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HOW SHOULD THE LAW RESPOND TO AUSTRALIANS' USE OF INTERNATIONAL COMMERCIAL SURROGACY?

Please note this article contains descriptions of sexual acts involving children which may be disturbing to some readers.

Abstract

Australians have previously been described as the largest 'outsourcers' of surrogacy arrangements per capita in the world. Even in the midst of unprecedented travel restrictions as a consequence of the COVID-19 pandemic, Australians are still pursuing offshore surrogacy. However, the current law is gridlocked: it does not effectively prevent Australians from engaging in international commercial surrogacy, but it does not effectively regulate it either. In this context, the South Australian Law Reform Institute prepared a report in 2018 which examined the role and operation of surrogacy law in South Australia and now forms the basis of the *Surrogacy Act 2019* (SA). This article examines some of the issues of ethics, policy, practice and countervailing human rights associated with the current approach and concludes by suggesting how the law should respond to the complex challenges posed by cross-border surrogacy in order to minimise the risk of harm to the intended Australian parents, surrogate and the child through regulation.

I Introduction

If surrogacy gives rise to a 'legal and moral morass'[1] or 'a Pandora's box',[2] the contentious practice of commercial surrogacy raises a particular myriad of complex issues of law, ethics, policy and practice.[3]

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1 'The People vs Surrogacy', *The People vs* (ABC Radio National, 12 August 2018) 00:04:02 <http://www.abc.net.au/radionational/programs/the-people-vs/the-people-vs-surrogacy/10043286>.

2 David Plater et al, *Surrogacy: A Legislative Framework* (Report No 12, South Australian Law Reform Institute, October 2018) 34.

3 Ibid 33–40. See also Julie Redman, 'If Baby Gammy Came To Live in Adelaide: Legal and Ethical Discussion on the Current State of Recognition of Children Born from Overseas Commercial Surrogacy' (Speech, Law Society of South Australia, 18 May 2016) 1.

Currently in all Australian jurisdictions, commercial surrogacy[4] — where a person is provided valuable consideration beyond that of reasonable medical expenses — is 'ethically unacceptable',[5] unlawful and subject to criminal penalties.[6] Notwithstanding this, in South Australia, (as well as Tasmania, Victoria and Western Australia) it is lawful for residents to commission a surrogate outside of Australia,[7] nearly all of which will constitute commercial arrangements.[8] The Department of Home Affairs ('DHA') confers citizenship on the child on the basis of the biological link to the commissioning parents, and the Federal Circuit and Family Court ('Family Court') is empowered to confer parental responsibility (where an application is made, which in many cases it is not).[9]

This article does not attempt to traverse all ethical issues associated with commercial surrogacy.[10] However, this article notes the unique ethical issue associated with the approach in South Australia, which allows residents to travel overseas and perpetrate

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4 Commercial Surrogacy, as opposed to non-commercial (or 'altruistic') surrogacy is when a surrogate agrees to carry and birth a child for another without valuable consideration (save for reasonable medical and other costs incurred) for the act, which is lawful in South Australia in particular circumstances.

5 National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (Guidelines, 20 April 2017) 65 ('*ART Guidelines*').

6 See below Appendix 1: *Parentage Act 2004* (ACT) s 41; *Surrogacy Act 2010* (NSW) ss 6, 8, 23; *Surrogacy Act 2010* (Qld) ss 15, 56; *Surrogacy Act 2019* (SA) ss 23–5; *Surrogacy Act 2012* (Tas) ss 10, 40; *Assisted Reproductive Treatment Act 2008* (Vic) s 44(1); *Surrogacy Act 2008* (WA) ss 7–8. Currently there is no law regulating surrogacy in the Northern Territory, however surrogacy is regarded as ethically unacceptable in this jurisdiction, as it is throughout Australia: see *ART Guidelines* (n 5).

7 See below Appendix 1: *Surrogacy Act 2019* (SA); *Surrogacy Act 2012* (Tas); *Assisted Reproductive Treatment Act 2008* (Vic); *Surrogacy Act 2008* (WA).

8 Australian Human Rights Commission, Submission No 67 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (17 February 2016) 22 [109].

9 *Family Law Act 1975* (Cth) s 61A ('*FLA*'). See also *Australian Citizenship Act 2007* (Cth) ss 19B, 19C, 19D; *Re X* [2009] Fam 71, 80–1 [24] ('*Re X*').

10 This is well covered elsewhere. See, eg: 'Surrogacy and the Sale of Children', *United Nations Human Rights Office of the High Commissioner* (Web Page, 6 March 2018) <https://www.ohchr.org/EN/Issues/Children/Pages/SurrogacySummary.aspx>; John Tobin, 'To Prohibit or Permit: What Is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63(2) *International and Comparative Law Quarterly* 317, 319; Hague Conference on Private International Law, 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Agreements' (Preliminary Document No 11, Permanent Bureau, Hague Conference on Private International Law, March 2011) 18–20 ('Private International Law Issues Surrounding the Status of Children'); Mary Keyes, 'Cross-Border Surrogacy Agreements' (2012) 26(1) *Australian Journal of Family Law* 28.

the exact practice that the legislature intends to prevent domestically.[11] However, as outlined below, an approach that regulates and thereby minimises harm to all parties is preferable, notwithstanding that it does not alleviate all ethical concerns with commercial surrogacy generally, and in particular this phenomenon.[12]

Australians have in the past been described as the largest 'outsourcers' of surrogacy arrangements per capita[13] (prior to the COVID-19 related border closures), and overseas commercial arrangements far exceed altruistic domestic arrangements.[14] However the law does not sufficiently regulate these arrangements, placing the welfare of surrogates, and the child they carry on hopeful Australian parents' behalf, at significant risk. That being said, this article focuses primarily on how the law can respond to offshore commercial surrogacy in order to better protect the interests of the child, which accords with the paramount consideration under the *Family Law Act 1975* (Cth) ('*FLA*') and Australia's obligations pursuant to the *Convention on the Rights of the Child*.[15] The problematic aspects of the current approach are analysed from three angles: Part II in relation to the South Australian legislative position; Part III in relation to the DHA; and Part IV in relation to the Family Court.

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11 See South Australia, *Parliamentary Debates,* House of Assembly, 4 June 2015, 1523 (John Gardner): 'It is critical to understand, this bill seeks to maintain the offence and clarify the offence of commercial surrogacy.'

12 See generally Jenni Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27(2) *Australian Journal of Family Law* 135, 149, 164–9.

13 Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 5 March 2015, 5 (Sam Everingham). See also Sarah Jefford, 'How Many Surrogacy Births Are There in Australia?' (Blog Post) <https://sarahjefford.com/how-many-surrogacy-births-are-there-in-australia>. Anna Whitelaw, 'Hundreds Pay for Overseas Surrogacy', *The Sydney Morning Herald* (online, 3 June 2012) <https://www.smh.com.au/politics/federal/hundreds-pay-for-overseas-surrogacy-20120602-1zp1u.html>. It is not known exactly how many Victorians utilise offshore assisted reproductive treatment, but is stated to be a 'large, but unquantified, number': Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Report, May 2019) 13. In 2019, it was estimated that there were approximately 250 cases every year: Rebecca Puddy, 'Commercial Surrogacy Debated as UN Envoy Prepares Final Report on the Rights of Children', *ABC News* (online, 29 June 2019) <https://www.abc.net.au/news/2s019-07-29/push-to-simplify-international-commercial-surrogacy/11303164?nw=0>; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (Report, April 2016) ('*Surrogacy Matters*').

14 See Plater et al (n 2) 33–4.

15 *FLA* (n 9) s 60CA; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*Convention on the Rights of the Child*'). See also Anne-Marie Rice and Louise O'Reilly, 'The Surrogate's Progress: A Question of State Law, or Children's Best Interests?' (2012) 32(10) *Proctor* 21, 23; *Re D & E* (2000) 26 Fam LR 310, 315 [21]; *Farnell v Chanbua* (2016) 56 Fam LR 84, 151–2 [351]–[354] ('*Baby Gammy Case*'); *Re X* (n 9) 80–1 [24]

Parts V and VI then conclude that all children born to such arrangements should be subject to court oversight to ensure they are protected from harm and to give their relationship with the parents that are raising them a secure legal footing.[16] Part V also outlines a potential alternative response to South Australians' use of transnational surrogacy to facilitate this. It is suggested that three broad changes be implemented: the introduction of a requirement that residents receive pre-approval before engaging a surrogate overseas; the Family Court be empowered to make orders of parentage[17] regarding children born through commercial surrogacy arrangements; and citizenship be conferred upon parentage orders made by the Family Court.

The onset of the COVID-19 pandemic in March 2020 resulted in Australian citizens and permanent residents being prohibited from leaving Australia without a travel exemption. Notwithstanding the border restrictions, it has been reported that the charitable organisation, Growing Families, assisted over 100 couples obtain travel exemptions to pursue offshore surrogacy arrangements since March 2020.[18] It is a real possibility that there will be a surge in citizens engaging in commercial surrogacy overseas when the Australian border restrictions are eased. It is imperative that reforms are adopted now so that the best interests of all parties, but most critically of the children born to surrogates overseas, can be upheld.

(Hedley J), cited in *Baby Gammy Case* (n 15) 151 [353] (Thackray CJ); *Ellison v Karnchanit* (2012) 48 Fam LR 33, 55–6 [88]–[92] ('*Ellison*'); *Mason v Mason* [2013] FamCA 424, [39]–[43] ('*Mason*').

16 As it is described in United Kingdom legislation: *Human Fertilisation and Embryology Act 2008* (UK) ss 54, 54A. See also Petra Thorn, Tewes Wischmann and Eric Blyth, 'Cross-Border Reproductive Services: Suggestions for Ethically Based Minimum Standards of Care in Europe' (2012) 33(1) *Journal of Psychosomatic Obstetrics and Gynecology* 1.

17 Parental responsibility is a lesser order than that for parentage (otherwise referred to as a parentage order or parental order), and is defined as 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children': *FLA* (n 9) s 61B.

18 Caitlin Fitzsimmons, 'Travel Exemptions Granted for IVF Tourism and Surrogacy', *The Sydney Morning Herald* (online, 13 June 2021) <https://www.smh.com.au/lifestyle/health-and-wellness/travel-exemptions-granted-for-ivf-tourism-and-surrogacy-20210609-p57zid.html>. See also the story of a Melbourne couple who traveled to Mexico for the birth of their daughter born via surrogacy in July 2020 but were unable to return: Vanessa Brown, 'Aussie Couple Trapped in Mexico Raising Money on GoFundMe To Get Home', *News.com.au* (online, 27 September 2020) <https://www.news.com.au/travel/travel-updates/travel-stories/aussie-couple-trapped-in-mexico-raising-money-on-gofundme-to-get-home/news-story/1bbde27aa80baa7a003580cd523ff5bc>.

A *Background*

In 2014, Baby Gammy,[19] a child with Down Syndrome, was left in Thailand with his surrogate, while his twin Pipah received a passport and returned to Australia with the commissioning parents. When the case came before the Family Court of Western Australia, Thackray CJ contentiously made orders in favour of the commissioning couple, notwithstanding that the father was convicted of sexual offences against young children.[20]

Following this highly publicised case, on 26 December 2017, the independent South Australian Law Reform Institute ('SALRI') was asked by the then South Australian Attorney-General, John Rau, to inquire into and report on certain aspects of the law regulating surrogacy contained in pt 2B of the *Family Relationships Act 1975* (SA), and to suggest a suitable regulatory framework for surrogacy arrangements in South Australia. SALRI examined this difficult question and conducted wide consultation with experts, interested parties and the community generally in respect of the role and operation of surrogacy law and practice in South Australia,[21] within its terms of reference. The recommendations made by SALRI were accepted by the South Australian Government and the *Surrogacy Act 2019* (SA) was passed with all party support having close regard to those recommendations.[22]

However, there are still real issues with the law in this area which necessitate reform to appropriately respond to South Australians' (and, generally, Australians') use of offshore commercial surrogacy, which will be traversed below.

B *A Harm Reduction Approach Should Be Taken*

The local prohibition and the lack of oversight of international surrogacy arrangements has generated reproductive 'tourism'. Intending parents are charged high,

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19 The Family Court of Western Australia held that it *was* in Pipah's best interest to remain with the commissioning couple despite her Australian father having worrying convictions of repeated child sex offences: *Baby Gammy Case* (n 15) 238–42 [786], [789]. See also Redman (n 3).

20 *Baby Gammy Case* (n 15) 174–5 [479]. This was on to the condition that Pipah never be left alone with Mr Farnell, and she was to be taught by a book that he was a risk to her: at 102 [102], 180 [506], 238–42 [789].

21 See Plater et al (n 2).

22 South Australia, *Parliamentary Debates*, Legislative Council, 31 May 2018, 319 (John Dawkins); South Australia, *Parliamentary Debates*, House of Assembly, 15 November 2018, 3733 (Vickie Chapman, Attorney-General); South Australia, *Parliamentary Debates*, Legislative Council, 5 December 2018, 2418–19 (John Dawkins); South Australia, *Parliamentary Debates*, House of Assembly, 1 August 2019, 6967 (Vickie Chapman, Attorney-General); South Australia, *Parliamentary Debates*, Legislative Council, 17 October 2019, 4685–6 (Michelle Lensink); South Australia, *Parliamentary Debates*, Legislative Council, 29 October 2019, 4742 (John Dawkins), 4744 (Ian Hunter), 4745 (Irene Pnevmatikos), 4747 (Emily Bourke), 4748–9 (Tammy Franks); South Australia, *Parliamentary Debates*, Legislative Council, 31 October 2019, 4807 (Connie Bonaros).

if not exorbitant fees, by brokers and surrogacy agencies,[23] and there is little to no oversight of the circumstances of the surrogacy and the protective measures available to the surrogate. Most critically, for the reasons that follow, the law at present fails to adequately ensure the best interests of the child.

In principle, these deficiencies in the law could be addressed through the implementation of an extraterritorial ban or legalisation of commercial surrogacy domestically.[24] However, this article adopts a practical — rather than merely principled — approach to reform.

First, surrogacy in Australia falls within the legislative power of the states rather than the Commonwealth, and if there was to be a national approach there would be great difficulty associated with passing uniform legislation across all jurisdictions, and so it is unlikely that such a ban will come to fruition in the foreseeable future.[25] As will be discussed further in Part II, even if such a ban were ever passed, the majority of hopeful parents would continue to seek offshore commercial surrogacy irrespective of its legality.[26] Consequently, prohibiting offshore surrogacy is likely to prove ineffective in preventing the practice, and all parties would continue to have their welfare placed at risk.[27]

Second, this article does not advocate for legalising commercial surrogacy within South Australia based on practical considerations. Commercial surrogacy is a highly sensitive, and therefore controversial, area of the law. As such, it is unlikely

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23 Jeremy Feiglin and Julian Savulescu, 'A New Ethical Model of Commercial Surrogacy Arrangements for Australia' (2018) 25(4) *Journal of Law and Medicine* 919, 920, 925.

24 See generally Sam G Everingham, Martyn A Stafford-Bell and Karin Hammarberg, 'Australians' Use of Surrogacy' (2014) 201(5) *Medical Journal of Australia* 270; Jenni Millbank, 'Responsive Regulation of Cross-Border Assisted Reproduction' (2015) 23(2) *Journal of Law and Medicine* 346, 350; Anita Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (2015) 23(2) *Journal of Law and Medicine* 333, 336 ('The Regulation of Commercial Surrogacy').

25 See South Australia, *Parliamentary Debates*, Legislative Council, 12 November 2014, 1597 (John Dawkins). South Australia, *Parliamentary Debates*, House of Assembly, 4 June 2015, 1524 (John Gardner). See also Barbara Miller, 'The Surrogacy Trap: Why Our Laws Need New Life', *ABC News* (online, 24 December 2012) <http://www.abc.net.au/news/2012-12-24/miller-whose-baby-is-it/4439810>. Similarly, it would be very difficult given the divergent approaches to get consensus internationally: Claire Fenton-Glynn, 'The Regulation and Recognition of Surrogacy under English Law' (2015) 27(1) *Child and Family Law Quarterly* 83, 95.

26 Paula Gerber, 'Making Commercial Surrogacy Illegal Only Makes Aspiring Parents Go Elsewhere', *The Conversation* (online, 18 February 2016) <https://theconversation.com/making-commercial-surrogacy-illegal-only-makes-aspiring-parents-go-elsewhere-54382>; Anita Stuhmcke, 'The Criminal Act of Commercial Surrogacy in Australia: A Call for Review' (2011) 18(3) *Journal of Law and Medicine* 601, 609 ('The Criminal Act of Commercial Surrogacy in Australia'); Whitelaw (n 13).

27 Stephen Wilkinson, 'Exploitation in International Paid Surrogacy Arrangements' (2016) 33(2) *Journal of Applied Philosophy* 125, 138.

that Parliament would be willing to legalise the practice,[28] particularly in the face of strong opposition from various sectors of the community.[29] Additionally, any legalisation of surrogacy will need to form part of an agreed national response between the states and the Commonwealth,[30] as it is unlikely that any state would ever seek to 'go it alone' in introducing commercial surrogacy.[31] Further, even if the practice was somehow legalised in Australia (or a jurisdiction within it), international arrangements may still remain popular,[32] particularly if there were low numbers of, or higher fees for, surrogates in Australia.

Consequently, this article suggests that the law should respond to the use of international commercial surrogacy by South Australians by facilitating it, but for the reasons that follow not in the laissez-faire manner it currently occurs.[33] Although this does not alleviate all ethical concerns,[34] the proposed reform will better protect intended parents, the surrogate, and most importantly the child.[35]

II South Australian Legislation

A *Should the Law Respond with an Extraterritorial Ban?*

Given that commercial surrogacy arrangements are 'ethically unacceptable'[36] and remain prohibited within South Australia,[37] there have been calls to extend this

[28] See South Australia, *Parliamentary Debates*, House of Assembly, 4 June 2015, 1523–4 (John Gardner); South Australia, *Parliamentary Debates*, Legislative Council, 12 November 2014, 1598 (John Dawkins). See generally Family Law Council, *Report on Parentage and the Family Law Act* (Report, December 2013) 86–7 ('*Report on Parentage and the Family Law Act*').

[29] See, eg, Annie Guest, 'Family Groups To Fight Surrogacy Laws', *ABC News* (online, 12 February 2010) <http://www.abc.net.au/news/2010-02-12/family-groups-to-fight-surrogacy-laws/329564>.

[30] See generally Plater et al (n 2) 85–7.

[31] Ibid 62.

[32] Ibid 33 [2.1.1]; Michael Gorton, *Review of Assisted Reproductive Treatment* (Consultation Paper, Victoria State Government, August 2018) 22–5.

[33] Australian Human Rights Commission (n 8) 22.

[34] See, eg, Chief Judge John Pascoe, Submission No 35 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (February 2016) 22–3.

[35] See generally Kathleen Simmonds, 'Reforming the Surrogacy Laws of Australia: Some Thoughts, Considerations and Alternatives' (2009) 11(1) *Flinders Journal of Law Reform* 97, 122.

[36] *ART Guidelines* (n 5) 65.

[37] *Surrogacy Act 2019* (SA) ss 23–5.

ban to operate extraterritorially.[38] This would address the current paradox: transnational commercial surrogacy is permitted, but it is condemned and criminalised domestically.[39] From an ethical perspective, such an approach enables relatively affluent couples to commission surrogates overseas (of generally low socioeconomic standing), and thus has been criticised for featuring an undercurrent of 'elitism'.[40] This ethical issue is best encapsulated by the question posed by former Chief Judge John Pascoe: 'If we believe it is reasonable for a woman in a third world country to rent her womb, why don't we believe it is appropriate in Australia?'[41]

Whilst extending the prohibition on commercial surrogacy to apply extraterritorially[42] may alleviate these ethical concerns, in practice it would not be successful. This is supported by the fact that in the Australian Capital Territory,[43] New South Wales[44] and Queensland[45]— where the prohibition on commercial surrogacy operates extraterritorially — residents were (prior to COVID-19) continuing to pursue these arrangements overseas,[46] or evading the law by moving to other states (such as South Australia) where offshore surrogacies are legally permissible (known as forum shopping).[47] In

38 See generally Julie McCrossin, 'Babies without Borders' [2015] (9) *Law Society of NSW Journal* 40, 40–3; Sonia Allen, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (Report: Part 2, January 2019) 173–6. Cf Plater et al (n 2) 124.

39 Redman (n 3) 3.

40 South Australia, *Parliamentary Debates,* Legislative Council, 12 November 2014, 1598 (John Dawkins). See generally: *Cowley v Yuvaves* [2015] FamCA 111, [24] (Thornton J); *Mason* (n 15) [4] (Ryan J); Merryn Elizabeth Ekberg, 'Ethical, Legal and Social Issues To Consider when Designing a Surrogacy Law' (2014) 21(3) *Journal of Law and Medicine* 728, 735; McCrossin (n 38) 42.

41 McCrossin (n 38) 42. See also Chief Judge John Pascoe, Submission No 35 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into The Regulatory And Legislative Aspects of International And Domestic Surrogacy Arrangements*, February 2016, 13, 22–3; Stephen Page, Submission No 27 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (10 February 2016) 35–6; Stuhmcke, 'The Regulation of Commercial Surrogacy' (n 24) 345.

42 Ie, to South Australian residents.

43 *Parentage Act 2004* (ACT) s 45.

44 *Surrogacy Act 2010* (NSW) s 11.

45 *Surrogacy Act 2010* (Qld) s 54.

46 Jefford (n 13); Whitelaw (n 13); Amy Corderoy, 'More Parents Defy Law with Overseas Surrogacy', *The Sydney Morning Herald* (online, 14 September 2013) <https://www.smh.com.au/national/more-parents-defy-law-with-overseas-surrogacy-20130913-2tq94.html>. See also Anita Stuhmcke, 'Reflections on Autonomy in Travel for Cross Border Reproductive Care' (2021) 39(1) *Monash Bioethics Review* 1, 5.

47 See generally Social Development Committee, Parliament of South Australia, *Inquiry into Gestational Surrogacy* (Parliamentary Paper No 210, 13 November 2007) 26–7; Keyes, 'Cross-Border Surrogacy Agreements' (n 10) 32–3.

a 2014 study, it was found that of those who lived in Australian jurisdictions where the extraterritorial law applied, 55% would enter an overseas commercial surrogacy contract, based on a low probability of prosecution and 23% would move to a state where this law did not apply.[48] Even in the midst of a pandemic, and unprecedented travel restrictions, intending parents are continuing to seek travel exemptions to fulfil offshore surrogacy arrangements.[49]

Despite being imposed to protect the child and the surrogate,[50] in practice the extraterritorial ban has had unintended negative consequences, and arguably has done more harm than good. The illegality of these arrangements has effectively forced the practice underground. Parents are discouraged from applying for formal parental recognition in the Family Court due to the risk of prosecution or stigmatisation of themselves or their child, and children are left without a secure legal relationship to their commissioning parents[51] (which will be discussed in greater detail in Parts III and IV of this article). The consequent absence of any real regulation exposes the child, the surrogate, and even the intended parents to a greater risk of harm.

It is acknowledged that residents' noncompliance with the law is compounded by the fact that no individual in these jurisdictions has ever been prosecuted for taking part in a commercial surrogacy.[52] However, even if greater enforcement measures were implemented, as the phrase goes, the building of a better mousetrap would merely result in smarter mice. Extraterritorial prohibition would not only come with the negative consequences above, but likely result in noncompliance or 'creative compliance' if adopted in South Australia.[53] Again, as the pursuit of offshore surrogates is inevitable irrespective of its legality,[54] efforts should be directed into reducing the harm rather than curbing the practice.

B *Should a Pre-Approval Process Be Introduced?*

In 2015, legislation was passed in South Australia which required the State Attorney-General to approve the arrangement prior to an international surrogate being

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48 Everingham, Stafford-Bell and Hammarberg (n 24) 273–4.

49 Fitzsimmons (n 18).

50 See, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2010, 26544 (John Hatzistergos).

51 Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 143; Stuhmcke, 'The Criminal Act of Commercial Surrogacy in Australia' (n 26) 609; Adiva Sifris, 'The Family Courts and Parentage of Children Conceived through Overseas Commercial Surrogacy Arrangements: A Child-Centred Approach' (2015) 23(2) *Journal of Law and Medicine* 396, 408–9 ('Child-Centred Approach').

52 Stuhmcke, 'The Regulation of Commercial Surrogacy' (n 24) 336–7; Plater et al (n 2) 124–7.

53 Stuhmcke, 'The Criminal Act of Commercial Surrogacy in Australia' (n 26) 609.

54 Whitelaw (n 13); Corderoy (n 46).

commissioned, however these powers were never exercised.[55] In its 2018 report, SALRI recommended that this approval mechanism should be abandoned,[56] noting that it did not consider it appropriate for such pre-approval to be provided by the State Attorney-General as such a state office holder does not have the necessary role or expertise. This recommendation was accepted.[57]

Whilst the author agrees with SALRI's recommendation, there nonetheless should be a pre-approval mechanism administered, but by a government body or decision maker with relevant expertise if offshore commercial surrogacy remains legal. Legislators should consider administering pre-approval in a similar way to the regulation of assisted reproductive treatments in Victoria under the *Assisted Reproductive Treatment Act 2008* (Vic),[58] which has a dedicated statutory authority for the approval of (altruistic) surrogacy arrangements and assisted reproductive treatments, the Patient Review Panel, in respect of offshore surrogacy arrangements.

Scrutiny of the agreement before it takes place will better protect all parties; as was evident in the *Baby Gammy Case*, by the time such arrangements come before the Family Court of Western Australia, it was effectively too late for the circumstances of the surrogacy to be scrutinised.[59] Without intending to be exhaustive, it is submitted that the Patient Review Panel must consider at a minimum the following factors before granting pre-approval.[60]

First, the fitness of the intended parents should be considered,[61] with supporting evidence of a criminal history check and evidence of psychologists and/or social workers. In order to protect the child's best interests, the approval process must be designed to protect children from being placed with highly unsuitable parents, such as those who have been convicted of an offence involving violence, abuse or sexual

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55 *Family Relationships (Surrogacy) Amendment Act 2015* (SA) s 3(1)(b) ('*Surrogacy Amendment Act*'). The former Attorney-General, John Rau, made clear to SALRI his position that this is an unwelcome and virtually impossible role for a state government to perform: Plater et al (n 2) 107 [10.2.1]–[10.2.2].

56 Plater et al (n 2) 113 [10.4.14].

57 See above n 22.

58 See also *Assisted Reproductive Treatment Regulations 2009* (Vic). Israel similarly has a committee which involves interviewing and psychological assessment of all parties: *Surrogate Motherhood Arrangements Act* (Israel) 5756–1996.

59 See generally Shelby Llewellyn, 'Surrogacy Law Reform in South Australia: Are Surrogacy Registers a New Way forward in Australia?' (2015) 34(2) *The University of Tasmania Law Review* 130, 131; *Ellison* (n 15) 55 [87] (Ryan J); Chief Judge John Pascoe, 'Surrogacy: The Commodification of New-Born Children' (2015) 24(1) *Australian Family Lawyer* 21, 24.

60 See generally Casey Humbyrd, 'Fair Trade International Surrogacy' (2009) 9(3) *Developing World Bioethics* 111.

61 See for example in respect of altruistic surrogacies: *Surrogacy Act 2019* (SA) s 10(4)(g).

offences against a child,[62] such as the offender who was able to commission Baby Gammy and Pipah offshore unimpeded.[63] Unfortunately, this is not the only instance of sexual offenders commissioning children offshore.[64] For example, in May 2016, a Victorian man commissioned a surrogate arrangement overseas and returned to Australia with twins, whom he proceeded to physically and sexually abuse.[65] Such disturbing cases highlight the need to actively regulate offshore surrogacy in order to protect the child from physical or mental violence or maltreatment.[66]

A key objective of the current laws that regulate surrogacy is to protect surrogates.[67] From an ethical standpoint, this should similarly underpin any law that facilitates South Australians procuring such arrangements overseas. Although Australian law is unable to directly regulate surrogacy in other countries, requiring an examination of the proposed arrangement prior to it being undertaken may significantly reduce this risk of possible exploitation, and physical or mental harm facing surrogates

62 See, eg, *Adoption (General) Regulations 2018* (SA) reg 9(2)(c).

63 'Convicted Australian Paedophile Father Allowed To Keep Thai Surrogate Baby', *South China Morning Post* (online, 14 April 2016) <https://www.scmp.com/news/asia/australasia/article/1935955/convicted-australian-paedophile-father-allowed-keep-thai>; Adamn Harvey, 'Baby Gammy's Biological Father Revealed as Convicted Paedophile, Raises Surrogacy Law Questions', *7:30 with Leigh Sales* (ABC, 7 August 2014) <https://www.abc.net.au/7.30/baby-gammys-biological-father-revealed-as/5655840>.

64 See, eg, Hague Conference on Private International Law, 'Private International Law Issues Surrounding the Status of Children' (n 10) 18–19.

65 ABC News, 'Father Trafficked and Sexually Abused Surrogate Twin Baby Daughters', *ABC News* (online, 19 May 2016) <http://www.abc.net.au/news/2016-05-19/victorian-man-jailed-for-sexually-abusing-surrogate-twins/7428720>. This case was especially disturbing. The man sexually abused his two infant surrogate twins. The offender and his wife paid $44,000 for a Thai surrogate to give birth to the children. The offender admitted his intention was to bring the girls to Australia for purposes of sexual abuse. The abuse started from when the newborns were only 27 days old, continuing for eight months. The offender received 22 years in prison for his crimes relating to the twins and two nieces after pleading guilty to 38 charges, including two of trafficking children, 20 of incest, 11 of producing, accessing, or transmitting child abuse material, and an 'upskirting' charge relating to photos he took of women's underwear while riding trains: see Nino Bucci, '22 Years in Jail for Man Who Abused His Surrogate Baby Twins', *The Age* (online, 19 May 2016) <http://www.theage.com.au/victoria/22-years-injail-for-man-who-abused-his-surrogate-baby-twins-20160519-goyn2h.html>.

66 *Convention on the Rights of the Child* (n 15) art 19; Australian Human Rights Commission (n 8) 11; Hague Conference on Private International Law, 'The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project' (Preliminary Document No 3 B, Hague Conference on Private International Law, 2014) 26 [63] ('The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project').

67 Australian Human Rights Commission, Submission to Family Law Council, *Report on Parentage and the Family Law Act*, 3 May 2013, 7–8 [30].

who may have little bargaining power in an unregulated market.[68] Pre-approval should involve examining the measures taken to ensure the surrogate has given free, informed and continuing consent to the agreement,[69] determined by evidence of specialist independent counselling and legal advice prior to the engagement (and that it will be offered following the birth).[70] For example, as noted by Ryan J in *Mason,* if the surrogate's first language is not English, evidence must be provided of translation to their first language; or if they are illiterate, they must be read documents in their first language.[71] Although entering into a detailed discussion surrounding whether such commercial arrangements are inherently exploitative is outside the scope of this article, it must be acknowledged that certain factors that may infringe a person's free consent, such as a low socio-economic position, cannot be completely removed, only mitigated.[72] However, an informed and willing adult should not be presumed to be unable to freely consent because of their social or financial circumstances.[73] Implementing measures to ensure a surrogate's consent is free and informed in the pre-approval process is preferable, as it best ensures the person's autonomy is respected[74] and any value judgements regarding their reproductive labour are set aside.[75] The fee paid by the commissioning parents, the amount retained by the surrogacy agency (or broker), and the remuneration provided to the surrogate must also be reviewed. Such an assessment again limits value judgements regarding what is subjectively considered *fair* remuneration, and may assist in safeguarding Australian parents from being financially exploited (such as by an unregulated surrogacy agency),[76] and ensure fairer compensation for the surrogate.[77]

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68 Chief Judge Pascoe, 'Parenting and Children's Issues: International Commercial Surrogacy and the Risk of Abuse' (Conference Paper, Annual Legalwise International Family Law Conference, 17–20 September 2014) 5 ('Parenting and Children's Issues'); Sonia Allan, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (5 August 2013) 4; Hague Conference on Private International Law, 'Private International Law Issues Surrounding the Status of Children' (n 10) 18–20.

69 See generally Australian Human Rights Commission (n 8) 32.

70 Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 167.

71 *Mason* (n 15) [4], where Ryan J highlighted that the surrogacy agreement and the affidavit evidence of the surrogate was written in English and witnessed only by her thumbprint. His Honour required translation of all of the documents into Hindi and evidence that they had been read aloud to the surrogate in that language.

72 See discussion on 'situational vulnerability': Pip Trowse and Donna Cooper, 'The Agony and the Ecstasy: Sacrifice and Pain for Financial Gain — Have Indian Surrogate Mothers Been Exploited by Their Intended Parents in Commercial Surrogacy Arrangements?' (2018) 25(2) *Journal of Law and Medicine* 388, 395.

73 See generally Majorie Shultz, 'Questioning Commodification' (1997) 85(6) *California Law Review* 1841, 1852.

74 Feiglin and Savulescu (n 23) 921.

75 Ibid.

76 Chief Judge Pascoe, 'Parenting and Children's Issues' (n 68) 7.

77 Feiglin and Savulescu (n 23) 923.

Notwithstanding that facilitation of offshore commercial surrogacy will continue be criticised by many as unethical, a legislative response that provides *some* oversight of the prospective arrangement prior to commissioning the surrogate is preferable to none.[78] Whilst there will need to be further consideration given to the precise factors and their weight in any pre-approval system, it is submitted at a general level that the pre-approval model proposed demands greater attention by scholars and legislators as it better balances competing interests by accommodating hopeful South Australian parents' desire to found a family through offshore surrogacy[79] only where the welfare of the surrogate and the child are adequately protected.[80] The law should no longer be complicit where the exact harm the legislature intends to prevent locally is perpetrated by our own residents overseas.

III Government Agencies

A *Should Citizenship Precede Orders in Respect of Parenting?*

The DHA confers citizenship based on biological Australian descent, and once attained, a passport for the child can be obtained to enter Australia.[81] Thus, the fact that a child may have been born through a surrogacy arrangement[82] — even an unlawful one — is not relevant to citizenship or passport applications.[83]

78 *Report on Parentage and the Family Law Act* (n 28) 82.

79 The 'right' to found a family is recognised in the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 16.1. However, this does not extend to a right to utilise surrogacy to have a child. See also Australian Human Rights Commission (n 8) 8 [24]. See also Plater et al (n 2) 66–8 [7.4.1]–[7.4.9].

80 Australian Human Rights Commission (n 8) 8 [24].

81 *Australian Citizenship Act 2007* (Cth) ss 19B, 19C, 19D. For a recent example, see *Batkin v Bagri* [2019] FamCA 979, [19] ('*Batkin*'). See also: Adiva Sifris, 'Overseas Compensated Surrogacy Arrangements and the Family Court of Australia: What About the Children?' [2020] 14 *Court of Conscience* 44, 44–7 ('What About the Children?'); Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 141; Department of Foreign Affairs and Trade, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (26 June 2013); Australian Government, Department of Home Affairs, 'International Surrogacy Arrangements', *Immigration and Citizenship* (Web Page, 24 August 2021) <https://immi.homeaffairs.gov.au/help-support/glossary/international-surrogacy>; Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 26 February 2015, 3–4 (Frances Finney).

82 Australian Government, Department of Home Affairs, 'International Surrogacy Arrangements', *Immigration and Citizenship* (Web Page, 24 August 2021) <https://immi.homeaffairs.gov.au/help-support/glossary/international-surrogacy>; *Australian Citizenship Act 2007* (Cth) pt 2 sub-div A.

83 See generally Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 26 February 2015, 9 (Anne Moores).

It is acknowledged that this practice is informed by the legitimate need to ensure children are not left 'marooned stateless and parentless'[84] in accordance with the *Convention on the Reduction of Statelessness*[85] and the *Convention on the Rights of the Child*.[86] However, the lack of any oversight at what the 'final opportunity' prevent a child from returning to reside with a commissioning couple[87] cannot be justified on this basis alone.[88]

Whilst it is recognised that children adopted internationally generally have a country of origin and are therefore at lower risk of statelessness than children born of overseas surrogacy who often do not (depending on their country of birth),[89] children born by a surrogate should in a similar way be subject to oversight by the Family Court *before* citizenship is conferred to ensure they are not parentless. As will be detailed further in Part IV, the intending parent/s are not necessarily legally the child's parents and/or have parental responsibility without a court order.[90]

Children born to overseas surrogacy arrangements are not the legal children of their intended Australian parents regardless of a genetic link,[91] and do not have parental responsibility unless (and until) an order is made by the Family Court.[92] Although the exact number of children born to surrogates is unknown, between 2008–16 there were over 420 citizenship applications for children born through surrogacy overseas.[93]

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84 *Re X* (n 9) 76 [10]. See also: *Pawandeep Singh v Entry Clearance Officer* [2005] QB 608; Anil Malhotra and Ranjit Malhotra, 'All Aboard for the Fertility Express' (2012) 38(1) *Commonwealth Law Bulletin* 31; *Surrogacy Matters* (n 13) 19 [1.62]; Hague Conference on Private International Law, 'Private International Law Issues Surrounding the Status of Children' (n 10) 23 [48]; Australian Human Rights Commission (n 8) 35. See generally *Commonwealth Government*, *Australian Government Response to the Recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs Report: Surrogacy Matters* (Report, November 2018).

85 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975). Article 1 sets out the primary rule, which is that a State must grant its nationality to a person born in its territory who would otherwise be stateless.

86 *Convention on the Rights of the Child* (n 15) art 7.

87 *Re X* (n 9) 80–1 [24].

88 Jenni Millbank, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (1 May 2013) 8.

89 For instance, in the past children born in India to Australian parents were not conferred Indian citizenship: see Kerry Brewster, 'Surrogacy Laws May Leave Australian Babies Stateless', *ABC News* (online, 5 March 2013) <https://www.abc.net.au/news/2013-03-05/surrogacy-laws-could-leave-australian-babies-stateless/4552460>.

90 Where there is not a biological connection to the intending parent.

91 *Australian Citizenship Act 2007* (Cth) s 8; *FLA* (n 9) s 60H.

92 See generally *Report on Parentage and the Family Law Act* (n 28) 92–6.

93 Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 143. See also Lana Zannettino et al, 'Untangling the Threads: Stakeholder Perspectives of the Legal and Ethical Issues Involved in

However, only a very small number of applications for parental orders have been made to the Family Court.[94] This is as a result of the illegality (in some states) and/or associated stigma of such arrangements,[95] as well as the fact that the commissioning parents have *already* obtained citizenship and a passport for the child, and are *already* exercising functional 'parental responsibility'.[96] Therefore, in the absence of a relationship breakdown (as in the *Baby Gammy Case*) or where both intended parents are not listed on the birth certificate[97] commissioning parents have little incentive to seek a legal order of parental responsibility.[98] Consequently, applying for their child's Australian citizenship is often the last form of State recognition of their relationship to the child they will seek.[99] As such, although the majority of children born to surrogates overseas will have a genetic link to and are being raised by their intended parents, these children have no legally recognised relationship with their parents.[100] In that respect, citizenship before parentage is the 'cart before the horse'.[101]

Preparing Australian Consumers for Commercial Surrogacy Overseas' (2019) 27(1) *Journal of Law and Medicine* 94, 96. See above n 13 and accompanying text.

94 *Report on Parentage and the Family Law Act* (n 28) 99.

95 SALRI was told that many of the parents who utilise international surrogacy 'fly under the radar' and for various reasons are not anxious to publicise or highlight their situation: Plater et al (n 2) 300. See also Eric Blyth and Abigail Farrand, 'Reproductive Tourism: A Price Worth Paying for Reproductive Autonomy?' (2005) 25(1) *Critical Social Policy* 91; Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 169.

96 Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35(1) *Melbourne University Law Review* 165, 203 ('The New Surrogacy Parentage Laws in Australia'); Stuhmcke, 'The Regulation of Commercial Surrogacy' (n 24) 341.

97 It has been posited that it is no coincidence that all of the international surrogacy cases to date involved arrangements in which birth documentation was not in the names of both intended parents and/or citizenship by descent had not yet been granted: Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 143.

98 Particularly in jurisdictions where there is the risk of criminal sanction for engaging in the international surrogacy: Australian Human Rights Commission (n 8) 25, 36; Millbank, 'The New Surrogacy Parentage Laws in Australia' (n 96) 191; *Report on Parentage and the Family Law Act* (n 28) 76–84, 98–104.

99 Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 142–3.

100 See, eg, *Beman v Sassi* [2014] FamCA 186, where an application for parenting orders was made in 2014 following the breakdown of a relationship, however, no order had been previously been sought despite being brought to Australia in July 2011. See generally Australian Human Rights Commission (n 8) 24; Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 137; *Report on Parentage and the Family Law Act* (n 28) 32.

101 Jenni Millbank, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (1 May 2013) 7.

Concerningly, as discussed above, there have also been repugnant cases where children have been commissioned by parents for the purpose of sexually abusing them,[102] or by individuals who have convictions for sexual offences against children. For instance, in the *Baby Gammy Case*, the convicted father was able to gain citizenship and a passport for Pipah, who resided in his care without objection. It was only when orders in respect of parenting were formally applied for that his fitness as a parent was questioned.[103] This is a further reason why citizenship should not be conferred before such orders have been granted.

The law should be amended so that citizenship rights will follow on from, rather than precede, parental orders in cases of offshore surrogacy.[104] This will continue to uphold children's right to acquire a nationality,[105] but in doing so alleviate the risk of the children being subject to trafficking or abuse at the hands of their intended parents.[106] Requiring all offshore surrogacy arrangements to be subject to court oversight will also protect the long-term interests of the child, by providing all children with a secure legal relationship with the parents who are raising them[107] (a theme emphasised to SALRI by Pascoe CJ of the Family Court of Australia),[108] rather than being kept in secret for fear or stigmatisation (or in some states, prosecution).[109] It is in the best interest of the child that citizenship be granted *after* orders have been made in respect of parental responsibility or parentage by the Family

[102] ABC News, 'Father Trafficked and Sexually Abused Surrogate Twin Baby Daughters' (n 65).

[103] Redman (n 3) 4–7.

[104] Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 164–9.

[105] *Convention on the Rights of the Child* (n 15) art 7.

[106] Hague Conference on Private International Law, 'The Parentage / Surrogacy Project: An Updating Note' (Preliminary Document No 3 B, Hague Conference on Private International Law, February 2015) annex II; Australian Human Rights Commission (n 8) 34.

[107] See generally Australian Human Rights Commission (n 8) 11; Chief Judge John Pascoe, Submission No 35 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (February 2016) 20, 25–9.

[108] Plater et al (n 2) 269 [24.1.1]–[24.1.3]. See also: at 63–6 [7.2.1]–[7.2.11], 90 [9.3.4]–[9.3.5].

[109] See generally Paula Gerber and Katie O'Byrne, 'Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy' in Paula Gerber and Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Ashgate, 2015) 81, 85; Stephen Page, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (5 June 2013) 32–3; Rainbow Families Council, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (27 June 2013) 2; Michaela Stockey-Bridge, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (28 June 2013) 5–6; Paul Boers, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (26 June 2013) 14.

Court. Given that this suggested reform is interconnected with the practice of the Family Court, this discussion will continue in Part IV.

IV Family Court

A *Should the Family Court Be Able To Make Parentage Orders in Respect of Children Born to Overseas Surrogates?*

While surrogacy arrangements fall within the legislative powers of the states and territories, the determination of parentage at a federal level is regulated by the *FLA*. Although the power to transfer parentage from the surrogate to the commissioning parents is vested in state courts,[110] parents often seek parenting orders at the federal level in the Family Court.[111] There are a number of problems with the practice of the Family Court in relation to international surrogacy matters that must be reformed in order to protect the welfare of the child.

First, in most, if not all applications from commissioning parents in respect of children born to offshore surrogates,[112] the Family Court has turned a 'blind eye' to the circumstances of the child's birth.[113] The Family Court has expressed its concerns regarding orders made in respect of commercial surrogacy,[114] particularly as to the 'inconsistencies of the laws',[115] lack of scrutiny of those participating in the arrangements, and the inability to protect and safeguard the surrogates engaged. Often the circumstances of the arrangement are unknown, including whether the agreement was translated and read, or whether independent legal advice was obtained.[116] This is even more troubling in states where the arrangements are unlawful. In doing so, the Family Court is giving effect to arrangements that are unlawful domestically,[117]

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110 *Surrogacy Act 2019* (SA) ss 8, 18. See also: *Parentage Act 2004* (ACT) s 24(c); *Surrogacy Act 2010* (NSW) s 18; *Surrogacy Act 2010* (Qld) s 22; *Surrogacy Act 2012* (Tas) ss 14–16; *Status of Children Act 1974* (Vic) s 20(1)(a); *Surrogacy Act 2008* (WA) s 12.

111 Chief Judge John Pascoe, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (21 February 2013) 8.

112 Being either applications for legal parentage or the lesser parental responsibility.

113 Feiglin and Savulescu (n 23) 926. See also: at 919, 925; *Rose* [2018] FamCA 978, [48], [55].

114 See, eg: *Fisher-Oakley v Kittur* [2014] FamCA 123; *Ellison* (n 15); *Bernieres v Dhopal* (2015) 53 Fam LR 547; *Green-Wilson v Bishop* [2014] FamCA 1031.

115 *Masters v Harris* [2017] FamCA 450, [56].

116 See, eg, *Batkin* (n 81) [25].

117 In jurisdictions where the prohibition operates extraterritorially, the Family Court is also effectively sanctioning a breach of the law. See Mary Keyes and Richard Chisholm, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (16 July 2013) 33–4; Surrogacy Australia, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (3 June 2013). See also *Dudley v Chedi* [2011] FamCA 502, [37] ('*Dudley*').

and, as Mary Keyes emphasises, it is not appropriate for federal law to 'contradict, undermine and frustrate' the prohibition against commercial surrogacy,[118] as this arguably brings the Court into disrepute.[119]

However, this article accepts that the Family Court cannot give priority to public policy considerations regarding the illegality of the arrangement, or even the welfare of the surrogate. The issue before the Court concerns the best interest of the child as prescribed by the *FLA*,[120] and consistent with art 3(1) of the *Convention on the Rights of the Child*.[121] As expressed by Ryan J in *Ellison*, '[c]onsidered from the perspective of the children, it is difficult to discern how it could be in their interests to permit public policy considerations to stand in the way of a declaration of parentage'.[122]

However, in *Bernieres*,[123] the Full Court of the Family Court expressed that 'it is not possible to discard the plain meaning of legislation where public policy considerations may not be seen to be in the best interests of the children affected'.[124] This case concerned a Victorian couple's application for a declaration of parentage and parenting orders in relation to a child born via a commercial arrangement in India using the commissioning father's sperm and an anonymous donor egg. The child was granted Australian citizenship and a passport because of her biological father, and had been residing in Australia for three years prior to the application being made.

The *Bernieres* decision has complex implications,[125] primarily being that whilst the Family Court can make a parental responsibility order in relation to a child born of an overseas surrogacy for the intending parents, the Family Court *cannot* make a declaration of parentage.[126] The Court held that the fact the child had a biological Australian father did not 'translate' to him being a parent for the purposes of the *FLA*,[127] as the intention of s 60HB was to leave it to each of the states and territories to regulate the status of children born under surrogacy arrangements.[128] As the

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[118] Professor Mary Keyes, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (24 April 2016) 1.

[119] Chief Judge Pascoe, 'Parenting and Children's Issues' (n 68) 11.

[120] *FLA* (n 9) s 60CC.

[121] *Convention on the Rights of the Child* (n 15) art 3(1).

[122] *Ellison* (n 15) Ibid 56 [91].

[123] (2017) 324 FLR 21 ('*Bernieres*').

[124] Ibid 32 [54].

[125] See generally Sifris, 'What About the Children?' (n 81).

[126] See generally Plater et al (n 2) 293–304. See also Ronli Sifris and Adiva Sifris, 'Parentage, Surrogacy and the Perplexing State of Australian Law: A Missed Opportunity' (2019) 27(2) *Journal of Law and Medicine* 369, 371 ('A Missed Opportunity').

[127] *Bernieres* (n 123) 33 [65].

[128] Ibid 33 [62]–[63]. See also Sifris and Sifris, 'A Missed Opportunity' (n 126) 371.

relevant Victorian Act[129] did not recognise children born via commercial surrogacy arrangements, the Court found that it could not make parentage orders.

Although parental responsibility confers '[m]ost of the practical things a parent has the power to do' in relation to a child,[130] it does not provide the same certainty as a finding of legal parentage,[131] and it automatically ends when a child turns 18.[132] It does not afford sufficient recognition of the functional child/parent relationship.[133] A child has the right to know and be cared for by their parents.[134] This suggests that a child should have certainty as to who their legal parents are.[135] To the extent that the Family Court is not empowered to make orders in respect of parentage of children born through offshore surrogacy, this may well compromise that right.[136]

Further, art 2(2) of the *Convention on the Rights of the Child*[137] provides that states should take appropriate measures to ensure that children are protected from all

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129 *Status of Children Act 1974* (Vic).

130 Family Law Section, Law Council of Australia, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (13 September 2013) 3 [15].

131 *Ellison* (n 15) 56 [91]–[92]. See also Sifris and Sifris, 'A Missed Opportunity' (n 126) 371.

132 Sifris, 'Child-Centred Approach' (n 51) 407.

133 See generally Women's Legal Centre ACT and Region, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (28 June 2013) 4. See also Keyes and Chisholm (n 117) 33–4; Surrogacy Australia, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (3 June 2013) 3.

134 *Convention on the Rights of the Child* (n 15) art 7. See also Sifris and Sifris, 'A Missed Opportunity' (n 126) 375.

135 It has been recognised that a finding that a person is a child's parent 'might well be of the greatest significance to the child in establishing his or her lifetime identity': *G v H* (1994) 181 CLR 387, 391 (Brennan and McHugh JJ). On that basis art 8 of the *Convention on the Rights of the Child* (n 15) may also be relevant.

136 For instance, in respect of intended fathers see *Mennesson v France* [2014] 5 Eur Court HR 1, the European Court of Human Rights held that France's refusal to recognise the relationship between children born through surrogacy arrangements and their intended father (who the child was biologically linked to) violated art 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), being a right to respect of private and family life. However, note that no breach of art 8 was found in *Paradiso v Italy* (European Court of Human Rights, Grand Chamber, Application no 25358/12, 24 January 2017) in absence of a genetic link to the child born of surrogacy. In respect of intended mothers see *Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship between a Child Born Through a Gestational Surrogacy Arrangement Abroad and the Intended Mother (Advisory Opinion)* (European Court of Human Rights, Request no P16-2018-001, 10 April 2019). See generally: Gerber and O'Byrne (n 109) 85; Australian Human Rights Commission (n 8) 10–11; Women's Legal Centre ACT and Region (n 133) 4; *Bernieres* (2015) 53 Fam LR 547, 566 [143].

137 *Convention on the Rights of the Child* (n 15).

forms of discrimination on the basis of the status of their parents, legal guardians or family members. Without power to make orders in respect of parentage, this may cause those children born to offshore surrogates to be treated differently, and/or in a discriminatory manner,[138] to those born through altruistic surrogacy arrangements. For instance, without a declaration of parentage, a child's access to medical benefits, their rights of intestacy, workers compensation entitlements and access to child support (if their intended parents separate) may be limited.[139] Equally, this is not in the child's best interests.

Any legal response to surrogacy needs to recognise the fundamental premise that the best interests of the child are the paramount consideration, under the *FLA* and the *Convention on the Rights of the Child*.[140] In order to minimise this risk of harm and better uphold the rights of the child, the law must catch up to the reality that children born to surrogacy exist, and accord sufficient recognition to this form of parent-child relationship.[141] All children born to such arrangements should be subject to court oversight to give their relationship with the parents raising them a 'secure legal footing'.[142] The trial judge in the first instance decision of *Bernieres* remarked that '[t]here is a clear need for urgent legislative change'.[143] The Full Court on appeal expressed that it was not open to the Court to fill the 'legislative vacuum' that exists for children born via overseas commercial surrogacy arrangements.[144] This cannot be ignored. The gap must be filled by legislators.

Whilst there was a recent opportunity to identify solutions to fill this gap, in the author's view the Australian Law Reform Commission in its 2019 report did not adequately address the issues surrounding parentage of children born through surrogacy arrangements. The Australian Law Reform Commission simply suggested that this be captured in a separate Commonwealth Act.[145]

The Family Court must be vested with the power to transfer parentage from the surrogate to the Australian parents upon their return (whether in a separate Act or otherwise). For the reasons outlined above, this is critical to ensuring that the child's best interests are maintained. However, affording the Family Court jurisdiction to

[138] *Report on Parentage and the Family Law Act* (n 28) 63.

[139] *Dudley* (n 117) [22]; Alexandra Harland and Cressida Limon, 'Recognition of Parentage in Surrogacy Arrangements in Australia' (n 109) 149. See also Hague Conference on Private International Law, 'The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project' (n 66) 10 [18]–[19]; Australian Human Rights Commission (n 8) 11.

[140] See above n 15.

[141] Sifris, 'Child-Centred Approach' (n 51) 405.

[142] As it has been described in United Kingdom: *J v G* [2013] EWHC 1432 (Fam) [30]. See Thorn, Wischmann and Blyth (n 16).

[143] (2015) 53 Fam LR 547, 566 [147] (Berman J).

[144] *Bernieres* (n 123) 34 [69] (Bryant CJ, Strickland and Ryan JJ), citing ibid 564 [121].

[145] Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (ALRC Report No 135, March 2019) 428 [14.21].

transfer parentage will be less effective if intending parents are not applying for it (ie, if citizenship rights are not predicated on such a transfer),[146] and both reforms must be adopted in conjunction.

V Suggested Reforms

Given that the Family Court is not in a position to provide real scrutiny of the terms and circumstances of the surrogacy due to the fact that its overriding consideration is the best interests of the child,[147] a pre-approval model with an expedited parental hearing is preferable. Children born as a result of agreements that have received requisite approval should be able to enter South Australia with their intended parents, and the Family Court should be conferred power to provide legal recognition of *parentage* in favour of the intended parents.[148] Similar to the framework in the United Kingdom, entry could be allowed through granting the child a specific visa[149] or alternatively granting an entry visa subject to the statutory discretion of the relevant Minister as occurs in New Zealand.[150]

Citizenship should be conferred upon the Court's orders in respect of parentage, rather than preceding it.[151] This will prevent the children of such arrangements being legally 'parentless', and better uphold a child's right to know and be cared for by their commissioning parents pursuant to the *Convention on the Rights of the Child*.[152] Thus, if South Australian parents have the requisite approval, the administrative process will be expedient.[153]

Once entry is granted, the intended parents must apply to the Family Court for parenting orders within a fixed timeframe to gain citizenship.[154] Given the pivotal role that surrogacy agencies and brokers play in orchestrating offshore arrangements,

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146 *Report on Parentage and the Family Law Act* (n 28) 112.

147 See above n 15.

148 *Mason* (n 15) [33]–[34]; *Dudley* (n 117) [27]; Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 164–5.

149 Such as under the *Human Fertilisation and Embryology (Parental Orders) Regulations 2010* (UK) SI 2010/985.

150 Consultation with Megan Noyce, Ministry of Justice New Zealand, (Family Law Council, Consultation for Report, 16 January 2013). See *Report on Parentage and the Family Law Act* (n 28) 118.

151 Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 164–9.

152 *Convention on the Rights of the Child* (n 15) art 7.

153 Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 164–6.

154 However, these provisions should also be able to accommodate surrogacy arrangements that occurred before the introduction of the Court's transfer jurisdiction. For instance, if parents wish to obtain parentage transfer for children born prior to the amendments this should be possible: Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 168.

setting clear standards to be satisfied in the pre-approval process and access to an expedited proceeding for the intended parents is an effective way to incentivise best practice by brokers.[155] That is, as agencies have a commercial interest in ensuring their clients receive pre-approval and a fast tracked hearing, they will have the incentive to ensure the fitness of the parents and overall fairness of the terms of the arrangement,[156] including by the provision of translation services and independent counselling to the surrogate.[157] There should also be consideration given to the imposition of civil or criminal penalties against Australian brokers if this is not adhered to. This will accommodate hopeful parents' desire to found a family, but only where the rights of the surrogate and the child are adequately protected.[158]

As was suggested by Ryan J in *Ellison*, it is additionally proposed that in the transfer proceedings, the Court should have regard to the evidence that the commissioning parent/s acted in good faith in relation to the surrogate.[159] In accordance with international human rights obligations[160] and the *FLA*, the best interests of the child will of course remain the primary consideration.[161]

If parents do not have the requisite approval, the DHA should be under an obligation to report this to the relevant authorities when they apply for the child's visa.[162] This is comparable to the reporting obligations of other government agencies, such as the Department of Foreign Affairs and Trade, which must report upon becoming aware of the commission of a serious indictable offence overseas in breach of Australian law.[163] Intending parents will not have access to an expedited proceeding and the Court will consider the fact that the parents attempted to circumvent the law.[164] Again this will encourage intending parents and surrogacy agencies to gain pre-approval for their surrogacy arrangement.

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155 Ibid 166–7. See also: Keyes and Chisholm (n 117) 138; Feiglin and Savulescu (n 23) 925.

156 Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 166–7.

157 For further discussion on ensuring the quality of independent counselling: ibid 167.

158 Ibid.

159 *Ellison* (n 15) 63–5 [132]–[139]; Keyes and Chisholm (n 117) 128–30.

160 *Convention on the Rights of the Child* (n 15) art 3.

161 *Report on Parentage and the Family Law Act* (n 28) 80.

162 Department of Immigration and Border Protection, Submission No 45 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016) 3–4.

163 Australian Human Rights Commission (n 8) 27; Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 26 February 2015, 9 (Amanda Gorely).

164 As has been considered in the United Kingdom: *Re X* (n 9) 80 [21].

Vesting the Family Court with the jurisdiction to transfer parentage to the commissioning parents, and predicating citizenship rights on this transfer will ensure that most, if not all, children of offshore commercial surrogacy will have their relationship with their commissioning parents legally recognised.[165] The Family Court will continue to uphold children's fundamental right to acquire a nationality,[166] and better uphold their right to know their parents.[167] This is an appropriate measure to protect children from all forms of discrimination on the basis of the status of their parents, legal guardians or family members.[168] It will also hopefully improve their welfare by reducing the social stigma for children created through this alternative avenue for family formation. However, it must be acknowledged that by making a transfer of parentage available to those commissioning a surrogacy offshore, there is an inevitable tension between the ethics in encouraging South Australians to pursue a practice that domestic law views as harmful, and the need to provide legal clarity and certainty for vulnerable children.[169] Although it must be acknowledged that this approach does not alleviate all ethical concerns associated with South Australians 'outsourcing' surrogates, it is of greater importance that the law minimises the harm to all parties.

Ultimately, ethical or public policy concerns *must* yield to the need to ensure the welfare of the child,[170] both in the short term (by placing the child with suitable parents) and long term (by ensuring a secure legal relationship to the intended parents). As expressed by Hedley J in *Re X*, this approach 'is both humane and intellectually coherent'.[171]

VI Conclusion

Australians' use of transnational commercial surrogacy is inevitable. It has continued despite its extraterritorial prohibition in a number of states,[172] and with

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165 Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 166.

166 *Convention on the Rights of the Child* (n 15) art 7.

167 As required by ibid arts 7–8. See also Australian Human Rights Commission (n 8) 10.

168 In accordance with the *Convention on the Rights of the Child* (n 15) art 2(2).

169 Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 169.

170 Ibid.

171 *Re X* (n 9) 80–1 [24].

172 Jenni Millbank, Submission to Family Law Council, *Report On Parentage and the Family Law Act* (1 May 2013) 5; Law Institute of Victoria, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (31 July 2013) 12; Surrogacy Australia, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (3 June 2013) 3; Stephen Page, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (5 June 2013) 32–3; Rainbow Families Council, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (8 June 2013) 2; Michaela Stockey-Bridge, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (28 June 2013) 5–6; Paul Boers, Submission to Family Law Council, *Report on Parentage and the Family Law Act* (26 June 2013) 14.

fertility issues on the rise[173] and the persistence of people's inherent desire to have a family, the pursuit of reproductive tourism is only set to increase, especially once Australians are permitted to travel internationally following the relaxation of current COVID-19 restrictions. How should the law respond to this? With adequate regulation.

Currently, there is a gridlock: the law does not ban offshore commercial surrogacy, but it does not effectively regulate it either. The absence of adequate regulation has placed the welfare of surrogates, and the child they carry on hopeful Australian parents' behalf, at significant risk. Potential harms from offshore commercial surrogacy are not being prevented but are being exported overseas.[174] In order to reduce the risk to all parties, it is vital that South Australian legislators regulate the practice through a pre-approval system, and at a Federal level it must be ensured that citizenship is only provided upon the transfer of parentage or parental responsibility from the Family Court. As part of these amendments the Family Court must be conferred power to make orders for parentage. Although this approach does not alleviate all ethical concerns associated with Australians 'outsourcing' surrogates, it is of greater importance that the law provides just outcomes and minimises potential harm to all parties.[175] These suggested reforms will ensure that the formation of Australians' families do not come at the expense of the rights and welfare of surrogates and the children they carry on their behalf.[176] We may not be able to prevent or preclude recourse to offshore commercial surrogacy, but we can, and should, seek to minimise its adverse implications.

173 Greg Hunt, 'New Online Tool To Help Navigate IVF' (Media Release, Department of Health, 15 February 2021) <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/new-online-tool-to-help-navigate-ivf>.

174 See Millbank, 'The New Surrogacy Parentage Laws in Australia' (n 96) 190.

175 See Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (n 12) 149, 164–9.

176 Simmonds (n 35) 122; South Australia, *Parliamentary Debates*, House of Assembly, 4 June 2015, 1523 (John Gardner).

Appendix 1

Table 1: Summary of Surrogacy Provisions in Australian Jurisdictions[177]

	ACT	**NSW**	**QLD**	**SA**	**TAS**	**VIC**	**WA**
Relevant Act	*Parentage Act 2004* (ACT)	*Surrogacy Act 2010* (NSW)	*Surrogacy Act 2010* (Qld)	*Surrogacy Act 2019* (SA)	*Surrogacy Act 2012* (Tas)	*Assisted Reproductive Treatment Act 2008* (Vic)	*Surrogacy Act 2008* (WA)
Relevant Prohibition Provisions	s 41 Prohibits intentionally entering commercial substitute parentage agreements	ss 6, 8 Prohibits entering into commercial surrogacy arrangements	ss 15, 56 Prohibits entering into commercial surrogacy arrangements	ss 23–5 Illegal to enter, arrange or induce a person to enter a commercial surrogacy arrangement	s 40 Prohibits entering into commercial surrogacy arrangements	s 44(1) Prohibits surrogate receiving material benefit or advantage as a result of surrogacy arrangement	ss 7, 8 Prohibits entering into surrogacy arrangement that is for reward
Offence has Extra-Territorial Application	Yes Contained in s 45	Yes Contained in s 11	Yes Contained in s 54(b)	No	No	No	No

177 In the NT, the Surrogacy Bill 2022 was passed on 12 May 2022.