Monash University

Ethics and Law in Embryology in context[1]

By Stephen Page[2]

A miracle of modern medicine

As Judge Clare SC said about a child in 2012:[3]

> *"LCH is a long awaited and precious gift, much loved by his family and a miracle of modern medicine. When his biological parents were unable to conceive naturally, his aunt grew and nurtured LCH in her body for them."*

Or as put in 2020 by another judge[4]:

> *"Rarely, if ever, are the Courts of the land asked to make orders pursuant to an application that is described, as it is in the submissions that are before me, as a "good news story." This is one of those rare and wonderful occasions."*

I have had the honour and privilege of visiting IVF clinics on four continents:

- Africa;
- America;
- Asia;
- Australia.

I am struck, at times, by the attitudes of laboratory staff who consider their jobs to be mundane and monotonous.

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[1] Lecture delivered to Monash University embryology undergraduate students on Monday 11 June 2022.

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[3] *LWV v LMH* [2012] QChc26.

[4] *KRB & BFH v RKH & BJH* [2020] QChC 7.

To those of us who are not embryologists, can I merely say that what you do, as her Honour put it, is to create miracles. What you do is magical. It is simply extraordinary that an egg can be extracted safely, then inspected under powerful microscopes, then trimmed and then fertilised (whether through standard IVF or through ICSI) and then when the embryo has been determined to have reached the right level of cell division, either 3 or 5 days, then carefully frozen.

It is even more miraculous in my view that once the embryo is removed out of the liquid nitrogen in which it has sat for however many months, it is then, through an extraordinarily complex process, properly thawed and hatched until it is ready to be implanted in the cervix of a woman so that she can become pregnant, either for herself or someone else.

Each of these parts is in itself fascinating, and put together results in, as her Honour put it, a miracle of modern medicine.

It is an extraordinarily powerful thing to create life. Each and every one of you should be extremely proud of your abilities to do so.

However, as Alexander Pope said 400 years ago: *"Power corrupts. Absolute power corrupts absolutely."* It is absolutely essential that with this enormous power to create life that there are laws and ethical requirements.

An example of what not to do

Another former student of this course is Dr Pisit, who is an IVF doctor in Thailand. He has previously boasted that he has undertaken this course. Sadly, Dr Pisit seems to have forgotten the enormous responsibility in his hands when it comes to undertaking this work.

He shot to prominence in 2014 in two cases at the same time. You should have these cases seared into your brain for what not to do. The fundamental rule of medicine is of course to do no harm. One wonders what Dr Pisit thought of that on each of these journeys.

Journey 1: Baby Gammy

A couple from Western Australia, Mr and Mrs Farnell underwent surrogacy in Thailand, through Dr Pisit's clinic. They paid a surrogate, Mrs Chanbua. Through Dr Pisit's efforts, two embryos were implanted, one of which became the child Gammy and the other his sister Pypah. At the time there were no or next to no legal controls on egg donation or surrogacy in Thailand. Both children were conceived from the sperm of Mr Farnell and egg from an unknown Thai egg donor.

If we just stop there, neither of the children will ever know who was their egg donor. This is an all too common phenomenon around the world, which I will deal with later today.

There appears to have been no legal advice given to the Farnells or Mrs Chanbua before they entered into the agreement. If there were any screening of any of them, it was extremely lackadaisical. Well and truly after the children were born, it became apparent that:

- Mr Farnell was a convicted paedophile. Mrs Chanbua certainly didn't know that when she agreed to be a surrogate.

- Mrs Chanbua was underage to be a surrogate. This was unknown to Mr and Mrs Farnell when they entered into the agreement.

- Mrs Chanbua had an ongoing desire to have a son. This was not known to Mr and Mrs Farnell before entering into the agreement.

No doubt, if either side knew any of those matters before they started the deal, it wouldn't have proceeded. Nevertheless, it did. In reality, there was no informed consent.

It was portrayed after the birth of babies Gammy and Pypah that Mr and Mrs Farnell did not want Gammy, as he had been discovered to have Down syndrome and that they had therefore abandoned him in Thailand where he had been scooped up by the vulnerable Mrs Chanbua who did what she could to care for him – then discovering that he also had a hole in the heart. Mr and Mrs Farnell did not pay any child support for Gammy.

It was certainly a perfect storm for the media and then became an international media whirlwind. Mr and Mrs Farnell had returned to Bunbury with Pypah alone. They discovered some months later to their horror that the world's media had encamped itself outside their house, with spotlights blazing at night and them being denied any privacy whatsoever.

Subsequently, Mr and Mrs Farnell commenced court proceedings in the Family Court of Western Australia. The court process can only be described as awful. This is without any criticism of any of the lawyers or the judge concerned. The judgment[5] is a very thorough, reasoned discussion of what went wrong and what needed to occur in the best interests of Pypah. Mr and Mrs Farnell were seeking orders that Pypah live with them, ultimately to be challenged by Mrs Chanbua who said that both children should be together with her in Thailand. Mr and Mrs Farnell prevailed.

Why I say it was awful is because aside from the bitterness engendered in any contest in the Family Court concerning parenting, there was an overlay of issues about culture, different countries and the fact that there were six parties:

- Mr and Mrs Farnell, applicants;
- Ms Chanbua, respondent;
- Independent Children's Lawyer;

[5] *Farnell and Chanbua* [2016] FCWA 17.

- Western Australia's Attorney-General;
- The Australian Human Rights Commission;
- Western Australia's child protective services.

The truth as determined by the court was that Mr and Mrs Farnell did not know it was illegal for them to undertake surrogacy in Thailand even though it was likely that they may have committed an offence in Western Australia in doing so. Their evidence, which was accepted by the court, was that they were told whilst he was in utero that Baby Gammy had Down syndrome and they should contemplate an abortion. They were told that it was against the law in Thailand to do so, but to go to China where with money anything was possible. They refused. They could not have contemplated that action. Their determination was always to have Baby Gammy in their care.

At birth, Mrs Chanbua decided that she was going to hang on to Baby Gammy, due to her desire to always have a boy. She was the mother under Thai law. Mr and Mrs Farnell were not in a position to challenge her in court in Thailand. Whilst in theory they could have done so, at that stage riots were occurring in Bangkok ahead of the military coup. They were advised to get out of Thailand for their safety and that of Pypah. They did so. Not surprisingly, they told a lie when they got home, consistent with having been traumatised – namely that Gammy had died.

It seems an extraordinary thing that a court would hold that a toddler should get to live with a convicted paedophile and his wife. Nevertheless, that is the careful conclusion that Chief Judge Thackray came to. When Western Australia's child protective services went to interview Mr and Mrs Farnell, they did so under the glare of the world's media. There they were, encamped on the footpath and across the road with floodlights on Mr and Mrs Farnell's house, often knocking on the door. I recall then child protective services originally visited and Mr and Mrs Farnell weren't home. The commentary in the media was asking when they would come back. They did come back and they did so repeatedly. Under the most intense public media (and no doubt Ministerial) scrutiny, the Department took the view that there was not an unacceptable risk in Gammy living with Mr and Mrs Farnell, in circumstances where the Department:

- had scheduled and would continue to schedule regular check-up visits for years;
- had undertaken and would continue to undertake unannounced spot checks.

His Honour noted that Pypah was living in a household which was the only one she ever knew, being cared for by the people who loved her who spoke English, the only language she knew. If she were to move to Thailand to live with her brother, she would be living with strangers in a strange place speaking a language she did not know.

When I say that the world's media took an interest, this was no exaggeration. I was interviewed as an expert by seemingly much of the world's media, including:

- all Australia's major TV networks, radio networks and press;
- Radio New Zealand;
- Deutsche Welle;
- New York Times;
- Wall Street Journal.

On one day alone, I took part in five separate national TV interviews:

- Today (Nine Network);
- National Nine News;
- The Project (Network 10);
- SBS World News;
- 7.30 Report (ABC).

On that day I also had several press and radio interviews including with ABC and commercial radio.

I had nothing to do with the case whatsoever – save as an expert.

The view widely expressed by IVF clinic operators in Australia is very simple:

1. Act conservatively, in accordance with the law and any ethical requirements;

2. If in doubt, act in such a way that you don't appear on the front page of the local newspaper (where the story will inevitably be a bad one).

That's not all, the Baby Farm

In the midst of the Baby Gammy saga, one might understand the Thai government being extremely upset at being criticised by the world's media for allowing a paedophile to become a parent on its watch due to a lack or seeming lack of laws and ethical requirements. Whilst the Thai government had the inevitable knee jerk reaction to what had gone wrong with Baby Gammy - which was to severely proscribe surrogacy, various journalists advised me that they were much more concerned about the other of Dr Pisit's activities, which was the baby farm. Dr Pisit enabled 16 Thai or Cambodian women to undertake parallel surrogacy journeys at the same time for the son of a Japanese dot.com billionaire in order to enable him to form an instant family[6].

Ultimately, that man was able to obtain orders in Thailand to allow all the children to live with him in Japan.

[6] https://www.bbc.com/news/world-asia-43169974 viewed 4 June, 2020.

What burden has he and Dr Pisit imposed on each of those children as they grow up and have a sense of identity about their place in the world? Who is going to be caring for these children as they grow up? It is extremely doubtful that any of the women who were surrogates gave informed consent to become a surrogate on the basis that there would be so many more children born at the same time as the child or children that they bore. How can it possibly be said that Dr Pisit had followed the mantra of do no harm in all of those circumstances?

The former Chief Justice of the Family Court of Australia, John Pascoe AC CVO has stated that in several parts of the world, rules concerning IVF and surrogacy are the Wild West[7].

Georgia is one of the top 5 countries that Australians have been to for surrogacy. You should be aware of Kristina, 24, and Galip, 57, Ozturk. She is Russian. He is Turkish. They met in Georgia and married. In just over a year in Georgia, they had 21 children via surrogacy, and had the help of 16 nannies[8]. He has since been detained for allegations of money laundering and falsifying documents[9].

I would strongly urge you that if you are returning to a country that does not have adequate rules about law and ethical practice concerning ART and surrogacy, *be very cautious* about how you practice. You have the ability to screw up lives greatly, whether they are the women who give birth, their partners or children or any donor conceived children or adults. You have the potential to do so for several generations.

Talk to donor conceived adults

There is nothing more challenging when undertaking the joyful task of enabling new life to be created for those who cannot have children, to talk to those who are donor conceived adults. Quite simply, if they don't know where they came from, they will tell you so. If they have had extraordinary journeys to try and find out where they came from – they will tell you. Make sure you listen.

In Australia it has been mandatory since 2004 for clinics to keep records so that those who are conceived from egg, sperm or embryo donation may have the chance after they turn 18 to find out where they came from. In one State, here in Victoria, the rules have gone even further so that from where time began through for sperm donation in IVF clinics, donor conceived adults may be able to find out who their sperm donor was, even though the sperm donor donated on the basis of complete anonymity.

[7] See, for example, http://www.austlii.edu.au/au/journals/FedJSchol/2012/15.pdf viewed 4 June, 2020.
[8] https://www.dailymail.co.uk/femail/article-10128323/Russian-woman-24-welcomed-TWENTY-ONE-surrogate-babies-just-year.html viewed 5 July 2022.
[9] https://www.news.com.au/lifestyle/real-life/news-life/mumof22-details-struggle-as-millionaire-husband-detained/news-story/e2602e43a4dfa1bc0ecc701f663bb263 viewed 5 July 2022.

Currently, Queensland has a Parliamentary inquiry underway, to consider whether there should be a central register there, and whether there should be retrospectivity with identification of donors back to the beginning.

Of course, complete anonymity now is a myth. The seemingly inexorable rise of websites with enormous databases such as *ancestry.com* and *23andme.com* means that even now it is possible to track down a donor. Imagine what it will be like in 20 years' time. I have talked to donor conceived adults who have used these sites to find their progenitors, siblings or cousins. This is not science fiction. Egg donor agreements have for the last year or so been drafted in the US pointing out that true anonymity is over.

Recently the Sunday Mail in Brisbane has been running stories of male doctors who supplied their sperm when they were medical students, in the name of science and on the promise of anonymity. They are now worried that they might get the tap on the shoulder from those they helped conceive. In one such case, not reported, this has already happened.

If your jurisdiction requires that donors be anonymous, then you should keep accurate records of who those donors are. One day it is highly likely that the identities of the donors will be exposed. I have been told that in some clinics in developing countries that the identity of the donor is fraudulent. The intended parents go through a book or website to choose an appropriate donor. They assume therefore that this donor albeit anonymous, will be the egg donor for them. Instead, it will be someone entirely different and if they are having twins (because they have received the promise of babies) but the first egg donor has insufficient eggs, it may be conceived from the eggs from both the first and second donor – without knowledge to the intended parents or the children who are conceived as a result (and neither of which donor is the donor they thought they chose).

The only word for it is fraud. Do not engage in this practice.

Similarly, do not engage in the practice of supplying your own sperm to conceive children. There have been cases in Australia, South Africa[10] and America amongst others where this has happened. Currently in the United States there are changes being made to the laws in one of the States there because 30 or 40 years after the event a doctor has been caught through DNA tests with 23andme.com, of supplying his own sperm to create children[11]. Criminal charges I understand have resulted and America being America there have been civil court cases launched as well.

ART regulation in Australia

[10] Noted Australian psychologist Fiona Darroch, for example, discovered to her horror that her parents had lied to her about her paternity. Dad was not her genetic dad. He was a sperm donor, who turned out to be the treating doctor.

[11] https://www.afr.com/companies/healthcare-and-fitness/the-fertility-doctor-who-used-his-own-sperm-to-impregnate-patients-20190326-p517jz viewed 5 July 2022.

Anyone who undertakes embryology in Australia will discover to their delight, surprise or annoyance that there is an absolute thicket of regulation. In addition to the general requirements regulating doctors, IVF clinics in Australia need to be accredited. Typically, they are accredited for ISO and NATA, but they also need to be accredited with RTAC[12], and if they undertake research, the National Health and Medical Research Council. In some States, such as South Australia, there is also a requirement for licences to be held from the State as well as the Commonwealth.

The basic scheme of regulation is that if a clinic is regulated, it is licensed by RTAC and therefore also be the subject of audits from RTAC. RTAC auditors are thorough. They require full compliance with the keeping of records which in turn has a mandated nature to it. Whilst it may seem that the keeping of those records at times is extremely onerous and repetitive, by remaining transparent, it decreases human error and increases the quality of work undertaken by the clinic.

The general requirement for compliance is set out with *Ethical Guidelines* issued by the CEO of the National Health and Medical Research Council. A current version of those is called *Ethical Guidelines on the Use of Assisted Reproductive Technology and Clinical Practice and Research (2017)*. If you practice in Australia and you haven't read them, do so. Be familiar with them.

The *Ethical Guidelines* were written by a committee of the NHMRC. The first thing that must be noted about them is that the drafting style is different to that of legislation. They have a discussion about why certain positions have been taken and their drafting is often not as precise (or for that matter as turgid) as one sees with legislation.

Confusingly, the *Ethical Guidelines* are not law. They are licensing conditions which are otherwise subject to either Commonwealth, State or Territory laws. There are many such laws impacting the operation of IVF clinics. I will touch on some.

Human tissue laws

Each State and Territory of Australia has a human tissue law, which regulates the use of human tissue. Each of the laws is similar to the others. Being a federation, there are slight differences State by State. In broad terms it can be said that ordinarily sperm, eggs and embryos will be considered to be tissue and therefore the subject of regulation. In broad terms these laws govern the posthumous retrieval of sperm and also prohibit the sale of sperm, eggs and embryos.

Jurisdiction	Act

[12] Every IVF clinic in Australia must have a licence from the Reproductive Technology Accreditation Committee of the Fertility Society of Australia. A condition of that licence is, subject to any statute law, compliance with the NHMRC, *Ethical Guidelines in the use of assisted reproductive technology in clinical practice and research (2017).*

Queensland	*Transplantation and Anatomy Act 1979*
New South Wales	*Human Tissue Act 1983*
ACT	*Transplantation and Anatomy Act 1978*
Victoria	*Human Tissue Act 1982*
Tasmania	*Human Tissue Act 1985*
South Australia	*Transplantation and Anatomy Act 1983*
Western Australia	*Human Tissue and Transplant Act 1982*
Northern Territory	*Transplantation and Anatomy Act 1979*

Example: Northern Territory

Section 22E of the *Transplantation and Anatomy Act 1979* (NT) provides:

"(1) A person commits an offence if:

(a) the person:

(i) enters, or agrees to offer to enter, into a contract or arrangement; or

(ii) holds himself or herself out as being willing to enter into a contract or arrangement; or

(iii) inquires whether someone is willing to enter into a contract or arrangement; and

(b) under the contract or arrangement, the person agrees, for valuable consideration (whether given or to be given to the person or anyone else), for the supply of tissue from the person's body or another person's body (whether before or after the death of a person or another person). '

Fault element: The person intentionally engages in conduct mentioned in subsection (1)(a). Maximum penalty: 400 penalty units are imprisonment for 2 years.

(2) However, subsection (1) does not apply if the contract or arrangement:

(a) is entered into in accordance with an authorisation under section 22F; or

(b) provides only for the reimbursement of expenses necessarily incurred by the person for the removal of tissue under this Act.

(3) Also, subsection (1) does not apply in relation to the supply of tissue if:

(a) the tissue is obtained under a contract or arrangement authorised under section 22F; and

(b) the tissue has been subjected to processing or treatment; and

(c) the tissue is supplied for use, in accordance with the directions of a medical practitioner, for therapeutic or scientific purposes.

(4) A contract or arrangement mentioned [in] subsection (1)(b) is void unless it is entered into in accordance with an authorisation under section 22F.

(5) In this section:

***Supply** includes sale."*

The relevant Minister can authorise a person to enter into a contract or arrangement under section 22F if the Minister is satisfied there is special circumstances to do so.

Tissue is defined in section 4 as:

"(a) Generally – includes:

(i) an organ; and
(ii) a part of the human body;
(iii) a substance extracted from, or from a part of, a human body; but

(b) for Part 2 – see section 6."

Donation of tissue by living persons is covered in Part 2. In section 6 tissue in that part does not include:

"(a) foetal tissue; or

(b) spermatozoa or ova."

It is clear that the legislature intended that eggs and sperm would be considered to be tissue. The key exception under section 22E(2)(b) is that there can be the donation of eggs or sperm when there is the *"reimbursement of expenses necessarily incurred by the person for the removal of tissue under this Act".*

Most of the time of course sperm is not removed but ejaculated and the limits of this exception have not yet been tested.

As I said, each of the other States and Territories have similar, but not identical, laws.

The reference to *necessarily incurred* means that there is an objective test of reasonableness as to what has been paid. That test must be seen in the context of the payment to eggs, sperm and embryo donors under our human cloning laws.

Commonwealth Human Cloning Law

Commonwealth laws regulate the operation of IVF clinics as to behaviour that they can not undertake in any circumstances or those that can be undertaken with approval whether as to the provision of assisted reproductive treatment or research. The two Commonwealth laws are *Prohibition of Human Cloning for Reproduction Act 2002* and *Research Involving Human Embryos Act 2002*.

These laws are part of a national scheme. Each of the States and the Australian Capital Territory have passed parallel laws. The Northern Territory has not. The only clinic in the NT has an agreement with the NT government, where the expectation is that clinicians will comply with South Australian requirements.

It would appear that the reason that there are both State and ACT laws in addition to the Commonwealth laws is that the Commonwealth laws focus on corporations (in accordance with its constitutional limits) whereas the State and ACT laws can also apply to individuals. Another difference is that the Commonwealth laws only apply to conduct within Australia. In most of the States and the ACT (and in the Northern Territory concerning its *Transplantation and Anatomy Act 1979* (NT)) there are what are called long arm laws, which apply to the relevant conduct overseas.

Human Cloning Laws

Jurisdiction	Human Cloning Act
Commonwealth	*Prohibition of Human Cloning for Reproduction Act 2002*
Queensland	*Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003*
New South Wales	*Human Cloning for Reproduction and Other Prohibited Practices Act 2003*
ACT	*Human Cloning and Embryo Research Act 2004*
Victoria	*Prohibition of Human Cloning for Reproduction Act 2008*
Tasmania	*Human Cloning for Reproduction and other Prohibited Practices Act 2003*
South Australia	*Prohibition of Human Cloning for Reproduction Act 2003*
Western Australia	*Human Reproduction Technology Act 1991*

Research Act

Jurisdiction	Research Act
Commonwealth	*Research Involving Human Embryos Act 2002*
Queensland	*Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003*
New South Wales	*Research Involving Human Embryos (New South Wales) Act 2003*

ACT	*Human Cloning and Embryo Research Act 2004*
Victoria	*Research Involving Human Embryos Act 2008*
Tasmania	*Human Embryonic Research Regulation Act 2003*
South Australia	*Research Involving Human Embryos Act 2003*
Western Australia	*Human Reproductive Technology Act 1991*

The Commonwealth legislation applies across Australia. The State and ACT legislation applies in addition. Section 21 of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) provides:

"(1) A person commits an offence if the person intentionally gives or offers valuable consideration to another person for the supply of a human egg, human sperm or a human embryo.

Penalty: Imprisonment for 15 years.

(2) A person commits an offence if the person intentionally receives, or offers to receive, valuable consideration from another person for the supply of a human egg, human sperm or a human embryo.

Penalty: Imprisonment for 15 years.

(3) In this section:
"reasonable expenses":

(a) in relation to the supply of a human egg or human sperm--includes, but is not limited to, expenses relating to the collection, storage or transport of the egg or sperm; and

(b) in relation to the supply of a human embryo:

(i) does not include any expenses incurred by a person before the time when the embryo became an excess ART embryo; and

(ii) includes, but is not limited to, expenses relating to the storage or transport of the embryo.

***"valuable consideration"** , in relation to the supply of a human egg, human sperm or a human embryo by a person, includes any inducement, discount or priority in the provision of a service to the person, but does not include the payment of reasonable expenses incurred by the person in connection with the supply."*

Section 24 of that Act provides:

"This Act is not intended to exclude the operation of any law of a State, to the extent that the law of State is capable of operating concurrently with this Act."

State is defined in section 8 as including the Australian Capital Territory and the Northern Territory.

The point of the legislation is to prevent people being commoditised for their gametes or embryos and in particular to prevent IVF clinics taking advantage of young women for their eggs.

As I said, each of the States and the ACT have passed parallel legislation. An example is section 16 of the *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (NSW), which provides:

"(1) A person commits an offence if the person intentionally gives or offers valuable consideration to another person for the supply of a human egg, human sperm or a human embryo.

Maximum penalty: Imprisonment for 15 years.

(2) A person commits an offence if the person intentionally receives, or offers to receive, valuable consideration from another person for the supply of a human egg, human sperm or a human embryo.

Maximum penalty: Imprisonment for 15 years.

(3) In this section:

*"**reasonable expenses**":*

(a) in relation to the supply of a human egg or human sperm includes, but is not limited to, expenses relating to the collection, storage or transport of the egg or sperm, and

(b) in relation to the supply of a human embryo:

(i) does not include any expenses incurred by a person before the time when the embryo became an excess ART embryo within the meaning of the Prohibition of Human Cloning for Reproduction Act 2002 of the Commonwealth, and

(ii) includes, but is not limited to, expenses relating to the storage or transport of the embryo.

*"**valuable consideration**" , in relation to the supply of a human egg, human sperm or a human embryo by a person, includes any inducement, discount or priority in the provision of a service to the person, but does not include the payment of reasonable expenses incurred by the person in connection with the supply."*

You may think that these laws only apply within their jurisdictions. Generally, that would be a wise assumption as Parliament is presumed not to legislate extraterritorially. As Justice O'Connor stated in *Jumbunna Coal Mine NL v. Victorian Coal Miners Association* (1908) 6 CLR 309 at 363:

"Most statutes, if their general words were taken literally in their wider sense, would apply to the whole world, but they are always read as being prima facie restricted in their operation within territorial limits."

However, to do so concerning these laws is a mistake, in six of the eight Australian jurisdictions. That is because in each of those six jurisdictions there is what is called a long arm law, i.e. it reaches the jurisdiction out like a long arm, grabbing people who are elsewhere.

In addition, the Commonwealth law has been drafted with the specific intention of applying to the importation of eggs, sperm and embryos[13].

There is a shortage of egg donors. This has resulted in several clinics importing eggs from overseas. Australians have also gone far afield to become parents, on every continent aside from Antarctica whether for an egg donation alone or along with surrogacy. They have gone to such countries as:

Continent	Country
North and Central America	Canada Mexico United States
South America	Argentina Brazil Columbia
Europe	Cyprus/ Turkish Cyprus Georgia Greece Russia Spain UK Ukraine
Africa	Ghana Kenya

[13] Section 4 Act, Explanatory memorandum to the Bill, 2002.

Continent	Country
	Nigeria South Africa
Asia	Cambodia China India Malaysia Nepal Thailand
Oceania	Australia New Zealand

Long arm laws mean that if a doctor or other clinicians refers a patient to a clinic overseas for the purposes of egg donation and that egg donation[14] is of a commercial nature, then an offence, possibly punishable by up to 15 years imprisonment, is committed.

Long arm laws?

Jurisdiction	Yes/No	Law
Commonwealth	No	But importation can be an offence: s.4, 21 *Prohibition of Human Cloning for Reproduction Act 2002*
Queensland	Yes	Section 12 *Criminal Code 1899*
New South Wales	Yes	Section 10C *Crimes Act 1900*
ACT	Yes	Section 64 *Criminal Code 2002*
Victoria	No	
Tasmania	No	
South Australia	Yes	Section 5G *Criminal Law Consolidation Act 1975*
Western Australia	Yes	Section 12 *Criminal Code 1913*
Northern Territory	Yes	Section 15 *Criminal Code 1983*

Example of long arm law

Section 10C of the *Crimes Act 1900* (NSW) provides:

"(1) If--

(a) all elements necessary to constitute an offence against a law of the State exist (disregarding geographical considerations), and

(b) a geographical nexus exists between the State and the offence,

[14] (This also applies to sperm and embryo, but typically arises with egg donation alone).

the person alleged to have committed the offence is guilty of an offence against that law.

(2) A geographical nexus exists between the State and an offence if--

(a) the offence is committed wholly or partly in the State (whether or not the offence has any effect in the State), or

(b) the offence is committed wholly outside the State, but the offence has an effect in the State."

In other words:

1. if the elements of the offence exist;
2. *part* of the act that constitutes the offence occurred in New South Wales; or
3. the *effect* of the act occurs in New South Wales,

then the offence occurs in New South Wales.

Example:

Dick and Dora Dimple are a couple living in Sydney. They decide to undertake egg donation in the United States. The Babies R Us egg donor agency helpfully emails them a contract with Francine Fishpoor as the proposed egg donor to be paid US$15,000 as her compensation.

Dick and Dora Dimple receive an electronic copy of the agreement. Using Doc-U-Sign they then sign online. In the process they have committed *part* of the act, namely either offering to enter into the contract or having entered into the contract in New South Wales.

Dick and Dora were referred to Babies R Us by their helpful IVF doctor in Sydney, Dr Hilda ("Squeaky") Klean. Dr Klean knew that there weren't enough egg donors in New South Wales, but her best friend happens to run Babies R Us, so Dr Klean referred them to Babies R Us because the prospect was that as a result Dick and Dora will be able to have a child. Dr Klean did not know that the New South Wales laws applied overseas and did not know that she might be committing an offence as a principal offender.

If the Secretary of the NSW Ministry of Health reasonably believed that Dr Klean was committing a breach of the relevant human cloning laws, then the NSW licence of her clinic might be at risk: *Assisted Reproductive Technology Act 2007* (NSW). Of course, that belief does not require a criminal conviction, or even court proceedings of any kind.

A person who incites or assists someone to commit an offence is what is called an accessory before the fact. Section 346 of the *Crimes Act 1900* (NSW) provides:

"Every accessory before the fact to a serious indictable offence may be indicted, convicted, and sentenced, either before or after the trial of the principal offender, or together with the principal offender, or indicted, convicted, and sentenced, as a principal in the offence, and shall be liable in either case to the same punishment to which the person would have been liable had the person been the principal offender, whether the principal offender has been tried or not, or is amenable to justice or not."

In other words, Dr Klean, by referring Dick and Dora to the agency, on the face of it has committed an offence punishable by up to 15 years imprisonment.

What Dr Klean should have done

Dr Klean when asked by Dick and Dora should have advised them that egg donation may be available overseas but that in doing so they may be committing a serious criminal offence and should get expert legal advice first to make sure that they don't commit that criminal offence.

What are *reasonable expenses*?

RTAC in Technical Bulletin 3 (2011) referred to the then Senate Inquiry regarding donor issues. RTAC went on to say:

"The Senate inquiry reported that some units were confused about the RTAC code of practice and NHMRC guidelines relating to 'reasonable expenses'.

*Where State legislation does not apply, the following are advised:… - **reasonable expenses** be based on the principles in the Surrogacy Act 2010 of NSW, which applying to sperm donation would cover:*

- *reasonable medical, travel or accommodation costs associated with offering to be a donor and associated with donation;*
- *receiving any legal advice associated with donation.*

The cost is reasonable only if the cost is actually incurred and the amount of the cost can be verified by receipts or other documentation. For the convenience of donors and units, it is suggested that units may decide to waive requiring receipts for individual items below $50."

The NHMRC in its *Ethical Guidelines* says at Guideline 5.4:

"5.4 ***Provide reimbursement of verifiable out-of-pocket expenses***

The current situation in Australia is that gamete donation must be altruistic, and that commercial training in human gametes or the use of direct or indirect inducements is prohibited by legislation. The position reflects concerns about the potential exploitation of donors (particularly egg donors) and the potential risks to all parties.

*5.4.1 While direct or indirect inducements are prohibited, it is reasonable to provide reimbursement of verifiable out-of-pocket expenses **directly** associated with the donation, including, but not limited to:*

- *medical and counselling costs, both before and after the donation;*
- *travel and accommodation costs within Australia;*
- *loss of earnings [Donors who access paid leave during the donation process cannot be reimbursed for loss of earnings. Loss of earnings can be demonstrated by the donor providing payslips verifying that unpaid leave was taken];*
- *insurance;*
- *childcare costs were needed to allow for the donor's attendance at donation related appointments and procedures;*
- *legal advice.*

*5.5 **Use of imported gametes***

5.5.1 Treatment in Australia using gametes donated by persons living in another country must not take place unless it can be established that the gametes were obtained in a manner consistent with any Commonwealth legislation and any relevant state or territory legislation, accreditation body guidelines and these Ethical Guidelines."

State legislation

In addition to those laws outline above (each of which typically has accompanying regulations), IVF clinics are also subject to further State laws in four jurisdictions. Therefore in broad terms, IVF clinics are regulated:

- primarily in four jurisdictions by the *Ethical Guidelines*: Queensland, Australian Capital Territory, Tasmania, Northern Territory;

- in addition, by State *Assisted Reproductive Treatment Acts*: New South Wales, Victoria, South Australia and Western Australia.

The only IVF clinic in the Northern Territory operates with South Australian licensed doctors. Compliance therefore must be given in that clinic to South Australian laws.

In South Australia and New South Wales there is limited intervention by the legislature as to licensing and the operation of certain aspects of ART. The laws and regulations in Victoria and Western Australia, by contrast, are a comprehensive regulation of IVF clinics.

In those four jurisdictions (New South Wales, Victoria, South Australia and Western Australia), clinicians must comply with the State legislation **and**, insofar as they are not incompatible, the *Ethical Guidelines*. This means that there can at times be a lot less flexibility in the operation of those clinics (particularly in Victoria and Western Australia) than there can be in jurisdictions that do not have that legislation (for example Queensland and the ACT).

Victoria has two principal regulators, one regulating the IVF industry as a whole – Victorian Assisted Reproductive Treatment Authority (VARTA) and the other regulating the presumption against treatment and all surrogacy arrangements through IVF clinics: the Patient Review Panel. Western Australia has a regulator of both IVF clinics and of surrogacy – the Reproductive Technology Council.

Recent reviews of ART/surrogacy in both Victoria and Western Australia have recommended:

- some fine tuning of the roles of the regulators in Victoria;
- the abolition of the RTC and its replacement.

We wait and see whether the recommendations in those reviews come to fruition.

Transparency of origin

It is the principle as I said across Australia for a donor conceived person to know ultimately where they came from. This is achieved by one of two methods:

- In New South Wales, Victoria, South Australia and Western Australia, by the operation of a Central Register whereby every donor conceived person can ultimately find out where they came from. The Central Register is run by the Government. The one in Western Australia was described by the recent Allen review as not being fit for purpose so watch this space as to any developments that may occur there.

- In the other five jurisdictions, it is based upon the records of the clinic under the *Ethical Guidelines*. In essence, the clinic has to keep the records forever. This provides a potential challenge if a clinic is sold or closed down.

After the child has turned 18, he or she can contact the clinic or Central Register and then be able to take steps to find out his or her genetic origin and if he or she consents (and the others consent as well) the origin of any genetic siblings.

Counselling is mandated as part of the process. It is not simply a case of giving over a name and address and then allowing the donor conceived adult to rock up on someone's door out of the blue and say: *"Hi dad I'm here"*.

It is likely that Victorian laws that as I said above apply retrospectively to when sperm donation commenced through clinics, will in time be replicated in the other Australian jurisdictions.

A difficult issue for clinicians is when intended parents go overseas. In many overseas jurisdictions there isn't this requirement for transparency. In some places, such as Spain, it is positively against the law to make any disclosure as to the genetic origin of the donor. In other places, such as South Africa, whilst donation is anonymous, currently all donors there before they donate, as a matter of the practice of the egg donor agencies (who can see change on the horizon) have to consent to the possibility that the child may later find out where they have come from and therefore be in contact with the donor. The reason for that change in position is because the South African Law Reform Commission is looking at copying Australia's example. The industry accordingly has moved with the times.

The United States has an interesting mix of practice whereby donors may be known, anonymous or open identity (the last being along the lines of what we have in Australia). In late 2018 I had six couples who were clients undertaking egg donation in California. In each of those six cases the donor said that she was anonymous. I explained to my clients the implications for their child and for them if the donor were to remain anonymous, namely that the child may blame the parents forever for not protecting the child's identity by being able to find out who the donor is. In five of those six cases, my clients were able to go back to the agency and persuade the donor to be an open identity donor. In the sixth case, the donor would not be moved. My clients asked me what to do. I gave them the recommendation to go with another donor. They had been through a great deal by this point and weren't prepared to do that. I told them that this was their choice and they could proceed with that donor – and they would tell their child that they had asked but she had declined – but it was theirs to wear. Ultimately it would be up to their child to judge whether they had done enough.

Of course, some donor conceived adults never know where they have come from. The focus often is on someone turning 18 and then wanting to know where they have come from. The problem, however, can have a much longer lead time.

My cousin

My cousin, Dave, was born in 1961. When he was aged 1 my aunt, who was then aged about 24, had a brain aneurysm and died 20 minutes later. His father then deserted him. Dave was brought up by my maternal grandparents. They died respectively when he was aged 13 and 14. At the age of 14 he came to live with my family. I was then aged 12.

A few years ago, when he turned 50, Dave started to notice that he had a crippling condition in his hands. When he checked with his GP, he was told that this was an inherited condition. When he enquired of my mother and other family members on his maternal side, he realised that this condition did not come from his maternal family. It came from his paternal family. He is unable to locate any member of his paternal family to find out the family history of this condition.

No incest!

Another basic provision under the *Ethical Guidelines* is that there should be a limit to the amount of sperm or egg donation, to prevent consanguinity. This can be tricky at times in regional areas where there may be a limited number of egg or sperm donors.

The test as set out under the *Ethical Guidelines* is that the number of donations be to a reasonable number of families, which is typically taken to be 10 as a rule of thumb.

Legislation in New South Wales limits donation to five women (albeit with a female partner or wife to be added to in effect be the sixth woman), Victoria to ten women and Western Australia to five recipient families, including families outside Western Australia.

These figures are entirely arbitrary and are considerably lower than those specified by, for example, the American Society of Reproductive Medicine.

Surrogacy

With the exception of the Northern Territory, surrogacy is regulated throughout Australia. The Northern Territory currently has no laws on surrogacy. As a result, the only clinic there, Repromed, will not undertake surrogacy cases – because there cannot be a transfer of parentage from the surrogate (and her partner) to the intended parent or parents. However, I am delighted that the NT has enacted the *Surrogacy Act 2022* (NT)[15], which it is hoped will take effect later this year.

The model of surrogacy regulation in Australia is broadly based on the UK model. This in turn is that surrogacy is an altruistic process, not commercial and that there is a post birth transfer of parentage. Surrogacy ordinarily, but does not always, involve the use of IVF or ART. Surrogacy can be in its various forms:

- Altruistic or non-commercial;
- Commercial (although this is illegal in Australia save for the Northern Territory);

[15] I was delighted to be on the NT Government's joint surrogacy working group.

- Gestational, i.e. the surrogate has the baby for someone else and is not the genetic mother;

- Traditional, i.e. the surrogate is the genetic mother (whether through natural conception, artificial insemination of some kind such as IUI – whether occurring at home or in a clinic – or IVF. Traditional surrogacy currently is not allowed through IVF clinics in Victoria, although continues to occur at home. Current proposals by the Victorian ART Review recommend that Victoria allow traditional surrogacy.

The assumption under Australian law is that at birth the surrogate is always the parent. This is contrary to the approach often seen in the United States, for example, that the test is based on biology or intention – in which case for a gestational surrogacy the intended parents are the parents at birth. This view contained in the law is at odds with what a recent UK review found about surrogates there, who do not view themselves as the mothers. They view the intended parents as the parents[16]. Most recently, the NZ Law Commission has called for auto recognition of intended parents as the parents[17].

Much of a surrogacy journey also involves egg or sperm donation, so those laws equally apply so far as they are relevant to a surrogacy journey. Too often I hear from clients who have looked at the laws regulating surrogacy (but not those of egg and sperm donation) by which stage they have already entered into egg donor agreements overseas and potentially committed offences punishable by up to 15 years imprisonment – through ignorance.

Put simply, the sooner intended parents can get expert legal advice when they are contemplating surrogacy, the better. The law, as Professor Jenni Millbank described some years ago, is a veritable minefield to be tiptoed through by intended parents.

Regulation of surrogacy in Australia

Each of the States and the ACT have laws regulating surrogacy:

State/Territory	Law
Queensland	*Surrogacy Act 2010*
New South Wales	*Surrogacy Act 2010*
ACT	*Parentage Act 2004*
Victoria	*Assisted Reproductive Treatment Act 2008, Status of Children Act 1974*
Tasmania	*Surrogacy Act 2012*
South Australia	*Family Relationships Act 1975 (*and likely soon *Surrogacy Act 2019)*[18]
Western Australia	*Surrogacy Act 2008*

[16] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/06/Surrogacy-consultation-paper.pdf viewed on 5 June 2020.
[17] NZ Law Commission, *Review of Surrogacy*, Issues Paper 47,2022.
[18] The *Surrogacy Act 2019* (SA) has been enacted, but is to commence on a date to be proclaimed. As of 5 June 2020 it has not been proclaimed.

Northern Territory	*Surrogacy Act 2022* (Not in operation, to commence likely 2022)

Domestic surrogacy journeys

Essentially, they work like this:

1. The parties find a surrogate. Recent research by Ms Miranda Montrone published at the Fertility Society of Australia Conference 2019 is that of the surrogates that she had dealt with, 95% were known in some way to the intended parents, the other 5% being found through other means such as Facebook forums.

2. The surrogate is assessed by a doctor as being suitable.

3. The intended parent or intended parents are eligible for surrogacy (see below).

4. The parties undertake pre-signing counselling.

5. The parties enter into a surrogacy arrangement that is non-binding except possibly as to the repayment of expenses by the surrogate if she does not consent to the making of an order or does not relinquish the child (although these are open to doubt).

6. If undertaken through an IVF clinic, the clinic approves the arrangement through its Ethics Committee. Most, but not all, IVF clinics have an Ethics Committee that deals with surrogacy cases.

7. If in Western Australia, approval is given by the Reproductive Technology Council, and in Victoria by the Patient Review Panel.

8. Once the child is born, the child is the child of the surrogate and other birth parent (see comment as to *Masson v. Parsons* below).

9. Usually in a period of about one month to six months post birth, an application is made to transfer parentage from the surrogate (and other birth parent) to the intended parent (or parents).

10. A State or Territory Court then makes an order transferring parentage.

11. Once made, the intended parents are parents of the child for all purposes under the local law and under the *Family Law Act 1975* (Cth): section 60HB, Family Law Regulations 1984 (Cth), reg. 12CA, and if they are Australian citizens, the child takes their citizenship: *Australian Citizenship Act 2007* (Cth), section 8.

12. Following the making of the order, the birth certificate is then altered to reflect the intended parents as the parents of the child.

Who can access surrogacy?

State/Territory	Single surrogate	Married/ de facto	Single intended parent	Married/ de facto intended parents	Exclusions
Queensland	Yes	Yes	Yes	Yes	No
New South Wales	Yes	Yes	Yes	Yes	No
ACT	No	Yes	No	Yes	Yes
Victoria	Yes	Yes	Yes	Yes	No
Tasmania	Yes	Yes	Yes	Yes	Everyone must come from Tasmania at the time of signing the agreement
South Australia	Yes	Yes	Yes	Yes	Yes[19]
Western Australia	Yes	Yes	Yes	Yes	Heterosexual married couples, heterosexual de facto couples, single women and female same sex couples can access surrogacy. Single men and male couples cannot. Transgender, non-binary and intersex people's access is unclear. The law is currently being reviewed.

Isn't traditional surrogacy more risky?

Yes, it is. Following the enactment of the *Surrogacy Act 2010* (Qld) and the *Surrogacy Act 2010* (NSW), IVF clinics in both States initially declined to undertake any traditional surrogacy at all

[19] When the *Surrogacy Act 2019* (SA) commences, then this exclusion will be removed.

because of the perceived or actual risk that the surrogate would seek to hang on to the child[20]. Since then, a number of clinics in both States are prepared to undertake traditional surrogacy, with the risk to be assessed on a case by case basis. A sister who is a traditional surrogate for her sister and brother-in-law, is a classic example of low risk. Victoria has a ban on traditional surrogacy through IVF clinics, but curiously not at home (where one might have thought that the risk was much higher)[21].

Example of a successful traditional surrogacy arrangement

Pauline and Julia were sisters. Each had husbands. Julia was the survivor of ovarian cancer. Before she had cancer treatment, her eggs were removed, fertilised with her husband's sperm and frozen. After treatment was completed, Pauline agreed to be her surrogate. Pauline and her husband were my clients. When they came to me, I was told that the plan was for Pauline to be implanted with Julia's embryos. I asked: *"What if it doesn't work?"* The response was that Julia and her husband would then find an egg donor and that ultimately the egg donor's egg would be fertilised and then implanted into my client Pauline. I said: *"What about traditional surrogacy?"* It seemed a nonsense to me to have to engage a third party egg donor when the obvious solution was the simplest, namely to have my client if needed as both the surrogate and the egg donor, so that the child would have a genetic link to both Julia and her husband's sides of the family. My client was immediately agreeable. I was told, however, that the clinic would not agree as it was outside its guidelines (although legal to do so in New South Wales).

I contacted the clinic, noting that its sister clinic in Queensland would undertake traditional surrogacy in those circumstances.

Ultimately, Julia's embryos failed, the clinic agreed to undertake traditional surrogacy, it worked and a child was born who was then the subject of an order made in the Supreme Court of New South Wales naming Julia and her husband as the parents.

What is commercial surrogacy? It is whatever the local parliament declares it to be!

It is assumed in Australia that all commercial surrogacy is the same. This is not true. It is also assumed that when parties go to Canada, where the law requires altruistic surrogacy that the surrogacy arrangement will be altruistic under Australian laws – also not necessarily the case. It is also assumed that when the parties undertake surrogacy in the United States, it must by definition be commercial, which also is not necessarily the case.[22]

[20] As an example of such a case, when the surrogacy arrangement was illegal, and therefore there was no counselling or legal advice before hand: *Re Evelyn* [1998] FamCA 55.
[21] *Assisted Reproductive Treatment Act 2008* (WA), s.40(1)(ab); *Status of Children Act 1974* (Vic), s. 20(1)(a).
[22] *Re Halvard* [2016] FamCA 1051.

The fact remains that Parliament in each jurisdiction has prescribed what is commercial and what is not. Currently, as I understand it in Australia, there is a 6 in 100,000 chance that any woman who is pregnant or gives birth to a child will die. Nevertheless, until December last year in Victoria, for example, to pay for the life insurance of a surrogate would have meant that the surrogate mother had been paid expenses other than those that are prescribed and would therefore have been committing an offence under the *Assisted Reproductive Treatment Act 2008* (Vic). Thankfully, the regulations were replaced with new regulations that allowed for the payment of insurance, along the lines of the laws in New South Wales and Queensland so far as expenses are concerned[23]. A similar approach has already been taken in Tasmania and has also been set out in the *Surrogacy Act 2019* (SA) and to a limited degree has been recommended by Professor Allen in her review of WA ART/surrogacy.

There has been an assumption by State legislators that surrogacy only happens within that jurisdiction. It is a common if not everyday event for surrogacy to occur across borders within Australia. Intended parents and surrogates and their partners therefore have to navigate the laws in both places to ensure that the agreement is legal. At times this can be a nightmare.

What is a *commercial surrogacy arrangement* is defined, in New South Wales for example, in section 9 of the *Surrogacy Act 2010* (NSW):

*"A **surrogacy arrangement** is a*

"commercial surrogacy arrangement" if a person receives a payment, reward or other material benefit or advantage (other than the reimbursement of the birth mother's surrogacy costs) for the person or another person—

(a) agreeing to enter into or entering into the surrogacy arrangement; or

(b) permanently relinquishing to 1 or more intended parents the custody and guardianship of a child born as a result of the surrogacy arrangement; or

(c) consenting to the making of a parentage order for a child born as a result of the surrogacy arrangement."

In turn, the *birth mother's surrogacy costs* are set out in section 7, the key to which is that they must be reasonable. Much of what is contained in section 7 is the giving of examples:

"(1) For the purposes of this Act, a

*"**birth mother's surrogacy costs**" are the birth mother's reasonable costs associated with any of the following matters:*

(a) becoming or trying to become pregnant,

[23] *Assisted Reproductive Treatment Regulations 2019* (Vic), reg. 11(1)(f).

(b) a pregnancy or a birth,

(c) entering into and giving effect to a surrogacy arrangement.

(2) The reasonable costs associated with becoming or trying to become pregnant include any reasonable medical, travel or accommodation costs associated with becoming or trying to become pregnant.

(3) The reasonable costs associated with a pregnancy or birth include the following:

(a) any reasonable medical costs associated with the pregnancy or birth (both pre-natal and post-natal),

(b) any reasonable travel or accommodation costs associated with the pregnancy or birth,

(c) any premium paid for health, disability or life insurance that would not have been obtained by the birth mother, had the surrogacy arrangement not been entered into,

(d) any reasonable costs, including reasonable medical costs, incurred in respect of a child (being the child of the surrogacy arrangement),

(e) the cost of reimbursing the birth mother for a loss of earnings as a result of unpaid leave taken by her, but only for the following periods:

(i) a period of not more than 2 months during which the birth happened or was expected to happen,

(ii) any other period during the pregnancy when the birth mother was unable to work on medical grounds related to pregnancy or birth.

(4) The reasonable costs associated with entering into and giving effect to a surrogacy arrangement include the following:

(a) the reasonable costs associated with the birth mother and the birth mother's partner (if any) receiving counselling in relation to the surrogacy arrangement (whether before or after entry into the arrangement),

(b) the reasonable costs associated with the birth mother and the birth mother's partner (if any) receiving legal advice in relation to the surrogacy arrangement or a parentage order relating to the surrogacy arrangement,

(c) the reasonable costs associated with the birth mother and the birth mother's partner (if any) being a party to proceedings in relation to such a parentage order, including reasonable travel and accommodation costs.

(5) A cost is reasonable only if:

(a) the cost is actually incurred, and

(b) the amount of the cost can be verified by receipts or other documentation.

(6) In this section:

***"medical costs"** does not include any costs that are recoverable under Medicare or any health insurance or other scheme."*

The New South Wales *Surrogacy Act* was copied on the Queensland *Surrogacy Act* but as has happens in a federation, then slightly altered.

Examples of reasonable costs

I acted for the surrogate, Lorinda, and her husband who lived in Queensland. Lorinda's friends were the intended parents living in New South Wales. Lorinda wanted three expenses met:

1. Massages;
2. Acupuncture;
3. The employment of a locum.

The solicitor for the intended parents said that the payment of each of these would make the agreement a commercial surrogacy arrangement and therefore a criminal offence both in New South Wales and Queensland. I disagreed. I said it was common for women who were pregnant to have acupuncture if they so wished. Clearly it was a reasonable cost even though it wasn't included in the list of examples in each of the New South Wales and Queensland *Surrogacy Acts*. The solicitor relented. As to massages, I said the same thing. I said it would be different if my client was sent maybe repeatedly to somewhere like the Sheraton Mirage for a spa treatment. That might be considered to be commercial in the circumstances. Otherwise, it was an absolutely everyday normal thing for a pregnant woman to have massages whilst pregnant. She ought to be cherished not punished. The solicitor relented.

The solicitor however, dug in their heels about employing a locum because section 7(3)(e) of the New South Wales Act says:

"The cost of reimbursing the birth mother for loss of earnings as a result of unpaid leave taken by her, but only for the following periods:

(i) A period of not more than 2 months during which the birth happened or is expected to happen;

(ii) Any other period during the pregnancy when the birth mother was unable to work on medical grounds relating to pregnancy or birth."

Given the nature of the business in which my client was engaged, I formed the view that if she did not employ a locum, she was putting herself potentially at risk and it was entirely reasonable for her to employ someone in her place. The principle of the legislation is not for her to profit but then not for her to be out of pocket. I told the solicitor on the other side that the example in (e) was an example only, not a strict requirement and did not apply to someone like my client who was self-employed. Eventually the solicitor relented. My client was able to employ a locum for most of the pregnancy. The surrogacy went ahead.

Subsequently an order was made in the Supreme Court of New South Wales transferring parentage.

The principle in the legislation in Australia is to ensure that surrogates are not commodified. The problem is that the number of surrogates who are available is much lower than demand, with the result that many more children are born overseas.

A key feature about surrogacy orders in Australia is that they are all made post-birth. It is necessary for the surrogate (and, usually, her partner, husband or wife) to consent to the making of the order. That consent can be refused for any reason. The agreement is not binding as to the making of an order transferring parentage[24].

This contrasts with some other jurisdictions, such as Argentina, South Africa and many States in the United States, where orders are often made before the birth of the child transferring or declaring the intended parents as the parents. These orders are often called pre-birth orders.

Going overseas for surrogacy

As best as the numbers can be determined, for every child born in Australia via surrogacy, four are born overseas. The best estimate I can give of the number of children born following the making of parentage orders in Australia is approximately 60 to 70 a year. There is typically one a year in each of South Australia and Western Australia. The numbers are hard to discern because surrogacy orders made in New South Wales and Victoria are part of the adoption list

[24] For such a case where the surrogate refused consent,with the result that the intended parents did not seek to obtain a parentage order, see *Lamb and Shaw* [2017] FamCA 769; *Shaw and Lamb* [2018] FamCAFC 42; *Lamb and Shaw* [2018] FamCA 629.

and there is no breakdown by the respective courts as to which order is adoption and which is surrogacy.

The rough and ready guide, based on ANZARD data[25], adjusted for gestational surrogacy births in Australia is as follows, compared with international births, which have been obtained under freedom of information from the Department of Home Affairs, for children born overseas via surrogacy who seek Australian citizenship by descent. The domestic figures are for the years ended 31 December, while the Department's figures are for the years ended 30 June:

Comparison of Australian domestic and international surrogacy births

Year	Domestic	International
2009	16	10
2010	13	<10
2011	19	30
2012	16	266
2013	29	244
2014	30	263
2015	43	246
2016	37	207
2017	51	164
2018	71	170
2019	61	232
2020		275
2021		223

In Western Australia, the numbers are even more skewed. For every surrogacy birth there, about 20+ are overseas. WA has about 10% of the Australian population.

There are various myths about why people undertake surrogacy overseas. Given the research that I cited above from Miranda Montrone, and as it is an offence in most of Australia to advertise for a surrogate (although Facebook groups are thriving) the reality is that most people undertake surrogacy overseas for one of two reasons:

1. They cannot find a surrogate here; or

2. They are migrants who are going back to their country of origin to undertake surrogacy there. I have had clients who have come from these countries either undertake or investigate undertaking surrogacy back home:

Continent	**Country**
North and Central America	Canada United States

[25] Australia and New Zealand Assisted Reproductive Database, UNSW, annual reports.

Continent	Country
South America	Brazil Columbia
Europe	Greece Russia UK Ukraine
Africa	Ghana Kenya Nigeria South Africa
Asia	Bangladesh China India Iran Malaysia Sri Lanka Thailand
Oceania	New Zealand

Where are the prime places that people go?

The four main countries in recent years have been:

- United States – heterosexual couples, LGBTI couples and singles;
- Canada – heterosexual couples, LGBTI couples and singles;
- Ukraine – heterosexual, married couples only.
- Georgia- heterosexual, married couple only.

Myths about international surrogacy

1. *It's better*. Not necessarily. The rules in Australia are very tight. We have great IVF clinics and great protection of human rights. The intended parents are clearly the parents as a matter of law at the conclusion of the legal process. Sometimes, such as in Western Australia, the process can be so complex or not available that it is easier to go overseas. A risk in Australia is that because there is no binding agreement, the surrogate can decline to hand over the baby.[26]

2. *It's cheaper*. On the whole it is considerably cheaper to undertake surrogacy in Australia than anywhere else. The greatest cost in undertaking surrogacy in Australia is the cost of ART. I suggest that clients undertaking surrogacy in Australia have a budget of $70,000.

[26] As was seen, for example in *Lamb and Shaw* [2017] FamCA 769 and *Lamb and Anor & Shaw* [2018] FamCA 629.

They may be lucky and be able to undertake the entire cost for as low as $30,000. By contrast, the cost in a developing country is in the order of A$100,000 when one takes into account having to fly there and back and accommodation as well as other ancillary costs, the cost in Canada is ballpark of $140,000 and the US when the Australian dollar was riding at 75c (it's now down to 69c) was between A$145,000 to A$300,000.

3. *Surrogacy agencies are licensed*. There is a general assumption within Australia that if you are going to something that is health related, it must be licensed by the Government. The general rule is that surrogacy agencies overseas are **not** licensed by the Government. In most places, there is more regulation in buying a bottle of milk from the supermarket than there is in the regulation of a surrogacy agency. On two occasions I have had clients undertake surrogacy in the United States with agencies that I did not know of and before I was involved. Subsequently in each case the agency went belly up and the clients lost their money. It is important that the intended parents ask around and obtain expert advice about who are reputable agencies.

   In developing countries, there is a much higher risk of there being sharks in the water, taking advantage of desperate people who are perceived to have considerable money.

4. *That surrogacy agencies and doctors overseas have the same high ethical standards as Australians.* This may or may not be true, depending on where they go. Generally, surrogacy agencies and doctors in the United States and Canada, for example, are excellent. The example of Rudy Rupak is a telling one, never to be forgotten.

Rudy Rupak

I do not profess to be an expert on the subject. I met Rudy Rupak in 2013 at a surrogacy conference in Melbourne, where he was a sponsor for his company, Planet Hospital. My immediate impression of him with his long, oiled hair and gold chain and open necked shirt was that he would have done well as a 1970s porn film director.

His claim to fame was that, in order to save money, intended parents could undertake surrogacy in Mexico. It was a considerable saving in money. He told me that surrogacy was available in the Mexican State of Tabasco following legislation brought by a senator there which in turn came about because of that senator's concern about infertility issues and Mr Rupak having contributed to her political action committee.

It got worse. Exposés by the New York Times and the Australian Broadcasting Corporation revealed that:

- Mr Rupak was trafficking poor Colombian women to Mexico to be surrogates.
- He was using a Ponzi scheme to fund the whole program.

Other news reports revealed that the intended parents at the conclusion of the surrogacy process in Mexico often had many months of pain before they were able to take their children home, having to traverse Mexican officials who were keen to put barriers in the way of getting home. One report revealed that a Canadian lawyer had suggested to his client that bribes be paid in a Mexican way to Mexican officials to enable the children to get home.

Mr Rupak was ultimately caught up with by the FBI and subsequently jailed in the US.

I spoke to an Australian couple who had undertaken surrogacy through Mr Rupak. The amount of pain they went through was just simply terrible and not something you would wish on your worst enemy.

In the words of the Ethical Guidelines[27]:

. *"Overseas clinics may operate in an environment that does not adhere to Australian standards of care, and the clinical services available may perpetuate donor anonymity, or include treatments or procedures which are considered unethical under these Ethical Guidelines or are illegal under Australian legislation.*

. *4.2.7 Clinics and clinicians must not promote or recommend practices which contravene these Ethical Guidelines or Australian legislation, nor enter into contractual arrangements with overseas providers who offer such practices.*

. *4.2.8 Clinics approached by an individual or a couple for advice on undertaking ART overseas have an ethical obligation to advise the individual or couple of any concerns about the standard of care in the overseas clinic or acknowledge where the standard of care is unknown.*

. *4.2.9 Where an individual or couple has made an autonomous decision to seek ART overseas, clinics may provide information aimed at the reduction of harm to the intended parent(s) and the person who would be born. This may include advice aimed at reducing the likelihood of ovarian hyperstimulation, the promotion of single embryo transfer and supporting the right of persons born from donated gametes or embryos to know the details of their genetic origins.*

. *4.2.10 Where an individual or couple has made an autonomous decision to seek ART overseas, a clinician may feel they have an ethical obligation to participate in elements of the treatment of the individual or couple in order to minimise potential*

[27] Guideline 4.2.7-4.2.10.

harms, however:

. *clinicians have no obligation to participate in such treatment (see paragraph 3.7 – Conscientious objection)*

. *clinicians should be aware of the relevant legislation in the relevant state or territory before participating in the treatment in such circumstances."*

One or two or six embryos

The standard, as seen above in the *Ethical Guidelines* in Australia is that ordinarily one embryo will be implanted. The rationale for this is that implanting more than one changes a low risk pregnancy to a high risk one, being risky to the health not only of the surrogate but also of the children. It is considerably more common in the United States to implant two embryos, in part because of the lack of insurance coverage with IVF there. Nevertheless, in the United States there has been a great move in the last few years to implanting only one embryo in surrogacy arrangements. In part, this has been because the risk factors identified in Australia. It is also being driven by insurance. Insurers in the United States often will not cover twin pregnancies or do so at such prohibitive rates and provide such little cover that it is not worthwhile proceeding. If children are conceived in the United States as twins, it is estimated that there is a 60-70% chance they will be born prematurely, i.e. before the 37th week. Each will then be placed in a neonatal intensive care unit (NICU) *each* of which costs up to US$17,000 *per day*. If they are in there for a month, they are not covered by the insurance that may cost the intended parents A$1million - out of the price range of most.

Anecdotally there has been a rise in parallel surrogacy journeys, i.e. two surrogates becoming pregnant at the same time. As illustrated in the Dr Pisit example above, it is unlikely that the children will be born at precisely the same time and there is a need for full transparency for the surrogates so that they can say that they have given informed consent to each journey proceeding.

Six embryos

Some years ago, I acted for an Indian Australian couple who went to India for surrogacy. On neither occasion did they know or meet the surrogate. This is entirely against the usual approach taken by Australians to know who the woman is who is giving birth to their child and maintain a long-term relationship with that woman – for the benefit of their child. However, this approach was common in India.

For medical reasons unknown to the couple, the first surrogacy journey was unsuccessful.

The second surrogacy journey involving a new surrogate resulted in the doctor implanting six embryos. One child was conceived and born. When I asked why six embryos were being implanted, I was told that that's what the doctor was doing. When I asked: *"What discussion did you have about selective reduction?"* the response was *"What is selective reduction?"* Either the quality of IVF was so poor that even with six embryos being implanted, only one child might have resulted or there was a multiple pregnancy followed with a selective reduction that may not have been advised in advance to the surrogate but certainly was not advised at any stage to the intended parents.

Human Rights Protections

It is fundamental under Australian law that the woman who is pregnant or gives birth has control over the pregnancy and birth process. There are been several court cases in Australia[28] in which a party has sought an injunction to prevent another from having an abortion. On each case the court has said that it does not have jurisdiction and would not intervene.

The principle was taken a higher level in Queensland when a principle of the *Surrogacy Act* said this in section 16:

"(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."

I was glad that that provision was in essence copied in the *Surrogacy Act 2012* (Tas) and the Surrogacy Act 2019 (SA). The principle is taken at a further level in South Australia in its *Surrogacy Act 2019*, which although yet to commence, states in section 7(1)(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."*[29]

The Queensland Act goes the furthest of all the legislation in setting out the objects of the Act and guiding principles. The main objects are set out in section 5:

"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

[28] For example, *Attorney-General (Qld) (Ex rel Kerr) v T* (1983) 1 Qd R 404; *F &F Injunctions* [1989] FamCA 41.

(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."

The guiding principles are set out in section 6:

"(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

(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."

These provisions in turn take up key parts of the *International Convention on the Rights of the Child*, to which Australia and all other countries (except the US) are parties[30]:

> *"[9] Australia is a signatory to the International Convention on the Rights of a Child. Article 8 of the convention is relevant here. It relates to states entering into particular agreements with regard to the rights of children. Article 8 in particular provides:*
>
> *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law, without unlawful interference.*
>
> *[10] And secondly:*
>
> *Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.*
>
> *[11] These considerations are reflected in the Surrogacy Act 2010 Queensland, sections 5 and 6."*

Almost ten years ago, I drafted a surrogacy arrangement in Queensland. I acted for the surrogate and her husband. I drafted a clause that reflected section 16(2) of the *Surrogacy Act*, i.e. that my client had the same rights to manage her pregnancy and birth as any other pregnant woman. It was one thing for it to be part of the common law, another for it to be in statute and yet even better for my client *in her eyes* for it to be set out explicitly in the arrangement.

In every domestic surrogacy arrangement that I have had since then (whether in Queensland, New South Wales, Victoria, South Australia or Western Australia) I have included a clause to similar effect. It truly empowers the surrogate to be in control of her body. She is after all the one who should be cherished, the one is taking all the risks and above all has the risk of death or injury from giving the gift of life to someone else.

I am delighted that when South Australia enacted its Surrogacy Act 2019 (SA), my submission was accepted- that the human rights of all involved, including the child born, must be respected[31].

Spanner in the works – *Masson v. Parsons*

No discussion about donation or surrogacy in Australia is now complete without discussing this court case: *Masson v. Parsons* [2019] HCA 21. Mr Masson supplied a quantity of sperm at home to his friend Ms Parsons. A child, known in the court proceedings as X was born. Mr Masson was named on the birth certificate as the father. Ms Parsons' friend, a female friend,

[30] *KRB and BFH v RKH and BJH* [2020] QChC 7.
[31] Section 7(1)(a).

whom she later married, assisted in the act of pregnancy. Mr Masson was gay and Ms Parsons not surprisingly was a lesbian.

For ten years the child X called Mr Masson *"daddy"*. The two Ms Parsons then proposed that they move to New Zealand with their children. Ms Parsons had had another child, this time by an anonymous sperm donor through an IVF clinic.

The critical issue at trial was whether Mr Masson was a parent. He had the right to litigate in any event, because under section 65C of the *Family Law Act*, he was considered by all parties to be someone who was concerned with the care, welfare and development of the child X. However, it seems his case had much more power to prevent the child from leaving Australia if he were a parent.

There was no specific provision under the *Family Law Act* that listed Mr Masson as a parent. Nevertheless, the trial judge found that Mr Masson was a parent as a matter of fact because:

- He was genetically the father;
- He intended to be the father;
- He had parented the child.

The two Ms Parsons had maintained that they were in a de facto relationship at the time of the insemination. If what they said were true, then under section 60H of the *Family Law Act* and section 14 of the *Status of Children Act 1996* (NSW) they were the sole parents of X. The trial judge found that they were not in a de facto relationship and therefore the door was open for Mr Masson to be the other parent.

The two Ms Parsons appealed that decision. The Full Court of the Family Court of Australia found that Mr Masson was **not** a parent. This was primarily because he was not within a specific listing of parent under the *Family Law Act*. It was also found that there was a scheme of legislation between the *Family Law Act* and State and Territory *Status of Children Acts*. These are laws setting out amongst other things parentage presumptions. The court found that Mr Masson was excluded as a parent under the *Status of Children Act 1996* (NSW) and therefore he was not a parent. It was irrelevant that he was genetically a parent, had intended to parent and had engaged in parenting.

Mr Masson appealed to the High Court. The High Court found that Mr Masson **was** a parent. Chief Justice Kiefel and Justices Bell, Gageler, Keane, Nettle and Gordon held:

At [26]:

> *"Although the Family Law Act contains no definition of "parent" as such, a court will not construe a provision in a way that departs from its natural and ordinary meaning unless it is plain that Parliament intended it to have some different meaning. Here, there is no basis in the text, structure or purpose of the legislation to suppose that*

Parliament intended the word "parent" to have a meaning other than its natural and ordinary meaning….Section 60B(1) perhaps suggests that a child cannot have more than two parents within the meaning of the Family Law Act. But whether or not that is so, s 60B(1) is not inconsistent with a conception of parent which, in the absence of contrary statutory provision, accords to ordinary acceptation."

At [29]:

"In re G (Children), Baroness Hale of Richmond observed in relation to comparable English legislation that, according to English contemporary conceptions of parenthood, "[t]here are at least three ways in which a person may be or become a natural parent of a child" depending on the circumstances of the particular case: genetically, gestationally and psychologically. That may also be true of the ordinary, accepted English meaning of "parent" in this country, although it is unnecessary to reach a concluded view on that issue. The significance of her Ladyship's analysis for present purposes, however, is that, just as the question of parentage under the legislation with which she was concerned was one of fact and degree to be determined by applying contemporary conceptions of parenthood to the relevant circumstances, the question of whether a person qualifies under the Family Law Act as a parent according to the ordinary, accepted English meaning of "parent" is a question of fact and degree to be determined according to the ordinary, contemporary Australian understanding of "parent" and the relevant circumstances of the case at hand. The primary judge and the Full Court were correct so to hold."

At [44]:

"Division 1 of Part VII of the Family Law Act proceeds from the premise that "parent" is an ordinary English word which is to be taken as having its ordinary, accepted English meaning. In some respects, most notably in s 60H, the Family Law Act may be seen as expanding the conception of "parent" beyond ordinary acceptation by adding a limited range of persons who stand in specified relationships to children born of artificial conception procedures. Additionally, under s 60G, a person may qualify as a parent of a child born of an artificial conception procedure by reason of the person's adoption of the child under the law of a State or Territory. But ss 60H and 60G are not exhaustive of the classes of persons who may qualify as parents of children born of artificial conception procedures. It remains that, apart from those specific provisions, the question of whether a person is a parent of a child born of an artificial conception procedure depends on whether the person is a parent of the child according to the ordinary, accepted English meaning of "parent". And as has been explained, that is a question of fact and degree to be determined according to the ordinary, contemporary Australian understanding of "parent" and the relevant circumstances of the case at hand."

At [45]:

> *"It is also necessary to appreciate, as is explained later in these reasons, that the evident purpose of s 60H and more generally of Division 1 of Part VII of the Family Law Act is that the range of persons who may qualify as a parent of a child born of an artificial conception procedure should be no more restricted than is provided for in Division 1 of Part VII. Consequently, although ss 60G and 60H are not exhaustive of the persons who may qualify as parents of children born of artificial conception procedures, if a person does qualify as a child's parent either under s 60G by reason of adoption, or according to s 60H, or according to ordinary acceptation of the word "parent", it is beside the point that a State or Territory provision like s 14(2) of the Status of Children Act otherwise provides. Section 79(1) of the Judiciary Act does not operate to insert provisions of State law into a Commonwealth legislative scheme which is "complete upon its face" or where, upon their proper construction, the provisions of the Commonwealth scheme can "be seen to have left no room" for the operation of State provision. And, as is apparent from its text, context and history, Division 1 of Part VII of the Family Law Act leaves no room for the operation of contrary State or Territory provisions."*

At [47]:

> *"During the 1980s, that [status of children] legislation was expanded to deal with the consequences of advances in the field of artificial conception, initially in terms confined to the status of children born to married women who conceived by assisted conception, but later so as to encompass children born to lesbian couples and single women. As Victoria submitted, there is no doubt that it was one of the purposes of those enactments to ensure that a husband who consented to the artificial insemination of his wife with semen obtained from another man would irrebuttably be presumed to be the father of the child and that the legal links between the donor of the sperm used in the artificial conception procedure and the child thus conceived be dissolved. It is, however, plain from the referral of powers by the relevant States to the Commonwealth that the object of the exercise was to facilitate the creation of a uniformly applicable Commonwealth scheme, and plain from the form of Division 1 of Part VII, and particularly from the current forms of ss 60G and 60H, that Division 1 of Part VII is designedly selective as to the State and Territory provisions relating to parentage that the Commonwealth permits to apply. Sections 60H(2) and 60H(3) in particular create an obviously intended capacity for the Commonwealth from time to time to add or to choose not to add, or to exclude, those of the State and Territory legislative provisions determinative of the parentage of a biological father of a child born as a result of an artificial conception procedure that apply under the Family Law Act."*

At [48]:

> *"The evident purpose of Division 1 of Part VII of the Family Law Act is that the Commonwealth is to have sole control of the provisions that will be determinative of parentage under the Act."*

At [53]-[55]:

> 53. *"Finally, counsel for the first and second respondents and counsel for Victoria contended that … this Court should hold that the ordinary, accepted English meaning of "parent" excludes a "sperm donor".*
>
> 54. *Those submissions must also be rejected. As has been explained, the ordinary, accepted English meaning of the word "parent" is a question of fact and degree to be determined according to the ordinary, contemporary understanding of the word "parent" and the relevant facts and circumstances of the case at hand. To characterise the biological father of a child as a "sperm donor" suggests that the man in question has relevantly done no more than provide his semen to facilitate an artificial conception procedure on the basis of an express or implied understanding that he is thereafter to have nothing to do with any child born as a result of the procedure. Those are not the facts of this case. Here, as has been found – and the finding is not disputed – the appellant provided his semen to facilitate the artificial conception of his daughter on the express or implied understanding that he would be the child's parent; that he would be registered on her birth certificate as her parent, as he is; and that he would, as her parent, support and care for her, as since her birth he has done. Accordingly, to characterise the appellant as a "sperm donor" is in effect to ignore all but one of the facts and circumstances which, in this case, have been held to be determinative.*
>
> 55. *It is unnecessary to decide whether a man who relevantly does no more than provide his semen to facilitate an artificial conception procedure that results in the birth of a child falls within the ordinary accepted meaning of the word "parent". In the circumstances of this case, no reason has been shown to doubt the primary judge's conclusion that the appellant is a parent of his daughter."*

Effect of *Masson v Parsons*

The implications of this decision are far reaching. If someone seems like a parent, they probably are. If the *Status of Children Act* in your State or Territory says that they are not a parent, that seems to run counter to their ability to be parents under the *Family Law Act*, then often the *Status of Children Act* is irrelevant.

Most tellingly, the High Court is leaving open the ability to have more than two parents. Again, this is despite State legislation (such as section 10A(1)(c) of the *Births, Deaths and Marriages Registration Act 2003* (Qld)) that limits the number of parents to two.

Masson takes the same approach as to who is a parent as was taken by the Full Court of the Family Court in 2010 in *H v. Minister for Immigration and Citizenship* [2010] FCAFC 119 as to in that case who was a parent under the *Australian Citizenship Act*. Tellingly, in *H v. Minister for Immigration and Citizenship*, no genetic link was needed between the fathers in each case and the children for the fathers to be identified as parents.

It would now seem that the decision of the Full Court of the Family Court of Australia in *Bernieres and Dhopal* [2017] FamCAFC 180 is now not good law. Mr and Mrs Bernieres were a couple living in Melbourne. Lawfully, they underwent surrogacy in India. They did not commit any offence in Victoria in doing so. A child was conceived and born to a surrogate from Mr Bernieres' sperm and egg from a donor. The child obtained Australian citizenship in India. On returning to Melbourne, they applied to the Family Court for amongst other orders, an order that they be recognised as the parents. The Court refused to do so. The rationale was that they were not specifically recognised under the *Family Law Act*, that there was a scheme between the *Family Law Act* and the *Status of Children Act* of Victoria, they were not recognised under the *Status of Children Act* and therefore they were not the child's parents. The conclusion of the case could only be that the child either had no parents or that the child's parents were the surrogate and her husband, people who:

- contracted not to be the parents;
- were not recognised in their jurisdiction, India as the parents;
- had no genetic connection whatsoever with the child;
- had never intended to be the parents;
- had never parented the child;
- had no ongoing relationship with the child;
- were never likely to parent the child.

If *Bernieres and Dhopal* were decided today, then consistent with *Masson and Parsons*, in my view Mr and Mrs Bernieres would be the parents.

In donor cases, the key phrase that rings loud and true from *Masson* is that Mr Masson *"provided his semen to facilitate the artificial conception of his daughter on the* ***express or implied understanding that he would be the child's parent****"*.

The fact that it was implied says that there was no written agreement between the parties. The case rings the bell that there ought to be written donor agreements between known donors (particularly sperm donors) and intended parents. Written agreements (whether binding or not) make plain as to whether someone is intended to be a parent or not. Oral agreements as they say, are worth the paper they are written on. Clinics should be insisting on written agreements.

According to media reports, each of Mr Masson and the two Ms Parsons have spent $2 million in legal fees by the conclusion of the High Court. The case, regrettably, is not at an end. If they

had had a written agreement setting out Mr Masson's role with the proposed child, they may have saved considerable costs.

It is advisable to have written agreements with known egg donors, but the risk in my view is considerably lower, because of the much more intrusive process involved in becoming an egg donor than that of becoming a sperm donor with therefore a much higher physical and emotional commitment to becoming a donor. Nevertheless, when one member of a same-sex couple is donating her embryos to another, there ought to be such an agreement to avoid a case such as *Crisp and Clarence* [2015] FamCA 964 in which two women argued as to whether one of them was a parent or donor and between them spent $600,000 in legal fees.

My views therefore are for intended parents (particularly single women)[32] that any donors should be clinic recruited donors. If there is not to be a clinic recruited donor, but a known donor, then three steps should be undertaken to ameliorate but not eliminate risk:

1. Have a written donor agreement.

2. Require all the parties to undertake counselling with an experienced fertility counsellor, including requiring them to be in the one room at the same time (as is required under the NHMRC *Ethical Guidelines*) so that they are all in the same canoe paddling in the same direction. To do otherwise is to invite a train wreck like *Masson v Parsons* or *Reiby and Meadowbank* [2013] FCCA 2040, in which the man is of the view that he is a parent, and the women are of the view that he is merely a sperm donor.

3. Go through a clinic- to make sure that medical risks are minimised. I do not want a child to end up with HIV, or the parents to be told that their child has cystic fibrosis.

One may think, in light of *Masson* that the *Family Law Act* therefore governs who is a parent in surrogacy arrangements. Not necessarily. The *Family Law Act* specifically recognises State (and ACT) parentage orders- and thereby by implication recognises the parentage presumptions under State and ACT Status of Children Acts used in those proceedings.

In *Lamb and Shaw*[33], a Family Court judge ventured (pre-Masson) as to who was a parent under the Queensland Status of Children Act- namely the intended genetic father was a parent when the surrogate was single. That approach was disapproved in 2019 in the Childrens Court of Queensland[34]:

> *"[14] It follows from this that the interpretation of the Surrogacy Act by Tree J was unnecessary given that the Family Law Act provides a complete answer to the issue of who is a parent for the purposes of that jurisdiction.*

[32] Because of the effect of section 60H of the *Family Law Act* recognising couples through ART, and related State and Territory *Status of Children* legislation.
[33] Cited above.
[34] *RBK v MMJ* [2019] QChC 42.

[15] Tree J's interpretation of the Status of Children Act and the Surrogacy Act in my view cannot be correct if it means that a sperm donor who wishes to be an intended parent is instead a birth parent because of the different terms used in s 21 of the Act. This is because the reference to the man who produced the semen having no rights or liabilities in respect of a child to be born as a result of pregnancy is also used in s 19C(2) in a situation where there has been artificial insemination and the female bearing the child has a female de facto partner or a female registered partner.

[16] If it is correct that a child who is born as a result of donor semen by a man intending to become the full-time parent of the child with his male partner becomes for the purposes of the Act a birth parent; then, on that basis, there will be different meanings assigned to the same phrase in ss 19C and 21 of the Act. This is because of the interplay between those sections and s 10A of the Births, Deaths and Marriages Registration Act which allows for only two people to be registered as parents in the birth certificate. In the case of s 19C of the Act that would be the mother of the child and her female partner.

[17] The better view then is that it cannot be that a semen donor in a case such as this is a birth parent within the meaning of the Surrogacy Act. The interpretation that fits both the Status of Children Act and the Births, Deaths and Marriages Registration Act is that a birth parent by definition is a person other than an intended parent. This means that once a person has entered into a surrogacy agreement as an intended parent they are excluded by the definition in s 8(3) of the Surrogacy Act from being a birth parent. This does not take away from the fact that they are a biological parent but accords with the provision that they have no rights or liabilities as a result of the donation of the sperm."

The clear point needs to be made, if it is not obvious, that who is a parent remains an uncertain and evolving area of law, as legislators and judges play catch up with advances in society and medical society, where you are at the forefront.

Criminality of going overseas for surrogacy

There are four places in the world that make it absolutely plain that undertaking a commercial surrogacy journey overseas is a criminal offence back home:

- Hong Kong;
- Queensland;
- New South Wales;
- ACT.

It is an offence in Queensland, New South Wales and the ACT to enter into or to offer to enter into a commercial surrogacy arrangement, with a maximum penalty varying between 1 to 3

years imprisonment. The time for prosecution varies, between 1 year in Queensland and the ACT and no time limit in New South Wales.

Queensland also makes it an offence to give or receive consideration under a commercial surrogacy arrangement, again extending to overseas. Again, there is a one-year limitation period. Because the agreement would be entered into at the beginning of the process and the last payment would be made at or about the time that the child is delivered, and a surrogacy journey can last between 18 months and 4 years, this means that in Queensland the limitation period in effect could be up to 5 years. To date, no one has been prosecuted under these overseas laws.

New South Wales extends jurisdiction further by saying that the offence is committed by someone who is domiciled in New South Wales. I have acted for any number of clients who have been working temporarily in places like London, Singapore or New York who were born and raised in New South Wales and consider New South Wales to be their permanent home. These clients are on the other side of the world from New South Wales, but whilst living and working overseas may nevertheless unintentionally be committing an offence back home.

It is a mistake to think that the extraterritorial laws only apply to Queensland, New South Wales and the ACT.

In the *Baby Gammy* case, Chief Judge Thackray made plain that if a party ordinarily resident in Western Australia enters into a commercial surrogacy arrangement overseas whereby one or more elements of the offence has been committed in Western Australia under its long-arm law, section 12 of the *Criminal Code 1913*, then the offence of entering into a surrogacy arrangement that is for reward is committed in Western Australia.

The *Surrogacy Act 2019* (SA) makes it an offence to enter into a commercial surrogacy arrangement. The South Australian Law Reform Institute is of the view that South Australia's long arm law, section 5G of the *Criminal Law Consolidation Act 1935* (SA) does not apply to overseas surrogacy arrangements. I share the view with Professor Allen that *"it is a matter for interpretation"*. Any South Australian resident should be careful in executing an overseas commercial surrogacy arrangement as defined under South Australian law because they *may* unintentionally be committing an offence under South Australian law.

The Surrogacy Act 2022 (NT) contains offences concerning surrogacy, including commercial surrogacy, that will apply overseas due to the long arm provisions of its Criminal Code, section 43CA.

By contrast, anyone living in Victoria or Tasmania will not be committing an offence by entering into an overseas commercial surrogacy arrangement.

Professor Allen has specifically recommended that WA laws criminalise overseas commercial surrogacy. By contrast, the SALRI review in South Australia recommended otherwise and the

Victorian ART review declined to deal with the topic, saying that it was a matter for further inquiry.

Finally…

You should expect that the law will lag behind science and society. What you and your colleagues are able to achieve is often way ahead of what our laws provide. Parliaments and regulators play catch-up. Be careful with the enormous power granted to you with your skills or you will find that the social licence given to you will be taken away, as we have seen with kneejerk reactions to perceived abuses of surrogacy in places such as India, Nepal, Thailand, Cambodia and Mexico. In India, for example, the industry was estimated to be worth up to US$1 billion per annum. Now it seems to be a case of the veritable ghost town.

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