

RESOLVING THE ‘MINEFIELD’ OF SURROGACY: THE *SURROGACY ACT 2019* (SA) AND THE ENDURING QUESTION OF COMMERCIAL SURROGACY†

ABSTRACT

In 2018, the South Australian State Government asked the independent South Australian Law Reform Institute (‘SALRI’), based at the Adelaide Law School, to resolve the ‘minefield’ of surrogacy. SALRI’s subsequent major report received strong support and praise from all sides of Parliament. The passage of the *Surrogacy Act 2019* (SA), based on SALRI’s report, was welcomed as a ‘historic day’. SALRI was precluded from considering a system of commercial surrogacy by its terms of reference, and its research and consultation supported an intermediate approach as the most appropriate way forward. This article considers SALRI’s report and argues that, although the consequent legislation is a welcome reform, the wider question of commercial surrogacy, currently precluded in all Australian jurisdictions, remains an enduring question. The view that commercial surrogacy is inherently exploitative has been challenged by recent research, with the seemingly tenuous distinction between commercial and non-commercial surrogacy also being questioned. Also, as COVID-19 travel restrictions ease, international surrogacy travel will inevitably resume. Due to the complex, national and international implications of surrogacy, the preferable long-term solution is for a national, uniform scheme to be coordinated between the states and territories and the Commonwealth. For such a scheme to be effective, there must be an honest and realistic consideration of commercial surrogacy at a national level. It is argued that now is the time to confront the elephant in the room of commercial surrogacy.

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I INTRODUCTION

Surrogacy is a difficult and complex topic, where the understandable and deep longing for a child collides with the rights of that child and the woman who carries it. The involvement of unregulated for-profit intermediaries and the cross-border nature of most arrangements adds layers to the complexity, and creates more openings for unethical practices and human rights abuses to occur. The issue is truly a minefield.¹

These observations of John Pascoe, the then Chief Justice of the Family Court, illustrate the fraught nature of the 2018 reference undertaken by the independent South Australian Law Reform Institute (‘SALRI’) in its examination of surrogacy law and practice in South Australia.² SALRI’s resulting report traversed well-trodden ground:³ it was at least the 28th review to examine surrogacy in Australia over recent years.⁴ Additionally, [t]he myriad issues surrounding surrogacy have been teased out in painstaking detail in various forums over recent years, including in law reform commissions and other inquiries, in what has been described as a “paroxysm of inquiry and reform”.⁵ The moral and other implications of surrogacy

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- ¹ John Pascoe, ‘Sleepwalking through the Minefield: Commercial Surrogacy and the Global Response’ (Media Release, ACT Law Society, 15 May 2018) <<https://www.actlawsociety.asn.au/article/sleepwalking-through-the-minefield--commercial-surrogacy-and-the-global-response>>. See also 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) 1 [1.2] (‘*Surrogacy Matters*’).
- ² SALRI is an independent, non-partisan law reform body based at the Adelaide Law School. It was formed in December 2010 under an agreement between the University of Adelaide, the Law Society of South Australia and the South Australian Attorney-General’s Department. SALRI is based on the model used in Alberta and Tasmania and has a well-established output and impact over its ten years of operation. SALRI is ably assisted by its expert Advisory Board and the Law Reform class.
- ³ David Plater et al, *Surrogacy: A Legislative Framework* (Report No 12, South Australian Law Reform Institute, October 2018) (‘*Surrogacy Report*’).
- ⁴ Ibid 35 n 70. SALRI expressed the hope that its ‘Report may prove of greater value than perhaps some of the preceding 27 Australian reviews’: at 29 [1.2.16]. There have been further reviews: see NSW Department of Justice, *Statutory Review: Surrogacy Act 2010* (Report, July 2018); Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (Report, January 2019) pt 2; Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Report, May 2019); Te Aka Matua o te Ture | New Zealand Law Commission, ‘Te Kōpū Whāngai: He Arotake | Review of Surrogacy’ (Issues Paper No 47, July 2021).
- ⁵ Meghan Butterfield, ‘Should I Lie to You? A Review of Victoria’s Law regarding Disclosure of Surrogacy Arrangements to the Children They Produce: Is It Compliant with the *Convention on the Rights of the Child*?’ (2021) 46(1) *Monash University Law Review* 100, 102, quoting Jenni Millbank, ‘The New Surrogacy Parentage Laws in Australia: Cautious Regulation or “25 Brick Walls”?’ (2011) 35(1) *Melbourne University Law Review* 165, 166 (‘The New Surrogacy Parentage Laws in Australia’).

are ‘intensely debated’.⁶ To say that the issues surrounding surrogacy are not simple is an understatement, and it is no easy task to resolve the ‘minefield’ of surrogacy.⁷ Surrogacy ‘is a complex and sensitive subject’ which ‘raises many ethical, legal and other issues and implications [and] attracts strong, emotional and often conflicting views from those directly affected and legal and academic commentators’.⁸

The stated aims of surrogacy laws⁹ and practice¹⁰ in Australia have been, and remain to: prevent the exploitation of vulnerable adults; avoid the commercialisation of reproduction; and protect children’s best interests.¹¹ However, the issue of domestic commercial surrogacy — that is, commercial surrogacy agreements entered into and carried out within Australia — has been conspicuous by its absence from the Australian law reform and legislative agendas. In recent years, many enquiries into surrogacy in Australia have occurred, but none of these enquiries (including SALRI’s review) have included commercial surrogacy in its terms of reference, limiting their usefulness and scope.¹²

The legislative, legal and academic attention that surrogacy has received is surprising. ‘As far back as 1990, the National Bioethics Consultative Committee (NBCC) noted that surrogacy had received disproportionate attention in Australia, given its infrequent occurrence, and suggested that the powerful symbolism of the mother-child bond lay at the base of this intensity.’: Jenni Millbank, ‘From Alice and Evelyn to Isabella: Exploring the Narratives and Norms of “New” Surrogacy in Australia’ (2012) 21(1) *Griffith Law Review* 101, 106.

⁶ Cara Luckey, ‘Commercial Surrogacy: Is Regulation Necessary to Manage the Industry?’ (2011) 26(2) *Wisconsin Journal of Law, Gender and Society* 213, 216.

⁷ John Pascoe, ‘Sleepwalking through the Minefield: Legal and Ethical Issues in Surrogacy’ (2018) 30 (Special Issue) *Singapore Academy of Law Journal* 455. See also Madeleine Thompson and David Plater, ‘An Issue That Is Not Going away: Recent Developments in Surrogacy in South Australia’ (2019) 16(4) *Journal of Bioethical Inquiry* 477.

⁸ South Australia, *Parliamentary Debates*, House of Assembly, 1 August 2019, 6967 (Vickie Chapman, Attorney-General).

⁹ *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Surrogacy Act 2019* (SA) (*‘Surrogacy Act’*); *Surrogacy Act 2012* (Tas); *Assisted Reproductive Treatment Act 2008* (Vic); *Surrogacy Act 2008* (WA).

¹⁰ National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (Guidelines, 20 April 2017) (*‘Ethical Guidelines’*).

¹¹ See, eg: *Surrogacy Act* (n 9) ss 6–8; Millbank, ‘The New Surrogacy Parentage Laws in Australia’ (n 5) 167.

¹² See Judge Alexandra Harland, ‘Surrogacy, Identity, Parentage and Children’s Rights: Through the Lens of a Child’ (2021) 59(1) *Family Court Review* 121, 122–3; Millbank, ‘The New Surrogacy Parentage Laws in Australia’ (n 5) 166–7; Jenni Millbank, ‘Rethinking “Commercial” Surrogacy in Australia’ (2015) 12(3) *Journal of Bioethical Inquiry* 477, 479; Tammy Johnson, ‘The Regulation of Commercial Surrogacy in Australia: A Harm Analysis’ (PhD Thesis, Queensland University of Technology, 2020) 49 n 14.

The terms of reference for SALRI’s 2018 report excluded the consideration of both a regulated system of commercial surrogacy and the option of prohibiting all forms of surrogacy.¹³ The precise terms as set out by then Labor Attorney-General John Rau and later supported by the then Liberal Attorney-General Vickie Chapman, included:

1. To review Part 2B of the *Family Relationships Act 1975* (SA).
2. To consult with relevant experts and other interested parties as considered suitable by SALRI and consider best practice from other jurisdictions concerning the regulation of surrogacy arrangements.
3. To make recommendations on best practice and legislative changes as a result of the investigations.
4. To be guided by the principle that surrogacy arrangements are private arrangements between individuals with the State setting the parameters of what must and must not be agreed to, rather than taking a direct and ongoing role in the establishment and maintenance of individual arrangements.¹⁴

Through its extensive research and consultation, SALRI heard a wide range of views as to how surrogacy arrangements should be regulated. These divergent views can largely be placed on the following spectrum:

- those that believe that Australian jurisdictions should permit the full range of surrogacy arrangements to take place, including a regulated commercial system,
- those that viewed that there should be limited availability to a regulated version of commercial surrogacy or the imposition of a cap on payments,
- those who would prefer that only the current system of altruistic surrogacy continue, and

¹³ *Surrogacy Report* (n 3) 2, 29 [1.2.17], 30 [1.3.2], 38 [2.1.12], 77 [7.5.40].

¹⁴ See *ibid* 1. SALRI was also asked to examine the impact of the decision of the Full Court of the Family Court in *Bernieres v Dhopal* (2017) 324 FLR 21 (*‘Bernieres’*) in relation to the recognition of parentage arising from offshore surrogacy. SALRI ultimately resolved that it would be inappropriate for reasons of both policy and practice for a state to seek to resolve the ‘gap’ to recognise parentage from international surrogacy arising from *Bernieres* and this is an issue to be resolved at a national level: at 4–5, 293–304. It is beyond the scope of this article to consider *Bernieres*.

- those who consider that all forms of surrogacy should be prohibited altogether.¹⁵

Despite this, neither the options of banning or precluding any form of surrogacy nor introducing a regulated system of commercial surrogacy in South Australia were within SALRI's terms of reference.¹⁶ SALRI adopted the view espoused by John Dawkins of the South Australian Legislative Council¹⁷ as an accurate rationale of the law to be followed in this area:

the [aim of the] current law in South Australia [is] to secure the welfare of children born through surrogacy, to try to make accessibility of surrogacy arrangements in this jurisdiction wider, to limit overseas use of the commercial surrogacy process, and to ensure that commercial surrogacy remains banned in South Australia.¹⁸

SALRI took the view that the 'horse has already bolted' with in vitro fertilisation ('IVF'), and that 'adoption and surrogacy and the law cannot now realistically be wound back to preclude surrogacy'.¹⁹

SALRI noted that it may be inevitable that Australians will continue to travel overseas for surrogacy, but 'given the strong human rights concerns and implications associated with international commercial surrogacy', SALRI expressed *at the time of its report* that, even if a regulated domestic system of commercial surrogacy could be implemented, 'the risk of exploitation of both surrogate mothers and children remains significant and therefore, at this stage, the practice of commercial surrogacy should remain unlawful in South Australia'.²⁰ However, SALRI did not necessarily seek to close the door to commercial surrogacy. It emphasised that, given the complexities and national and international implications of surrogacy, the

¹⁵ *Surrogacy Matters* (n 1) 6 [1.18]. See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (Report No 38, May 2009) 23–50, especially at 48 [3.147]; NSW Department of Justice (n 4) iv [0.6].

¹⁶ *Surrogacy Report* (n 3) 30 [1.3.2]. See also Te Aka Matua o te Ture | New Zealand Law Commission (n 4) 6–9 [1.10]–[1.21].

¹⁷ Mr Dawkins has been a longstanding advocate for reform. One Member of Parliament aptly acknowledged 'his tireless work in this area. He has demonstrated impeccable strength, tenacity and resolve in advocating on the issue of surrogacy for many, many years. It is wonderful to see the results of that work in this bill. ... [He] first took up the issue some 14 years ago, as I understand.': South Australia, *Parliamentary Debates*, Legislative Council, 31 October 2019, 4807 (Connie Bonaros).

¹⁸ South Australia, *Parliamentary Debates*, Legislative Council, 12 November 2014, 1597–8 (John Dawkins).

¹⁹ *Surrogacy Report* (n 3) 77 [7.5.40]. See also Te Aka Matua o te Ture | New Zealand Law Commission (n 4) 6–7 [1.11]–[1.16].

²⁰ *Surrogacy Report* (n 3) 61 [6.2.1]. See also NSW Department of Justice (n 4) 8 [2.26]–[2.28], 9 [3.6].

preferable long-term solution would be a national and uniform scheme coordinated between the states and territories and the Commonwealth, and to make use of the referral of state power to the Commonwealth.²¹

SALRI’s report, implemented in the *Surrogacy Act 2019* (SA) (*‘Surrogacy Act’*), made a total of 69 recommendations.²² In summary, SALRI supported a suitable regulatory framework for South Australia that prohibited commercial surrogacy and maintained the (admittedly often tenuous)²³ distinction between commercial and non-commercial surrogacy and sought to protect the interests of all parties involved, notably, the best interests of any child.

The *Surrogacy Act*, based on SALRI’s report, passed with all-party support. The passage of the Act was welcomed as a ‘historic day’.²⁴ While the Act was a welcome measure to clarify and improve surrogacy law and practice in South Australia, it left unresolved the elephant in the room — the question of domestic commercial surrogacy.

This article considers SALRI’s reference and argues that, although the *Surrogacy Act* is a worthwhile measure, the wider question of permitting commercial surrogacy in South Australia (and elsewhere in Australia) remains unanswered. The arguments both for and against commercial surrogacy put to SALRI are reconsidered in light of the research on surrogacy outcomes and the continuing practice of Australians accessing commercial surrogacy overseas.

It is argued that relying on a clear distinction between commercial and non-commercial surrogacy is unhelpful²⁵ and that payment beyond the surrogate’s expenses is not an effective or accurate indication as to whether a surrogacy arrangement is beneficial or harmful to the parties involved.²⁶ As Jenni Millbank argues, ‘the distinction between “commercial” and “altruistic” surrogacy is confusing and untenable and ... “payment” is not an effective proxy for “exploitation”, which can

²¹ See *Surrogacy Report* (n 3) 32 [1.3.10], 51 [4.3.7]. There is, at present, a complicated and convoluted division of powers in this area in Australia between the Commonwealth and the states, and achieving uniformity across Australian jurisdictions is a notoriously difficult task.

²² See the second reading speech for the Act: South Australia, *Parliamentary Debates*, House of Assembly, 1 August 2019, 6967–72 (Vickie Chapman, Attorney-General).

²³ See Te Aka Matua o te Ture | New Zealand Law Commission (n 4) 8 [1.20].

²⁴ South Australia, *Parliamentary Debates*, Legislative Council, 10 November 2020, 2064 (Tammy Franks).

²⁵ Law Commission of England and Wales and Scottish Law Commission, *Building Families through Surrogacy: A New Law* (Consultation Paper No 244, 6 June 2019) 25–6 [2.14]–[2.18]; *Surrogacy Report* (n 3) 42–4 [3.2.1]–[3.2.12].

²⁶ See, eg: Anita Stuhmcke, ‘The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions’ (2015) 23(2) *Journal of Law and Medicine* 333; Emily Jackson et al, ‘Learning from Cross-Border Reproduction’ (2017) 25(1) *Medical Law Review* 23, 28, 30, 32.

and should be addressed in other ways'.²⁷ It is contended that the assumption that commercial surrogacy, particularly in the Australian context, is inevitably unsafe and exploitative, is unsound.

Furthermore, it is suggested that the presence of payment or a profit is not the only basis on which non-commercial and commercial surrogacy can or should be distinguished.²⁸

While the concerns with some forms of commercial surrogacy must be addressed, they do not inherently preclude a regulated model of domestic commercial surrogacy in Australia.²⁹ Once the present COVID-19 travel restrictions lapse,³⁰ international surrogacy travel will inevitably resume, and Australians will be accessing commercial surrogacy arrangements, many without regulation. Therefore, in Australia, it is time for an honest and realistic consideration of domestic commercial surrogacy at a national level. As will be seen, the complexities and the national and international implications of surrogacy are such that the preferable long-term solution to this issue is a national and uniform regulated scheme, coordinated between the states and territories and the Commonwealth. The complex question of regulating surrogacy on an international level is beyond the scope of this article.

II DEFINING SURROGACY: COMMERCIAL AND NON-COMMERCIAL SURROGACY

Surrogacy refers to an arrangement in which a woman (the surrogate) gestates and bears a child with the intention that the child will be raised by someone else, the intended parent(s).³¹ Governments typically legislate for two aspects of surrogacy policy: first, the legality and enforceability of surrogacy arrangements;³² and second, the distinction between non-commercial and commercial surrogacy, which is the focus of this article.

In a non-commercial surrogacy arrangement, the surrogate is not paid beyond verifiable out-of-pocket costs directly associated with acting as a surrogate such as

²⁷ Millbank, 'The New Surrogacy Parentage Laws in Australia' (n 5) 195.

²⁸ See also Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (n 26).

²⁹ The regulation of surrogacy at an international level would be even more difficult to achieve, and the potential of this occurring is outside the scope of this article.

³⁰ See generally Patricia Fronek and Karen Smith Rotabi, 'The Impact of the COVID-19 Pandemic on Intercountry Adoption and International Commercial Surrogacy' (2020) 63(5) *International Social Work* 665.

³¹ Miranda Montrone and Kerry Sherman, 'Surrogacy' in Marc D Gellman (ed), *Encyclopedia of Behavioral Medicine* (Springer, 2nd ed, 2020) 2204, 2204. With respect to the party or parties who engaged the services of the surrogate the term 'commissioning parents' is also widely used. However, no term is ideal: see *Surrogacy Report* (n 3) 22 n 6.

³² Including the granting of parenting orders for children born through surrogacy, although this is beyond the scope of this article.

medical and counselling costs, travel and accommodation costs within Australia, loss of earnings due to unpaid leave, insurance, childcare costs (when required to enable appointment attendance) and legal fees.³³

In a commercial surrogacy arrangement, the intended parents pay the surrogate for her gestational services above and beyond her costs. In Australia, commercial surrogacy is defined as 'an arrangement where a surrogate receives payment or inducement above and beyond the reimbursement of verifiable out-of-pocket expenses *directly* associated with the surrogacy procedure or pregnancy'.³⁴

A *Australians' Use of Commercial Surrogacy*

While commercial surrogacy is ostensibly prohibited in Australia,³⁵ a significant number of Australians travel overseas to engage in surrogacy arrangements, 'most of which would have been commercial, even though prohibited in most home jurisdictions'.³⁶ This is highlighted by the increasing number of citizenship approvals for Australian children born overseas through surrogacy: figures have increased from 10 in 2008–9 to 232 in 2018–19.³⁷ Though the use of international commercial surrogacy largely ceased with COVID-19 travel restrictions,³⁸ this is likely to prove a 'mere hiatus', and 'business as usual' is likely to resume once international travel restrictions ease.³⁹

³³ *Surrogacy Report* (n 3) 253 [25.1.3], 253–68. See also *Ethical Guidelines* (n 10) 3. The *Surrogacy Report* adopted the term non-commercial surrogacy rather than 'altruistic': at 23, 44 [3.2.12], 45 [3.3.7]. This term is also used in this article, reflecting critiques that the term 'altruistic' conveys incorrect assumptions about the motivations of surrogates in commercial arrangements and the outcomes for surrogates in non-commercial arrangements: see *Surrogacy Report* (n 3) 43 [3.2.5]; Jackson et al (n 26) 28.

³⁴ *Ethical Guidelines* (n 10) 3 (emphasis in original).

³⁵ *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Surrogacy Act* (n 9); *Surrogacy Act 2012* (Tas); *Assisted Reproductive Treatment Act 2008* (Vic); *Status of Children Act 1974* (Vic); *Surrogacy Act 2008* (WA). There is no law governing surrogacy in the Northern Territory, but surrogacy is ethically prohibited, as it is throughout Australia: see *ibid* 65.

³⁶ Miranda Montrone and Petra Thorn, 'Surrogacy in Australia' (2020) 17(5) *Journal of Reproductive Medicine and Endocrinology* 240, 243.

³⁷ *Ibid*.

³⁸ Fronck and Smith Rotabi (n 30) 665; Sirin Kale, 'Surrogates Left Holding the Baby as Coronavirus Rules Strand Parents', *The Guardian* (online, 14 May 2020) <<https://www.theguardian.com/lifeandstyle/2020/may/14/surrogates-baby-coronavirus-lockdown-parents-surrogacy>>; Nicole Mowbray, 'Family Planning: How Covid-19 Has Placed Huge Strains on All Stages of Surrogacy', *The Guardian* (online, 14 June 2020) <<https://www.theguardian.com/lifeandstyle/2020/jun/14/family-planning-how-covid-19-has-affected-all-steps-of-surrogacy>>.

³⁹ Fronck and Smith Rotabi (n 30) 668. The current situation in Ukraine in light of the Russian invasion though is likely to deter any significant resumption of commercial surrogacy. See Ronli Sifris, 'Russia's Invasion Is Wreaking Havoc with Surrogacy in

A multitude of reasons exist for intended parents to utilise international commercial surrogacy over domestic non-commercial surrogacy and, indeed, many Australians prefer to do so. For example, in one Australian study, 44% of respondents did not consider domestic non-commercial surrogacy at all, and when people only considered one surrogacy option, 92% considered international commercial surrogacy. It was explained:

The main reasons respondents did not consider surrogacy in Australia were a concern that the surrogate might decide to keep the child (86 [75%]), a belief that it was too long and complicated a process (78 [68%]) and having no one of the right age or life stage to ask (69 [61%]). Concern that carrying a child for no reward was an unfair exchange was also often cited (53 [46%]).⁴⁰

People choose to pursue international commercial surrogacy for several reasons, including: barriers to non-commercial surrogacy; an acute shortage of local willing surrogates;⁴¹ and/or the inability to undertake commercial surrogacy in Australia. However, some researchers argue that this may also be related to a lack of knowledge about the pitfalls of international commercial surrogacy, and insufficient knowledge about the availability of non-commercial surrogacy in Australia.⁴² Miranda Montrone and Petra Thorn explain:

This increase was most probably connected to the significant political and legislative focus and related media attention [about international commercial surrogacy] in Australia during the development of legislation in a number of states in the preceding few years. This would have alerted intended parents to the possibility of surrogacy for family formation but did not give them enough knowledge of the benefits of [non-commercial] surrogacy locally for them to follow this path, and nor did they have enough knowledge of the disadvantages and prohibitions of international commercial surrogacy to decide against travelling overseas.⁴³

This also likely reflects the inconsistency in Australian legal practice regarding surrogacy, a point made clearly by one intended parent: ‘Given the lack of a national, consistent framework for surrogacy in Australia, it is not surprising that so many people choose to look to internationally [sic] options for surrogacy.’⁴⁴

Ukraine: It Shows Why Australia Must Change Its Laws’, *The Conversation* (online, 22 March 2022) <<https://theconversation.com/russias-invasion-is-wreaking-havoc-with-surrogacy-in-ukraine-it-shows-why-australia-must-change-its-laws-179652>>.

⁴⁰ Sam G Everingham, Martyn A Stafford-Bell and Karin Hammarberg, ‘Australians’ Use of Surrogacy’ (2014) 201(5) *Medical Journal of Australia* 201:1–4, 2.

⁴¹ Michael Gorton, ‘Review of Assisted Reproductive Treatment’ (Consultation Paper, August 2018) 22–5 (‘Review of Assisted Reproductive Treatment’); *Surrogacy Matters* (n 1) 23 [1.74], 31 [1.111]; *Surrogacy Report* (n 3) 33 n 60.

⁴² Montrone and Thorn (n 36) 243.

⁴³ *Ibid* 243.

⁴⁴ Rainbow Families NSW, Submission No 97 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (February 2016) 87.

Intended parents are willing to go to extreme lengths to have a family, with typically law-abiding citizens willing to risk criminal prosecution when they see commercial surrogacy as their only avenue to parenthood.⁴⁵ Such an approach was evident in several submissions by intended parents to the House of Representatives Standing Committee on Social Policy and Legal Affairs (‘Commonwealth Inquiry into Surrogacy’). For example, one intended parent highlighted how desperation drove Australians to break the law (knowingly or unknowingly) and that, in needing to travel overseas, the risk increased for all parties:

People will seek and eventually access surrogacy and some, have broken the law, knowing that to be the case, some have inadvertently done so. But what I know is that some people who feel they are at the end of the rope in terms of creating a family will be driven to extreme measures in order to fulfill that dream ... In accessing an effectively banned and unregulated industry overseas or abroad, couples, surrogates and the unborn children ALL face risk. Some stories end happily, others end disastrously for one or more involved.⁴⁶

The Commonwealth Inquiry into Surrogacy heard from Australians who had engaged in international commercial surrogacy that they would have preferred to pursue surrogacy in Australia, but saw commercial surrogacy overseas as their only option:

We chose Commercial Surrogacy because at the time this was our only option for us to be able to start a family. ... [T]hrough this journey, through conversation with other families, it became apparent that they would have much rather have been able to do this in Australia, but through pure desperation had to look overseas.⁴⁷

It is perhaps ironic that the present prohibition on domestic commercial surrogacy encourages Australian intended parents to seek it out overseas, including in countries where unethical practices can occur.⁴⁸

B *The Context and Research regarding Non-Commercial Surrogacy*

Throughout Australia, commercial surrogacy is currently prohibited, and only non-commercial surrogacy is permitted. The number of live births from gestational

⁴⁵ There are no laws in South Australia that, unlike New South Wales, the Australian Capital Territory and Queensland, have extraterritorial application and make it an offence for residents of South Australia to take part in international commercial agreements. There have been no prosecutions for offences under these laws and the utility of such extraterritorial criminal laws to deter overseas surrogacy has been doubted. See *Surrogacy Matters* (n 1) 23 [1.71], 31 [1.113].

⁴⁶ Submission No 2 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (28 January 2016) 2.

⁴⁷ Rainbow Families NSW (n 44) 81. This was also relayed to SALRI. See *Surrogacy Report* (n 3) 61 [6.1.26].

⁴⁸ South Australia, *Parliamentary Debates*, Legislative Council, 29 October 2019, 4743 (John Dawkins). See below nn 65–71.

surrogacy (where the surrogate does not use her gametes) in Australia has been steadily increasing, going from six in 2005⁴⁹ to 86 in 2018.⁵⁰

A recent Australian study involving 602 people (318 intended parents, 160 surrogates and 124 partners of surrogates) in 160 non-commercial surrogacy arrangements provides one of the most extensive studies of surrogacy practice in Australia.⁵¹ In most of the studied cases, surrogacy was required due to the intended mothers' medical history or health risks (89.9%), with the remaining cases being intended parents in male same-sex relationships (10.1%).⁵² Surrogates primarily comprised immediate family members (48.5%, including sisters/sisters-in-law and mothers/mothers-in-law) and friends or extended family members (46.3%).⁵³ In a second study, surrogates were most commonly friends or the intended mother's sister.⁵⁴

However, it should be emphasised that it is difficult to know exactly how common surrogacy is⁵⁵ and there is a shortage of reliable figures regarding both domestic and international surrogacy.⁵⁶ The Hague Conference has observed that the number of international surrogacy arrangements entered globally is 'impossible to determine'.⁵⁷

⁴⁹ Yueping Alex Wang, Jishan Dean and Elizabeth A Sullivan, 'Assisted Reproduction Technology in Australia and New Zealand 2005' (Assisted Reproduction Technology Series No 11, September 2007) 39.

⁵⁰ Jade E Newman, Repon C Paul and Georgina M Chambers, 'Assisted Reproductive Technology in Australia and New Zealand 2018' (Report, September 2020) 43. The number of children born to domestic surrogacy arrangements in Australia is unclear. SALRI was told in consultation that even domestic surrogacy inside Australia (especially involving family members of close friends) may 'fly under the radar'. Stephen Page, a leading lawyer, estimates that in a 'normal year' about 40 children are born through surrogacy in Australia: see *Surrogacy Report* (n 3) 34 n 62.

⁵¹ Miranda Montrone et al, 'A Comparison of Sociodemographic and Psychological Characteristics among Intended Parents, Surrogates, and Partners Involved in Australian Non-Commercial Surrogacy Arrangements' (2020) 113(3) *Fertility and Sterility* 642.

⁵² *Ibid* 645.

⁵³ *Ibid*.

⁵⁴ Montrone and Thorn (n 36) 241.

⁵⁵ See also Debra Wilson, 'Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications' (2017) 7(3) *University California Irvine Law Review* 653, 656–7.

⁵⁶ Te Aka Matua o te Ture | New Zealand Law Commission (n 4) 15–19 [2.6]–[2.16].

⁵⁷ Permanent Bureau of the Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Report No 10, March 2012) 8. The precise number of Australians and South Australians who travel overseas for surrogacy is also difficult to determine: see Jenni Millbank, 'Responsive Regulation of Cross-Border Assisted Reproduction' (2015) 23(2) *Journal of Law and Medicine* 346, 352–4.

A major challenge in pursuing non-commercial surrogacy in Australia is identifying a suitable and willing surrogate.⁵⁸ As Miranda Montrone and Petra Thorn note:

It can be daunting for intended parents to know where to look to find a surrogate, and as one intended father said about the difficulty in asking for this help, 'it's not like you are asking for a cup of coffee.' Commonly surrogates report that when they discuss their plans with other women the response they hear is 'That's amazing, I couldn't do it.'⁵⁹

Concerns about the complexity and length of the surrogacy process in Australia also contribute to reliance upon international surrogacy:

There have also been unfounded concerns that surrogates in Australia may refuse to relinquish the child and a belief that domestic surrogacy was too long and complicated a process. And as there are few upfront requirements required for overseas surrogacy, it may appear to be quicker and easier.⁶⁰

While some research exists about non-commercial surrogacy or surrogacy in general (where the form of surrogacy is unspecified), most commentary concerns commercial surrogacy, as illustrated below.

C The Discourses of Exploitation and Commodification

All forms of surrogacy, including non-commercial arrangements, have been argued to be inherently exploitative and harmful and a practice that should be precluded.⁶¹ The practice of surrogacy generates intense emotions and, by those who oppose it, has even been compared with slavery.⁶² However, this criticism is most commonly applied to commercial surrogacy. Sonia Allan concluded:

⁵⁸ Gorton, 'Review of Assisted Reproductive Treatment' (n 41) 22–5. Monica, a potential surrogate mother involved with online surrogacy networks, estimated to SALRI there are from one to 20 or even one to 100 potential surrogates to prospective intending parents in Australia: see *Surrogacy Report* (n 3) 33 n 60.

⁵⁹ Montrone and Thorn (n 36) 241.

⁶⁰ *Ibid* 243.

⁶¹ Kajsa Ekis Ekman, 'All Surrogacy Is Exploitation: The World Should Follow Sweden's Ban', *The Guardian* (online, 26 February 2016) <<https://www.theguardian.com/commentisfree/2016/feb/25/surrogacy-sweden-ban>>.

⁶² Rosalie Ber, 'Ethical Issues in Gestational Surrogacy' (2000) 21(2) *Theoretical Medicine and Bioethics* 153. One Liberal Party of Australia candidate in the 2022 Australian election even branded surrogacy as 'reproductive prostitution': Michael Koziol and James Massola, 'Deves Said Surrogacy Is "Reproductive Prostitution" and Violates Human Rights', *The Sydney Morning Herald* (online, 21 April 2022) <<https://www.smh.com.au/politics/federal/deves-said-surrogacy-is-reproductive-prostitution-and-violates-human-rights-20220421-p5af4q.html>>.

Prohibitions on commercial surrogacy reflect the public policy position that commercial surrogacy should be discouraged or deterred on the basis that it commodifies the child and the surrogate mother and risks the exploitation of poor families for the benefit of rich ones.⁶³

Another author notes: ‘One common reason for opposing legalized and regulated commercial surrogacy is the fear that the practice exploits vulnerable and impoverished women and creates a class of “baby-making machines”.’⁶⁴

These fears are not wholly without foundation. The risks of exploitation through commercial surrogacy, especially as previously witnessed in offshore locations⁶⁵ such as India⁶⁶ or Thailand⁶⁷ and, more recently, Ukraine,⁶⁸ are well-established.⁶⁹

⁶³ Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (n 4) 137.

⁶⁴ Victoria R Suzman, ‘A Comparison of Surrogacy Laws of the US to Other Countries: Should there Be a Uniform Federal Law Permitting Commercial Surrogacy?’ (2016) 38(2) *Houston Journal of International Law* 619, 635.

⁶⁵ April L Cherry, ‘The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice’ (2014) 17(3) *University of Pennsylvania Journal of Law and Social Change* 257, 269–71.

⁶⁶ See, eg: Jennifer A Parks, ‘Care Ethics and the Global Practice of Commercial Surrogacy’ (2010) 24(7) *Bioethics* 333; Law Commission of India, *Need for Legislation To Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy* (Report No 228, August 2009) 11 [1.8]; Malene Tanderup et al, ‘Informed Consent in Medical Decision-Making in Commercial Gestational Surrogacy: A Mixed Methods Study in New Delhi, India’ (2015) 94(5) *ACTA Obstetrica et Gynecologica Scandinavica* 465; Pamela Laufer-Ukeles, ‘Mothering for Money: Regulating Commercial Intimacy’ (2013) 88(4) *Indiana Law Journal* 1223, 1268; Seema Mohapatra, ‘Stateless Babies and Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy’ (2012) 30(2) *Berkeley Journal of International Law* 412, 435–7.

⁶⁷ Andrea Whittaker, ‘From “Mung Ming” to “Baby Gammy”’: A Local History of Assisted Reproduction in Thailand’ (2016) 2 *Reproductive BioMedicine and Society Online* 71.

⁶⁸ Tracy Bowden, ‘Australian Parents Warn Reality of Ukrainian Surrogacy Doesn’t Always Match the Dream’, *ABC News* (online, 21 August 2019) <<https://www.abc.net.au/news/2019-08-21/australian-parents-warn-about-ukraine-surrogacy-lotus/11426396>>; Oksana Grytsenko, ‘The Stranded Babies of Kyiv and the Women Who Give Birth for Money’, *The Guardian* (online, 15 June 2020) <<https://www.theguardian.com/world/2020/jun/15/the-stranded-babies-of-kyiv-and-the-women-who-give-birth-for-money>>.

⁶⁹ Jonathan W Knoche, ‘Health Concerns and Ethical Considerations regarding International Surrogacy’ (2014) 126(2) *International Journal of Gynecology and Obstetrics* 183.

Chief Justice Pascoe, on more than one occasion, warned of the dangers of an unregulated 'Wild West' of surrogacy,⁷⁰ elaborating:

A commercial surrogacy industry has emerged, encompassing for-profit intermediaries such as agents, clinics and lawyers. These intermediaries advertise to potential parents, marketing commercial surrogacy as a reproductive solution for wealth [sic] couples, as well as recruiting local women to be surrogates. These women are usually poor, indebted and from lower social classes, and become surrogates for financial reasons. Obviously a commercial enterprise, the surrogacy industry bears all the usual hallmarks, including financial lures, cost cutting, competitive pricing, and techniques — which may be morally reprehensible but — which guarantee results. The industry is now a billion dollar 'booming global business'.

The industry is largely unregulated, as it simply moves from country to country as one tightens its regulations. The same clinics have moved from India to Thailand to Cambodia and now to Laos.

Without regulation, it is the market that governs the surrogacy industry ... The process was described by one parent as 'like going to the supermarket to pick up your baby.' This has led to serious threats to the human rights of those involved, particularly the surrogate mother and the child.⁷¹

Critics draw comparisons between commercial surrogacy and other stigmatised transactions that involve the exchange of money for the use of another person's body, like prostitution,⁷² 'baby-selling',⁷³ and organ sales.⁷⁴ The practice of commercial surrogacy is further called a 'reproductive supermarket'⁷⁵ and is said to 'commercialize ... an otherwise natural process'.⁷⁶ The practice is also seen to commoditise

⁷⁰ Pascoe, 'Sleepwalking through the Minefield: Legal and Ethical Issues in Surrogacy' (n 7) 455.

⁷¹ Pascoe, 'Sleepwalking through the Minefield: Commercial Surrogacy and the Global Response' (n 1).

⁷² Lisa L Behm, 'Legal, Moral, and International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States' (1999) 2(3) *DePaul Journal of Health Care Law* 557, 578.

⁷³ Pamela Laufer-Ukeles, 'Approaching Surrogate Motherhood: Reconsidering Difference' (2002) 26(2) *Vermont Law Review* 407, 415.

⁷⁴ Jay R Combs, 'Stopping the Baby-Trade: Affirming the Value of Human Life through the Invalidation of Surrogacy Contracts' (1999) 29(2) *New Mexico Law Review* 407.

⁷⁵ Katherine Drabiak et al, 'Ethics, Law, and Commercial Surrogacy: A Call for Uniformity' (2007) 35(2) *Journal of Law, Medicine and Ethics* 300, 303.

⁷⁶ Diksha Munjal-Shankar, 'Identifying the "Real Mother" in Commercial Surrogacy in India' (2014) 18(3) *Gender, Technology and Development* 387, 389.

surrogates' bodies.⁷⁷ There are even concerns that the practice serves to facilitate 'the creation of an underclass of women who would become society's "breeders"'.⁷⁸ Critics of commercial surrogacy often express the concern that it reinforces a perception of women as 'mere "baby-making machines"' and 'promotes ... a view of children as marketable "goods" or products'.⁷⁹ It has also been stated that '[t]here are, in a civilized society, some things that money cannot buy'.⁸⁰ There are well-documented concerns regarding commercial surrogacy and fears of exploitation, notably of the surrogate.⁸¹ The Family Court has expressed its concerns relating to surrogacy on numerous occasions.⁸²

The concerns around international commercial surrogacy are 'well-documented'.⁸³ The practice of international commercial surrogacy, especially in low-income countries, has attracted extensive concern, often centring around the exploitation

⁷⁷ Chief Justice Thackray acknowledged the 'tensions that arise when a woman's body is rented for the benefit of others and where the unit of exchange is measured in the life of a new human being': *Farnell v Chanbua* (2016) 56 Fam LR 84, 95 [57]. See also Andrew Lu, 'Surrogacy and Parentage in Western Australia: Current Perspectives' (2016) 24(5) *Australian Health Law Bulletin* 78, 82.

⁷⁸ Ronli Sifris, 'Commercial Surrogacy and the Human Right to Autonomy' (2015) 23(2) *Journal of Law and Medicine* 365, 367.

⁷⁹ Jennifer Rimm, 'Booming Baby Business: Regulating Commercial Surrogacy in India' (2009) 30(4) *University of Pennsylvania Journal of International Law* 1429, 1444.

⁸⁰ *Re Baby M*, 109 NJ 396, 440 (1988).

⁸¹ See, eg: Patricia Fronek, 'Current Perspectives on the Ethics of Selling International Surrogacy Support Services' (2018) 8(1) *Medicolegal and Bioethics* 11; Karen Smith Rotabi and Nicole F Bromfield, *From Intercountry Adoption to Global Surrogacy: A Human Rights History and New Fertility Frontiers* (Routledge, 2017).

⁸² *Batkin v Bagri* [2019] FamCA 979, [25] (Johns J); *Masters v Harris* [2017] FamCA 450, [56] (Johns J); *Fisher-Oakley v Kittur* [2014] FamCA 123 (Cronin J); *Ellison v Karnchanit* (2012) 48 Fam LR 33 (Ryan J); *Bernieres v Dhopal* (2015) 53 Fam LR 547 (Berman J).

⁸³ *Surrogacy Report* (n 3) 293 [26.1.2]. See, eg, *Masters v Harris* (n 82) [56], where Johns J stated:

I share those concerns with respect to the practice of commercial surrogacy, particularly that: — There are inconsistencies of the laws within Australia regarding international surrogacy; The lack of scrutiny of those in Australia participating in such arrangements; The inability to protect and safeguard the rights of the surrogates engaged; and the inability to ensure that the children born of such arrangements have the opportunity to know and experience their cultural and biological identity.

See also: *Mason v Mason* [2013] FamCA 424, [4] (Ryan J); *Fisher-Oakley v Kittur* (n 82) [5]–[10], [21], [27]; *Ellison v Karnchanit* (n 82) [5]; *Bernieres v Dhopal* (n 82) [25]–[26]; *Pappas v Ugapathai* [2017] FamCA 1090, [33] (Thornton J); *Re Rose* [2018] FamCA 978, [48]–[56] (Carew J); *Allan v Peters* [2018] FamCA 1063, [47] (Carew J); *Batkin v Bagri* (n 82) [25].

of surrogates and the commodification of reproductive health.⁸⁴ Some commentators strongly believe that disparities in socioeconomic status, sometimes present in international commercial surrogacy, inherently amount to exploitation: 'When one hears of travellers from rich countries paying very poor women in an LMIC [lower-middle income country] to carry their babies, it is difficult not to wonder if this is a case of exploitation.'⁸⁵

Others have also advanced the view that international commercial surrogacy results in the commodification of children:

the market mentality that enables 'value free' decisions ... commodifies ... carriers. This objectification similarly shapes our understanding of 'having' children as if they were market goods. The international surrogacy enterprise thus denigrates our view of humanity. In the end, we must ask ourselves whether the elation childless couples experience following the birth of a genetically related child is sufficient to offset the health risks, the violation of a surrogate's autonomy and her potential exploitation, the commodification of her person, and the resultant alteration of societal values.⁸⁶

Concerns of exploitation are not confined to low-income countries,⁸⁷ and have also been expressed regarding the United States.⁸⁸ However it has been argued that access to better healthcare and better legal, economic and social conditions for surrogates result in lower incidence of exploitation.⁸⁹

⁸⁴ See, eg: Susan L Crockin, 'Growing Families in a Shrinking World: Legal and Ethical Challenges in Cross-Border Surrogacy' (2013) 27(6) *Reproductive BioMedicine Online* 733; Anne Donchin, 'Reproductive Tourism and the Quest for Global Gender Justice' (2010) 24(7) *Bioethics* 323; N Lamba et al, 'The Psychological Well-Being and Prenatal Bonding of Gestational Surrogates' (2018) 33(4) *Human Reproduction* 646; Kristine Schanbacher, 'India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women' (2014) 25(2) *Hastings Women's Law Journal* 201; Sifris (n 78); Human Rights Council, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, 37th sess, Agenda Item 3, UN Doc A/HRC/37/60 (15 January 2018) ('*Human Rights Council Report*').

⁸⁵ Raywat Deonandan, Samantha Green and Amanda van Beinum, 'Ethical Concerns for Maternal Surrogacy and Reproductive Tourism' (2012) 38(12) *Journal of Medical Ethics* 742, 744.

⁸⁶ Knoche (n 69) 185.

⁸⁷ *Surrogacy Matters* (n 1) 25 [1.85].

⁸⁸ An odd feature of the United States system is that up to 20% of surrogates in that jurisdiction are military spouses. They are seen as 'ideal' surrogate mothers. See Elizabeth Ziuff, "'Honey, I Want To Be a Surrogate": How Military Spouses Negotiate and Navigate Surrogacy with Their Service Member Husbands' (2019) 40(18) *Journal of Family Issues* 2774, 2775.

⁸⁹ *Surrogacy Matters* (n 1) 24 [1.82].

The risk of exploitation and abuse in some commercial systems is clear. However, it is not inevitable that commercial surrogacy denotes exploitation and abuse. Instead, it is necessary to examine the precise system employed to allow and regulate surrogacy rather than the label attached to the practice.

D *Countering the Discourses of Exploitation and Commodification*

The arguments in favour of surrogacy should not be discounted. The assertions of exploitation and subjugation⁹⁰ made against commercial surrogacy have been challenged by some studies and commentators.⁹¹ As the Family Law Council noted:

A number of commentators have questioned the assumption that Indian women who work as surrogates are necessarily exploited, arguing that commercial surrogacy can provide financial opportunities that would not otherwise be available to poor women.⁹²

In the case of India, surrogates interviewed in 2016 received USD3,750–14,800 (average USD7,230) and USD5,560–9,640 (average USD7,200) for assisting international and domestic intended parents, respectively.⁹³ These sums are considerable for people living in a country classified as lower-middle-income by the World Bank,⁹⁴ with a gross national income per capita of \$6,440 (purchasing power parity in international dollars) in 2020.⁹⁵

⁹⁰ Sharmila Rudrappa, 'India's Reproductive Assembly Line', *Contexts* (online, 19 May 2012) <www.contexts.org/articles/spring-2012/indias-reproductive-assembly-line/>, in another study notes: 'given their employment options and their relative dispossession, they believed that Bangalore's reproduction industry afforded them greater control over their emotional, financial, and sexual lives. In comparison to garment work, surrogacy was easy.'

⁹¹ See, eg: Yasmine Ergas, 'Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy' (2013) 27(1) *Emory International Law Review* 117; Jaden Blazier and Rien Janssens, 'Regulating the International Surrogacy Market: The Ethics of Commercial Surrogacy in the Netherlands and India' (2020) 23(4) *Medicine, Health, Care and Philosophy* 621.

⁹² Family Law Council, *Report on Parentage and the Family Law Act* (Report, December 2013) 91.

⁹³ Sarah Huber, Sharvari Karandikar and Lindsay Gezinski, 'Exploring Indian Surrogates' Perceptions of the Ban on International Surrogacy' (2018) 33(1) *Affilia* 69, 74.

⁹⁴ 'World Bank Data Help Desk', *The World Bank*, (Web Page, 2022) <<https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>>. Lower-middle income countries have a gross national income per capita of \$1046–4095.

⁹⁵ 'GNI per Capita, PPP (Current International \$): India', *The World Bank* (Web Page, 2022) <<https://data.worldbank.org/indicator/NY.GNP.PCAP.PP.CD?locations=IN>>. 'An international dollar would buy in the cited country a comparable amount of goods and services a U.S. dollar would buy in the United States': 'What Is an "International Dollar"?'', *The World Bank* (Web Page) <<https://datahelpdesk.worldbank.org/knowledgebase/articles/114944-what-is-an-international-dollar>>.

Surrogacy has offered women in low- and lower-middle-income countries, such as India, an avenue to improve their families' quality of life in ways that may not otherwise have been possible. Changes to quality of life have included women spending increased time with their families, acquiring or renovating a home, providing educational opportunities, and gathering savings for their families.⁹⁶

Furthermore, it has been argued that the realities of life in lower-income countries cannot be denied. Amrita Pande argues that the criticism of Indian surrogacy ignores the reality of life for Indian surrogates:

These (Eurocentric) portrayals of and speculations about surrogacy cannot incorporate the reality in India, where commercial surrogacy has become a survival strategy and a temporary occupation for some poor rural women ... in the case of a developing country like India, where surrogacy is fast emerging as a survival strategy, it makes little analytical sense to battle about the morality of surrogacy.⁹⁷

Indeed, what constitutes exploitation is subjective, with both surrogates and intended parents identifying other labour acts that women in lower-income countries may engage in as equally or more exploitative. For example, an Indian surrogate defended her participation in surrogacy by stating: 'This is not exploitation. Crushing glass for 15 hours a day is exploitation.'⁹⁸

Further, an intended mother who chose to undertake surrogacy in India rather than the United States highlighted the double-standard for surrogacy compared to clothing production: 'People say it is exploitation, but it is just as much exploitation to purchase a backpack [produced by an Indian woman in a sweatshop], but people in that case are not nearly half as grateful.'⁹⁹

While financial compensation in commercial surrogacy can confer benefits for surrogates and their families, many women who participate in surrogacy maintain that their reasons for doing so have little to do with money.¹⁰⁰ Surrogates' motivation

⁹⁶ See: Anna Arvidsson, Sarah Johnsdotter and Birgitta Essén, 'Views of Swedish Commissioning Parents Relating to the Exploitation Discourse in Using Transnational Surrogacy' (2015) 10(5) *PLoS ONE* e0126518:1–12; Anindita Majumdar, 'Conceptualizing Surrogacy as Work-Labour: Domestic Labour in Commercial Gestational Surrogacy in India' (2018) 13(2) *Journal of South Asian Development* 210.

⁹⁷ Amrita Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (2010) 35(4) *Signs* 969, 971–2.

⁹⁸ Abigail Haworth, 'Surrogate Mothers: Womb for Rent', *Marie Claire* (online, 29 July 2007) <<https://www.marieclaire.com/politics/news/a638/surrogate-mothers-india/>>. The mother added: 'The baby's parents have given me a chance to make good marriages for my daughters. That's a big weight off my mind.'

⁹⁹ Arvidsson, Johnsdotter and Essén (n 96) 7.

¹⁰⁰ Drabiak et al (n 75) 300, 303–4.

to ‘help’ others or provide a ‘gift’ even in a commercial system is notable.¹⁰¹ Alice, an intended parent who has participated in a ‘non-commercial’ arrangement in South Australia and a ‘commercial’ arrangement overseas, highlighted to SALRI the profound sense of wanting to help a childless couple that motivates surrogates to volunteer their services, even in a commercial system.¹⁰²

Additionally, in a study exploring intended parents’ views about surrogate exploitation, an intended father recognised the financial benefits to their surrogate, but presented the non-commercial desire to assist him and his partner to become parents as the surrogate’s primary reason for engaging in commercial surrogacy:

Oh, I really felt that it was mutual, that she did this because she wanted to give a gift, as simple as that. ... When we met the second and third times, we realised that this is really how she feels about it, and then you begin to realise that she really means this. Like, it’s nothing she does casually. She does it as a nice gesture, and at the same time we know that she will have financial security in the future, at least for a while. She had no job and wanted to be home with her kids and then perhaps get some money for it. I felt it was very fair and very correct and it never felt like taking advantage of someone. Certainly, many argue that we are rich, that we in Sweden exploit the system, but it certainly has not felt like that, never ever!¹⁰³

In countering the exploitation discourse, it has also been argued that denying a woman the right to choose to act as a gestational carrier strips her of autonomy over her own body and implies that women, even with thorough counselling, are incapable of making these determinations.¹⁰⁴ Further, some commentators view

¹⁰¹ Heather Jacobson, *Labor of Love: Gestational Surrogacy and the Work of Making Babies* (Rutgers University Press, 2016); Helena Ragone, *Surrogate Motherhood: Conception in the Heart* (Westview Press, 1994); Vasanti Jadva et al, ‘Surrogacy: The Experiences of Surrogate Mothers’ (2003) 18(10) *Human Reproduction* 2196; Olga Van den Akker, ‘Genetic and Gestational Surrogate Mothers’ Experience of Surrogacy’ (2003) 21(2) *Journal of Reproductive and Infant Psychology* 145, 150–1; Karen Busby and Delaney Vun, ‘Revisiting the *Handmaid’s Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers’ (2010) 26(1) *Canadian Journal of Family Law* 13, 55–9; Susan Imrie and Vasanti Jadva, ‘The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements’ (2014) 29(4) *Reproductive BioMedicine Online* 424, 425, 431.

¹⁰² *Surrogacy Report* (n 3) 43 [3.2.5]. See also: Jadva et al (n 101); Van den Akker, ‘Genetic and Gestational Surrogate Mothers’ Experience of Surrogacy’ (n 101) 150–1; Busby and Vun (n 101) 55–9; Imrie and Jadva (n 101) 425, 431; Ruth Walker and Liezl van Zyl, *Towards a Professional Model of Surrogate Motherhood* (Palgrave MacMillan, 2017) ch 1.

¹⁰³ Arvidsson, Johnsdotter and Essén (n 96).

¹⁰⁴ Sifris (n 78).

commercial surrogacy, whether domestic or international, as an unobjectionable opportunity for women to freely exercise bodily and economic autonomy.¹⁰⁵

It has even been asserted that the 'thought that commercial surrogacy should be banned because the poor working women who mostly choose surrogacy are too incompetent to be entrusted to make their own decisions in this sphere has an ugly, elitist sound'.¹⁰⁶ Furthermore, in a recent qualitative study, women in India who had previously acted as surrogates were interviewed about the recent prohibition of surrogacy. All the women opposed the prohibition, citing the benefits for all parties (intended parents, surrogates and medical professionals).¹⁰⁷ They asserted that the prohibition had adversely impacted their ability to earn income for their families. As one Indian woman declared:

I feel that this is completely wrong on the government's part and that surrogacy should not have been banned. I feel that there should be rules and regulations pertaining to it, but it shouldn't be banned altogether. ... The government should reconsider their decision about the ban since there are women who are being affected by this, such as the widows, divorced, uneducated women ... and they are at a loss because the standard of living is increasing every day and by the means of surrogacy, they can at least assist themselves financially. ... They can certainly enforce rules and restrictions to regulate this practice, but they should lift the ban.¹⁰⁸

Others have argued that '[w]omen do not need to be protected from themselves, as they are capable of making their own decisions and accepting responsibility for the risks involved in those decisions'.¹⁰⁹ As Jennifer Rimm cogently argues:

Supporters of legalized commercial surrogacy argue that surrogacy contracts are less like prostitution and more like other service contracts that individuals enter into for purely financial reasons. There are numerous jobs that are potentially dangerous to one's physical and mental health, but which the government allows individuals to pursue. Moreover, these jobs are usually filled by people with limited alternatives. The underprivileged should not be denied their freedom to contract for a highly paid service because their economic situation makes it more likely that they are tempted by financial incentives to do so.¹¹⁰

¹⁰⁵ Ergas (n 91) 139–41, 176; Peter Gaffney, 'Why the "Widespread Agreement" Is Wrong: Contesting the Non-Harm Arguments for the Prohibition of Full Commercial Surrogacy' (2009) 17(2) *Journal of Law and Medicine* 280, 292; Rimm (n 79) 1459; Munjal-Shankar (n 76) 392.

¹⁰⁶ Lori B Andrews and Nanette Elster, 'Regulating Reproductive Technologies' (2000) 21(1) *Journal of Legal Medicine* 35, 41.

¹⁰⁷ Huber, Karandikar and Gezinski (n 93).

¹⁰⁸ *Ibid* 75.

¹⁰⁹ Luckey (n 6) 220.

¹¹⁰ Rimm (n 79) 1450.

Labour rights have been proposed as one possible means to minimise exploitation while also respecting women's autonomy to choose to engage in surrogacy. While this has been highlighted in relation to India, such a framework holds promise for the regulation of domestic commercial surrogacy arrangements within Australia:

Labor rights provide a framework within which the Indian government can address the exploitative elements of surrogacy arrangements without forbidding women from using their reproductive capacities as they deem suitable. Such a solution strikes ... as a happy fit for a country which seeks to provide safe and affordable surrogacy services, while simultaneously protecting surrogates from the potential pitfalls of an unregulated free market in wombs.¹¹¹

Surrogacy — even if undertaken on a regulated and non-commercial basis — has also been conceptualised as a violation of the rights of the child. Dr Renate Klein, for example, maintained to SALRI that surrogacy should be prohibited in all forms on moral, ethical and legal grounds.¹¹² She asserted that surrogacy 'is unashamedly an adult or parent centred view, with the basic human rights of newborn babies ignored' and it is impossible to design a regulatory framework for surrogacy that complies with Australia's international obligations, particularly under the *Convention on the Rights of the Child*.¹¹³

Such a view may be seen as overly simplistic. It is unclear whether commercial surrogacy infringes the rights of the child.¹¹⁴ Ronli Sifris noted to SALRI that 'whether commercial surrogacy arrangements amount to the sale of children under international human rights law "has been the subject of passionate debate"'.¹¹⁵ In contrast to Klein's argument, many scholars assert that there is no sale of a child in a commercial surrogacy arrangement as the exchange of money is for the surrogate's services (that is, carrying and giving birth to the child) rather than for the child.¹¹⁶ Indeed, Sifris concluded that 'the payment to a surrogate in this context is similar to the payment to a fertility specialist in the IVF context; it is compensation for the provision of a service, not payment for a child'.¹¹⁷ Sifris told SALRI that

¹¹¹ Ibid 1462.

¹¹² *Surrogacy Report* (n 3) 75 [7.5.28]. See also Ekman (n 61).

¹¹³ *Surrogacy Report* (n 3) 75 [7.5.28]. See also Renate Klein, *Surrogacy: A Human Rights Violation* (Spinifex Press, 2017).

¹¹⁴ For further discussion of the human rights issues raised by compensated surrogacy arrangements see Ronli Sifris, Karinne Ludlow and Adiva Sifris, 'Commercial Surrogacy: What Role for Law in Australia?' (2015) 23(2) *Journal of Law and Medicine* 275, 283–4.

¹¹⁵ *Surrogacy Report* (n 3) 76 [7.5.35].

¹¹⁶ Jason KM Hanna, 'Revisiting Child-Based Objections to Commercial Surrogacy' (2010) 24(7) *Bioethics* 341; 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* (Routledge, 2015) 81.

¹¹⁷ *Surrogacy Report* (n 3) 76 [7.5.35].

'the CRC [Conventions on the Rights of the Child] Committee has failed to adopt a clear position on the question of compensation' and its various comments suggest that the CRC Committee does not view *all* compensated surrogacy arrangements as constituting the sale of a child; only those circumstances involving 'the misuse of surrogacy'.¹¹⁸

This view is compelling. The report of the United Nations Special Rapporteur expressed concerns over the practice of surrogacy in both commercial and non-commercial surrogacy systems and that it may contravene international human rights law,¹¹⁹ but this is not necessarily the case:

commercial surrogacy may not constitute sale of children if it is closely regulated in compliance with international human rights norms and standards, and in a manner contrary to what exists in many commercial surrogacy regimes. [Non-commercial] surrogacy, too, must be appropriately regulated to avoid the sale of children.¹²⁰

Even Chief Justice Pascoe, a critic of surrogacy practices, has expressed a similar view:

commercial surrogacy can be conducted without constituting the sale of children if the surrogate mother is paid for gestation services *only* and *not* for the transfer of the child. To ensure that this is not just a legal fiction, there must be no contractual or legal obligation on the surrogate mother to legally or physically transfer the child. The surrogate mother must be considered to have completed her obligations in carrying and birthing the child, even if she retains the child and maintains both legal parentage and parental responsibility. ... [A]ll payments must have been made to the surrogate mother prior to any transfer of the child and be non-reimbursable if she chooses to keep the child, and that transfer of legal parentage must be by a court or competent authority after the birth and with the best interests of the child a paramount consideration. These recommendations of the Special Rapporteur provide guidance and a minimum standard necessary to prevent the sale of children, whether or not countries permit, regulate or prohibit surrogacy.¹²¹

¹¹⁸ Ibid 76 n 249 (emphasis in original).

¹¹⁹ The *Human Rights Council Report* (n 84) 7 [24] elaborated:

Surrogacy, in particular commercial surrogacy, often involves abusive practices. Furthermore, it involves direct challenges to the legitimacy of human rights norms, as some of the existing legal regimes for surrogacy purport to legalize practices that violate the international prohibition on sale of children, as well as other human rights norms. Moreover, many of the arguments provided in support of these legal regimes for commercial surrogacy could, if accepted, legitimate practices in other fields, such as adoption, that are considered illicit. Thus, if this type of governing legal regime becomes accepted, whether as international or national law, or through recognition principles, it would undermine established human rights norms and standards.

¹²⁰ Ibid 12 [41]. The Special Rapporteur expressed particular concern at the binding 'contractual basis' of US commercial surrogacy systems: at 16 [68].

¹²¹ Pascoe, 'Sleepwalking through the Minefield: Commercial Surrogacy and the Global Response' (n 1) (emphasis in original). See also *Human Rights Council Report* (n 84) 17–20.

Rather than reliance upon the, perhaps, simplistic mantra that commercial surrogacy is inevitably harmful and exploitative and, therefore, should be prohibited, a more nuanced and appropriate solution is to seek to formulate a suitable regulated system to avoid exploitation and protect the interests of all parties, notably the best interests of any child.

III OUTCOMES OF SURROGACY: WHAT DOES THE RESEARCH EVIDENCE SAY?

Surrogacy is a complex and contentious topic that attracts strong and conflicting views, often based on personal beliefs. Many views are anecdotal. Isabel Karpin, Jenni Millbank and Anita Stuhmcke expressed to SALRI that “everyone has an opinion” on surrogacy but “very little of the literature is based on sound empirical research”.¹²² It is therefore essential to objectively review the research evidence regarding surrogacy outcomes to inform discussion about the future of commercial surrogacy in Australia.

Contemporary media about surrogacy often focuses on the problems and challenges, bearing little resemblance to reality and the statistics. Most surrogacy arrangements are uneventful and ‘end without issue, with both the intending parents and the surrogate completing their journey together and feeling satisfied and fulfilled’.¹²³ The view that commercial surrogacy amounts to the sale of children or the commodification of women and children, as explored above, is disputed.¹²⁴

It is often asserted that surrogacy is harmful to surrogates and/or children born from surrogacy.¹²⁵ There exists research that finds detrimental physical and/or psychological effects suffered (or potentially suffered) by surrogates and/or children

¹²² *Surrogacy Report* (n 3) 72 [7.5.16].

¹²³ South Australia, *Parliamentary Debates*, Legislative Council, 29 October 2019, 4748 (Tammy Franks).

¹²⁴ *Surrogacy Report* (n 3) 34 n 31, citing Rhonda Powell, ‘Exploitation of Surrogate Mothers in New Zealand’ in Annick Masselot and Rhonda Powell (eds), *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, 2019) 57, 61.

¹²⁵ See, eg: Marcus Agnafors, ‘The Harm Argument against Surrogacy Revisited: Two Versions Not To Forget’ (2014) 17(1) *Medicine, Health Care and Philosophy* 357; Klein (n 113); Sonia Allan, Submission No 17 to the 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* (11 February 2016); Patricia Fronek and Denise Cuthbert, Submission No 63 to the 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* (11 February 2016).

born as a result of surrogacy.¹²⁶ However, these findings have been challenged.¹²⁷ The Te Aka Matua o te Ture | New Zealand Law Commission ('NZLC') recently pointed to

a growing body of empirical research into the impact of surrogacy arrangements on surrogate-born children, their families and surrogates, mostly from the United Kingdom and the United States, which demonstrates largely positive outcomes for those involved.¹²⁸

Marcus Agnafors notes that the harm argument has 'come under attack due to what is often deemed to be accumulating empirical evidence showing that there are no substantial harms resulting from the practice'.¹²⁹ The Australian Human Rights Commission referenced studies from the United Kingdom suggesting that children born from local non-commercial surrogacy arrangements generally grow up in loving families and are well-adjusted.¹³⁰ Other studies

¹²⁶ See, eg, the sources cited in *Surrogacy Report* (n 3) 71–2 n 227.

¹²⁷ *Ibid* 72 [7.5.16].

¹²⁸ Te Aka Matua o te Ture | New Zealand Law Commission (n 4) 23 [2.28]. See also Viveca Söderström-Anttila et al, 'Surrogacy: Outcomes for Surrogate Mothers, Children and the Resulting Families' (2016) 22(2) *Human Reproduction Update* 260 for a detailed overview of the research up to early 2015 (and acknowledgement of its limitations). Of particular note is the University of Cambridge's long term longitudinal study of assisted reproduction families, which has been running since 2000: see Susan Golombok et al, 'Families Created through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life' (2004) 40(3) *Developmental Psychology* 400, 402; Susan Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14' (2017) 53(10) *Developmental Psychology* 1966, 1968.

¹²⁹ Agnafors (n 125) 357. While noting that the harm argument is being increasingly questioned, Marcus Agnafors suggests that aspects of the harm argument deserve ongoing consideration.

¹³⁰ Australian Human Rights Commission, Submission No 67 to the 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) 3 [4], citing Susan Golombok et al, 'Parenting Infants Conceived by Gamete Donation' (2004) 18(3) *Journal of Family Psychology* 443; Golombok et al, 'Families Created through a Surrogacy Arrangement: Parent-Child Relationships in the 1st Year of Life' (n 128); S Golombok et al, 'Families Created by Gamete Donation: Follow-Up at Age 2' (2005) 20(1) *Resolved Human Reproduction* 286; Susan Golombok et al, 'Surrogacy Families: Parental Functioning, Parent-Child Relationships and Children's Psychological Development at Age 2' (2006) 47(2) *Journal of Child Psychology and Psychiatry* 213; Susan 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(7) *Human Reproduction* 1918; Susan Golombok et al, 'Children Conceived by Gamete Donation: Psychological Adjustment and Mother-Child Relationships at Age 7' (2011) 25(2) *Journal of Family Psychology* 230; Susan Golombok et al, 'Families Created through Surrogacy: Mother-Child Relationships and Children's

also observe an absence of adverse psychosocial consequences among surrogacy participants.¹³¹

Two comprehensive reviews of the existing research commented on the apparent absence of adverse physical or psychological effects to the child, surrogate or intended parents.¹³² In a 2015 systematic review examining 55 primary studies, which included a mix of traditional (where the surrogate has a genetic link to the child), gestational (where the surrogate has no genetic link to the child), non-commercial and commercial surrogacy, adverse outcomes were not evident.¹³³ There was no evidence of significant psychological difficulties for surrogates or their children. While some surrogates reported some/moderate difficulties relinquishing the child initially, this substantially reduced over time, with no significant difficulties associated with relinquishment found at one-year follow-up.¹³⁴ Similarly, in the case of surrogates' children, no adverse consequences were found for children born prior to their mother acting as a traditional or gestational surrogate.¹³⁵

For intended parents, no differences in psychological wellbeing or mother-child interactions were identified for intended mothers compared with mothers who conceived naturally or with the assistance of an egg donor. Longitudinally, intended mothers and fathers reported similar marital satisfaction as parents who had conceived naturally or with the assistance of a gamete donor.¹³⁶

Notably, no significant differences in psychological wellbeing were found between children born from surrogacy and those born after natural conception or other

Psychological Adjustment at Age 7' (2011) 47(6) *Developmental Psychology* 1579; Susan Golombok et al, 'Children Born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' (2013) 54(6) *Journal of Child Psychology and Psychiatry* 653; V Jadva et al, 'Surrogacy Families 10 Years on: Relationship with the Surrogate, Decisions over Disclosure and Children's Understanding of Their Surrogacy Origins' (2012) 27(10) *Human Reproduction* 3008. However, the Human Rights Commission emphasised that these results were not in the context of international surrogacy arrangements: at 4 [9].

¹³¹ See, eg: RJ Edelman, 'Surrogacy: The Psychological Issues' (2004) 22(2) *Journal of Reproductive and Infant Psychology* 123; Olga BA van den Akker, 'A Longitudinal Pre-Pregnancy to Post-Delivery Comparison of Genetic and Gestational Surrogate and Intended Mothers: Confidence and Genealogy' (2005) 26(4) *Journal of Psychosomatic Obstetrics and Gynaecology* 277; Olga BA van den Akker, 'Psychosocial Aspects of Surrogate Motherhood' (2007) 13(1) *Human Reproduction Update* 53; Busby and Vun (n 101) 93; Golombok et al, 'Children Born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' (n 130); Millbank, 'Rethinking "Commercial" Surrogacy in Australia' (n 12) 480–1.

¹³² Söderström-Anttila et al (n 128); Vasanti Jadva, 'Postdelivery Adjustment of Gestational Carriers, Intended Parents, and Their Children' (2020) 113(5) *Fertility and Sterility* 903.

¹³³ Söderström-Anttila et al (n 128).

¹³⁴ *Ibid* 268.

¹³⁵ *Ibid*.

¹³⁶ *Ibid* 272.

methods of assisted reproduction, although the findings came from a relatively small number of studies.¹³⁷ In longer-term studies, children were found to be well adjusted at 10-year follow-up¹³⁸ and to experience no difference in psychological adjustment in adolescence compared to children conceived via donation or naturally.¹³⁹ Additionally, mothers of children born via surrogacy demonstrated less negative parenting, greater acceptance of their adolescent children and fewer problems in family relationships than mothers of children born from gamete donation.¹⁴⁰

However, the authors of the 2015 review emphasised concerns about research methodology and noted that there is a lack of research

on outcome for families and surrogate mothers involved in commercial cross-country surrogacy in less well developed countries where surrogacy is a growing industry. Furthermore, there are no studies on children growing up with gay fathers.¹⁴¹

In the more recent 2020 review,¹⁴² an absence of ill-effects for all parties was also reported. It was also evident that some previous gaps in the literature, including the outcomes of surrogacy for gay men, have begun to be addressed. While the literature is growing, scope for further research still exists. As Vasanti Jadva's 2020 review acknowledges,

[o]verall, studies have shown good psychological outcomes for surrogates, parents, and children, but research is still very limited, particularly in relation to the geographical location of the research, the ages of the children studied, and the lack of longitudinal projects.¹⁴³

The 2020 review found that surrogates differentiate their connection with their biological children from that with the children they carry in surrogacy, not viewing the latter as their own, and exhibiting low levels of psychological difficulties post-birth.¹⁴⁴ Furthermore, a study by Jadva et al found no long-term psychological difficulties for surrogates 5–10 years post-surrogacy, with surrogates followed up

¹³⁷ Ibid 267–8.

¹³⁸ Ibid.

¹³⁹ Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14' (n 128) 1966.

¹⁴⁰ Ibid.

¹⁴¹ Söderström-Anttila et al (n 128) 274. See also: Janice Ciccarelli and Linda Beckman, 'Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy' (2005) 61(1) *Journal of Social Issues* 21; Imrie and Jadva (n 101) 434.

¹⁴² Jadva (n 132).

¹⁴³ Ibid 903.

¹⁴⁴ Ibid 904.

at 10 years reporting high levels of self-esteem.¹⁴⁵ Similarly, in a recent study of 184 non-commercial surrogates in Canada, 88.1% of surrogates had ‘very high’ or ‘quite high’ levels of satisfaction with their surrogacy experience, and most reported that the experience had either no impact or a positive impact on their family functioning.¹⁴⁶

The outcomes for surrogates’ own children appear mixed and may be age-related. In one study, children aged 7–17 years reported negative feelings about their mother being a surrogate, whereas another study found children aged 12–25 years reported positive outcomes, including psychological wellbeing, close family relationships and positive views towards their mother having been a surrogate.¹⁴⁷

A recent study exploring the impact of surrogacy on gestational surrogates’ families found them to be functioning well. However,

[a] small number of children reported negative emotions about surrogacy and more research is needed to identify which children may be at risk. Children reported surrogacy having a positive impact on their lives and endorsed both pride and excitement about their mother being a surrogate.¹⁴⁸

Longitudinal research regarding families formed through surrogacy has found few differences from families conceived naturally or via other forms of assisted reproduction, with positive parenting seen among intended parents.¹⁴⁹ Similarly, the 2020 review reported on five studies where gay men had used surrogacy to form their families; their children were found to be well-adjusted and well-functioning.¹⁵⁰

¹⁴⁵ Vasanti Jadva, Susan Imrie and Susan Golombok, ‘Surrogate Mothers 10 Years on: A Longitudinal Study of Psychological Well-Being and Relationships with the Parents and Child’ (2015) 30(2) *Human Reproduction* 373, 376.

¹⁴⁶ Samantha Yee, Carly V Goodman and Clifford L Librach, ‘Determinants of Gestational Surrogates’ Satisfaction in Relation to the Characteristics of Surrogacy Cases’ (2019) 39(2) *Reproductive Biomedicine Online* 249, 252.

¹⁴⁷ Jadva (n 132) 904.

¹⁴⁸ Mary P Riddle, ‘The Psychological Impact of Surrogacy on the Families of Gestational Surrogates: Implications for Clinical Practice’ (2020) *Journal of Psychosomatic Obstetrics and Gynecology* 1, 1.

¹⁴⁹ Jadva (n 132) 904–5.

¹⁵⁰ Ibid 905. See also: Roberto Baiocco et al, ‘Lesbian Mother Families and Gay Father Families in Italy: Family Functioning, Dyadic Satisfaction, and Child Well-Being’ (2015) 12(3) *Sexuality Research and Social Policy* 202; L Van Rijn-van Gelderen et al, ‘Wellbeing of Gay Fathers with Children Born through Surrogacy: A Comparison with Lesbian-Mother Families and Heterosexual IVF Parent Families’ (2018) 33(1) *Human Reproduction* 101; Susan Golombok et al, ‘Parenting and the Adjustment of Children Born to Gay Fathers through Surrogacy’ (2018) 89(4) *Child Development* 1223; Nicola Carone et al, ‘Italian Gay Father Families Formed by Surrogacy: Parenting, Stigmatization, and Children’s Psychological Adjustment’ (2018) 54(10) *Developmental Psychology* 1904; Robert-Jay Green et al, ‘Gay Fathers by Surrogacy: Prejudice, Parenting, and Well-Being of Female and Male Children’ (2019) 6(3) *Psychology of Sexual Orientation and Gender Diversity* 269.

Also documented within the review were few differences in parenting, parent-child relationships and child wellbeing between children of single men who have used surrogacy compared to gay two-father and heterosexual two-parent IVF families.¹⁵¹ The NZLC noted that ‘families with surrogate-born children are just as likely to flourish as traditional families and sometimes more so’.¹⁵²

While most research has focused on the psychological outcomes for parents and children involved in surrogacy arrangements, some data on perinatal¹⁵³ outcomes in surrogacy exist. In their systematic review, Viveca Söderström-Antilla et al explored physical health outcomes, including obstetric outcomes for surrogates as well as perinatal physical health outcomes for children born through surrogacy. As with all pregnancies, surrogates may potentially experience pregnancy-related complications or poor outcomes such as the perinatal death of the baby. However, Söderström-Antilla et al noted that surrogates experienced hypertensive disorders and placenta-related complications at similar rates to IVF pregnancies and had lower rates of hypertensive disorders than oocyte (egg) donation pregnancies.¹⁵⁴ Similarly, comparable rates of pre-term birth were noted for surrogacy and IVF pregnancies,¹⁵⁵ with babies born as a result of surrogacy having higher than average birth weight and low incidence of low birth weight.¹⁵⁶ Congenital abnormality rates were similar for children born through surrogacy and IVF and oocyte donation pregnancies.¹⁵⁷ Furthermore, two large sample studies comparing surrogacy and non-surrogacy IVF pregnancies found no higher risk among surrogacy pregnancies for a range of adverse physical health outcomes.¹⁵⁸

¹⁵¹ Jadva (n 132) 905.

¹⁵² Te Aka Matua o te Ture | New Zealand Law Commission (n 4) 23 [2.29], citing Susan Golombok ‘The Psychological Wellbeing of ART Children: What Have We Learned from 40 Years of Research?’ (2020) 41(4) *Reproductive Biomedicine Online* 743.

¹⁵³ The Australian Institute of Health and Welfare defines the perinatal period as commencing at 20 completed weeks (140 days) gestation and ending 28 completed days after birth.

¹⁵⁴ Söderström-Antilla et al (n 128) 263.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid 264.

¹⁵⁷ Ibid.

¹⁵⁸ See Sesh Kamal Sunkara et al, ‘Perinatal Outcomes after Gestational Surrogacy versus Autologous IVF: Analysis of National Data’ (2017) 35(6) *Reproductive Bio-Medicine Online* 708, where the authors observed that surrogacy pregnancies had no significant difference in risk for pre-term and early pre-term birth, low birth and very low birth weight and congenital abnormalities compared to fresh and frozen IVF cycles. Surrogacy pregnancies had a higher risk of high birth weight compared to fresh IVF cycles but there was no difference in risk for frozen IVF cycles: at 708. See also Kiran M Perkins et al, ‘Trends and Outcomes of Gestational Surrogacy in the United States’ (2016) 106(2) *Fertility and Sterility* 435 where the authors found that surrogacy pregnancies had no significant difference in risk for miscarriage or low birth weight compared to fresh non-donor and donor IVF cycles and there was no

It is also notable that research into surrogacy outcomes calls into question the distinction between non-commercial and commercial surrogacy, with most researchers examining surrogacy outcomes collectively.

With regards to transnational surrogacy, the research remains more limited. It has been noted that intended parents often see transnational surrogacy as their only option and may need to spend months away from their home country (and support networks) with their baby to gain appropriate documentation.¹⁵⁹ According to Jadva, '[t]his raises important concerns about what impact traveling abroad for surrogacy may have on parents' mental health as well as on the parent-child relationship in the early months of the child's life'.¹⁶⁰

While the growing research evidence suggests a lack of ill-effects from surrogacy, there are still some qualifications:

Most of the research examining family relationships and the psychological adjustment of children born through surrogacy have found that families function well and the children do not experience problems in psychological adjustment. Far fewer studies have been conducted on children born through surrogacy than on children created through other forms of third-party reproduction such as egg and sperm donation. Importantly, no studies have examined the psychological adjustment and experiences of those born through surrogacy beyond early adolescence.¹⁶¹

Additionally, while longitudinal research is emerging, it has, to date, been largely conducted in the United Kingdom.¹⁶² Therefore, due to differing cultural contexts and surrogacy practices, the long-term effects of surrogacy on the parties are still not fully known, especially regarding the international surrogacy context.¹⁶³

While it is evident that more research, particularly regarding longitudinal effects, is required, current data, reviewed through systematic analysis, suggests that surrogacy does not present significant risks for poorer psychosocial outcomes for

increased risk of pre-term birth for donor IVF pregnancies. Higher rates of pre-term birth were noted compared to non-donor IVF pregnancies but this difference in risk was accounted for by multiple births: at 438.

¹⁵⁹ Jadva (n 132) 906.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² Kate Swanson et al, 'Understanding Gestational Surrogacy in the United States: A Primer for Obstetricians and Gynecologists' (2020) 222(4) *American Journal of Obstetrics and Gynecology* 330, 334–5.

¹⁶³ As noted in Family Law Council (n 92) 89:

[T]here is, as yet relatively little evidence with respect to the impact of the growing overseas commercial surrogacy markets in developing countries. In particular, there has been little research, to date, on the impact on women and children involved in commercial surrogacy arrangements in countries such as India and Thailand ...

surrogates, intended parents, or children born from surrogacy. Indeed, the evidence to date demonstrates an absence of adverse consequences. Any reconsideration of surrogacy law and practice in Australia should reflect on the currently available evidence about surrogacy outcomes.

IV SURROGACY AND THE LAW

Surrogacy is not a new issue or problem. Babylonian law and customs allowed the practice to avoid otherwise inevitable divorce,¹⁶⁴ and there are biblical references to surrogacy.¹⁶⁵ However, modern law has increasingly struggled to adapt to various developments, namely:

- the rapid advances in reproductive technology which have made gestational surrogacy viable, affordable and reliable;¹⁶⁶
- the changing social attitudes and, at least, partial acceptance of surrogacy;¹⁶⁷
- the increasing prevalence and recognition of diverse family structures (including single parents and same sex couples);¹⁶⁸
- the high rate of infertility;¹⁶⁹

¹⁶⁴ JN Postgate, *Early Mesopotamia: Society and Economy at the Dawn of History* (Routledge, 1992) 105.

¹⁶⁵ Nayana Hitesh Patel et al, 'Insight into Different Aspects of Surrogacy Practices' (2018) 11(3) *Journal of Human Reproductive Sciences* 212, 213:

The earliest known description of surrogacy is claimed to be the servant Hagar begetting a child for the childless Sarah through her husband Abraham described in the biblical Book of Genesis. In Bible, Rachel asked her maid Bilhah to conceive a child with her husband Jacob.

¹⁶⁶ Paul R Brezina et al, 'Recent Advances in Assisted Reproductive Technology' (2012) 1(4) *Current Obstetrics and Gynecology Reports* 166.

¹⁶⁷ See, eg: Deborah Constantinidis and Roger Cook, 'Australian Perspectives on Surrogacy: The Influence of Cognitions, Psychological and Demographic Characteristics' (2012) 27(4) *Human Reproduction* 1080; Kirsty Horsey and Sally Sheldon, 'Still Hazy after All These Years: The Law Regulating Surrogacy' (2012) 20(1) *Medical Law Review* 67, 86–7; Millbank, 'From Alice and Evelyn to Isabella: Exploring the Narratives and Norms of "New" Surrogacy in Australia' (n 5) 128; Te Aka Matua o te Ture | New Zealand Law Commission (n 4) 22–3 [2.23]–[2.27].

¹⁶⁸ In Australian Law Reform Commission, *Review of the Family Law System* (Issues Paper No 48, March 2018) 46 [140], the Australian Law Reform Commission notes that a significant number of Australian families with children do not fit the traditional heterosexual nuclear family model. Since the passage of the *Family Law Act*, Australia has seen increasing numbers of stepfamilies, blended families, sole-parent families and same-sex families, as well as growing numbers of kinship-care arrangements.

¹⁶⁹ Zoë Corbyn, 'Shanna Swan: Most Couples May Have To Use Assisted Reproduction by 2045', *The Guardian* (online, 28 March 2021) <<https://www.theguardian.com/society/2021/mar/28/shanna-swan-fertility-reproduction-count-down>>. See Anita

- the growing demand for surrogacy arrangements in light of ‘the marked and continual decline in availability of young children for domestic and international adoption’,¹⁷⁰
- the acute shortage of willing surrogates within Australia (which in turn encourages recourse by Australians to offshore surrogacy),¹⁷¹ and
- the significant and increasing number of Australians who travel overseas to utilise surrogacy¹⁷² (though temporarily reduced by COVID-19 travel restrictions).¹⁷³

The modern complexities are compounded by the fact that surrogacy does not stop at either state¹⁷⁴ or national borders.¹⁷⁵ Indeed, as William Mackenzie of the Australian Department of Foreign Affairs has noted:

We have also observed that the apparent mobility of the international surrogacy industry means that changes to laws or practice in one country will often result

Stuhmcke, ‘For Love or Money: The Legal Regulation of Surrogate Motherhood’ (1996) 3(1) *Murdoch University Electronic Journal of Law* 6 <<http://classic.austlii.edu.au/au/journals/MurUEJL/1996/6.html>> who notes that ‘[i]t has been suggested that as many as one couple in six are involuntarily childless, figures which represent a threefold increase in infertility in the last 20 years’: at n 20, citing Claudia Wallis, ‘The New Origins of Life: How the Science of Conception Brings Hope to Childless Couples’, *Time* (online, 10 September 1984) <<http://content.time.com/time/subscriber/article/0,33009,952514-8,00.html>>.

¹⁷⁰ Jenni Millbank, ‘Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy’ (2013) 27(2) *Australian Journal of Family Law* 135, 136. See also Fronek and Cuthbert (n 125) 2–3.

¹⁷¹ Gorton, ‘Review of Assisted Reproductive Treatment’ (n 41) 22–5.

¹⁷² See also Jenni Millbank, ‘The Role of Professional Facilitators in Cross-Border Assisted Reproduction’ (2018) 6 *Reproductive BioMedicine and Society Online* 60. The precise number of Australians who travel overseas for surrogacy is difficult to determine: see Millbank, ‘Responsive Regulation of Cross-Border Assisted Reproduction’ (n 57) 352–4. A general estimate is that up to 250 children born through overseas surrogacy arrangements are bought back to Australia each year: see *Surrogacy Matters* (n 1) 22 [1.69]; Stuhmcke, ‘The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions’ (n 26) 337. These figures could be an underestimate. See *Surrogacy Report* (n 3) 34 n 62:

The number of children born to domestic surrogacy arrangements in Australia is unclear [but is less than international]. Professors Karpin, Millbank and Stuhmcke from the University of Technology Sydney noted to SALRI based on their recent research that recourse to overseas surrogacy outnumbers use of domestic surrogacy by a factor of 15 to 1.

¹⁷³ Fronek and Smith Rotabi (n 30) 668.

¹⁷⁴ Surrogacy arrangements routinely involve travel across state borders, and multiple Australian jurisdictions may be involved. It is now routine for the intending parents and surrogates and the fertility provider to be located in different states: see *Surrogacy Report* (n 3) 34 n 63.

¹⁷⁵ *Human Rights Council Report* (n 84) 6 [18].

in the relocation of the business to a more hospitable jurisdiction, where the regulatory regime may be weaker.¹⁷⁶

The legal landscape is also bewildering. The current laws in Australia dealing with assisted reproductive technologies (‘ART’), surrogacy and parentage, are ‘fragmented and complex’.¹⁷⁷ There is, at present, a convoluted division of powers in this area in Australia between the states and the Commonwealth.¹⁷⁸ Some issues concerning parentage come under state laws, with others under Commonwealth laws.¹⁷⁹ There is no one uniform, or even consistent, surrogacy law.¹⁸⁰

The *Surrogacy Act* was based on SALRI’s report,¹⁸¹ which received strong support and praise from all sides of the State Parliament,¹⁸² notably John Dawkins.¹⁸³ The

¹⁷⁶ Commonwealth, *Parliamentary Debates*, House of Representatives Standing Committee on Social Policy and Legal Affairs, 3 March 2016, 1 (William Mackenzie), quoted in *Surrogacy Matters* (n 1) 27 [1.94].

¹⁷⁷ Harland (n 12) 125. See also Australian Human Rights Commission (n 130) 14 [54].

¹⁷⁸ *Surrogacy Report* (n 3) 56–62. See Harland (n 12) 125 who notes that because Australia is a federation, with roles and powers shared between the Commonwealth and states and territories, this is made more complex:

Family law is governed by Commonwealth laws. This includes marriage, divorce, de facto relationships, parenting matters and financial matters. The states and territories govern laws with respect to adoption and surrogacy. Some issues with respect to parentage come under Commonwealth laws, with others under state laws.

¹⁷⁹ Harland (n 12) 125.

¹⁸⁰ *Surrogacy Matters* (n 1) 6 [1.20].

¹⁸¹ 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, Minister for Human Services).

¹⁸² See: 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, Minister for Human Services); 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).

¹⁸³ See South Australia, *Parliamentary Debates*, Legislative Council, 29 October 2019, 4742 (John Dawkins) where Mr Dawkins highlighted the depth of SALRI’s efforts:

I think Madeleine Thompson, from that organisation, who has done a lot of the work that SALRI was charged to do by the current Attorney-General, have read every word I have ever said in this place about surrogacy, and I feel sorry for her, because there have been a few. But it has been an issue that I have been passionate

Act, consistent with SALRI's approach, sought to navigate a path that avoided commercial surrogacy without seeking to preclude or prevent domestic surrogacy entirely. As the then Attorney-General explained:

The development of a complete regulatory framework for surrogacy requires sensitivity and careful consideration to ensure that a moderate and suitable way forward is achieved, giving regard to the resulting impact on South Australian families.¹⁸⁴

Paula Luethen noted: 'The Bill will create a situation where South Australia is the leader in the surrogacy field and should become a respected jurisdiction for surrogacy agreements to take place.'¹⁸⁵

However, the *Surrogacy Act* left unresolved the elephant in the room — domestic commercial surrogacy. The concerns and criticisms of commercial surrogacy were well ventilated in South Australian Parliamentary Debates.¹⁸⁶

As noted above, the laws in Australia dealing with ART, surrogacy and parentage are fragmented and complex. It has been noted that, while there is a need for reform, 'before (both altruistic and commercial) surrogacy can be regulated on a national level, some law-making difficulties must be overcome',¹⁸⁷ namely, the division of powers between the states, territories and the Commonwealth.

There are a number of reasons why it appears timely for Australia to reconsider its position on domestic commercial surrogacy so it can be allowed and appropriately regulated. There exist challenges to the exploitation and commodification discourses in contemporary research. There are also barriers to surrogacy in Australia and, as a result, Australians are already engaging in international commercial surrogacy.

about since the days that Kerry Faggotter first came to see me when her little boy was one year old — he is now 15. ... I appreciate the work of Madeleine Thompson but also, obviously, Professor John Williams and David Plater for the very broad way they examined all of the complex issues that are related to surrogacy. ... There has been significant consultation — in fact, I think it is probably greater than significant. I think the SALRI consultation was very comprehensive not only in this jurisdiction but in other parts of this country.

¹⁸⁴ South Australia, *Parliamentary Debates*, House of Assembly, 1 August 2019, 6967 (Vickie Chapman, Attorney-General).

¹⁸⁵ South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2019, 7046 (Paula Luethen).

¹⁸⁶ See, eg: South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2019, 7049 (John Gardner); South Australia, *Parliamentary Debates*, House of Assembly, 11 September 2019, 7214–15 (David Spiers); South Australia, *Parliamentary Debates*, House of Assembly, 11 September 2019, 7217 (Stephen Patterson); South Australia, *Parliamentary Debates*, Legislative Council, 29 October 2019, 4743 (John Dawkins); South Australia, *Parliamentary Debates*, Legislative Council, 29 October 2019, 4745–6 (Irene Pnevmatikos).

¹⁸⁷ Johnson (n 12) 330.

Further, it is clear that extraterritorial offences failing to act as a deterrent and questions. As will be seen below about the validity of a distinction between non-commercial and commercial surrogacy, such regulation is also supported by the arguments that criminal prohibitions on paid surrogacy within Australia have never been properly explored or justified,¹⁸⁸ and exploitation can be better addressed by other means.¹⁸⁹

There is an argument that the legislative prohibition on surrogacy should not be discarded because the practice is inevitable.¹⁹⁰ However, the utility of laws which are not effective and are not enforced must be questioned.¹⁹¹ Despite the complexities, surrogacy currently occurs and will continue to occur within Australia as it is the only viable means of family formation for some people. As the NZLC highlighted, 'it is also important to recognise that any attempt to prohibit surrogacy is unlikely to succeed'.¹⁹² To be blunt, '[u]nless a state is prepared to police the bedrooms of the nation, surrogacy arrangements cannot effectively be outlawed, only driven underground'.¹⁹³

¹⁸⁸ Anita Stuhmcke, 'The Criminal Act of Commercial Surrogacy in Australia: A Call for Review' (2011) 18(3) *Journal of Law and Medicine* 601. There have been only a handful of prosecutions in Australia for surrogacy offences and only nominal penalties imposed: see Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (n 26) 333. There are no laws in South Australia that, unlike New South Wales, the ACT and Queensland, have extraterritorial application and make it an offence for residents of South Australia to take part in international commercial agreements. The absence of prosecutions for offences under these laws is notable and the practical effectiveness of such extraterritorial criminal laws to deter overseas surrogacy has been doubted: see *Surrogacy Matters* (n 1) 23 [1.71], 31 [1.113]. Cf Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (n 4) pt 2, 175–6.

¹⁸⁹ Jennifer Damelio and Kelly Sorensen, 'Enhancing Autonomy in Paid Surrogacy' (2008) 22(5) *Bioethics* 269, 275–7.

¹⁹⁰ 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.

¹⁹¹ As early as 1988, the NSW Law Reform Commission noted, in relation to the role of the criminal law in regulating surrogacy, that they: 'do not believe that a total legislative prohibition would be either just in its results or enforceable in practice': New South Wales Law Reform Commission, *Artificial Conception: Surrogate Motherhood* (Report No 60, 1988) [3.16]. The Commission added that:

many of the significant issues involved in the practice of surrogacy are not amenable to control by the law. ... [T]he law is a very blunt and inappropriate instrument by which to mould social values. In particular the criminal law should be used sparingly for the purpose of changing or controlling social habits: at [3.16].

¹⁹² Te Aka Matua o te Ture | New Zealand Law Commission (n 4) 7 [1.15].

¹⁹³ Margaret Brazier, Alastair Campbell and Susan Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* (Report No Cm 4068, October 1998) [4.38], cited in Te Aka Matua o te Ture | New Zealand Law

These pragmatic considerations must inform any effort at law reform and render any effort at an outright prohibition, unrealistic. As Irene Pnevmatikos observed:

The fact remains that for some surrogacy is the only option available to individuals and couples who wish to start a family ... It is a practice that is already occurring, with it being predicted that there are somewhere between 250 and 700 surrogacies in Australia. We have a responsibility to: firstly, ensure the safety of the child to be born as a paramount concern; secondly, to ensure that there are adequate supports and services available to the individual or couple, just as any other individual or couple is afforded; and, thirdly, that the practice is free from exploitation and profiteering.¹⁹⁴

Thus, '[l]aws must adapt in order to manage the complexities resulting from its use'.¹⁹⁵ There have been increasing suggestions for the introduction of a regulated system of commercial surrogacy in Australia along these lines.¹⁹⁶ Tammy Johnson in a recent doctoral dissertation argued that 'the prohibition of commercial surrogacy in Australia is unjustified' because legislation restricting surrogacy in Australia 'goes beyond what is necessary to address the only harm unique to commercial surrogacy — commodification'.¹⁹⁷ This harm, she argues, could be directly addressed through regulation, and not blanket prohibition.¹⁹⁸ Diana Bryant, the former Chief Justice of the Family Court has also publicly argued for

Commission (n 4) 7 n 6. In this context, it is worth noting that attempts by NSW, Queensland and the ACT to prohibit, through the criminal law, intended parents from entering international commercial surrogacy arrangements have been seen as a 'failed experiment': Debra Wilson and Julia Carrington, 'Commercialising Reproduction: In Search of a Logical Distinction between Commercial, Compensated, and Paid Surrogacy Arrangements' (2015) 21(1) *New Zealand Business Law Quarterly* 178, 186. See also: *Surrogacy Matters* (n 1) 22–3 [1.70]–[1.71], 31 [1.112]–[1.113]; *Surrogacy Report* (n 3) 126–7 [12.3.1]–[12.3.5]. Cf Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (n 4) pt 2, 175–6.

¹⁹⁴ South Australia, *Parliamentary Debates*, Legislative Council, 29 October 2019, 4746 (Irene Pnevmatikos).

¹⁹⁵ Suzman (n 64) 621.

¹⁹⁶ See, eg: Gaffney (n 105); Barbara Miller, 'Commercial Surrogacy: Push to Make Paid Pregnancies Legal, More Accessible in Australia', *ABC News* (online, 1 December 2016) <<https://www.abc.net.au/news/2016-12-01/commercial-surrogacy-legislation-push-the-price-of-life/8077862>>; Sifris (n 78); Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (n 26); Kelton Tremellen and Sam Everingham, 'For Love or Money? Australian Attitudes to Financially Compensated (Commercial) Surrogacy' (2016) 56(6) *Australian and New Zealand Journal of Obstetrics and Gynecology* 558. See also NSW Department of Justice (n 4) 7–8 [2.22]–[2.25].

¹⁹⁷ Johnson (n 12) 324.

¹⁹⁸ *Ibid.*

this,¹⁹⁹ and the Family Law Council has noted that a number of submissions to it suggested that, in the best interests of children, a proper system of commercial surrogacy should be introduced in Australia which would be preferable to the unsatisfactory ‘not in my backyard’ situation that currently exists.²⁰⁰

E *The Distinction between Commercial and Non-Commercial Surrogacy:
Artificial and Arbitrary*

The oft-cited distinction between commercial and non-commercial surrogacy is confusing and unhelpful, distracting,²⁰¹ and even untenable.²⁰² Many interested parties suggested to SALRI that the classification of ‘non-commercial’ and ‘commercial’ surrogacy contemplated under South Australian law (and similar legislative schemes in Australia and elsewhere) is unhelpful and unproductive within the context of modern surrogacy.²⁰³

It was expressed to SALRI that the term ‘commercial’ surrogacy

brings up the unsettling images of exploitative ‘baby factories’ as often shown in media documentaries whilst a [non-commercial] surrogacy suggests a wholly selfless act without any financial consideration or even reimbursement.²⁰⁴

Several parties, including intended parents and surrogates, commented to SALRI that such labels are distracting, and there is often no clear distinction between ‘commercial’ and ‘non-commercial’ surrogacy.²⁰⁵ Sifris described to SALRI the notion that the two categories are somehow mutually exclusive as a ‘flawed proposition’.²⁰⁶

The experiences of Alice, an intended parent who participated in both a ‘non-commercial’ arrangement in South Australia and a ‘commercial’ arrangement

¹⁹⁹ Bridget Brennan, ‘Commercial Surrogacy Should Be Legalised, Family Court Chief Justice Diana Bryant Says’, *ABC News* (online, 18 April 2015) <<https://www.abc.net.au/news/2015-04-18/commercial-surrogacy-should-be-legalised-family-court-justice/6402924>>; Sarah Vogler, ‘Push to Make Surrogacy Legal in Australia’, *The Courier Mail* (online, 17 April 2015) <<https://www.couriermail.com.au/news/queensland/push-to-make-surrogacy-legal-in-australia/news-story/177c9a42e81e031939546c6586e8ad88>>.

²⁰⁰ Family Law Council (n 92) 86.

²⁰¹ *Surrogacy Report* (n 3) 42 [3.2.2].

²⁰² National Bioethics Consultative Committee, *Surrogacy: Report 1* (Report, 1990) 9–10 [2.4.4.4]–[2.4.4.9]; Jackson et al (n 26) 28; Anita Stuhmcke, ‘The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions’ (n 26).

²⁰³ *Surrogacy Report* (n 3) 42 [3.2.1].

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid* [3.2.2]. See also Te Aka Matua o te Ture | New Zealand Law Commission (n 4) 8 [1.20].

²⁰⁶ *Surrogacy Report* (n 3) 42 [3.2.2].

overseas, supported this view. Alice told SALRI that the distinction between ‘non-commercial’ and ‘commercial’ surrogacy is often blurred. It also conveys misleading impressions and expectations.²⁰⁷ Alice highlighted that she found the purportedly non-commercial system in Australia to be more of ‘a money-making business enterprise’ than the commercial system in Ukraine.²⁰⁸ Other parties also told SALRI that the current ‘non-commercial’ system in Australia is, in fact, anything but in practice.

Another argument in favour of abandoning the distinction between commercial and non-commercial surrogacy is that even under the most amicable surrogacy arrangement, a surrogate under the present non-commercial framework is likely to end up out of pocket after acting as a surrogate. In SALRI’s consultation, many parties agreed with this argument, ‘emphasising that, although the surrogate does not receive compensation beyond her reasonable medical or other expenses in South Australia, it is “everyone else” who is getting paid’.²⁰⁹ The incongruity of this was often highlighted to SALRI.

One Australian fertility specialist has observed:

Everyone gets their knickers so much in a twist about commercial surrogacy, but ... [o]ne 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.²¹⁰

Such issues have been expressed elsewhere. Chief Justice Pascoe, for example, in his submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, highlighted the risks of exploitation in a non-commercial system, referring to the ‘unfair contract position’ of clinics and the risk of ‘unethical practices’ and ‘inflated claims’.²¹¹ He noted the need for ‘consistency and coherence’ in the regulation of surrogacy across Australia and that ‘the surrogacy industry is ripe for abuse and exploitation of vulnerable women and children’.²¹² Chief Justice Pascoe also elaborated on these concerns in his written submission to SALRI:

²⁰⁷ Ibid 42 n 98: ‘One issue is that the intending parents in a [non-commercial] system may misunderstand the nature of the arrangement and question a surrogate’s entitlement to reimbursement of medical and other valid expenses.’

²⁰⁸ Ibid 43 [3.2.5].

²⁰⁹ Ibid 43 [3.2.6].

²¹⁰ Denise Rice, ‘Surrogacy a Legal Maze’, *The Sunday Times* (Perth, 17 June 2007) 68.

²¹¹ Chief Judge John Pascoe, Submission No 35 to the 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) 14–15.

²¹² Ibid.

The not for profit nature of intermediaries, including clinics, brokers and lawyers is a key aspect of why the surrogacy industry has been so rife with abuse. Commissioning parents and surrogate mothers are both vulnerable to the messaging and advice given by such intermediaries. Strict regulation of all intermediaries, with consequences for any breaches, is crucial in protecting all parties involved.²¹³

V RETHINKING SURROGACY FRAMEWORKS IN AUSTRALIA: IS IT TIME FOR A 'PROFESSIONAL MODEL'?

As has been demonstrated, there is a growing view that it is time to rethink surrogacy in Australia. Johnson notes that there has never been a 'structured proposal for a national model under which both altruistic and commercial surrogacy can be effectively regulated'.²¹⁴ Millbank argues that surrogacy laws in Australia are not based 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"'.²¹⁵ Similarly, Ainsley Newson states that

[t]he current status quo is unsatisfactory on legal, ethical and practical grounds. It is time to openly debate how Australia should balance the desire for child-bearing through surrogacy with the limited domestic availability of women willing to act as surrogates.²¹⁶

This status quo includes the maintenance of the distinction between commercial and non-commercial surrogacy, which many commentators view as artificial. In light of this, support has grown for a third option, often termed 'the professional model'.²¹⁷ Ruth Walker and Liezl van Zyl articulate this:

A core assumption underlying the dichotomy is that unpaid surrogates are motivated by altruism, whereas commercial surrogates are motivated by money. This assumption is mistaken. Payment to the surrogate does not preclude '[non-commercial]' motivation. There are many professions that are worthwhile in themselves and that attract people who want to work for the good of others. ... Consider, then, nursing, teaching, social work, medicine and child care. People who care about their patients, students and clients will do a better a job than those who do not. The fact that they are paid does not make us say they are only in it for the money. Most people cannot afford to work unpaid and their motivation is judged by other criteria. We think surrogates should be treated the

²¹³ *Surrogacy Report* (n 3) 92 [9.5.5].

²¹⁴ Johnson (n 12) 330.

²¹⁵ Millbank, 'The New Surrogacy Parentage Laws in Australia' (n 5) 169.

²¹⁶ Ainsley J Newson, 'Compensated Transnational Surrogacy in Australia: Time for a Comprehensive Review' (2016) 204(1) *Medical Journal of Australia* 33, 33.

²¹⁷ See Millbank, 'Rethinking "Commercial" Surrogacy in Australia' (n 12).

same way and that the professional model of surrogacy provides a solution to the problems that plague both [non-commercial] and commercial surrogacy.²¹⁸

Walker and van Zyl summarise the features of their preferred professional model:

1. The surrogate is paid for her service (and not the baby).
2. The intended parents have the rights and obligations of legal parentage from the birth of the baby.
3. The regulatory framework emphasises support for all parties, including care for the surrogate after she has given birth.
4. The surrogate cannot contract out of her rights as a pregnant woman. The intended parents must understand and respect her rights and their duties towards her.
5. Surrogates and clinics must be licensed and registered by an independent regulatory body with responsibility for ensuring that the legal and ethical standards are met.²¹⁹

While the term ‘professional model’ has been used, advocates stress that they are not promoting surrogacy as a career pathway. They also suggest that there is merit in limiting the number of pregnancies so as not to unduly risk women’s health.²²⁰

One example of a professional model can be seen in England and Wales, where non-government organisations (‘NGOs’) commonly assist the parties to surrogacy arrangements. In this context, a report recommended government regulation of surrogacy intermediaries as early as 1998.²²¹ Critics of a professional or intermediary model point to cases such as *Re G*, in which a British NGO overlooked that one or both intended parents they were assisting to access surrogacy must be United Kingdom residents to be eligible for a British parenting order, as evidence for the need of tight regulation of such organisations.²²²

²¹⁸ Walker and van Zyl, *Towards a Professional Model of Surrogate Motherhood* (n 102) 12–13. See also Ruth Walker and Liezl van Zyl, ‘Beyond Altruism: A Case for Compensated Surrogate Motherhood’ in Rhonda M Shaw (ed), *Bioethics beyond Altruism: Donating and Transforming Human Biological Materials* (Palgrave Macmillan, 2017) 165.

²¹⁹ Walker and van Zyl, *Towards a Professional Model of Surrogate Motherhood* (n 102) 21.

²²⁰ *Ibid* 13.

²²¹ Brazier, Campbell and Golombok (n 193) 50–6.

²²² *Re G* [2007] EWHC 2814 (Fam). See also *Surrogacy Report* (n 3) 102–6. The suggestion of a non-commercial NGO intermediary has been seen as problematic. See, eg: Millbank, ‘Rethinking “Commercial” Surrogacy in Australia’ (n 12) 487; Marcy Darnovsky and Diane Beeson, ‘Global Surrogacy Practices’ (Working Paper No 601, International Forum on Intercountry Adoption and Global Surrogacy, December 2014) 19.

Given potential difficulties with NGOs or other intermediaries acting as surrogacy 'brokers', a professional model may function best under a government regulatory body that sets professional standards (including a code of ethics), determines and monitors training and ethical standards, and ensures appropriate compliance. Walker and van Zyl describe such a professional model:

At the top, there is an independent regulatory body with the same functions as other professional bodies. It is responsible for licensing fertility clinics, registering surrogates, setting fees, maintaining ethical standards and monitoring compliance. It also hears complaints and has the power to discipline members, including the authority to remove registration or licenses. ... The regulatory body would maintain a register of women who were willing to act as surrogates and who met the relevant criteria. ... The requirement to use only registered surrogates does not rule out intended parents finding their own candidates. However, it does prevent coercion of family members or friends because the regulatory body would still need to register that person. ... The regulatory body also sets the fees for surrogates. ... There would be a set fee that is fair compensation for the surrogate and not subject to bargaining. ... At no time during the pregnancy or afterwards would the surrogates and parents be without access to all the professional support services they need from medical to counselling and social workers.²²³

Proponents of such a system suggest that it would enable harm minimisation, for example, by giving surrogates access to ongoing professional or peer support,²²⁴ and assisting with the development of regulations on 'brokering, fair wages and advertising'.²²⁵ Walker and van Zyl argue that the presence of a professional regulatory body would 'ensure fair payment, that consent was freely given, that the parties were fully informed of their rights and responsibilities, and that constraints on the surrogate mother were legitimate'.²²⁶ This highlights that even proponents of a professional model recognise the need for regulation. Additionally, such an approach would also enable harm minimisation for children born from surrogacy by regulating a series of checks and balances to ensure that intended parents would act in a manner that is in the child's best interests. Such a model could also include appropriate police character checks for the parties.²²⁷

While some jurisdictions applying a professional model, such as the United Kingdom, allow for intermediaries to assist in the surrogacy process, it should be recalled that

²²³ Walker and van Zyl, *Towards a Professional Model of Surrogate Motherhood* (n 102) 17–19.

²²⁴ See *Surrogacy Report* (n 3) 105 [10.1.31].

²²⁵ Newson (n 216) 35.

²²⁶ Walker and van Zyl, 'Beyond Altruism: A Case for Compensated Surrogate Motherhood' (n 218) 176.

²²⁷ *Surrogacy Report* (n 3) 183–96. This would avoid the situation that arose in the contentious 'Baby Gammy' case where the commissioning father had prior convictions for child sexual abuse: see *Farnell v Chanbua* (2016) 56 Fam LR 84.

critics of Australia's current non-commercial surrogacy system already question the role of third parties in surrogacy arrangements, noting that it is 'everyone else' (and not the surrogate) who is getting paid.²²⁸

While the notion of a suitable 'intermediary' to assist Australian parties is not without merit, it requires further careful consideration. As SALRI observed:

Without in any way wishing to question their role, SALRI at this stage does not support the suggestion of a formal or legislative role in South Australia for NGOs in a surrogacy context. SALRI also notes the reservations that have been expressed in the UK in this context. Given the sensitivity and importance of the issues involved when the life of a child is created and the potential vulnerabilities of all parties to a lawful surrogacy agreement, there is a need for careful consideration and suitable oversight of any such NGO and/or intermediary role.²²⁹

Further, SALRI suggested that the question of intermediaries ought to be answered as part of a national discussion as to the nature of surrogacy arrangements to be accepted in Australia and should be considered in any future national legislative scheme.²³⁰ The repeated calls for a professional model of surrogacy, coupled with the fact that extraterritorial offences do not dissuade Australians from engaging in international commercial surrogacy, suggest that now is the time to minimise harm by adopting a national government-regulated framework for domestic commercial surrogacy, however that may look.

VI CONCLUSION

At the time of its 2018 report, SALRI was precluded from exploring a regulated system of commercial surrogacy in South Australia. SALRI, consistent with its views in favour of a national coordinated approach to surrogacy, further considered that any such question could not be considered in isolation at state level and must be answered through co-operation between all Australian jurisdictions as part of any future national coordinated surrogacy system. It would be impossible for one state to seek to 'go it alone' and introduce a system of commercial surrogacy.²³¹

Similarly, the issue of commercial surrogacy in Australia was raised to the Family Law Council, who found that such a system would need to be 'preceded by broad community consultation and public debate'.²³²

²²⁸ See above n 210.

²²⁹ *Surrogacy Report* (n 3) 105 [10.1.29].

²³⁰ *Ibid* 106 [10.1.35].

²³¹ *Ibid* 62 [6.2.2].

²³² Family Law Council (n 92) 109 [3.9].

While SALRI's report noted that the research regarding the effects of surrogacy on the participants was 'conflicting' and was unable to express any findings upon the effects of surrogacy on the parties involved,²³³ this finding predates the more recent studies discussed above.

In light of this growing evidence and the inevitability that offshore commercial surrogacy will resume when COVID-19 restrictions ease,²³⁴ it is time for genuine consultation and debate on this issue. The prohibition on domestic commercial surrogacy should be re-examined, and the introduction of a national system of regulated, domestic commercial surrogacy, considered. Johnson notes:

The Australian government, at both state and federal levels, has until recently consistently refused to consider the issue of commercial surrogacy in any detail by not including it in the Terms of Reference of its Inquiries. ... [W]hilst momentum is slowly gaining at a federal level for nationally consistent surrogacy regulation, the gap between what is socially acceptable and what is legally acceptable in the context of commercial surrogacy remains ever-present. The time for reform of the legislation prohibiting commercial surrogacy will come. But when?²³⁵

There is no doubt that exploitation and adverse outcomes have arisen during commercial surrogacy; however, the same is true for non-commercial surrogacy. As has been discussed, the distinction between commercial and non-commercial surrogacy is arbitrary and tenuous at best, and it is overly simplistic to hold that commercial surrogacy is 'bad' and non-commercial surrogacy, 'good'. While further research is still required, a large and increasing body of evidence suggests that all parties may benefit when surrogacy occurs in a suitable best-practice manner that protects the interests of all parties; surrogate, intended parents and, above all, the child. This evidence, and Australians' inevitable recommencement of overseas commercial surrogacy, indicates that reform is timely.

Indeed, what matters is not the label used to describe the process (commercial or non-commercial), but rather the underlying system regulating surrogacy as a means of family formation. Australia requires a national uniform system that addresses all surrogacy participants' needs and regulates standards to minimise risk to all parties and address fears of exploitation.²³⁶ The complexities and implications, both

²³³ *Surrogacy Report* (n 3) 74 [7.5.25]–[7.5.26]. SALRI recommended that there should be a review of the 'operation and effectiveness of any new *Surrogacy Act* five years after its commencement, given the complexities and rapid advances in the area of surrogacy (both research wise and internationally)': at 7.

²³⁴ Fronek and Smith Rotabi (n 30) 668.

²³⁵ Johnson (n 12) 331–2.

²³⁶ While such a system would certainly not solve the issues that exist with commercial surrogacy arrangements overseas, it would reduce the need for Australian intended parents to travel overseas to access such arrangements. The international regulation of commercial surrogacy is beyond the scope of this article.

nationally and internationally, of surrogacy are such that the preferable long-term solution to this issue is a national and uniform scheme coordinated between the states, territories and the Commonwealth (noting how difficult and time-consuming this can be to achieve in practice). It is time for Australia to have an honest and realistic consideration of domestic commercial surrogacy at a national level. It is time for the ‘elephant in the room’ of commercial surrogacy to be addressed.