Submission No 59

EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023

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Date Received: 12 April 2024

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Our Ref: SRP:

12 April 2024

Community Services Committee
NSW Parliament

Email: communityservices@parliament.nsw.gov.au

Dear Committee

SUBMISSION AS TO EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023

I write in support of the Bill. I support the submission by Equality Australia.

The purpose of my writing today is to address you as to the proposed amendments to the *Surrogacy Act 2010*, in schedule 19.

INDEX

PROPOSED SECTION 6A

[1] Section 6A

Insert after section 6—

6A Rights of birth mother to manage pregnancy and birth

(1) This section applies to a surrogacy arrangement despite anything 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.

An unborn child in Australia does not have a separate legal identity. Attempts by men to prevent their partner or former partner to have an abortion have been unsuccessful as a result[1]. Therefore, a surrogate in a surrogacy arrangement will have control over their body.

The *Surrogacy Act 2010* (NSW) was modelled on the *Surrogacy Act 2010* (Qld). Queensland was the first state in the nation to have a similar provision in its *Surrogacy Act*: section 16. This section came about from the recommendation of a Parliamentary committee[2]. The provision makes it plain that Parliament acknowledges and enables the autonomy of the birth mother in managing the pregnancy and childbirth. She has control over her body.

New South Wales is an outlier in not having such a provision. It is a mystery to me as to why that provision was not taken up at the time of the enactment of the Act.

Since then, I and others have successfully advocated for these provisions to be in State and Territory *Surrogacy Acts*. Section 16 of the Queensland Act has been replicated in Tasmania in 2012 [3], South Australia in 2019 [4], Victoria in 2021 [5], and the Northern Territory in 2022 [6].

Currently the Western Australian Government has drafted a Bill which has not yet been tabled before that Parliament concerning replacing its *Surrogacy Act 2008* (WA). I do not know whether there is a similar provision in that Bill.

Currently the *Parentage (Surrogacy) Amendment Bill 2023* (ACT) is before the Legislative Assembly. Proposed section 28D provides:

> *"28D. Rights of Birth Parent*
>
> *A birth parent has the same rights to manage their pregnancy and birth as any other pregnant person."*

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[1] *K v T* [1993] 1 Qd R 396; *Attorney-General ex rel. Kerr v. T* [1983] 1 Qd R 404; *Attorney-General for the State of Queensland, ex rel. Kerr v T* (1983) 57 ALJR 285; *F & F Injunctions* [1989] FamCA 41 and *Talbot & Norman* [2012] FamCA 96.

[2] Report, *Investigation into Altruistic Surrogacy Committee*, Queensland Parliament, 2008, p.69.

[3] Section 11, *Surrogacy Act 2012* (Tas).

[4] Section 16 *Surrogacy Act 2019* (SA).

[5] Section 44A *Assisted Reproductive Treatment Act 2008* (Vic).

[6] Section 10 of the *Surrogacy Act 2022* (NT).

Since 1988, I have seen a small number of domestic surrogacy journeys where the intended parents have sought to dictate to the surrogate how she can manage her pregnancy and childbirth. Thankfully that conduct is uncommon. In one appalling case, the surrogate wanted to have one person with her whilst she was subject to a c-section. The intended parents sought to dictate who should be in attendance and that the birth (which after all was an invasive medical procedure) should be filmed (which she opposed, as she wanted to retain whatever dignity and privacy she could at such a moment).

I have always insisted, wherever my clients have undertaken surrogacy in Australia, that there be a clause of similar ilk in the agreement, whether it be part of the statute law or not. I will never forget the first surrogate that I acted for who had that clause to that effect in the agreement. She wept tears of joy that it was clearly stated in black and white, and supported by Parliament in that case (as she was a Queensland surrogate) that she had control over her own body.

THE *"FAILED EXPERIMENT"*

[2] Section 11 Geographical nexus for offences

Omit the section.

The objective data shows that the extraterritorial ban does not work.

The numbers

Between 1 July 2010 and 30 June 2023, 2,769+ children have been born overseas via surrogacy to Australians. On a per capita basis, 869 or 31.4% of those children born overseas via surrogacy were to residents of NSW. The number of children born overseas via surrogacy to residents of ACT, NSW and Queensland over that period is 1,470, or 53.1% on a per capita basis. There have been no prosecutions for surrogacy offences in the ACT[7], NSW or Queensland in that time.

> *"If you watch animals objectively for any length of time, you're driven to the conclusion that their main aim in life is to pass on their genes to the next generation. Most do so directly, by breeding. In the few examples that don't do so by design, they do it indirectly, by helping a relative with whom they share a great number of their genes. And in as much as the legacy that human beings pass on to the next generation is not only genetic but to a unique degree cultural, we do the same. So animals and ourselves, to continue the line, will endure all kinds of hardship, overcome all kinds of difficulties, and eventually the next generation appears."*

Sir David Attenborough, *The Trials of Life* (1990)

"A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who other than the taxpayers is obligated to provide maintenance and support for the child. These cases will not go away."[8]

[7] https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/2414840/Final-Inquiry-into-the-Parentage-Surrogacy-Amendment-Bill-2023.pdf at [2.24].

[8] *In re marriage of Buzzanca* (1998) 61 Cal. App. 4th 1412 at 1429.

Australia has had a long and difficult history in how to regulate surrogacy. In 1988, the first litigated surrogacy case, *Baby M*[9], was heard in New Jersey, and made headlines around the world. A husband and wife who were unable to have children entered into a contract with a woman (Mary Beth Whitehead), for her to be the surrogate and to be paid a fee.

The child was born, but the deal fell apart. Ms Whitehead argued that she was the parent and the child should live with her. It was a traditional surrogacy journey, i.e., Ms Whitehead was the genetic mother. In those days, gestational surrogacy journeys were rare. Now, most surrogacy journeys (it's hard to put a figure on it, but my best estimate would be 95% in Australia) are gestational with the balance being traditional. The New Jersey Supreme Court held that the agreement was void, but that the child should live with the intended father and his wife, as it was in the child's best interests, given that the intended father was the genetic father.

A few months later, there was the first IVF surrogacy journey in Australia in which a child was born in Victoria with her mother's sister being the surrogate and the child being conceived from her mother's egg fertilised by sperm from a donor[10].

The combination of these two events resulted in an uproar so that every State in Australia legislated in some form or another against surrogacy.

The most extreme example was in Queensland with the enactment of the *Surrogate Parentage Act 1988* (Qld). That Act criminalised all forms of surrogacy, whether gestational, traditional, commercial or not, whether occurring within Queensland, or outside Queensland if undertaken by anyone ordinarily resident in Queensland.

Queensland is the first place in the world to have legislated to criminalise surrogacy extraterritorially.

Ms Warner MLA stated that the Opposition was opposed to that extraterritorial provision:[11]

> *"The reason that the opposition seeks the amendment is that the second part of the clause attempts to use Queensland law in an extraterritorial sense, that is, to chase the residents of Queensland all over the other Australian States and perhaps all over the world to try to limit their activities according to the norms that apply in this State ... It seems that the Queensland Government has a desire to proclaim almost anybody a Queenslander.*
>
> *The Opposition also has difficulty accepting the term 'ordinarily resident in Queensland'. What does that term mean? Does it apply to a person who goes away for a week, two weeks, three weeks or a year? How will those matters be determined. I suspect that the clause will place citizens in a quandary about their rights and circumstances referred to in clause 3.*
>
> *I wish to point out that in virtually every State in Australia, the question of surrogacy is banned. Therefore, clause 3 is actually unnecessary. It sets a poor precedent and is likely to be misinterpreted and create confusion."*

Mr Wells, also a member of the Opposition and later Attorney-General stated in support of Ms Warner:[12]

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[9] *In re Baby M*, 537 A.2d 1227, 109 N.J. 396.

[10] https://www.smh.com.au/national/nsw/we-need-to-talk-about-surrogacy-a-lifelong-friendship-and-a-mission-for-change-20230808-p5durw html .

[11] Hansard, 7 September 1988, p682.

"The clause as it stands would have the effect to making Queenslanders subject to Queensland law irrespective of where they were in Australia. If a Queensland resident went to Victoria or South Australia to legally undergo an operation similar to the one undergone in the Kirkman case and then returned to Queensland, in principle, that person could be thrown into gaol for three years. The legislation is silent about what would happen to the child who was born as a result of that act, an act which was perfectly legal in the place where it was carried out … The Act is silent about what would happen to the child. I do not know whether the child would be thrown in gaol with its mother or it would be given its liberty.

This Committee is debating a clause which gives extraterritorial affect to a Bill which carries a penal provision. To give extraterritorial affect to a clause such as that is contrary to the spirit of common law, contrary to the spirit of the statute law of Queensland and contrary to sound policy, and is a symptom of a degree of legal paternalism as creeping into this Parliament. It is creeping in by virtue of the fact that later in this section the Government will attempt to introduce provision into the Criminal Code which will give extraterritorial affect to the determinations of this Parliament …[13]

Honourable members will be aware that Queensland Criminal Code was drawn up by Sir Samuel Griffith. In a letter, he said –

> *'In consequence, perhaps, of the insular position of England, the common law appears to contain no provision as to the punishment of an offender in a case where several acts or events are necessary to constitute an offence, and where some only of these acts or events occur within the jurisdiction, the rest occurring out of the jurisdiction; such, for instance, as the case of a man who, standing in Queensland territory, shoots a man standing in New South Wales …'*

He went on to say that the Criminal Code that he was drawing up was designed to cope with cases like that, cases that involved a man standing in one State and shoots somebody in another or in cases where somebody does something that has an effect in another State or vice versa. That indicates the extent to which the penal law of Queensland, as conceived by Sir Samuel Griffith, was prepared to countenance this sort of extraterritorial reality. This legislation goes very far beyond that. It goes to the extent of saying that somebody who does something in another State, which is perfectly legal in that State will nevertheless be pursued by Queensland law… A Parliament that constantly enacts provisions that it cannot enforce will bring itself into disrepute. How precisely will the Government enforce a provision that says that something that is legal in another State, but is illegal in Queensland, will be illegal nevertheless? How does the Government intend to override the laws of another State? How will the people be apprehended, unless they return to Queensland? It does not make sense. The Government does not have the apparatus to do that. Does it intend to send Queensland Police down to Victoria, South Australia or wherever it is to make sure that Queensland law is not contravened? The law is not enforceable. Worse than that, it cannot be made universal. If a Government takes a proposition such as this one that imports extraterritoriality; if it says, 'Queenslanders have no right to do this and, what is more, they have no right to do it anywhere'; and if other States do exactly the same thing, what will happen is that one State will have legislated that a person has a right to do something and that he has the right to do it anywhere and another State will have legislated the person does not have a right to do something and that it cannot be done anywhere. How

[12] Hansard 7 September 1988 pp683-684.
[13] Hansard 7 September 1988 p685.

will that work? That will lead to legal chaos. It just cannot be made universal." (emphasis added)

Following the enactment of the *Surrogate Parenthood Act 1988* (Qld), these extraterritorial provisions have been copied in:

- The ACT, with the enactment of the *Parentage Act 2004*.
- Hong Kong in 2007, with amendments to the *Human Reproductive Technology Ordinance*.
- Queensland again, with the repeal of the *Surrogate Parentage Act 1988* and the enactment of the *Surrogacy Act 2010*.
- NSW in 2011 with the commencement of the *Surrogacy Act 2010* (NSW).

This Queensland disease has now moved to Italy. There is currently a Bill before the Senate in Italy where the extreme right wing Italian Government, seeking to target gay couples undertaking surrogacy[14], has put a Bill before that Parliament to criminalise Italian citizens who undertake surrogacy overseas[15]. It is widely seen that that Bill will be evaded by heterosexual couples who can claim that the wife became pregnant overseas. The clear focus of that Bill is to target gay couples undertaking surrogacy overseas.

I am informed by a colleague in Ireland that there is now a similar move proposed in Ireland. Ireland is considering enacting surrogacy laws and there has been some view that these laws have an extraterritorial provision.

These laws do not work. They have never worked, as predicted by Mr Wells. A Parliamentary committee which reviewed altruistic surrogacy in Queensland in 2008 noted that in the intervening 20 years there had been five prosecutions in Queensland. None of them had led to imprisonment. In most cases, the charges were dismissed and no conviction was recorded. In one case a woman received a good behaviour bond for her role in arranging a surrogacy.[16] As far as I am aware, all of them concerned domestic surrogacy and none of them concerned overseas surrogacy.

There have been no prosecutions since commencement under the:

- *Surrogacy Act 2010* (NSW)
- *Surrogacy Act 2010* (Qld)
- *Parentage Act 2004* (ACT)
- *Human Reproductive Technology Ordnance* (HK).

Hong Kong

I am told by Hong Kong colleagues how police there attempt to enforce its overseas commercial surrogacy ban. After the application for the permit for the child to live in Hong Kong is made (and the parent has disclosed to the government that the child was born via surrogacy) the parents must attend the police station for an interview. If police are polite, they ask through the solicitor

[14] https://www.politico.eu/article/italy-surrogacy-giorgia-meloni-erode-lgbtq-rights/.
[15] https://www france24.com/en/live-news/20230726-italian-mps-back-surrogacy-ban-on-couples-going-abroad.
[16] Report, Investigation into Altruistic Surrogacy Committee, Queensland Parliament, 2008, p.9.

for the parent to attend at a suitable time. If impolite, they attend at the parent's home and arrest them.

After the formalities to confirm the identity of the parent occur, and the interview commences, the parent claims the right to silence. At this point, the interview ends. The parent is not prosecuted.

If the extraterritorial provisions were to be enforced, NSW Police would have to be dispatched overseas to investigate. Overseas police forces would not render substantial or possibly any assistance- as what occurs overseas is legal. The surrogate, who is presumably proud of their role, cannot be compelled to take part, and would be unco-operative, as would the surrogacy agency, lawyer and clinic. One could not imagine the taxpayers of NSW sending police over on what may be seen to be junkets at taxpayers' expense, when there are perceived to be many more pressing demands on police resources.

How this provision was enacted in New South Wales happened at the last minute. There had been, along with the other States, a surrogacy inquiry, in the case of New South Wales, in the Upper House. There was no discussion or recommendation in the Upper House inquiry about there being an extraterritorial ban[17]. Nor was there any proposal by the Government in response to that report that there be an extraterritorial ban[18].

There was nothing in the second reading speeches that indicated that there were would be an extraterritorial ban[19]. That ban occurred following a last-minute amendment by the then Minister in the third reading stage. That proposal had had no community consultation whatsoever. It had not been flagged by the Government anywhere. The Bill, with the amendment, passed within 24 hours.

Two years later, in 2012 I presented about surrogacy to New South Wales MPs. Several of them told me that they felt that they were opposed philosophically to the proposed ban but that they felt that if they voted against the proposed ban, that they would be voting against surrogacy altogether. They supported that there be a law about surrogacy, so, as a result, reluctantly, they agreed to the change.

In 2014, following many media reports about difficulties with overseas surrogacy, the then heads of Australia's family law system, Chief Justice Diana Bryant of the Family Court of Australia and Chief Judge John Pascoe of the Federal Circuit Court of Australia both called for a repeal of these laws. Chief Justice Bryant said:

> *"It's pretty clear that no one's going to take any action. It's foolish to have laws that you are not going to enforce. You are better off repealing them."*

Chief Justice Bryant and Chief Judge Pascoe said:

> *"We are concerned about the inconsistency of Australian laws where overseas commercial surrogacy is illegal in some states but not in others. Where it is illegal to enter into a commercial surrogacy arrangement overseas, governments are apparently unwilling to enforce existing laws.*

[17] Standing Committee on Law and Justice, *Legislation on altruistic surrogacy in NSW, report 38*, NSW Parliament, May 2009.
[18] Letter by Attorney-General Hatzistergos to the Standing Committee on Law and Justice, 17 December 2009.
[19] Second reading speech of the Hon. John Hatzistergos, 21 October, 2010.

> *Courts being asked to make parenting orders are placed in a difficult position where there is clear illegality by the Australian "parents" but there is uncertainty about whether any action will be taken by the relevant authorities. Parents who have acted in good faith should not be left in legal limbo where their status as parents is unclear as is currently the case under state and federal laws.*
>
> *In our view, if governments do not want to enforce these laws, they should be repealed."*

At that time, a review was being undertaken by the Department of Justice as to the *Surrogacy Act*. That review, reported in 2018[20], noted the difficulties in prosecution of this offence[21] but called upon the Commonwealth to show leadership.

In 2015 the House of Representatives conducted an informal surrogacy inquiry, followed in 2016 by a formal surrogacy inquiry. It rejected an extraterritorial ban. The Committee stated[22]:

> *"1.71 The evidence before the Committee indicates that the extra-territorial offences in these States have not deterred intended parents from accessing commercial surrogacy services, and no one has ever been prosecuted under those laws.*
>
> *1.72 The Committee received evidence from many Australians who have entered into surrogacy arrangements both in Australia and overseas. Their desire to be parents is powerful and in most cases they have come to surrogacy only after exhausting every other option available to them.*
>
> *1.73 The factors which lead people to pursue offshore commercial surrogacy arrangements are complex and each family or individual is faced with a unique set of circumstances. However, submissions from those who have made the choice to engage offshore commercial surrogacy services raised a number of common reasons for doing so.*
>
> *1.74 Many submitters said that they considered offshore surrogacy because it was very difficult to find a woman to act as the birth mother in Australia. Intended parents attributed this difficulty to Australia's laws on commercial surrogacy and also to the prohibition on intended parents or prospective surrogates advertising.*
>
> *1.75 In addition, submitters said that they value the legal certainty that offshore commercial surrogacy arrangements can provide. In many overseas countries, surrogacy agreements are legally enforceable, and there are predictable outcomes in terms of parentage. By contrast, surrogacy agreements are not binding in Australia and establishing parentage relies on the consent of the surrogate.*
>
> *1.76 Some submitters said that they found the differences between State and Territory laws confusing, and that the different rules around compensation of surrogates caused uncertainty. Offshore commercial surrogacy was, by comparison, less difficult.*
>
> *1.77 Finally, some Australian jurisdictions prohibit same-sex attracted individuals or couples from engaging in domestic surrogacy. Offshore commercial surrogacy is often the only family formation option available to people affected by this prohibition."*

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[20] NSW Department of Justice, Statutory Review: Surrogacy Act 2010, July 2018.
[21] At [3.58].
[22] https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/243_Reps_Committees/SPLA/Surrogacy_Inquiry/FullReport.pdf?la=en&hash=72CD8BA7B391048191998CAF827D3EE22DD6722B .

We are now eight years later, and the number of prosecutions remains the same- zero.

The Committee did not recommend an overseas ban, as it would deny the ability of people to become parents, and was unworkable:

> *" 1.110 Offshore commercial surrogacy is an option considered by many Australians who are unable to have children naturally. Offshore surrogacy can offer more certainty in relation to legal and parentage status than domestic altruistic surrogacy arrangements, and this is clearly regarded as a benefit by Australians seeking to use surrogacy services.*
>
> *1.111 In addition, offshore commercial surrogacy may be the only option available to Australians considering surrogacy. Finding someone willing to be the birth mother to their child in altruistic surrogacy arrangements can be difficult. Moreover, some Australians do not meet the eligibility requirements in their State due to their sexuality or personal circumstances.*
>
> *1.112 The Committee notes the objections of submitters who oppose all forms of surrogacy on ethical grounds. However, given that there is no reasonable prospect of a worldwide ban on commercial surrogacy in the near future, the Committee must focus on how the potential risks and harms of international commercial surrogacy can be minimised.*
>
> *1.113 The evidence is clear that extra-territorial offences for engaging in commercial surrogacy have not worked to deter Australians from travelling overseas to use surrogacy services. In the absence of a consistent national ban, credibly enforced, there is little likelihood that this will change, and Australians will continue to use offshore commercial surrogacy services….*
>
> *1.116 Clearly, the current Australian regulatory regime in relation to offshore commercial surrogacy is imperfect. The extra-territorial laws enacted by Queensland, New South Wales, and the Australian Capital Territory do not appear to be deterring people from travelling overseas for surrogacy.*
>
> *Further, the evidence provided to this inquiry by the Attorney-General's Department, DFAT and DIBP shows no desire to manage the approximately 250 Australian families who enter into offshore commercial surrogacy arrangements, even when they do so in high-risk jurisdictions. This situation is far from ideal.*
>
> *1.117 Consequently it is the Committee's view that the Commonwealth Government should conduct a review of its current laws, regulations and policies as they relate to offshore surrogacy and consider additional options to identify ways in which it may better protect the rights of birth mothers and the children they carry on behalf of Australian citizens. The aim of the review should be to ensure that Australians who broker, facilitate or engage in offshore surrogacy arrangements are aware of the human rights risks those arrangements may pose."*

In 2018, the *Gorton Inquiry* which concerned surrogacy and ART in Victoria was asked, outside its terms of reference, for there to be an extraterritorial ban. It declined to deal with the issue.[23]

[23] https://content.health.vic.gov.au/sites/default/files/migrated/files/collections/research-and-reports/a/art-review-final-report.pdf at p.138-9.

In 2018, the South Australian Law Reform Institute in considering what surrogacy laws there should be in that State considered that there not be an extraterritorial ban under that State's laws[24]. SALRI noted a difference of views about whether or not there should be extraterritorial offences[25]:

> *"At the Roundtable Expert Forum, participants expressed various views on whether extra-territorial offences should apply to those seeking to engage in, or negotiate, commercial surrogacy contracts. Some participants supported such offences, citing the need to reflect the policy objective that commercial surrogacy is unlawful and prohibited in South Australia. Such offences were said to reflect and give effect to the policy that overseas commercial surrogacy is undesirable and should be discouraged, especially in unregulated 'Wild West' jurisdictions. Others noted that such extra-territorial offences are ineffectual and unhelpful. It was noted that in the States where such offences exist (New South Wales, the Australian Capital Territory and Queensland), no one has ever been prosecuted. It was also said that criminalising this conduct could keep surrogate families and arrangements secretive and underground.*
>
> *A similar diversity of views and reasoning emerged in SALRI's wider consultation."*

I was then cited by SALRI[26]:

> *"Mr Page explained that 'history demonstrates that trying to stop (by criminal sanction) people going overseas for surrogacy does not work'. Mr Page noted that the Australian Capital Territory, New South Wales and Queensland extraterritorial offences had never led to any prosecutions, even when apparent clear cases had been referred to the DPP for consideration for prosecution by the Family Court. He said the DPP is likely to have more pressing things to focus on. Mr Page noted these offences should either be enforced or repealed and 'don't have a mockery of the law'. Mr Page raised what real sanction would ever be imposed for a parent charged with breaching the extraterritorial offence as it could leave the child born as a result of surrogacy without a parent. Mr Page also noted these offences can be readily evaded by the intending parents moving (or appearing to move as more than one party noted to SALRI) interstate where such specific laws do not exist. Mr Page said that such offences are unhelpful in leading to secrecy and discouraging transparency and any such parents from coming forward."*

SALRI concluded that extraterritorial offences should not be introduced into South Australia *"in light of their ineffectual nature"*:

> *"SALRI accepts the strong concerns that have been expressed about international commercial surrogacy, but it considers that any specific extraterritorial surrogacy offence is inappropriate and ineffectual. Such laws have not discouraged Australians from using commercial surrogacy overseas. It is notable that no person has ever been prosecuted in Australia for international commercial surrogacy, not even cases referred to the DPP by the Family Court for consideration of whether a prosecution should be instituted against the parents who had contravened the extraterritorial offences. The State authorities, including SAPOL, are likely to lack the role, resources, specialised expertise and, one suspects, inclination (given their many other demands) to effectively deal with international commercial surrogacy. The notion of SAPOL officers travelling to Kiev or India or Cambodia to gather evidence or seeking or obtaining effective co-operation from overseas authorities is highly unlikely…*

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[24] https://law.adelaide.edu.au/system/files/media/documents/2019-02/salri_surrogacy_report_oct_2018_0.pdf .
[25] At [12.22.2]-[12.22.3].
[26] At 12.2.8.

SALRI also notes the view in consultation that such extraterritorial offences are readily evaded by parties moving address or appearing to move address. Finally, SALRI notes the powerful view in consultation that such extraterritorial offences are unhelpful in leading to secrecy and discouraging frankness and parties coming forward.

In any event, SALRI considers that any such offshore commercial surrogacy offence is better dealt with at a national level. It is open to the Commonwealth, given the wide scope of its external affairs constitutional power and the wide range of existing offshore Commonwealth offences, to outlaw recourse by Australians to commercial surrogacy overseas if it so chooses. The national authorities, especially the Australian Federal Police, have the role and specialised expertise to more effectively deal with and enforce such an offshore offence than the State authorities."

The Commonwealth has chosen to not legislate an extra-territorial ban.

In 2022, the Northern Territory Parliament in enacting the *Surrogacy Act 2022* (NT) did not have an extraterritorial ban. I was a member of the Northern Territory Government's joint surrogacy working group. The issue of whether or not there was to be an extraterritorial ban was a matter discussed by that group and, presumably, by Cabinet.

There has been a recommendation by the *Allen Review* in Western Australia in 2018 for an extraterritorial ban there. The most recent review, undertaken by the Ministerial Expert Panel into the *Surrogacy Act*, recommended that there not be an extraterritorial ban[27]:

"Extra-territorial criminal sanctions

The MEP is of the view that improving and expanding access to altruistic surrogacy in WA will reduce the demand for international commercial surrogacy. In NSW, Queensland and the ACT there are extra-territorial provisions prohibiting Australians from engaging in international commercial surrogacy. The Allan Review noted that these provisions have never been used as they are deemed not to be in the best interest of the child. Extra-territorial provisions are not recommended by the MEP for inclusion in proposed legislation for WA."

Most cuttingly, the New Zealand Law Reform Commission, when reviewing surrogacy laws there, looked at this issue and endorsed comments by New Zealand researchers that the extraterritorial ban was a *"failed experiment"*[28].

The recent inquiry into the *Parentage (Surrogacy) Amendment Bill 2023* (ACT) has recommended that the ACT Government further examine whether the criminalisation of extraterritorial commercial surrogacy is appropriate[29].

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[27] https://www health.wa.gov.au/~/media/Corp/Documents/Health-for/ART/MEP-on-ART-and-Surrogacy-Final-Report.pdf at p.45.

[28] New Zealand Law Commission, *Review of Surrogacy: Issues Paper 47*, 2021 at 1.15, where it cites: Debra Wilson and Julia Carrington "Commercialising Reproduction: In Search of a Logical Distinction between Commercial, Compensated, and Paid Surrogacy Arrangements" (2015) 21 NZBLQ 178 at 186. See also South Australian Law Reform Institute Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA) (Report 12, 2018) at [12.3.1]; and House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements (Parliament of the Commonwealth of Australia, April 2016) at [1.70]–[1.71] and [1.112]–[1.113].

[29] https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/2414840/Final-Inquiry-into-the-Parentage-Surrogacy-Amendment-Bill-2023.pdf , Recommendation 3.

Two cases were referred by the Family Court of Australia in 2011[30] to the Queensland Director of Prosecutions for investigation of overseas commercial surrogacy offences. The cases involved two couples who underwent surrogacy in Thailand. The couples were not prosecuted.

In 2012, that Court did not refer a Queensland couple who had undertaken surrogacy in Thailand to Queensland authorities. The Court accepted[31] what the Australian Human Rights Commission said:

> *"the court is faced with having children in front of it and needs to make orders that are in the best interests of those children, and at that stage it's probably too late to ask whether – or to inquire into the legality of the arrangements that had been made. The court really needs to take children as it finds them."*

The Commission was critical of the judge in the earlier case not recognising the parentage of the child born in Thailand through surrogacy, on the basis of concerns that the intended parents had engaged in commercial surrogacy overseas in breach of Queensland law; as to not recognise the parentage was not consistent with the children's best interests or the *UN Convention on the Rights of the Child*.

In the words of the Court[32]:

> *"Lest it be overlooked, irrespective of how State law views the applicant's actions, the children have done nothing wrong."*

In 2021 the Family Court of Australia[33] made a referral to the NSW Commissioner of Police for investigation of offences under section 8 of the Act (commercial surrogacy). There were no prosecutions.

OVERSEAS SURROGACY

When Australians undertake surrogacy overseas, they must, on making an application for Australian citizenship by descent, tell the Australian Government as to whether or not the child was born through surrogacy. The Australian Government collates that data, even as to the countries in which the child was born. There are two small groups of children born overseas through surrogacy who escape that data:

- Some heterosexual couples lie to the Australian Government about how their child was conceived. I suspect that number is very small, because experience has taught me that officers of the Department of Home Affairs are rigorous in finding out the truth about how the child was conceived. They demand, for example, the production of medical records in cases where they are suspicious that surrogacy has occurred.

- There are a small number of visa holders living in Australia who have undertaken surrogacy overseas. Those children will necessarily be known to the Department of Home Affairs, but their births will not be collated in the data held by the Australian Government as to children who have applied for Australian citizenship by descent who have been born via surrogacy overseas.

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[30] *Findlay & Punyawong* [2011] FamCA 503; *Dudley & Chedi* [2011] FamCA 502. In the latter case, the couple had previously come to the Family Court seeking orders: *Dennis & Pradchaphet* [2011] FamCA 123. The judge in the earlier case had not referred them.

[31] *Ellison & Karnchanit* [2012] FamCA 602 at [87].

[32] At [92].

[33] *Seto & Poon* [2021] FamCA 288.

For a number of years, I have undertaken Freedom of Information searches of the Department of Home Affairs as to surrogacy births overseas.

Data on the number of domestic surrogacy births is much harder to come by. The New South Wales Supreme Court, for example, does not publish data as to the number of parentage orders made under the *Surrogacy Act 2010*. It would be extremely helpful if it did so. No Registrar of Births, Deaths and Marriages anywhere in Australia collates data as to the number of children born through surrogacy – although that data would be available to them. Again, it would be very helpful if they did.

The sources of data for Australian surrogacy births come from:

- The Childrens Court of Queensland for the number of parentage orders made there, available through its annual reports.

- In Victoria, from the Victorian Assisted Reproductive Treatment Authority in its annual reports as to the number of children born in Victoria via surrogacy, and from the County Court of Victoria in its annual reports as to the number of parentage orders made there.

- From the Reproductive Technology Council of Western Australia for the number of children born via surrogacy there, shown in its annual reports, and from the Ministerial Expert Panel report (approximately one child a year).

- Through the Australian and New Zealand Assisted Reproductive Database, which comprises data sent by IVF clinics in Australia and New Zealand to the Fertility Society of Australia and New Zealand Limited[34], collated in an annual report (ANZARD) prepared by the University of New South Wales. There is data collated on the number of children born through gestational (but not traditional) surrogacy in Australian and New Zealand IVF clinics. Unhelpfully, ANZARD does not directly have a breakdown of Australia and New Zealand data. It does provide separate data as to the number of New Zealand children born via surrogacy and from there it is possible to calculate the number of children born via gestational surrogacy in Australian IVF clinics.

Data provided by the Australian Government as to children who have applied for Australian citizenship by descent and born via surrogacy, is collated on a financial year basis.

Data collated by ANZARD is collated on a calendar year basis, and is typically two years old.

WHAT DOES THE DATA TELL US?

Back in 2010 there were very few Australians undertaking surrogacy. Between 2010 and 2012, there was an extraordinary increase in the number of children born overseas through surrogacy. The simple reason for that was that following the approach taken by the New South Wales Minister, there was great anger by intended parents who felt betrayed, and then a media firestorm. Surrogacy advocates started running seminars to help intended parents undertake surrogacy (including overseas). The media firestorm meant that many people who did not know previously that they could undertake surrogacy suddenly became aware. I for one was inundated with work.

Between 1 July 2010 and 30 June 2023, 2,769+ children have been born to Australians overseas via surrogacy, according to the Department of Home Affairs. By comparison, the number of

[34] I am a director of the Society but write this in my personal capacity.

children born via gestational surrogacy in Australian IVF clinics between 1 January 2008 and 31 December 2021 was 537.

Since 2012, typically more than 200 Australian children are born overseas via surrogacy.

The big change occurred between 2010 and 2012, as seen in **Table 1**.

Table 1: Australian children born overseas and domestically via surrogacy 2009-2023

Year	International surrogacy births	Domestic surrogacy births
2009	10	14
2010	<10	11
2011	30	19
2012	266	17
2013	244	28
2014	263	29
2015	246	44
2016	207	38
2017	164	51
2018	170	73
2019	232	55
2020	275	76
2021	223	82
2022	213	
2023	236	

From discussions I had with Queensland and NSW MPs at the time of the enactment of the respective *Surrogacy Acts*, it seems as though the extraterritorial bans were particularly designed to stop Australians going to India, which was then a major surrogacy hub. MPs were understandably concerned about potential risks to the human rights of Indian women and of the children who were born.

The ban, however, was an own goal. The number of children born to Australians via surrogacy in India is seen in **Table 2**.

Table 2: Australian children born via surrogacy in India 2009-2023

2009	<10
2010	<10

2011	<10
2012	227
2013	191
2014	108
2015	74
2016	54
2017	14
2018	<5
2019	<5
2020	<5
2021	0
2022	<5
2023	5

The change that occurred between 2010 and 2012 I attribute to what occurred in the New South Wales Parliament and the reaction to it. The slow drop that has occurred since then has not been because of any change in Australia but changes in India. By administrative means, commencing in 2012, India made it more difficult for Australians to undertake surrogacy, then from 2014 made it almost impossible for Australians to undertake surrogacy and then tightened up again in 2016. By 2021, India had legislated so that only Indians could undertake surrogacy. The small number of children born, five, in 2023 in India, I attribute to Australian citizen parents who are in a unique category seen in India as overseas citizens of India (OCI's). India does not recognise dual citizenship, however, Indians who are OCI's have a special category in India. It would appear from the 2023 births that a small number of children are being born to OCI's who are Australian citizens in India.

In recent years, in rough terms, for every child born in Australia via surrogacy, three are born overseas.

PROPOSED CHANGE TO SECTION 18(2)(b)

[3] Section 18(2)(b)

Omit the paragraph. Insert instead—

(b) the Court is satisfied, having regard to the circumstances of the birth parent or parents, the intended parent or parents and the surrogacy arrangement, that it is in the best interests of the child to make the parentage order.

The proposed change to section 18(2)(b), concerning the making of a parentage order, is to focus, rather than on exceptional circumstances, on the best interests of the child.

This change will make it easier for the court to make parentage orders. This is clearly the right focus, given Australia's international obligations. Those international obligations include under the *1989 UN Convention on the Rights of the Child*:

- Article 3.1

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

  2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."

- Article 5

  "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

- Article 6.2

  "States Parties shall ensure to the maximum extent possible the survival and development of the child."

- Article 7

  "1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents."

- Article 8.1

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

- Article 16

  "1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

  2. The child has the right to the protection of the law against such interference or attacks."

The *International Covenant on Civil and Political Rights* states, relevantly, in article 2.1:

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 7 provides:

> *"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
>
> *2. Everyone has the right to the protection of the law against such interference or attacks."*

Courts in England and in Australia have held that under article 8 of the *UN Convention*, the child's right to identity includes the right of identity with the intended parents[35].

The *Inter-American Convention on Human Rights* was considered by the Inter-American Court of Human Rights in *Murillo v Costa Rica* [2012].

Article 11 of the *American Convention* is in similar terms to Article 7 of the ICCPR. The court said[36]:

> *"Article 11 of the American Convention requires the State to protect individuals against the arbitrary actions of State institutions that affect private and family life. It prohibits any arbitrary or abusive interference with the private life of the individual, indicating different spheres of this, such as the private life of the family …*
>
> *The scope of the protection of the right to private life has been interpreted in broad terms by the International Human Rights courts, when indicating that this goes beyond the right to privacy. The protection of private life encompasses a series of factors associated with the dignity of the individual, including, for example, the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationship. The concept of private life encompasses aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings in the outside world. The effective exercise of the right to private life is decisive for the possibility of exercising personal autonomy on the future course of relevant events for a person's quality of life. Private life includes the way in which individuals views himself and how he decides to project this view towards others, and is an essential condition for the free development of the personality. Furthermore, the Court has indicated that motherhood is an essential part of the free development of a woman's personality. Based on the foregoing, the court considers that the decision of whether or not to become a parent is part of the right to private life and includes, in this case, the decision of whether or not to become a mother or father in the genetic or biological sense."*

Further,[37]

> *"The court has already indicated that the family's right to protection entails, among other obligations, facilitating, in the broadest possible terms, the development and strength of a family unit."*

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[35] *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam) at [27], [31]; *KRB & BFH v RKH & BJH* [2020] QChC 7, in which I appeared.
[36] At [142]-[143].
[37] At [145].

No one is more vulnerable than a child. The child's identity should be able to be established without difficulty. The proposed change will make it easier for a parentage order to be made so that the child's identity can be properly established.

The making of a parentage order is a profound development in the life of a child. An English court said about the equivalent to the equivalent in the UK to section 18:

> *"Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family. As Ms Isaacs correctly puts it, this case is fundamentally about Xs identity and his relationship with the commissioning parents. Fundamental as these matters must be to commissioning parents they are, if anything, even more fundamental to the child. A parental order has, to adopt Theis J's powerful expression, a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in Re J (Adoption: Non-Patrial) [1998] INLR 424, 429, referred to as "the psychological relationship of parent and child with all its far-reaching manifestations and consequences." Moreover, these consequences are lifelong and, for all practical purposes, irreversible: see G v G (Parental Order: Revocation) [2012] EWHC 1979 (Fam), [2013] 1 FLR 286, to which I have already referred. And the court considering an application for a parental order is required to treat the child's welfare throughout his life as paramount: see in In re L (A Child) (Parental Order: Foreign Surrogacy) [2010] EWHC 3146 (Fam), [2011] Fam 106, [2011] 1 FLR 1143. X was born in December 2011, so his expectation of life must extend well beyond the next 75 years. Parliament has therefore required the judge considering an application for a parental order to look into a distant future."*

PROPOSED OMISSION OF SECTION 23(2)

[4] Section 23 Surrogacy arrangement must be altruistic

Omit section 23(2)

The *Surrogacy Act* requires, under section 23(2) that the surrogacy arrangement must be altruistic.

The effect of the proposed amendment is that, in New South Wales, the court will be reluctant to make a parentage order for a domestic surrogacy arrangement when it has been a commercial one, but enables the court to do so if it is the best interests of the child.

Currently, the court cannot make a parentage order for a child who has been born overseas through commercial surrogacy.

That limitation has meant that the parentage of children limps along rather than is properly recognised.

For those who have undertaken surrogacy overseas where both parents are named on the birth certificate, such as in the United States, Canada, New Zealand, United Kingdom, Ukraine – that

poses little impediment for the child. When the child's daycare or school enrolment is undertaken, there ought to be no great difficulties and no embarrassment caused to the child.

Historically, however, surrogacy has occurred in these countries where only the biological father is recognised as a parent and in those marked with an asterisk, the surrogate (whether or not it is traditional surrogacy) is identified on the birth certificate as the mother:

- India
- Malaysia*
- Thailand*
- Mexico* (sometimes)[38]

From the child's point of view, by virtue of a legal fiction, the person who gave birth to the child is recognised as the child's mother, although that person has nothing to do with the child and is not recognised *by the child* as a parent.

We are not any longer dealing with newborns. Given the explosion of surrogacy births that occurred in 2012, we now have 12 year old children who will soon reach adulthood whose parentage remains limping, uncertain and unclear. Given the obligations of the State to those children, they ought to have clarity as to *their* parentage.

In the absence of any other mechanism, there should be the ability of the Supreme Court to have that parentage recognised by order. Similar processes exist in the United Kingdom, for example. Notwithstanding the natural concern by judges of intended parents undertaking commercial surrogacy overseas, judges in the United Kingdom have nevertheless made parental orders in those circumstances. A review of the cases in the UK indicates that many of the intended parents who underwent overseas surrogacy did not know that overseas commercial surrogacy was disapproved of in the United Kingdom.

The proposed change would be consistent with Australia's international obligations on the protection of the child and particularly, the child's right to be treated equally and the child's right to privacy and the child's right to an identity.

PROPOSED CHANGE TO SECTION 26(3)

[5] Section 26 Age and wishes of child must be considered

Omit section 26(3). Insert instead—

(3) The precondition in subsection (2) is a mandatory precondition to the making of a parentage order.

The change removes the requirement that the child must be under 18 years of age at the time the application is made. In doing so, the change proposes that a Supreme Court judge has discretion to make a parentage order concerning an adult who was born through surrogacy. Given the

[38] The position with Mexico is complex. Mexico is a federation of 31 States. As a result of a 2018 decision of the Supreme Court of Mexico, it is now possible in some States in Mexico to have both intended parents recognised on the birth certificate as the parents. However, historically in Mexico (and this practice continues in some States), the biological father and surrogate are recognised on the birth certificate as the parents.

number of children born since 2012, that day is not far off when children born through surrogacy will be adults.

There is the ability under the *Adoption Act 2000* to make an adoption order for a child over 18 when the child was being cared for by the applicant or applicants[39].

A biological or intended parent should not have to adopt their own child. If they are considering having to adopt their own child, there may be the need under the *Family Law Act* to also obtain an order from the Federal Circuit and Family Court of Australia for leave to adopt[40]. The proposed change should result in a quicker, simpler, easier and less intrusive process to obtain a parentage order from the Supreme Court than an adoption order in those circumstances.

The court would be provided, as it would with any other parentage order application, with an independent assessment as to whether or not it is in the best interests of the child that a parentage order be made.

Experience has taught me that those reports are thoroughly undertaken and in a similar way to those undertaken in adoption or under the *Family Law Act*.

I support the proposal as it upholds the human rights of the children concerned and their families and is consistent with Australia's international obligations.

ABOUT ME

I am, with my husband, a father through egg donation and surrogacy. I have also suffered infertility. My daughter was born through IVF and surrogacy in Queensland. We were one of the fortunate few who was able to have a local surrogate and a local egg donor. Most intended parents are not so lucky.

My first surrogacy case was in 1988. Since then, I have advised in over 1,900 surrogacy journeys for clients throughout Australia and at last count, 37 other countries. I have advised hundreds of clients from NSW.

I was admitted as a Solicitor of the Supreme Court of Queensland in 1997 and of the High Court Roll of Practitioners in 1989. I was admitted as a Barrister and Solicitor of the Supreme Court in South Australia in 2013. Since 1996, I have been a Queensland Law Society Accredited Specialist.

Between 2017 and 2022, I lectured in *Ethics and the Law in Reproductive Medicine* at the University of New South Wales, for which in 2019 I received a post-graduate teaching award.

In 2020, I received the inaugural Pride in Law Award.

In 2023, I received the Queensland Law Society President's Medal.

I am a Fellow of the International Academy of Family Lawyers, co-chair of its sexuality and gender identity committee, a member of its parentage committee and a member of its forced marriage committee.

I am a Fellow of the Academy of Adoption and Assisted Reproduction Attorneys, the first Fellow outside the United States and Canada. I am a member of its ART resources committee.

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[39] S.24.

[40] S.60G. See also ss. 60F(4)(a), 60HA(3)(a), 61E, 65J; *Uniform Civil Procedure Rules 2005*, r.56.8(t).

I am an international representative on the ART committee of the American Bar Association and have been in that role since 2012.

I am a director of the Fertility Society of Australia and New Zealand, the only lawyer to have ever been elected or appointed to that role.

I am a member of the All Kids Are Equal campaign.

I ***attach*** my CV. I have written and presented widely about surrogacy around the world, including for Monash University, University of Hong Kong and University of the Western Cape. I have spoken at conferences and seminars internationally and in Australia for the Family Court of Australia, the Law Societies of Queensland and South Australia, the Fertility Society of Australia and New Zealand, International Bar Association, American Bar Association, Academy of Adoption and Assisted Reproduction Attorneys and International Academy of Family Lawyers, among others.

This letter is written in my personal capacity.

I wish to be able to assist the committee in any way that I can and would be prepared to give evidence if requested.

Yours faithfully

[redacted]

Stephen Page
2023 Qld Law Society President's Medal Recipient
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family and fertility lawyers
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Email: [redacted]