parent can demonstrate a biological connection with the child.[118] DIBP has published a fact sheet in relation to international surrogacy arrangements.[119] The fact sheet indicates that if there is a genetic link between the child and an intended parent (usually the intended father) then this will be sufficient to demonstrate 'biological parentage':

> In the majority of surrogacy arrangements, at least one of the intended parents is also a biological parent of the child. Normally, the biological parentage can be readily determined through medical records and/or DNA testing. Provided that DNA testing is carried out to approved standards the result of DNA testing is given substantial weight when determining if a person is a parent of another person.[120]

125. In the absence of DNA evidence to an approved standard, DIBP will accept other evidence of a parent-child relationship. This may include:

a. a formal surrogacy agreement entered into before the child was conceived

b. lawful transfer of parental rights in the country in which the surrogacy was carried out to the Australian citizen before or at time of the child's birth

c. evidence that the Australian citizen's inclusion as a parent on the birth certificate was done with that parent's prior consent

d. evidence that the Australian citizen was involved in providing care for the unborn child and/or the mother during the pregnancy, for example, emotional, domestic or financial support and making arrangements for the birth and prenatal and postnatal care

e. evidence that the child was acknowledged socially from or before birth as the Australian citizen's child, for example, where the child was presented within the Australian citizen's family and social groups as being the Australian citizen's child.[121]

126. In some cases, DIBP will examine the terms of a surrogacy arrangement for the purpose of determining who the legal parent of a child is. However, DIBP is not required to make inquiries about whether or not the surrogacy arrangement was a commercial surrogacy arrangement.[122] The fact that an international surrogacy arrangement may have been unlawful (either under Australian or foreign law) is not relevant to an assessment of whether to grant citizenship.[123] If DIBP becomes concerned about the welfare of the child during the application process, for example if it has concerns about child trafficking, it will refer those concerns to the Australian Federal Police.[124]

(b) Passport applications

127. Australian citizens are entitled to be issued with an Australian passport.[125] However, a passport must not be issued to a child who is an Australian citizen, unless:

a. each person who has parental responsibility for the child consents to the child being issued with a passport; or

b. an order of a court of the Commonwealth, a State or Territory permits:

i. the child to have an Australian passport; or

ii. the child to travel internationally; or

iii. the child to live or spend time with another person who is outside Australia.[126]

128. The Commonwealth agency responsible for administering the *Australian Passports Act 2005* (Cth) (Passports Act) is the Department of Foreign Affairs and Trade (DFAT). The policy of DFAT, based on s 11(5) of the Passports Act, is that intended parents in surrogacy cases are not parents under Australian law and do not have parental responsibility until an order to that effect is made by a relevant family court in Australia.[127]

129. As a matter of practice, this means that when an application is made overseas for a passport for a child born as a result of an international surrogacy arrangement, DFAT will require consent to be given by the surrogate mother.[128] The consent sought from the surrogate mother is limited to her

consent to a passport being issued. It does not extend, for example, to her consent to entering the surrogacy arrangement.[129] Intended parents are required to complete a *Child born through surrogacy* form.[130] The fact that an international surrogacy arrangement may have been unlawful (either under Australian or foreign law) is not relevant to an assessment of whether to grant a passport.[131]

130. DFAT staff are required to make a report to Australian authorities when they become aware of a serious crime against Australian law being committed overseas. Evidence given to this Committee's roundtable on surrogacy suggested that this was limited to serious indictable offences with a maximum sentence of over 5 years' imprisonment. This means that offences against the laws of New South Wales, Queensland or the Australian Capital Territory of entering into a commercial surrogacy arrangement would not be required to be reported.[132]

131. Passports for children are normally valid for a period of 5 years. They cannot be renewed; parental consent must be confirmed for each application.[133] This suggests that unless there is a formal transfer of parentage or parental responsibility, the consent of the surrogate mother will be required again when a passport comes up for renewal. However, it appears that in some cases surrogate mothers are being asked to consent that an intended parent act as sole signatory for the purposes of future passport applications.[134] The Commission is not aware of the extent of this practice or whether it complies with the terms of the Passports Act.

7.3 Family court proceedings

(a) Parenting orders and declarations of parentage

132. As noted above, a very small proportion of intended parents who have had a child as a result of an international surrogacy arrangement decide to seek orders from the Family Court of Australia or the Family Court of Western Australia to regularise their relationship with the children. The analysis below contains references to the Family Law Act but there are equivalent provisions in the Family Court Act.

133. When a court application is made following an international surrogacy arrangement, the most common orders sought are parenting orders. Parenting orders confer parental responsibility for a child on a person to the extent set out in the order.[135] There is a range of matters that may be included in a parenting order, such as:

    a. who the child is to live with;

    b. the time the child is to spend with another person;

    c. the allocation of parental responsibility for the child;

    d. maintenance of a child;

e. any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.[136]

134. 'Parental responsibility' means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.[137] However, a parenting order does not amount to a declaration that a person is the 'parent' of a child. An application for a parenting order may be made by either or both of the child's parents, the child, a grandparent of the child or any other person concerned with the care, welfare or development of the child.[138] It may be made in favour of a parent of the child or some other person.[139] A parenting order stops being in force when the child turns 18 years old.[140]

135. Typically, parenting orders are sought following the breakdown of a relationship so that there is clarity about the division of parental responsibility between separating partners. However, parenting orders have also been sought in international surrogacy cases so that it is clear that the intended parents have parental responsibility. This is important for a range of decisions about the child's life (for example, as noted above, the issuing of passports). Such orders are necessary in the case of international arrangements because in those cases a transfer of parentage is not possible under State and Territory surrogacy regimes.[141]

136. Most, if not all, applications for parenting orders in cases of international surrogacy arrangements are approved. In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.[142] Section 60CC of the Family Law Act sets out how a court determines what is in the child's best interests. By the time a matter comes before the Family Court, a child will usually have been granted either Australian citizenship and an Australian passport, or a permanent visa entitling him or her to enter and remain in Australia with the intended parents. The child will be typically be living with the intended parents on a full time basis. There are usually no other people identified who are willing to provide long term care and support to the child. Provided the child can be properly identified (for example through DNA evidence to show that the child is who the parties claim and has not been trafficked)[143] and there is no evidence that it would be contrary to the child's welfare for him or her to live with the intended parents, courts usually have little hesitation in making parenting orders.

137. In some cases, the Family Court has been asked, in addition to parenting orders, to make a finding or a declaration of parentage in favour of one of the intended parents. Findings or declarations of parentage have been made in a number of cases.[144] In a number of other cases, findings or declarations sought were not made.[145] There is a limited range of circumstances in which it may be open to a court to make a declaration of parentage in relation to an international surrogacy arrangement. Given the technical nature of the arguments and a number of recent contrasting judgments, this submission does not deal with that issue in detail.[146]

138. In *Ellison & Karnchanit*, a case dealing with twins born as a result of a surrogacy agreement in Thailand, the Commission argued that if it was open to the court to make a declaration of parentage in favour of Mr Ellison then

such a declaration should be made. The main reason for that submission was that such a declaration would promote other human rights of the twins, including rights in relation to citizenship, migration, medical treatment, intestacy and child support.[147]

139. A declaration of parentage under the Family Law Act operates under its own terms as conclusive evidence of parentage for the purposes of all laws of the Commonwealth.[148] In addition, once a declaration is made it will create a presumption of parentage at State and Territory level as a result of provisions in relevant Status of Children legislation.[149]

140. It has been suggested that, although parentage orders may be in the best interests of the individual children who are the subject of the application, such orders should not be made in cases of international surrogacy arrangements because they represent a 'signal failure' in that they effectively facilitate and tolerate a practice that is unlawful under domestic law and may involve the exploitation of the surrogate mother.[150]

141. These are difficult decisions for judges to make and involve competing considerations. The tension between seeking to make orders that are in the best interests of children while not endorsing actions that may be against public policy was acknowledged and described in detail by Ryan J in *Ellison & Karnchanit*.[151] Any assessment of the correctness of the choice made in that case, based on the necessity for appropriate signals to be sent to prospective intended parents, needs to take a broader view of the steps involved in parents seeking to bring children of international surrogacy arrangements back to Australia.

142. At present, the more fundamental signal failure involves conflicting policy positions at the State and Territory level on the one hand and the federal level on the other. If there were a policy goal of sending a signal to prospective intended parents, then such a signal could be sent much earlier, for example at one of the several interactions between intended parents and federal agencies prior to children being brought back to Australia or, ideally, before the intended parents engage a surrogate mother overseas.

8 Options for future regulation of international surrogacy

143. As noted above, almost all cases where Australians enter into a surrogacy arrangement overseas involve commercial arrangements. There is a variety of legislative and regulatory responses that States can take to the issue of international surrogacy arrangements. These range from complete prohibition at one extreme, through to some form of regulation, and a laissez faire approach at the other extreme.

144. At present, the approach taken at the federal level to international surrogacy is a laissez faire approach. Intended parents are permitted to engage in surrogacy arrangements overseas and bring the children born of those arrangements back to Australia. There is no scrutiny of the terms or circumstances of international surrogacy arrangements by federal agencies

who are responsible for granting citizenship or passports to children born as a result of international surrogacy arrangements.

145. The Commission does not seek to identify the most appropriate position for Australia to take, but submits that if international surrogacy is to be permitted, then it needs to be appropriately regulated to adequately protect the rights of the surrogate mother and any children born as a result of a surrogacy arrangement.

146. This section sets out a number of alternative options for regulating international surrogacy arrangements.

8.1 Prohibition of international surrogacy arrangements

147. Some commentators have called for Australia to prohibit all international commercial surrogacy arrangements.[152] A number of specific concerns about such arrangements have been identified.

148. Prohibition may be necessary in two circumstances:

a. if commercial surrogacy amounts to 'sale of children' and thus is prohibited by international human rights law (this would reinforce the current prohibition on commercial surrogacy domestically);

b. if international surrogacy arrangements (whether altruistic or commercial) cannot be effectively regulated.

(a) Sale of children

149. The sale of or traffic in children is prohibited by article 35 of the CRC and also by the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (CRC OPSC).[153] Australia ratified CRC OPSC on 8 January 2007.

150. Article 35 of the CRC provides:

> States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

151. Article 1 of CRC OPSC requires States to prohibit the sale of children, which is defined in article 2 as 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration'. States are required by article 3 to ensure that, as a minimum, a number of specified acts are criminalised. In the context of the sale of children, these acts include offering, delivering or accepting a child for the purpose of:

(a) sexual exploitation of the child

(b) transfer of the organs of the child for profit

(c) engagement of the child in forced labour.

152. Article 45 of the CRC recognises the special competence of UNICEF to provide expert advice on the implementation of the Convention in areas falling within the scope of its mandate. UNICEF has prepared a Handbook on CRC OPSC. In that Handbook, UNICEF notes that States tend to identify sale of children with trafficking in children but that there are some significant differences. It says that:

> The sale of a child is not necessarily linked to the purpose of exploitation by those who pay for the child, as is the case for child trafficking. This is true even though the OPSC addresses the sale of children in connection with various forms of exploitation.[154]

153. Some commentators have suggested that commercial surrogacy arrangements necessarily involve the sale of children because they involve a transaction (the surrogacy arrangement) whereby a child is transferred to a person or a group of persons (the intended parents) for remuneration or other consideration.[155] If this is the case, then international human rights law requires that all commercial surrogacy arrangements be prohibited.

154. Others have suggested that commercial surrogacy arrangements are not properly characterised as the sale of a child but rather as the payment of the surrogate mother for her time and effort in carrying and giving birth to the child on behalf of the intended parents.[156] They also emphasise that commercial surrogacy is different in nature to the conduct at which CRC OPSC was aimed when it was made.

155. Recent statements from the Committee on the Rights of the Child suggest that it does not consider that all commercial surrogacy arrangements amount to the sale of children. Rather, there is the potential for arrangements to amount to sale of children if they are unregulated.

156. In the United States, surrogacy is regulated at the state level. State law varies widely and comprises states that have specific legislation either prohibiting or regulating surrogacy, states that have not legislated but have judgments of appellate courts in contested surrogacy cases which have created binding precedent, and states that have neither legislation nor relevant case law.[157] In Concluding Observations in response to a report by the United States, the Committee expressed concern about the 'absence of federal legislation with regard to surrogacy, which if not clearly regulated, amounts to sale of children'.[158]

157. Similarly, and around the same time, the Committee recommended improved regulation of surrogacy within Israel to ensure respect for the rights of children and in particular their right to have access to information about their origins.[159] It did not make recommendations against commercial arrangements. Significantly, Israel permits monthly compensation payments to the surrogate mother for pain and suffering and any other reasonable compensation, on top of reimbursement of her expenses.[160] More recently, in the context of CRC OPSC, the Committee noted the efforts of Israel to regulate international surrogacy arrangements but expressed its concern about the lack of an 'appropriate screening procedure for prospective parent/s of children born by surrogate mothers abroad, aimed at preventing hidden sale of children and/or

possible sexual abuse'.[161] The Committee recommended more stringent policies to secure protection of children born through international surrogacy arrangements. Again, the concern appears to be primarily about the level of appropriate regulation rather than the commercial nature of the arrangement.

158. In November 2013, in response to concerns from civil society about the protection of children born in India as a result of international surrogacy arrangements and the rights of surrogate mothers,[162] the Committee on the Rights of the Child asked India to provide information on any measures taken to ensure that its legislation and procedures relating to surrogacy were compliant with the CRC.[163]

159. After considering the information provided by India and by civil society organisations, the Committee noted in its Concluding Observations that: '[c]ommercial use of surrogacy, which is not properly regulated, is widespread, leading to the sale of children and violation of children's rights'.[164] Again, the concern of the Committee appeared to be the lack of effective regulation, rather than the commercial nature of the arrangements *per se*. The Committee recommended that India:

> Ensure that … legislation contain provisions which define, regulate and monitor surrogacy arrangements and criminalizes sale of children for the purpose of illegal adoption, including the misuse of surrogacy.[165]

160. Even if commercial surrogacy does not necessarily amount to sale of children, states may still be justified in prohibiting it if it cannot be properly regulated.

(b) Whether effective regulation of international arrangements is possible

161. International surrogacy arrangements, and particularly commercial arrangements, raise a number of particular concerns. Key among these relate to the position of the surrogate mother; in particular whether she has given free and informed consent to the agreement and whether she is at risk of exploitation, including risk of trafficking.[166] Similar equally serious concerns arise in relation to the potential trafficking of children.

162. Specific concerns include whether women have been properly informed of the physical and psychological risks associated with surrogacy, whether advice about the agreement has been given in a way that the woman understands (which may be particularly important if she is illiterate), and whether her decision to be a surrogate was made free from financial, social and emotional pressure.[167] These concerns have been expressed by a range of states that responded to a questionnaire from the Hague Conference on Private International Law.[168]

163. Details of some of the problems that can arise are contained in two reports published by the Centre for Social Research in India.[169] The first report was prepared in relation to three cities in Gujarat state. A second report using the same methodology was later prepared in relation to Delhi and Mumbai. In each case, the Centre conducted interviews with 100 surrogate mothers and 50 commissioning parents. Surrogate mothers reported that the most significant factor influencing their decision to become a surrogate was

poverty.[170] A significant number of women reported that they had felt 'emotionally pressurized' by their husbands to undergo surrogacy for financial reasons.[171]

164. Unlike the requirements that attach to surrogacy arrangements in Australia, the Centre reports that many surrogacy agreements in India may not be executed prior to conception, which provides less protection for the surrogate mothers. The reports noted that 'the commissioning parents usually came to India to sign the contract when the pregnancy had been confirmed and all abnormalities had been ruled out by the doctors dealing with the case, which was around second trimester'.[172] The Centre also said that the surrogacy contract rarely addressed issues related to the health and well-being of the surrogate mother. According to the reports, in 50% to 60% of cases the surrogate mothers and their husbands were either illiterate or had education only to primary level which made it difficult for them to fully understand the terms of the surrogacy agreements. Typically, surrogate mothers said that they were not provided with a copy of the contract.

165. Some surrogate mothers were reportedly paid 1% to 2% of the total amount received by the clinics from the intended parents. However, if the surrogate mother did not give birth to a live child or if the intended parents refused to accept the child, the payment to the surrogate mother may be reduced or she may not receive any payment at all.[173]

166. The Commission is aware of allegations that in some cases surrogate mothers are not paid in full until they have signed documents agreeing to the transfer of parentage or the issuing of passports, leading to real concerns about the voluntariness of these actions.

167. Other significant issues for surrogate mothers relate to the level of physical and psychological care that they are given before, during and after their pregnancy.[174] Specific concerns include a high number of embryos being transferred to surrogate mothers,[175] and routine use of caesarean sections to suit the timing of intended parents.[176]

168. In one case in the Family Court of Australia, a copy of an Indian surrogacy agreement was tendered in evidence. Justice Ryan observed that:

> it should not pass without comment that the provisions which limit the birth mother's ability to manage her health during the pregnancy and make decisions about delivery of her babies, are troubling. It is also troubling that this 29 page document is written in English. It is signed by the applicant and, because she is illiterate in English and Hindi, the mother's attestation is her thumb print. There is nothing in the document which suggests that before the birth mother signed it that it was read and translated to her.[177]

169. In some cases, there have been errors made by clinics in using the wrong gametes or embryos with the result that the children born are not genetically related to the intended parents.[178] There are also significant differences between states in relation to donor and surrogate anonymity, which may impact on a child's ability to know about his or her origins.[179]

170. There are some particular cases that raise very serious human rights issues for children. These include examples of intended parents deciding not to take children who are born with disabilities and examples of potential child trafficking.[180] These cases raise issues under articles 35 and 36 of the CRC which require States to take all appropriate national, bilateral and multilateral measures to prevent child abduction and trafficking in children, and to protect children against all other forms of exploitation prejudicial to any aspects of the child's welfare. These issues are also central to CRC OPSC.

171. The range of significant issues identified above demonstrates that there are good grounds for prohibiting surrogacy arrangements with particular countries based on their current regulatory regimes. The particular circumstances of each country should be carefully assessed to determine whether surrogacy is safely regulated and meets the guiding principles identified in recommendation 1 of this submission.

(c) Prohibition by source countries for international surrogacy

172. Some countries that Australians have historically travelled to for commercial surrogacy arrangements have already taken steps to prohibit commercial surrogacy arrangements with foreigners, including Thailand, India and Nepal.[181]

173. In November 2014, Cambodian authorities advised the Australian Government that commercial surrogacy was illegal in Cambodia with penalties including imprisonment and fines.

174. On 30 July 2015, legislation came into effect in Thailand which banned commercial surrogacy. Under the new laws, foreigners may not enter into a surrogacy arrangement with a Thai surrogate mother unless they have been married to a Thai national for at least three years.[182] The surrogate mother must also either be a relative of the couple or meet regulations set by the Thai public health ministry.[183]

175. On 25 August 2015, a decision of the Supreme Court of Nepal initially halted surrogacy services in Nepal. On 18 September 2015, the Nepali government banned surrogacy in Nepal.[184]

176. On 27 October 2015, the Indian Institute of Medical Research issued a letter to a number of Indian doctors specialising in fertility advising that surrogacy in India will be limited to married Indian couples and will not be available to foreigners.[185] On 4 November 2015, the Government of India issued advice confirming that surrogacy was no longer available for foreigners.[186]

(d) Issues arising in relation to prohibition

177. As noted above, three Australian jurisdictions currently prohibit their residents from engaging in international commercial surrogacy arrangements. There are some issues that would need to be considered if this approach were to be adopted by all Australian jurisdictions, including at the Commonwealth level.

This is particularly the case where the surrogacy arrangements are lawful in the jurisdiction in which they take place.

178. One issue is how any prohibition would interact with the current laws in relation to citizenship by descent. That is, if Australians breached the prohibition and engaged in a surrogacy arrangement, would their children be entitled to Australian citizenship?

179. If citizenship by descent was no longer available in such circumstances, there is the potential for children to be left parentless and even stateless. For example, if the state in which the arrangement takes place considers that the surrogacy arrangement was lawful, then it is likely it will consider that the child is the child of the intended parents and is Australian. However, if Australian citizenship is in fact not available to the child and Australia does not recognise the transfer of parentage, then there is the potential for the child to be parentless. In extreme cases a child may also be left stateless. Australia has obligations under the *Convention on the Reduction of Statelessness*.[187] Resolving these dilemmas is a key area of work that is currently being undertaken by the Hague Conference on Private International Law.[188]

(e) Assessment of regimes in relevant countries

180. The Commission considers that it is appropriate for the Commonwealth to take a more active role in assessing the suitability of regulatory regimes, including how regulatory requirements are enforced in practice, in the countries where Australians engage in surrogacy arrangements. A detailed review of these regimes would allow a decision to be made about the appropriate regulatory response by Australia.

181. A review of this nature may involve engaging experts in assisted reproductive treatment in Australia to provide advice about the adequacy of medical treatment in those countries. A complete review would also require examination of the treatment of children and surrogate mothers, how surrogate mothers are identified, the nature of the surrogacy agreements, the content of local laws including those dealing with anonymity of surrogates or donors and how each of these requirements are actually enforced in practice.

Recommendation 6

The Commission recommends that the Commonwealth undertake a systematic review of the structure and enforcement of regulatory regimes in countries where Australians engage in surrogacy arrangements, for the purposes of determining whether these regimes meet the requirements made in recommendation 1 and informing a decision about the appropriate regulatory response by Australia.

8.2 Domestic regulation of international surrogacy by the Commonwealth

182. Another regulatory option available to Australia is domestic regulation of international surrogacy arrangements. It may be that it is considered appropriate to adopt some combination of prohibition and regulation.

183. A regulatory approach would be justified in relation to countries were Australia was satisfied that international surrogacy arrangements met at least the first three criteria of recommendation 1 in this submission: that the best interests of the child are protected (including the child's safety and well-being and the child's right to know about his or her origins); that the surrogate mother is able to make a free and informed decision about whether to act as a surrogate; and that sufficient regulatory protections are in place to protect the surrogate mother from exploitation.

184. In those circumstances, there are a number of issues that would need to be addressed at a federal level in order to satisfy the fourth criteria of recommendation 1 in this submission: that there is clarity about the parent-child relationships that result from the arrangement. Currently, there is no regular process or requirement for the transfer of parentage in Australia following an international surrogacy arrangement.

185. These issues were considered in detail by the Family Law Council in its *Report on Parentage and the Family Law Act* which made a number of specific recommendations.[189] This submission does not seek to duplicate the detail of that analysis, but makes the following points.

186. Section 60HB of the Family Law Act recognises transfers of parentage that occur pursuant to altruistic surrogacy arrangements that are approved by relevant State and Territory courts. However, this section does not apply to international surrogacy arrangements. If a decision is taken to permit certain international surrogacy arrangements, then it will be necessary for there to be a mechanism to transfer parentage to the intended parents for the purposes of Australian law and a requirement for intended parents to make such application.

187. At present, there is uncertainty about whether the Family Court of Australia can or should make a declaration of parentage in such circumstances. The Commission understands that there is currently a case before the Full Court of the Family Court which will consider the question of whether the current regulatory structure permits a declaration of parentage to be made in cases of international surrogacy arrangements.[190]

188. However, as noted by the Family Law Council, the current regulatory structure is unclear and confusing, and parts of it are being used for purposes for which it was not designed.

189. Steps that could be taken to clarify parentage issues include:

    a. a clearer definition of 'parent' in the Family Law Act;

b. the introduction of a federal Status of Children Act that:

    i. includes the power to make orders about the status of children and legal parentage for the purpose of all Commonwealth laws (recommendation 6 of the Family Law Council); and

    ii. specifically deals with applications for transfer of parentage in surrogacy cases where State and Territory Acts do not apply (recommendations 12 and 13 of the Family Law Council);

c. redrafting s 60H of the Family Law Act to make it clear that it does not apply to surrogacy arrangements (recommendation 14 of the Family Law Council).

190. The Commission notes that in order to introduce a federal Status of Children Act it may be necessary for the Commonwealth to obtain an appropriate reference of power from Western Australia. Further, if changes are made to the definition of 'parent' in the Family Law Act at the Commonwealth level, then equivalent changes should also be made to the Family Court Act in Western Australia.

Recommendation 7

The Commission recommends that if the Commonwealth decides to permit some form of international surrogacy arrangements, then the following amendments be made to Commonwealth law to clarify parent-child relationships that result from those arrangements:

a. a clearer definition of 'parent' be inserted into the *Family Law Act 1975* (Cth);

b. a federal Status of Children Act be introduced that:

    i. includes the power to make orders about the status of children and legal parentage for the purpose of all Commonwealth laws (recommendation 6 of the Family Law Council); and

    ii. specifically deals with applications for transfer of parentage in surrogacy cases where State and Territory Acts do not apply (recommendations 12 and 13 of the Family Law Council);

c. s 60H of the *Family Law Act 1975* (Cth) be redrafted to make it clear that it does not apply to surrogacy arrangements (recommendation 14 of the Family Law Council).

8.3 Multilateral agreements

191. One way in which it may be possible to regulate surrogacy arrangements more effectively at the international level would be through a multilateral agreement.[191] At present, such an agreement exists in relation to international adoption arrangements: the Hague Convention on Intercountry Adoption.[192]

192. The Permanent Bureau of the Hague Conference on Private International Law is currently working on a project designed to determine the scope and feasibility of a multilateral agreement relating to parentage in general and international surrogacy arrangements in particular. There are two objectives of the project:

    a. to ensure that children have a certain and secure legal status; and

    b. to ensure that international surrogacy arrangements are conducted in a way that respects the human rights and welfare of all those involved in the arrangement, including the children born as a result.[193]

193. The project is directed not just at international surrogacy arrangements but rather at questions of parentage more generally when children are connected with more than one State or when they move across an international border. Differences between legal regimes in different States can cause real practical problems for children in having their relationship with their parents recognised and in acquiring citizenship.[194] There are good reasons for States to become party to a multilateral agreement of this nature, regardless of their individual views on surrogacy. This is because such a multilateral agreement will provide greater certainty for children about their legal status, reduce the potential for 'limping' parentage (where different legal parentage is established according to the laws of different States), and reduce the potential for children to become stateless.

194. To the extent that surrogacy arrangements took place pursuant to a new convention, the Permanent Bureau envisaged that there would be minimum standards which would assist in ensuring that relevant human rights were met. The Permanent Bureau identified the following proposed minimum standards:

    1) The free and informed consent of surrogate mothers to any ISA [international surrogacy arrangement];

    2) That all parties are appropriately informed and educated about any ISA, both legally, in all relevant States, as well as medically and psychologically;

    3) The medical and psychological suitability of a woman to become a surrogate mother;

    4) The welfare of any child born to an ISA: e.g., this may include some basic checks in relation to the intending parents, including child abuse and criminal background checks and possibly upper age restrictions, as well as provisions concerning the child's right to know his / her origins. …

    5) The appropriate competency and conduct of intermediaries … .[195]

195. A range of other potential standards were also discussed. One proposed model would see the Convention set minimum standards, but leave detailed regulation and the adoption of higher standards if necessary to bilateral agreements between States.[196] To this extent, the Convention would reflect the Hague Convention on Intercountry Adoption which does not require States

who are party to it to engage in inter-country adoption, but provides for minimum standards if they do.[197]

196. As noted in the Attorney-General's announcement of this Committee's terms of reference, the Government has nominated Chief Judge John Pascoe AO CVO of the Federal Circuit Court to the Hague Conference on Private International Law's Experts' Group on parentage and surrogacy.[198]

197. The next meeting of the Experts' Group is from 15-18 February 2016.[199]

Recommendation 8

The Commission recommends that the Commonwealth continue to engage with the Hague Conference on Private International Law in relation to the potential for an international convention dealing with the regulation of parentage and surrogacy.

8.4 Bilateral agreements

198. Multilateral agreements can take a long time to complete. Agreements such as the Hague Convention on Intercountry Adoption are multilateral but, as noted above, also rely on bilateral arrangements between States.

199. It would be possible for Australia to negotiate bilateral agreements with particular countries it considered were appropriate destinations for Australians to travel to engage in surrogacy arrangements, at the same time as pursuing a multilateral agreement.

Recommendation 9

The Commission recommends that the Commonwealth engage with countries where Australians engage in surrogacy arrangements, for the purpose of determining whether bilateral agreement can be reached on the regulation of parentage and surrogacy.

Annexure A: COAG draft principles on surrogacy

Draft principles agreed to by the Standing Committee of Attorneys-General to form the basis of surrogacy laws in Australia.[200]

1. A court may grant a parentage order where the court is satisfied a surrogacy arrangement was entered into by the surrogate mother, her partner (if any) and the intended parents prior to conception.
2. A court may grant a parentage order where the court is satisfied all parties have undergone counselling with an accredited counsellor in relation to the surrogacy arrangement.
3. A court may grant a parentage order where the court is satisfied all parties have received independent legal advice about the surrogacy arrangement prior to entering the arrangement.
4. A court may grant a parentage order where an application was made to the court at least 21 days, but not more than six months after the birth.
5. The intended parents must reside in the jurisdiction in which the application is made.
6. All parties to the surrogacy arrangement must give informed consent to the granting of a parentage order.
7. The child must be living with the intended parents at the time the application is heard.
8. A court may grant a parentage order where the court is satisfied granting the order is in the best interests of the child.
9. A court may grant a parentage order where certain requirements set out in the model provisions are not met if the court is, despite this, satisfied granting the order is in the best interests of the child. The ability of the court to waive requirements is subject to mandatory requirements set out in legislation.
10. A court may take into account any other matter it considers relevant when determining whether to grant a parentage order.
11. A court may grant a parentage order to parents who are now lawfully raising children under the age of 18 years conceived through surrogacy if:
    (a) the court is satisfied that a surrogacy arrangement was entered into prior to conception;
    (b) the court is satisfied the surrogacy arrangement was not a commercial arrangement;
    (c) all parties consent to the granting of the order; and
    (d) it is in the bests interests of the child.

    In determining such an application the court will be required to take into account the views of the child, where appropriate.
12. After a parentage order is granted a new birth certificate can be applied for and will resemble an ordinary birth certificate recording only the names of the legal parents.

13. The original birth record would still exist and the child would be able to obtain both records in defined circumstances.
14. The jurisdiction where the original birth certificate was issued will provide for the mutual recognition of a parentage order granted in another jurisdiction by provision of a new birth certificate. Alternately, the jurisdiction where the original birth certificate was issued should cancel the birth certificate and the jurisdiction where the parentage order was granted should issue a new birth certificate.
15. The surrogate mother will be able to enforce an arrangement for the reimbursement of reasonable expenses.

Endnotes

[1] S Golombok et al, 'Parenting infants conceived by gamete donation' (2004) 18 *Journal of Family Psychology* 443; S Golombok et al, 'Families created through a surrogacy arrangement: Parent-child relationships in the first year of life' (2004) 40 *Developmental Psychology* 400; S Golombok et al, 'Families created by gamete donation: Follow-up at age 2' (2005) 20 *Human Reproduction* 286; S Golombok et al, 'Surrogacy families: Parental functioning, parent-child relationships and children's psychological development at age 2' (2006) 47 *Journal of Child Psychology and Psychiatry* 213; S Golombok et al, 'Non-genetic and non-gestational parenthood: Consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3' (2006) 21 *Human Reproduction* 1918; S Golombok et al, 'Children conceived by gamete donation: Psychological adjustment and mother-child relationships at age 7' (2011) 25 *Journal of Family Psychology* 230; S Golombok et al, 'Families created through surrogacy: Mother-child relationships and children's psychological adjustment at age 7' (2011) 47 *Developmental Psychology* 1579: S Golombok, L Blake, P Casey, G Roman and V Jadva, 'Children born through reproductive donation: a longitudinal study of psychological adjustment' (2013) 54(6) *Journal of Child Psychology and Psychiatry* 653. V Jadva, L Blake, P Casey and S Golombok, 'Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins' (2012) 27(10) *Human Reproduction* 3008.

[2] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Roundtable on surrogacy*, 5 March 2015, pp 3-5; S Allan, 'The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations' in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015), p 113.

[3] Family Law Council, *Report on Parentage and the Family Law Act* (2013), p 63.

[4] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Roundtable on surrogacy*, 26 February 2015 (Ms Frances Finney, Assistant Secretary, Permanent Visas and Citizenship Programme, Department of Immigration and Border Protection), p 12.

[5] J Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35 *Melbourne University Law Review* 165 at 173.

[6] *International Covenant on Civil and Political Rights*, article 23(2).

[7] For a consideration of the right to found a family in s 23(2) of the ICCPR and its application to all couples, regardless of sex, sexual orientation or gender identity (or intersex status) when read with articles 2 and 26 of the ICCPR, see the Commission's position paper on *Marriage equality* (2012) at https://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0#s4 (viewed 30 January 2016).

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

[9] *International Covenant on Civil and Political Rights* (ICCPR), opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).

[10] Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, UN Doc HRI/GEN/1/Rev.1 at 30 (1994). At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6621&Lang=en (viewed 29 January 2016).

[11] S Allan, 'The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations' in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015), pp 122-124; European Centre for Law and Justice, 'Surrogate Motherhood: A Violation of Human Rights', Report presented at the Council of Europe, Strasbourg, 26 April 2012, pp 13-15.

[12] Office of the High Commissioner for Human Rights, *Human Rights and Human Trafficking*, Fact Sheet No. 36 (2014), p 1.

[13] *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, opened for signature 15 November 2000, [2005] ATS 27 (entered into force generally 25 December 2003; entered into force for Australia 14 October 2005).

[14] *Convention Against Transnational Organized Crime*, opened for signature 15 November 2000, [2004] ATS 12 (entered into force generally 29 September 2003; entered into force for Australia 26 June 2004).

[15] These rights have been considered in detail in J Tobin 'To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63(2) *International and Comparative Law Quarterly* 317 and P Gerber and K O'Byrne, 'Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy' in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015), pp 81-112.

[16] Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc CRC/C/GC/14, 29 May 2013, para 1.

[17] *Convention on the Rights of the Child* (CRC) article 3(1), opened for signature 20 November 1989, [1991] ATS 4 (entered into force generally 2 September 1990; entered into force for Australia 16 January 1991, ratified with a reservation to article 37(c)).

[18] J Tobin 'To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63(2) *International and Comparative Law Quarterly* 317 at 331.

[19] Committee on the Rights of the Child, *General Comment No. 7: Implementing child rights in early childhood*, UN Doc CRC/C/GC/7/Rev.1, 20 September 2006 at [10].

[20] S Golombok et al, 'Parenting infants conceived by gamete donation' (2004) 18 *Journal of Family Psychology* 443; S Golombok et al, 'Families created through a surrogacy arrangement: Parent-child relationships in the first year of life' (2004) 40 *Developmental Psychology* 400; S Golombok et al, 'Families created by gamete donation: Follow-up at age 2' (2005) 20 *Human Reproduction* 286; S Golombok et al, 'Surrogacy families: Parental functioning, parent-child relationships and children's psychological development at age 2' (2006) 47 *Journal of Child Psychology and Psychiatry* 213; S Golombok et al, 'Non-genetic and non-gestational parenthood: Consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3' (2006) 21 *Human Reproduction* 1918; S Golombok et al, 'Children conceived by gamete donation: Psychological adjustment and mother-child relationships at age 7' (2011) 25 *Journal of Family Psychology* 230; S Golombok et al, 'Families created through surrogacy: Mother-child relationships and children's psychological adjustment at age 7' (2011) 47 *Developmental Psychology* 1579.

[21] V Jadva, 'Children born through surrogacy: Are they being told and what are their feelings?' (2013) ISS/IRC Monthly Review Special Issue on International Surrogacy, referred to in Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* (2014) at [187].

[22] S Golombok, L Blake, P Casey, G Roman and V Jadva, 'Children born through reproductive donation: a longitudinal study of psychological adjustment' (2013) 54(6) *Journal of Child Psychology and Psychiatry* 653.

[23] Committee on the Rights of the Child, *General Comment No. 7, Implementing child rights in early childhood*, UN Doc CRC/C/GC/7/Rev.1, 20 September 2006, paras 6, 15 and 16.

[24] V Jadva, L Blake, P Casey and S Golombok, 'Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins' (2012) 27(10) *Human Reproduction* 3008.

[25] Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc CRC/C/GC/14, 29 May 2013, para 59.

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

[27] Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc CRC/C/GC/14, 29 May 2013, para 56.

[28] P Gerber and K O'Byrne, 'Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy' in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015), p 94.

[29] J Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction*, Victorian Law Reform Commission (2004), pp 35-46.

[30] P Gerber and K O'Byrne, 'Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy' in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015), p 85.

[31] A Harland and C Limon 'Recognition of Parentage in Surrogacy Arrangements in Australia' in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015), p 149.

[32] The Commission's submissions are available on its website at https://www.humanrights.gov.au/sites/default/files/content/legal/submissions_court/intervention/20111125-Ellison_and_Karnchanit%20.doc (viewed 30 January 2016).

[33] *Assisted Reproductive Treatment Act 2008* (Vic), s 42.

[34] Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project* (2014), at [63].
[35] Family Law Council, *Report on Parentage and the Family Law Act* (2013), pp 65-67 and 163-177 (Appendices E and F).
[36] T Johnson, 'Through the Looking-Glass: A Proposal for National Reform of Australia's Surrogacy Legislation' in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015), pp 32-42 and 60-62.
[37] *Surrogacy Act 2008* (WA), s 19. It appears that a woman in a same sex relationship could be an intended parent, but her partner would not be.
[38] *Family Relationships Act 1975* (SA), s 10HA(2)(b)(iii).
[39] J Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35 *Melbourne University Law Review* 165.
[40] *Surrogacy Act 2010* (NSW), s 10; *Surrogacy Act 2010* (Qld), s 55; *Assisted Reproductive Treatment Act 2008* (Vic), s 45; *Parentage Act 2004* (ACT), s 43.
[41] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Roundtable on surrogacy*, 5 March 2015, pp 7-8 (Prof J Millbank, Mr S Everingham).
[42] Standing Committee of Attorneys-General, Australian Health Ministers' Conference, Community and Disability Service Ministers' Conference, Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009). At http://content.webarchive.nla.gov.au/gov/wayback/20141215114954/http://www.lccsc.gov.au/agdbasev7wr/sclj/documents/doc/surrogacy%20paper.doc (viewed 28 January 2016).
[43] Law Crime and Community Safety Council, *Surrogacy*. At http://content.webarchive.nla.gov.au/gov/wayback/20141215114722/http://www.lccsc.gov.au/sclj/archive/former_sclj/projects/family_welfare/surrogacy.html (viewed 28 January 2016).
[44] A Wood, 'States to halt paid overseas mothers' *Daily Telegraph*, 25 May 2015, p 15.
[45] For example, T Johnson, 'Through the Looking-Glass: A Proposal for National Reform of Australia's Surrogacy Legislation' in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015), pp 45-59.
[46] T Johnson, 'Through the Looking-Glass: A Proposal for National Reform of Australia's Surrogacy Legislation' in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015), p 40.
[47] *Surrogacy Act 2010* (NSW), s 10; *Surrogacy Act 2010* (Qld), s 55; *Assisted Reproductive Treatment Act 2008* (Vic), s 45; *Parentage Act 2004* (ACT), s 43.
[48] *Surrogacy Act 2008* (WA), s 10.
[49] Reproductive Technology Council, *Surrogacy in Western Australia*. At http://www.rtc.org.au/consumer/surrogacy_wa.html (viewed 28 January 2016).
[50] *Surrogacy Act 2012* (Tas),s 41(2)(c).
[51] *Family Relationships (Surrogacy) Amendment Act 2015* (SA).
[52] *Family Relationships Act 1975* (SA), s 10FB.
[53] *Family Relationships Act 1975* (SA), s 10FA.
[54] *Family Relationships Act 1975* (SA), s 10FA(3).
[55] South Australia, *Parliamentary Debates*, House of Assembly, 4 June 2015, p 1523 (Mr Gardner MP, quoting the Hon John Dawkins MLC, a member of the Opposition who had introduced the Bill as a private members bill).
[56] South Australia, *Parliamentary Debates*, House of Assembly, 4 June 2015, p 1523 (Mr Gardner MP).
[57] Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights* (2015), pp 29-31. At https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/resilient-individuals-sexual (viewed 28 January 2016).
[58] D Dempsey, Same-sex parented families in Australia, Australian Government, Australian Institute of Family Studies, Victoria (2013). At https://aifs.gov.au/cfca/sites/default/files/cfca/pubs/papers/a145197/cfca18.pdf (viewed 28 January 2016).
[59] Explanatory Memorandum for the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth), p 5.
[60] *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth), which introduced ss 5A, 5B and 5C into the *Sex Discrimination Act 1984* (Cth).
[61] Sex Discrimination Regulations 1984 (Cth), reg 5, introduced by the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Regulation 2013 (Cth).
[62] By the Sex Discrimination Amendment (Exemptions) Regulation 2014 (Cth) and the Sex Discrimination Amendment (Exemptions) Regulation 2015 (Cth).

[63] South Australian Law Reform Institute, LGBTIQ Reference, *Fact Sheet 5 – Starting a Family and Parenting Rights*, p 1. At https://law.adelaide.edu.au/research/law-reform-institute/documents/factsheet-5-family-&-parenting-rights-100615.pdf (viewed 28 January 2016).

[64] Government of South Australia, Department for Communities and Social Inclusion, *South Australian Strategy for the Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer People 2014-2016* (2014). At https://www.sa.gov.au/__data/assets/pdf_file/0007/59470/DCSI-608-PCD-LGBTIQ-Strategy-2014-Booklet_WEB.pdf (viewed 28 January 2016).

[65] South Australian Law Reform Institute, LGBTIQ Reference, *Fact Sheet 5 – Starting a Family and Parenting Rights*, p 3. At https://law.adelaide.edu.au/research/law-reform-institute/documents/factsheet-5-family-&-parenting-rights-100615.pdf (viewed 28 January 2016).

[66] South Australian Law Reform Institute, *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation*, Audit Paper (2015) p 90. At https://law.adelaide.edu.au/research/law-reform-institute/documents/audit_report_lgbtiq_sept_2015.pdf (viewed 28 January 2016).

[67] *Adoption Act 2000* (NSW), s 8(1)(a).

[68] *Adoption Act 2000* (NSW), s 8(2)(i).

[69] *Adoption Act 2000* (NSW), s 45(2).

[70] *Adoption Act 2000* (NSW), s 45(1); Adoption Regulation 2015 (NSW), Part 3.

[71] Adoption Regulation 2015 (NSW), reg 44(1)(d) and (e).

[72] *Adoption Act 2000* (NSW), s 7(e). Prospective adoptive parents in relation to an international adoption require an application to be made to the Court on their behalf under s 107, following the same assessment of suitability under Parts 3 and 4 of the Act as apply to those seeking domestic adoption.

[73] *Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, done at The Hague on 29 May 1993, [1998] ATS 21, article 5(a).

[74] *Assisted Reproductive Treatment Act 2008* (Vic), s 42.

[75] For a discussion of the background to the introduction of screening in relation to ART generally in Victoria, see Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (2007), pp 63-66. For specific consideration of screening in the context of surrogacy, see the same report, pp 172, 174,

[76] Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project* (2014), at [63].

[77] *Surrogacy Act 2008* (WA), s 17(c)(ii).

[78] *Assisted Reproductive Treatment Act 2008* (Vic), ss 39 and 40 (dealing with approval by the Patient Review Panel); *Surrogacy Act 2008* (WA), s 17 (dealing with approval by the Western Australian Reproductive Technology Council).

[79] Standing Committee of Attorneys-General, Australian Health Ministers' Conference, Community and Disability Service Ministers' Conference, Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009), pp 18-19. At http://content.webarchive.nla.gov.au/gov/wayback/20141215114954/http://www.lccsc.gov.au/agdbasev7wr/sclj/documents/doc/surrogacy%20paper.doc (viewed 28 January 2016).

[80] The same point was made by the Hague Conference on Private International Law in considering whether international surrogacy could be dealt with under the Hague Convention on Intercountry Adoption, see K Trimmings and P Beaumont 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7(3) *Journal of Private International Law* 627 at 633 and 636-638.

[81] Cf A Botterell and C McLeod, 'Licensing Parents in International Contract Pregnancies' *Journal of Applied Philosophy*, Symposium on Global Surrogacy, forthcoming, manuscript pp 24-29.

[82] Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc CRC/C/GC/14, 29 May 2013, para 73.

[83] CRC, article 19(1).

[84] CRC, article 19(2).

[85] Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc CRC/C/GC/14, 29 May 2013, para 74.

[86] For example, see Commission for Children and Young People and Child Guardian, *Submission to the Altruistic Surrogacy Committee, Legislative Assembly of Queensland* (2008), p 9. See also Government of Western Australia, Department of Health, *Review of the Surrogacy Act 2008* (2014), p 12.

[87] United Nations Human Rights Committee, *Canepa v Canada*, Communication No. 558/1993, UN Doc CCPR/C/59/D/558/1993, para
[88] J Tobin, 'To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63(2) *International and Comparative Law Quarterly* 317; S Allan, 'The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations' in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015).
[89] A Stuhmcke, 'The criminal act of commercial surrogacy in Australia: A call for review' (2011) 18 *Journal of Law and Medicine* 601.
[90] J Millbank, 'Paying for birth: the case for (cautious) commercial surrogacy' *The Guardian*, 2 September 2013; T Johnson, 'Through the Looking-Glass: A Proposal for National Reform of Australia's Surrogacy Legislation' in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015), pp 45-51.
[91] J Millbank, 'Paying for birth: the case for (cautious) commercial surrogacy' *The Guardian*, 2 September 2013.
[92] J Millbank, 'Paying for birth: the case for (cautious) commercial surrogacy' *The Guardian*, 2 September 2013. Johnson has gone as far as suggesting a particular capped rate: T Johnson, 'Through the Looking-Glass: A Proposal for National Reform of Australia's Surrogacy Legislation' in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015), p 49, fn 131.
[93] With the possible exception of the Northern Territory that does not have specific legislation dealing with surrogacy.
[94] Family Law Council, *Report on Parentage and the Family Law Act* (2013), pp 76-84 and 98-104.
[95] *Surrogacy Act 2010* (NSW), s 8.
[96] *Surrogacy Act 2010* (NSW), s 11.
[97] *Crimes Act 1900* (NSW), s 10C.
[98] *Surrogacy Act 2010* (NSW), s 10.
[99] *Surrogacy Act 2010* (Qld), s 56.
[100] *Surrogacy Act 2010* (Qld), s 54.
[101] *Surrogacy Act 2010* (Qld), ss 55, 57 and 58.
[102] *Parentage Act 2004* (ACT), s 41.
[103] *Parentage Act 2004* (ACT), s 45.
[104] A Stuhmcke, 'Extra-Territoriality and Surrogacy: The Problem of State and Territory Moral Sovereignty' in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015), p 70.
[105] *Dudley & Chedi* [2011] FamCA 502 and *Findlay & Punyawong* [2011] FamCA 503.
[106] This observation is based on a search of published judgments of the Family Court of Australia (and the Federal Circuit Court of Australia) involving surrogacy arrangements. At the time of writing, the Commission is aware of three subsequent cases in New South Wales and one in the Australian Capital Territory.
[107] *Beman & Sassi* [2014] FamCA 186.
[108] *Beman & Sassi* [2014] FamCA 186 at [17].
[109] See, for example, *Collins & Tangtoi* [2010] FamCA 878; *O'Connor & Kasemsarn* [2010] FamCA 987; *Dennis & Pradchaphet* [2011] FamCA 123; *Dudley & Chedi* [2011] FamCA 502; *Findlay & Punyawong* [2011] FamCA 503; *Hubert & Juntasa* [2011] FamCA 504; *Johnson & Chompunut* [2011] FamCA 505;
[110] See, for example, *Findlay & Punyawong* [2011] FamCA 503; *Hubert & Juntasa* [2011] FamCA 504; *Johnson & Chompunut* [2011] FamCA 505; *Ellison & Karnchanit* [2012] FamCA 602.
[111] See, for example, *Gough & Kaur* [2012] FamCA 79; *Mason & Mason* [2013] FamCA 424; *Fisher-Oakley & Kittur* [2014] FamCA 123; *Green-Wilson & Bishop* [2014] FamCA 1031; *Cowley & Yuvaves* [2015] FamCA 111; *Bernieres & Dhopal* [2015] FamCA 736; *Saliba & Romyen* [2015] FamCA 927; *Wickham & Baker* [2015] FamCA 1077.
[112] J Millbank, 'Resolving the dilemma of legal parentage for Australians engaged in international surrogacy' (2013) 27 *Australian Journal of Family Law* 135 at 142-143.
[113] *Australian Citizenship Act 2007* (Cth), s 16.
[114] *Australian Citizenship Act 2007* (Cth), s 17.
[115] *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [47]-[48] and [127]-[131] (the Court).
[116] *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [48] (the Court).
[117] *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [129]-[130] (the Court).
[118] Family Law Council, *Report on Parentage and the Family Law Act* (2013), pp 106-111, discussing the policy approach of DIBP and its submissions to the Council about citizenship.
[119] Australian Government, Department of Immigration and Border Protection, *Fact sheet – International surrogacy arrangements*. At

https://www.border.gov.au/about/corporate/information/fact-sheets/36a-surrogacy (viewed 31 January 2016).

[120] Australian Government, Department of Immigration and Border Protection, *Fact sheet – International surrogacy arrangements*. At https://www.border.gov.au/about/corporate/information/fact-sheets/36a-surrogacy (viewed 31 January 2016).

[121] Australian Government, Department of Immigration and Border Protection, *Fact sheet – International surrogacy arrangements*. At https://www.border.gov.au/about/corporate/information/fact-sheets/36a-surrogacy (viewed 31 January 2016).

[122] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Roundtable on surrogacy*, 26 February 2015 (Ms Frances Finney, Assistant Secretary, Permanent Visas and Citizenship Programme, Department of Immigration and Border Protection), pp 3-4.

[123] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Roundtable on surrogacy*, 26 February 2015 (Ms Frances Finney, Assistant Secretary, Permanent Visas and Citizenship Programme, Department of Immigration and Border Protection), pp 3-4.

[124] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Roundtable on surrogacy*, 26 February 2015 (Ms Frances Finney, Assistant Secretary, Permanent Visas and Citizenship Programme, Department of Immigration and Border Protection), p 4.

[125] *Australian Passports Act 2005* (Cth), s 7.

[126] *Australian Passports Act 2005* (Cth), s 11.

[127] Family Law Council, *Report on Parentage and the Family Law Act* (2013), pp 111-112, discussing the policy approach of DFAT and its submissions to the Council about the issuing of passports.

[128] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Roundtable on surrogacy*, 26 February 2015 (Ms Anne Moores, Assistant Secretary, Passport Business Improvement and Integrity Branch, Department of Foreign Affairs and Trade), p 6.

[129] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Roundtable on surrogacy*, 26 February 2015 (Ms Anne Moores, Assistant Secretary, Passport Business Improvement and Integrity Branch, Department of Foreign Affairs and Trade), p 8.

[130] Australian Government, Department of Foreign Affairs and Trade, *Surrogacy*. At https://www.passports.gov.au/passportsexplained/childpassports/Pages/surrogacy.aspx (viewed 31 January 2016).

[131] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Roundtable on surrogacy*, 26 February 2015 (Ms Anne Moores, Assistant Secretary, Passport Business Improvement and Integrity Branch, Department of Foreign Affairs and Trade), p 9.

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[141] *Family Law Act 1975* (Cth), s 60HB.

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[143] See discussion in *Ellison & Karnchanit* [2012] FamCA 602 at [5] and sources cited in footnotes 1 and 2.

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[145] *Dudley & Chedi* [2011] FamCA 502; *Findlay & Punyawong* [2011] FamCA 503; *Hubert & Juntasa* [2011] FamCA 504; *Johnson & Chompunut* [2011] FamCA 505; *Mason & Mason* [2013] FamCA 424 and *Bernieres & Dhopal* [2015] FamCA 736.

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[171] This was the case for 27% of surrogate mothers from Mumbai and 48% of surrogate mothers from Delhi. The issue was also reported in Gujarat state but data was not presented in the report.
[172] This was the case for 85% of contracts with surrogate mothers in Delhi and Mumbai.
[173] 56% of surrogate mothers in Delhi and 36% of surrogate mothers in Mumbai said that if the commissioning parents refused to accept the child or if the pregnancy was aborted, the surrogate mother was often paid half of what she was supposed to receive. 24% of surrogate mothers in Delhi and 34% of surrogate mothers in Mumbai said that they would not receive any money if there were problems with the pregnancy.
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