Paving a way forward for surrogacy arrangements in SA

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Australians have become one of the world's greatest users of international commercial surrogacy (ICS) and as many as one in six Australian couples have issues relating to infertility.[1] Surrogacy can be described as the process whereby commissioning parents enter into an agreement with a woman to carry their baby to term and relinquish rights to any child born.[2]

Baby Gammy[3] and the issues surrounding ICS arrangements have been given much media and academic attention in recent months. There are many human rights, moral and ethical issues surrounding surrogacy which are currently being debated.

Under South Australian legislation it remains legal for residents to undertake a commercial surrogacy arrangement overseas. However, in parts of Australia, such as Queensland, New South Wales, Western Australia and the Australian Capital Territory, legislation prohibits the practice, making it an offence. The Family Relationships (Surrogacy) Amendment Bill 2014 before State Parliament seeks to recognise and regulate prescribed international surrogacy agreements and the bringing back of children born as a result of those agreements legally into South Australia[4].

Despite this, the South Australian law is not able to keep pace with the changing realities of the emerging options available for infertile heterosexual couples, same sex couples and singles who seek to have a child to complete their family unit. The changing face of what constitutes "family" today is growing ever more complex. While South Australia's laws on surrogacy are comprehensive to a degree, it is time for legislative change which mirrors our social attitudes, namely, extending surrogacy to same-sex couples and singles and considering commercial surrogacy domestically.

Surrogacy is currently a State by State issue. At present all States in Australia except the Northern Territory have introduced their own surrogacy legislation.[5]

In March this year the Commonwealth Parliament[6] resolved to inquire into surrogacy arrangements in Australia and for Australians, following the Family Law Council Annual Report 2013-14 calling for this. The roundtable has recommended the Federal Attorney General call an inquiry into the regulatory and legislative aspects of surrogacy arrangements focussing on both domestic surrogacy and international surrogacy involving Australians. Also on their agenda will be attention to whether it is time to call for uniform legislation across Australia and a consideration of commercial surrogacy within Australia to better regulate the reality of commercial surrogacy as it occurs around the world in the United States, India, Nepal, Mexico, Cambodia and the Ukraine.

In South Australia, a very specific and limited number of couples can access parentage orders following a successful altruistic surrogacy arrangement pursuant to our State Acts, the *Family Relationships Act* 1975 (The Act) and the *Births, Deaths and Marriages Registration Act* 1996. Both were amended to take effect from November 2010.

The specific criteria for arrangements within South Australia are limited to the following situations[7]:

- There must be a written Recognised Surrogacy Agreement entered into before treatment is provided by a clinic;
- The Agreement must be certified and witnessed by a South Australian lawyer who must have explained the legal implications of such Agreement to one of the parties. Independent lawyers certificates are required;
- The Agreement must be between a married couple or a de facto heterosexual couple together for at least three years and a willing surrogate mother;
- The commissioning parents must be domiciled in South Australia at the time of signing the Agreement;
- All parties must be over 18 years;
- The female commissioning parent must be infertile, appear to be infertile, unable to carry a pregnancy or to give birth on medical grounds or a risk that a serious genetic defect, serious disease or serious illness would be transmitted to a child born to the commissioning parent;
- The parties must intend the pregnancy to be achieved by the use of a fertilisation procedure carried out in South Australia;
- The parties have undertaken independent counselling and obtained certificates from an accredited fertilisation counsellor[8] of the implications of surrogacy and attended another counsellor about psychological issues that may arise in connection with the Agreement; and
- The Agreement must not be compensatory or commercial in nature and is restricted to reimbursement of specific expenses connected with a pregnancy, the birth or care of a child born, counselling or medical services or legal services provided in connection with the Agreement.

Babies born as a result of a recognised surrogacy arrangement are generally relinquished at birth in the hospital. There is no mandatory requirement for

counselling after birth for the parties of the Agreement. This issue has been discussed by the Honourable J.S.L Dawkins in his recent committee speech[9] and is an area in need of legislative amendment.

Occasionally the time delay between the birth of a child and the parentage orders is up to 12 months due to counselling requirements or other issues that may arise in the Youth Court of South Australia. Judges in the Youth Court have the ability to order a family report if it is seen as necessary. In South Australia to date, there have been eight such parentage orders; four through the use of transitional provisions and four through the use of a Recognised Surrogacy Agreement. Issues have arisen in several cases requiring additional counselling of both parties and the use of a negotiated outcome to arrive at a point of free and informed consent from the surrogate mother.

Once a child is born via a clinic offering altruistic surrogacy treatment and if the commissioning parents are complying with the Recognised Surrogacy Agreement, they have the right to apply to the Youth Court of South Australia for parentage orders four weeks after birth and before six months of age[10]. If the Judge finds a recognised complying surrogacy agreement is in place and finds the surrogate mother has given free and informed consent parentage orders are made. The Judge then requests the Registrar of Births, Deaths and Marriages to change the name of the child to the name declared and change the parents of the child on the Birth Certificate[11]. Records are kept of surrogate arrangements and an extended birth certificate can be obtained.

There is some discretion with the Judge[12] to cure irregularities or rectify mistakes and non-compliance despite the strict criteria set out in the Act. Importantly, this discretion does not extend to waiving the consent of the surrogate mother to parenting orders.

At present, single women and same sex couples cannot access surrogacy with the assistance of our State law nor can they with the assistance of one of the reproductive technology clinics in South Australia who offer assisted surrogacy arrangements. Clinics are bound by the *Assisted Reproductive Treatment Act 1988* which requires a recognised surrogacy agreement pursuant to the *Family Relationships Act 1975* and the NHMRC Ethical Guidelines for Clinical Practice of Assisted Reproductive Technology (2007)[13].

An eligible couple contemplating surrogacy in South Australia must first find a surrogate mother willing and able to assist them. The Act makes it an offence to advertise for commercial surrogacy but makes no mention of advertising for altruistic surrogacy.

The Bill currently before Parliament, as well as regulating international surrogacy agreements and the bringing of children into South Australia, seeks to make domestic arrangements more accessible. It does however maintain that commercial surrogacy continues to be banned within the State yet allows a regulated potentially commercial international surrogacy agreement to be recognised in South Australia. This seems to be a contradiction. The Bill does propose creating a Register of surrogates which would be accessed by approved medical institutions to make finding a surrogate within South Australia much easier. Such a framework hopes to decrease the desire of commercial arrangements overseas. The Register, which will act as a database, opens up the State to a major opportunity to regulate compensatory surrogacy, offering reasonable compensation beyond that of medical expenses to all women who register for surrogacy domestically.

It is the writer's experience that the lack of interstate cross border surrogacy is unnecessarily prohibitive given that altruistic surrogacy often occurs by donation from a close family member who may be living interstate. Mary Keyes has argued[14] that the prohibition on cross border surrogacy in South Australia has failed to prevent the practice or stop commissioning parents from forum shopping which State best accommodates their particular situation.

Traditional surrogacy arrangements whereby the surrogate mother uses her own egg and the sperm of the intended father and hands the child over at birth is not illegal in South Australia.[15] This does occur, but the greatest disincentive for this form of surrogacy is that the birth mother's name will always remain on the birth certificate and no parentage orders can be made. The Family Court of Australia can make orders for *parental responsibility* but has no power to recommend the changing of a child's birth certificate. Having said that, parenting orders granted by the Family Court pursuant to s60H of the *Family Law Act* 1975 (Cth) must consider the best interests of the child.

> The changing face of what constitutes 'family' today is growing ever more complex.

It is worth noting here that the Family Court has in the last three years handed down several decisions granting parenting orders to couples who have presented to the Court with a child born through an international surrogacy arrangement, the birth mother having been paid and having relinquished her rights to the child. In the 2012 case of *Ellison v Karnchanit*[16], Ryan J found that in such circumstances it is hard for the Court to determine that it is not in the child's best interests to remain with the commissioning parents when the surrogate mother lives overseas and has allowed the child to be brought to Australia. Such findings suggest that while the general consensus in Australia is against commercial surrogacy, the Australian judicial system will grant parental responsibility to those who have the care of the child after finding it is in the child's best interests despite the arrangement being prima facie illegal under Australian law.

State and Territory laws attempt to protect women and children from commodification and exploitation with regulation but the Family Court has little alternative than to condone international commercial surrogacy when commissioning parents seek orders because our legal system has the paramount consideration to protect the child's best interests. Is this a fait accompli?

Others equally argue the commodification of new born children is abhorrent and is the wrong path for our Australian society. Chief Judge John Pascoe[17] writes that ICS is the new frontline in the trafficking and commodification of women and new born children.[18]

Australian Consular officials are granting

birth certificates and Australian passports overseas to allow these children to become Australian citizens. If they do not, the child may be stateless and abandoned. According to the United Nations, a child has a right to acquire nationality from birth[19] and a child has a right to know their genetic origins[20].

As a result, the current ethical dilemma is whether or not South Australia, in its capacity to regulate its own surrogacy legislation, should seek to prohibit commercial surrogacy or permit it in some shape or form. Is it possible to learn from the overseas models and find what Jenni Millbank describes as a "middle path"[21] for Australia?

She argues, quite convincingly, that because surrogacy is already considered a valid treatment for infertility it should be possible to undertake surrogacy arrangements domestically in circumstances where it is accessible, safe, fair and where there is certainty of legal status[22]. One of the major concerns of ICS arrangements involving Australian commissioning parents is that there is no effective way to control the exploitation of vulnerable women. In that respect, it seems a harm-minimisation approach to commercial surrogacy makes sense.

At an international level, Australia is a signatory of the Convention on the Rights of the Child and its Optional Protocol. John Tobin[23] considers Article 3 of the Protocol which states activities such as sexual exploitation, transfer of organs and engagement of the child in forced labour lead to exploitation and degradation of children, but suggests that the intended purpose of commercial surrogacy is non-exploitative because the intending parents will provide appropriate care and support for the child[24]. A Hague convention on surrogacy is being promoted internationally and would seem to be a sensible way forward.

Further arguments against commercial surrogacy do express legitimate concerns, for example that profit motivations could overpower informed consent. Any regulations that are implemented may be too strict, and have the opposite effect in forcing Australians to seek arrangements elsewhere.

A common argument is that state commercial surrogacy invades the sacred family realm and can reduce women to "wombs for hire"[25]. However, Australian legislation does protect women's rights and gender equality in such a way that the accommodation of a commercial surrogacy regime is not such an absurd proposal. A regulated system in South Australia or uniform laws in Australia could protect the welfare of the surrogate mother as well as any potential children and would significantly lessen the demand in impoverished countries.

There is nothing to suggest that commercial surrogacy or perhaps the more aptly termed "compensatory" surrogacy would lessen the altruism of the surrogate mother. Studies in the United States of surrogate mothers have found that financial reward is not the defining reason women enter into surrogacy arrangements. Wanting to help others create a family and enjoyment of pregnancy are strong contributing factors[26].

With the Family Relationships (Surrogacy) Amendment Bill in contemplation, it would seem a natural next step for this planned framework to adapt still more to mirror contemporary attitudes to assisted reproductive technology[27]. Progressive action would place South Australia at the forefront of safe and regulated surrogacy opportunities for Australian people.

In all of the discourse occurring internationally, nationally and locally, everyone can agree that Australia is committed to protecting the fundamental rights of children. Our legal system and our ethical and moral compasses must maintain the best interests and welfare of any child born as a result of ever-changing family structures. **B**

Note: Julie Redman has been solicitor in all eight surrogacy matters that have been brought before the Youth Court of South Australia pursuant to current South Australian legislation.

(Endnotes)

1 www.fertilitysociety.com.au
2 Altruistic surrogacy is when the surrogate mother is not paid any amount beyond reimbursement for medical expenses associated with the pregnancy. In contrast, commercial surrogacy is where the surrogate mother is paid compensation beyond the reasonable expenses incurred.
3 An Australian couple abandoned a baby in Thailand with his surrogate mother after he was found to have Down syndrome and a life threatening heart condition. They brought his twin back to Western Australia on an Australian passport granted in Thailand by Australian consular officials. As a result of this case Thailand is no longer available for Australians seeking overseas surrogacy
4 Section 10FA Family Relationships (Surrogacy) Amendment Bill 2014
5 NT must comply with Ethical guidelines on the use of Assisted Reproductive technology in Clinical Practice and research as set out in National Health and Medical Research Council (NHMRC)
6 The Commonwealth of Australia - House of Representatives Standing Committee on Social Policy and Legal Affairs.
7 S10HA of the Family Relationships Act 1975
8 Australia and New Zealand Infertility Counsellors Association Accredited ('ANZICA')
9 The Hon. J.S.L Dawkins committee stage speech 18th March 2015 Family Relationships (Surrogacy) Amendment Bill. He believes mandatory counselling post birth must be offered to surrogate mothers.
10 S10HB(5) Family Relationships Act 1975
11 S10HD Family Relationships Act 1975
12 S10HG(2) of the Family Relationships Act allows the Court to excuse the failure or excuse compliance with the matter by ordering that the requirement or the matter be dispensed with (to the necessary extent).
13 National Health and Medical Research Council Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research, 2007, 13.1.
14 Mary Keyes 'Cross-border surrogacy agreements' *26 Australian Journal of Family Law (2012) 26,* p49
15 It is possible under section 10HA(2)(b)(viii)(B) of the Act whereby at least 1 of the commissioning parents will provide human reproductive material with respect to creating an embryo for the purposes of pregnancy, unless a certificate is issued stating otherwise.
16 *Ellison and Another v Karnchanit* (2012) 48 Fam LR 33
17 Chief Judge John Pascoe (AO CVO, Federal Circuit Court of Australia
18 'Surrogacy – The Commodification of New-Born *Children' Australian Family Lawyer Vol 24/2 March 2015*
19 Article 7(1) United Nations Convention on the Rights of the Child
20 Article 8(1) United Nations Convention on the Rights of the Child
21 Jenni Millbank, 'Rethinking "Commercial" Surrogacy in Australia', *Bioethical Inquiry, 12 July 2014*
22 Ibid, pg2.
23 John Tobin 'To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy' *International and Comparative Law Quarterly 5 August 2014*
24 Ibid, p336.
25 Nicole F. Bromfield & Karen Smith Rotabi 'Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations' *Global Social Welfare, 1 July 2014,* p128
26 Ibid, p125.