25TH ANNUAL FAMILY LAW CONFERENCE
MILLER DU TOIT CLOETE INC/THE UNIVERSITY OF THE WESTERN CAPE

ART WITH A PARTICULAR FOCUS ON SURROGACY AND THE RIGHTS OF THE PARTIES AND THE CHILD

By Stephen Page[1]

"No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), and as now appears in the not-too-distant future, cloning and even gene splicing courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who other than the taxpayers is obligated to provide maintenance and support for the child. These cases will not go away."[2]

What human rights?

In the words of the International Women's Health Coalition and Human Rights Watch[3]:

"The issue of surrogacy arrangements, particularly compensated surrogacy arrangements, requires careful consideration of several sets of intersecting rights, and the interests of multi rights holders. This is particularly important given that human rights analysis surround surrogacy is relatively nascent and given the key principles of universality and interdependence of human rights. …

We are concerned by any over-broad view of the applicability of the prohibition on the sale of children to surrogacy that would unnecessarily, disproportionally or in a discriminatory fashion limit the options of surrogacy as a means of founding a family and exercising reproduction rights. The optional protocol prohibits 'any act or

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[2] California Court of Appeal in *In re Marriage of Buzzanca* (1998) 61 Cal.App. 4th 1412 at 1428-9

[3] May 2019 submission to the Special Rapporteur on the sale and sexual exploitation of children inputs on safeguards for the protection of the rights of children born from surrogacy arrangements, at https://www.hrw.org/news/2019/06/03/submission-special-rapporteur-sale-and-sexual-exploitation-children?fbclid=IwAR1ij8PIVZ_3qbU1GlScsQIryEKdbIrUta5kkE5QHGMyWAGqGIUERGpiloc viewed on 9 May 2022

transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.' People acting as surrogates may do so for no remuneration (money paid for work or a service) or no consideration (money in exchange for benefits, goods, or services), and in other cases may receive compensation that constitutes fair recompense for lost wages and other opportunity costs, healthcare and nutrition expenses, and restitution for the significant burdens and risks associated with pregnancy. We submit that such arrangements do not and should not in and of themselves constitute sale of children under the optional protocol."

The submission sets out non-exhaustive examples of applicable human rights and relevant, persuasive and informative human rights standards that should be considered concerning surrogacy. They are:

Human Right	**International Law**
Right to equality and non-discrimination	For example, *Universal Declaration on Human Rights*: article 2, *International Covenant on Civil & Political Rights*: article 26, I*nternational Covenant on Economic Social & Cultural Rights*: article 2, *Convention for the Elimination of Discrimination Against Women*: article 2, *Convention on the Rights of Persons with Disabilities*: articles 5 & 6
Right to health	For example, *Universal Declaration of Human Rights*: article 25, *International Covenant on Economic Scientific and Cultural Rights*: article 12, *Convention for the Elimination of Discrimination Against Women*: article 12
Right to privacy	For example, *Universal Declaration of Human Rights*: article 12, *International Covenant on Civil & Political Rights*: article 17
Bodily autonomy	For example, *International Covenant on Civil & Political Rights*: articles 7 and 17, *Convention for the Elimination of Discrimination Against Women*: article 12 and General Response 24

Reproductive autonomy	For example, *International Covenant on Economics Social and Cultural Rights*, General Comment 22, *Convention on the Elimination of Discrimination Against Women*: article 12 and General Response 24
Right to decide number and spacing of children	For example, *Convention on the Elimination of Discrimination Against Women*: article 16
Right to found a family	For example, *Universal Declaration of Human Rights*: article 16, *Convention of Rights of Persons with Disabilities*: article 23
Right to information	For example, *Universal Declaration of Human Rights*: article 19, *International Covenant on Civil & Political Rights*: article 19
Right to benefit from scientific progress	For example, *Universal Declaration of Human Rights*: article 27, *International Covenant on Economic Scientific and Cultural Rights*: article 15(b)
Right of persons with disabilities	For example, *Convention on the Rights of Persons with Disabilities*: articles 5, 6, 7, 12, 17 and 23

The then UN Special Rapporteur on the sale and sexual exploitation of children identified the following further human rights:

Human Right	**International Law**
Best interests of the child as a primary consideration	*International Convention on the Rights of the Child*: article 3, para 1 and general comment 14 (2013)
Identity rights, access to origins and family environment	*International Convention on the Rights of the Child*: articles 7, 8, 9, 10 and 20
Prohibition of sale of children	*International Convention on the Rights of the Child*: article 35 and *Optional Protocol on the Sale of Children*, and child trafficking: *International Convention on the Rights of the Child*: article 35, *Protocol to prevent, suppress and punish*

	trafficking in persons especially women and children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo protocol)

Rights of LGBTIQ+ people

The International Commission of Jurists and various human rights experts wrote the *Yogyakarta principles* by which:

> *"The experts agree that the Yogyakarta principles reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity. They also recognise that States may incur additional obligations as human rights law continues to evolve.*
>
> *The Yogyakarta principles are firm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright."*

Principle 24 is entitled *"The Right to Found a Family"* and provides[4]:

> *"Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.*
>
> *States shall:*
>
> *a) Take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity;*
>
> *b) Ensure that laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative,*

[4] http://yogyakartaprinciples.org/principle-24/ viewed on 9 May 2022

administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration;

c) *Take all necessary legislative, administrative and other measures to ensure that in all actions or decisions 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, and that the sexual orientation or gender identity of the child or of any family member or other person may not be considered incompatible with such best interests;*

d) *In all actions or decisions concerning children, ensure that a child who is capable of forming personal views can exercise the right to express those views freely, and that such views are given due weight in accordance with the age and maturity of the child;*

e) *Take all necessary legislative, administrative and other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners;*

f) *Take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners;*

g) *Ensure that marriages and other legally-recognised partnerships may be entered into only with the free and full consent of the intending spouses or partners."*

GOING OVERSEAS

A review of human rights principles in Australian law concerning surrogacy and ART must be seen in the context that most babies born to Australians via surrogacy are born overseas. To ignore this is to be wilfully blind.

Approximately one in five Australian children born via surrogacy are born in Australia, or put it another way, four in five are born overseas[5]. In part, this exporting of intended parents overseas is because of pull factors (such as digital disruption- the ability of surrogacy agencies to have their details before you on your phone when you search for surrogacy, but also because of the multicultural mix in Australia), but also push factors (primarily the lack of egg donors and surrogates in Australia, which in turn is largely driven by our legal settings).

The irony is that in an endeavour to have a perfect system that protects the rights of women (egg donors and surrogates) and children born through surrogacy, Australia exports most of its intended parents to countries where there is less than ideal protection of woman and children.

It is estimated by the Australian Bureau of Statistics that about 51% of the Australian population are either migrants of the children of migrants. When it comes to surrogacy, Australians have had children all over the world. Clients of mine, for example, aside from the "usual suspects" have attempted or undertaken surrogacy in:

- Bangladesh
- Brazil
- China
- Ghana
- Iran
- Kenya
- Malaysia

[5] A comparison undertaken by the author of the number of births of child from Australian and New Zealand IVF clinics by gestational surrogacy, via the annual reports of the Australian and New Zealand Assisted Reproductive Database, adjusted for Australian births only, and applications for Australian citizenship by descent by children born overseas through surrogacy, obtained by the author by freedom of information from the Department of Home Affairs, the most recent comparative year being the year ended 1 December 2019 (ANZARD) and the year ended 30 June 2019 (Department). This shows that 21% of births via surrogacy occurred in Australia, and 79% overseas.

- Nigeria
- Sri Lanka
- UK
- New Zealand[6]

By contrast, most overseas surrogacy journeys are to a small number of overseas countries. Back in 2011, the number of births overseas was 30. Then in 2012, it exploded to be above 200, where it has roughly stayed ever since. The two changes that happened in 2010 and 2011 that caused this change were:

- NSW, like the other States, was enacting what became the Surrogacy Act 2010. There had been extensive community consultations as to what should be in the Bill. When the Bill was presented to Parliament, a last minute amendment- without community consultation or even notice- banned NSW residents or domiciles undertaking commercial surrogacy overseas. This was a reversal of how overseas surrogacy was perceived in NSW. In doing so, NSW joined the ACT and Queensland (and Hong Kong) in doing so. There was a firestorm of protest, which led to a media frenzy.
- In response, parents through surrogacy organised, and started holding self-help seminars, which continue to this day.

The ban to stop people going overseas was counter-productive. There was a huge increase in publicity about surrogacy. In those early days, most children were born in India- until India changed the settings. Despite the criminality of engaging in commercial surrogacy overseas which is a specific offence in the ACT, Queensland and NSW (and in some cases in SA and WA), not one person has ever been prosecuted, making a mockery of the law. The law is in effect not enforceable, because no one is willing to enforce it. In the meantime, over 2000 children have been born to Australians overseas through surrogacy.

While there is a great spread of countries where Australians go to overseas for surrogacy, there are a small number of countries where most births occur. They are:

[6] This list by me is not comprehensive, but illustrates the point of where intended parents go.

Top 6 countries where Australians undertake surrogacy in 2021

Rank	Country
1.	United States
2.	Ukraine
3.	Canada
4.	Georgia
5.	Mexico
6.	Thailand

Source: Department of Home Affairs for the year ended 30 June 2021

These figures are worth commenting on.

The most recent figures about Australian surrogacy births come from 2019. These show, by comparison with the international figures, that more Australian children are born via surrogacy in the United States than at home. Cost is not the driver. I estimate the cost of undertaking surrogacy at home at a ballpark of A$70,000-85,000, (US$49,000-59,000) depending on the State, whereas Aussies going to the US will spend as low as A$150,000 to above $300,000, depending on the agency and location in the US of the agency and surrogate.

The figures are retrospective, in the sense that they record births, not when journeys commence. I expect therefore a considerable drop in demand for Ukraine in the 2022 and 2023 figures.

Canada is an altruistic regime like Australia. Unlike Australia, it has surrogacy agencies, and therefore a greater availability of surrogates than in Australia.

Despite Georgia having laws about surrogacy, the ethics of at least one clinic there would appear questionable, with one local couple having 21 babies via surrogacy *in one year*[7].

Mexico has only come into the top 5 in 2021. Current targeting by overseas agencies is to gay couples. Surrogacy occurs in Cancun. There has been targeting of Australian gay intended parents by agencies operating out of Colombia. One should expect to see Colombia in these figures in coming years.

Thailand has been in the top 5 for the last few years, consistently showing up in the figures since the Thai baby farm[8] and the Baby Gammy saga[9]. One would expect that Thailand would not appear at all. Thai laws passed following those two scandals restricted surrogacy in Thailand to:

- Heterosexual married couples
- Where one of them is a Thai citizen
- The surrogate is non-commercial, aged between 20 and 40, and a blood relative of the intended parents is unable to be found.

Despite Australia being multicultural, one would hardly expect that 8 or 9 children a year [10]would be born to Australian intended parents in Thailand in recent years- but that has been the pattern.

The reality is that Thai surrogates might travel to Laos for implantation, after sperm samples are taken in Cambodia- and then give birth in Thailand or Malaysia or China. The borders are porous.

The Thai government has recently announced it is proposing laws to enable commercial surrogacy[11] so that the practice can be properly regulated, and to reduce trafficking- as the current ban does not work.

[7] https://www.insider.com/family-has-21-biological-children-born-in-19-months-2021-11 viewed 19 May 2022.
[8] https://www.bangkokpost.com/learning/advanced/428450/thailand-baby-farm viewed 19 May 2022.
[9] *Farnell & Chanbua* [2016] FCWA 17.
[10] As per Department of Home Affairs figures.
[11] https://www.bangkokpost.com/thailand/general/2265299/surrogacy-law-to-be-eased viewed 19 May 2022.

To establish citizenship, a child who is born overseas must establish that at the time of birth, the child had an Australian parent. The emphasis of the Department of Home Affairs, the Government Department which administers citizenship, is - whether or not the parents have broken the law concerning overseas commercial surrogacy – to consider merely whether the child is entitled to Australia citizenship[12].

This is consistent with Australia's obligations:

- *International Convention on the Rights of the Child* that the best interests of the child are a primary consideration[13].

- That the child has a right to an identity, including nationality, name and family relations: *International Convention on the Rights of the Child*, article 8.

- States parties shall implement the child's rights where otherwise the child would be left stateless: *International Convention on the Rights of the Child*, article 7, paragraph 2.

Three Australian jurisdictions (Australian Capital Territory, New South Wales and Queensland) have specific offences extending extraterritorially concerning the commission of commercial surrogacy overseas. In two jurisdictions (South Australia and Western Australia) and soon to be in a third jurisdiction (Northern Territory[14]) to engage in commercial surrogacy overseas may be committing a criminal offence at home, due to the effect of criminal long-arm laws.

The Australian Human Rights Commission in *Ellison and Karnchanit* [2012] FamCA 602 set out various human rights issues implicated in surrogacy[15]:

[12] As set out the *Australian Citizenship Instructions*, which is an internal guideline to officers of the Department of Home Affairs.
[13] *International Convention on the Rights of the Child,* article 3, paragraph 1 and general comment No. 14 (2013); *Minister of State for Immigration and Ethnic Affairs v RAH Hin Teoh* [1995] HCA 20; (1995) 183 CLR 273 at [32]-[33] per Mason CJ and Deane J.
[14] Surrogacy Act 2022 was enacted 12 May 2022, due to come into effect between August 2022 and 21 March 2024.
[15] At [85].

"22. There are a number of articles of the CRC [Convention on the Rights of the Child] that are relevant to determine the best interests of the child in the present proceedings.

23. The starting proposition, Art 2(2) of the CRC relevantly provides that State Parties shall take all appropriate measures to ensure that children are protected against all forms of discrimination on the basis of the status of their parents, legal guardians or family members. The Commission submits that children born of a surrogacy arrangement should not be subjected to a disadvantage or detriment as a result of any difference in legal status conferred on their parents or guardians.

24. Secondly, there are a number of articles of the CRC that deal with particular rights that involve the relationship between children and their parents or guardians. For example:

24.1 States parties undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures (Article 3(2)).

24.2 States parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of their rights (Article 5).

24.3 States parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents, or the case may be, legal guardians, have the primary responsibility for the upbringing and

development of the child. The best interests of the child will be their basic concern (Article 18(1)).

25. These rights recognise the importance of parents and safeguarding the interests of children. However, the language used in the CRC is not limited to parents, and recognises that in some circumstances these responsibilities will also fall on other legal guardians."

The Commission then dealt in submissions concerning a case where a judge declined to make a finding or declaration of parentage[16] where the court articulated five reasons why it declined to do so:

1. The applicable State law made what the first applicant did illegal i.e. engage in overseas commercial surrogacy;

2. There was at that time no provision of State law that would allow the recognition of any relationship between the child and the first applicant;

3. Had the surrogacy arrangement been altruistic, there is now such a provision that would allow such recognition;

4. The first applicant may seek a remedy through adoption legislation; and

5. The [parenting] orders sought could be made without recognising the first applicant as the father of the children.

The Commission submitted though it was open to the court to adopt that course, in the opinion of the Commission it was not consistent with the children's interests or the *Convention*. The Commission submitted that the first three reasons given by the court raised public policy issues. Without a doubt, a matter such as this raises public policy issues, namely the potential for a declaration of parentage to potentially subvert (in part) at least the spirit of law in Queensland in relation to commercial surrogacy. In the words of Ryan J, *"the AHRC is demonstrably correct in its submission that 'the court is faced with having children in front of it and needs to make orders that are in the best interests of those children, and at that stage*

[16] *Dudley and Chedi* [2011] FamCA 502 at [32]

is probably too late to ask whether – or to enquire into the legality of the arrangements that had been made. The court really needs to take children as it finds them.'"[17]

Ryan J then noted that public policy considerations and other considerations that arose in Australia including as the best interests of the children were the same as in the UK where Hedley J in *Re X and Y (Foreign Surrogacy)* [2009] 1 FLR 733 said:

> *"I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the court should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigor of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigor must be mitigated by the application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order … If public policy is truly to be upheld, it would need to be enforced at a much earlier stage than the final hearing … The point of admission to this country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement. It is, of course, not for the court to suggest how (or even whether) action should be taken, I merely feel constrained to point out the problem."*

Ryan J noted a similar approach in the New South Wales Supreme Court concerning an application by intended parents to adopt a child born through an altruistic surrogacy arrangement[18]:

> *"Consideration of the welfare and interests of the child in this case outweighs, in an overwhelming way, any consideration that in order to serve public policy and*

[17] At [87]
[18] *Re D & E* [2000] NSWFC 646; (2000) 26 FamLR 310 at [21] per Bryson J

discourage surrogacy arrangements an adoption order should be withheld or the court's response to the application should be modified to accommodate the view that surrogacy arrangements should not be encouraged, or should be discouraged. The applicants, the birth mother and the child have no real interest in attainment of public policy objectives of that kind. I see no way in which the welfare and interests of the child, which are the paramount consideration, would be served by modifying what would otherwise be an appropriate disposal of this case to accommodate broad public policy considerations relating to where the surrogate parenthood arrangements should be made, or should be encouraged."

An odd development in family law in Australia a few years ago concerned the status of the child when there had been international surrogacy. The parents were recognised as the parents for the purposes of citizenship law[19], but oddly, were not recognised as the parents for the purposes of family law[20]. Whatever effect this had on the parents, it left the parentage of the child certain for the purposes of citizenship, but uncertain for the purposes of parental responsibility (including relevantly for the purposes of the *1980 Hague Convention*), and inheritance, among other things.

More recently, the test of who is a parent for the purposes of the *Australian Citizenship Act 2007* (Cth) and the *Family Law Act 1975* (Cth) have aligned, so that who is a parent of a child for the purposes of each Act is someone who is seen in the wider view of Australian society to be a parent, which is a question of fact and may not necessarily have a genetic link[21]. Given Australia's international obligations, including to avoid the sale and trafficking of children, the *Australian Citizenship Instructions* make plain that if a child is born overseas via surrogacy and

[19] *H v Minister for Immigration and Citizenship* [2010] FCAFC 119

[20] For example, *Bernieres and Dhopal* [2017] FamCAFC 180 where the intended, genetic father (recognised as the father for the purposes of the child's Australian citizenship) was not a parent under the *Family Law Act*, nor was the non-genetic intended mother. The Court did not address who was a parent of the child, but under the surrogacy agreement in India, both the Indian surrogate and her husband were not the parents. There was no suggestion that the anonymous egg donor was a parent. The California Court of Appeal in *Re Buzzanca* (1998) 61 Cal. App. 4th 1412 was critical of a lower court which found that a child born through surrogacy there had no parents (being the non-genetic intended father and mother, or the surrogate), but the Australian court seemed not to consider the same issues, or the child's right to an identity under art. 8 of the *International Convention*.

[21] *H v Minister for Immigration and Citizenship* [2010] FCAFC 119; *Masson v Parsons* [2019] HCA 21

there is no genetic link between parent and child, the application for citizenship must be viewed with the utmost scrutiny.

DOMESTIC SURROGACY

Australia is a federation. The Commonwealth Parliament has left it to each of the six States and two Territories to legislate concerning surrogacy. Consequently, each has done so, except for the Northern Territory which has now enacted legislation, due to commence sometime between August 2022 and 21 March 2024.

Principal Australian Surrogacy Laws

Jurisdiction	**Law**
Australian Capital Territory	*Parentage Act 2004*
New South Wales	*Surrogacy Act 2010*
Northern Territory	NA – but see footnote 14
Queensland	*Surrogacy Act 2010*
South Australia	*Surrogacy Act 2019*
Tasmania	*Surrogacy Act 2012*

Victoria	*Assisted Reproductive Treatment Act 2008* and *Status of Children Act 1974*
Western Australia	*Surrogacy Act 2008*

HOW DO AUSTRALIAN SURROGACY LAWS DEAL WITH HUMAN RIGHTS ISSUES?

In each jurisdiction (aside from the Northern Territory- see footnote 14) it is an offence to engage in commercial surrogacy[22]. This is because it is viewed that to pay a surrogate is exploitation of her. There is no ability in Australia, except currently in the Northern Territory for traditional surrogacy[23], for the surrogate to be paid a fee[24].

Similarly, the principles of the main surrogacy legislation in each jurisdiction is that the best interests of the child is a or the paramount concern.

I will identify four jurisdictions to discuss human rights issues. In broad terms, Australian jurisdictions have a similar approach to surrogacy. The first jurisdiction, Queensland, is illustrative of the point.

Queensland

Commercial surrogacy is banned in Queensland, as it is elsewhere (excepting currently the NT) based on State and ACT law. What is commercial surrogacy is defined differently in each jurisdiction. Thus payment of some expenses for the surrogate might deem the arrangement a criminal one in one jurisdiction, but lawful in another. Cross-border (within Australia)

[22] For example, sections 56, 57 Surrogacy Act 2010 (Qld).
[23] There is only one IVF clinic in the NT. That clinic cannot undertake commercial surrogacy as licensing requirements of all Australian IVF clinics prevent it form doing so. In the absence of laws by which intended parents can be recognised as parents of children born through surrogacy, the clinic has decided not to assist in surrogacy cases.

[24]For which I for one have been critical. See, for example: Page and Sifris, *Australian Surrogacy Law: Recommendations for Reform*,Paula Gerber and Melissa Castan (eds), Critical Perspectives on Human Rights Law in Australia, Vol 2 (Thomson Lawbook Co, 2021) 81-100: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4092172 .

surrogacy journeys can therefore be quite complex. Queensland has flexibility about expenses for the surrogate, provided that they are reasonable[25], which allows flexibility to provide for the unique characteristics of each surrogacy journey.

Queensland's *Surrogacy Act 2010* sets out in section 5 the main objects of the Act and section 6 *Guiding Principles*. Section 5 provides:

> *"The main objects of this Act are—*
>
> *(a) to regulate particular matters in relation to surrogacy arrangements, including by prohibiting commercial surrogacy arrangements and providing, in particular circumstances, for the court-sanctioned transfer of parentage of a child born as a result of a surrogacy arrangement; and*
>
> *(b) in the context of a surrogacy arrangement that may result in the court-sanctioned transfer of parentage of a child born as a result—*
>
> *(i) to establish procedures to ensure parties to the arrangement understand its nature and implications; and*
>
> *(ii) to safeguard the child's wellbeing and best interests."*

Section 6 provides:

> *"(1) This Act is to be administered according to the principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and for the rest of his or her life, are paramount.*
>
> *(2) Subject to subsection (1), this Act is to be administered according to the following principles—*
>
> *(a) a child born as a result of a surrogacy arrangement should be cared for in a way that—*
>
> *(i) ensures a safe, stable and nurturing family and home life; and*

[25] *Surrogacy Act 2010* (Qld), s.11.

(ii) promotes openness and honesty about the child's birth parentage; and

(iii) promotes the development of the child's emotional, mental, physical and social wellbeing;

(b) the same status, protection and support should be available to a child born as a result of a surrogacy arrangement regardless of—

(i) how the child was conceived under the arrangement; or

(ii) whether there is a genetic relationship between the child and any of the parties to the arrangement; or

(iii) the relationship status of the persons who become the child's parents as a result of a transfer of parentage;

(c) the long-term health and wellbeing of parties to a surrogacy arrangement and their families should be promoted;

(d) the autonomy of consenting adults in their private lives should be respected."

Section 6(2)(b) allows for traditional surrogacy to occur, does not require there to be a genetic link and does not require the parents to be married or in a heterosexual relationship. Section 16 protects the surrogate's bodily autonomy:

"(1) This section applies to a surrogacy arrangement despite anything that the parties to the arrangement may have agreed, whether or not in writing.

(2) A birth mother has the same rights to manage her pregnancy and birth as any other pregnant woman."

Australia, alone of the major common law countries, does not have a Bill of Rights or similar human rights legislation[26]. It has been the common law of Australia that a woman has bodily

[26] Although the ACT, Victoria and Queensland now have such laws.

autonomy and in particular, can make the decision as to whether or not to have an abortion[27]. Some of the same cases describe a common law right or freedom to reproduce- or not to reproduce.

I am delighted that this provision has been copied in Tasmania, South Australia and Victoria and soon to be the Northern Territory[28].

There is a barrier to treatment in Australia which requires that a woman cannot undertake surrogacy merely for the sake of her figure but must have a medical need for surrogacy. There are similar provisions in each State. As an example, the Queensland Act provides in section 14:

> *"(1) For an application for a parentage order—*
>
> *(a) if there is 1 intended parent under the surrogacy arrangement—there is a medical or social need for the surrogacy arrangement if the intended parent is a man or an eligible woman; or*
>
> *(b) if there are 2 intended parents under the surrogacy arrangement—there is a medical or social need for the surrogacy arrangement if the intended parents are—*
>
> *(i) a man and an eligible woman; or*
>
> *(ii) 2 men; or*
>
> *(iii) 2 eligible women.*
>
> *(2) An "eligible woman" is a woman who—*
>
> *(a) is unable to conceive; or*
>
> *(b) if able to conceive—*

[27] *K v T* [1983] 1 Qd R.396, *Attorney-General (ex rel Kerr) v T* [1983] 1 Qd R.404, *Attorney-General for the State of Queensland (ex rel Kerr) v T* (1983) 57 ALJR 285, *In the Marriage of F & F: Injunctions* [1989] FamCA 41; *Talbot and Norman* [2012] FamCA 96, *Lee and Hutton* [2013] FamCA 745.

[28] For which I advocated in South Australia, Victoria and the Northern Territory.

(i) is likely to be unable, on medical grounds, either to carry a pregnancy or to give birth; or

(ii) either—

(A) is unlikely to survive a pregnancy or birth; or

(B) is likely to have her health significantly affected by a pregnancy or birth; or

(iii) is likely to conceive—

(A) a child affected by a genetic condition or disorder, the cause of which is attributable to the woman; or

(B) a child who is unlikely to survive a pregnancy or birth; or

(C) a child whose health is likely to be significantly affected by a pregnancy or birth."

A requirement of making a parentage order is that all parties must consent to the making of the parentage order, thereby upholding the autonomy as parents of the surrogate and her partner[29].

A problem with that theory is that if the surrogate is acting capriciously or for some reason refuses, then a parentage order can never be made[30].

Tasmania, alone, has overcome this problem in that the court can nevertheless make an order without the consent of the surrogate or her spouse if it is in the best interests of the child[31]. The Tasmanian provision has been copied, with some modification, in the Northern Territory's Act.

As part of this preservation of parentage of the surrogate and her partner, a parentage order transferring parentage from the surrogate and her partner to the intended parents can only

[29] Section 22(2)(h).
[30] As an example of such a case, *Lamb and Shaw* [2017] FamCA 769, *Lamb and Shaw* [2018] FamCA 629.
[31] Section 16(3) *Surrogacy Act 2012* (TAS).

be made post-birth and can only be sought approximately between one month and six months post-birth[32].

Queensland has evolved from the early days in 1988 when, in reaction to the *Baby M* surrogacy case in New Jersey,[33] Queensland alone of all Australian jurisdictions, criminalised all forms of surrogacy – gestational or traditional, commercial or altruistic, whether within Queensland or anywhere else, if undertaken by Queenslanders[34].

Queensland now allows all forms of surrogacy – traditional or gestational, provided that they fall within the definition of altruistic. Nevertheless, the extraterritorial ban on surrogacy remains. Intended parents may be single or they may a couple – married or not. The surrogate may be single or a member of a couple, whether married or not. Sexuality is irrelevant.

South Australia

I am particularly proud of section 7(1)(a) of the *Surrogacy Act 2019* (SA), because it is something that I sought specifically and it has now ended up in legislation. Section 7 provides:

> *"(1) The following principles (the "surrogacy principles") apply in relation to the lawful practice of surrogacy in South Australia:*
>
> *(a) the human rights of all parties to a lawful surrogacy agreement, including any child born as a result of the agreement, must be respected;*
>
> *(b) the surrogate mother under a lawful surrogacy agreement should not be financially disadvantaged as a result of her involvement in the lawful surrogacy agreement.*

[32] Section 22(1), 22(2)(b)(i) *Surrogacy Act 2010* (Qld). This is a common requirement across Australia.
[33] Where the New Jersey court upheld a surrogacy agreement, granting custody of the child to the intended parents. The case caused a legislative shockwave in Australian States in response.
[34] *Surrogate Parenthood Act 1988* (Qld).

(2) The Minister, the Court, and each person or body engaged in the administration of this Act must exercise their powers and perform their functions so as to give effect to the surrogacy principles.

(3) However, the surrogacy principles do not displace, and cannot be used to justify the displacement of, section 6."

Section 6 provides:

"(1) The best interests of any child born as a result of a lawful surrogacy agreement is to be the paramount consideration in respect of the administration and operation of this Act.

(2) To avoid doubt, the requirement under this section applies to the Court."

South Australia is interesting as to how its laws in this area have evolved. Initially, ART was only available to married women. It then became available to unmarried women following a court case in which a divorced woman sought to rely on the federal *Sex Discrimination Act 1984* (Cth) to enable her to undertake IVF[35].

Along with the other States, South Australian then legislated for surrogacy. It was limited at first to heterosexual, married or de facto couples. Then, there was some liberalisation of the regime in 2014 and 2015. By 2017 it was recognised that same-sex couples could undertake surrogacy. By 2019, singles were also able to undertake surrogacy.

Northern Territory

I am quite proud of the *Surrogacy Act 2022* (NT). Although it does not contain everything that I want in it, it does mostly. I was a member of the Northern Territory Government's Surrogacy Joint Working Group. Sections 5 and 6 provide:

[35] *Pearce v South Australian Health Commission* (1996) 66 SASR 486; [1996] SASC 6233.

"5. The paramount consideration in respect to the administration and operation of this Act is the best interests of any child born under a surrogacy arrangement.

6. Subject to subsection 5, the following principles apply to the administration and operation of this Act:

(a) a woman should be able to make a free and informed decision about whether to be a surrogate mother;

(b) the parties to a surrogacy arrangement should be protected from exploitation;

(c) a surrogate mother should not be financially disadvantaged as a result of her involvement in a surrogacy arrangement."

Most of the other features of the legislation are similar to that of the Bill are similar to those of various States, such as Queensland, South Australia and NSW.

Western Australia

The *Surrogacy Act 2008* (WA) was, surprisingly, a central piece of an election. It became a central election pledge of what turned out to be the incoming Liberal Government to have legislation to allow surrogacy. The *Surrogacy Act* was designed not to fall foul of the Commonwealth *Sex Discrimination Act 1984* and was designed to have as many protections in it as possible.

Sadly, the figures speak for themselves. In an average year, **one child is born in Western Australia through surrogacy each year – but between 22-27 on current figures are born to Western Australian residents overseas[36]**. The system has so many hurdles that it makes it

[36] Sources: Annual reports of the Reproductive Technology Council of Western Australia for domestic surrogacy births. For international births, the number of children born to Australians via surrogacy overseas who have applied for citizenship by descent, compiled by the Department of Home Affairs, divided by 10 (as Western Australia has about 10% of the Australian population).

almost impossible to undertake surrogacy at home. It reminds me of an episode from *Yes, Minister*, where the perfect hospital had hundreds of employees, but no patients[37].

Who can access surrogacy? Heterosexual couples, single women and lesbian couples. Despite the removal of exemptions for State laws which discriminate against LGBTIQ+ people, so that Federal law makes plain that there should not be discrimination in the provision of goods or services towards LGBTIQ+ people[38], nevertheless Western Australia has continued to discriminate against single men and gay couples. It is unclear in Western Australia if someone is non-binary or transgender whether they could access surrogacy. If they are identified as a woman or in a heterosexual couple or a female couple, then the answer is yes but if they are identified as a single man or in a male couple, the answer is no.

The Western Australian Government has proposed amending this, but in the last Parliament its Bill was defeated in the Upper House.

As of late 2021, I have advised in over 1,750 surrogacy journeys for clients throughout Australia (including Western Australia) and at last count, 32 countries overseas. Approximately half of that client group were heterosexual couples and the other half were gay couples, with a smattering of single men, single women, one or two non-binary or transgender clients and two or three lesbian couples. In essence, if my client group is representative of the whole, half the people who could have undertaken surrogacy in Western Australia are prevented from being able to do so.

Even if someone is eligible to undertake surrogacy in Western Australia, it is a process that is so rigorous that defeats most:

1. There must be a written surrogacy arrangement.

2. Expenses payable for the surrogate are limited to reasonable expenses associated with achieiving or attempting to achieve pregnancy, reasonable expenses associated with the birth, and any assessment or expert advice in connection with the arrangement- but the reasonable expenses are limited to medical expenses not

[37] https://www.youtube.com/watch?v=JAk448volww .
[38] Section 22 *Sex Discrimination Act 1984* (Cth).

covered by Medicare or health insurance, two months leave form work or for medical reasons arising during the pregnancy, psychological counselling and some health, disability or life insurance. Despite the enormous size of Western Australia, to pay for travel or accommodation is a criminal offence. Similarly, to pay for maternity wear, necessary childcare, parking costs, acupuncture or massage, to give some examples, would render the agreement commercial (and criminal).

3. There must be independent legal advice both sides prior to signing (as is common throughout Australia).

4. There must be two separate counsellors providing counselling prior to signing (as opposed to one counsellor in most other States).

5. A donor of genetic material and their partner must be a party to the surrogacy arrangement and must have received independent legal advice and counselling. Quite simply, if in the common scenario of three-quarters of surrogacy journeys where an egg donor is required (approximately half from my experience of heterosexual couples and all gay couples and single men) – unless the egg donor is known, the intended parents cannot undertake surrogacy in Western Australia. WA is unique in the world for this requirement. One of the push factors in Australians undertaking surrogacy overseas is an inability to find an egg donor. WA has a separate requirement that a donor of genetic material can ordinarily only provide their genetic material to 5 recipient families, including their own, worldwide[39]. While this limit is unlikely to impact potential availability of egg donors, it greatly restricts the availability of sperm donors.

6. An application then must be made to the State Regulator, the Reproductive Technology Council of Western Australia[40].

7. After making the application, there is a mandatory three month cooling off period before the application is considered by the Regulator.

[39] *Human Reproductive Technology Directions 2021* (WA), cl. 8.1.
[40] Both Western Australia and Victoria require pre-approval form a State regulator. The other jurisdictions do not.

8. Only after the Regulator gives approval, then treatment can commence.

9. Treatment is to occur in Western Australia.

10. After the birth of the child, as occurs interstate, a post-birth parentage order is made transferring parentage from the surrogate (and her partner if any) to the intended parent(s). That application cannot be made for 28 days to 6 months post-birth.

11. Before the parentage order is made, the parties enter into a plan- which must be approved by the court – about the level of involvement by the surrogate and her partner in the child's life.

As one intended parent told me some years ago, he and his wife had obtained approval of the Reproductive Technology Council, but the process was so difficult and so long that by the end of it that the surrogate had given up. They were back at the beginning – looking for a surrogate after jumping through seemingly innumerable hurdles in order to become parents.

The couple then decided to go to California. It is likely that in doing so, their journey was illegal in Western Australia. Nevertheless, like everyone else, they were not prosecuted. Instead, they had an absolutely joyful experience of surrogacy through the surrogacy agency and the IVF clinic. The contrast to them was stark. The process in Western Australia for them was stressful and traumatising, whereas the process in the United States was joyful and affirming. As the father said to me – the whole objection in Western Australia is to payment of the surrogate and yet she is the one taking the risk. Everyone else gets paid – the lawyers, the counsellor, the doctors and nurses and the judge – but the person who is at the centre of it has all the risk, but it is somehow commercial if she gets paid.

The stringent requirements in Western Australia have resulted in higher fees for intended parents, which appear to be the highest in Australia. I am reliably informed that one clinic charges a fee of A$10,000 so that Reproductive Technology Council approval can be obtained. This does not include the cost of the legal fees as to advising and drafting the surrogacy arrangement or going to court.

It is no surprise then that WA residents go overseas, and occasionally interstate, to undertake surrogacy. They vote with their feet. However, they cannot obtain advice from WA lawyers to

do so, as it is a criminal offence for the lawyers to provide that advice[41]. Anywhere they might go, it is almost a certainty that the journey would be considered criminal in WA. For example, if they were to go to Canada, an altruistic regime, they have to take extreme care not to commit an offence at home. Two common expenses in every Canadian surrogacy agreement that I have seen could render the agreement criminal back home in WA:

- Transport and accommodation.
- Snow shovelling (No one wants a pregnant woman shovelling snow. Canada, unlike Western Australia, has snow.)

A proposal by the review into ART and surrogacy in Western Australia recommended that there be a ban along the lines of Queensland, New South Wales and the Australian Capital Territory into Western Australian residents undertaking surrogacy overseas. Such a change has yet to be legislated.

I note that of over 2000 children born overseas to Australian intended parents through surrogacy and despite two of the most populous States criminalising overseas commercial surrogacy (Queensland and New South Wales) and it clearly being an offence in some circumstances in Western Australia – not one person ever has been prosecuted for undertaking commercial surrogacy overseas even though at times they have been on the front page of the local newspaper or on the local TV news or on at least one occasion, in *Farnell & Chanbua* [2016] FCWA 17 splashed across the world's media in the *Baby Gammy* saga. There has been no preparedness by politicians or officials to prosecute parents for undertaking commercial surrogacy overseas.

DONOR-CONCEIVED ADULTS

Since 2004 Australia has pursued transparency for donor-conceived adults so that they will be able to find out upon reaching the age of 18 who their donor was if they seek that (and if relevant consents are given), to any donor-conceived siblings[42]. Those who were conceived

[41] *Surrogacy Act 2008* (WA), s.11.
[42] As currently seen in National Health and Medical Research Council, *Ethical Guidelines on the use of artificial reproductive technology in clinical practice and research* (2017), required to be followed by

prior to 2004, when anonymity occurred with gamete donation, continue to speak out if they are unable to find out where they have come from.

As the example of Fiona Darroch makes plain, the problem is not limited to Australia. She was born in 1961 in South Africa. She and her family subsequently migrated to Australia. After the death of her father, Fiona discovered that her father was not her genetic father. Her parents had lied to her.

Subsequently, by undertaking searches on Ancestry.com and 23andme.com, Fiona discovered that she had approximately 200 other siblings and that her genetic father was the South African doctor who undertook the sperm donation. He used his own sperm as a God-like figure. Before her discovery, he had suicided.

Fiona Darroch has discovered that some of her genetic siblings are keenly interested to know (as she is), some are opposed to knowing and some are indifferent. There is an assumption by donor-conceived adult advocates that everyone will want to know as to their outcome. Human frailty and reality tells us otherwise – as evidenced by her story.

Victoria in 2017 was the first jurisdiction in the world to retrospectively strip back anonymity to the very beginning, so that donor-conceived adults could find out where they had come from. This has been copied in South Australia. Currently there is a Parliamentary Inquiry in Queensland to see whether there should be a central registry[43] in Queensland, including retrospective anonymity.[44]

With the rise of databases like 23andme.com and Ancestry.com, anonymity is dead. It is only a question of time before the donor is able to be identified.

Australian IVF clinics (subject to any contrary law) by the Fertility Society of Australia and New Zealand, Reproductive Technology and Accreditation Committee, *Australia and New Zealand Code of Practice* (2021).

[43] So that information about gamete and embryo donors is held by the State, rather than just with IVF clinics.

[44] The submissions to the Parliamentary Inquiry are quite interesting as to the different approaches – the argument against the removal of retrospectivity, the arguments for knowing a person's genetic origins. The submissions can be found at https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=170&id=4150 viewed on 9 May 2022. My submissions argued for a central registry and for retrospectivity. I said: *"All of us have a right to know where we have come from."*

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