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Dear Ms. de Boer-Buquicchio,

### **Donor-conception and surrogacy**

Thank you for inviting input relevant to the preparation of your next thematic report to the United Nations General Assembly to be presented in October 2019. I am an Associate Professor in Health Law who has worked on issues related to donor-conception, assisted reproduction (including but not limited to egg, sperm and embryo donation) and surrogacy for more than fifteen years. I have recently led reviews of South Australian (2015-2017) and Western Australian (2018) laws having been appointed by the respective Health Ministers in those states.

I provide to you, information regarding Australia on the issues you have asked for input, below.

### **Identity, origins and parentage**

#### **Access to information by donor-conceived individuals about their donors**

Australia is a federation of states, with the responsibility for regulating assisted reproduction and surrogacy falling predominantly to the states and territories (and not the federal government). As such, laws in Australia vary across jurisdictions regarding what information a donor-conceived person can access and how. Beginning in the early 1980s laws were enacted in Victoria to provide access to information about donor-conception, genetic heritage and/or relations. This now includes legislation in the Australian states of New South Wales,<sup>1</sup> Victoria,<sup>2</sup> Western Australia.<sup>3</sup> In these jurisdictions the law provides that a donor-conceived person who knows of their status and wishes to obtain

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1. *Assisted Reproductive Technology Act 2010* (NSW).
  2. *Infertility (Medical Procedures) Act 1984* (Vic) (Repealed); *Infertility Treatment Act 1995* (Vic) (Repealed); *Infertility Treatment Regulations 1997* (Repealed); *Assisted Reproductive Treatment Act 2008* (Vic).
  3. *HRT Act 1991* (WA).

information about their donor(s) may turn to a special register<sup>4</sup> to access information about their donor(s), and possibly siblings.

In addition, at a Commonwealth level, the *NHMRC Ethical Guidelines on the use of assisted reproduction in clinical practice and research*, apply to all registered clinics across the country due to Commonwealth legislation governing research involving human embryos and associated practices. The NHMRC Ethical Guidelines, have required non-anonymous donation since 2004 (requiring that before donation takes place a person must consent to identifying information being released to a donor-conceived person upon request). Although there is no legislation in Queensland, South Australia, Tasmania, and the Northern Territory, a person conceived with sperm donated after this date may thus approach the clinic to request such information. Clinics are expected to assist the person, although the extent to which they do so is varied.

Table 5.1 summarises the law in Australia and how it has changed over time. (Note, donors and recipient parents in some jurisdictions may also be able to obtain information.)

**Table 5.1: Australian laws regarding recording and release of information**

Jurisdiction	Legislation	Date of implementation	Access
<b>Victoria (Australia)</b>	1. Infertility (Medical Procedures) Act 1984;	1. 1985 (with consent)	Central Register 1. Non-identifying from 1988
	2. Infertility Treatment Act 1995; Infertility Treatment Regulations 1997;	2. 1 January 1998 (consent required under law prior to donation)	2. Identifying information prospectively from 1998 (consent required);
	3. Assisted Reproductive Treatment Act 2008	3a) 2010 (new act –)	3a) provided for an addendum to birth certificates notifying the person of donor-conceived status
		3b) amended 2015	3b) Amendments 2015 - Retrospective release of identifying information with consent for those conceived with sperm, eggs or embryos donated pre-1998
	3c) amended 2016	3c) Amendments 2016 – Full retrospective release for <i>all</i> donor-conceived people, contact veto/preference system from 1 March 2017. (Access from age 18) <b>(Current)</b>	

4. Australian states of New South Wales, Victoria, Western Australia (see also countries of Croatia; Finland; The Netherlands; New Zealand; Switzerland; United Kingdom. In Ireland while the legislation has since 2015 provided for a register, the law is not yet operational).

Jurisdiction	Legislation	Date of implementation	Access
			<p>Voluntary Register also operates – important for sibling matches and further information sharing.</p> <p>NB. Some early records may have been destroyed.</p>
<b>Western Australia</b>	Human Reproductive Technology Act 1991 (WA)	Recording of information on RT Register from 1993 Amended 2004	<p>Access to information</p> <ul style="list-style-type: none"> <li>• Prospective (all donor-conceived people conceived with donor gametes/embryos) after 2004 (access from age 16)</li> <li>• With consent pre-2004</li> </ul> <p>Voluntary register also operates</p>
<b>New South Wales (Australia)</b>	Assisted Reproductive Technology Act 2007	1 January 2010	<p>Central Register:</p> <ul style="list-style-type: none"> <li>• Prospective (all donor-conceived people conceived with donor gametes/embryos) after 2010</li> <li>• With consent pre-2010</li> </ul> <p>NB. Evidence that some records were tampered with or destroyed – donor-codes ripped out.</p>
<b>South Australia</b>	<p>Assisted Reproductive Treatment Act 1988 (SA);</p> <p>Assisted Reproductive Treatment Regulations 2010 (SA).</p>	<p>1988- Identifying information cannot be released without consent</p> <p>Amended 1 July 2010 – enshrine NHMRC Guidelines</p>	<p>Clinic-Based:</p> <ul style="list-style-type: none"> <li>• Identifying information can be obtained via clinics subject to the consent</li> <li>• Consent must have been given post-2004 donations under NHMRC Guidelines</li> </ul> <p>NB. Some records not held by clinics and therefore fall outside of the Act.</p> <p>In 2017 I made recommendations for central register and release of information to all donor-conceived people,<sup>5</sup> subject to parties being able to place a contact veto. A bill was introduced to parliament in 2018 but has yet to be debated.</p>

Jurisdiction	Legislation	Date of implementation	Access
Northern Territory, Australian Capital Territory, Queensland, Tasmania	Currently, follow NHMRC Guidelines.	Have required non-anonymous donation since 2004.	Clinic-Based NB. No monitoring or enforcement; practices appear to vary.

In Victoria there is also legislative provision for entry of information about the method of conception on the birth register to ensure that a donor-conceived person knows they are donor-conceived and then may seek further information if desired. Victorian law explicitly states that such information will be provided to the donor-conceived person on an application for their birth certificate at age 18.

#### **Jurisdictions that Provide for Access Regardless of When a Donor-conceived person was born**

While generally laws recognizing the right to access information have acted prospectively, some jurisdictions have recognised the right to access information for all donor-conceived people, regardless of whether donor anonymity was required and/or “guaranteed” by clinicians at the time of donation.<sup>6</sup> Specifically, Switzerland recognised such rights to access to information in 2001. There, a register of donor information for children born post-2001 was established, but the law also provides that those born before 2001 can apply to clinics for information, who are obliged to release it. However, due to other laws that permitted the destruction of records after 10 years, some donor-conceived people have not been successful in accessing information via the clinics. In Germany, Supreme Court recognition has been given to donor-conceived people’s constitutional and human rights to access identifying information about their donor, at any age.<sup>7</sup>

In Australia, in 2017, Victoria, adopted laws recognising the right of all donor-conceived people to equal access to information, regardless of when they were born, subject to a contact veto/preference system.<sup>8</sup>

6. G. Pennings, (2012). How to kill gamete donation: Retrospective legislation and donor anonymity. *Hum. Reprod.*, 27(10), 2881–2885. doi:10.1093/humrep/des218; Sonia Allan, Donor identification kills gamete donation: A response. *Hum. Reprod.*, 20, 1–5.

7. Supreme Court of Germany decision XII ZR 201/13, summary, available at <https://www.crin.org/en/library/legal-database/supreme-court-germany-decision-xii-zr-201/13>, accessed 04 August 2018.

8. For detailed discussion of the Victorian laws see Sonia Allan, ‘Donor Identification: Victoria gives Rights to all Donor-Conceived People’ 98 *Family Matters*, November 2016.

In Western Australia, there has been long-term historical reference to the fact that opening records from the past was likely to happen in the future, with consent forms including such statements and/or practitioners required to discuss this with their donors.

### **Balancing rights to privacy and rights to information**

The contact veto system<sup>9</sup> adopted in Victoria Australia is seen as a way to balance rights to privacy with rights to access information. Note - The idea of a contact veto is not new. It has existed in relation to the release of information about birth parents in the adoption context since the 1980s in Australia.

A contact veto is enforceable at law and protects the lodging person's privacy by allowing them to lodge a veto on contact (stating no contact; or their preference for type of contact). This prevents interference with their intimate sphere of daily life and as such their privacy. It still however allows for information release. In this way, the donor-conceived person's needs are met regarding identity formation, knowledge about their heritage, medical history and so on however a relationship with the donor may not follow unless all parties agreed.

I have recommended this system be implemented in my South Australia and Western Australian reviews.

### **Inclusion of known donors on birth certificates**

In South Australia, since June 2016 the law has allowed for the inclusion of a biological parent (if known) on the birth registration statement,<sup>10</sup> and in turn, such information may be included on a birth certificate of a person (for example, a donor-conceived person) who is over 18 and consents to such inclusion; or if the donor-conceived person is under the age of 18, their legal parent(s) or guardian(s) consent to such inclusion.<sup>11</sup> This has been achieved in practice by allowing the issuance of a second birth certificate upon which such information may be recorded. The provision as currently drafted will expire on the establishment of a donor register. It was recommended in the *Report on the Review of the Assisted Reproductive Technology Act 1988* that the provision be extended to all donor-

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9. See for further discussion of the contact veto system: Sonia Allan, 'Access To Information about Donors by Donor-Conceived People: A Human Rights Analysis', *Journal of Law and Medicine* (March, 2013); Sonia Allan, 'Donor Identification 'Kills Gamete Donation'? A Response to Professor Pennings' *Human Reproduction* (2012); Sonia Allan, 'Psycho-Social, Ethical and Legal Arguments For and Against the Retrospective Release of Information about Donors to Donor-conceived people in Australia' (2011) 19(1) *Journal of Law and Medicine*; Sonia Allan, 'Donor Conception, Secrecy, and the Search for Information' 19(4) *Journal of Law and Medicine*. 631.

10. *Births, Deaths, and Marriages Act 1996* (SA) s 14.

11. *Births, Deaths, and Marriages Act 1996* (SA) s 46.

conceived children, i.e. in allowing them to have a second birth-certificate issued that shows their biological parentage.<sup>12</sup> I made similar recommendations in Part 1 of my Western Australian report.<sup>13</sup>

## Sale of children

In Australia, legislation exists in all states and the Australian Capital Territory, prohibiting commercial surrogacy,<sup>14</sup> based upon *'a deep discomfort with the commodification of children, women and reproductive services' (amongst other things)*.<sup>15</sup> In recent years, prohibitions concerning commercial surrogacy<sup>16</sup> have been listed by the Australian Government as being *'an explicit prohibition of the sale of children'* pursuant to Australia's obligations under the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPCC).<sup>17</sup>

Such a view flows from the Convention on the Rights of the Child, which requires that States Parties take *'all appropriate national, bilateral and multilateral measures to prevent the ... sale of or traffic in children for any purpose or in any form'*<sup>18</sup> recognising that Article 2 of the OPCC further defines the sale of children as *'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration'*.<sup>19</sup> Commercial surrogacy thus has been seen to fall within the definition of sale of a child as it is *an act or transaction whereby a child is transferred by any person or group of persons (the surrogate, the clinics, the brokers) to another (the commissioning person(s)) for remuneration or any other consideration*.<sup>20</sup>

12. Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988 (SA)* (2017), (South Australian Government).
13. Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Part 1)* (Jan 2019).
14. See Parentage Act 2004 (Tas); Surrogacy Act 2010 (NSW); Surrogacy Act 2010 (Qld); Statutes Amendment Act (Surrogacy) Act 2009; Surrogacy Act 2012 (Tas); Assisted Reproductive Treatment Act 2008 (Vic); Surrogacy Act 2008 (WA).
15. Mary Keyes, 'Cross-border Surrogacy Agreements' (2012) 26 *Australian Journal of Family Law* 42.
16. Surrogacy Act 2010 (NSW), s 8.
17. Attorney-General's Department (Commonwealth), *Australia's response to the List of Issues – Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 4–5 June 2012, accessed 10 June 2014, available at <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/default.aspx>.
18. Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 35.
19. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002), art 2(a).
20. Note there have been issues raised in Australia regarding family law judges making legal parentage orders in transnational surrogacy cases, contrary to Australia's reported stance that laws against commercial surrogacy meet our obligations under the OPCC (and contrary to some state laws that prohibit entering into such agreements extraterritorially). In such situations the judges have deemed legal parentage as being *'in the best interests of the child'* in the circumstances. Such orders do not

I submit that it would be unacceptable to change the focus of payment as being for a woman's services and trying creatively to avoid the connection of the payment being 'for the child'. This is something agents or those people wanting to procure a child in such a manner call for. In fact, if a particular practice constitutes the 'sale of a child' under international law, State Parties to such law cannot escape their obligations by simply decreeing under their domestic law that they do not regard those practices as such, or by re-defining essential terms under domestic law contrary to how those terms are understood under international law.<sup>21</sup>

**Note situations and provide data, if any, where a lack of safeguards has allowed or unduly risked violations of these norms in the context of surrogacy arrangements.**

The availability of commercial surrogacy in overseas jurisdictions has meant that several Australians have accessed children for the purposes of sexual exploitation. Known cases may be the 'tip of the iceberg'. Examples include:

- In 2016 an Australian Court heard that a Victorian man paid an overseas surrogate to give birth to twin daughters, brought the girls to Australia where he filmed himself sexually abusing them and shared the footage with other paedophiles. The 49-year-old father was jailed for 22 years after pleading guilty to 37 charges including 20 counts of incest and two of child trafficking. Prosecutors said it was an admission he brought the girls to Australia for sexual services. He abused his daughters on a weekly basis for eight months from when they were one month old.
- In 2014 Mark Newton and Peter Truong were arrested for sexually exploiting a child. A US/Australian couple who ultimately procured a child via paid adoption in Russia, the couple, and numerous other men, abused the boy from 6 weeks to 6 years of age. Newton and Truong had engaged in numerous (failed) commercial surrogacy attempts before finding a woman who was already pregnant and willing to sell them her baby once it was born. Surrogacy nevertheless was a real and tried avenue by the men to procure the child.<sup>22</sup>

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resolve the question of sale or commodification, they simply reflect the difficult situation courts are faced with once a child is brought back into the country.

21. D.M. Smolin, 'Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children' (2015) (pre-publication version of article accepted for publication by the Pepperdine Law Review), available at [http://works.bepress.com/david\\_smolin/19/](http://works.bepress.com/david_smolin/19/). (I note that Australia's international law obligations are discussed further below).

22., Department of Justice, United States Attorney Joseph H. Hogsett, Southern District of Indiana 'Hogsett announces charges against four men in international child exploitation conspiracy', 28 June 2013, accessed 10 June 2014, available at [http://www.justice.gov/usao/ins/press\\_releases/Pressrelease13/Newton.20130628.pdf](http://www.justice.gov/usao/ins/press_releases/Pressrelease13/Newton.20130628.pdf); United States of America v Mark Jonathan Newton (United States District Court, 1: 12-cr-00121-SEB-TAB, 25 June 2013).

Undue risks are also exemplified by the well-known Australian case of 'Baby Gammy': See *Farnell v Chanbua* FCWA [2016] 17. In that case Mr. Farnell accessed surrogacy in Thailand which resulted in twins being born, one twin, 'Baby Gammy' has Downs Syndrome and remains living with the surrogate mother. The other twin, Pippah, lives in Western Australia with Mr. Farnell and his wife. Mr. Farnell has a significant history of child sex offending, which includes him having been convicted of offences against two girls aged between 5 and 12 years between January 1982 and December 1984, and against another girl between January 1988 and May 1996. A charge relating to a fourth girl who was 7 years old was dropped. It is assumed there may have been others. He was sentenced to a total of 4.5 years in prison, spending 2 years in jail between 1997-1999, and was then released on parole until March 2000. He was subsequently assessed as 'low-risk' for reoffending albeit with caution and recommendations that he be monitored. For a discussion of Mr. Farnell's history of child sex offences, see *Farnell v Chanbua* FCWA [2016] 17. [478]-[495].

### Comment on the adequacy of current safeguards against the sale of children and child trafficking in the context of surrogacy arrangements.

In more than fifteen years of researching these issues I have found that *there are not adequate safeguards against the sale of children and child trafficking in the context of commercial surrogacy arrangements*. Any ability to enter into commercial transactions, where ultimately one can gain a child, creates the risk and reality of sale and commodification, and the potential for exploitation or trafficking.

Further, I have found that there appears to be *no level of regulation of commercial surrogacy that can or will safeguard children against this*. It should be noted that Mark Newton and Peter Truong did not have prior convictions and thus criminal record screening is not enough. Where commercial surrogacy is available, so too is the sale of children, and the potential for (and reality of) child trafficking and sale for exploitation (sexual or otherwise). The presence of 'agents' or 'support services' that actually operate to lead people into commercial surrogacy arrangements in return for payments made to them by the 'intending parent(s)' and/or clinics makes the situation worse.

Australia has prohibited commercial surrogacy domestically which appears to provide some safeguards within country. The Australian government has noted:

*The Government recognises the serious risks of exploitation and human rights violation in some overseas jurisdictions conducting commercial surrogacy. The Australian Capital Territory, New South Wales and Queensland have extraterritorial provisions prohibiting Australian residents engaging in*



*international commercial surrogacy. At the Commonwealth level, Australia has comprehensively criminalised human trafficking, slavery and slavery-like practices, including servitude and forced labour. These offences have extended geographical jurisdiction and could apply to international commercial surrogacy arrangements that involve the exploitation of the surrogate mother or the child.*<sup>23</sup>

In my 2019 report on the review of the Western Australian legislation, I have recommended the introduction of extraterritorial prohibitions in that state noting that while such prohibitions do not deter *all* people from travelling to engage in commercial surrogacy, there was evidence put to me during my review that such laws had been effective in preventing others from doing so – as they were law abiding citizens who did not agree with commercial surrogacy. They also may operate to curb commercial conduct by industry, agents, clinics and allow prosecution for their involvement in leading people into such arrangements, which is often the larger concern.

## Data

### The Policy Position across Australia

Legislation exists in all states of Australia and the Australian Capital Territory to regulate surrogacy arrangements.<sup>24</sup> The general policy position taken in all such jurisdictions has been to permit ‘altruistic’ surrogacy, but to prohibit ‘commercial’ arrangements.

In relation to altruistic surrogacy agreements, the law recognises that altruistic arrangements may take place when family members, close friends, or other known parties agree to act as an altruistic surrogate mother, subject to meeting certain criteria. The woman who intends to be, or becomes, the birth mother does not receive any payment or reward in relation to the conception, pregnancy, or birth of the child from which she derives a profit, although in all jurisdictions that regulate such arrangements in Australia, she may receive reimbursement of expenses actually incurred. The policy position underpinning the law governing such agreements is that altruistic surrogacy should be regulated ‘with great care’, particularly as long-term research on outcomes for children and surrogate mothers has not been conducted in enough detail to justify allowing such arrangements to occur

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23. Australian Government, *Australian Government Response to the Recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters Report*, November 2018, p 3.

24. See *Parentage Act 2004* (Tas); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Statutes Amendment Act (Surrogacy) Act 2009*; *Surrogacy Act 2012* (Tas); *Assisted Reproductive Treatment Act 2008* (Vic); *Surrogacy Act 2008* (WA).

without careful scrutiny and safeguards to protect surrogate mothers, intending parents and children.<sup>25</sup>

Commercial surrogacy (also referred to as ‘compensated’ or ‘for-profit’ surrogacy), in contrast, involves an arrangement in which the birth mother is be paid a fee or receives reward in relation to the conception, pregnancy, or birth from which she derives a profit. That is such payment or reward moves beyond expenses actually incurred. The prohibitions on commercial surrogacy agreements reflect the policy position that such agreements 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*’.<sup>26</sup>

The National Health and Medical Research Council (NHMRC) *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2017* (Ethical Guidelines) state:

*Commercial surrogacy, where the surrogate receives financial compensation above and beyond expenses associated with the surrogacy procedure and pregnancy, is ethically unacceptable because it raises concerns about the commodification and exploitation of the surrogate, the commissioning parent(s) and any person born as a result of the surrogacy arrangement. ...Clinics and clinicians must not practise, promote or recommend commercial surrogacy, nor enter into contractual arrangements with commercial surrogacy providers (see paragraphs 4.2.7 – 4.2.10). ... It is ethically unacceptable to provide, or offer to provide, direct or indirect inducements for surrogacy services.*<sup>27</sup>

### **Recent Federal and State Inquiries**

In 2016, the Commonwealth House of Representatives Standing Committee inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements recommended that the practice of commercial surrogacy remain illegal in Australia. In considering the divergent views put forward to it regarding commercial surrogacy, the Committee took the position that

*even if a regulated system of commercial surrogacy could be implemented, the risk of exploitation of both surrogates and children remains significant. Therefore, the Committee*

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25. See for example, Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption Final Report* (2007), p 168.
  26. Standing Committee of Attorneys-General, Australian Health Ministers’ Conference and Community and Disability Services Ministers’ Conference Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009).
  27. NHMRC Ethical Guidelines (2017), p 65.

*strongly supports the current legislative position of Australian States and Territories that the practice of commercial surrogacy remains illegal in Australia.*<sup>28</sup>

In its response to the Committee's report the Australian government agreed with this view.<sup>29</sup>

In 2018, New South Wales, South Australian and Western Australian state reviews also supported the continued prohibition on commercial surrogacy. In July 2018 the New South Wales Department of Justice found that:

*The policy objective of preventing commercial surrogacy remains valid and we do not recommend amending this objective. ...This policy objective aims to prevent exploitation, preserve the dignity of children and women and prevent the commodification of women and children. Such concerns would not be protected by a narrower objective.*<sup>30</sup>

In October 2018 the South Australian Law Reform Institute (SALRI) noted the Hon. John Dawkins statement regarding the aim of the current law in that state as being ‘

*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.*<sup>31</sup>

In their report SALRI stated that it did not support either a system of regulated commercial surrogacy in South Australia ‘in light of the well-documented concerns that commercial surrogacy gives rise to’....<sup>32</sup> noting ‘the risk of exploitation of both surrogate mothers and children remains significant’.<sup>33</sup> SALRI further recommended that

*the practice of commercial surrogacy should remain illegal in South Australia, but that domestic, non-commercial surrogacy agreements should be permissible in certain specified circumstances.*<sup>34</sup>

My review of the Western Australian legislation and regulatory system recommended the same.

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28. Commonwealth Government, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (April 2016), [1.19].

29. Australian Government, *Australian Government Response to the Recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters Report*, November 2018, p 3.

30. NSW Department of Justice, *Statutory Review: Surrogacy Act 2010*, July 2018, [2/26]- [2.27].

31. South Australia, Parliamentary Debates, Legislative Council, 12 November 2014, 1597–8 (John Dawkins) cited in David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA)* (South Australian Law Reform Institute, Adelaide, 2018), p 1.

32. *Ibid*, South Australian Law Reform Institute, p 2.

33. *Ibid*, South Australian Law Reform Institute, [6.2.1].

34. *Ibid*, South Australian Law Reform Institute, Recommendation 7.

**Indicate if surrogacy arrangements are legal in your State and if so how many occur every year.**

In recent years there has been approximately 50-55 births/year across the whole country as a result of altruistic gestational surrogacy.<sup>35</sup>

**Indicate if intermediaries facilitating surrogacy arrangements must be registered and, if so, how many are registered in your State.**

In New South Wales, Queensland, Tasmania, and Western Australia (and arguably South Australia) it is an offence for a person to receive a payment, reward, valuable consideration, or other material benefit or advantage in relation to another person agreeing to enter into or entering into a surrogacy arrangement. Commercial brokerage or introductory services are thus prohibited. The reason for this is to prevent assisted reproduction clinics or other organisations profiting from assisting to arrange altruistic surrogacy arrangements, and thus transforming an altruistic arrangement into a commercial surrogacy arrangement.<sup>36</sup>

**Please indicate the number of cases, on an annual basis, where nationals have made a surrogacy arrangement abroad and have returned to their country of origin with the surrogate-born child.**

Noting altruistic surrogacy is legal in Australia and commercial surrogacy is prohibited – there are reports that the number of people who have gone overseas and returned to Australia with a child following international commercial surrogacy arrangements are in the hundreds – although exact numbers are unknown, and the data is unreliable. In my review of the Western Australian legislation the GayDads WA submission noted:

*For the period 2010 to 2017 the WA Reproductive Technology Council approved a total of 28 surrogacy applications and recorded 10 births [domestically]...Members of GayDads WA are the parents of 48 children – almost five times the total number of WA surrogacy births over the period 2010 to 2017. 97% of these children were born as a result of overseas commercial surrogacy...<sup>37</sup>*

There were also heterosexual couples who made submissions to and/or attended the face-to-face forums during the consultation period of the review who had children as a result of commercial surrogacy.

**Following on the previous question, please indicate under which circumstances authorities have allowed their nationals to bring the child born from a surrogacy arrangement back into their**

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35. For annual statistics see <https://npsu.unsw.edu.au/data-collection/australian-new-zealand-assisted-reproduction-database-anzard>.  
36. NSW Department of Justice, Statutory Review *Surrogacy Act 2010*, July 2018, [3.67].  
37. GayDads WA, Submission 74.

country of origin and if so please indicate which ones (e.g. domestic parenting orders, judgements, best interests of the child determinations, etc.), and how often they have been used.

In Australia, at a federal level, people who have engaged in surrogacy arrangements abroad are able to apply for citizenship by descent for the child(ren) that have been born as a result provided there is a genetic relationship with one of the intending parent(s), and subsequently a passport. The granting of citizenship by descent involves the determination of applications pursuant to the *Australian Citizenship Act 2007*(Cth)<sup>38</sup> Australian citizenship laws apply universally to the children of an Australian parent and the current law not give discretion to refuse a child's application for citizenship once it has been established that one of its parents is Australian.<sup>39</sup>

Likewise, Australian passport laws<sup>40</sup> apply universally to child passport applications, no matter how the child came to be conceived. If a child is granted Australian citizenship and meets the requirements of the *Passports Act 2005* (Cth) (that is, they meet citizenship, identity and consent requirements) they have a legal entitlement to an Australian passport.<sup>41</sup> Note, if a child is to travel from Australia throughout its life it is likely to have at least four passports issued before it reaches adulthood as they are valid for 5 years – thus at age 0, 5, 10 and 15 years (and more if it is lost or the child changes its name). Consent of the surrogate mother will be required unless there is a recognised order from an Australian court (such as an order for legal parentage, parental responsibility, adoption, registering a foreign order); or having the passports office dispense with the requirement for consent (which may for example, occur when there '*has been no contact between the child and the non-consenting person for a substantial period before the application is made*'). The latter would reflect that the relationship between the child and the surrogate mother has been severed.

Lastly, in the same context, please indicate how many cases have led to the non-recognition of parentage orders established in the State where the surrogacy arrangement occurred.

NB – this seems like an argument that is often put as a means to support international commercial surrogacy – i.e. the poor children are left without legal parentage – but it fails to recognise that many people who engage in international commercial surrogacy arrangements, especially where they are on the child's birth certificate and are granted citizenship for the child, ***do not apply for***

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38. *Australian Citizenship Act 2007* (Cth) Part 2 Subdivision 2 Div. A.

39. Department of Immigration and Border Protection, Submission 45, pp. 3-4 to the Commonwealth Government, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (April 2016). (Note the DIBP has been subsumed by the Department of Home Affairs).

40. *Australian Passport Act 2005* (Cth).

41. Department of Foreign Affairs and Trade, *Submission 47*, p. 3 to *Ibid*.

**parentage orders nor parenting orders** (and are in fact encouraged not to, as they are costly and not necessary in most circumstances – see further discussion below).

### **The Australian Context: Legal Parentage**

In all states and territories of Australia issuance of citizenship by descent or a passport does not confer on the intending parent(s) legal parentage of the child born as a result of an international commercial surrogacy arrangement in Australia.

In all Australian jurisdictions the court may only make *parentage* orders to transfer the parentage of a child from his or her surrogate birth parent/s to the child's arranged parents when the arrangement complies with the law (which commercial surrogacy arrangements do not).

The intention of the parties or the biological donation of sperm or ova by the intending parents to be carried by the surrogate mother do not change the situation as it has been held that

*... any interpretation which makes the paternity of a child dependent upon the intention of the donor of the sperm would be a recipe for disaster ... the law in this area is already sufficiently fraught for it to be highly undesirable to introduce the contestable element of "intention". One need only look at the time and money expended on this litigation to see how difficult it can be to establish intention.*

In the Commonwealth Family Law Court, the same position was arrived at in the appeal case of *Bernieres and Anor & Dhopal* [2017] - the full bench of the Family Court held that the parentage of children born of surrogacy arrangements entered into overseas or in Australia is a 'state matter' and cannot be resolved within the present *Family Law Act 1975* (Cth). Prior applications for legal parentage by people from the other states had seen various single court judges of the Commonwealth family law courts apply the *Family Law Act 1975* (Cth) in differing ways. However, the Full Court of the Family Court in *Bernieres and Anor & Dhopal* [2017] said:

*60HB of the Family Law Act 1975 (Cth) specifically addresses the position of children born under surrogacy arrangements,<sup>[42]</sup> leaving s60H to address the status of children born by means of conventional artificial conception procedures. ...[T]he plain intention of s 60HB is to leave it to each of the States and Territories to regulate the status of children born under surrogacy arrangements, and for that to be recognised for the purposes of the Act.<sup>43</sup>*

This has not, however, foreclosed the Family Court of Australia which has seen subsequent applications and single judge orders granting registration of overseas orders resulting from

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42. Section 60HB provides that for children born under surrogacy arrangements (1) If a court has made an order under a prescribed law of a State or Territory to the effect that: (a) a child is the child of one or more persons; or (b) each of one or more persons is a parent of a child; then, for the purposes of this Act, the child is the child of each of those persons...
43. *Bernieres and Anor & Dhopal and Anor* [2017] FamCAFC 180 at [62].

commercial surrogacy arrangements in Australia. In the 2018 case of *Sigley and Sigley* such orders were granted by Forrest J in relation to an overseas order to transfer legal parentage following a commercial surrogacy arrangement in an unnamed United States jurisdiction.<sup>44</sup> In his reasons for judgment, Forrest J identified that the Applicants reside in the USA and *not* one of the jurisdictions of Australia that have extraterritorial prohibitions and that it was presented to the Court that they intended to return to live in the State of Victoria at some time in the future – which does not have such prohibitions. The acting solicitor argued on behalf of the clients that as:

- Victoria allows intended parents to enter into commercial surrogacy arrangements overseas at least in that it has not sought to criminalise such behaviour;
  - entry by the Applicants into the commercial surrogacy agreement was lawful in the state of the United States where the twins were conceived; and
  - the Australian government has not determined to criminalise entry by Australian citizens or residents into commercial surrogacy agreements overseas as, arguably, it could do,
- registration of the overseas orders should be granted. In *Sigley*, the Forrest J agreed. Forrest J had also previously granted such applications as discussed above in *Re Grosvenor*<sup>45</sup> and *Re Halvard*.<sup>46</sup>

However, in a similar case, *Rose*, Carew J more recently declined an application filed in Queensland to make such an order noting that:

*[t]o register an order which recognises a commercial surrogacy would be contrary to public policy because it would give curial approval to something that is prohibited by law.*<sup>47</sup>

As granting or denying an application to register such orders is based on the discretion of the judge there is no particular rule as to whether such applications will be granted or refused. Nevertheless, it does appear that the presence or absence of extraterritorial prohibitions on the actions undertaken are relevant. In addition, Carew J emphasised the importance of upholding the public policy position taken in Australia concerning commercial arrangements.

### **Parenting Orders**

Note, while transfer of **legal parentage** is not available the state courts can consider application for a **parenting order** which does not confer legal parentage but is an order that relates to how

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44. *Sigley & Sigley* [2018] FamCA 3. As noted above, relevant to the application to register the Orders of the State C Court in the Family Court of Australia were ss 70G, 70H and 70J of the *Family Law Act 1975* (Cth) which provide for registration of orders and the effect of registration.

45. *Re: Grosvenor* [2017] FamCA 366 (26 May 2017).

46. *Re: Halvard and Anor* [2016] FamCA 1051 (5 December 2016).

47. *Rose* [2018] FamCA 978 (23 November 2018) at [48].

parenting responsibilities will be allocated in the best interests of the child.<sup>48</sup> Parenting orders confer all the rights and responsibilities on the people parenting the child up until the age of 18. They do not confer rights in relation to succession, and so a Will is necessary to ensure the child can inherit should a non-biological carer die. It is noted that parenting orders were made in the above discussed Family Court of Australia case of *Bernieres* which were governed by Part VII of the *Family Law Act 1975* (Cth)<sup>49</sup> – the original lower Court judge finding that such orders ‘were entirely appropriate’.<sup>50</sup>

## Discussion

Some, on return to Australia with a child or children born as a result of such an arrangement would like to have ‘legal parentage’ granted to them. Others may seek ‘parenting orders’ so that there is a legal order giving them parental responsibility over the child.

However, it became apparent during my review that ***the vast majority of people who bring children back into Australia enter with the child having been given a birth certificate with the intended parent(s) names on it, Australian citizenship, a passport, (or a long-term visa), and decide never to appear before the Courts at all (and are in fact advised by surrogacy ‘support’ groups and/or their lawyers not to unless their circumstances necessitate doing so.)***

In my review of the Western Australian laws, found that the issues raised regarding commercial surrogacy are complex. They do not just raise issues as to whether legal parentage should be granted at the end but also require consideration of the presence of commercial surrogacy, especially in countries where women are very poor, what has led the intended parent(s) to engage in commercial arrangements overseas, and what aspects of the regulation of surrogacy need amendment in order to address this.

In my review I made recommendations to assist those entering into lawful altruistic surrogacy arrangements, while recommending the continued prohibition on commercial surrogacy. In addition, I recommended that introducing provisions for extraterritorial application of the law, consistent with New South Wales, Queensland, and the Australian Capital Territory, would be consistent with the strong public policy position taken against commercial surrogacy. I also called for the provision of uniform information to the public concerning Commonwealth laws that ‘*comprehensively criminalise. human trafficking, slavery and slavery-like practices, including servitude and forced labour*’ noting the Australian Government’s response to their House of Representatives Standing

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48. *Family Court Act 1997* (WA), ss 88(c), 84(2a) and 89(1). Any party "concerned with the care, welfare or development" of a child may apply for an order for parental responsibility and the Family Court may allocate such responsibility.

49. *Bernieres and Anor & Dhopal and Anor* [2015] FamCA 736 at [128]-[132]; *Bernieres and Anor & Dhopal and Anor* [2017] FamCAFC 180 noting such orders at [33].

50. *Bernieres and Anor & Dhopal and Anor* [2015] FamCA 736 at [132].



Committee inquiry into surrogacy stated that *'these offences have extended geographical jurisdiction and could apply to international commercial surrogacy arrangements that involve the exploitation of the surrogate mother or the child'*.<sup>51</sup>

I also recommended that the government consider whether to require that *all* applicant parent(s) for Australian citizenship, a passport, or a visa for a child that has been born as a result of an international surrogacy agreement and with whom intended parent(s) intend to reside in Western Australia, should be issued with notice that they *must* appear before the Court within a certain time (specified) to allow the Court to consider whether the granting of *parenting orders* is in the best interests of the child. This would avoid the current situation of people avoiding the Courts altogether because they do not wish to incur further costs or scrutiny of the arrangement. It would also allow an appropriate order to be made to secure the child's interests. Additional hurdles, scrutiny, and costs related to engaging in surrogacy agreements abroad, may also serve as another factor that deters people from engaging in such activity.

I did not endorse a recommendation for *'a discretionary power to transfer parentage from the surrogate mother to the intended parents where certain 'safeguards' or criteria have been satisfied.'*<sup>52</sup> As the reviewer of the Western Australia legislation I found that the suggestion that such action would offer a *'practical solution'* that would allow recognition of *'properly regulated international surrogacy jurisdictions'*<sup>53</sup> was flawed. Such action would conflict with and undermine the strong public policy stance taken against commercial surrogacy within the states and territories. If a person was to enter into such agreement within the state (domestically) they would not be entitled to an order for legal parentage; it would be completely contrary to then create a law that allows conferral of legal parentage upon someone who has travelled abroad to do what is prohibited here.

Reference to *'properly regulated surrogacy jurisdictions'* may also be without foundation when considering those jurisdictions to which people are travelling to engage in commercial surrogacy arrangements. It otherwise raises issues regarding the criteria that would be used to determine what constitutes *'properly regulated'*? California, for example, has laws, but its Supreme Court has emphasised that the concern of such law is with the validity of the contract and its enforcement, not with ensuring the welfare or best interests of the child. All of the jurisdictions provide for, and are

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51. Australian Government, *Australian Government Response to the Recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters Report*, November 2018, 3.

52. See summary of laws around the globe above at section 9.2 of this report.

53. David Plater, Madeleine Thompson, Sarah Moulds, John Williams and Anita Brunacci, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA)* (South Australian Law Reform Institute, Adelaide, 2018), p 303 [26.3.12].

engaged in, the buying and selling of human sperm, human eggs, and human embryos, which is also contrary to Australian state, territory and federal law. None of them have laws protecting the interests of children born as a result of such arrangements for example, that require the recording and release of identifying information about donors of gametes, embryos and/or surrogates to surrogacy born or donor-conceived people. None provide services in which contact with the donor(s) of gametes or embryos or the surrogate mother may be mediated. In all such jurisdictions, donor anonymity is lawful and practiced; and in many such jurisdictions encouraged.

*As stated in my review 'While I am extremely mindful that those people who I met during the review may be disappointed with this, I am also mindful that the limits and boundaries of the law have been set based upon great consideration of the risks presented by both commercial and altruistic surrogacy arrangements. This moves beyond individual situations and requires consideration of the broader implications the law has for women, children, and those who seek surrogacy and ART. Commercial surrogacy is prohibited ...and the findings of [my] review do not support changing that. Altruistic surrogacy is permitted, but only when criteria is met that is intended to ensure the well-being of all parties involved, and that it is undertaken in a manner that sees the best interests of children as the paramount consideration. It would not be appropriate for the state to then endorse practices elsewhere that do not meet the standards agreed upon for citizens within the state, or by those who choose to uphold the law rather than circumvent or breach it.*

To conclude I did want to also note that altruistic surrogacy is tightly regulated in Australia, and may not be a solution in countries in which it would be used to hide commercial arrangements and/or where women are at significant risk of human trafficking.

I hope the above is of assistance to you. Sincerely,

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I refer you to a number of articles and the reports I have written on matters relevant to the above:

### **Book**

- Sonia Allan, *Donor Conception and the Search for Information: From Secrecy and Anonymity to Openness* (2017) Routledge.

### **Peer reviewed articles**

- Sonia Allan, 'Donor Identification: Victoria gives rights to all donor conceived people', in Australian Institute of Family Law, *Family Matters* (November 2016).
- Sonia Allan, 'Access to Information about Donors by Donor Conceived Individuals: A Human Rights Analysis' (2013) 20 *Journal of Law and Medicine* 655.
- Sonia Allan, 'Deciding on Access to Donor-conception Information' (2012) 37(4) *Alternative Law Journal* 272, 272.
- Sonia Allan, 'Donor Identification 27(12) 'Kills Gamete Donation'? A Response to Professor Pennings' (2012) *Human Reproduction* 3380.
- Sonia Allan, 'Donor Conception, Secrecy, and the Search for Information' 19(4) *Journal of Law and Medicine* (June 2012).
- Sonia Allan, 'Psycho-Social, Ethical and Legal Arguments For and Against the Retrospective Release of Information about Donors to Donor-Conceived Individuals in Australia' (2011) 19(1) *Journal of Law and Medicine* 354.

### **Reports**

- Sonia Allan, The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Part 1) (Jan 2019)
- Sonia Allan, The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Part 2) (Jan 2019)
- International Federation Fertility Society, *Surveillance 2019 (8<sup>th</sup> Edition)* (2019) (I am on the IFFS Committee editorial board – we survey laws and practices around the world tri-annually).
- Sonia Allan, *Report: South Australian Review of the Assisted Reproductive Treatment Act 1988* (2017). Report prepared for the Minister of Health South Australia regarding legislative review of Act.