

THE NEW SURROGACY PARENTAGE LAWS IN AUSTRALIA: CAUTIOUS REGULATION OR ‘25 BRICK WALLS’?

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[This article critically analyses recent law reforms that have taken place throughout Australia allowing for the transfer of legal parentage in surrogacy arrangements from the birth mother (and her partner, if any) to the ‘intended parents’. Although styled as liberalising reforms, the increasingly complex web of eligibility rules are likely to be an ill fit with the existing and future family formation behaviours of those involved in surrogacy, and may ultimately exclude more families than they assist. While surrogacy policy throughout Australia aims to prevent the exploitation of women who act as birth mothers, to prevent the commercialisation of reproduction and to protect the interests of current and future children born through these means, this article argues that the reforms are unlikely to meet these aims. The interest of children in having a legal relationship with the parents who are raising them will not be met for many, as half of the regimes exclude children conceived outside the jurisdiction and all of them exclude arrangements where payment has been made to the birth mother. Potential harms are not being prevented, but rather are being exported elsewhere through the increasing incidence of international surrogacy. A more flexible and inclusive approach to parental transfer, such as that which currently exists in UK law, is recommended.]

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I INTRODUCTION

That is what being infertile means. You have to look at every other option. Infertility makes you consider alternative ways to become parents that you would never have dreamed of. It makes you realise that giving birth does not define you as a parent and becoming a parent is more important than becoming pregnant.

Trea Burger, intended mother.¹

Because we are not our children's legal guardians we could not enrol them when they started school and when they had their tonsils out, their surrogate mother had to sign the hospital papers. ... While she is a mother of five and happy to do this for us, I worry that if anything happened [to us] the children would be legally theirs and they already have a family. ... It's been a big strain on our family life ... We just get our hopes up then they come crashing down again.

Jackie Robinson, mother of 10-year-old twin boys born through surrogacy.²

I guess in general the approach is that we are not really trying to encourage surrogacy. ... We are saying, 'We want to regulate it. We want to control it. We want to make sure that if it is done, it is done properly. We do not want to prohibit it completely, but we want to make sure that it is done in a responsible way[.]

Legal officer, WA Department of Health.³

Recent years have seen a paroxysm of inquiry and reform around surrogacy laws in Australia. In the space of just three years, reports were issued by seven public inquiries,⁴ and a specially-created federal-state government working party involving all nine Australian jurisdictions issued a discussion paper intended to 'harmonise' state approaches.⁵ In turn, this rash of interest has generated new

¹ Evidence to Investigation into Altruistic Surrogacy Committee, Parliament of Queensland, Brisbane, 8 July 2008, 54 (Trea Burger).

² Quoted in Liz Brown, 'Family's Legal Dilemma', *Lilydale and Yarra Valley Leader* (Lilydale, Victoria) 4 February 2008, 3.

³ Legislative Council Standing Committee on Legislation, Parliament of Western Australia, *Report on The Surrogacy Bill 2007* (2008) ('*Western Australian Report*') 5 [4.12].

⁴ Six of these were parliamentary inquiries: Social Development Committee, Parliament of South Australia, *Inquiry into Gestational Surrogacy* (2007) ('*South Australian Report*'); *ibid*; Legislative Council Select Committee on Surrogacy, Parliament of Tasmania, *Report on Surrogacy* (2008); Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Report* (2008) ('*Queensland Report*'); Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) ('*New South Wales Report*'); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 [Provisions]* (2008). Only one was the product of an independent law reform commission: Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (2007) ('*VLRC Report*').

⁵ See Standing Committee of Attorneys-General Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009) ('*SCAG Paper*'). Unlike countries such as the United Kingdom and New Zealand, which have unitary governments and centralised regula-

surrogacy laws in all Australian jurisdictions except the Northern Territory.⁶ Broadly speaking these reforms take place in two areas. One is the amendment of laws which had previously restricted eligibility for assisted reproductive technology ('ART'), in order to allow the use of in-vitro fertilisation ('IVF') for surrogacy in limited circumstances. The other major change, which is the focus of this article, was the introduction of state-based regimes for the transfer of legal parentage to the 'commissioning' or 'intended' parents.⁷

The stated aim of surrogacy laws in Australia has been, and remains, to prevent the exploitation of vulnerable adults, to avoid the commercialisation of reproduction and to protect the best interests of children.⁸ The values of non-discrimination and parental autonomy in family formation are less frequently articulated in the legislative principles.⁹ Although consciously styled as beneficial reforms liberalising earlier 'draconian' approaches to surrogacy, I argue that this

tors of assisted reproductive technologies ('ART'), in Australia laws on ART, surrogacy and parentage are largely in the hands of the states and have varied considerably in recent decades. Canada's federal legislation on ART was recently partially struck down as unconstitutional, but the criminalisation of paid surrogacy (s 12) remains: see *Reference re Assisted Human Reproduction Act* [2010] SCC 61. Parentage laws are in the hands of the provinces, such that Canada also faces the problem of children born through surrogacy having different parental status nationwide. Some Canadian provinces have listed intended parents in gestational surrogacy as legal parents on birth registers following legal challenges: John Seymour and Sonia Magri, 'ART, Surrogacy and Legal Parentage: A Comparative Legislative Review' (Occasional Paper, Victorian Law Reform Commission, August 2004) 43. For further comparison of Canadian and Australian surrogacy regulation, see generally Ailis L Burpee, 'Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State Regulation of Surrogacy' (2009) 37 *Georgia Journal of International and Comparative Law* 305.

⁶ *Parentage Act 2004* (ACT), commenced 22 March 2004; *Surrogacy Act 2010* (NSW), commenced 1 March 2011; *Surrogacy Act 2010* (Qld), commenced 1 June 2010; *Statutes Amendment (Surrogacy) Act 2009* (SA), commenced 26 November 2010, amending *Family Relationships Act 1975* (SA), *Births, Deaths and Marriages Registration Act 1996* (SA) and *Assisted Reproductive Treatment Act 1988* (SA); *Assisted Reproductive Treatment Act 2008* (Vic), surrogacy provisions (Pt IV) commenced 1 January 2010; *Surrogacy Act 2008* (WA), commenced 1 March 2009. The Surrogacy Bill 2011 (Tas) passed the House of Assembly on 14 April 2011, but on 14 June 2011 the Legislative Council referred the bill to committee, delaying the progress of the bill until late 2011. All references in the text of this article are to the government Bill as passed by the Assembly, however it is not known at the time of writing whether these provisions will ultimately pass into law. The Legislative Council is dominated by independent members, several of whom flagged proposed amendments in the course of debate on the referral: Tasmania, *Parliamentary Debates*, Legislative Council, 14 June 2011, 4-31,38-43.

⁷ *Parentage Act 2004* (ACT) divs 2.4-2.5; *Surrogacy Act 2010* (NSW) pt 3; *Surrogacy Act 2010* (Qld) ch 3 pt 2; *Family Relationships Act 1975* (SA) pt 2B div 3; Surrogacy Bill 2011 (Tas) pt 4; *Status of Children Act 1974* (Vic) pt 4; *Surrogacy Act 2008* (WA) pt 3. Once such a transfer is granted by a state or territory court, the resulting relationship is recognised by the *Family Law Act 1975* (Cth) through s 60HB. The status of 'parent' and 'child' in FLA is then imported into several other federal Acts which adopt the *Family Law Act* definition. Note that, while the terminology used in the legislation varies, I use 'intended parents' and 'birth mother' throughout this article, both for consistency and because these terms are role-based descriptions which carry less connotation of value judgment than terms such as 'commissioning parents', 'substitute parents', 'arranged parents' and 'surrogate mother'.

⁸ See, eg, *Surrogacy Act 2010* (NSW) ss 3, 8; *Surrogacy Act 2010* (Qld) s 5; *Assisted Reproductive Treatment Act 2008* (Vic) ss 5(a)-(b), 44.

⁹ But see *Surrogacy Act 2010* (Qld) ss 6(2)(b), (d); *Assisted Reproductive Treatment Act 2008* (Vic) s 5(e). The *New South Wales Report* did articulate a principle of minimal interference, but it was neither encapsulated in a recommendation nor carried into the legislation: *New South Wales Report*, above n 4, 67 [4.92].

new era may offer little benefit to children born through surrogacy. This is because the increasingly complex web of eligibility rules, developed through successive reforms to pre-empt and safeguard the interests of children, appears to be an ill fit with the family formation behaviours of those involved in surrogacy.

There is a major dearth of empirical data on the practice of surrogacy in Australia over past decades, with only a few small qualitative studies in existence.¹⁰ Critically, none of the inquiries generating these new laws paused to commission research on the actual experience of surrogacy in Australia. This lack of evidence was compounded by the fact that, with the exception of Victoria,¹¹ the reform inquiries were undertaken by hastily convened parliamentary inquiries, where only six to nine months was allocated for the entire hearing and reporting process. It appears that only one birth mother gave evidence at any inquiry, and the inquiries heard from, at most, one or two intended parents who had *actually* gone through surrogacy, and between two and six individuals or couples *contemplating* surrogacy as intended parents.¹² Moreover, with the exception of the Victorian inquiry, there was no detailed consideration of the available sociological research on the experience of birth mothers and intended parents involved in surrogacy in comparable countries such as the United Kingdom ('UK').¹³

¹⁰ This limitation was acknowledged in the *Queensland Report*, above n 4, 2, 11–13. Qualitative studies include one unpublished report of interviews with 13 gestational surrogates, referred to in the *VLRC Report*, above n 4, 37, 161, 178. The Victorian Law Reform Commission ('VLRC') was also alone in addressing the international research: *VLRC Report*, above n 4, 161–2.

¹¹ In contrast to the other states, Victoria's inquiry was conducted by an established law reform commission over several years and entailed extensive consultation as well as the production of background papers and discussion papers. While the other inquiries were solely focused on surrogacy, Victoria addressed ART regulation broadly, as well as adoption. Victoria nonetheless produced a very restrictive model — at least in part because the background context of ART regulation in that state has been one of highly prescriptive state control since the 1980s.

¹² The West Australian inquiry received only three submissions from those directly affected (one from a birth mother, one from a couple and one private submission): *Western Australian Report*, above n 3, 19 [4.70]. The Tasmanian inquiry heard from only one intended parent and two couples who wished to be: *Tasmanian Report*, above n 4, 10–11. It is not clear how many of the 130 written submissions received by the Queensland inquiry were from affected adults, but of the 38 people who gave oral evidence there were at least six individuals wishing to be intended parents, as well as one woman who wished to be a birth mother but was not actually involved in any arrangement: *Queensland Report*, above n 4, 18–19, 95. The South Australian inquiry heard from three couples who had children through gestational surrogacy, one couple who had children through genetic surrogacy, one woman who wished to be an intended parent, and two women who had been birth mothers: *South Australian Report*, above n 4, 9. The New South Wales inquiry received written submissions from two couples who were already intended parents, and two women who wished to be intended parents: see <<http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/V3ListSubmissions?open&ParentUNID=127CB755FE3D5304CA25749B0017C3F2>>.

¹³ See data from a set of related longitudinal studies in the UK led by Susan Golombok, including: Vasanti Jadva et al, 'Surrogacy: The Experiences of Surrogate Mothers' (2003) 18 *Human Reproduction* 2196; Fiona MacCallum et al, 'Surrogacy: The Experience of Commissioning Couples' (2003) 18 *Human Reproduction* 1334; Susan Golombok et al, 'Surrogacy Families: Parental Functioning, Parent–Child Relationships and Children's Psychological Development at Age 2' (2006) 47 *Journal of Child Psychology and Psychiatry* 213; S Golombok et al, 'Non-Genetic and Non-Gestational Parenthood: Consequences for Parent–Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3' (2006) 21 *Human Reproduction* 1918. See also numerous studies conducted by Olga van den Akker in the UK, including Olga van den Akker, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' (2003) 21 *Journal of Reproductive and Infant Psychology* 145; Olga B A van den Akker, 'A Longitudinal

Arguably, the new laws in Australia are based not on evidence of the actual behaviours or needs of families formed through surrogacy to date, but rather on largely abstract ideas and assumptions about the perils of surrogacy and how it can be ‘improved’.¹⁴

In the absence of any broadly-based empirical data on the experience of surrogacy in Australia, I undertook, as part of this research, a survey of media reports of surrogacy arrangements appearing over the period in which most of the reform was occurring. Over the 2007–10 period, the Australian media printed several hundred articles about surrogacy, which, when analysed, revealed 69 distinct families involved in surrogacy.¹⁵ These comprised:

- 42 ‘past’ arrangements, from which children have been born (with children ranging in age from 23 years to one month);
- 20 ‘current’ arrangements, which included five pregnancies (with the remainder of families either in the process of concluding agreements or trying to conceive); and
- Seven ‘future’ arrangements, where parties were pursuing surrogacy but did not have an arrangement in train with a specific birth mother.

While it is impossible to know if this reportage is in any way representative, it is unfortunately the best available data in Australia at this moment. Even as a limited media survey of those reporting their experiences publically, this source reveals more demographic information on a significantly greater number of distinct surrogacy arrangements than all of the reform inquiries put together.¹⁶ While not purporting to be comprehensive, the media survey data is used here to identify the experiences of families relating to some of the elements of surrogacy that are the focus of the current wave of regulation: in particular, the relationship status of intended parents, the relationship of intended parents to birth mother,

Pre-Pregnancy to Post-Delivery Comparison of Genetic and Gestational Surrogate and Intended Mothers: Confidence and Genealogy’ (2005) 26 *Journal of Psychosomatic Obstetrics and Gynecology* 277.

¹⁴ On the role of such assumptions in social science research, see Elly Teman, ‘The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood’ (2008) 67 *Social Science and Medicine* 1104.

¹⁵ These reports were all drawn from the Australian media databases FACTIVA and INFORMIT using the search words ‘surrogacy’ and ‘surrogate’, covering the period January 2007 to December 2010. Of these reports, 45 identified at least one person (usually an intended parent, less commonly a birth mother) by full name, in 15 there was identification by first names only, and in nine all adult parties were unnamed (of those nine reports, either the child’s first name was given or the salient facts of each arrangement differed such that it was clear that they were distinct arrangements).

¹⁶ Of the reported arrangements where parties were named, it was possible to identify only eight in which individuals or couples gave a submission or testimony to one or more of the reform inquiries: those people were Andrew and Michelle Webber, David and Denise Norman, Fiona and Robert Rushford, Laura Clark, Kerry and Clive Faggotter, Maggie Kirkman, Stephen Conroy and Trea Burger. It is interesting that surrogacy families appear more likely in this period to speak to the press than to parliamentary inquiries in the pursuit of law reform. However, as there were nine arrangements with unnamed parties in the media survey and several ‘closed’ or unnamed submissions to the inquiries, it is possible that there was more overlap between the media and reform cohorts than is readily apparent.

the role of genetic connectedness, and the incidence of payment and evasive travel. Are intended parents using their own gametes (or those of the birth mother or an egg donor)? Is money being paid to birth mothers? Are intended parents evading local law through domestic or international travel? Throughout the article I refer to the media survey and to the details of some of the families therein as a way of providing some context for reflection on the scope and applicability of the laws. I stress that while it is not known whether the reported experiences are in any way representative of surrogacy families in Australia more generally, in the continuing absence of empirical research it is also impossible to know in what way, if any, they are unrepresentative.¹⁷

This article first outlines the context of Australian laws and reforms on surrogacy over the past 30 years, before offering a critical evaluation of the new parentage regimes. Although there has never been a uniform approach to surrogacy laws in Australia to date, there have been, broadly speaking, two distinct ‘waves’ of inquiry and reform — the first in the 1980s and early 1990s, and the second in the mid to late 2000s.

II THE FIRST WAVE: MORAL PANIC

Although surrogacy has long occurred, the advent of IVF generated a range of new possibilities in terms of gestational and genetic roles. *Genetic surrogacy* (also referred to as ‘traditional’ or ‘partial’ surrogacy) involves the birth mother contributing her own egg. This means that genetic surrogacy can occur in informal circumstances through sex or home insemination, with little or no involvement from the state or the health profession. *Gestational surrogacy*, in which the birth mother has no genetic link to the child, is only possible with the use of IVF. Gestational surrogacy may occur with either the intended mother’s egg or that of an egg donor. The invention and progressive improvements of the techniques of embryo freezing and, more recently, egg freezing have also contributed to the growth of surrogacy, as they have enabled women undergoing procedures which destroy or severely impair fertility, such as hysterectomy and chemotherapy, to first harvest eggs with the intention of pursuing parenthood through surrogacy at a later date.

The first wave of Australian surrogacy reforms in the late 1980s and early 1990s¹⁸ reflected the then contemporary ‘moral panic’ over the possibilities

¹⁷ Studies undertaken in cooperation with ART clinics, for example, will over represent gestational surrogacy because there is no necessity for ART when the birth mother’s own egg is used (genetic surrogacy). Olga van den Akker suggests a marked contrast in practice of those pursuing surrogacy through IVF in clinic settings (which are almost exclusively gestational surrogacies) and those engaging in surrogacy conceptions informally: see ‘Functions and Responsibilities of Organizations Dealing with Surrogate Motherhood in the UK’ (1998) 1 *Human Fertility* 10. The Golombok study recruited surrogacy families through applicants for parentage transfer, leading to higher participation from intended parents than birth mothers: MacCallum et al, above n 13, 1335; Golombok et al, ‘Non-Genetic and Non-Gestational Parenthood’, above n 13, 1919.

¹⁸ There were eight state and three federal inquiries which made recommendations about surrogacy between 1983 and 1991: Anita Stuhmcke, ‘Looking Backwards, Looking Forwards: Judicial and Legislative Trends in the Regulation of Surrogate Motherhood in the UK and Australia’ (2004)

posed by new assisted reproductive technologies, such as IVF and the use of donor gametes. Surrogacy was seen as occupying the outer end of the threat ART presented to ‘natural’ reproduction and the nuclear family. Such views are nicely exemplified by a 1988 report of the New South Wales Law Reform Commission, which stated that surrogacy ‘denigrates the position of women in society and the process of childbirth’¹⁹ and ‘holds dangers, both for the individuals involved and for the future development of childbearing and childcare arrangements in our society.’²⁰ While only able to ascertain a handful of instances of surrogacy in Australia at that time, the Commission went on to recommend that surrogacy ‘*should be discouraged by all practicable legal and social means*’²¹ including a public education campaign ‘to heighten awareness of the dangerous implications of general acceptance of the practice.’²²

Through the 1980s and early 1990s there was considerable divergence in the states’ original tranche of legislative responses.²³ At one extreme, Queensland criminalised all forms of surrogacy, paid and unpaid,²⁴ while at the other, New South Wales (‘NSW’) did not legislate at all until 2007, when it passed minimalist ART laws prohibiting commercial surrogacy and deeming surrogacy agreements unenforceable.²⁵ Yet there were a number of key common elements in legislation around Australia, such as:

- statutory clarification that surrogacy agreements were unenforceable as contracts;
- wideranging prohibitions on advertising and on providing advice or acting as an intermediary for surrogacy;
- criminalisation of ‘commercial’ or paid surrogacy; and,

¹⁸ *Australian Journal of Family Law* 13, 23–9. The National Bioethics Consultative Committee (‘NBCC’) was alone among first wave inquiries in that it did *not* recommend various methods of prohibition and disincentive, but instead proposed that surrogacy arrangements should be permitted within a framework of government control: National Bioethics Consultative Committee, *Surrogacy Report 1* (1990); National Bioethics Consultative Committee, *Discussion Paper on Surrogacy 2 – Implementation* (1990). The NBCC reports were sufficiently ahead of their time that the committee was disbanded shortly afterwards, only to see the substance of many of its recommendations appear twenty years later in the second wave reforms.

¹⁹ New South Wales Law Reform Commission, *Artificial Conception Report 3: Surrogate Motherhood*, Report No 60 (1988) 39.

²⁰ *Ibid* 40.

²¹ *Ibid* 38 (recommendation 2) (emphasis added).

²² *Ibid* 53.

²³ For a summary and discussion of the first wave, see generally Stuhmcke, above n 18; Lindy Willmott, ‘Surrogacy: Ill-Conceived Rights’ (2002) 10 *Journal of Law and Medicine* 198; Seymour and Magri, above n 5; *VLRC Report*, above n 4, 164–5.

²⁴ *Surrogacy Parenthood Act 1988* (Qld) s 3. This legislation was the subject of widespread and sustained criticism: see, eg, Catherine Brown, Lindy Willmott and Ben White, ‘Surrogacy in Queensland: Should Altruism be a Crime?’ (2008) 20 *Bond Law Review* 1; Queensland Government, *Report of the Taskforce on Women and the Criminal Code*, Recommendation 82 (2000) <<http://www.women.qld.gov.au>>.

²⁵ See generally Malcolm Smith, ‘Reviewing Regulation of Assisted Reproductive Technology in New South Wales: The *Assisted Reproductive Technology Act 2007* (NSW)’ (2008) 16 *Journal of Law and Medicine* 120.

- in the three jurisdictions which introduced strict statutory control of access to ART (South Australia ('SA'), Victoria and Western Australia ('WA')), direct and indirect exclusions from using fertility services to attempt surrogacy with IVF.²⁶

Of the jurisdictions without legislative control of ART, Tasmania and the Australian Capital Territory ('ACT') implemented a 1991 recommendation of the Australian Health Ministers to prohibit fertility providers and other professionals from assisting with surrogacy.²⁷ This meant that NSW was originally the only jurisdiction with open access to fertility services for surrogacy.²⁸ Genetic or 'partial' surrogacy, using the birth mother's own egg and not involving IVF, was still possible everywhere in Australia except Queensland. In 1996, just two years after enacting its legislation prohibiting professional assistance with surrogacy, the ACT passed amendments such that it was then only an offence to medically assist *commercial* surrogacy.

From the late 1990s through to the mid 2000s, the Canberra Fertility Centre in the ACT and Sydney IVF in NSW became the key providers of IVF for surrogacy in Australia²⁹ (more providers have appeared in NSW in recent years).³⁰ The Canberra Fertility Centre developed its own ethical guidelines which limit the provision of IVF to gestational surrogacy involving full genetic connection to both intended parents³¹ — this means that the intended parents must both be capable of providing viable gametes. Sydney IVF developed guidelines allowing gestational but not genetic surrogacy. Unlike the Canberra Fertility Centre, Sydney IVF does not require gametes from both intended parents, meaning that surrogacy can take place with donor eggs (although it will also only treat heterosexual couples for surrogacy).³² A clear preference for gestational surrogacy was thus established in early medical practice in Australia. Reform inquiries have also tended to favour gestational surrogacy, based on the evidence from

²⁶ Note also that the Northern Territory Department of Health required ART practitioners to adhere to South Australian ART laws, although it was not bound to do so: Government of South Australia, Department of Health, 'Reproductive Technology Legislation Around Australia' (2007).

²⁷ See ACT Law Reform Commission, *Substitute Parentage Agreements*, Report No 20 (2003) 10–11 ('ACT Report') for text of the Health Ministers' recommendation. This was the first failed attempt at 'harmonisation' of Australian surrogacy laws. The prohibition extended to the provision of all 'technical' or 'professional' services, thus also encompassing legal advice and counselling or psychological assistance: *Substitute Parent Agreements Act 1994* (ACT) s 8; *Surrogacy Contracts Act 1993* (Tas) s 5 (both Acts have now been repealed).

²⁸ Note that all ART practitioners throughout Australia are obliged to conform to national ethics guidelines, which prohibit involvement in paid surrogacy, advertising the provision of surrogacy services, and facilitating surrogacy, and urge caution in ensuring informed consent for unpaid surrogacy: see National Health and Medical Research Council, *Ethical Guidelines on the use of Assisted Reproductive Technology in Clinical Practice and Research* (June 2007) 57.

²⁹ *Queensland Report*, above n 4, 45.

³⁰ These providers include IVF Australia, Next Generation Fertility and Fertility East..

³¹ See Canberra Fertility Centre, *Surrogacy Information Booklet* (2011) 3 <http://www.canberrafertilitycentre.com.au/images/pdfs/w_CFC_Surrogacy_info.pdf>.

³² It still does not require gametes from both intended parents: see Mark Bowman, Medical Director of Sydney IVF: *New South Wales Report*, above n 4, 60–1, 84; Sydney IVF, *How we can Help: Surrogacy* (2011) <<http://www.sydneyivf.com/How-we-can-help/Our-Services/Assisted-Conception/Surrogacy/Surrogacy>>.

fertility clinics and what appear to be widely held assumptions that disputes and issues of relinquishment are more likely to occur in genetic surrogacy.³³

The UK is a notable contrast in that genetic surrogacy appears to have been fairly common in the past. Research concerning those using the parentage transfer regime in the UK from 2000 to 2002, by Fiona Golombok and her team, found a relatively even split of genetic and gestational surrogacy arrangements.³⁴ Neither the Golombok research nor a number of qualitative research studies of birth mothers undertaken by Olga van den Akker found significant differences along genetic–non-genetic lines in either birth mothers’ or intended parents’ experiences of the pregnancy, relinquishment, or subsequent relationship with the child.³⁵

Genetic surrogacy does appear to be quite rare in Australia. Of the 69 arrangements reported in the media survey, there were only five arrangements that were clearly identified as genetic surrogacy involving the birth mother’s own egg, and a further 13 where it was unclear whether the surrogacy was genetic or gestational.³⁶ The vast majority of reported arrangements — 51 — were clearly identifiable as gestational surrogacy, and of these most involved both intended parents as genetic parents. In all, there were 29 gestational arrangements which involved both intended parents’ gametes,³⁷ 18 in which a donor egg and the intended father’s sperm were used,³⁸ and one in which the intended mother’s egg and donor sperm were used. There were a further three arrangements in which it was clear that the intended mother’s egg had been or would be used, but unclear whether the intended mother had a male partner.³⁹

In the absence of research it is impossible to know whether the dominance of gestational surrogacy in Australia reflects the preference of intended parents and/or of birth mothers, arises as a result of the restrictive practice of fertility providers, or is a combination of all of the above. It seems apparent that genetic surrogacy is not a common practice, nor is surrogacy where neither intended parent is a genetic parent. However, the contribution of either donor eggs or donor sperm does appear to be relatively common.

³³ See, eg, Recommendation 10 in *Queensland Report*, above n 4, 55; *New South Wales Report*, above n 4, 4, 91–3 (the Committee noted arguments against genetic surrogacy but refrained from making a recommendation). It was also influential that the one reported dispute in surrogacy in Australia involved a genetic surrogacy arrangement: *Re Evelyn* (1998) 23 Fam LR 53.

³⁴ The Golombok study of 34 birth mothers comprised 56 per cent genetic and 44 per cent gestational arrangements: Jadva et al, above n 13, 2197. The overlapping cohort of 42 intended parents comprised 62 per cent genetic and 38 per cent gestational surrogacies: MacCallum et al, above n 13, 1337.

³⁵ See the studies at above n 13.

³⁶ All five of the genetic surrogacies were past arrangements. Of those that were unclear, six arrangements involved the intended father’s sperm but it was not clear whose egg was used and in seven arrangements it was unclear whose gametes were involved.

³⁷ In 17 past arrangements both intended parents gametes had been used, in nine current arrangements (which include one pregnancy) the intended parents proposed to use their own gametes, while in three future arrangements this was also proposed.

³⁸ This cohort included 10 gay male couples, six heterosexual couples and one single man.

³⁹ Two of these were future arrangements and one past.

III THE SECOND WAVE: TIGHTLY CONTROLLED TOLERANCE

Prior to the second wave reforms, in state and territory law parentage of children born through surrogacy clearly vested in the birth mother and her male partner, regardless of genetic connection⁴⁰ and with limited or no ability to transfer legal parentage to the intended parents.⁴¹ In Australia, direct or ‘private’ adoption is unavailable: children cannot be placed with the intended parents by the birth mother, because children placed for adoption must be surrendered to state agencies who then decide placement. Indeed, in a number of jurisdictions it is an offence to make an ‘arrangement’ for a private adoption or change the residence of a child with a view to this end. Such offences will catch surrogacy arrangements if adoption is the intended outcome.⁴²

Some states provide a limited exception allowing direct adoption if the adoptive parent is a ‘relative’ of the child.⁴³ Thus if the birth mother is the sister of an intended mother, for example, such that the intended mother is legally the child’s aunt, the intended mother and her partner may apply for a direct adoption. Even so, government agencies have strongly disapproved of this practice and actively opposed adoption applications in such circumstances.⁴⁴ Additionally, in some states the relevant Minister or department head can exercise a discretion under the relevant adoption law to approve an unauthorised adoption placement.⁴⁵ Recently, intended parents in NSW who requested the exercise of such discretion were told that they must wait for six years before the relevant agency would proceed with their application.⁴⁶

The only generally accessible avenue for intended parents has been to apply to the Family Court or Federal Magistrates Court for ‘parental responsibility’

⁴⁰ ART parentage rules accord legal parentage to the birth mother and a consenting partner regardless of the genetic parentage of either: see generally Jenni Millbank, ‘De Facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms’ (2009) 23 *Australian Journal of Family Law* 160, 171–6. As there remains no central definition of ‘parent’ or ‘child’ in federal law, the position is more complex and uncertain.

⁴¹ Under Commonwealth law, intended parents can apply for residence and parental responsibility orders because the ability to apply for and be granted such orders is not limited to legal parents — orders may be granted in favour of ‘any other person concerned with the care, welfare or development of the child’: *Family Law Act 1975* (Cth) s 65C(c).

⁴² See, eg, *Adoption Act 1994* (WA) s 8, discussed in Western Australia, *Parliamentary Debates*, Legislative Council, 13 November 2007, 6924 (Giz Watson).

⁴³ *Adoption Act 2000* (NSW) s 87(2)(a); *Adoption Act 1984* (Vic) s 122(2). Note that in 1997 the New South Wales Law Reform Commission specifically recommended the continued exclusion of surrogacy arrangements from adoption law: New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 488 (Recommendations 107–8).

⁴⁴ See, eg, the submissions of the NSW Department of Community Services opposing adoption in *Re A and B* (2000) 26 Fam LR 317 and *Re D and E* (2000) 26 Fam LR 310. See also the attempt of a local authority to make twins born through surrogacy wards of the state in an early English case: *Re W* [1991] Fam Law 180.

⁴⁵ See, eg, *Adoption Act 2000* (NSW) ss 10, 11.

⁴⁶ David Norman, Submission No 18 to Standing Committee on Law and Justice, *Inquiry into Legislation on Altruistic Surrogacy in NSW*, 25 September 2008.

through parenting orders.⁴⁷ Such orders authorise intended parents to make educational and medical decisions for the child and allow for the issue of a passport, but do not endure after the child turns 18 and do not grant parental status as such. Some commentators have argued that the evolution of the flexible legal concept of ‘parental responsibility’ is positive, and that the concept can encapsulate the complexity of multiple genetic and social parents through ART and surrogacy, as well as through other forms of ‘fragmented’ parentage.⁴⁸

However, I believe that parental responsibility alone is inadequate for the needs of surrogacy families due to its temporary and circumscribed nature. Parental responsibility orders do not impact on any of the web of laws that automatically grant vital rights to children, such as inheritance and other compensation laws, as well as rights that flow from extended family relationships. So, for example, a child who is the subject of parental responsibility orders does not become automatically eligible under intestacy laws to inherit from their intended parents, nor do they gain any form of legal relationship with grandparents, or even with other siblings if the children have been born to different birth mothers. In addition, parental responsibility orders do not allow for the reissue of a birth certificate listing the intended parents. Birth certificates have both a symbolic value and a practical purpose.⁴⁹ In the absence of a birth certificate, surrogacy families must present themselves as *not*-parents, using documents that have been authorised by the birth parents or court orders proving they hold responsibility for a myriad of dealings with government and other agencies. In doing so they are constantly exposing and explaining the circumstances of the child’s conception and birth to others.

In the mid 2000s a second wave of inquiry and reform commenced.⁵⁰ This renewed interest was prompted by:

- several surrogacy families approaching state and territory courts for declarations of legal parentage (all of which were denied);⁵¹

⁴⁷ Applications for parenting orders may be heard by either the Family Court of Australia or the Federal Magistrates Court: *Family Law Act 1975* (Cth) s 33B. Such applications may be brought by those who are not legal parents: *Family Law Act 1975* (Cth) s 65C(c). In addition, the Family Court of Western Australia may make orders in favour of someone other than a parent: *Family Court Act 1997* (WA) s 85.

⁴⁸ See, eg, Craig Lind and Tom Hewitt, ‘Law and the Complexities of Parenting: Parental Status and Parental Function’ (2009) 31 *Journal of Social Welfare and Family Law* 391.

⁴⁹ See generally Liz Short, ‘“It Makes the World of Difference”: Benefits for Children of Lesbian Parents of Having Their Parents Legally Recognised as Their Parents’ (2007) 3 *Gay and Lesbian Issues and Psychology Review* 5.

⁵⁰ While other inquiries produced reports in the intervening years — see, eg, Legislative Assembly Select Committee on the *Human Reproductive Technology Act 1991* (WA), Parliament of Western Australia, *Report* (1999); Queensland Government, above n 24 — their recommendations were not implemented.

⁵¹ See, eg, *PJ v DOCS* [1999] NSWSC 340 (6 April 1999); *Re an Application Pursuant to the Births Deaths and Marriages Registration Act 1997* [2000] ACTSC 39 (5 May 2000). The latter case led to the *Artificial Conception Amendment Act 2000* (ACT) and is highlighted as the genesis of the 2003 ACT inquiry: *ACT Report*, above n 27, 2–4. See also *Re Michael (Surrogacy Arrangements)* (2009) 41 Fam LR 694.

- applications for adoption (in the few instances where intended parents were eligible for direct adoption because the birth mother was related to one of them);⁵² and
- a number of applications to the Family Court of Australia for parental responsibility,⁵³ in which several of the judgments called for legislative reform.⁵⁴

In addition, in 2006 a federal Senator announced the birth of his child through a surrogacy arrangement, bringing significant attention and increasing public sympathy concerning the issue.⁵⁵

In framing this new era of openness to surrogacy, the twin themes of ‘altruism’ and ‘national harmony’ dominated. However, while reforms were characterised as part of a uniform law or ‘harmonisation’ initiative to bring the various states’ divergent approaches into line with each other, this rhetoric was largely baseless. In 2007 the Standing Committee of Attorneys-General (‘SCAG’) began discussions and in 2009 issued a proposal for a ‘national model to harmonise regulation of surrogacy’, the emphasis of which was on legal parentage. The guiding principles proposed by the paper were that:

- parentage orders are to be made in the best interests of the child;
- intervention of the law in people’s private lives should be kept to a minimum; and
- the model should seek to avoid legal dispute between the birth parent(s) and the intended parents.⁵⁶

However, it is notable that, by the time this proposal was issued, legislation had already been passed in the ACT, Victoria and WA which, as we will see below, took widely different approaches to defining eligibility for parentage transfers. Reforms passed afterwards in Queensland, SA and NSW and more recently introduced in Tasmania, have continued to produce variations in approach.

⁵² See, eg, *W: Re Adoption* (1998) 23 Fam LR 538; *Re A and B* (2000) 26 Fam LR 317; *Re D and E* (2000) 26 Fam LR 310.

⁵³ See, eg, *Re Mark* (2004) 31 Fam LR 162; *King and Tamsin* [2008] FamCA 309 (28 April 2008); *Raines and Curtin* [2007] FamCA 1295 (15 October 2007); *Cadet and Scribe* [2007] FamCA 1498 (5 November 2007).

⁵⁴ See, eg, *Re an Application Pursuant to the Births Deaths and Marriages Registration Act 1997* [2000] ACTSC 39 (5 May 2000) [14] (Crispin J); *Re Mark* (2004) 31 Fam LR 162, 174 (Brown J).

⁵⁵ Senator Conroy and his partner Paula Benson had a daughter with the assistance two female friends, one of whom was the birth mother and the other an egg donor. Of the nearly 200 press reports see, eg, Katharine Murphy, ‘The Senator, the Surrogate and the New Baby’, *The Age* (Melbourne), 7 November 2006, 1; Phillip Coorey, ‘Surrogate Mothers for MP’s Baby’, *The Sydney Morning Herald*, 7 November 2006, 1; Sue Dunlevy, ‘I’ll Carry Your Baby — Surrogate Mother Volunteered to Help Senator’, *The Daily Telegraph* (Sydney), 8 November 2006, 7. For discussion of the role of discourse in the parliamentary debates and media coverage see Jenni Millbank, ‘From Alice and Evelyn to Isabella: Exploring the Narratives and Norms of “New” Surrogacy in Australia’ (forthcoming).

⁵⁶ *SCAG Paper*, above n 5, 2.

There was harmony, however, inasmuch as all state governments were unanimous in limiting discussion to *unpaid* surrogacy. The Queensland and NSW parliamentary inquiries self-consciously titled their reports as concerning ‘altruistic’ surrogacy, while the terms of reference of all of the other inquiries were similarly circumscribed.⁵⁷ Any consideration of paid or ‘commercial’ surrogacy was completely excluded from discussion. So, for example, the SCAG paper is prefaced by the statement that

[t]he proposed model would not permit commercial surrogacy. That practice is already unlawful throughout Australia. It is judged that commercial surrogacy commodifies the child and the surrogate mother, and risks the exploitation of poor families for the benefit of rich ones. Consequently, when this paper refers to surrogacy, it refers to an arrangement in which the surrogate receives no financial benefit (other than reimbursement for losses and expenses).⁵⁸

This limited focus had significant consequences for the parentage laws which followed, as inquiries simply did not address the problem of parentage for children born through ‘commercial’ surrogacy.

The benefit of the second wave focus on ‘altruism’ was that it did allow movement beyond the moral panic of the first wave into a frame of reference that was constructed as cautious but realistic about the fact that surrogacy families are in existence and apparently becoming more common. The increasingly pragmatic attitude of government in the second wave is exemplified by the 2008 Queensland Parliamentary Committee Report, which stated that ‘for a small group of people ... altruistic surrogacy provides the only realistic opportunity to create family’ and concluded that the role of the state is ‘to create an environment that maximises the possibility for success and happiness for people who create their families through altruistic surrogacy arrangements rather than disadvantages or stigmatises them.’⁵⁹ Given that Queensland had for the preceding twenty years threatened, and in several instances initiated, criminal prosecutions for engaging in any form of surrogacy,⁶⁰ these statements represent a seismic shift in view. In a similar vein, Tasmania, which for the previous 17 years had criminalised professional assistance with surrogacy, released its Surrogacy Bill in late 2010 with an explanatory document stating that the Bill would ‘open a way to assist people to realise their dreams of making a family.’⁶¹

⁵⁷ See, eg. *VLRC Report*, above n 4, 5, where it is stated that ‘[t]he commission is also requested to consider the meaning and efficacy of sections 8, 20 and 59 [of the *Infertility Treatment Act 1995* (Vic)] in relation to altruistic surrogacy, and clarification of the legal status of any child born of *such an arrangement*’ (emphasis added).

⁵⁸ *SCAG Paper*, above n 5, 4–5.

⁵⁹ *Queensland Report*, above n 4, 23.

⁶⁰ The *Surrogate Parenthood Act 1988* (Qld) s 3 imposed a maximum penalty of 100 penalty units or three years imprisonment for entering into, or offering to enter into, a surrogacy arrangement, whether in Queensland or elsewhere (if the persons involved were ordinarily resident in Queensland at the time the event occurred). The *Queensland Report* noted five prosecutions, with ‘most’ charges dismissed and one good behaviour bond recorded: *Queensland Report*, above n 4, 9.

⁶¹ Department of Justice (Tas), *Proposed Tasmanian Surrogacy Bill: Exposure Bill*, 1 <http://www.justice.tas.gov.au/legislationreview/reviews/surrogacy_bill_2010_consultation>.

IV THE NEW PARENTAGE REGIMES

The Australian reforms all introduced a post-birth, consent based parentage transfer process with various preconditions and court oversight. Transferring legal parentage to the intended parents from the birth mother (and her partner, if any) is justified by and consistent with a functional family approach to relationship law more broadly.⁶² When a child is being raised by his or her intended parents, it is those intended parents who are the primary caregivers and who are therefore in need of a legal relationship with the child that will protect and assist in the process of parenting. I have argued elsewhere that this need is irrespective of any partial or complete genetic link between the child and the intended parents; it is not about an *entitlement* to parental status but, rather, it is about who is *doing parenting*.⁶³

A court-based post-birth transfer process for surrogacy parentage has been used in the United Kingdom since 1994.⁶⁴ Unlike the pre-birth contractual model common in many states of the United States ('US'),⁶⁵ the UK approach is framed by key safeguards in that it allows the birth mother to change her mind before (and for some time after) the birth,⁶⁶ and requires scrutiny of the parties' consent and an assessment of the child's best interests *after* the child has come into existence.⁶⁷ In a post-birth process, the consent of the birth mother must be both informed and continuing. A post-birth transfer further protects the interests of the birth mother by enhancing her ability to control the pregnancy and birth process.

The Australian laws on parentage transfer contain the above elements because they were modelled on the UK approach.⁶⁸ Yet this article demonstrates that the Australian states have progressively departed from the UK model by adding increasingly complex layers of procedural and substantive requirements, such that there is now only a dim resemblance between the Australian and UK approaches to parentage in surrogacy. Rules on payment and on conception within the jurisdiction, along with additional eligibility criteria discussed below,

⁶² See Jenni Millbank, 'Unlikely Fissures and Uneasy Resonances: Lesbian Co-Mothers, Surrogate Parenthood and Fathers' Rights' (2008) 16 *Feminist Legal Studies* 141. See also Millbank, 'De Facto Relationships, Same-Sex and Surrogate Parents', above n 40.

⁶³ Millbank, 'Unlikely Fissures and Uneasy Resonances,' above n 62, 161–4.

⁶⁴ The UK provisions for parental orders in surrogacy were part of the original *Human Fertilisation and Embryology Act 1990* (UK) regulating ART (s 30), although they did not become operative until 1994. These provisions are discussed in Eric Blyth, 'Surrogacy arrangements in Britain: Policy and Practice Issues for Professionals' (1998) 1 *Human Fertility* 3.

⁶⁵ See generally Steven H Snyder and Mary Patricia Byrn, 'The Use of Pre-Birth Parentage Orders in Surrogacy Proceedings' (2005) 39 *Family Law Quarterly* 633.

⁶⁶ *Human Fertilisation and Embryology Act 2008* (UK) s 54, replacing the earlier *Human Fertilisation and Embryology Act 1990* (UK) s 30).

⁶⁷ *Ibid.*

⁶⁸ The exception is WA, which departed from the underlying principle of consent by allowing for the transfer of parentage despite the objection of the birth mother if she is not genetically related to the child and one of the intended parents is so related: see *Surrogacy Act 2008* (WA) ss 21(3), (4). Tasmania uncritically duplicated this provision: *Surrogacy Bill 2011* (Tas) s 14(5).

mean that the Australian systems are much narrower in scope than the UK model.⁶⁹

The first regime for parentage transfer in Australia was introduced in the ACT in 2004 as part of a wider package of reforms to that territory's adoption and assisted reproduction parentage laws.⁷⁰ The ACT legislation was closely based upon s 30 of the *Human Fertilisation and Embryology Act 1990* (UK). As in the UK, in the ACT the court is empowered to permit transfer of parentage if:

- the child is between six weeks and six months old;⁷¹
- the child is living with the intended parents;⁷²
- the intended parents live within the jurisdiction;⁷³
- the arrangement involves two intended parents;⁷⁴
- the intended parents are at least 18 years of age;⁷⁵
- at least one intended parent is a genetic parent of the child;⁷⁶ and
- there was no payment of money or other benefit to the birth mother (the agreement was not 'commercial').⁷⁷

While the original 1990 UK provisions were limited to intended parents who were married, the ACT scheme was open to unmarried and same-sex couples (as is the UK regime now, following amendments in 2008).⁷⁸ However, the ACT regime is also narrower than the UK system in three important respects. The ACT only allows the court to grant a parentage transfer if:

- the birth mother is not a genetic parent to the child (ie only gestational and not genetic surrogacy);⁷⁹ and
- assisted conception took place within the ACT.⁸⁰

⁶⁹ While the UK regime has been criticised as inflexible, for example because it does not allow any discretion for transfer after the age of 6 months (see, eg, *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) (9 December 2008) [12] (Hedley J)), its restrictions are minor in comparison with much of the Australian law.

⁷⁰ *Parentage Act 2004* (ACT) pt 2 div 2.5. This Act extended more limited ad hoc provisions that had been in place since 2000 as recommended by the *ACT Report*, above n 27.

⁷¹ *Parentage Act 2004* (ACT) s 25(3).

⁷² *Ibid* s 26(3)(a). While this provision is phrased as a mandatory consideration rather than a requirement, it is unclear whether the court could in fact make the order if the child is not living with the intended parents.

⁷³ *Ibid* s 24(e).

⁷⁴ *Ibid* s 24(c).

⁷⁵ *Ibid* s 26(3)(b). While this provision is phrased as a mandatory consideration rather than a requirement, it is unclear whether the court could in fact make the order if the intended parents were not at least 18 years of age.

⁷⁶ *Ibid* s 24(d).

⁷⁷ *Ibid* ss 24(c), 26(3)(d).

⁷⁸ See *Human Fertilisation and Embryology Act 2008* (UK) s 54. This provision became operative in April 2009.

⁷⁹ *Parentage Act 2004* (ACT) s 24(b); nor can her partner be a genetic parent (ie a sperm or egg donor in the surrogacy).

⁸⁰ *Ibid* s 24(a).

In addition, there is no power in the ACT legislation for the court to retrospectively 'authorise' payments.

It is difficult to know what was behind these three variations, given that no rationale was offered for any of them in the parliamentary materials surrounding the reforms.⁸¹ It is possible that the exclusion of genetic surrogacy was influenced by the practice of the only clinic within the ACT which undertook IVF for surrogacy at that time.⁸² Given that the stringent ethics and assessment processes undertaken by the Canberra Fertility Centre were limited to gestational surrogacy, it is also possible that the jurisdictional limit was intended to further entrench the dominance of this practice.

The third area of divergence, concerning the rules on payment, is likewise unexplained in supporting materials. The text of the ACT legislation prohibiting payment *exactly* duplicated the UK law in specifying that payment must not be provided in connection with the making of the parenting order, the surrogacy agreement, the relinquishment of the child or the arrangements concerning the order.⁸³ Yet there was one critical omission: the UK payment provisions are followed by the addendum, '*unless authorised by the court*'.⁸⁴ This addendum is very significant because without it the courts have no power to grant transfer of parentage if payment characterised as 'valuable consideration' or 'material benefit' has changed hands.

All other Australian states have subsequently followed the ACT and departed from the UK approach by omitting the discretionary power to authorise payment so as to grant parentage transfer. SA and Victoria also followed the narrower ACT approach by requiring that conception take place within the jurisdiction in order for intended parents to be eligible to apply for parentage transfer.⁸⁵ WA does not actually mandate conception in the jurisdiction, but presumes that participants will be using WA ART clinics and has made it very difficult to do otherwise.⁸⁶ Queensland, NSW and Tasmania did not introduce a jurisdictional limit regarding conception. On the question of the genetic connection between birth mother and child have all the other Australian jurisdictions departed from the ACT template and taken the more liberal UK approach by including both genetic and gestational surrogacy in parentage transfer regimes.⁸⁷

⁸¹ The Explanatory Statement notes the requirements that there be no genetic connection between the birth mother and child and that conception occur within the jurisdiction, but does not explain the reasons for them: Explanatory Statement, Parentage Bill 2003 (ACT) 8. Similarly, reference to requirements in parliamentary debates include no further explanation: Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 10 February 2004, 122–6 (Mr Stanhope, Chief Minister).

⁸² See Canberra Fertility Centre, above n 31.

⁸³ *Parentage Act 2004* (ACT) s 26(3)(d); cf *Human Fertilisation and Embryology Act 1990* (UK) s 30(7).

⁸⁴ *Human Fertilisation and Embryology Act 1990* (UK) s 30(7) (emphasis added).

⁸⁵ *Family Relationships Act 1975* (SA) s 10HB(2)(c); *Status of Children Act 1974* (Vic) s (20)(1)(a).

⁸⁶ See discussion at below n 112.

⁸⁷ See, eg, *Surrogacy Act 2010* (NSW) s 5, where there is no consideration of whether the birth mother or her spouse is a genetic parent of the surrogate child. Note that Victoria excludes

As the various states developed their own regimes, they introduced additional restrictive eligibility requirements and exacting mandatory processes. In the ACT, SA, Queensland and Tasmania these requirements are contained only in parentage transfer laws.⁸⁸ In NSW and WA some requirements have been embedded in ART regulation instead, although most requirements are contained in the parentage laws.⁸⁹ In Victoria there is an approval process under ART legislation⁹⁰ and then a dual pathway in parentage laws, with additional procedural requirements for those who have not conceived through approved IVF by a licensed ART provider.⁹¹ Taken together, these eligibility rules include requirements that the birth mother:

- is at least 25 years old (NSW, Queensland, Victoria, WA);⁹²
- has already given birth to her own live child (Victoria if licensed ART is used, WA unless there are ‘exceptional circumstances’);⁹³ and
- is not a genetic parent to the child (ACT, Victoria if licensed ART is used).⁹⁴

In addition, the intended parents are required to:

- be at least 25 years old (one or both Queensland, WA);⁹⁵
- be a couple, not an individual (ACT, SA);⁹⁶
- not be a man or male couple (WA);⁹⁷

genetic surrogacy from licensed ART, but parents may still be eligible to have a Patient Review Panel authorise a non-complying surrogacy arrangement where the ‘circumstances of the proposed surrogacy arrangement are exceptional’: *Assisted Reproductive Treatment Act 2008* (Vic) s 41.

⁸⁸ *Parentage Act 2004* (ACT) pt 2 div 2.5; *Family Relationships Act 1975* (SA) pt 2B div 3; *Surrogacy Act 2010* (Qld) ch 3; *Surrogacy Bill 2011* (Tas) pt 4.

⁸⁹ *Surrogacy Act 2010* (NSW) pt 3, div 2; *Assisted Reproductive Technology Act 2007* (NSW) s 15A, pt 2 div 3, s 15A; *Surrogacy Act 2008* (WA) ss 16–17; *Human Reproductive Technology Act 1991* (WA) s 23.

⁹⁰ *Assisted Reproductive Treatment Act 2008* (Vic) ss 39–43.

⁹¹ *Status of Children Act 1974* (Vic) ss 22–3.

⁹² *Surrogacy Act 2010* (NSW) s 27(1); *Surrogacy Act 2010* (Qld) s 22(2)(f) (this age requirement also applies to the birth mother’s spouse, if any); *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(b); *Status of Children Act 1974* (Vic) s 23(2)(a); *Surrogacy Act 2008* (WA) s 17(a)(i). The proposed age is 21 in the Tasmanian bill: *Surrogacy Bill 2011* (Tas) cl 14(2)(b), but may be raised to 25 by the upper house: see note 6.

⁹³ *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(ac); *Surrogacy Act 2008* (WA) s 17(a)(ii).

⁹⁴ *Parentage Act 2004* (ACT) s 24(b); *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(ab).

⁹⁵ *Surrogacy Act 2010* (Qld) s 22(2)(g)(i); *Surrogacy Act 2008* (WA) s 19(1)(a). In NSW, both intended parents must be over 18, although if they are under 25 they face additional requirements: *Surrogacy Act 2010* (NSW) ss 28, 29.

⁹⁶ *Parentage Act 2004* (ACT) s 24(c); *Family Relationships Act 1975* (SA) s 10HA(2)(a)(ii). However, one intended parent can apply for the order in certain circumstances, such as if their partner has died or they have separated after the arrangement was entered into but prior to the application.

⁹⁷ *Surrogacy Act 2008* (WA) ss 19(1)(b), 19(2). This reflects the approach to ‘infertility’ and eligibility in WA, which centres on a woman requiring treatment (since 2002 she does not need to be in a heterosexual relationship): see the discussion about providing certainty to intended

- be married or in a heterosexual de facto relationship for more than three years (SA);⁹⁸
- be classified as infertile or having a ‘need’ for surrogacy (NSW, Queensland, SA, Victoria if licensed ART is used, WA).⁹⁹ This expressly excludes age related infertility in WA, but does include ‘social infertility’ in NSW, Queensland and Victoria;
- reside within the jurisdiction (ACT, NSW, Queensland, SA, Tasmania, Victoria, WA).¹⁰⁰ Queensland and Tasmania are the only states where the court has the ability to waive this requirement;¹⁰¹
- be fit and proper parents (SA);¹⁰² and
- have at least intended parent who is a genetic parent of the child (ACT, SA).¹⁰³

Finally, the surrogacy agreement must be:

- in writing (NSW, Queensland, SA, WA; in WA any egg or sperm donor must also be party to the agreement);¹⁰⁴
- witnessed by a lawyer (SA);¹⁰⁵
- entered into prior to the pregnancy (ACT, NSW, Queensland, SA, Tasmania, Victoria, WA);¹⁰⁶
- the subject of independent and/or certified counselling for all parties (ACT, NSW, Queensland, SA, Tasmania, Victoria, WA).¹⁰⁷ This must take place

parents in WA, *Parliamentary Debates*, Legislative Assembly, 4 September 2007, 4765–78. See also Western Australia, *Parliamentary Debates*, Legislative Council, 19 June 2008, 4173–82. There were numerous unsuccessful attempts to amend the Bill through 2007 and 2008 in order to exclude single women from being eligible to be intended parents.

⁹⁸ *Family Relationships Act 1975* (SA) s 10HA(2)(b)(iii).

⁹⁹ *Surrogacy Act 2010* (NSW) s 30; *Surrogacy Act 2010* (Qld) ss 14, 22(2)(d); *Family Relationships Act 1975* (SA) s 10HA(2)(b)(v); *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(a); *Surrogacy Act 2008* (WA) ss 17(d), 19(1)–(3).

¹⁰⁰ *Parentage Act 2004* (ACT) s 24(e); *Surrogacy Act 2010* (NSW) s 32; *Surrogacy Act 2010* (Qld) s 22(2)(g)(ii); *Family Relationships Act 1975* (SA) s 10HB(2)(b); *Surrogacy Bill 2011* (Tas) cl 14(2)(e)(ii); *Status of Children Act 1975* (Vic) s 20(1)(b); *Surrogacy Act 2008* (WA) s 19(1)(a).

¹⁰¹ *Surrogacy Act 2010* (Qld) s 23(2); *Surrogacy Bill 2011* (Tas) cl 14(3)(a).

¹⁰² *Family Relationships Act 1975* (SA) s 10HB(10).

¹⁰³ *Parentage Act 2004* (ACT) s 24(d); *Family Relationships Act 1975* (SA), s 10HA(2)(viii)(B) (unless both intending parents are infertile or should not be a genetic parent of the child for a medical reason: ss 10HA(2)(viii)(B), 10HA(5)).

¹⁰⁴ *Surrogacy Act 2010* (NSW) s 34; *Surrogacy Act 2010* (Qld) s 22(2)(e)(v); *Family Relationships Act 1975* (SA) s 10HA(6); *Surrogacy Act 2008* (WA) s 17(b). It appears likely that Tasmania will also include this requirement, as the government has indicated its intention to move an amendment to the current bill to require writing: Tasmania, *Parliamentary Debates*, Legislative Council, 14 June 2011, 10 (Parkinson).

¹⁰⁵ *Family Relationships Act 1975* (SA) s 10HA(6)(c).

¹⁰⁶ *Parentage Act 2004* (ACT) s 23; *Surrogacy Act 2010* (NSW) s 24; *Surrogacy Act 2010* (Qld) ss 7(1), 22(2)(e)(iv); *Family Relationships Act 1975* (SA) s 10HA(2)(a)(i); *Surrogacy Bill 2011* (Tas) cl 4(5); *Assisted Reproductive Treatment Act 2008* (Vic) s 3; *Surrogacy Act 2008* (WA) ss 3, 17(e).

prior to the pregnancy in Queensland, SA, Victoria and WA, and will be required twice in Tasmania: prior to the pregnancy and again, post-birth but prior to the parentage transfer;

- the subject of legal advice (NSW, Queensland, SA, Tasmania, Victoria, WA).¹⁰⁸ In all states except Victoria this must be certified independent legal advice received prior to the pregnancy; and
- supported by the report of a designated counsellor (NSW, Queensland, SA, Victoria if licensed ART is used).¹⁰⁹ In all states except Victoria this must involve explicit approval for the parentage transfer itself.

Furthermore, the arrangement must involve:

- a ‘cooling off period’ of three months (WA);¹¹⁰
- assisted conception within the jurisdiction (ACT, SA, Victoria).¹¹¹ While WA does not expressly require this, it is implicit in the structure of the approval process which centres the WA ART system (such that approval would be very hard to get if conception did not occur within the jurisdiction);¹¹²

¹⁰⁷ Counselling is a relevant consideration but not a mandatory requirement in the ACT: *Parentage Act 2004* (ACT) s 26(3)(e). See also *Surrogacy Act 2010* (NSW) s 35; *Surrogacy Act 2010* (Qld) s 22(2)(e)(ii); *Family Relationships Act 1975* (SA) ss 10HA(2)(vi)–(vii), (3); *Surrogacy Bill 2011* (Tas) cl 14(2)(c); *Assisted Reproductive Treatment Act 2008* (Vic) ss 40(1)(c), 40(2), 43; *Status of Children Act 1974* (Vic) s 23(2)(b); *Surrogacy Act 2008* (WA) s 17(c)(i); *Surrogacy Regulations 2009* (WA) reg 4.

¹⁰⁸ *Surrogacy Act 2010* (NSW) s 36; *Surrogacy Act 2010* (Qld) ss 22(2)(e), 30; *Family Relationships Act 1975* (SA) s 10HA(6)(c); *Surrogacy Bill 2011* (Tas) cl 14(2)(a)(i); *Assisted Reproductive Treatment Act 2008* (Vic) ss 40(1)(c), 43(c); *Status of Children Act 1974* (Vic) s 23(2)(b)(iii); *Surrogacy Act 2008* (WA) s 17(c)(iii); *Surrogacy Regulations 2009* (WA) reg 5(2)(f).

¹⁰⁹ NSW requires the counsellor’s opinion as to whether the parentage transfer is in the child’s best interests and the reasons for that opinion: *Surrogacy Act 2010* (NSW) ss 17(1)–(2). Queensland requires a counsellor’s report supporting parentage transfer: *Surrogacy Act 2010* (Qld) ss 22(2)(i), 32 (although this requirement can be dispensed with in exceptional circumstances: s 23(2)). SA requires a statement by the counsellor that the surrogacy agreement will not jeopardise a resulting child’s welfare: *Family Relationships Act 1975* (SA) ss 10HA(2)(vii), (3)(b)(i)–(ii). See also *Assisted Reproductive Treatment Act 2008* (Vic) ss 40(2)(a), 43(a)–(b).

¹¹⁰ *Surrogacy Act 2008* (WA) s 17(c).

¹¹¹ *Parentage Act 2004* (ACT) s 24(a); *Family Relationships Act 1975* (SA) s 10HA(2)(b)(viii)(A); *Status of Children Act 1975* (Vic) s 20(1)(a).

¹¹² A parentage order is not possible without prior approval of the arrangement by the Western Australian Reproductive Technology Council (‘RTC’): *Surrogacy Act 2008* (WA) s 16(1). Such approval requires, among other things, counselling by a counsellor who must also be approved by the RTC: *Surrogacy Regulations 2009* (WA) reg 3. Both the RTC website and the approval forms direct participants to designated clinic surrogacy coordinators (which clinics are required to have by the *Surrogacy Directions 2009* (WA) cl 8) — it is not apparent that the form may be submitted *without* the involvement of a clinic. For example, the RTC website states that one may ‘View the application forms required to be submitted to the Council *by the clinic surrogacy coordinator*’: <http://www.rtc.org.au/consumer/surrogacy_wa.html> (emphasis added). The Application Form for arranged parents commences with the statement: ‘This form is to be completed by the applicant(s) with the assistance of the Clinic Surrogacy Co-ordinator’. Nonetheless, the RTC has confirmed that it *is* able to approve an arrangement which involved sex and took place outside the jurisdiction if the parties undertook all compliance measures in advance

- prior application and approval of all parties following an assessment by a government appointed tribunal (Victoria if licensed ART is used, WA);¹¹³
- a court approved plan addressing contact and communication between the parties and what information will be provided to the child (WA);¹¹⁴ and
- a criminal record check and child protection check for all parties (Victoria if licensed ART used).¹¹⁵

While no state requires all of the above criteria to be met, many states require several. One WA MP remarked in the course of debates, ‘I am certain that if everyone were subjected to the tests in this bill before they entered into parenthood, we would have a severe population shortage very quickly.’¹¹⁶ It is hard to see how these rules accord with the guiding principle agreed to in 2009 by the SCAG that a nationally consistent approach to surrogacy law should aim to keep the intervention of the law in people’s private lives ‘to a minimum’.¹¹⁷

Perhaps because of its unique history in criminalising all forms of surrogacy, Queensland was the most open to reflection on the appropriate role of government in regulating family formulation. The Queensland report incorporated the principles of non-discrimination and autonomy in its discussion and recommended that the role of government should be one which:

Balances the prevention of harm and the protection of personal liberty in the creation of families through altruistic surrogacy; and

Seeks parity in policy development for families created through altruistic surrogacy with other families created through assisted reproductive technology (ART) or natural conception.¹¹⁸

The reforms in Queensland displayed a markedly more liberal approach to eligibility for parentage than the reforms which preceded them in other states, and, indeed, ultimately reflected a less interventionist approach than Queensland’s own reform document had recommended.¹¹⁹ The Explanatory Memorandum to the legislation states:

within WA: email from Nyaree Jacobsen, Acting Executive Officer, RTC, to Jenni Millbank, 22 November 2010.

¹¹³ *Assisted Reproductive Treatment Act 2008* (Vic) s 39; *Surrogacy Act 2008* (WA) ss 16(1). The Queensland and New South Wales inquiries also recommended this, but these recommendations were not implemented: *Queensland Report*, above n 4, 62 (recommendation 12); *New South Wales Report*, above n 4, 101 (recommendation 5).

¹¹⁴ *Surrogacy Act 2008* (WA) ss 21(2)(f), 22.

¹¹⁵ *Assisted Reproductive Treatment Act 2008* (Vic) s 42. Victoria requires a criminal background check on all parties undertaking ART; for surrogacy, this means the intended parents, birth mother and her partner, if any.

¹¹⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, 761 (AJ Waddell).

¹¹⁷ See *SCAG Paper*, above n 5, 2.

¹¹⁸ *Queensland Report*, above n 4, 30.

¹¹⁹ Notably, Queensland did not introduce an approval panel or a mandatory ‘cooling-off’ period recommended in the *Queensland Report*, above n 4, 60–1.

It is inconsistent with the principle that the welfare and best interests of the child are paramount to exclude the intended parent/s from applying for a parentage order because of their relationship status. All children are entitled to the same legal protections and certainty regardless of the nature of the relationship of their parents or the circumstances that resulted in their conception and birth.¹²⁰

Unlike the jurisdictions which preceded it in implementing reform, Queensland has no requirement of genetic connection between intended parent(s) and child, no restriction on the genetic connection between birth mother and child, no prescription as to the method of conception or the sexual orientation or marital status of the intended parents, and no restriction on the intended parent being a single person rather than part of a couple. In light of recent history in which couples from Queensland covertly travelled to other states¹²¹ and countries to engage in surrogacy because it was criminalised at home, and given that such conduct was *also* criminal through extraterritorial provisions in Queensland law,¹²² it is highly significant that Queensland decided to make its parental transfer regime open to intended parents regardless of the place of conception.

It appears that Queensland tipped the balance in terms of the reform trajectory Australia-wide.¹²³ When NSW and Tasmania introduced their laws in late 2010 and early 2011 respectively, both adopted the less prescriptive Queensland approach, duplicating all of the above elements.¹²⁴ Additionally, Queensland allows the court discretion to grant parentage orders if the intended parents are not ordinarily resident within the jurisdiction.¹²⁵ Tasmania likewise introduced this discretion.

While most states introduced legislative clarification of ‘reasonable expenses’¹²⁶ and NSW, Queensland, Tasmania and WA also took the step of making agreements for the payment of such expenses enforceable at the behest of the birth mother,¹²⁷ the pre-existing provisions criminalising paid or ‘commercial’ surrogacy were largely retained. In the ACT and Queensland the reforms simply replicated earlier extraterritorial provisions such that offences include acts

¹²⁰ Explanatory Notes, Surrogacy Bill 2009 (Qld) 7.

¹²¹ See, eg, *Queensland Report*, above n 4, 11.

¹²² *Surrogate Parenthood Act 1988* (Qld) s 3(2)(b).

¹²³ However, the juxtaposition of these relaxed substantive and strict procedural elements may also prove problematic. For example, requiring exhaustive counselling and legal advice — with written agreements and certificates of compliance prior to conception, even though conception can take place in highly informal circumstances (including home insemination or sex) — may mean that parties are unaware of the requirements until it is too late (although note that Queensland and Tasmania do have greater flexibility than most other states in that many procedural requirements may be waived by the Court in exceptional circumstances: *Surrogacy Act 2010* (Qld) s 23; Surrogacy Bill 2011 (Tas cl 14(3))).

¹²⁴ Recall, however that the Tasmanian bill has been referred to committee by the upper house, and so may ultimately pass in a more restrictive form than the current bill: see note 6.

¹²⁵ *Surrogacy Act 2010* (Qld) s 23(2).

¹²⁶ See, eg, *Surrogacy Act 2010* (NSW) s 7; *Surrogacy Act 2010* (Qld) s 11; *Surrogacy Act 2008* (WA) s 6.

¹²⁷ *Surrogacy Act 2010* (NSW) s 6(2); *Surrogacy Act 2010* (Qld) s 15(2); Surrogacy Bill 2011 (Tas) cl 8(2); *Surrogacy Act 2008* (WA) s 7(3).

undertaken outside the jurisdiction by those ordinarily resident there.¹²⁸ Thus, ACT residents who undertake paid surrogacy outside the ACT continue to face the same criminal sanctions that they did prior to reform. In Queensland, whereas pre-reform all surrogacy anywhere was criminalised, post-reform only *paid* surrogacy anywhere attracts penalty.¹²⁹ NSW is alone in actually *introducing* extraterritorial criminal offences as part of the reforms.¹³⁰ This issue will be discussed in some detail below in Part VI ('Travel and Payment').

Transfer of legal parentage under the state and territory regimes is carried into the *Family Law Act 1975* (Cth) ('FLA') through s 60HB and specific prescription of the various state surrogacy laws.¹³¹ This status is in turn reflected in various other federal Acts which adopt the FLA s 60HB definition of 'parent'.¹³² However, there remains no central definition of 'parent' and 'child' in federal law and each Act is open to a purposive interpretation based upon its own terms. It appears, therefore, that parents through surrogacy may be legal parents under some, but not other, federal Acts, and that this uncertainty prevails whether or not they have undertaken the state transfer process. This issue will be discussed in relation to the meaning of 'parent' in provisions on citizenship by descent below in Part VIII ('The Consequences of the Australian Approach for Legal Parentage and Australian Citizenship').

V ACCESSIBILITY

While in the modern era the rules of legal parentage have confounded the intention of parents in surrogacy and led to contradictory legal, social and genetic parentage for children born in this way, they were not created *in order* to exclude parties in surrogacy. It is problematic that the second wave reforms introduced parentage rules that were crafted as part of an overarching regulatory approach with the intention to modify and contain the (presumptively unruly and unethical) pre-conception behaviour of intended parents, and to deny them parentage if they did not comply. In this sense the reforms contain echoes of the punitive laws of illegitimacy which were abolished in Australia decades ago.¹³³

Surrogacy raises genuine concerns about matters such as power imbalance, informed consent and relinquishment. However, I argue that a strict and inflexible approach to legal parentage is not an effective way for the state to address such concerns. A parentage regime which will only cover certain families if they

¹²⁸ *Parentage Act 2004* (ACT) s 45; *Surrogacy Act 2010* (Qld) s 54.

¹²⁹ In both the ACT and Queensland, the penalties post-reform remain identical to those pre-reform: *Substitute Parent Agreements Act 1994* (ACT) s 5 cf *Parentage Act 2004* (ACT) s 41 (100 penalty units or imprisonment for one year, or both); *Surrogate Parenthood Act 1988* (Qld) s 3 cf *Surrogacy Act 2010* (Qld) s 56 (100 penalty units or imprisonment for three years).

¹³⁰ *Surrogacy Act 2010* (NSW) s 11. The penalty for paid surrogacy for an individual is 1000 penalty units or imprisonment for two years, or both: s 8.

¹³¹ *Family Law Act 1975* (Cth) s 60HB; *Family Law Regulations 1984* (Cth) reg 12CAA. At the time of writing all of the state and territory laws except Tasmania had been prescribed.

¹³² See, eg, *Child Support (Assessment) Act 1989* (Cth) s 5; *Australian Citizenship Act 2007* (Cth) s 8.

¹³³ See Anthony Dickey, *Family Law*, 4th ed (2002), 288-297.

behave in specific ways defies the fundamental rationale for creating a parentage transfer process in the first place — the pragmatic recognition that it is almost always in a child's interests to have a legal relationship with the parents who are raising him or her. Moreover, there are obvious practical difficulties posed by the fact that a *post*-birth incentive is being used to try to induce certain kinds of parental behaviour *prior* to conception. Such difficulties are even more acute in the states without ART laws that act as pre-emptive 'gatekeepers'. If parties cannot or will not comply, a court process that takes place weeks or months after birth means that the state is shutting the gate to legal parentage well and truly after the horse has bolted. Since Australian states all have different and ever more detailed substantive requirements as well as mandatory pre-conception processes, the likelihood of mistaken non-compliance increases.

It is not improbable that parties will enter into a surrogacy arrangement in ignorance of one or more key elements of their state law. There are already numerous UK cases in which intended parents were mistaken about major substantive requirements of the law (such as rules on payment, on domicile, on legal parentage and on the domestic validity of birth certificates issued overseas), even when they had received professional advice, including legal advice in advance of the arrangement.¹³⁴ Likewise, both press reports and recent Australian case law suggest a high level of confusion among intended parents *and* their legal advisers about fundamental matters such as the rules of legal parentage. A very common mistake is the assumption that male intended parents are legal parents simply because they are genetic parents, even though conception has taken place using assisted means.¹³⁵ Another common misunderstanding is that being named on the birth certificate decisively establishes legal parentage. Intended parents frequently believe that, for example, listing a male genetic parent on the birth certificate grants him legal status as a parent,¹³⁶ or having both intended parents

¹³⁴ See, eg, *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) (9 December 2008) (discussed in detail below in Part VII). In that case the intended parents had made extensive inquiries of the Home Office website in the UK, received further advice from bodies in the UK, and visited a hospital in the Ukraine. They had also sought and been given both English and Ukrainian legal advice. No-one had advised them that they might be unable to re-enter the UK with the children because they lacked legal parentage. For errors relating to lost earnings and reasonable expenses, see *Re S (Parental Order)* [2009] EWHC 2977 (Fam) (9 November 2009); *Re C* [2002] 1 FLR 909; *C and C* [1997] Fam Law 226. *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam) (28 November 2007) involved a mistake as to the domicile requirement for parentage orders. In *Re L (A Child) (Surrogacy: Parental Order)* [2010] EWHC 3146 (Fam) (8 December 2010), [8] (Hedley J) it is noted that the parents received mistaken advice that they were ineligible for surrogacy within the UK on the basis of age.

¹³⁵ See, eg, a report of incorrect legal advice where intended parents in the ACT were told that they did not require a parentage transfer as they were both genetic parents: Carol Nader 'Bearing the ultimate gift' *The Age*, 8 May 2010. In state law it is abundantly clear that male genetic parents in surrogacy are not legal parents if conception was achieved other than through sex. While there was some ambiguity about this status in the *Family Law Act 1975* (Cth) prior to 2008, the issue has since been clarified by legislative amendment through ss 60HA and HB. See *Re Michael: Surrogacy Arrangements* (2009) 41 Fam LR 694, discussed in Millbank, 'De Facto Relationships, Same-Sex and Surrogate Parents', above n 40, 191–2.

¹³⁶ Birth certificates are only a form of proof; they grant a rebuttable presumption of parentage. If the child is conceived through ART, the circumstances of conception generate an irrebuttable presumption in law that renders the birth certificate erroneous.

listed on an overseas-issued birth certificate ensures that Australian law will automatically recognise them as legal parents.¹³⁷ None of the above is correct, yet intended parents continue to list themselves on, and present, birth documentation based on such mistaken beliefs.

Assuming that there will be some degree of mistaken non-compliance, it is important to note that while some legislative requirements can be waived by courts in exceptional circumstances, most cannot. For example, requirements that conception take place within the jurisdiction in the ACT and SA, and that agreements be made prior to conception in all jurisdictions — and approved by a government body in WA — cannot be waived by a court. In many instances, even if the court was convinced that the intended parents had acted in good faith and made an honest mistake in circumstances where it was clearly in the child's best interests to grant a parentage transfer, such an order cannot be granted.

Moreover, the dizzying degree of jurisdictional variation concerning which requirements can be waived by the court provides more possibility for confusion. So, for example, in Queensland the requirement that the birth mother be aged over 25 can be waived in exceptional circumstances in order to grant a parentage order, if this is in the child's best interests.¹³⁸ However, this requirement cannot be waived in NSW or WA, nor in Victoria if licensed ART was not used.¹³⁹ Requirements that the birth mother obtain counselling and legal advice may be waived by the court in NSW, Queensland, Tasmania and WA if the parentage order is nonetheless in a child's best interests,¹⁴⁰ but in WA this power of waiver is *only* available if the birth mother is not a genetic parent and at least one of the intended parents is.¹⁴¹ Similarly, while courts in NSW, Queensland, Tasmania, Victoria and WA are able to grant parentage in exceptional circumstances after the child has reached the age of six months,¹⁴² those in SA and the ACT have no such discretionary power.¹⁴³

¹³⁷ It does not. As in the UK, the laws of parentage in the parent's jurisdiction of residence (not the child's birth) prevail. See, eg, *Re Mark* (2004) 31 Fam LR 162, 165 (Brown J).

¹³⁸ *Surrogacy Act 2010* (Qld) s 23(2).

¹³⁹ In Victoria there is a 'dual track', so that the requirements differ depending on whether licensed ART is used. It is a requirement of both the ART and parentage legislation that the birth mother is over 25, but the ART legislation provides for a Patient Review Panel which can authorise non-compliant arrangements in exceptional circumstances. *Assisted Reproductive Treatment Act 2008* (Vic) ss 40(1)(b), 41; *Status of Children Act 1974* (Vic) s 23(2).

¹⁴⁰ *Surrogacy Act 2010* (NSW) ss 18(2), 22(1); *Surrogacy Act 2010* (Qld) s 23(2); *Surrogacy Bill 2011* (Tas) cl 14(3)(a); *Surrogacy Act 2008* (WA) ss 21(3)(a), (b).

¹⁴¹ *Surrogacy Act 2008* (WA) s 21(3),(4).

¹⁴² *Surrogacy Act 2010* (NSW) s 16(3); *Surrogacy Act 2010* (Qld) s 23(2); *Surrogacy Bill 2011* (Tas) cl 13(2); *Status of Children Act 1974* (Vic) s 20(3); *Surrogacy Act 2008* (WA) s 20(3).

¹⁴³ In addition, South Australian transitional provisions providing eligibility for parentage transfer for existing children were originally limited to those under the age of five at the time the legislation came into operation: *Statutes Amendment (Surrogacy) Act 2009* (SA) sch 1 cl 1(4). This meant that the child of one of the chief campaigners for the law — who was then aged five years and two months — was excluded: Liz Walsh 'Heartache for Mum — Surrogacy Law Blow', *Sunday Mail* (Adelaide), 16 May 2010, 25. Fortunately, this was remedied by the *Statutes Amendment (Surrogacy) Amendment Act 2010* (SA), which extends the age of the child to 10. Note, however, that this amendment still withholds discretion from the court.

Even if parties do know exactly what is required of them in order to take part in a recognised surrogacy arrangement, they may still be unable to comply. For instance, an intended mother who does not have viable eggs, or a gay male couple, residing in a jurisdiction that requires gestational surrogacy, must be able to find *both* a birth mother and an egg donor to help them. Recalling that it is prohibited to advertise for a birth mother or use any form of professional intermediary to locate one, intended parents are effectively casting around their family and friends for someone who is both willing and able to fit the narrow criteria required by law. The vision of second wave surrogacy as a relationship between family and friends may not be realistic for many. Of the 69 reported arrangements in the media survey, 15 involved a birth mother who was related to one of the intended parents, and in a further 12 the birth mother was a friend. Yet the majority of reported arrangements, 36, involved a birth mother who was previously unknown to the intended parents.¹⁴⁴

While prerequisites for the birth mother may be very hard to comply with, there are also requirements of the intended parents that will simply be impossible for some to meet, such as those concerning marital status and sexual orientation in SA and WA. Although the majority of intended parents in the media survey identified themselves as married heterosexual couples,¹⁴⁵ there was a sizable proportion who were not, including 16 gay male couples and two single people.¹⁴⁶ The first parentage application under the Queensland regime was successfully brought by a gay male couple.¹⁴⁷

When the surrogacy reforms were being debated in WA, the Attorney-General stated that between 40 and 50 couples were awaiting surrogacy in that State, and he estimated that around 25 women per year would apply.¹⁴⁸ In fact it was nearly two years after the passage of the reforms before the first application was received by the approval body,¹⁴⁹ and at the time of writing the total number of

¹⁴⁴ In addition there were six arrangements where the previous relationship of the parties was unclear. Of the arrangements involving the relatives, 11 were related to the intended mother and four to the intended father. Most relatives were sisters, although there was also two mothers and one aunt (both of the intended mother) and two cousins.

¹⁴⁵ Forty three of the arrangements involved heterosexual couples: 38 of whom were married at the time of the report (including one couple who had been unmarried at the time of the surrogacy), one couple in a de facto relationship, with a further four couples whether the relationship status was not clear.

¹⁴⁶ There were also eight female intended parents who did not identify their relationship status.

¹⁴⁷ *BLH v SJW* [2010] QDC 439 (28 September 2010). Because the arrangement had been made prior to the commencement of the Act, the case involved the operation of transition provisions allowing for waiver of numerous procedural requirements.

¹⁴⁸ Yasmine Phillips and Debbie Guest, 'Surrogacy Laws Bring Hope after Long Wait', *The West Australian* (Perth), 27 June 2008, 11. After the passage of the legislation, the Health Minister gave lower estimates, stating that he expected 10 couples to undertake surrogacy applications in the first year the process was offered, with five to eight applications in subsequent years: Yasmine Phillips 'Laws Make Surrogacy "Close to Impossible"', *The West Australian* (Perth), 31 March 2009, 14.

¹⁴⁹ Natasha Boddy, 'WA Gets First Surrogate Mother Bid', *The West Australian* (Perth), 7 August 2010, 15.

applications stood at three.¹⁵⁰ All of the parties quoted in the media survey after the 2007 Western Australian Bill was tabled indicated their inability to comply with its requirements. Desiree and Stephen Case, intended parents who had been involved in the process of campaigning for the laws, reported that they were unable to find a birth mother over the age of 25.¹⁵¹ In two further reports, intended parents indicated that they were unable to find a birth mother at all and were speaking to the press in the hope that someone would come forward.¹⁵² Others noted that the time and expense involved in the Western Australian process were so onerous that they planned to, or already had, travelled out of the jurisdiction instead. In the words of Alisa Latto, an intended parent:

Basically, the new [WA] laws, for me, still make it close to impossible to do surrogacy. ... There are still so many hoops that you're required to jump through and it's such a time-consuming and expensive process.¹⁵³

Time is of the essence, particularly for intended mothers who want to use their own eggs, and the lengthy assessment and approval process has been cited as a significant barrier. Ms Latto planned to undertake paid surrogacy in the US at a cost of approximately \$100 000 because, in her view, it would be comparable in price and 'easier in the long run'.¹⁵⁴ Lisa Morgan stated that she was 'fed up' with the 'drawn-out process' and excessive cost of psychological assessment and government approval in WA — estimated at \$15 000 — and, as such, was considering interstate travel.¹⁵⁵ Another woman, who had spent years pursuing surrogacy options and ultimately travelled overseas, was reported as saying of the Western Australian provisions: 'I'm not afraid of red tape but when you come across about 25 brick walls, you've just got to say to yourself "it's time to change tack"'.¹⁵⁶

So what happens when intended parents 'change tack'? It is striking that in the overwhelming consensus to be 'cautious' and implement extensive 'safeguards' around 'altruistic' surrogacy,¹⁵⁷ none of the state inquiries directly addressed the problem of parentage for children when adults travel out of the jurisdiction and/or pay a birth mother to carry the pregnancy.

¹⁵⁰ By November 2010 two applications had been approved and a further one was under consideration: Jacobsen, above n 112.

¹⁵¹ Phillips and Guest, above n 148, 11.

¹⁵² Peta Rule, 'Support, But No Surrogacy For Kylie', *The West Australian* (Perth), 22 January 2007, 13; Anthony Deceglie, 'Who Will Have Our Baby', *The Sunday Times* (Perth), 11 April 2010, 16.

¹⁵³ Phillips, above n 148, 14.

¹⁵⁴ *Ibid*

¹⁵⁵ Anthony Deceglie, '25yo Limit Stalls Births', *The Sunday Times* (Perth), 20 June 2010, 40.

¹⁵⁶ Quoted in Natasha Boddy, 'WA Gets First Surrogate Mother Bid', *The West Australian* (Perth), 7 August 2010, 15.

¹⁵⁷ See, eg, the following statement by the VLRC: 'altruistic surrogacy ... should be regulated with great care ... [and] careful scrutiny. Safeguards are necessary to protect surrogates, commissioning parents and children': *VLRC Report*, above n 4, 168.

VI TRAVEL AND PAYMENT

There is significant evidence that the past response of many Australians prevented from undertaking ART by eligibility restrictions in the laws of their home state has been to travel elsewhere.¹⁵⁸ Indeed, second wave inquiries included detailed testimony from intended parents and fertility clinics that cross-border travel for surrogacy was a common response to both direct and indirect prohibitions on surrogacy in the home state.¹⁵⁹ Parliamentary debates and second wave reports are peppered with references to parents being ‘forced’ to travel as a result of first wave legislation.¹⁶⁰ Some reports, such as that issued by the Victorian Law Reform Commission, openly acknowledged multiple adverse consequences of earlier restrictions on ART and surrogacy:

The inability of people to seek treatment in their home state has serious implications. First, it puts the commissioning parent(s) and the surrogate to unnecessary inconvenience. Second, it means that the legal relationships between the parties involved are uncertain. ... The uncertainty surrounding the legal status of a child born of a surrogacy arrangement interstate may mean that parties do not disclose the nature of the conception upon their return to Victoria.¹⁶¹

I would also add that there are very serious harms for those who are unable to travel — for example if they cannot afford to do so — as they may be excluded from their preferred, or only available, family formation avenue.

It is noteworthy that of the 69 reported surrogacy arrangements in the media survey, travel to evade restrictive local laws or access donor gametes unavailable in the home jurisdiction occurred in 44 arrangements.¹⁶² Travel to another Australian state was reported in nine arrangements, while international travel was reported in 35 cases.¹⁶³ Yet there has been very little consideration of the issue of travel, or residence, in crafting the parentage transfer regimes.

¹⁵⁸ See, eg, Kerry Petersen et al, ‘Assisted Reproductive Technologies: Professional and Legal Restrictions in Australian Clinics’ (2005) 12 *Journal of Law and Medicine* 373, 383, where the authors detail how fertility services in Victoria responded to legislative restrictions on access to ART by actively facilitating treatment elsewhere. In 2008 the Canberra Fertility Centre reported that it had accepted 35 Queensland couples for IVF surrogacy: *Queensland Report*, above n 4, 11.

¹⁵⁹ Second wave inquiries received submissions specifically detailing interstate travel for ART in relation to surrogacy: see, eg, *South Australian Report*, above n 4, 26–7; *Queensland Report*, above n 4, 11. This included clinics in SA providing pre-conception services, for example blood tests, to enable embryo transfers which took place across the border.

¹⁶⁰ Indeed Philip Ruddock, the former federal Attorney-General (who had previously been involved in federal government attempts to prevent unmarried women from having the right to access to ART), argued for national laws on surrogacy in 2006 with the claim that ‘it is not satisfactory that people are forced to effectively forum-shop ... This can be distressing for people who have already faced difficulties starting a family’: quoted in *VLRC Report*, above n 4, 166 (emphasis added).

¹⁶¹ *VLRC Report*, above n 4, 171.

¹⁶² In addition, in nine current arrangements, although travel was not reported as part of the arrangement in place, the intended parents indicated that they would travel to evade local law if necessary.

¹⁶³ In addition, there was one arrangement where the birth mother was currently living overseas but it was unclear who would travel where.

The belatedly-issued 2009 SCAG proposal for legislative *harmonisation* did refer in passing to evasive travel, which it termed ‘forum shopping’. Despite its guiding principle of minimal intervention, the paper proposed limiting intended parents to the most restrictive common denominator:

Acknowledging that there may be some lack of uniformity in relation to various preconditions for a parentage order (for example in relation to the eligibility of same-sex parents, or the nature of screening undertaken) it is considered appropriate to specify a connection between the intended parents and the State or Territory in which the application is made, to prevent exploitation of these differences (forum shopping). ...

A requirement to reside in the State or Territory will deny access to a parentage order to couples who forum shop if there are discrepancies in eligibility and preconditions between the jurisdictions.¹⁶⁴

It is extraordinary that the putative victim in the above passage is *the law itself* rather than the infertile people excluded by its discriminatory operation. Here intended parents are construed as powerful consumers (or ‘shoppers’) who *exploit* legal variation through domestic travel. The SCAG paper went on to present a series of options regarding how (but not *if*) to limit parentage transfer within each jurisdiction.¹⁶⁵

International travel by Australian intended parents for surrogacy may have increased in the years immediately preceding the commencement of most of the reforms. The parent support group ‘Australian Families Through Gestational Surrogacy’ surveyed overseas IVF clinics and agencies known to engage in surrogacy and asked them to report on surrogate births to Australian intended parents. The figures returned by these providers showed a three-fold increase in births in a three year period, from 97 in 2008–9 to 269 in 2010–11.¹⁶⁶

While travel and payment raise distinct legal and policy issues, undertaking surrogacy overseas does appear to render payment significantly more likely. It is for this reason that I discuss the issues of international travel and payment together. The media survey demonstrated a very strong correlation between international travel and ‘commercial’ payment: of the 35 international arrangements it is striking that 32 parties reported payment to the birth mother.¹⁶⁷ In contrast, none of the parties who travelled within Australia reported payment.

Twenty international arrangements involved the intended parents travelling to the US, with 12 families travelling to India. There were three arrangements where it was unclear whether the intended parents or the birth mother had travelled,

¹⁶⁴ *SCAG Paper*, above n 5, 14.

¹⁶⁵ *Ibid* 14–15.

¹⁶⁶ Australian Families Through Gestational Surrogacy, ‘*Statistics on Babies Born to Australians*’ (2011) <<http://www.surrogacyaustralia.org/australian-babies-born-by-clinic/statistics-on-babies-born-to-australians>>.

¹⁶⁷ The exceptions were a past arrangement, with a sister living in the US who acted as birth mother, and two current arrangements between gay male couples and birth mothers in New Zealand in which it was not clear whether payment was involved.

involving two birth mothers from New Zealand and one from Borneo. While most of the reported international arrangements involved travel to the ‘first world’ — particularly the US, mostly California — it also appears that travel to less developed countries is on the increase. This trend is evinced by the development of support groups for intended parents engaging in commercial surrogacy in India¹⁶⁸ and the issuing of official guidance on the practice by the Australian High Commission in New Delhi.¹⁶⁹ In addition, cases are now appearing in the Family Court where surrogacy was undertaken in Thailand.¹⁷⁰

International surrogacy intermediaries are usually commercial entities, often ART providers or matching agencies acting in conjunction with them. Moreover, domestic Australian prohibitions on payment for surrogacy, gamete donation, and advertising or acting as an intermediary for surrogacy mean that travel may be undertaken precisely because it provides broader opportunities for surrogacy through payment. In the words of one intending mother, Kylie Gair, who was prepared to spend \$200 000 on international surrogacy:

Commercial surrogacy would make my situation a lot easier, because currently if you don’t already know someone who can be your surrogate, it’s very hard to find someone in Australia. ... A lot of people thought I was mad, but when I asked them if someone offered them \$200,000 now on the condition that they never had a child, would they take it, they understood.¹⁷¹

Among the reported ‘commercial’ international arrangements, the total costs quoted ranged from a low of \$30 000 to a high of \$300 000, with an average of \$50 000 in India and \$150 000 in the US.¹⁷² When the amount of payment to the birth mother was specified, it usually comprised around 10 per cent of the total cost in India and around 20 per cent in the US. Based on these media reports it

¹⁶⁸ See, eg, Tigerlilycat, ‘Australia India Surrogacy Advocates’ on Tigerlilycat, *Made in India* (26 January 2009) <<http://152am.blogspot.com/2009/01/australia-india-surrogacy-advocates.html>>; Amani (Meg), ‘Australian Families Through Gestational Surrogacy’ on Amani (Meg), *Amani and Bob’s Indian Surrogacy* (13 March 2011) <<http://amaniandbobsurrogacy.blogspot.com/2011/03/this-is-community-service-announcement.html>>; ‘Surrogacy — India’ discussion thread, *Essential Baby* <<http://www.essentialbaby.com.au/forums/lofiversion/index.php/t654643.html>>. Note also Australian Families Through Gestational Surrogacy, above n 166: of 269 surrogate births to Australian intended parents in 2010–11, 179 were from clinics and agencies in India, 45 from Thailand, 36 from the US and 9 from Canada. This may reflect the self-selection of facilities contacted for the survey. Respondents comprised 7 clinics and agencies from India, 1 clinic from Thailand, 6 agencies from the US and 1 agency from Canada.

¹⁶⁹ Australian High Commission (India), *Children Born through Surrogacy Arrangements Applying for Australian Citizenship By Descent* <http://www.india.embassy.gov.au/ndli/vm_surrogacy.html>.

¹⁷⁰ *Collins and Tangtoi* [2010] FamCA 878 (9 August 2010); *O’Connor and Kasemsarn* [2010] FamCA 987 (29 October 2010); *Dennis and Pradchaphet* [2011] FamCA 123 (22 February 2011). These cases are discussed below in Part VIII (‘The Consequences of the Australian Approach for Legal Parentage and Australian Citizenship’).

¹⁷¹ Quoted in Rule, above n 152, 13.

¹⁷² Note also that of the reported ‘altruistic’ domestic arrangements where no payment was made to the surrogate, intended parents indicated that they incurred costs which ranged from \$30 000 to \$90 000. While the bulk of such payments were for private fertility treatment (because public funding is not granted to IVF treatment for surrogacy in Australia), they also included legal expenses of between \$20 000 and \$50 000. See, eg, Norman, above n 46; Joel Gibson, ‘Complex Surrogacy Laws to be Untangled’, *Sydney Morning Herald*, 8 May 2010, 15.

appears that birth mothers in India are being paid less than those in the US in both relative and real terms.

Issues of payment and their relation to informed consent are complex and justify considered policy inquiry, which they simply have not had in Australia to date. Anita Stuhmcke has argued that criminal prohibitions on paid surrogacy within Australia have never been adequately explored or justified.¹⁷³ Others have suggested that the distinction between ‘commercial’ and ‘altruistic’ surrogacy is confusing and untenable¹⁷⁴ and that ‘payment’ is not an effective proxy for ‘exploitation’,¹⁷⁵ which can and should be addressed in other ways.¹⁷⁶ These debates are explored at length elsewhere.¹⁷⁷ Widespread concern that international surrogacy may involve harmful practices¹⁷⁸ has unfortunately not been accompanied by detailed empirical research. Because the second wave inquiries were explicitly limited to ‘altruistic’ surrogacy, none of them considered what role, if any, payment played in terms of informed consent or power imbalance; nor did they receive any evidence as to whether and how such risks were exacerbated in the international context.

While the SCAG discussion paper touched on international commercial surrogacy in passing, it assumed rather than demonstrated harm:

A concern has been raised that there may also be a need to introduce a residency requirement for the surrogate mother, in part to prevent the exploitation

¹⁷³ Anita Stuhmcke, ‘The Criminal Act of Commercial Surrogacy in Australia: A Call for Review’ (2011) 18 *Journal of Law and Medicine* 601.

¹⁷⁴ An argument made as long ago as 1990 in the NBCC Report, above n 18, [2.4.4.4-9]. There is a lack of clarity around, for example, what ‘reasonable expenses’ entail and whether they can include wage and risk based forms of compensation. As one intended mother stated in the media survey, ‘I would never expect someone to carry a baby for me and not be compensated for pain and suffering. People still die in childbirth’: Bruce McDougall, ‘Pay Surrogate Mums’, *Daily Telegraph*, 2 August 2008.

¹⁷⁵ See, eg, Stephen Wilkinson, ‘The Exploitation Argument against Commercial Surrogacy’ (2003) 17 *Bioethics* 169, 184–7; Eric Blyth and Claire Potter, ‘Paying for it? Surrogacy, Market Forces and Assisted Conception’ in Rachel Cook et al (eds), *Surrogate Motherhood: International Perspectives* (2003) 227, 232–3. See also the argument of Anne Jequier, an IVF doctor quoted in the media survey:

Everyone gets their knickers so much in a twist about commercial surrogacy, but ... I believe that money is perhaps one of the healthiest motivators you can have for doing most things. One of the things that we are starting to see is some really unpleasant pressure being put on close friends and relatives to act as surrogates because commercial surrogacy is banned.

Quoted in Denise Rice, ‘Surrogacy a Legal Maze’, *The Sunday Times* (Perth), 17 June 2007, 68.

¹⁷⁶ See, eg, Jennifer Damelio and Kelly Sorensen, ‘Enhancing Autonomy in Paid Surrogacy’ (2008) 22 *Bioethics* 269, 275–7; Wilkinson, above n 175, 168.

¹⁷⁷ See, eg, Jason K M Hanna, ‘Revisiting Child-Based Objections to Commercial Surrogacy’ (2010) 24 *Bioethics* 341.

¹⁷⁸ See, eg, Jennifer A Parks, ‘Care Ethics and the Global Practice of Commercial Surrogacy’ (2010) 24 *Bioethics* 333; Damien W Riggs and Clemence Due, ‘Gay Men, Race Privilege and Surrogacy in India’ (2010) 22 *Outskirts* <<http://www.chloe.uwa.edu.au/outskirts>>; Jennifer Rimm, ‘Booming Baby Business: Regulating Commercial Surrogacy in India’ (2009) 30 *University of Pennsylvania Journal of International Law* 1429; Ruby L Lee, ‘New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation’ (2009) 20 *Hastings Women’s Law Journal* 275; Amrita Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (2010) 35 *Signs* 969.

of women in third-world countries, given that this seems to be a developing practice in some places.¹⁷⁹

In fact, as discussed earlier, while all the state parentage regimes ultimately included residency of the intended parents and half also addressed place of conception, none looked to the residency of the birth mother. However, NSW introduced extraterritorial criminalisation of paid surrogacy through an eleventh-hour amendment by government Member of Parliament Linda Burney after the Bill had already passed through the Legislative Council. Ms Burney stated that she was especially concerned about ‘women in poor or developing countries’, arguing that

[b]y making commercial surrogacy an extraterritorial offence we will help to prevent exporting this exploitation of women overseas. We do not support it here so why should we support it overseas?

In some countries where commercial surrogacy is allowed, such as the United States, some regulation is in place to protect the wellbeing of surrogate mothers. In other countries regulation is mostly absent. In my mind it would be irresponsible and indeed immoral to legislate in New South Wales but to be silent on the potential exploitation by our own citizens of vulnerable women overseas ...¹⁸⁰

Using payment an absolute proxy for ‘exploitation’ has meant there has been no identification of what these risks are and their occurrence or likelihood; nor consideration of what role Australian law could play in trying to ensure that the risk of harm elsewhere is minimised.

The assumption that the imposition of criminal penalties will prevent the practice is also plainly ill-founded. In addition to considerable evidence of past evasion presented at the various surrogacy inquiries, several parties who featured in media reports were from jurisdictions where their conduct was criminal at the time,¹⁸¹ and some applications for parenting orders in the Family Court involve parties whose conduct may have been unlawful in their home state.¹⁸² Indeed the

¹⁷⁹ *SCAG Paper*, above n 5, 14.

¹⁸⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 November 2010, 27599 (Linda Burney).

¹⁸¹ For example, a Queensland couple, ‘Dee’ and ‘Rob’ undertook paid surrogacy in the US were able to conceal the circumstances of the birth because they had recently moved house: Kay Dibben, ‘Surrogacy’s Problem Child’, *The Sunday Mail* (Brisbane), 22 June 2008, 62. Another Queensland couple, Dana and Ben Deverson, undertook paid surrogacy in the US (even though Dana was a former police officer). When Dana then conceived naturally, she found it ‘hard to explain’ how her children are seven months apart in age: Kay Dibben, ‘Mystery Woman Brought Us Joy’, *The Sunday Mail* (Brisbane), 18 January 2009, 17; Ainsley Pavey, ‘Naturally, A Miracle For Couple “Unable to Conceive”’, *The Sunday Mail* (Brisbane), 22 April 2007, 39.

¹⁸² The only contested surrogacy arrangement to go before the courts in Australia to date involved intended parents who resided in Queensland (and an agreement which was made in Queensland): *Re Evelyn* (1998) 23 Fam LR 53. The case was heard before the Family Court in 1997, and then the Full Court of the Family Court on appeal in 1998 in Brisbane. None of the parties to the arrangement were charged with an offence under Queensland law. See also *Collins and Tangtoi* [2010] FamCA 878 (9 August 2010); *Dennis and Pradchaphet* [2011] FamCA 123 (22 February 2011), both cases concerning paid surrogacy in Thailand with intended parents who reside in Queensland.

first parentage order in Queensland concerned an arrangement which was criminal when it was entered into.¹⁸³ Even with the relaxation of ART laws for surrogacy in SA, Victoria and WA, it appears likely that evasive travel for surrogacy will continue. Indeed, seven parties in ‘current’ arrangements in the media survey reported that they planned to or had engaged in travel, and six of these parties specifically noted that this was due to the restrictive nature of the new long-awaited laws in their home state.¹⁸⁴

I acknowledge that surrogacy overseas may pose a greater risk of harm to participants than surrogacy within Australia, for reasons that include ART treatment occurring within health settings that are less than optimal. One example is the use of multiple embryo transfer in IVF. Multiple transfer is an inherently risky practice because it increases the likelihood of multiple pregnancy and birth, with considerably higher health risks to both the birth mother and babies, including neonatal death, cerebral palsy and pre-eclampsia.¹⁸⁵

While the media survey is an imperfect source of data, it does suggest that the practice of multiple transfer is more common in international surrogacy arrangements than domestic ones. Of the 42 past arrangements reported in the media survey, eight resulted in multiple births, including seven sets of twins and one of triplets. Only one of those multiple births occurred following ART within Australia: four occurred following ART in India, and three following ART in the US. Recollecting that overseas arrangements accounted for just over half of the total pool — whether or not the media pool itself is representative of broader experience — the incidence of multiple births is clearly disproportionately high. A further three reports indicated implantation of multiple embryos in overseas arrangements, one of which was a current arrangement in India where it was planned that four embryos would be transferred in the first treatment cycle.¹⁸⁶ In addition, of the six decisions concerning international surrogacy that have thus far been released by the Family Court, it is notable that four families had twins.¹⁸⁷

¹⁸³ *BLH v SJW* [2010] QDC 439 (28 September 2010).

¹⁸⁴ See text at above nn 153–156; Kay Dibben, ‘I’ll Carry Your Child — Couples Wait for New Law’, *The Sunday Mail* (Brisbane), 25 January 2009, 28; Larry Schwartz, ‘Dads Double Their Brood’, *The Age* (Melbourne), 24 January 2008, 15; Tamara McLean, ‘Gays Flock to US For Babies’, *Herald Sun* (Melbourne), 2 July 2008, 4.

¹⁸⁵ See, eg, the evidence detailed in the report used as the basis for the UK changes: Peter Braude, *One Child at a Time: Reducing Multiple Births after IVF — Report of the Expert Group on Multiple Births after IVF* (October 2006) Human Fertilisation and Embryology Authority, <http://www.hfea.gov.uk/docs/MBSET_report.pdf>. The report begins, at 3:

Multiple pregnancy is a major cause of stillbirth, neonatal death and disability. Compared with singletons, twins are four times more likely to die in pregnancy, seven times more likely to die shortly after birth, ten times more likely to be admitted to a neonatal special care unit, and have six times the risk of cerebral palsy. Maternal morbidity and mortality is also increased due to late miscarriage, high blood pressure, pre-eclampsia, and haemorrhage amongst others.

¹⁸⁶ Annette Sharp, ‘Charmyne’s Indian baby’, *The Daily Telegraph* (Sydney), 9 November 2010, 16.

¹⁸⁷ *Wilkie and Mirkja* [2010] FamCA 667 (9 July 2010); *Collins and Tangtoi* [2010] FamCA 878 (9 August 2010); *O’Connor and Kasemsarn* [2010] FamCA 987 (29 October 2010); *Dennis and Pradchaphet* [2011] FamCA 123 (22 February 2011). In this last case there were in fact three

The implantation of multiple embryos has been prohibited or strongly discouraged by ethics committees and regulators in countries such as Australia and the UK in recent years.¹⁸⁸ Within Australia, the national code requires ART clinics to ‘continuously attempt to reduce the incidence of multiple pregnancies’¹⁸⁹ and specifically requires that no more than two embryos be transferred in any woman aged under 40.¹⁹⁰ In the context of surrogacy, multiple transfer is particularly troubling. Multiple transfer places the interests of ART providers above those of the birth mother and potential child(ren). In the first place, IVF is taking place with women whose fertility is not in doubt, and for whom the likelihood of a multiple birth is particularly high. Multiple implantation increases the likelihood of a pregnancy, and in doing so it hastens the process, cuts costs to parents and boosts the ‘success’ rates of clinics. However, the risks from these successes fall squarely on the birth mother and the child(ren) of multiple births (and also, arguably, upon intended parents if a child dies or is born disabled or with acute health needs).¹⁹¹ In my view these risks are likely to be exacerbated in any context in which enforceable surrogacy contracts and/or pre-birth parentage transfer is sanctioned by law. This is because the birth mother may lack, or believe she lacks, the power to manage the pregnancy through, for example, selective termination, on the basis that the foetuses are not legally ‘hers’.¹⁹²

My argument is therefore not that international surrogacy is without risk of harm. Rather, it is that extraterritorial criminal sanctions in the ACT, NSW and Queensland, and the categorical exclusion of children born through paid surrogacy from legal parentage regimes throughout all Australian jurisdictions, represent an insufficiently justified and most likely ineffective response. In my view, these provisions will not prevent Australians from engaging in paid surrogacy overseas, nor do anything to render that practice less risky for any of those involved. Indeed, criminalisation may inhibit constructive discussion about

children born to the intended parents through two simultaneous arrangements, one child to Ms Pradchaphet and twins to another woman, Ms C. The proceedings relating to the twins were listed separately. *Rusken and Jenner* [2009] FamCA 282 (13 March 2009) involved parties who were resident in South Africa at the time IVF for surrogacy was undertaken there; more than one embryo was implanted, which resulted in the birth of one child. In contrast, of the four decisions released concerning domestic arrangements, none involved a multiple birth.

¹⁸⁸ See, eg, policy changes made in the UK by the Human Fertilisation and Embryology Agency from 2005 onwards after an expert review of the risks: for an outline of these changes, see <<http://www.hfea.gov.uk/530.html>>.

¹⁸⁹ Reproductive Technology Accreditation Committee, Fertility Council Australia, *Code of Practice for Assisted Reproductive Technology Units* (2008, revised October 2010) 11 <<http://www.fertilitysociety.com.au/wp-content/uploads/201011201-final-rtac-cop.pdf>>.

¹⁹⁰ *Ibid.* In addition, the Code requires providers to recommend to patients that only one embryo be transferred in a first treatment cycle of a woman under 35.

¹⁹¹ Surrogacy overseas also appears more likely to involve egg donors whose identities are not recorded and who are therefore untraceable, in contrast to the Australian approach, which increasingly favours the provision of an opportunity for identification of the donor if the child wishes this upon reaching adulthood.

¹⁹² The Assisted Reproductive Technologies (Regulation) Bill 2010 (India) cl 34(23) provides that ‘a surrogate shall be duty-bound not to engage in any act that would harm the foetus during pregnancy’. At the time of writing the Bill was still in draft form and had not been tabled in Parliament.

how domestic surrogacy could be expanded or international surrogacy made safer.

Recall that almost half of the 69 surrogacy families reported in the media survey are ineligible for any form of parentage transfer within Australia — even if jurisdictional restrictions were removed — because they were ‘commercial’ and not ‘altruistic’ arrangements. The media survey suggests that when parents are able to return to Australia without revealing that the child was in fact born through surrogacy, they are often doing so. So, for instance, where intended parents who are heterosexual couples are both listed on the birth certificate by the foreign jurisdiction, they may simply apply for citizenship by descent and return to Australia as if they were the birth parents. This is an undesirable outcome for many reasons, including that intended parents may feel obliged to continue to conceal this information not just from the state but from health care providers, their social circles and perhaps the child themselves.

International surrogacy adds a number of challenges to the already complex issue of legal parentage and, as a consequence, citizenship. Courts in both France and Germany have recently denied citizenship to the genetic children of their nationals born overseas through surrogacy.¹⁹³ As discussed, Australia has followed the UK approach by introducing post-birth parentage transfer regimes. These require that parent(s) *and* child are within the jurisdiction in order to apply,¹⁹⁴ adding a catch 22 dimension to international surrogacy — one must return from overseas in order to utilise the parentage transfer process, but may find it hard to bring a child into the country without first establishing legal parentage. The contrast between the Australian approach and the UK response to this conundrum is instructive.

VII THE UK APPROACH

In the UK, although at least one of the intended parents must be domiciled in the UK to be eligible for parentage transfer, conception can take place elsewhere. In addition, the approach to payment is broader and more flexible than that in Australia. Payments for reasonable expenses can include amounts based on an estimate of lost wages for the birth mother. Furthermore, even when reasonable expenses have been exceeded, UK courts have held that they can retrospectively authorise earlier payments to a birth mother in order to grant parentage if it is clearly in the child’s best interests to do so. This approach means that it is possible for discretionary permission to be granted to children born overseas

¹⁹³ See Nisha Satkunarajah ‘Legal Case Brings France’s Surrogacy Laws into Focus’ (18 April 2011) 604 *BioNews*; Nisha Satkunarajah, ‘Surrogate Child Denied German Passport’ (9 May 2011) 606 *BioNews*.

¹⁹⁴ See *Re K (Minors: Foreign Surrogacy)* [2010] EWHC 1180 (Fam) (28 May 2010) [6] (Hedley J). See also UK Border Agency, *Inter-Country Surrogacy and the Immigration Rules* (1 June 2009) <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/residency/Inter-country-surrogacy-leaflet>>.

through paid surrogacy to enter the UK so they can then regularise their status. Under 2010 regulations, once a parentage order is made in the UK, citizenship is automatically conferred on the child.¹⁹⁵

The 2008 English case of *X and Y (Foreign Surrogacy)* ('*X and Y*')¹⁹⁶ illustrates this approach. An English couple travelled to the Ukraine to engage in surrogacy using the intended father's sperm and a donor egg. The Ukrainian birth mother gave birth to twins who were registered according to Ukrainian law as the children of the English intended parents. Yet under UK law the birth mother and her partner remained the legal parents unless and until the transfer process occurred in the UK. Thus the twins were not entitled to enter the UK as they did not – as yet – have English parents; thus they faced the prospect of being stateless orphans. The Home Office gave the twins discretionary permission to enter the UK in order to access the parental orders available under s 30 of the *Human Fertilisation and Embryology Act 1990* (UK), orders which would now be available under s 54 of the *Human Fertilisation and Embryology Act 2008* (UK). However, the Court was faced with the obstacle that there had been payment beyond reasonable expenses to the birth mother.

The intended parents paid a total of €27 000 to the birth mother, structured as a wage while she was pregnant and a large balance paid in two lump sums post-birth, when the Ukrainian and then UK paperwork for parentage was consented to.¹⁹⁷ Frankly, there could be no clearer breach of the UK payment provisions, which specify that payment (other than for expenses reasonably incurred) must not be made in connection with consent to parentage orders.¹⁹⁸ In light of the above discussion on mistaken non-compliance, it is noteworthy that the intended parents *had* received both English and Ukrainian legal advice, as well as advice from a surrogacy support organisation, yet were unaware of the critical facts that the twins would lack UK citizenship and that the payments they made would be in breach of UK law.

Hedley J used a three step test, based on factors considered in earlier cases on surrogacy and adoption,¹⁹⁹ to consider whether the Court should retrospectively authorise the payment. These steps were:

- 1 was the sum paid so disproportionate to reasonable expenses it would offend public policy?
- 2 were the applicants acting in good faith and without 'moral taint' in their dealings with the surrogate mother?
- 3 were the applicants party to any attempt to defraud the authorities?²⁰⁰

¹⁹⁵ Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (UK).

¹⁹⁶ [2008] EWHC (Fam) 3030 (9 December 2008).

¹⁹⁷ Of the €25 000 lump sum, 80% was payable on the surrogate mother's provision of a consent for the applicants to be registered on the Ukrainian birth certificate, and the balance on the signing of written consent to the UK parental order application: *ibid* [17] (Hedley J).

¹⁹⁸ *Human Fertilisation and Embryology Act 1990* (UK) s 30(7).

¹⁹⁹ See *C and C* [1997] Fam Law 226 (25 June 1996); *Re C* [2002] 1 FLR 909.

²⁰⁰ *X and Y* [2008] EWHC 3030 (9 December 2008) [21]–[22].

The second and third questions were answered unhesitatingly in the applicants' favour. In considering the first question, whether the value of the payment was so excessive as to offend against public policy, the Court suggested that the 'answer may vary considerably depending upon where the arrangement was made. The whole basis of assessment will be quite different in say urban California to rural India.'²⁰¹ Ultimately, the Court determined that the payment was not excessive by reference to the comparable cost of living in urban Ukraine and the UK.²⁰²

In coming to the decision to retrospectively authorise the payment, the Court noted that it was torn between two competing and irreconcilable concepts — Parliament's clear intention to prevent commercial surrogacy at the level of general policy versus the court's duty to mitigate such policy by consideration of the child's welfare in the individual instance:

The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.²⁰³

In this and other cases involving payment in excess of reasonable expenses, the English courts have consistently fallen on the side of individual children's welfare in granting parentage orders. In a later case, Hedley J considered amendments which raised the welfare of the child to be the paramount consideration and held that this tipped the balance between public policy and welfare 'decisively in favour of welfare', such that 'it will only be in the clearest cases of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making.'²⁰⁴

The Australian parentage transfer regimes do not enable judges to exercise any discretion in similar cases. This raises the question: what is happening to children in such cases?

VIII THE CONSEQUENCES OF THE AUSTRALIAN APPROACH FOR LEGAL PARENTAGE AND AUSTRALIAN CITIZENSHIP

Children born overseas through ART in surrogacy arrangements are not the legal children of their Australian intended parent(s) under state and territory law or under the *FLA*, regardless of genetic link and regardless of any provision in a foreign birth certificate or court order to the contrary. The question of whether

²⁰¹ *Ibid* [22].

²⁰² This line of reasoning suggests that payment for surrogacy in rural India must be lower than payment in urban Ukraine in order to be acceptable to public policy. I think it is worth reflecting upon a principle which requires poor people in poor countries to be paid *less* in order to prevent exploitation.

²⁰³ *X and Y* [2008] EWHC 3030 (9 December 2008) [24] (Hedley J).

²⁰⁴ *Re L* [2010] EWCH 3146 (Fam) (8 December 2010) [10].

children born through surrogacy are entitled to enter Australia by virtue of Australian citizenship by descent is therefore complex and uncertain.²⁰⁵

The *Australian Citizenship Act 2007* (Cth) s 8 ('*Citizenship Act*') defines a parent through assisted conception or surrogacy by reference to the definitions contained in ss 60H and 60HB of the *FLA*. As discussed earlier, s 60H provides that the birth mother (and consenting partner) are legal parents regardless of genetic link if conception is undertaken through assisted means, and also prescribes the various parentage laws to the same effect.²⁰⁶ Section 60HB accords intended parents legal status via state surrogacy parentage regimes prescribed by regulation.²⁰⁷ In short, citizenship law reflects family law, which in turn reflects the state parentage laws including the surrogacy transfer regimes — but state-based surrogacy transfers cannot be accessed prior to entering Australia, and, moreover, they exclude arrangements in which payment has been made to the birth mother.

Perhaps because of the above conundrum, the Department of Immigration and Citizenship ('DIAC') issued instructions in 2009 which declared that the definition of a parent in surrogacy under s 8 of the *Citizenship Act* 'does not apply to surrogacy arrangements entered into overseas',²⁰⁸ with two more sets of instructions issued in 2010 continuing to proceed on the basis that the s 8 definition *only*

²⁰⁵ In the absence of a legal connection to either intended parent, intended parents could be in breach of the *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* ('*Hague Convention*') if they attempt to remove the child from the country of birth to be adopted in Australia without complying with the requirements for inter-country adoption: see *Hague Convention*, opened for signature 29 May 1993, 1870 UNTS 167 (entered into force 1 May 1995) ch 2. New Zealand has issued advice that, where a child is born as a result of overseas surrogacy in a *Hague Convention* signatory, an inter-country adoption is the only way to create a legal parental relationship with the child: Department of Internal Affairs, Child, Youth and Family and Immigration New Zealand, *International Surrogacy* <<http://www.cyf.govt.nz/documents/adoption/international-surrogacy-information-sheet.pdf>>. The Australian Citizenship Instructions also note this result of the *Hague Convention*: Department of Immigration and Citizenship, *Australian Citizenship Instructions* (July 2009) 31 <http://www.citizenship.gov.au/data/assets/pdf_file/0017/213560/aci-jul-2009.pdf>. However, it is far from clear that the *Hague Convention* is applicable if the child is already the child of the intended parents under the law of the sending country and no adoption will be attempted in the receiving country. Article 2 provides that (emphasis added):

- (1) The Convention shall apply where a child habitually resident in one Contracting State ('the State of origin') has been, is being, or is to be moved to another Contracting State ('the receiving State') *either after his or her adoption* in the State of origin by spouses or a person habitually resident in the receiving State, *or for the purposes of such an adoption* in the receiving State or in the State of origin.
- (2) The Convention covers *only adoptions which create a permanent parent-child relationship*.

²⁰⁶ See also *FLA* s 60HA; *Family Law Regulations 1984* (Cth) regs 12C, 12 CA.

²⁰⁷ See *Family Law Regulations 1984* (Cth) Reg 12 CAA.

²⁰⁸ Department of Immigration and Citizenship, *Australian Citizenship Instructions (ACIs)* (July 2009) 31 <http://www.citizenship.gov.au/data/assets/pdf_file/0017/213560/aci-jul-2009.pdf>. The Instructions continue: 'Section 8 of the Act applies to couples who use artificial conception procedures or surrogacy arrangements occurring under a prescribed law of an Australian state or territory to become parents to a child.'

applies to domestic surrogacy despite there being no wording in the *Citizenship Act* to indicate this.²⁰⁹

In the absence of s 8, it appears that the approach of DIAC is to apply an interpretation of the ‘ordinary meaning’ of ‘parent’ to grant citizenship by descent under s 16(2) of the *Citizenship Act*.²¹⁰ It appears that citizenship is being granted if at least one of the intended parents is able to prove genetic parenthood through DNA testing and this is accompanied by evidence of the legality of parentage for at least one of the intended parents and relinquishment of parental rights by the birth mother in the foreign jurisdiction.²¹¹ This suggests that the ‘ordinary meaning’ that is being applied encompasses a combination of genetic parentage and deference to the laws of foreign jurisdictions which transfer parentage prior to birth or which accord male genetic parents legal status at birth despite conception having taken place through assisted means. While intuitively the ‘ordinary’ meaning of parent may seem inclusive, it does not allow for consistent application, as, for example, it extends to a male genetic parent but provides no answer for a female genetic parent. Deference to foreign laws of parentage is extremely problematic. Arguably there is no basis for this deference in Australian laws of parentage²¹² and the result is an incoherent approach in policy and further uncertainty and inconsistency in practice.

Instructions on surrogacy issued by the Australian High Commission in India repeatedly reference ‘contractual’ arrangements granting parentage, including

²⁰⁹ Department of Immigration and Citizenship, *Australian Citizenship Instructions (ACIs)* (May 2010) 49 <http://www.citizenship.gov.au/_pdf/acis-may-2010.pdf>. The Instructions provide: ‘Some circumstances are not covered by section 8. These include children born to single women as a result of artificial conception procedures, and children who are born overseas as a result of a surrogacy arrangement.’ In the Instructions issued in September 2010, this text is omitted and s 8 is only addressed under the heading ‘Children born in Australia as a result of a surrogacy arrangement’, and then under the following heading, ‘Children born overseas as a result of a surrogacy arrangement’: Department of Immigration and Citizenship, *Australian Citizenship Instructions (ACIs)* (September 2010) 49, 50 <http://www.citizenship.gov.au/_pdf/acis-sept-2010.pdf>. The instructions direct parents to contact the Citizenship Help Desk: at 50.

²¹⁰ See *H v Minister for Immigration and Citizenship* (2010) 272 ALR 605, 612 (Moore, Kenny and Tracey JJ).

²¹¹ Department of Immigration and Citizenship, *Australian Citizenship Instructions (ACIs)* (July 2009) 31 <http://www.citizenship.gov.au/_data/assets/pdf_file/0017/213560/aci-jul-2009.pdf>:

A surrogate child will generally be eligible for Australian citizenship by descent if at least one of the biological parents is an Australian citizen, who has been granted full parental rights by a court of law. In the case of a child born as a result of surrogacy arrangements, it is a requirement for registration of citizenship by descent that there be a genetic link between a parent and the child in question and that that parent be recognised on the birth certificate.

Documents required to register a surrogate child as an Australian citizen by descent are: a statement from the doctor to the courts stating clearly that genetic material from person A and/or person B has been implanted in person C; and court documentation stating clearly the legal custody of the surrogate child and waiving the rights of the surrogate mother. The statement must also confirm the doctor’s statement regarding the person/s donating the genetic material.

Family situation is not relevant to registration of citizenship by descent, provided at least one biological parent is an Australian citizen who has been granted full parental rights by a court of law.

See also Australian High Commission (India), above n 169.

²¹² *Re Mark* (2004) 31 Fam LR 162, 173–4 (Brown J).

consideration of their *enforceability*.²¹³ Using an *enforceable contract* for surrogacy as the basis to accord Australian citizenship is anathema to all surrogacy laws throughout Australia as well as to general Australian law on parentage.²¹⁴ To be clear: the ability to compel the birth mother to relinquish the child under foreign law is a factor being taken in *favour* of granting recognition of parentage through Australian citizenship. Thus it appears that executive action is according recognition to the very practice most emphatically rejected by law within Australia — a commercial, contractual approach to surrogacy, including transfer of parentage as an enforceable obligation which can take place against the wishes of the birth mother.

I do not object to the fact that authorities are trying to prevent children born through international commercial surrogacy arrangements from being rendered stateless orphans. However, the situation outlined above is surely a perverse outcome in terms of the policy objectives guiding the Australian approach. The legal parentage of such children should be remedied by a more direct, transparent and inclusive legislative response.

Moreover, deference to the foreign laws of parentage has led to inequitable and unpredictable outcomes. Children born to Australian parents through surrogacy in countries that do *not* provide for the relinquishment of parental rights by the birth mother through either court orders or contract have been denied citizenship by descent. In three cases concerning surrogacy undertaken in Thailand, the Australian Embassy in Bangkok denied applications on this basis, meaning that the parents were stranded overseas for between three and nine months and ultimately

²¹³ Australian High Commission (India), above n 169. Under the section headed ‘Written advice confirming legal parentage’, the website advice states:

Where a client is unable to obtain court documentation stating the legal parentage of the child ... clients will be requested to provide written advice from a lawyer expert in Indian family law and/or contract law that their surrogacy contract is legal and confirming they are the legal parent(s) of the child.

This advice should include comment on the general legality of the contract (with reference to the provisions of Indian legislation that make it valid) and whether the contract confirms the legal parentage of the child (with reference to the relevant provisions of Indian legislation). It should also include comment on the following elements and state the grounds on which the lawyer is satisfied that these elements are met.

- whether all parties consent to the contract;
- whether the contract is legally enforceable;
- whether the contract gives full legal parental rights to the Australian citizen parent;
- whether the contract waives the parental or any other rights of any other parties to the contract; and
- whether the contract includes evidence that all parties are still consenting and still agree to the contract after the birth of the child concerned.

This situation will be further complicated if India passes proposed ART legislation, which requires foreign nationals engaged in surrogacy in India to present documentation that any resulting child would be entitled to enter the intended parents’ home country: Assisted Reproductive Technologies (Regulation) Bill 2010 (India) cl 34(19). At the time of writing (January 2011), the Bill was still in draft form and had not been tabled in Parliament.

²¹⁴ See, eg, *ND and BM* (2003) 31 Fam LR 22, [23]–[27] (Kay J): one cannot contract out of parental status, even if all parties are in agreement. See also *Re Evelyn* (1998) 23 Fam LR 53, where the terms of the surrogacy agreement were irrelevant to the court’s inquiry about who should raise the child.

were only able to bring the children to Australia having obtained Thai passports and travel visas for them.²¹⁵ Once within Australia the parties applied to the Family Court for parenting orders, which do not offer parental status per se but can remove the parental responsibility of the birth mother and grant parental responsibility to the intended parents. In turn the Australian Embassy indicated that it would accept such orders as the basis for citizenship by descent after the child was on-shore.²¹⁶ This is a situation of considerable uncertainty.²¹⁷

The examples of India and Thailand detailed above reveal a significant slip-page, even hypocrisy, of Australian law and policy in its approach to parental rights for children born through international commercial surrogacy. In effect, the federal government is treating the children as citizens for limited purposes, using changing and non-transparent procedures, yet categorically denying intended parents access to the very state-based transfer regimes which would actually transfer legal parentage.

The default position of relying upon Family Court orders to provide some parental relationship in law is also very unsatisfactory for other reasons. As discussed, parental responsibility orders do not offer all of the protections to children which legal parentage does. In addition, such orders are being made in wider circumstances and in accordance with more lax processes than those required by the parentage transfer regimes. The Family Court must apply a general ‘child’s best interests’ test developed in the context of separating parents, without any consideration of the specific factors which direct the role of the state courts in parentage transfer. So while the Family Court must consider the benefit to the child of a relationship with the legal/birth mother,²¹⁸ it is not obliged to inquire into, or be satisfied of, the informed consent of the birth mother; nor is it required to undertake any consideration of the role of payment, or the amount paid, in assessing whether the agreement was conscionable.

²¹⁵ *Collins and Tangtoi* [2010] FamCA 878 (9 August 2010) [9]–[10] (Loughnan J); *O’Connor and Kasemsarn* [2010] FamCA 987 (29 October 2010) [12]–[15] (Ainslie-Wallace J); *Dennis and Pradchaphet* [2011] FamCA 123 (22 February 2011) [6]–[8] (Stevenson J).

²¹⁶ *Collins and Tangtoi* [2010] FamCA 878 (9 August 2010) [10] (Loughnan J). This appears to be an incorrect reading of s 16(2) of the *Citizenship Act*, which the Full Federal Court has recently stated requires that the parent be a parent at the time of the child’s birth: see *H v Minister for Immigration and Citizenship* (2010) 292 ALR 605, 638 (Moore, Kenny and Tracey JJ). Although Family Court orders *do* suffice to make a person a ‘responsible parent’ under s 6(1)(c) of the *Citizenship Act* (and a responsible parent is required to submit the application for a child under s 16(2)), the Full Federal Court in *H* also held that the definition of parent s 6(1)(c) does not determine who is a parent for the purposes of s 16(2): at 621 (Moore, Kenny and Tracey JJ).

²¹⁷ In mid 2011 the Australian Embassy in Bangkok published information on its website describing the requirements for citizenship by descent in surrogacy as ‘under review’ (3.1) and providing instructions on the processing of applications for travel visas for children born through surrogacy: <http://www.thailand.embassy.gov.au/bkok/DIAC_Children_surrogacy.html>. The Embassy instructions mirror the Australian High Commission in New Dehli in requiring DNA testing to establish a genetic link with at least one Australian parenta but also require a mandatory interview with the birth mother and her husband (if any) to ascertain her consent to the child’s removal from Thailand: [6.6].

²¹⁸ *Family Law Act 1975* (Cth) s 60CC. The court must apply a presumption of equal parental responsibility to the legal parents: at s 61DA.

Since 2003, there have been six decisions released by the Family Court concerning applications for parental responsibility for children born through paid international surrogacy. The first three cases concerned intended parents who were gay male couples, all from Victoria: *Re Mark* involved a child born from a surrogacy arrangement in California,²¹⁹ *Cadet and Scribe* ('*Cadet*') concerned a child from an arrangement in Ohio,²²⁰ and *Wilkie and Mirkja* ('*Wilkie*') concerned twins born in India.²²¹ *Collins and Tangtoi* ('*Collins*'),²²² *Dennis and Pradchaphet* ('*Dennis*')²²³ and *O'Connor and Kasemsarn* ('*O'Connor*')²²⁴ all concerned children born in Thailand, to two couples from Queensland and a single man from NSW, respectively. While each judgment records that the intended fathers' sperm was used (including, in the case of the male couples, which father's sperm was used), and that a donor egg was used in the conception in all instances,²²⁵ not one records the amount of money paid to the birth mother or the identity of the egg donor. Only the judgment in *Re Mark* includes any detail of the terms of the surrogacy arrangement.²²⁶ Again it is of concern that extraterritorial provisions criminalising paid surrogacy are likely to prevent parties from revealing such information, and may also inhibit the court from inquiring into such matters for fear that it will expose parents to prosecution.

In *Re Mark* the birth mother was served with notice of the proceedings and elected not to participate,²²⁷ while in *Cadet*, *Collins*, *O'Connor* and *Dennis* the birth mother was served with notice and consented to the orders as a party to proceedings (although in none of these cases did she attend the hearing).²²⁸ Thus the courts received some evidence, albeit limited, of the birth mothers' consent to the arrangements. In *Collins*, *O'Connor* and *Dennis* the birth mother gave evidence by affidavit which included the information that she had received legal advice and that an interpreter had read her all of the relevant documents, including the affidavits and applications for orders.²²⁹ In *Collins* the Court concluded that although '[t]here are always concerns in relation to a case where one of the

²¹⁹ (2004) 31 Fam LR 162.

²²⁰ [2007] FamCA 1498 (5 November 2007).

²²¹ [2010] FamCA 667 (9 July 2010).

²²² [2010] FamCA 878 (9 August 2010).

²²³ [2011] FamCA 123 (22 February 2011).

²²⁴ [2010] FamCA 987 (29 October 2010).

²²⁵ *Ibid* [3] (Ainslie-Wallace J); *Re Mark* (2004) 31 Fam LR 162, 163 (Brown J); *Cadet* [2007] FamCA 1498 (5 November 2007) [2] (Brown J); *Wilkie* [2010] FamCA 667 (9 July 2010) [6] (Cronin J); *Collins* [2010] FamCA 878 (9 August 2010) [2] (Loughnan J); *Dennis* [2011] FamCA 123 (22 February 2011) [5] (Stevenson J).

²²⁶ (2004) 31 Fam LR 162, 163 (Brown J).

²²⁷ *Ibid*. Brown J also noted that the birth mother 'was not a respondent to the initiating application and did not seek to be joined or heard in respect of that proposed application': at 176.

²²⁸ *Cadet* [2007] FamCA 1498 (5 November 2007) [1] (Brown J); *Collins* [2010] FamCA 878 (9 August 2010) [1] (Loughnan J); *O'Connor* [2010] FamCA 987 (29 October 2010) [9] (Ainslie-Wallace J).

²²⁹ *Collins* [2010] FamCA 878 (9 August 2010) [5]–[6] (Loughnan J); *O'Connor* [2010] FamCA 987 (29 October 2010) [8]–[9] (Ainslie-Wallace J); *Dennis* [2011] FamCA 123 (22 February 2011) [14] (Stevenson J).

parties is outside the jurisdiction and does not speak English',²³⁰ any such concerns were here assuaged by the affidavit evidence of the birth mother and interpreter, as well as by the evidence of a Thai lawyer.²³¹

The 2010 case of *Wilkie* is far more troubling. The judgment notes that the surrogacy arrangement was overseen by a solicitor in Mumbai who was subsequently unable to contact the birth mother because she had given a false address. The intended parents had not met the birth mother and so could not provide any further information.²³² In this case the court did not require any further attempt to locate the birth mother, dispensed with the requirement of service of the proceedings on the birth mother,²³³ and granted the orders with no further inquiry into her role. Again I stress that I do not cavil at an outcome which provides security for children through parental responsibility for the parents raising them. Rather, I argue that the state based regimes — if they included commercial and out-of-jurisdiction surrogacy — would provide a far more focused and thoroughgoing inquiry into the consent of all parties and the fairness of the arrangement.

The 'cautious' approach to regulation embodied in the new Australian surrogacy laws is unduly complex and inflexible. If the use of commercial international surrogacy continues, there will ultimately be a far weaker level of protection for the rights of birth mothers and the interests of children than if the domestic regimes had been more liberal in their coverage.

IX CONCLUSION

Several rounds of inquiry and the implementation of 'liberalising' reforms to Australian surrogacy laws may offer limited practical benefit to surrogacy families. Restrictive ART laws, including exhaustive and expensive mandatory state assessment and approval processes in Victoria and WA, and variable and restrictive parentage transfer regimes, combined with a lack of judicial discretion, mean that many — perhaps most — surrogacy families will be excluded. An inconsistent and opaque policy on Australian citizenship for children born overseas adds a further layer of confusion.

To return to the basic principles of surrogacy laws throughout Australia: they aim to prevent the exploitation of women who act as birth mothers, prevent the commercialisation of reproduction, and protect the interests of current and future children born through these means. None of these principles is absolute, and as Hedley J suggested in *X and Y*, sometimes they must be balanced against each other.²³⁴

²³⁰ [2010] FamCA 878 (9 August 2010) [20] (Loughnan J).

²³¹ *Ibid* [20]–[21].

²³² *Wilkie* [2010] FamCA 667 (9 July 2010) [2] (Cronin J).

²³³ I infer from the following passage an assumption that the birth mother is illiterate: 'There are no indications as to her status or intellectual capacity which would enable me to find that a notice by way of advertisement in a newspaper would bring the application to her attention': *ibid* [2] (Cronin J).

²³⁴ *X and Y* [2008] EWHC 3030 (Fam) (9 December 2008) [24] (Hedley J).

Surrogacy is not a field in which clear legal solutions offering an appropriate balance of principle and pragmatism are readily apparent. Nonetheless, this article argues that the Australian approach is a manifest failure. A simple first step towards improvement would be to amend the parentage transfer regimes to bring them more closely into line with the English approach, allowing applications if there is conception outside the jurisdiction and granting broader discretion to deal with non-compliance, including instances in which payment has been made to the birth mother. In terms of substantive eligibility, discriminatory requirements, such as those concerning marital status and sexual orientation, ought to be removed in the states which have them, as they prevent the court from being able to consider the individual child's best interests. Marital status requirements are also inconsistent with the modern approach to Australian family and relationship laws, which largely includes same-sex couples and parents on an equal footing with heterosexual families and enables a case-by-case assessment of parental capacity where necessary.²³⁵

If Australian policymakers are genuinely concerned about outsourcing surrogacy arrangements overseas, it would be worth them reconsidering some of the fundamental tenets of domestic surrogacy law and policy. First wave bans on advertising for surrogacy and acting as an intermediary in surrogacy were widely framed and have not been reconsidered in the second wave reforms. Most of these prohibitions are not limited to paid surrogacy, making it very difficult, if not impossible, for intended parents to engage in unpaid surrogacy domestically if they do not have a pre-existing relationship with the birth mother. Moreover, second wave reforms introduced crude legislative proxies for power imbalance and informed consent — such as rules requiring the birth mother to be over 25 or have given birth to her own child — which appear to be impeding domestic arrangements further. Given that many of the parentage transfer regimes, as well as the current practice of fertility providers, stress the use of extensive counselling processes, such proxies could be relaxed in favour of specific inquiry into the actual motivations and state of mind of the birth mother concerned. As with other recommendations in this article, this change would involve increased discretionary power for the court in parentage transfer applications.

For the longer term, I suggest that the question of a wage-based or risk-based compensation approach to payment for birth mothers involved in domestic surrogacy should be properly addressed. In addition, the extension of public health funding for fertility treatments to cover their use in surrogacy arrangements would help to make surrogacy more affordable within Australia, and thereby reduce incentives for international travel.

While the prospect of a third wave of reforms may appear premature (and exhausting!), all of the above changes would permit a more accessible and realistic framework by which surrogacy can take place within Australia. Keeping

²³⁵ Millbank, 'De Facto Relationships, Same-Sex and Surrogate Parents', above n 40, 183–93.

surrogacy onshore would in turn provide a far greater opportunity for harm minimisation objectives to be pursued through legal avenues.